

Real Property, Financial Services & Title Insurance Update: Weeks Ending January 29 & February 5, 2016

February 11, 2016

Real Property Update

- **Foreclosure/Standing:** filing of original note and mortgage with assignment after complaint filed does not establish standing to sue at inception of suit where endorsement undated and assignment dated after complaint filed – [Corrigan v. Bank of America](#), No. 2D14–3208 (Fla. 1st DCA Feb. 5, 2016) (reversed and remanded) [Note: Judge Lucas concurs based on binding precedent but believes result may be inequitable and urges Florida Supreme Court to answer question previously certified whether foreclosure plaintiff may cure lack of standing at inception by proof it has since acquired standing]
- **Foreclosure:** trial court’s dismissal of foreclosure action with prejudice as sanction for discovery violations reversed because court failed to make explicit findings on each of the six factors outlined in *Kozel v. Ostendorf*, 639 So. 2d 817 (Fla. 1993) – [Bank of New York Mellon v. Clark](#), No. 1D15–2250 (Fla. 1st DCA Feb. 2, 2016) (reversed and remanded)
- **Foreclosure/Lost Note:** after bank proved claim to reestablish lost note, trial court required to provide adequate protection to appellants, or make finding none was required, as mandated by Fla. Sta. § 673.3091(2014) – [Blitch v. Freedom Mortgage Corp.](#), No. 2d14–4398 (Fla. 2d DCA Feb. 5, 2016) (reversed and remanded)
- **Foreclosure:** trial court improperly set foreclosure action for trial because case not “at issue” where defendant failed to answer complaint and bank did not obtain default – [Reilly v. U.S. Bank National Ass’n](#), No. 4D14–867 (Fla. 4th DCA Feb. 3, 2016) (reversed and remanded)

- **Foreclosure/Business Records:** bank's employee sufficiently familiar with bank's practices and procedures in creating payment history and notice of default and acceleration to lay necessary foundation for admission as business records and, consequently trial court erred in excluding them from evidence – [Wells Fargo Bank, N.A. v. Balkissoon](#), No. 4D14–669 (Fla. 4th DCA Feb. 3, 2016) (reversed and remanded)
- **Foreclosure:** trial court should have found excusable neglect and vacated its order dismissing bank's foreclosure action due to counsel's failure to appear at case management conference because counsel presented evidence that, due to a breakdown in internal firm procedures, she failed to receive trial court's order setting case management conference – [Ocwen Loan Servicing, LLC v. Timber Courtney Brogdon](#), No. 5D15–2877 (Fla. 5th DCA Feb. 5, 2016) (reversed and remanded)
- **Homestead Exemption/Forced Sale:** denial of due process for trial court to refuse to hear argument that property protected from forced sale by homestead exemption – [Hayes v. Norman Harris Servs., Inc.](#), No. 2D15–1838 (Fla. 2d DCA Jan. 29, 2016) (affirming in part, reversing in part, and remanding for further proceedings)
- **Foreclosure/Standing:** borrower entitled to involuntary dismissal of bank's foreclosure action where bank put on no evidence that note was indorsed in a manner to give original plaintiff status of holder at time suit was filed – [Chery v. Bank of America, N.A.](#), Case No. 4D14–3446 (Fla. 4th DCA Jan. 27, 2016) (reversing final judgment of foreclosure and remanding with instructions to enter an order of involuntary dismissal)
- **Foreclosure/Paragraph 22:** borrower not entitled to involuntary dismissal of bank's foreclosure claim where notice of intent to accelerate sent by bank substantially complied with paragraph 22 of mortgage and caused no prejudice to borrower – [The Bank of New York Mellon v. Johnson](#), No. 5D14–3626 (Fla. 5th DCA Jan. 29, 2016) (reversing involuntary dismissal against Bank and remanding for a new trial)
- **Foreclosure/Business Records:** bank not entitled to admit business records evidence where affidavit failed to demonstrate affiant's familiarity with record-keeping system of mortgagee and failed to address whether bank verified mortgagee's documents' accuracy and compliance with industry standards – [Hidden Ridge Condo. Ass'n, Inc. v. OneWest Bank, N.A.](#), No. 5D14–3727 (Fla. 5th DCA Jan. 29, 2016) (reversed and remanded)
- **Foreclosure/Res Judicata:** bank's foreclosure action not subject to res judicata where prior foreclosure action dismissed for lack of standing – [Brown v. M & T Bank](#), Case No. 5D15–1397 (Fla. 5th DCA Jan. 29, 2016) (affirmed)

Title Insurance Update

- **Title Agent:** title agent and insurer not required to give notice of availability of title insurance to refinancing owner – [Scott v. BAC Home Loan Servicing, L.P.](#), No. 13–5540 (E.D. Pa. Jan. 26, 2016) (memorandum granting summary judgment)
- **Bad Faith:** whether title insurer acted in bad faith in defending and appealing quiet title action presented issues of material fact precluding summary judgment under Hawai'i's enhanced standard of good faith for insurers acting under a reservation of rights – [Anastasi v. Fidelity National Title Ins. Co.](#), No. SCWC–30557 (Hi. Feb. 4, 2016) (affirming in part and vacating in part judgment of intermediate appellate court and remanding)
- **Bad Faith:** whether title insurer induced retained counsel to breach her ethical duties to insured in defending and appealing quiet title action raised issues of material fact precluding summary judgment under Hawai'i's enhanced standard of good faith for insurers acting under a reservation of rights – [Anastasi v. Fidelity National Title Ins. Co.](#), No. SCWC–30557 (Hi. Feb. 4, 2016) (affirming in part and vacating in part judgment of intermediate appellate court and remanding)
- **Bad Faith:** whether work product doctrine protects communications by an in-house attorney who performed duties both as an attorney and a claims adjuster depends on whether the document was produced “because of” anticipated litigation – [Anastasi v. Fidelity National Title Ins. Co.](#), No. SCWC–30557 (Hi. Feb. 4, 2016) (affirming in part and vacating in part judgment of intermediate appellate court and remanding)
- **Limitation of Liability:** insured's claim for coverage is barred for failing to obtain insurer's written consent prior to settling any claims – [Bartolomeo v. Fidelity National Title Ins. Co.](#), No. 2011–06225 (Cal. App. Dec. 30, 2015) (affirming judgment dismissing complaint)

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