

STATE OF MICHIGAN  
IN THE SUPREME COURT

Bank of America, N.A.,

Plaintiff/ Appellant

v.

First American Title Insurance Company;  
Patriot Title Agency, LLC; Kirk D. Schieb;  
Westminster Abstract Company doing  
business as Westminster Title Agency, Inc.;  
The Prime Financial Group, Inc.; Valentino  
M. Trabucchi; Pamela S. Notturmo, formerly  
known as Pamela S. Siira; Douglas K. Smith;  
Joshua J. Griggs; Nathan B. Hogan; State  
Value Appraisals LLC, and Christine D.  
Mays,

Defendants/Appellees,

and

Fred Matson, Michael Lynett, Jo Kay James,  
and Paul Smith,

Third-party Defendants.

Richard J. Landau (P42223)  
Christopher A. Merritt (P70924)  
**RJ LANDAU PARTNERS PLLC**  
Attorneys for Plaintiff Bank of America, N.A.  
5340 Plymouth Road, Suite 200  
Ann Arbor, Michigan 48105  
Phone: (734) 865-1585  
Fax: (734) 865-1595

Steven M. Ribiat (P45161)  
**BROOKS WILKINS SHARKEY & TURCO,  
PLLC**  
Attorneys for Defendant First American  
Title Insurance Company  
41000 Woodward Avenue  
Bloomfield Hills, Michigan 48304  
Phone: (248) 258-1439

Charles D. Price  
Jeffrey T. Heintz  
Lucas M. Blower  
**BROUSE MCDOWELL, L.P.A.**  
Co-Counsel for Defendant, First  
American Title Insurance Company  
600 Superior Avenue East, Suite 1600  
Cleveland, OH 44114-1151

ORIGINAL

149599  
(81)

FILED

SEP 9 2014

---

John R. Monnich (P23793)  
OTTENWESS TAWHEEL & SCHENK PLC  
535 Griswold St Ste 850  
Detroit, MI 48226  
Phone: (313) 965-2121

---

**REPLY BRIEF OF PLAINTIFF BANK OF AMERICA, N.A. IN RESPONSE TO FIRST  
AMERICAN TITLE INSURANCE COMPANY'S OPPOSITION TO APPLICATION  
FOR LEAVE TO APPEAL**

## TABLE OF CONTENTS

<b><u>INDEX OF AUTHORITIES</u></b> .....	iv
<b><u>INDEX OF EXHIBITS</u></b> .....	vi
<b>I. Introduction</b> .....	1
<b>II. Argument</b> .....	1
<b>A. First American must indemnify the Bank if Westminster closed the transactions with “fraud or dishonesty.”</b> .....	1
1. <u>First American does not challenge the Court of Appeals’ interpretation of the CPL language regarding “fraud or dishonesty.”</u> .....	2
2. <u>Recent case law confirms that the Court of Appeals clearly erred in ruling there was no genuine issue of material fact as to Westminster’s fraud or dishonesty.</u> .....	3
3. <u>The Bank’s underwriting is irrelevant to the claims against First American.</u> .....	5
<b>B. The application of the full credit bid rule to third parties is neither long standing nor well established</b> .....	6
<b>C. Extension of the full credit bid rule to third parties undermines the policy goals of the rule.</b> .....	7
<b>D. First American’s arguments as to judicial estoppel and subrogation are waived and inapplicable.</b> .....	8
<b>III. Conclusion</b> .....	10

**INDEX OF AUTHORITIES**

**Cases**

*Bank of Three Oaks v Lakefront Props*, 178 Mich App 551; 444 NW2d 217 (1989).....6

*Capital v Colonial Title Co*, 2013 Mich App LEXIS 920 (May 23, 2013).....6

*FDIC, as Receiver for Washington Mutual Bank v Attorneys' Title Insurance Fund, Inc.*, Case No 12-cv-23599 (SD FL, September 3, 2014).....3, 4, 5

*Fifth Third Mortgage Co v Chicago Title Ins Co*, 692 F3d 507 (CA 6, 2012).....5, 6

*Fifth Third Mortgage Co v Chicago Title Ins Co*, 758 F Supp 2d 476 (SD Ohio 2010).....5

*Letvin v. Lew*, 2014 US Dist LEXIS 87343 (ED Mich June 24, 2014).....7

*Miller-Davis Co v Ahrens Constr, Inc*, 495 Mich 161; 848 NW2d 95 (2014).....6

*New Freedom Mortgage Corp v Globe Mortgage Corp*, 281 Mich App 63; 761 NW2d 832 (2008).....*passim*

*Owendale-Gagetown School Dist v State Bd of Education*, 413 Mich 1; 317 NW2d 529 (1982)..8

*Paschke v Retool Industries*, 445 Mich 502; 519 NW2d 441 (1994).....9

*People v Johnson*, 474 Mich 96; 712 NW2d (2006).....5

*Pulleyblank v Cape*, 179 Mich App 690; 446 NW2d 345 (1989).....6

*Romain v Frankenmuth Mut Ins Co*, 483 Mich 18; 762 NW2d 911 (2009).....5

*Scott v State Farm Mut Auto Ins Co*, 483 Mich 1032; 766 NW2d 273 (2009).....5

*Smith v General Mortgage Corp*, 402 Mich 125; 261 NW2d (1978).....6, 7

*Swindlehurst v Resistance Welder Corp*, 110 Mich App 693; 313 NW2d 191 (1981).....9

**Statutes**

MCL600.3201.....9

MCL 600.3280.....*passim*

MCL 600.5807.....8

MCL 750.219d.....7

## **INDEX OF EXHIBITS**

**Exhibit 15:** *FDIC, as Receiver for Washington Mutual Bank v Attorneys' Title Insurance Fund, Inc.*, Case No 12-cv-23599 (SD FL, September 3, 2014)

**Exhibit 16:** *Letvin v. Lew*, 2014 US Dist LEXIS 87343 (ED Mich June 24, 2014)

## I. Introduction

It is undisputed that the four mortgage transactions in this case were fraudulent and resulted in millions of dollars in losses to Bank of America. (Ex 1, Per Curiam Op, p 8.)<sup>1</sup> The Bank's application presents this Court with its first opportunity to address the Court of Appeals' drastic expansion of the full credit bid rule in *New Freedom Mortgage Corp v Globe Mortgage Corp*, 281 Mich App 63; 761 NW2d 832 (2008), and provide a definitive interpretation of the correct application of countless closing protection letters (CPLs) issued in Michigan by First American Title Insurance Company and other title insurers.<sup>2</sup>

The issues in the Bank's application with respect to First American are (1) whether the Court of Appeals improperly applied the broad CPL standard for fraud and dishonesty in ruling there was no issue of material fact with respect to the actions of Westminster (and therefore First American's duty to indemnify the Bank under the CPLs) and (2) whether *New Freedom* improperly extended the full credit bid rule beyond mortgagors and persons claiming under the mortgagor. First American does not address the first issue, and offers no real support for the ruling in *New Freedom*.

## II. Argument

### A. First American must indemnify the Bank if Westminster closed the transactions with "fraud or dishonesty."

---

<sup>1</sup> Exhibits 1 through 14 are attached to the Bank's application. First American describes the fraud as "alleged" (Opp'n, p 2), but did not file a cross application for leave to appeal.

<sup>2</sup> First American expends considerable effort arguing that Westminster Abstract Company d/b/a Westminster Title Agency, Inc. and Patriot Title Agency, LLC were not agents of First American for the purposes of closing. (Opp'n, p 4-6.) But it is not disputed that First American's liability in this case is based solely on the CPL contracts. (Per Curiam Op, p 11.)

First American's opposition addresses nothing but the full credit bid rule, suggesting that the Bank's application applies to First American only as to that issue.<sup>3</sup> This is not true. In addition to challenging the Court of Appeal's application of the full credit bid rule, the Bank's application argues that the Court of Appeals erred when it found that First American had no duty to indemnify the Bank pursuant to CPLs issued by First American in connection with the Enid and Heron Ridge transactions. (Application, Argument B.2.)<sup>4</sup>

1. First American does not challenge the Court of Appeals' interpretation of the CPL language regarding "fraud or dishonesty."

First American argued to the Court of Appeals that Westminster did not act fraudulently or dishonestly because all prior liens were paid and the Bank received a first mortgage lien. (Per Curiam Op, p 6.) The Court of Appeals summarily rejected this unduly constrained interpretation of the CPLs and found the phrase "fraud or dishonesty" to be "quite broad," including the ordinary meaning of the word dishonesty, as well as constructive and silent fraud. (*Id.*, p 9; Application, p 23-24.) First American did not file a cross application for leave to appeal, or even address the majority's interpretation of the phrase "fraud or dishonesty." First American has therefore waived any right to contest the interpretation of this phrase by the Court of Appeals.<sup>5</sup> Likewise, First American has conceded that the Court of Appeals correctly interpreted and applied the CPLs as to Patriot and that the same standard must be applied Westminster as well.

First American must indemnify the Bank if its actual losses arise out of "[f]raud or dishonesty of the Issuing Agent handling [the Bank's] funds or documents in connection with

---

<sup>3</sup> First American claims in a footnote that the other issues presented in the Bank's application "pertain to, and will be addressed by, Westminster." (Opp'n, p 2 n 1.)

<sup>4</sup> The Bank's separate closing instruction contracts with Westminster are addressed in the Bank's separate reply to Westminster.

<sup>5</sup> It is not surprising that First American did not file a cross application for leave to appeal as the Court of Appeals' interpretation of "fraud or dishonesty" mirrors that of every other court to have considered the issue. (See Application, p 23.)

such closings.” (Ex 4; Per Curiam Op, p 11.) First American’s choice to obfuscate this point rather than defend the actions of Westminster is revealing. First American knows that had the majority correctly applied its own reasoned standard for fraud and dishonesty, the Court of Appeals would have found an abundance of facts from which a reasonable juror could conclude that Westminster likewise acted fraudulently or dishonestly. (Application, p 9-13, 24-26.)

2. Recent case law confirms that the Court of Appeals clearly erred in ruling there was no genuine issue of material fact as to Westminster’s fraud or dishonesty.

In holding that there were no genuine issues of material fact as to Westminster’s fraud or dishonesty, the Court of Appeals ignored the same evidence it considered significant with respect to Patriot’s conduct. The Court of Appeals further ignored evidence that Westminster knew the borrowers did not provide down payments, would not occupy the properties, prepared inaccurate HUD-1s, and concealed secondary financing from the Bank. (Application, p 24-26.) Recent case law from the Southern District of Florida ruling on similar CPL claims demonstrates that the majority clearly erred in the application of its own well-reasoned standard. *FDIC, as Receiver for Washington Mutual Bank v Attorneys’ Title Insurance Fund, Inc.*, Case No 12-cv-23599 (SD FL, September 3, 2014), attached as exhibit 15.

Like in this case, the court in *Attorneys’ Title* applied a broad interpretation of the “fraud and dishonesty” CPL provision. *Id.*, p 2, 15.<sup>6</sup> But in *Attorneys’ Title*, the court found that conduct similar to that of Westminster triggered CPL liability. In one transaction, the closing agent was found to have dishonestly handled the lender’s documents by failing to disclose secondary financing on the HUD-1. *Id.*, p 17-18. This is precisely what Westminster did in the Heron Ridge transaction. (Application, p 12-13.) The title insurer cited to *New Freedom* for the proposition

---

<sup>6</sup> In fact, the Court of Appeals’ interpretation of “fraud or dishonesty” was broader than the court in *Attorneys’ Title*. Compare Per Curiam Op, p 11 with *Attorneys’ Title*, p 15, n 10.

that the HUD-1 is not the lender's document, but the court concluded that *New Freedom* failed to consider the relationship between the closing agent and the lender and was otherwise "unpersuasive." *Attorneys' Title*, p 18. Like the Court of Appeals in this case, the court believed that the word "your" modified only the word "funds" and not "documents."<sup>7</sup> But regardless of whether or not the HUD-1 is the lender's document, Westminster's concealment of the secondary financing for the Heron Ridge transaction (among other things) is probative evidence from which a reasonable juror could conclude (like the court did in *Attorneys' Title*) that Westminster was "either actively participating [in] or...aware of but failed to disclose [the fraud]." (Per Curiam Op, p 10.)

In *Attorneys' Title*, the closing agent testified that he orally disclosed the secondary financing to the lender, but there was no documentary evidence to support that assertion and the secondary financing was not in fact disclosed in the HUD-1. *Id.*, p 17. This is analogous to Westminster orally informing the Bank that the name of the seller had changed for the Enid transaction without disclosing to the Bank or documenting the double-escrow nature of the transaction – which Westminster knew to be improper. (Application, p 9-10). The court in *Attorneys' Title* further found that inferences derived from the bank's records that a closing agent knew the borrower did not provide the required down payment (Application, p 25) triggers liability for "fraud or dishonesty." *Attorneys' Title*, p 22. Westminster's failure to disclose the double escrow and unapproved changes to the HUD-1 in the Enid transaction (among other things) is probative evidence from which a reasonable juror could conclude (like the court did in *Attorneys' Title*) that Westminster was "either actively participating [in] or...aware of but failed

---

<sup>7</sup> The Court of Appeals would have found that "fraud or dishonesty" would apply to *any* "documents in connection with such closing" if not constrained by *New Freedom*. (Per Curiam Op, n 5.)

to disclose [the fraud].” The failure to disclose these critical pieces of information was material to inducing the Bank’s reliance on the bona fides of the borrowers for the transactions closed by Westminster. See *Attorneys’ Title*, p 25.

3. The Bank’s underwriting is irrelevant to the claims against First American.

First American implies that the Bank’s underwriting for the subject loans was subject to criticism – stating that the loans were “based only on the borrowers’ credit scores.”<sup>8</sup> But “stated income” loans do not relieve third parties of their contractual obligations to the Bank. (Application, p 21.) First, the CPLs contain no terms regarding the Bank’s underwriting. *Fifth Third Mortgage Co v Chicago Title Ins Co*, 758 F Supp 2d 476, n 4, 485-488 (SD Ohio 2010) aff’d by 692 F3d 507, 511-512 (CA 6, 2012)) (rejecting title insurer’s multitude of theories as to lender’s allegedly negligent underwriting for a stated income loan); see also *Romain v Frankenmuth Mut Ins Co*, 483 Mich 18, 21-22; 762 NW2d 911 (2009) (alleged negligence is irrelevant where there is no duty). Stated income loans were common at the time, and there is no evidence that First American was ever concerned about the Bank’s underwriting. If the Bank’s underwriting was material, First American (the drafter of the CPLs) could have included it as a condition to the CPLs. *Fifth Third Mortgage Co*, p 488. Moreover, CPLs cover losses “arising out of” the closing agent’s fraud or dishonesty, a standard significantly more lenient than that applied to proximate cause. *Attorneys’ Title*, p 8.<sup>9</sup>

---

<sup>8</sup> This is inaccurate. With stated income loans, the Bank relied on asset reputations and collateral verification, as well as credit verification. (App’x 5, ex 11, p 25.) The Court of Appeals made the same error. (Per Curiam Op, p 3-4.)

<sup>9</sup> Michigan and Florida law are analogous. See *Scott v State Farm Mut Auto Ins Co*, 483 Mich 1032, 1035; 766 NW2d 273 (2009) *People v Johnson*, 474 Mich 96, 101; 712 NW2d (2006).

**B. The application of the full credit bid rule to third parties is neither long standing nor well established.**

First American requests that this Court “decline [the Bank]’s invitation to alter the long-standing full credit bid rule” that is “well-established Michigan law” for the Enid and Kirkway Road transactions. (Opp’n p 2, 11.) First American’s characterization of the full credit bid rule is wildly inaccurate. No case prior to *New Freedom* applied the full credit bid rule to third parties.<sup>10</sup> Each case cited by First American prior to *New Freedom* involved the rights of a mortgagor or the guarantor of the secured debt. *Smith v General Mortgage Corp*, 402 Mich 125; 261 NW2d (1978) (mortgagors); *Bank of Three Oaks v Lakefront Props*, 178 Mich App 551; 444 NW2d 217 (1989) (mortgagor and guarantors); *Pulleyblank v Cape*, 179 Mich App 690; 446 NW2d 345 (1989) (mortgagors). Only after *New Freedom* was decided in 2008 can First American point to a case where the full credit bid rule (as expressed in *New Freedom*) was relied on to dismiss claims against a third party. *Capital v Colonial Title Co*, 2013 Mich App LEXIS 920 (May 23, 2013).

The power to render a deficiency decree stems entirely from statute – currently MCL 600.3280. *Bank of Three Oaks v Lakefront Properties*, 178 Mich App 551, 555 (1989). But the Bank is not seeking a deficiency decree, nor does the Bank claim that First American insured against the risk of default or otherwise guaranteed the borrowers’ debts. First American agreed to indemnify the Bank against the possibility that Patriot or Westminster would act fraudulently or dishonestly – a possibility that materialized. See *Fifth Third Mortgage Co*, 692 F3d p 511. It is undisputed that the Bank sustained millions of dollars in actual losses. (Per Curiam Op, p 8.) The Bank simply seeks to require First American to abide by its contractual obligations. *Miller-Davis Co v Ahrens Constr, Inc*, 495 Mich 161, 173; 848 NW2d 95 (2014) (indemnity contracts create

---

<sup>10</sup> First American’s opposition fails to cite even once to MCL 600.3280, the statute upon which First American bases its argument that it is relieved from indemnifying the Bank for its actual losses. Given the lack of support in the plain language of the statute, this is not surprising.

liability that is independent of any other obligation). The Court should grant the Bank's Application so this Court may consider (for the first time) whether the full credit bid rule should be applied to third parties.

**C. Extension of the full credit bid rule to third parties undermines the policy goals of the rule.**

First American's opposition dutifully parrots the policy rationale for the full credit bid rule. (Opp'n, p 12.) What is missing from First American's opposition, however, is any explanation as to how *New Freedom's* extension of the full credit bid rule to third parties furthers these policy rationales. This is missing because First American is incapable of doing so. MCL 600.3280 is a blunt instrument,<sup>11</sup> and the legislature wisely chose to confine the anti-deficiency statute by its plain terms to mortgagors and guarantors of the secured debt.

First American argues that full credit bids "discourage" other bidders. But the purpose of the foreclosure statutes is not to ensure that foreclosure sales are for market value, and there is no prohibition on "overbidding." See *Letvin v. Lew*, 2014 US Dist LEXIS 87343, 23-25 (ED Mich June 24, 2014), attached as ex 16. If First American wishes to argue that the Bank's bids deprived the sales of leaven and unreasonably increased the Bank's actual losses, First American should prove this as an affirmative defense.<sup>12</sup> (Application, p 31, n 32.)

The full credit bid rule seeks to discourage fraud and create certainty as to mortgagors' (and their guarantors') rights. *Smith*, 402 Mich 125, 129 (1978). But by extending the full credit bid rule beyond the secured debt to a lender's damages against third parties, *New Freedom* effectively *encourages* fraud by allowing third parties to escape liability and indirectly condones conduct the legislature has specifically criminalized. MCL 750.219d. And as demonstrated by

---

<sup>11</sup> As noted by First American, straw borrowers are not always innocent parties.

<sup>12</sup> First American provided no evidence of such discouraged bidders in this case.

First American's opposition, *New Freedom's* extension of the full credit bid rule to third parties encourages lenders to take actions that maintain uncertainty as to mortgagors' rights. According to First American, because a lender has discretion as to whether to pursue a deficiency judgment, borrowers are not harmed by *New Freedom's* extension of the full credit bid rule. (Opp'n, p 15.) But First American also apparently believes that lenders should delay foreclosure while investigating every loan for fraud before proceeding with foreclosure. (*Id.*) Such a wildly impracticable "solution" would only serve to increase the costs of obtaining a home loan in the first place and cause the secured debt (and consequently any potential deficiency judgment) to increase in the interim.<sup>13</sup> This is not certainty as to mortgagors' rights; it is the Sword of Damocles hanging above their heads for ten years. MCL 600.5807(4).

The full credit bid rule benefits both mortgagors and mortgagees (First American does not contest this). (Application, p 31.) *New Freedom's* extension of the full credit bid rule benefits neither. The only parties that benefit are third party wrongdoers and their indemnitors, whose contractual and tortious liability is waived away without consequence.

**D. First American's arguments as to judicial estoppel and subrogation are waived and inapplicable.**

In a footnote, First American argues that the Bank is judicially estopped from arguing that the subject properties are worth less than the Bank's credit bids. (Opp'n, p 16 n 13.) While First American appears to have given this argument passing reference in a reply brief at the Circuit Court level, First American failed to raise this issue at the Court of Appeals and has therefore abandoned this argument. *Owendale-Gagetown School Dist v State Bd of Education*, 413 Mich 1, 11; 317 NW2d 529 (1982) (failure to address an issue on a first appeal abandons the

---

<sup>13</sup> In such a scenario, the Bank has no doubt third parties like First American would argue that the Bank failed to mitigate its damages by not foreclosing sooner.

issue for subsequent appeals); *Swindlehurst v Resistance Welder Corp*, 110 Mich App 693, 701; 313 NW2d 191 (1981).

Even if First American had not abandoned this issue, First American's argument is without merit. First, judicial estoppel applies to "prior proceedings," and there was no prior proceeding, either judicial or administrative. *Paschke v Retool Industries*, 445 Mich 502, 509; 519 NW2d 441 (1994). Foreclosure by advertisement is non-judicial, and governed purely by statute. MCL 600.3201 *et seq*. Overbids by the lender at foreclosure sale are not prohibited (see *supra*), and the Bank has never, in any proceeding, claimed the properties were worth anything other than a fraction of the Bank's bids. If judicial estoppel applied to foreclosure by advertisement, the anti-deficiency statute would not have been necessary in the first place. The Court should ignore First American's transparent and belated attempt to shoehorn *New Freedom's* extension of the full credit bid rule into an ill-fitting doctrine.

First American also argues, for the very first time, that it should be excused from indemnifying the Bank because the Bank's full credit bids on the Enid and Kirkway Road properties impaired its subrogation rights. (Opp'n, p 16.) First American failed to make this argument to either the Circuit Court or the Court of Appeals, and as a result, this issue has clearly been abandoned. See *supra*. Moreover, under the plain language of the CPLs, impairment of First American's subrogation rights only limits First American's liability to the Bank "to the extent" the value of those rights were knowingly and voluntarily impaired. (Ex. 4, ¶ B.) First American pursued no discovery on this issue, and has no evidence that subrogation rights against

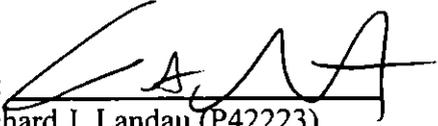
the borrowers hold any value, or that any judgment First American might have obtained against a borrower would be anything other than a worthless piece of paper.<sup>14</sup>

### III. Conclusion

For the foregoing reasons, and the reasons stated in its application, Plaintiff/Appellant Bank of America respectfully requests that this honorable Court grant the Bank's Application for Leave to Appeal, providing the Bank with the relief sought therein.

Respectfully submitted,

**RJ LANDAU PARTNERS PLLC**

By: 

Richard J. Landau (P42223)

Christopher A. Merritt (P70924)

Attorneys for Bank of America, N.A.

5340 Plymouth Road, Suite 200

Ann Arbor, MI 48105

(734) 865-1585

September 8, 2014

---

<sup>14</sup> Only one borrower was deposed, Jo Kay James. First American was given three opportunities to ask Ms. James questions, and declined each time. (App'x 4, ex 1, p 64, 79, 83.) James was the borrower for the Heron Ridge property, where the Bank did not make a full credit bid. First American could pursue its subrogation rights as to Ms. James, making First American's failure to ask her a single question all the more telling.