



Real Property & Title Insurance Case Law Update

Recent Opinions of Interest to
Real Property Litigators and Practitioners

Week Ending April 26, 2013

By the Carlton Fields Real Property Litigation Practice Group

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I. FLORIDA STATE CASES - ILAN NIEUCHOWICZ

- **Damages/Construction Defects:** measure of damages for construction defects is generally cost of correcting defects; if owner chooses to proceed with more expensive design than originally contemplated, recovery limited to reasonable cost of repair under original design -- [Kirtikos & Jupiter Holding Co., LLC v Anderson](#), Case Nos. 4D11-43, 4D11-2575 (Fla. 4th DCA April 24, 2013) (reversed for new trial on damages)
- **Release:** property owner's release of subcontractor which expressed intent to limit release to subcontractor did not bar general contractor's claim for indemnification against subcontractor to recover amounts paid to owner – [Pilot Constr. Servs., Inc. v Babe's Plumbing, Inc.](#), Case No. 2D11-6009 (Fla. 2d DCA April 24, 2013) (motion for rehearing granted)
- **Landlord-Tenant:** landlord entitled to retain unused portion of rent, payable per lease in one lump sum for entire term, upon landlord's proper termination of lease and was not unjustly enriched thereby – [Atlantis Estate Acquisitions, Inc. v Depierro](#), Case No. 4D11-295 (Fla. 4th DCA April 24, 2013) (reversing final judgment)
- **Insurance:** interpretation of property insurance policy is a question of law – [Ergas v Universal Prop. & Cas. Ins. Co.](#), Case No. 4D11-3803 (Fla. 4th DCA April 24, 2013) (affirming summary judgment)
- **Discovery/Privilege Log:** time for filing a privilege log is tolled until the court rules on objections to discovery – [DLJ Mortgage Capital, Inc. v Fox](#), Case No. 4D12-2264 (Fla. 4th DCA April 24, 2013) (petition granted)

II. 11TH CIRCUIT CASES - NONE

III. TITLE INSURANCE CASES - CHRIS SMART

- **Escrow Agent:** agent closes transaction without paying proceeds to mortgagee owes no duty to the mortgagee who was not party to escrow agreement either as the escrow agent or title insurer – [TSF 53419, LLC v. Fidelity Nat'l Title Ins. Co.](#), No. B232445 (Cal. App. April 24, 2013) (affirming summary judgment)
- **Exclusion:** whether inchoate mechanics liens unrecorded at the time of issuance of the policy render the insured title unmarketable so as to create coverage or are uncovered post-policy matters is a matter for trial – [Fidelity Nat'l Title Ins. Co. v. Captiva Lake Invest., LLC](#), No. 4:10-CV-1890 (E.D. Mo. April 22, 2013) (order denying cross motions for summary judgment)
- **Exclusion:** whether insured lender who disburses loan proceeds to developer without obtaining lien waivers as required by its own loan agreement “created” a risk that mechanics liens would be filed under 3(a) is a matter for trial because insurer must show intentional misconduct, breach of duty, or inequitable dealings by lender – [Fidelity Nat'l Title Ins. Co. v. Captiva Lake Invest., LLC](#), No. 4:10-CV-1890 (E.D. Mo. April 22, 2013) (order denying cross motions for summary judgment)
- **Escrow Agent:** causes of action for breach of contract, negligence, and breach of fiduciary duty against escrow agent for using improper legal description accrued on date of closing where plaintiff knew or should have know about the error in the description – [Dunmore v. Chicago Title Ins. Co.](#), No. 05-11-01720 (Tex. App. April 19, 2013) (affirming summary judgment)
- **Recoupment:** insurer stated cause of action against its title insurance issuing agent's bank for knowing allowing the agent to misappropriate the funds of others and for aiding and abetting – [First Am. Title Ins. Co. v. Westbury Bank](#), No. 12-CV-1210 (E.D. Wis. April 17, 2013) (denying in part and granting in part motion to dismiss)
- **Recoupment:** for purposes of determining proper statute of limitations, insurer's claims against law firm do not necessarily sound in malpractice – [Old Republic Nat'l Title Ins. Co. v. Studstill & Perry, LLP](#), No. 7:12-cv-83 (M.D. Ga. April 15, 2013) (denying motion to dismiss)
- **Recoupment:** for purposes of determining proper date of accrual of action, agent agreed to indemnify insurer pursuant to agency agreement, even though it did not use the word indemnify, and action accrued when agent refused to pay – [Old Republic Nat'l Title Ins. Co. v. Studstill & Perry, LLP](#), No. 7:12-cv-83 (M.D. Ga. April 15, 2013) (denying motion to dismiss)
- **Agent Liability:** investors who were shown a fraudulent commitment by issuing agent did not reasonably rely on the commitment in deciding to enter into real estate investment venture with issuing agent – [Stinespring v. Fidelity National Financial, Inc.](#), No. 12-C-5866 (E.D. Ill. April 15, 2013) (granting motion to dismiss)

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