

Real Property, Financial Services, & Title Insurance Update: Week Ending April 3, 2020

April 03, 2020

Real Property Update

- **Foreclosure:** Where the foreclosure defendant was properly served, and default and default final judgment was entered against said defendant, the defendant can only contest the unliquidated damages (not the liquidated damages, which include attorneys' fees less than 3% of the principal amount of the mortgage) - [MacDonnell v. U.S. Bank N.A.](#), No. 2D19-432 (Fla. 2d DCA Apr. 1, 2020) (affirmed in part, reversed in part, and remanded)
- **Standing / Right of First Refusal:** After a right of first refusal has been properly exercised, the third-party prospective purchaser no longer has standing to challenge the performance of a contract between the current owner and the holder of the right of first refusal - [Acquisition Trust Co. v. Laurel Pinebrook, LLC](#), No. 2D18-4979 (Fla. 2d DCA Apr. 1, 2020) (affirmed)
- **Foreclosure / Verification of Complaint:** Florida Rule of Civil Procedure 1.115(e) does not preclude a claimant from delegating its verification duties to its servicer - [Wilmington Sav. Fund Soc'y, FSB v. Tacoronte](#), No. 5D19-1326 (Fla. 5th DCA Apr. 3, 2020) (reversed and remanded)

Financial Services Update

- **FDCPA:** The mailing of an Internal Revenue Service form 1099-A to a borrower is not an attempt to collect a debt within the meaning of the FDCPA - [Owens-Benniefilled v. BSI Fin. Servs.](#), No. 19-13962 (11th Cir. Mar. 31, 2020)
- **TCPA / Direct-to-Voicemail Messages:** Direct-to-voicemail messages, which deliver prerecorded messages to a targeted individual's voicemail on his or her cellphone without directly dialing that individual's cellphone number or causing his or her cellphone to ring, are subject to the TCPA - [Gurzi v. Penn Credit Corp.](#), No. 6:19-cv-00823 (M.D. Fla. Mar. 30, 2020)

Title Insurance Update

- **Closing Fees / Class Action / Contract Interpretation:** Buyer stated claim for improper charges where buyer's alleged purchase contract required that all fees for "closing services" be charged to seller in all-cash transactions; court would not interpret parties' competing interpretations of contract language on motion to dismiss - [Antao Props. v. First Am. Title Ins. Co.](#), No. 8:19-cv-03058 (M.D. Fla. Mar. 27, 2020) (denying in part motion to dismiss).
- **FDUTPA:** Buyer's claim against title insurer for violation of FDUTPA failed as a matter of law because FDUTPA exempts regulated persons, and title insurers are regulated by the office of insurance regulation - [Antao Props. v. First Am. Title Ins. Co.](#), No. 8:19-cv-03058 (M.D. Fla. Mar. 27, 2020) (dismissing FDUTPA claim with prejudice)
- **Duty to Defend:** Title insurer had no duty to defend insured in action by neighbor alleging insured blocked access to roadway where roadway was not on insured property and therefore not insured and, even if roadway was on insured's property, exceptions for facts not shown in public records but that could be ascertained by an inspection of the land, making inquiry of persons in possession of the land, and/or a complete and accurate survey would bar coverage and negate any duty to defend - [Tritapoe v. Old Republic Nat'l Title Ins. Co.](#), No. 19-0100 (W. Va. Mar. 23, 2020) (affirming motion to dismiss)
- **Compulsory Counterclaim:** Insured's federal court claims against closing agent arising out of missed judgment lien were barred as compulsory counterclaims that should have been brought in state court action because they were logically related to state court claims brought against title insurer; moreover, court determined closing agent was an "opposing party" in the state court action even though not named as a party because title insurer and closing agent were in privity, had a "substantial identity of interests," and title insurer "presented and protected" closing agent's interests in state court action - [Williams v. Stewart Title Co.](#), No. 19-1129 (10th Cir. Mar. 23, 2020) (affirming dismissal with prejudice)
- **Exclusion 3(d):** Coverage for HOA's lien for delinquent assessments barred by exclusion 3(d) because delinquent assessments arose subsequent to the date of policy; court rejected insured's argument that state statute provided HOA's lien was always in existence, as of recording of the CC&Rs; instead, court found statute provides lien created at the time of delinquency - [Deutsche Bank Nat'l Tr. Co. v. Fidelity Nat'l Title Ins. Co.](#), No. 3:19-cv-00468 (D. Nev. Apr. 2, 2020) (granting motion to dismiss with prejudice)

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