

Real Property & Title Insurance Update: Week Ending April 8, 2016

April 11, 2016

REAL PROPERTY UPDATE

- **Sovereign Immunity:** DOT prohibited from using sovereign immunity defense in negligence action resulting from railroad crossing accident where DOT bound by crossing agreement, including indemnity clause; liability amount also not limited by caps set forth in section 768.28(5), Florida Statutes (2002) – [Fla. Dep't of Transp. v. Schwefringhaus](#), No. SC14-69 (Fla. Apr. 7, 2016) (affirmed)
- **Foreclosure/Standing:** bank failed to establish through documents or testimony that it owned or held the indorsed note with allonge when bank filed foreclosure complaint – [Sorrell v. U.S. Bank Nat'l Ass'n, as Trustee](#), No. 2D14-3883 (Fla. 2d DCA Apr. 6, 2016) (reversed and remanded for dismissal)
- **Partition/Disbursement of Sale Proceeds:** disbursement of proceeds from sale of partitioned property to party in connection with interlocutory attorney's fee orders improper because counterclaims arising from same transaction and occurrence remained pending – [Sieber v. Gil](#), No. 3D15-2270 (Fla. 3d DCA Apr. 6, 2016) (reversed and remanded)
- **Foreclosure/Standing:** bank did not prove that endorsement of note occurred and allonge was affixed prior to filing original complaint – [Elman v. U.S. Bank, N.A., as Trustee](#), No. 4D14-2520 (Fla. 4th DCA Apr. 6, 2016) (reversed and remanded for entry of judgment for borrowers)
- **Foreclosure/Business Records:** bank failed to prove amounts due and owing because bank's witness did not lay proper foundation for admission of payment history under business records exception to hearsay – [Maslak v. Wells Fargo Bank, N.A., as Trustee](#), Nos. 4D14-4672, 4D14-4673, 4D14-4707 (Fla. 4th DCA Apr. 6, 2016) (affirming judgment of foreclosure but remanding for further proceedings to establish amounts due and owing)

- **Foreclosure/Reformation:** in bank's action seeking foreclosure and reformation of mortgage, bank introduced clear and convincing evidence showing that a mistake was made, as required for reformation, but did not show what the actual agreement was between originally contracting parties– [Losner v. HSBC Bank USA, N.A., as Trustee](#), No. 4D15-493 (Fla. 4th DCA Apr. 6, 2016) (affirming trial court's judgment with respect to standing, reversing on reformation count, and remanding for entry of money judgment in lender's favor)
- **Foreclosure/Standing:** trial court did not abuse its discretion in determining bank's witness was competent to testify and in admitting loan history records into evidence; bank's notice of default substantially complied with paragraph 22; unclear whether HUD notice and face-to-face meeting conditions precedent applied but borrowers' evidentiary burden to establish – [Diaz v. Wells Fargo Bank, N.A.](#), No. 5D15-1612 (Fla. 5th DCA Apr. 8, 2016) (affirmed)

TITLE INSURANCE UPDATE

- **Nature of Title Insurance:** a title insurance policy is a contract of indemnity, not of guaranty or warranty, and once a claim is tendered a title insurer has the option of paying the insured's loss, clearing the defect within a reasonable time, or showing that the defect does not exist or is excluded from coverage – [Wells Fargo Bank, N.A. v. First American Title Ins. Co.](#), No. 15-2882 (D. Md. April 6, 2016)(memorandum and order denying motion to dismiss)
- **Statute of Limitations:** a title insurance policy is breached not at the time notice is given but only after the insurer fails to perform any of the options available to it pursuant to the policy – [Wells Fargo Bank, N.A. v. First American Title Ins. Co.](#), No. 15-2882 (D. Md. April 6, 2016)(memorandum and order denying motion to dismiss)
- **Late Notice:** late notice coupled with prejudice may give rise to a defense to a claim on a title insurance policy, but prejudice due to late notice is not a question that can be resolved on a motion to dismiss – [Wells Fargo Bank, N.A. v. First American Title Ins. Co.](#), No. 15-2882 (D. Md. April 6, 2016)(memorandum and order denying motion to dismiss)
- **Subrogation:** claim that insured suffered no damage because it was made whole by its title insurer, thus precluding the title insurer's claim for subrogation not the law of subrogation and is without merit – [First American Title Ins. Co. v. Dundee Reger, LLC](#), No. 15-C-5053 (E.D. Ill. April 5, 2016)(memorandum opinion and order denying motion to dismiss)
- **Jury Instructions:** the plaintiff insured's general objections to title insurer's jury instructions, failed to preserve objection to the inclusion of affirmative defense that the insurer complied with the policy by timely investigating and tendering payment in breach of contract instructions, and jury verdict for defense left insured without a claim, even for the amount tendered – [Millies v. Landamerica Transnation](#), No. 91301-3 (Wash. March 31, 2016) (affirming jury verdict for defense)

- **Liability for Agent:** title insurance agent's theft of funds could not be imputed to title insurer where the theft was not in the course of the agent's agency, did not it further the insurer's business, the agent was not acting with apparent authority, and thus the agent's theft did not preclude the insurer from pursuing claims against the parties to the transaction – [Commonwealth Land and Title Ins. Co. v. Howard](#), No. 5:14-24 (E.D. Ky. March 29, 2016) (opinion and order granting summary judgment)
- **Guilty Plea:** defendant's plea agreement admitting he falsely represented the value of the property estops him from denying that fact and entitles title insurer to summary judgment on fraud count – [Commonwealth Land and Title Ins. Co. v. Howard](#), No. 5:14-24 (E.D. Ky. March 29, 2016) (opinion and order granting summary judgment)
- **Vexatious Litigant:** order deeming plaintiff a vexatious litigant and showing that plaintiff, in this action and two prior lawsuits alleging the title insurer misappropriated funds and failed to give her clear title, engaged in a pattern of baseless and repetitive motions which merely harassed and unduly burdened defendant and judgment was narrowly tailored to fit the specific abuse and thus within the court's discretion – [Saylor v. Chicago Title Ins. Co.](#), No. 15-0303 (Az. App. March 29, 2016) (memorandum decision affirming trial court order dismissing action and deeming plaintiff a vexatious litigant)

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