

**In the Supreme Court**  
**Appeal from the Michigan Court of Appeals**  
**Murphy, C.J., and Markey and Riordan, JJ.**

---

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.

Supreme Court No.: 149599

Court of Appeals No.: 307756

Oakland CC No.: 2010-11206-CK

---

**PLAINTIFF-APPELLANT BANK OF AMERICA, N.A.'S REPLY TO FIRST AMERICAN TITLE INSURANCE COMPANY'S BRIEF ON APPEAL**

**ORAL ARGUMENT REQUESTED**

Richard J. Landau (P42223)  
Christopher A. Merritt (P70924)  
RJ LANDAU PARTNERS PLLC  
Attorneys for Plaintiff-Appellant Bank of America, N.A.  
5340 Plymouth Road, Suite 200  
Ann Arbor, Michigan 48105  
(734) 865-1585  
rjlandau@rjllps.com

**TABLE OF CONTENTS**

TABLE OF CONTENTS..... ii

INDEX OF AUTHORITIES..... iii

I. The application of the full credit bid rule to bar claims against third parties not liable on the secured debt is not supported by Michigan statute..... 1

A. Applying the full credit bid rule to the Bank’s claims against First American and Westminster would violate the terms of the parties’ contracts. .... 3

B. *New Freedom’s* extension of the full credit bid rule to third parties undermines the policy goals of the rule. .... 4

C. First American’s arguments as to judicial estoppel and subrogation are waived and inapplicable. .... 6

II. The Court should adopt a broad interpretation of the CPL language regarding “fraud or dishonesty.” ..... 7

III. The Bank’s underwriting is irrelevant to its breach of contract claims in this case. .... 8

## INDEX OF AUTHORITIES

### Cases

<i>Bank of Idaho v First America Title Ins Co</i> , 329 P3d 1066; 156 Idaho 618 (2014).....	3, 4
<i>Bank of Okla, NA v Red Arrow Marina Sales &amp; Serv</i> , 2009 OK 77; 224 P3d 685 (2009).....	2, 5
<i>Bank of Three Oaks v Lakefront Properties</i> , 178 Mich App at 551; 444 NW2d 217 (1989).....	1
<i>C &amp; D Capital LLC v Colonial Title Co</i> , unpublished opinion of the Michigan Court of Appeals, issued May 23, 2013 (Docket Nos 306927, 308262).....	1
<i>Corley v Miller</i> , 133 AD2d 732; 520 NYS2d 21 (NY App Div 2d Dep’t 1987).....	4
<i>FDIC v Attorneys’ Title Ins Fund, Inc</i> , unpublished opinion of the United States District Court of the Southern District of Florida, issued September 3, 2014 (Docket No 12-23599) .....	9
<i>FDIC v First American Title Ins Agency</i> , unpublished opinion of the United States District Court of the Central District of California, issued January 12, 2015 (Docket No 14-cv-617) .....	10
<i>FDIC v First American Title Ins Co</i> , unpublished opinion of the United States District Court for the Central District of California, issued August 24, 2011 (Docket No 10-0713).....	8
<i>FDIC v First American Title Ins Co</i> , unpublished opinion of the United States District Court of the Eastern District of Michigan, issued January 30, 2015 (Docket No 14-cv-13624) .....	10
<i>FDIC v First American Title Ins Co</i> , unpublished opinion of the United States District Court of the Southern District of Florida, issued February 9, 2015 (Case No. 14-cv-22535) .....	10
<i>Fifth Third Mortgage Co v Chicago Title Ins Co</i> , 758 F Supp 2d 476 (SD Ohio 2010) aff’d by 692 F3d 507 (CA 6, 2012) .....	9
<i>Glenham v Palzer</i> , 58 Wn App 294; 792 P.2d 551 (Wash Ct App 1990) .....	2, 5
<i>Holton v A+ Ins Assocs</i> , 255 Mich App 318; 661 NW2d 248 (2003).....	10
<i>JPMorgan Chase Bank, NA v First American Title Ins Co</i> , 795 F Supp 2d 624 (ED Mich 2011) .....	9
<i>Lawyers Title Ins Corp v New Freedom Mortgage Corp</i> , 285 Ga App 22; 645 SE2d 536 (2007) .....	9
<i>Letvin v. Lew</i> , unpublished opinion of the United States District Court of the Eastern District of Michigan, issued June 24, 2014 (Docket No 13-12015).....	5
<i>Miller-Davis Co v Ahrens Constr, Inc</i> , 495 Mich 161; 848 NW2d 95 (2014) .....	4
<i>New Freedom Mtg Corp v Globe Mortgage Corp</i> , 281 Mich App 63; 761 NW2d 832 (2008) 1, 4, 5, 6	
<i>Owendale-Gagetown School Dist v State Bd of Education</i> , 413 Mich 1; 317 NW2d 529 (1982) .	6
<i>Paschke v Retool Industries</i> , 445 Mich 502; 519 NW2d 441 (1994).....	6
<i>People v Breidenbach</i> , 489 Mich 1; 798 NW2d 738 (2011) .....	2
<i>People v Johnson</i> , 474 Mich 96; 712 NW2d 703 (2006) .....	9
<i>Preservation Capital Consultants, LLC v First America Title Ins Co</i> , 406 SC 309; 751 SE2d 256 (2013) .....	3, 4
<i>Pulleyblank v Cape</i> , 179 Mich App 690; 446 NW2d 345 (1989) .....	1
<i>Romain v Frankenmuth Mut Ins Co</i> , 483 Mich 18; 762 NW2d 911 (2009).....	9
<i>Scott v State Farm Mut Auto Ins Co</i> , 483 Mich 1032; 766 NW2d 273 (2009) .....	9

*Smith v General Mortgage Corp*, 402 Mich 125; 261 NW2d (1978)..... 1, 4  
*Swindlehurst v Resistance Welder Corp*, 110 Mich App 693; 313 NW2d 191 (1981) ..... 6  
*Wilkie v Auto-Owners Ins Co*, 469 Mich 41; 664 NW2d 776 (2003)..... 8  
*Willis v Realty Country*, 121 Idaho 312; 824 P2d 887 (Idaho Ct App 1991) ..... 2

**Statutes**

MCL 600.3201 *et seq.*..... 6  
MCL 600.3280 ..... 1, 2, 3  
MCL 750.219d..... 4

**Other Authorities**

2 Windt, *Insurance Claims and Disputes* (5th ed 2007) ..... 9  
Gosdin, *Title Insurance: A Comprehensive Overview* (3rd ed, 2007) ..... 9  
Written Testimony of Frank Pellegrini on Behalf of The American Land Title Association, June 18, 2009 <<http://www.alta.org/advocacy/mortgagefraudlinks.cfm>> [click “Frank Pellegrini Written Testimony”] (accessed April 15, 2015) ..... 5

**I. The application of the full credit bid rule to bar claims against third parties not liable on the secured debt is not supported by Michigan statute.<sup>1</sup>**

Michigan’s full credit bid rule stems directly from MCL 600.3280—which protects “mortgagor[s] . . . or any other person liable [on the secured debt]” against deficiency judgments.<sup>2</sup> See *Bank of Three Oaks v Lakefront Properties*, 178 Mich App at 551, 555; 444 NW2d 217 (1989). By statute, the Bank’s full credit bids on Enid and Kirkway prevent the Bank from pursuing deficiency judgments against those borrowers. But because neither First American nor Westminster is liable on the secured debts, they are not entitled to the protections of MCL 600.3280. First American, however, claims the application of the full credit bid rule to third parties like First American is “long-standing” and “well-established Michigan law.” (See First American Br, p 2, 11, 13). But no Michigan case prior to *New Freedom Mtg Corp v Globe Mortgage Corp*, 281 Mich App 63; 761 NW2d 832 (2008) applied MCL 600.3280 and the full credit bid rule to third parties.<sup>3</sup> Each case cited by First American involved the rights of a mortgagor or the guarantor of the secured debt. See *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). These cases simply applied the unambiguous language of MCL 600.3280, and do not support *New Freedom’s* expansion of the scope of MCL 600.3280 to insulate third parties not

---

<sup>1</sup> The Bank’s arguments against the application of the full credit bid rule in this case are equally applicable to its claims against Westminster.

<sup>2</sup> Westminster acknowledges this. (Westminster Br, p 29.) First American, however, ignores the statutory basis for the full credit bid rule completely. Given the lack of support for First American’s arguments in the plain language of MCL 600.3280, this is not surprising.

<sup>3</sup> First American cites a 2013 opinion by the Court of Appeals applying the full credit bid rule to claims against a third party in *C & D Capital LLC v Colonial Title Co*, unpublished opinion of the Michigan Court of Appeals, issued May 23, 2013 (Docket Nos 306927, 308262). But that court (like the Court of Appeals in this case) was bound by the incorrect rule announced in *New Freedom*.

liable on the secured debt (like First American and Westminster). See *People v Breidenbach*, 489 Mich 1, 8; 798 NW2d 738 (2011) (courts are not allowed to expand the scope of an unambiguous statute).

If the scope of Michigan's anti-deficiency statute is to be expanded beyond its plain terms (covering only borrowers and those liable on the secured debt), it is the legislature's duty to do so.<sup>4</sup> Other states faced with this issue have held exactly that. See *Glenham v Palzer*, 58 Wn App 294, 298; 792 P.2d 551 (Wash Ct App 1990) (no legislative intent for Washington's anti-deficiency statute to cover third parties); *Willis v Realty Country*, 121 Idaho 312; 824 P2d 887, 892 (Idaho Ct App 1991) (Idaho's anti-deficiency statute covers only borrowers and must be amended to expand protection to guarantors); see also *Bank of Okla, NA v Red Arrow Marina Sales & Serv*, 2009 OK 77, P18; 224 P3d 685 (2009) ("To read [Oklahoma's anti-deficiency statute] as absolving defendants of liability for their misrepresentations is to force upon the statute a construction wholly unrelated to its limited and specific purpose.") Like the parties seeking the protection of the full credit bid rule in *Glenham*, First American and Westminster are "strangers" to the secured debt protected by the anti-deficiency statute, and extending the application of the statute to non-obligors like First American and Westminster would serve no purpose consistent with legislative intent. *Glenham*, 58 Wn App at 298; see also *Red Arrow Marina*, 2009 OK 77, P19 ("The anti-deficiency [statute was] a direct legislative response to the plight of mortgage debtors rendered vulnerable to burdensome deficiency liability in harsh economic circumstances. A corrective measure derived from a depression-era desire to ease the burden of displaced mortgagors cannot be invoked today to absolve defendants of liability for fraud.")

---

<sup>4</sup> As noted by First American, borrowers are not always innocent parties. As such MCL 600.3280 is a blunt instrument that the legislature wisely chose to confine to mortgagors and guarantors of the secured debt.

**A. Applying the full credit bid rule to the Bank's claims against First American and Westminster would violate the terms of the parties' contracts.**

Not only does MCL 600.3280 not support the barring of the Bank's claims based on the full credit bid rule, there is no support in the language of the Bank's contracts with First American (closing protection letters or CPLs) or Westminster (closing instructions) reducing the Bank's recoverable damages based on its credit bids. Under both sets of contracts, the defendants are liable for the Bank's "loss," and it is undisputed that the Bank suffered millions of dollars in actual losses as a result of the closings at issue in this appeal. (30JA.) Neither the CPLs nor the closing instructions contain any language that could be read to reduce the liability of First American or Westminster based on the Bank's credit bids.

First American's brief suggests that the Bank did not have a "loss" because of its full credit bids on Enid and Kirkway, (First American Br at 10), but similar arguments by First American have been rejected with respect to claims under First American's loan policies (issued in connection with CPLs). See *Bank of Idaho v First America Title Ins Co*, 329 P3d 1066; 156 Idaho 618 (2014). In *Bank of Idaho*, First American argued that the lender had no loss because the lender's full credit bid constituted a "payment[] made" under the loan policy. See *id.* at 621. After reviewing the actual language of the loan policy at issue, the court found that a lender's full credit bid did not reduce First American's liability under the loan policy. *Id.* at 622. The court reasoned that the words "payments made" would normally be construed to mean payments by the borrower, not a credit bid by the lender. *Id.* at 621-22. A similar ruling was made against First American in *Preservation Capital Consultants, LLC v First America Title Ins Co*, 406 SC 309, 319-320; 751 SE2d 256 (2013)

(rejecting argument that a lender’s credit bid reduced liability under loan policy).<sup>5</sup> Like in *Bank of Idaho* and *Preservation Capital Consultants*, First American can point to no language in the subject CPLs (which First American drafted) that could be construed to reduce First American’s liability based on the Bank’s credit bids. The closing instructions are likewise devoid of any language that could reduce Westminster’s liability based on the Bank’s credit bids. Therefore, this Court should require First American and Westminster to abide by its contractual obligations and reimburse the Bank for its actual losses. See *Miller-Davis Co v Ahrens Constr, Inc*, 495 Mich 161, 173; 848 NW2d 95 (2014).

**B. *New Freedom’s extension of the full credit bid rule to third parties undermines the policy goals of the rule.***

The full credit bid rule seeks to discourage fraud and create certainty as to mortgagors’ (and their guarantors’) rights. *Smith*, 402 Mich at 129. **Error! Bookmark not defined.**<sup>6</sup> 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 under MCL 750.219d. And as demonstrated by First American’s brief, *New Freedom’s* extension of the full credit bid rule to third parties encourages lenders to take actions that maintain uncertainty as to

---

<sup>5</sup> It is believed that the loan policies at issue in *Bank of Idaho* and *Preservation Capital Consultants* were ALTA loan policies. ALTA (American Land Title Association) has sought leave to file an *amicus* brief in support of *New Freedom’s* application of the full credit bid rule. ALTA has no expertise in Michigan’s anti-deficiency statute so it is expected that ALTA will argue that a lender’s full credit bid negates a lender’s “loss” under a CPL or loan policy—an unsupportable position given the well-reasoned opinions of *Bank of Idaho* and *Preservation Capital Consultants*.

<sup>6</sup> First American and Westminster both cite to *Smith’s* quotation of New York case law for the policy rationale behind anti-deficiency statutes. (Westminster Br, p 30 n 7; First American Br, p 12.) But New York courts have refused to apply New York’s anti-deficiency statute to bar claims against third parties. *Corley v Miller*, 133 AD2d 732, 735; 520 NYS2d 21 (NY App Div 2d Dep’t 1987).

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. (First American Br, 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>7</sup>

First American also argues that full credit bids “discourage” other bidders,<sup>8</sup> 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*, unpublished opinion of the United States District Court of the Eastern District of Michigan, issued June 24, 2014 at \*23-25 (Docket No 13-12015). 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. (Bank Br, p 47 n 70.) For its part, Westminster claims that the application of the full credit bid rule to third parties not liable on the secured debt is “equitable.” (Westminster Br, p 29.) Equity, however, does not favor wiping away civil liability for third party wrongdoers—including conduct specifically criminalized by the legislature—because a lender made a full credit bid.<sup>9</sup> See *Glenham*, 58 Wn App at 298 and *Red Arrow Marina*, 2009 OK 77, P19.

---

<sup>7</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.

<sup>8</sup> There is no evidence in this case of other bidders besides the Bank for the subject properties.

<sup>9</sup> Given ALTA's stated purpose of combating mortgage fraud, it is curious that the trade association would advocate for a rule that insulates the perpetrators of mortgage fraud from civil liability. See Written Testimony of Frank Pellegrini on Behalf of The American Land Title Association, p 1, June 18, 2009 <<http://www.alta.org/advocacy/mortgagefraudlinks.cfm>> [click “Frank Pellegrini Written Testimony”] (accessed April 15, 2015).

The full credit bid rule benefits both mortgagors and mortgagees (First American does not contest this). (Bank Br, p 43.) *New Freedom's* extension of the full credit bid rule, however, benefits no one but third party wrongdoers and their indemnitors. This Court should overturn *New Freedom's* unsupported extension of the anti-deficiency statute in order to allow lenders to hold third parties and their indemnitors accountable for their contractual or tortious liability (as Michigan did before *New Freedom* and the weight of other jurisdictions have done when confronted with this issue).

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

First American argues in a footnote that the Bank is judicially estopped from arguing that the subject properties are worth less than the Bank's credit bids. (First American Br, p 13 n 10.) 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 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.

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.<sup>10</sup> MCL 600.3201 *et seq.* Overbids by the lender at foreclosure sale are not prohibited (see *Letvin*), and the Bank has

---

<sup>10</sup> If judicial estoppel applied to foreclosure by advertisement, Michigan's anti-deficiency statute would not have been necessary in the first place.

never, in any proceeding, claimed that the properties were worth anything other than a fraction of the Bank's bids (which is why there is no danger of the Bank receiving a "double recovery"). The Court should ignore First American's transparent and belated attempts to shoehorn *New Freedom's* extension of the full credit bid rule into this 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 properties impaired its subrogation rights. (First American Br, 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.<sup>11</sup> (274JA.) First American pursued no discovery on this issue. It 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>12</sup>

## **II. The Court should adopt a broad interpretation of the CPL language regarding "fraud or dishonesty."**

First American's brief claims in a footnote that the other issues presented in the Bank's appeal "pertain to, and will be addressed by, Westminster." (First American Br, p 2 n 1.) But Westminster's brief did not specifically address the Bank's argument that the Court of Appeals

---

<sup>11</sup> The Bank had no idea *New Freedom* would extend the full credit bid rule to third parties, so any argument that First American's subrogation rights against non-borrowers were voluntarily impaired would be further invalid for this reason.

<sup>12</sup> Only one borrower was deposed, Jo Kay James. First American was given three opportunities to ask Ms. James questions, and declined each time. (267 JA, 271-72 JA.) James was the borrower for the Heron Ridge property, where the Bank did not make a full credit bid. First American could have pursued its subrogation rights as to Ms. James, making First American's failure to ask her a single question all the more telling.

erred when it found 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. Briefly, First American argued to the circuit court and the Court of Appeals that Westminster could not have acted with “fraud or dishonesty” because the Bank received a first mortgage lien. (First American Br, pp 7-8; 27JA-28JA.) 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. (31JA; Bank Br, p 38.) First American has not contested the majority’s broad interpretation, and this Court should adopt this interpretation—which mirrors that of every other court to have considered the issue. (Bank Br, p 37.)<sup>13</sup>

**III. The Bank’s underwriting is irrelevant to its breach of contract claims in this case.**

First American claims the Bank’s loans were “based only on the borrowers’ credit scores.” (First American Br, p 2.) This is inaccurate.<sup>14</sup> Further, the fact that the loans were “stated income” loans does not relieve First American or Westminster of their contractual obligations to the Bank.<sup>15</sup> (Bank Br, Argument C.3.1.a.) The obligations of First American and Westminster are spelled out by the plain language of the subject contracts, which must be enforced as written. *See Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51-52; 664 NW2d 776 (2003). These contracts contain no

---

<sup>13</sup> Westminster’s conduct as it relates to the Court of Appeals’ interpretation of “fraud and dishonesty” is discussed in the Bank’s reply to Westminster’s brief on appeal.

<sup>14</sup> The Bank relied on asset reputations and collateral verification, as well as credit verification. (496JA, pp 25-26.) The Court of Appeals made this same error. (27JA.)

<sup>15</sup> Much of this section is equally applicable to the Bank’s breach of contract claims against Westminster under the closing instructions. *See FDIC v First American Title Ins Co*, unpublished opinion of the United States District Court for the Central District of California, issued August 24, 2011, \*29 (Docket No 10-0713) (1669JA) (negligence of lender not defense to claim for breach of closing instructions).

terms regarding the Bank's underwriting, and there is no evidence that First American or Westminster was ever concerned about the Bank's underwriting, or stated income loans (which were common at the time). See *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 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).

Moreover, CPLs specifically cover losses "arising out of" the closing agent's fraud or dishonesty—a standard significantly more lenient than that applied to proximate cause. *FDIC v Attorneys' Title Ins Fund, Inc*, unpublished opinion of the United States District Court of the Southern District of Florida, issued September 3, 2014 at \*29 (Docket No 12-23599).<sup>16</sup> As such, the contributory negligence of the lender simply may not be asserted as a defense to CPL claim "where the issuing agent is alleged to have participated in a mortgage fraud scam." See Gosdin, *Title Insurance: A Comprehensive Overview* 89 (3rd ed, 2007); *JPMorgan Chase Bank, NA v First American Title Ins Co*, 795 F Supp 2d 624, 633 (ED Mich 2011) (citing *Nelson v Northwestern S&L Asso*, 146 Mich App 505, 509; 381 NW2d 757 (1985)), aff'd, 750 F3d 573 (CA 6, 2014). In fact, just in the time since the Bank's application was granted by this Court, First American's attempts to defend CPL claims based on the lender's allegedly deficient underwriting have been rejected no less than three times. *FDIC v First American Title Ins Co*, unpublished opinion of the United States District Court of the Eastern District of Michigan, issued January 30, 2015 (Docket

---

<sup>16</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 703 (2006). See also *Lawyers Title Ins Corp v New Freedom Mortgage Corp*, 285 Ga App 22, 33; 645 SE2d 536 (2007); 2 Windt, *Insurance Claims and Disputes* §11:22A (5th ed 2007) (explaining the broad interpretation of the term "arising out of"). All unpublished cases are attached as exhibit 13.

No 14-cv-13624); *FDIC v First American Title Ins Agency*, unpublished opinion of the United States District Court of the Central District of California, issued January 12, 2015 (Docket No 14-cv-617); *FDIC v First American Title Ins Co*, unpublished opinion of the United States District Court of the Southern District of Florida, issued February 9, 2015, (Docket No. 14-cv-22535). As the Eastern District of Michigan just recently reiterated,

Per the plain language of the CPL[s], the only relevant inquiry in this case is whether First American’s issuing agent...was fraudulent or dishonest in handling [the Bank’s] funds or documents in connection with the closings.

*FDIC v First American*, issued January 30, 2015 at \*12 (Docket No 14-cv-13624). First American has given no reason, nor cited any authority, for this Court to view the Bank’s CPL claims any differently.<sup>17</sup>

Respectfully submitted,

**RJ LANDAU PARTNERS PLLC**

By: /s/Richard J. Landau  
 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

April 15, 2015

---

<sup>17</sup> Westminster also argues it should be excused from liability because the fraud was ongoing before the loans were sent to closing (Westminster Br, p 27). This is nothing but an improper “but for” argument of causation. *Holton v A+ Ins Assocs*, 255 Mich App 318, 325-326; 661 NW2d 248 (2003) (“defendants’ argument poses the classic ‘but for’ argument of causation, which in this context simply extends to further remote causes, i.e., but for someone building the home, plaintiffs would not have suffered a loss”). Not only is this argument plainly insufficient to avoid liability under the closing instructions, it is irrelevant as to the Bank’s separate claims under the CPLs— which do not require proximate cause.