

FORCE-PLACED INSURANCE COUNTERCLAIMS ARE TIME-BARRED

The District Court of Appeal of the State of Florida, Fourth District, recently affirmed the trial court's dismissal of the borrowers' permissive counterclaims based on violations of the Florida Unfair Trade Insurance Practices Act (FUTIPA) in connection with an alleged "force-placed insurance scheme," as the allegations were barred by the applicable **four-year statute of limitations**.

The Court upheld the dismissal of the borrowers' remaining compulsory counterclaims without prejudice for lack of jurisdiction, as the compulsory counterclaims were not appealable until a final disposition of the original case was obtained on the merits.

A copy of the opinion is available at: [Link to Opinion](#).

In 2009, a mortgagee brought a foreclosure action against the borrowers. The borrowers filed their answer, affirmative defenses, and two counterclaims for breach of contract and defamation.

The borrowers alleged that mortgagee's predecessor improperly purchased so-called "force-placed insurance" on the property and created an impound/escrow account with a deficit exceeding \$15,000 (the price of the insurance). The borrowers alleged that mortgagee's predecessor then misapplied the borrowers' principal and interest payments to pay down the escrow account.

In their counterclaims, the borrowers alleged that after mortgagee acquired the loan, it exacerbated the problem by increasing the deficit in the impound/escrow account for the payment of property taxes that had already been paid, which supposedly created a "phantom default."

Subsequently, in 2014, the borrowers filed an amended answer, which included nine counterclaims. The counterclaims set forth additional facts regarding an alleged "Illegal Force-Placed Insurance Scheme," which the borrower claimed was "the unconscionable above-market premiums, undisclosed commissions, and illegal kickbacks in the nature of reinsurance premiums and subsidized administrative services."

Thereafter, the mortgagee moved to dismiss all of the borrowers' counterclaims with prejudice. After a hearing, the trial court granted the motion to dismiss. The borrowers appealed despite mortgagee's foreclosure claims remaining pending.

On appeal, the Fourth District sua sponte raised the issue of whether the trial court granting the borrowers' counterclaims constituted a final appealable order. "An order is considered final if it 'disposes of the cause on its merits leaving no questions open for judicial determination except for the execution or enforcement of the decree if necessary.'" *Nero v. Cont'l Country Club R.O., Inc.*, 979 So. 2d 263, 266 (Fla. 5th DCA 2007) (quoting *Welch v. Resolution Tr. Corp.*, 590 So. 2d 1098, 1099 (Fla. 5th DCA 1991)).

The Appellate Court determined that the borrowers' appeal from the order dismissing their counterclaims was not considered a "final order" because it did not dispose of the case on the merits, as mortgagee's foreclosure was still pending.

However, the Fourth District exercised jurisdiction based upon the trial court's dismissal of a counterclaim "adjudicat[ing] a distinct and severable cause of action." *S.L.T. Warehouse Co. v. Webb*, 304 So. 2d 97, 100 (Fla. 1974); accord *Agriesti v. Clevetrust Realty Inv'rs*, 381 So. 2d 753, 753-54 (Fla. 4th DCA 1980).

In determining whether the trial court's order was appealable, the Appellate Court looked to distinctions between permissive and compulsory counterclaims. **If the court found that the counterclaims were permissive, then the partial final judgment adjudicating the counterclaims were immediately appealable. On the other hand, if the court found the dismissed counterclaims were compulsory, then the order dismissing the counterclaim was not appealable until a final disposition of the original case had been obtained on the merits.** *Johnson v. Allen, Knudsen, DeBoest, Edwards & Rhodes, P.A.*, 621 So. 2d 507, 509 (Fla. 2d DCA 1993).

By definition, **a permissive counterclaim does not arise out of the transaction or occurrence that is the subject matter of the main claim.** Fla. R. Civ. P. 1.170(b).

Compulsory counterclaims bear a "logical relationship" to the plaintiff's claims in that they arise out of the "same aggregate of operative facts as the original claim." *Londono v. Turkey Creek, Inc.*, 609 So. 2d 14, 20 (Fla. 1992) (quoting *Neil v. S. Fla. Auto Painters, Inc.*, 397 So. 2d 1160, 1164 (Fla. 3d DCA 1981)).

Here, the Fourth District found that the borrowers' counterclaims for breach of contract, breach of implied covenant of good faith and fair dealing, unconscionability, violation of the FCRCPA, conspiracy to violate the FCRCPA,

defamation per se, and violation of the FCCPA were compulsory because they each bore a logical relationship to the foreclosure. Having found those counterclaims compulsory, the Appellate Court dismissed the appeal without prejudice for lack of jurisdiction because the trial court did not reach a disposition on the merits.

Turning to the borrowers' two counterclaims based upon an alleged violation of the FUITPA, the Appellate Court found these counterclaims permissive as they were based on allegations that mortgagee's predecessor participated in a force-placed insurance scheme.

The Fourth District held that “[t]he ‘**purchase of insurance at above-market premiums, undisclosed commissions, and illegal kickbacks**’ constitutes **separate and distinct activity that does not arise out of the ‘same aggregate of operative facts’ as the acts giving rise to the foreclosure**” (quoting *Neil*, 397 So. 2d at 1164). As a result, the Appellate Court held that it had jurisdiction to reach the merits of the dismissal of those two counterclaims.

In assessing the merits of the borrowers' permissive counterclaims appeal, the Appellate Court affirmed the trial court's dismissal because the counterclaims were not timely filed. **The statute of limitations to bring an action under the FUITPA is four years.** § 95.11(3)(f), Fla. Stat. (2014).

The facts giving rise to the borrowers' FUITPA claims occurred between 2005 and 2008, and the borrowers did not plead their FUITPA claims until 2014. Thus, the Appellate Court held that the four-year statute of limitations barred the borrowers' FUITPA counterclaims as a matter of law, and affirmed the trial court's order dismissing those claims.