

Real Property, Financial Services, & Title Insurance Update: Week Ending February 22, 2019

February 23, 2019

Real Property Update

- **Foreclosure / Paragraph 22:** bank failed to introduce sufficient evidence to prove default letter was sent to borrower pursuant to paragraph 22 of the mortgage where bank's witness never testified that the letter was actually sent and no other evidence was introduced to prove paragraph 22 was satisfied - [Perez v. Deutsche Bank Nat'l Trust Co.](#), No. 2D17-1043 (Fla. 2d DCA Feb. 20, 2019) (reversed and remanded)

Financial Services Update

- **TCPA / Telemarketing:** defendant's alleged unauthorized pre-recorded robocalls, which stated simply that the telephone connection was bad and that someone would call plaintiff back, when followed by a call to plaintiff from a live person on behalf of defendant soliciting defendant's real estate brokerage services could plausibly be inferred as telemarketing in violation of the TCPA, as TCPA applies to a pre-recorded message that "includes or *introduces* an advertisement or constitutes telemarketing" even if the pre-recorded message does not itself constitute an advertisement or telemarketing because "the entire context of the robocall . . . must be considered[]" - [Chinitz v. NRT West, Inc.](#), No. 18-cv-06100-NC (N.D. Cal. Feb. 20, 2019) (denying in part defendant's motion to dismiss TCPA claim in putative class action)

- **FDCPA / Section 1692(g) Requirements:** holding that debt collector's letter did not violate the FDCPA where the letter's validation notice contained the disclosures required by Section 1692g in that it advised plaintiff she could orally dispute the validity of the debt and advised she could also obtain verification of the debt if she disputed the debt in writing; rejecting plaintiff's argument that the letter's inclusion of the debt collector's P.O. box address where "payments or correspondence" could be sent and its failure to expressly state that the plaintiff could dispute the debt by utilizing the phone number provided therein overshadows or contradicts the validation notice and amounts to a violation of the statute. While acknowledging the circuit split, the court noted that the Second Circuit has adopted the position that Section 1692g(a)(3) allows a consumer to orally dispute the validity of a debt, and that under Section 1692g(a)(4) a consumer can only obtain verification of a debt if the dispute is communicated to the debt collector in writing. The court determined that no overshadowing or contradiction occurred because the debt collector's address was in a separate section of the letter away from the validation notice and was "merely intended to communicate defendant's preference that physical correspondence be sent to defendant's post office box address, as opposed to its street address," and because the debt collector simply provided a phone number where it could be reached but did not include any language limiting or discussing the situations in which the debt collector intended plaintiff to use the phone number provided - [Goodman v. Mercantile Adjustment Bureau, LLC](#), No. 18-cv-04488 (ARR) (SJB) (E.D.N.Y. Feb. 19, 2019) (dismissing complaint)
- **FCCPA / Notice of Assignment:** assignee of foreclosure judgment is not required to comply with Section 559.715 of the FCCPA and provide notice of the assignment prior to bringing an action to recover a deficiency balance because Section 559.715 "does not act as a condition precedent to bringing a deficiency action" and does not contain any language "indicating compliance with the notice requirement is a condition precedent to debt collection[]" - [Dyck-O'Neal, Inc. v. Lanham](#), No. 1D16-1624 (Fla. 1st DCA Feb. 18, 2019)

Title Insurance Update

- **Release:** reversing dismissal of claim against title insurer for negligent title examination where broad exculpatory language within an earlier release was facially inconsistent with more specific title insurance obligations provided for in a later contract - [Papunen v. Bay Nat'l Title Co.](#), No. 3D17-938 (Fla. 3d DCA Feb. 20, 2019) (reversing order of dismissal and remanding)
- **Res Judicata:** plaintiff barred by res judicata from bringing claim against title insurer for failing to record mortgages where claims were previously dismissed with prejudice and trial court could rely on matters on which it could take judicial notice in deciding motion to dismiss - [Moss v. Horizon Bank, N.A.](#), No. 18A-PL-1526 (Ct. App. Ind. Feb. 19, 2019) (affirming trial court's dismissal)

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