

Real Property, Financial Services, & Title Insurance Update: Weeks Ending November 17 & 24, 2017

November 30, 2017

REAL PROPERTY UPDATE

- **Receiver/Barton Doctrine:** individual could not bring negligence action against discharged receiver of commercial property until individual first obtained leave to do so from the court that appointed the receiver – [Asset Recovery Group, LLC v. Cabrera](#), No. 3D17-1517 (Fla. 3d DCA Nov. 22, 2017) (granting petition for writ of prohibition, quashing order, and remanding for entry of order dismissing claims against receiver)
- **Foreclosure/Summary Judgment:** bank established at summary judgment that borrower defaulted on the promissory note, that bank owned the loan, and that borrower owed bank damages but not “pre-accrued interest,” a figure which was not supported by record evidence – [Capotosto v. Fifth Third Bank](#), No. 4D16-4197 (Fla. 4th DCA Nov. 22, 2017) (affirming but remanding for correction of judgment)

FINANCIAL SERVICES UPDATE

- **TILA/ECOA:** borrower’s complaint was properly dismissed because TILA exempts business loans from its scope and because plaintiff failed to allege discrimination on the basis of a protected ground under the Equal Credit Opportunity Act – [Roberts v. FNB South of Alma, Georgia](#), Case No. 17-11269, (11th Cir. Nov. 14, 2017).
- **FDCPA/FCCPA:** “nothing in the FDCPA, or the FCCPA, negates the right to collect a debt because of a violation of the statute” – [Pimentel v. Nationwide Credit, Inc.](#), 2017 WL 5633310 (S.D. Fla. Nov 13, 2017) (dismissing FDCPA and FCCPA claims predicated on alleged violations of the FDCPA, and FDCPA claims predicated on state specific notices and statutory language included in collection letter; but finding plaintiff sufficiently alleged Section 1692e claim predicated on defendant’s failure to disclose accruing interest applying the least sophisticated consumer standard)

- **FDCPA/FCCPA:** summary judgment granted to plaintiff on FDCPA and FCCPA claims where defendant admitted to mailing to the plaintiff directly a letter containing an implicit demand for payment, having actual knowledge plaintiff was represented by counsel; but finding genuine issues of material fact as to defendant's bona fide error defense precluded the entry of summary judgment thereon -- [Castellanos v. Portfolio Recovery Associates, LLC](#), 2017 WL 5514368 (S.D. Fla. Nov 3, 2017)
- **FDCPA/FCCPA/TCPA:** district court not deprived of jurisdiction over FDCPA, FCCPA, and TCPA where the alleged violations do not require the court to undo the state court foreclosure judgment and the claims are predicated on debt collection practices not challenged in state court foreclosure proceeding -- [Ferrer v. Bayview Loan Servicing, LLC](#), 2017 WL 5508528 (S.D. Fla. Nov 16, 2017) (denying motion to dismiss on Rooker-Feldman grounds)
- **TILA/FDCPA:** TILA and FDCPA claims dismissed on preclusion grounds, or alternatively, for failure to state a claim – [Sui v. Wells Fargo Bank, N.A.](#), 2017 WL 5624297 (C.D. Cal. Oct 5, 2017)
- **FCRA:** section 1681s-2 claim dismissed where plaintiff generally alleged furnisher failed to review all relevant information regarding the disputed account but failed to identify any information the furnisher failed to review -- [Aknin v. Experian Information Solutions, Inc.](#), 2017 WL 5508385 (S.D. Fla. Nov 15, 2017)
- **RESPA:** allegations that loan servicer repeatedly requested documentation previously submitted by the borrowers on their initial application for mortgage assistance sufficiently alleged violation under RESPA rule 12 C.F.R. § 1021.41(b), and delinquency fees assessed during the eight-month review sufficiently alleged actual damages under RESPA -- [Jackson v. Bank of America, N.A.](#), 2017 WL 5598856 (W.D.N.Y. Nov 21, 2017)

TITLE INSURANCE UPDATE

- **Created, Suffered or Assumed:** insured owners barred from coverage under title insurance policy for an easement that the policy did not disclose because owners were aware of easement prior to closing, and because contradictory disclosures in property descriptions at closing did not create a genuine issue of material fact as to owners' knowledge of easement – [Egan v. Eastland Title Servs., Inc.](#), Opinion No. 138068 (Ct. Sup. Ct., Sep. 29, 2017) (granting insurer's motion for summary judgment)
- **Negligent Misrepresentation:** buyers' reliance on sellers' representation concerning easement was unreasonable, where sellers did disclose easement, and buyer knew of easement but failed to ask about discrepancies in closing documents – [Egan v. Eastland Title Servs., Inc.](#), Opinion No. 138068 (Ct. Sup. Ct., Sep. 29, 2017) (granting seller's motion for summary judgment)

- **Motion to Dismiss:** insurer may not rely on presumption that defendant had knowledge of her deceased partner's misrepresentations in mortgage fraud scheme to be directly, derivatively, constructively and/or vicariously liable for deceased's fraud in action for fraud, fraudulent conveyance, breach of fiduciary duty, negligence, unjust enrichment, breach of contract and breach of the implied covenant of good faith and fair dealing, where no contract exists between insurer and defendant and deceased partner was acting in individual capacity – [First American Title Ins. Co. v. Bayoh](#), No. ESX-L-4539-17 (Sup. Ct. N.J., Nov. 3, 2017) (granting motion to dismiss, with prejudice)
- **Statute of Limitations:** insurer, as assignee of lender in mortgage fraud matter, stands in the shoes of lender for statute of limitation purposes and is bound by prior owner's timeline when attempting to bring claims for fraudulent conveyance, breach of fiduciary duty, and negligence – [First American Title Ins. Co. v. Bayoh](#), No. ESX-L-4539-17 (Sup. Ct. N.J., Nov. 3, 2017) (granting motion to dismiss, with prejudice)
- **Equitable Subrogation/Double Recovery:** insurer's judgment against former insured is not subject to the double recovery doctrine or Nevada's one action rule and is not implicated by lenders' equitable subrogation rights against the same former insured, where lenders and insurer are separate entities and obtained damages in different cases under different legal theories – [Zhang v. Reconstruct Co., N.A.](#), et al., No. 69246/70923 (Nev., Nov. 15, 2017) (affirming trial court's judgment of equitable subrogation)

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