

Real Property & Title Insurance Update: Weeks Ending April 15 & 22, 2016

April 26, 2016

REAL PROPERTY UPDATE

- **Foreclosure/Standing:** original allonge is part of original note and must be filed to prove standing; assignment of mortgage that did not assign note insufficient to establish standing to foreclose - [Caballero v US Bank NA, Trustee, et al.](#), Case No. 2D15-266 (Fla. 2d DCA Apr. 20, 2016) (reversed and remanded).
- **Foreclosure/Standing:** bank that proved Fannie Mae had control of electronic note, and was Fannie Mae's designated custodian, was considered e-note holder under section 671.201(21), Fla. Stat. (2010), and had same rights as holder of an equivalent record or writing under UCC - [Rivera and Santiago v Wells Fargo Bank, NA, et al.](#), Case No. 4D14-2273 (Fla. 4th DCA Apr.20, 2016) (affirmed).
- **Foreclosure/Standing:** plaintiff must have standing at time foreclosure complaint filed and at time final judgment entered - [Bowmar v SunTrust Mortgage, Inc.](#), Case No. 5D14-2134 (Fla. 5th DCA Apr.22, 2016) (reversed and remanded).
- **Foreclosure:** original note had same indorsements as copy of note attached to complaint; absent conflicting evidence at trial, bank established standing to file suit and its entitlement to enforce note - [Deutsche Bank National Trust Co. v Alaqua Property, Etc., et al.](#), Case No. 5D14-4326 (Fla. 5th DCA Apr.22, 2016) (reversed and remanded).
- **Foreclosure/Statute of Limitations:** applying Singleton, court held five-year statute of limitations did not bar second foreclosure suit filed on subsequent payment default occurring within five-year statutory period preceding commencement of second suit - [Deutsche Bank Trust Co. America v. Beauvais et al.](#) No. 3D14-575 (Fla. 3rd DCA Apr.13, 2016) (reversed and remanded).

- **Foreclosure/Statute of Limitations:** applying court's earlier holding in Beauvais (see above), court reversed final judgment of foreclosure where plaintiff asserted same payment default as basis for acceleration in second foreclosure suit more than five years after filing first foreclosure suit, but instructed trial court to simply recalculate correct sums due by excluding monthly installments due over five years before commencement of second foreclosure rather than dismiss foreclosure on statute of limitations grounds - [Collazo v. HSBC Bank USA, N.A.](#) No. 3D14-2208 (Fla. 3rd DCA Apr.13, 2016) (reversed and remanded with instruction).
- **Foreclosure/Condition Precedent:** plaintiff failed to sufficiently rebut borrower's affirmative defense that plaintiff did not comply with default notice provisions of mortgage where default notice not attached to affidavit or otherwise sworn to and thus was unauthenticated - [Toyos v. Helm Bank, USA](#), No. 4D15-1388 (Fla. 4th DCA Apr.13, 2016) (reversed and remanded).
- **Foreclosure/Jurisdiction:** trial court had jurisdiction to enter mortgage foreclosure judgment where, although HOA had filed lis pendens and action to foreclose lien before lender filed its lis pendens and foreclosure action, mortgage was of record at time of HOA's lis pendens; thus, rule that court presiding over initial lis pendens has exclusive jurisdiction did not apply, since that rule applies only to actions on interest unrecorded at time of initial lis pendens - [Citimortgage, Inc. v. Flowers et al.](#) No. 4D15-2452 (Fla. 4th DCA Apr.13, 2016) (reversed and remanded).
- **Foreclosure/Standing:** trial court correctly granted judgment in favor of plaintiff where note contained blank endorsement from original lender and testimony from original lender's loan verification analyst established that possession of the note was transferred to plaintiff when foreclosure action was filed - [Rincon v. & HSBC Bank USA, National Association, as Trustee for Wells Fargo Home Equity Trust 2004.](#) 5D14-1013 (Fla. 5th DCA Apr.15, 2016) (affirmed).

TITLE INSURANCE UPDATE

- **Coverage:** a member of an LLC does not have standing to bring a claim for breach of a title insurance policy to enforce the insured's LLC contractual rights, even though he may have an interest of the share of profits and losses of the LLC - [Eden v. Fidelity Nat'l Title Ins. Co.](#), No. 1CA-CV 15-0162 (Ariz. Ct. App. Apr. 12, 2016) (memorandum decision affirming dismissal)
- **Coverage:** plaintiff's claims that her insurer did not provide "post policy coverage" and that insurer discriminated against her on the basis of race and gender deemed frivolous, particularly because previous cases brought by plaintiff found that she was not entitled to payment under her title policy following the transfer of her property to a trustee upon foreclosure and subsequent sale - [Sewell v. Fidelity National Financial](#), No. PWG-15-3077, 3392 (D. Md. Apr. 18, 2016) (memorandum opinion)

- **CPL:** the protections of the full credit bid rule under Michigan’s anti-deficiency statute are limited to the rights of parties to the mortgage debt, and if an insured lender makes a full credit bid at foreclosure the lender may still pursue its rights for the CPL protections for which it contracted – [Bank of America v. First American Title Ins. Co.](#), No. 149599 (Mich., Apr. 13, 2016) (reversing and remanding) (abrogating *New Freedom Mtg. Corp. v. Globe Mtg. Corp.*, 761 NW 2d 832 (Mich. Ct. App. 2008))
- **CPL:** CPL that did not include the word “in” before the phrase “handling your funds or documents in connection with ... closings” defines the closing agent, broadening CPL indemnification coverage to any acts of fraud or dishonesty by the closing agent related to a closing and is not limited only to an agent’s fraud or dishonesty in handling a lender’s funds or documents, and may include other closing documents such as HUD-1 settlements – [Bank of America v. First American Title Ins. Co.](#), No. 149599 (Mich., Apr. 13, 2016) (reversing and remanding) (abrogating *New Freedom Mtg. Corp. v. Globe Mtg. Corp.*, 761 NW 2d 832 (Mich. Ct. App. 2008))
- **Coverage:** a title insurer is not required to defend or indemnify insured in an action that seeks to correct a legal description and thereby increase insured’s holdings and does not cause the insured to suffer a loss – [Stewart Title Guar. Co. v. McClain](#), No. 3423 EDA 2014 (Sup. Ct. Pa. Apr. 12, 2016) (memorandum decision affirming summary judgment)

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