

Real Property, Financial Services, & Title Insurance Update: Week Ending May 11, 2018

May 15, 2018

REAL PROPERTY UPDATE

- **Summary Judgment:** incorporation of an affirmative defense by referencing “previously filed pleadings” does not obviate movant’s obligation to comply with particularity requirements mandated by rule 1.510(c) - [Ambrogio v. McGuire](#), Case No. 2D17-2202 (Fla. 2d DCA May 11, 2018) (reversed and remanded).
- **Foreclosure/Standing:** plaintiff’s affidavit in support of motion for summary judgment failed to address how affiant/employee of purported servicer derived personal knowledge about Plaintiff’s connection to subject note or how Plaintiff became owner or holder - [Johnson v. Deutsche Bank National Trust Company Americas, as Trustee](#) RALI 2007-QS1, No. 2D16-4262 (Fla. 2d DCA May 11, 2018) (reversed and remanded).
- **Leasing/Exculpatory Clause:** exculpatory clause in lease held ambiguous and unenforceable where, in a single clause, it purports to relieve landlord from all liability and then concurrently imposes a duty on landlord to exercise ordinary care to prevent unauthorized opening of a safe - [Obsessions in Time, Inc., et al. v. Jewelry Exchange Venture, LLLP](#), No. 3D16-2620 (Fla. 3d DCA May 9, 2018) (reversed and remanded).
- **Condominiums/Summary Judgment:** dispute over ownership of parking spaces in condominium unable to be resolved on summary judgment due to genuine issues of material facts, as only evidence that purportedly established a transfer of ownership of parking spaces was a letter that was not properly authenticated - [Gidwani v. Roberts et al.](#), No. 3D17-677 (Fla. 3d DCA May 9, 2018) (reversed and remanded).

- **Homeowner’s Association/Prevailing Party:** plaintiff considered prevailing party and awarded fees and costs where jury found association breached its governing documents and granted injunctive claim in equity, but awarded no damages to plaintiff - [Coconut Key Homeowner’s Association, Inc. v. Gonzales](#), No. 4D17-739 &1749 (Fla. 4th DCA May 9, 2018) (affirmed in part, reversed in part and remanded).

FINANCIAL SERVICES UPDATE

- **FDCPA:** denying a motion to dismiss FDCPA claim and finding that repossession agencies can be considered “debt collector” when acting as “enforcers of security interests” - [Wright v. Santander Consumer USA, Inc.](#), No. 6:18-cv-263-Orl-22KRS (M.D. Fla. May 1, 2018)
- **BAPCPA:** denying Chapter 7 Trustee’s motion to intervene in action to recover tax return in case filed pre-BAPCPA, holding Trustee does not get the benefit of Bankruptcy Code § 1115 because any refund not property of bankruptcy estate where Debtor disgorged money post-petition, giving rise to a credit on post-petition tax return - [In re Steffen](#), 583 B.R. 284, 286 (M.D. Fla. Bankr. 2018)
- **FCRA and FDCPA:** granting motion to dismiss FCRA claim on grounds that “duties imposed on furnishers of credit information under § 1681s-2(a) are enforceable only by federal or state agencies” and there is no private right of action; granting motion to dismiss FDCPA claim because alleged debt collector provided plaintiff with a copy of itemized monthly billing statement in response to plaintiff’s notices of dispute and itemized monthly billing statement “is all that is required to verify a debt under § 1692g” - [Kozlowski v. Bank of America, N.A., et al.](#), No. 1:18-cv-00131-DAD-EPG (E.D. Cal. May 7, 2018)
- **FDCPA and TILA:** dismissing FDCPA claim because “mortgage servicers seeking to recover their own debt, are not debt collectors covered by the Fair Debt Collections Practices Act”; dismissing TILA claim for failure to allege “in any way how she was damaged by the lack of notice” - [Kashef v. Wells Fargo Bank, N.A., et al.](#), No. 17-cv-06576-JST (N.D. Cal. May 2, 2018)
- **FDCPA:** affirming summary judgment in favor of defendant and holding that FDCPA does require validation notices to include transitional language (i.e. language explaining that a request for payment does not limit a consumer’s right to challenge a debt within thirty days) - [Stuppiello v. Southwest Credit Systems, L.P.](#), No. 17-55061 (9th Cir. May 1, 2018).
- **FCRA:** granting, in part, defendant’s motion to dismiss and strike class allegations, court found that to bring a negligence claim under FCRA, “Plaintiff must plead and prove that Defendant’s alleged FCRA violation caused her to suffer actual damages”; court further recognized that injunctive relief is consistently denied to private litigants under FCRA (by federal district courts in the Ninth Circuit) and statutory and punitive damages are not recoverable for negligent as opposed to willful violations of the FCRA - [Gadomski v. Equifax Information Services, LLC](#), No. 2:17-cv-00670-TLN-AC (E.D. Cal. May 7, 2018)

- **FCRA and FAA:** finding bankruptcy discharge did not render arbitration provision in underlying credit agreement void and compelling arbitration for debtor's FCRA claim - [Delgado v. Ally Financial, Inc.](#), No. 3:17-cv-02189-BEN-JMA (S.D. Cal. May 8, 2018)
- **TILA:** dismissing a claim under TILA where account renewal disclosure was included with a periodic statement in compliance with TILA and Regulation Z - [Singer v. American Express Centurion Bank](#), No. 17-CV-2507 (S.D.N.Y. May 9, 2018)

TITLE INSURANCE UPDATE

- **Negligence:** actions for negligence and breach of oral contract against abstractor who was an agent of title company brought 10 years after they accrued were time-barred and precluded by the integration clause in the title insurance policy – [Union St. Tower, LLC v. First Am. Title Co.](#), Case No. 2018 N.Y. Slip. Op. 03390 (N.Y. App. 2018) (affirming the order granting abstractor's motion to dismiss).
- **Bankruptcy:** real property vendor who gave an affidavit to the title that failed to disclose a judgment was not entitled to a discharge because of false pretenses and false representation – [In Re Fakuri](#), Case No. 16 B 28526 (N.D. Ill. 2018) (memorandum opinion granting title insurer's motion for summary judgment).

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