CARLTON FIELDS

Real Property, Financial Services, & Title Insurance Update: Weeks Ending November 3 & 10, 2017

November 14, 2017

REAL PROPERTY UPDATE

- **Misrepresentation**: developer entitled to directed verdict on claims of fraudulent and negligent misrepresentation asserted by condominium association because association failed to present evidence that: (i) developer induced association to rely on misrepresentation or (ii) association justifiably relied on misrepresentation, resulting in damages - Arlington Pebble Creek, LLC v Campus Edge Condominium Association, Inc., Case No. 1D16-1347 (Fla. 1st DCA Nov. 6, 2017).
- **Zoning/Certiorari**: circuit court's failure to apply proper law on appeal of government's decision to deny zoning justified second-tier review. Surf Works, L.L.C. v. City of Jacksonville Beach, Case No. 1D16-3312 (Fla. 1st DCA Nov. 8, 2017).
- **Hearsay/Business Records Exception**: servicer's witness sufficiently acquainted with history of records that comprise loan and, therefore, could testify concerning loan payment history and third party default letter sent to borrower; lack of servicer's familiarity with prior servicer's record keeping practices and policies irrelevant - Deutsche Bank National Trust Co., etc. v Brito, Case No. 3D16-1466 (Fla. 3d DCA Nov. 8, 2017).
- **Hearsay/Business Records Exception**: payoff printout admissible as business record even if not kept in the ordinary course of business, so long as qualified witness testifies as to manner of preparation, reliability, and trustworthiness - Deutsche Bank National Trust Co., etc. v Brito, Case No. 3D16-1466 (Fla. 3d DCA Nov. 8, 2017)
- **Zoning**: zoning ordinance prohibiting vegetable gardens in front yard is constitutional as it does not restrict a fundamental right or suspect class - Ricketts and Carroll v. Village of Miami Shores, Florida, et. al., No. 3D16-2212 (Fla. 3d DCA Nov. 1, 2017) (affirmed).

- **Restrictive Covenants/Standing**: unit owners and condominium association had standing to enforce certain development restrictions contained in condominium documents, which were defined by declaration of condominium to include the subject lease - Waterview Towers Condo. Assoc., Inc., et. al. v. City of West Palm Beach, et. al., No. 4D16-285 (Fla. 4d DCA Nov. 1, 2017) (reversed and remanded)

FINANCIAL SERVICES UPDATE

- **FDCPA/FCCPA**: debtors not required to give lender notice and opportunity to cure violations of consumer protection statutes; lender not entitled to *bona fide* error defense - Foster v. Green Tree Servicing, LLC, Case No. 8:15-cv-1878-T-27MAP (M.D. Fla. Nov. 3, 2017) (denying lender's motion for summary judgment)

- **TCPA**: defendant can still be held liable under TCPA for sending "junk faxes" where it did not send faxes directly but hired a company to send fax advertisements on its behalf - Meyer v. Capital Alliance Group, Case No. 15-cv-2405-WVG (S.D. Cal. Nov. 6, 2017) (denying motion for summary judgment and holding that triable issue of fact exists as to apparent agency theory of vicarious liability)

- **FDCPA**: statute of limitations for FDCPA begins to run on date consumer receives allegedly unlawful communication, not on date it is sent - Gil v. Allied Interstate, LLC, Case No. 2:17-cv-3362 (E.D.N.Y. Nov. 3, 2017) (denying defendant's motion to dismiss on basis of statute of limitations)

- **TCPA**: noting that well-pled allegations of an automated telephone dialing system rely on indirect allegations, and finding allegations that a prerecorded message was utilized during relevant calls and that there was a noticeable pause or delay between the time the calls were answered and the time a person came on the line and began speaking were sufficient to raise an inference that defendants used an automated telephone dialing system to call plaintiff's cellular telephone - Cummings v. Rushmore Loan Management Service, Case No. 8:17-cv-1652-T-33MAP (M.D. Fla. Oct. 26, 2017)

- **FDCPA/FCCPA**: granting summary judgment in creditor's favor, concluding that although creditor's actual name was different from that listed in credit report by consumer reporting agency, name listed would not confuse the least sophisticated consumer into believing that separate entities were involved; plaintiff failed to prove FDCPA claims by, *inter alia*, failing to prove creditor engaged in conduct prohibited by the statute, failing to prove that a misrepresentation occurred that materially misled her, and failing to prove that a misrepresentation occurred that negatively impacted her; and concluding that FCCPA claim was preempted by FCRA since it was based solely on creditor's alleged inaccurate reporting - Jimenez v. Trident Asset Management, L.L.C., Case No. 8:16-cv-1059-T-23AAS (M.D. Fla. Oct. 31, 2017)

- **RESPA**: rejecting servicer's argument that, as a condition precedent to filing suit, plaintiff required to comply with "notice and cure" provision in mortgage, and concluding that "notice and cure" provision applies only to disputes between plaintiff and lender regarding acts pertaining to the mortgage and does not apply to disputes between plaintiff and servicer regarding servicing of the loan - Johnson v. Specialized Loan Servicing, LLC, Case No. 3:16-cv-178-J-MCR (M.D. Fla. Oct. 24, 2017)

- **FDCPA**: based upon the plain language of FDCPA and consumer protection purposes behind enactment of the statute, there is no bright line rule that requires a debt collector to "always identify the creditor by its full business name in order to avoid liability under § 1692g. Rather, consistent with the FTC's commentary, a debt collector may use the creditor's full business name, the name under which the creditor usually transacts business, or a commonly used acronym" - Leonard v. Zwicker & Associates, P.C., Case No. 17-10174 (D.C. Docket No. 2:16-cv-14326-DMM) (11th Cir. Nov. 1, 2017)

- **FDCPA/Rosenthal Act/HOLA**: because California law does not allow for deficiency judgment following non-judicial foreclosure, "actions taken to facilitate a non-judicial foreclosure, such as sending the notice of default and notice of sale, are not attempts to collect [a] 'debt'" under FDCPA. In addition, foreclosing on property pursuant to a deed of trust does not constitute debt collection activity under the Rosenthal Act. Further, court found that plaintiff's claims for violation of California's Homeowners' Bill of Rights were preempted by the federal Home Owners Loan Act ("HOLA"), concluding that HOLA preemption "continues to apply to conduct related to loans originated by a federally-chartered savings association even after those banks are merged into national banking associations" - Warren v. Wells Fargo & Co., Case No. 3:16-cv-2872-CAB-(NLS) (S.D. Cal. Oct. 27, 2017)

- **TCPA**: rejecting challenge under U.S. Supreme Court's decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) to plaintiff's standing, and noting that Ninth Circuit held earlier this year that a violation of TCPA is a concrete, *de facto* injury; thus, "plaintiffs who allege the receipt of an unwanted telephone call or text message in violation of the TCPA ha[ve] Article III standing, and they need not allege any *additional* harm beyond the one Congress has identified in passing the TCPA" - Franklin v. Ocwen Loan Servicing, LLC, Case No. 17-cv-02702-JST (N.D. Cal. Oct. 31, 2017)

- **FDCPA**: term "consumer" under FDCPA includes "persons from whom debt collectors mistakenly attempt to collect money, because through such collection efforts the debt collector effectively 'alleges' that the individual is 'obligated' to pay the debt" - Hedayati v. The Perry Law Firm, Case No. SA CV 16-0846-DOC (DFMx) (C.D. Cal. Oct. 27, 2017)

TITLE INSURANCE UPDATE

- **Title Insurer's Tort Liability**: claim that title insurer failed to disclose clouds on title dismissed because title insurer does not owe the duties of an abstractor, but merely agrees to issue contract of indemnity – Cao v. BSI Financial Svcs., Inc., No. H-17-321 (S.D. Tex. Oct. 19, 2017)

- **Coverage**: liens attaching to property through one of the insured co-owners renders the other co-owner's title unmarketable and that is a covered claim where title insurer fails to prove the liens were created, suffered, assumed or agreed to by the co-owner at trial - Degueyter v. First Am. Title Co., Case No. 17-78 (La. App. October 2017)

Related Practices

Real Property Litigation
Title Insurance
Consumer Finance