

Real Property, Financial Services, & Title Insurance Update: Weeks Ending May 18 & 25, 2018

May 25, 2018

REAL PROPERTY UPDATE

- **Foreclosure/Standing:** bank's allegation in complaint that it acquired loan and possessed both legal and beneficial interest in note and mortgage prior to filing complaint, coupled with the subsequent entry into evidence at trial of original note identical to copy attached to the complaint, was sufficient to demonstrate bank's standing at inception of action and at time of final judgment - [Bank of New York Mellon, as Trustee v. Burgiel](#), No. 5D17-1152 (Fla. 5th DCA May 25, 2018) (reversing and remanding judgment of involuntary dismissal)
- **Proposal for Settlement:** a joint Proposal for Settlement served pursuant to section 768.79, Florida Statutes (2011), and Florida Rule of Civil Procedure 1.442, that was contingent, and divested one defendants' ability to independently evaluate and accept, irrespective of the other party's decision, cannot support a claim for fees. [Pacheco v Gonzalez](#), Case No. 3D16-355 (Fla. 3d DCA May 16, 2018) (reversed).
- **Foreclosure/Attorneys' Fees:** following dismissal, borrowers were entitled to recover attorneys' fees, a parties to the mortgage and section 57.105, Florida Statutes. [Madl v Wells Fargo Bank, N. A., as Trustee](#), Case No. 5D16-53 (Fla. 5th DCA May 18, 2018) (affirmed)
- **Foreclosure - Credit Agreement:** HELOC credit agreement is not for a fixed amount of money and, therefore, is not a negotiable instrument, is not self-authenticating, and must be authenticated with evidentiary proof. [Third Federal Savings & Loan Assoc. of Cleveland v Koulouvaris](#), Case No. 2D17-773 (Fla. 2d DCA May 18, 2018) (affirmed).

FINANCIAL SERVICES UPDATE

- **FDCPA:** dismissing FDCPA claim based on alleged misrepresentations in loan modification agreement, as such agreements are not communications made in connection with the collection of a debt under § 1692e. [Thomas v. Select Portfolio Servicing, Inc.](#), 1:18-cv-00211 (E.D. Cal. May 24, 2018)
- **FDCPA:** dismissing putative class action brought under FDCPA and premised on theory that letter to collect cellular telephone debt was sent after two-year time bar under 47 USC § 415(a); Congress did not intend section 415(a) to preempt New York's six-year statute of limitations concerning the collection of a debt arising from a contractual obligation. [Torres v. Midland Credit Mgmt., Inc.](#), 17-cv-2794 (E.D.N.Y. May 21, 2018)
- **FCRA and TCPA:** entering summary judgment in favor of lender on FCRA claim where it conducted a reasonable investigation following each dispute by confirming borrower's name, social security number, date of birth, address, account number, account opening/closure dates, date of first delinquency, outstanding balance, and amount charged off. Entering summary judgment on TCPA claim based on a speculative inference that long pause before the caller began speaking meant the calls came from an auto dialer. [Celestine v. JP Morgan Chase Bank](#), 1:17-cv-20915 (S.D. Fla. May 11, 2018)
- **FDCPA:** dismissing FDCPA claim based on monthly mortgage statement that included language that "[t]his is an attempt to collect a debt," as lender's statement tracked the TILA model statement and discrepancies were minor. [Jones v. Select Portfolio Servicing, Inc.](#), No. 1:18-cv-20389 (S.D. Fla. May 2, 2018)

TITLE INSURANCE UPDATE

- **Foreclosure Commitment Fees:** under the Colorado Consumer Protection Act and the Colorado Fair Debt Collection Practices Act, foreclosure attorneys and title companies are prohibited from billing mortgage servicers for the full amount of a foreclosure commitment when a foreclosure is not completed and a title policy is not issued - [State ex rel. Coffman v. Robert J. Hopp & Associates, LLC](#), No. 2018COA69 (Col. App. May 17, 2018) (affirming trial court judgment)
- **Statute of Limitations:** affirming dismissal of negligence claim over incorrect legal description, which accrued either at closing or, at the latest, when the error was discovered; but reversing as to action on the policy, which accrued only when the bank's security on the (wrong) property turned out insufficient to cover the debt - [US Bank, N.A. v. HLC Escrow, Inc.](#), No. 17-1121 (1st Cir. April 25, 2018)

- **Creditor's Rights Exclusions:** affirming the summary judgment that fraudulent conveyance and fraudulent transfer claims were excluded by Exclusion 4, but reversing for fact-finding as to whether post-petition preferential transfer claim could be excluded by Exclusion 3 - [Hanks v. First American Title Ins. Co.](#), No. M2017-00560-COA-R3-CV (TN App. May 16, 2018)
- **RICO:** dismissing RICO count against homeowner's association and title company who supplied it with a search report showing dues owing from owners, where owners could not allege an "enterprise" separate from the association and title company merely pursuing their own affairs - [Edwards v. Holishor Assoc., Inc.](#), No. 18-0134-DRH (May 15, 2018)
- **Damages:** summary judgment for title insurer where insured owner's title was cleared of unexcepted lien by insurer's settlement with lienholder, and insured failed to produce evidence beyond his own speculation to support arguments on lost profits, decline in market value, loss of use of funds, and newly-raised lost rents theories of damages - [Neikes v. Ticor Title Co. of Oregon](#), No. A155171 (Or. App. May 16, 2018)

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