

Real Property, Financial Services, & Title Insurance Update: Weeks Ending December 1 & 8, 2017

December 18, 2017

REAL PROPERTY UPDATE

- **Foreclosure/Errors in Legal Description:** error in legal description did not preclude judgment of foreclosure because property was sufficiently identified by accurate lot and tract, street address, and parcel identification number - [Bayview Loan Servicing, LLC v. Newell](#), Case No. 1D16-5173 (Fla. 1st DCA Dec. 6, 2017) (reversed and remanded for entry of judgment).
- **Foreclosure/Certification of Possession of Original Note:** 702.015, Florida Statutes, requires a certification of possession of the original note, under penalty of perjury, with the filing of the complaint; notarization is not required - [RBS Citizens N.A. v Reynolds, et al.](#), Case No. 2D16-735 (Fla. 2d DCA Dec. 8, 2017) (reversed and remanded).
- **Foreclosure/Standing:** “to prove standing as a nonholder in possession [of the original promissory note,] with the rights of a holder, the [lender] must prove the chain of transfers starting with the first holder of the note” - [Supria v Goshen Mortgage, LLC, et al.](#), Case No. 4D16-4356 (Fla. 4th DCA Dec. 6, 2017) (reversed and remanded).
- **Foreclosure:** judgment of dismissal based upon statute of limitations defense was improper where lender alleged an initial default outside of the limitations period, but also alleged subsequent defaults within limitations period - [Deutsche Bank National Trust Co., Trustee, v Corrigan, et al.](#), Case No. 5D16-2983 (Fla. 5th DCA Dec. 8, 2017) (judgment of dismissal reversed and remanded).
- **Foreclosure/Standing:** dismissal for lack of standing was improper because bank filed a copy of the note, endorsed in blank, with the complaint and offered the original into evidence, thereby creating an inference that the bank had possession of the note at the inception of the case, and had standing, absent evidence to the contrary - [Bank of NY Mellon v Thompson](#), Case No. 5D16-3372 (Fla. 5th DCA Dec. 8, 2017) (dismissal reversed and remanded for new trial).

- **Foreclosure/Standing:** assignee of lender was required to prove standing of predecessor lender at the time of filing the complaint and, the Court's failure to admit testimony concerning lost note by predecessor was not harmful error because, even if it were admitted, such evidence would be insufficient to prove standing of predecessor at time of filing lawsuit - [Green Tree Servicing, LLC v Atchison](#), Case No. 5D17-226 (Fla. 5th DCA Dec. 8, 2017) (final judgment affirmed).

FINANCIAL SERVICES UPDATE

- **TCPA/FCCPA:** TCPA claim failed because Borrower made cell phone number available regarding the debt, providing express consent during loan transaction and subsequent phone calls; FCCPA claim failed because Borrower failed to prove lender's repeated telephone calls were abusive or harassing - [Harrington v. RoundPoint Mortg. Servicing Corp.](#), Case No. 2:15-cv-322-FtM-28MRM, --- F. Supp. 3d ---- (M.D. Fla. Nov. 30, 2017) (entering judgment for Defendants after bench trial under Rule 52).
- **FDCPA/FCCPA:** court held that least sophisticated consumer would not be misled or deceived where debtor alleged collection letter misleading where it included column for "fees" reflecting \$0.00 balance since no fees authorized under statute or subject agreement - [Jones v. Professional Fin. Co., Inc.](#), Case No. 17-61435-CIV (S.D. Fla. Dec. 4, 2017) (granting motion to dismiss with prejudice).
- **FDCPA/FCCPA:** collection agency had right to rely on the creditor's representations of debt and FDCPA does not require a debt collector to validate a debt prior to seeking collection - [Cornette v. I.C. System, Inc.](#), Case No. 16-24454-CIV (S.D. Fla. Nov. 30, 2017).
- **FDCPA:** servicer did not violate the FDCPA by demanding amounts in its foreclosure complaint that were barred by the statute of limitations - [Green v. Specialized Loan Servicing LLC](#), Case No. 6:16-cv-1298, --- F. Supp. 3d ---- (M.D. Fla. Nov. 30 2017) (granting motion to dismiss with prejudice).
- **FCRA:** denying summary judgment on consumer's FCRA claims where, in response to receipt of consumer's dispute letter, reporting agency notified consumer that it no longer maintained a commercially available credit file on consumer at time dispute letter was received - [Rumbough v. Comenity Capital Bank](#), Case No. 6:16-cv-1305-ORL-18GJK (M.D. Fla. Nov. 27, 2017).
- **FDCPA/FCCPA/FDUTPA:** no FDCPA violation because agency entitled to reasonably rely upon provider's representations concerning amount of debt owed and was not required to conduct pre-collection investigation; incorrect interpretation of contract by provider and/or agency, and a pattern or practice of charging collection fees, even if true, legally insufficient to establish knowledge element required to support FCCPA claim; no FDUTPA violation where no evidence agency attempted to collect fee that was excessive or for a service that was not performed - [Cornette v. I.C. System, Inc.](#), Case No. 16-24454-Civ-COOKE/TORRES (S.D. Fla. Nov. 30, 2017).

- **FDCPA:** FDCPA claim time-barred where trustee's sale of real property which formed basis of action occurred more than 9 years before plaintiff filed case, rejecting plaintiff's reliance on equitable tolling and delayed discovery rule where plaintiff's reliance based upon securitization of underlying loan and where no evidence substantiating plaintiff's conclusory statement he could not have previously discovered his loan had been securitized - [Ratliff v. Mortgage Store Financial, Inc.](#), Case No. 17-cv-02155-EMC (N.D. Cal. Nov. 29, 2017).
- **TCPA:** text message confirming dinner reservation does not constitute telemarketing or an advertisement and, as such, under TCPA only express prior consent is required and such consent can be given orally or in writing; concluding plaintiff consented to receiving text message by making dinner reservation and providing telephone number to defendant in connection therewith - [MacKinnon v. Hof's Huts Restaurant, Inc.](#), Case No. 2:17-cv-01456-JAM-DB (E.D. Cal. Nov. 28, 2017).
- **ECOA:** determining plaintiff failed to plead valid ECOA claim because she was not an "applicant" for purposes of ECOA where claim based on loan modification her parents applied for and where plaintiff not a party to loan and failed to allege she directly applied for extension, renewal, or continuation of credit from defendant - [Gatpandan v. Wilmington Savings Fund Society FSB](#), Case No. 17-cv-04001-LB (N.D. Cal. Nov. 28, 2017).
- **TILA:** concluding plaintiffs' TILA claim based on alleged fraudulent non-disclosure of identity of lender for loan time-barred where deed of trust identified lender and where rescission not timely sought by plaintiffs; rejecting plaintiffs' equitable tolling argument; dismissing complaint with prejudice - [Styles v. Deutsche Bank National Trust Company](#), Case No. 2:17-cv-01947 TLN AC (E.D. Cal. Nov. 30, 2017).
- **FDCPA:** noting in action brought against law firm for firm's debt collection activities that "debt collectors do not have immunity from FDCPA liability for their litigation conduct," and holding that "a debt collector engages in unfair or unconscionable litigation conduct in violation of section 1692f when, as alleged here, it in bad faith unduly prolongs legal proceedings or requires a consumer to appear at an unnecessary hearing," and rejecting the argument "that the remedial scope of the FDCPA is limited by State law." [Arias v. Gutman, Mintz, Baker & Sonnenfeldt LLP](#), Docket No. 16-2165-cv (2d Cir. Nov. 14, 2017).
- **FDCPA:** finding plaintiff sufficiently alleged facts to state a claim under sections 1692e and 1692g of the FDCPA where she alleged defendant's letter failed to state clearly whether interest would accrue on debt and noting that "debt collectors are required to disclose to consumers that their balance may increase due to interest and fees;" but concluding that letter did not violate that portion of 1692e and 1692g of the FDCPA concerning consumer's ability to dispute debt where letter tracked language of FDCPA pertaining to procedure for disputing debt - [Thomas v. Midland Credit Management, Inc.](#), Case No. 2:17-cv-00523 (E.D. N.Y. Nov. 27, 2017).

TITLE INSURANCE UPDATE

- **Marketability of Title/Encumbrances:** restrictive covenants may affect the manner in which property is to be used and the property's economic marketability but do not necessarily impact title to property, however, the restrictive covenants do create an interest in the property that are encumbrances within the meaning of a title policy – [Chesapeake Land Dev. Co., LLC v. Chicago Title Ins. Co.](#), Case No. CIV-16-0132-HE (W.D. Ok., Nov. 30, 2017) (granting in part and denying in part motion to dismiss)
- **Good Faith and Fair Dealing:** Oklahoma law applies the implied duty of good faith and fair dealing to title insurers – [Chesapeake Land Dev. Co., LLC v. Chicago Title Ins. Co.](#), Case No. CIV-16-0132-HE (W.D. Ok., Nov. 30, 2017) (granting in part and denying in part motion to dismiss)
- **Date of Loss/Calculation of Loss:** title policy does not contain a provision that explicitly supplies a date certain for calculating loss or damage, or the method for calculating such loss or damage; rather the policy provides significant leeway for the title insurer to evaluate and pay claims, and where the parties submit competing calculations of loss and damage summary judgment is inappropriate – [Marcantel v. Stewart Title Guar. Co.](#), Case No. 2:16-cv-00250-DBP (D. Utah, Dec. 1, 2017) (granting partial summary judgment)
- **Title Agent's Tort Liability:** Plaintiffs' ability to minimize loss by purchase of property through a related entity was not a defense to breach of fiduciary duty claim against title agent for failing to record mortgages or issue title insurance – [Tafea v. Gateway Title Co.](#), No. G048674 (Cal. App. Nov. 29, 2017).

Related Practices

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