

Real Property, Financial Services, & Title Insurance Update: Week Ending March 23, 2018

April 02, 2018

REAL PROPERTY UPDATE

- **Foreclosure / Amendments to Conform to Evidence:** trial court erred in allowing Wells Fargo to amend its complaint during trial to conform to evidence presented of two unpleaded modification agreements – [Tracey v. Wells Fargo Bank, N.A., as Trustee](#), No. 2D16-5091 (Fla. 2d DCA Mar. 23, 2018) (reversed and remanded)
- **Tax Appeal / Defense Class:** trial court properly denied unit owners' motion to certify a defense class with the association as the owners' class representative in appraiser's appeal of value adjustment board's determinations because the individual condominium units are assessed in the name of the individual owners, not their association, and section 194.181 requires the taxpayer to be a party defendant – [Central Carillon Beach Condo. Ass'n, Inc. v. Garcia](#), Nos. 3D17-1198 & 3D17-1197 (Fla. 3d DCA Mar. 21, 2018) (affirmed).
- **Interpretation of Condo Declaration:** trial court erred in concluding that sections of declaration required commercial unit owners to obtain the association's board's written consent before altering landscaping appurtenant to their units – [Waverly 1 & 2, LLC v. Waverly at Las Olas Condo. Ass'n, Inc.](#), No. 4D16-2866 (Fla. 4th DCA Mar. 21, 2018) (reversed and remanded)
- **Foreclosure / Standing:** plaintiff failed to prove at trial that initial plaintiff had standing to enforce lost note when it filed suit – [Vieira v. PennyMac Corp.](#), No. 4D16-3430 (Fla. 4th DCA Mar. 21, 2018) (reversed and remanded)
- **Foreclosure / Standing:** heirs did not have standing to challenge borrower's liabilities under note and mortgage, and, even if they did, it was their burden to plead affirmative defense regarding a forbearance agreement – [Rouffe v. CitiMortgage, Inc.](#), No. 4D16-3583 (Fla. 4th DCA Mar. 21, 2018) (affirming judgment of foreclosure, except as to the amount due under note, and remanding for further proceedings to determine that amount)

FINANCIAL SERVICES UPDATE

- **FCCPA/FDCPA:** denying summary judgment on FCCPA claim alleging violations of 559.72(9), based upon finding that a reasonable jury could *infer* actual knowledge of illegitimacy of amounts sought, despite lack of evidence that Defendant had actual knowledge that amounts sought were illegitimate - [Revien v. Eastern Revenue, Inc.](#), No. 9:17-CV-80959 (S.D. Fla. Mar. 21, 2018).
- **FDCPA/FDUTPA:** claim for FDCPA violations based upon two letters sent to plaintiff in June 2013, were time-barred and alleged "continuing violations" based upon filing of collection action could not save time-barred claim; FDUTPA claim against attorneys based upon sending pre-suit demand letters could not survive dismissal because alleged conduct "had zero connection to any 'trade or commerce'" - [In re Smith-Johnson](#), No. 8:16-BK-02514-RCT (Bankr. M.D. Fla. Mar. 19, 2018).

TITLE INSURANCE UPDATE

- **Exclusion 3(a):** Exclusion 3(a) applies in Texas to preclude coverage to insured who engaged in substantial misconduct where insured was aware that a judgment had been entered against him but did not have "full knowledge" that the judgment had attached to his real property, because to find otherwise would require an insurer to guarantee an insured's debt where the insured intentionally refuses to fulfill his financial obligation and would receive an inequitable windfall at the expense of the insurer – [Moser v. Fidelity Nat'l Title Ins. Co. \(In Re Moser\)](#), Civil Action No. 4:17-CV-104 (E.D. Texas Mar. 21, 2018) (affirming bankruptcy court)
- **Fortuity Doctrine:** In Texas, the fortuity doctrine applies to relieve insurers from covering inequitable behavior that an insured undertook prior to purchasing a "backward looking" title insurance policy, and precludes coverage when an insured is or should be aware of an ongoing, progressive or known loss at the time the policy is purchased – [Moser v. Fidelity Nat'l Title Ins. Co. \(In Re Moser\)](#), Civil Action No. 4:17-CV-104 (E.D. Texas Mar. 21, 2018) (affirming bankruptcy court)

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