



# Real Property & Title Insurance Case Law Update

Recent Opinions of Interest to  
Real Property Litigators and Practitioners

**Week Ending March 29, 2013**

*By the Carlton Fields Real Property Litigation Practice Group*

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## I. FLORIDA STATE CASES – SARA WITMEYER

- **Statute of Frauds: doctrine of promissory estoppel is not an exception to Florida's Statute of Frauds** – [DK Arena, Inc. v. EB Acquisitions I, LLC](#), No. SC10-897 (Fla. Mar. 28, 2013) (quashing decision of district court of appeal)
- **Confidentiality of Court Records: Florida Supreme Court amended Florida Rule of Judicial Administration 2.420 to eliminate requirement that filer identify which of the subdivision (d)(1)(B) categories applies to the confidential information being filed and to allow for "after-the-fact" notification of confidential information in a court filing** – [In Re: Amends. to Fla. R. Jud. Admin. 2.420](#), No. SC11-2466 (Fla. Mar. 28, 2013) (amending Rule 2.420)
- **Reformation: denial of counterclaim seeking to reform contract to adjust purchase price of commercial condominium units after additional unit was added to the contract was not clearly erroneous and was supported by sufficient evidence that parties had agreed to purchase and sale of all available commercial space for a flat price and that actual square footage was not an essential term of parties' agreement** – [Calypso Developers I, LLC v. Pelican Props. of S. Walton, LLC](#), No. 1D12-1075 (Fla. 1st DCA Mar. 28, 2013) (affirming final judgment)
- **Lost Instrument: bank failed to meet burden on summary judgment of foreclosure and to re-establish lost note where it failed to file "lost instrument affidavit" proving its right to enforce note—including how bank obtained note and circumstances of its loss—even though borrowers never raised this issue in their pleading** – [Boumarate v. HSBC Bank USA, N.A.](#), No. 5D12-1269 (Fla. 5th DCA Mar. 28, 2013) (reversing summary final judgment)
- **Proceedings Supplementary: judgment holder was entitled to proceedings supplementary based on sufficient motion and supporting affidavit** – [Okaloosa New Opportunity, LLC v. LD Projects, LLC](#), No. 5D12-3136 (Fla. 5th DCA Mar. 28, 2013) (reversing order denying motion for proceedings supplementary)

- **Escrow Deposit:** escrow agent did not breach fiduciary duty and was not grossly negligent for disbursing buyer's escrowed deposit funds in manner instructed by developer and required by escrow agreement – [SO5 501, LLC v. Metro-Dade Title Co.](#), No. 3D12-2032 (Fla. 3d DCA Mar. 27, 2013) (affirming final order granting motion for judgment on the pleadings)
- **Mechanic's Lien:** lienor was not required to file notice to owner required by chapter 713, where lienor had signed contract with corporate owner of property and had begun work but corporate owner then transferred property to an affiliated corporation, which was the owner at time suit was filed – [Marble Unlimited, Inc. v. Weston Real Estate Inv. Corp.](#), No. 4D11-3113 (Fla. 4th DCA Mar. 27, 2013) (reversing order dismissing mechanic's lien claim)

## II. 11TH CIRCUIT CASES - LAUREN SEMBLER

- **Condominium Developer Disclosure:** condominium developer was permitted to materially modify the estimated closing date, subject to buyer's 15-day rescission period, since the condominium statute gives developers the ability to materially alter the offering circular and the estimated closing date is part of the offering circular or prospectus - [Pretka v. Kolter City Plaza II, Inc.](#), No. 9:09-cv-80706-KAM (S.D. Fla. Mar. 22, 2013) (granting defendant's motion for summary judgment)
- **FCRA:** plaintiff could not sustain a claim under the Fair Credit Reporting Act (FCRA) where she failed to meet her burden under Georgia law and the FCRA has an increased burden by requiring malicious intent - [Simpson v. Certegy Check Services, Inc.](#), No. 12-14352 (11th Cir. Mar. 20, 2013) (affirming district court's grant of summary judgment in favor of defendant)
- **ILSA:** defendant made use of interstate commerce for purposes of Interstate Land Sales Full Disclosure Act where plaintiff utilized telephone and e-mail communications when communicating with defendant's agents and the transaction was between a Florida corporation and a citizen of France, but fact issue remained as to whether defendant was a "developer" to which the Act would apply - [Mendez v. Land Investors Corp.](#), No. 2:12-cv-158-FtM-29SPC (M.D. Fla. March 22, 2013) (order granting in part and denying in part plaintiff's motion for partial summary judgment)
- **Jury Trial Waiver:** FDUPTA and FCCPA claims which arose from collection activities for amounts due under note and mortgage fell within jury trial waiver precluding all claims related to mortgage - [Martorella v. Deutsche Bank National Trust Co.](#), No. 12-80372 (S.D. Fla. Mar. 18, 2013) (granting defendants' motion to strike plaintiff's jury trial demand)
- **FDUPTA:** plaintiff's allegations that defendant charged excessive amounts for force-placed insurance for which defendant was paid commissions supports plaintiff's claim under the unfairness element of FDUPTA - [Martorella v. Deutsche Bank National Trust Co.](#), No. 12-80372 (S.D. Fla. Mar. 18, 2013) (denying defendants' motion to dismiss)

## III. TITLE INSURANCE CASES - CHRIS SMART

- **Coverage:** title insurer not liable for closing agent's defalcation to seller, non-owner, and non-parties to transaction who are not a named insureds under the borrower's policy or closing services letter – [Karpontinis v. Multi-Solutions, Inc.](#), Case No. A-4949-11T3 (N.J. Super. Mar. 21, 2013) (affirming summary judgment)
- **Agency Liability:** underwriting agreement did not utterly refute allegation that agent was authorized to act as underwriter's agent in entering into escrow agreement – [Faith Assembly v. Titledge of New York Abstract, LLC](#), Case No. 2011-04345 (N.Y. Mar. 27, 2013) (affirming denial of motion to dismiss)
- **Statutory Liability:** New Jersey Statute requiring title company to give mortgagor notice of its right to purchase a title insurance policy does not create a private cause of action – [Estate of David Hernandez v. Kretz](#), Case No. 12-3152 (D.N.J. Mar. 11, 2013) (denying motion for leave to amend to add third party)

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