

Real Property, Financial Services, & Title Insurance Update: Week Ending June 19, 2020

June 19, 2020

Real Property Update

- **Re-Foreclosure / Redemption:** Trial court properly entered final judgment allowing re-foreclosure and allowing inferior lien holder right of redemption where inferior lien holder not named as party in original foreclosure – [Lucky Nation, LLC v. Al-Maghazchi](#), No. 4D19-2097 (Fla. 4th DCA June 17, 2020) (affirming final judgment in part, reversing portion of final judgment that awarded interest, property taxes, and expenses incurred after date of filing original foreclosure)
- **Foreclosure / Lost Note:** Trial court erred in finding bank proved standing where, under Florida Statutes section 673.3091, bank failed to prove original lender was entitled to enforce note when it was lost – [Lewis v. U.S. Bank Nat'l Ass'n](#), No. 4D19-942 (Fla. 4th DCA June 17, 2020) (reversing foreclosure judgment)

Financial Services Update

- **FCCPA / Homeowners & Condo Association's Assessments:** Assessments owed to homeowners and condominium associations qualify as “debt” under the FCCPA such that consumer stated a claim for violation of the FCCPA when association posted her name on public list of delinquent owners – [Williams v. Salt Springs Resort Ass'n, Inc.](#), No. 5D18-3913 (Fla. 5th DCA June 12, 2020) (reversing dismissal of second amended class action complaint and remanding)
- **FDCPA / Notice / Eviction Proceeding:** Law firm's sending dunning letters in anticipation of an eviction proceeding and the filing of an eviction proceeding can be considered debt collection under the FDCPA – [Amin v. Del Plata Inv. Grp., LLC](#), No. 9:20-cv-80697 (S.D. Fla. June 15, 2020) (denying law firm's motion to dismiss).

- **TCPA:** Defendant failed to meet its burden for interlocutory appeal on issue whether delivering a ringless voicemail message to the landline of a voicemail platform provider and bypassing the recipient's cell phone number and handset in the process qualifies as a "call" within the meaning of the TCPA – [Gurzi v. Penn Credit, Corp.](#), No. 6:19-cv-00823 (M.D. Fla. June 18, 2020) (denying motion for leave to file interlocutory appeal)
- **TCPA / Defendant's Attys' Fees:** Defendant was not entitled to attorneys' fees under 28 U.S.C. § 1927 where record did not reveal unreasonable and vexatious litigation misconduct by plaintiffs – [Figueroa v. Everalbum, Inc.](#), No. 19-16442 (9th Cir. June 15, 2020) (reversing award of attorneys' fees)
- **RESPA:** Court would consider documents outside the four corners of the pleadings where plaintiff "cherry-picked" documents helpful to support his claim that lender failed to timely respond to his appeal of denial of loan modification and omitted integral documents that might tend to undercut his claims – [Hicks v. Wells Fargo Bank, N.A.](#), No. 6:19-cv-06253 (W.D.N.Y. June 15, 2020) (granting motion to dismiss)

Title Insurance Update

- **Right to Prosecute:** Title insurer's "right" to prosecute an action in section 5(b) of the policy is not an "obligation" to do so, and insurer is not obligated to pay for insured's attorneys' fees and costs already incurred and necessary to prosecute pending its action against adjacent owner – [Irma Straus Realty Corp. v. Old Republic Nat'l Title Ins. Co.](#), No. 290 CA 19-01966 (N.Y. App. Div. June 12, 2020) (memorandum and order reversing order and granting motion dismissing complaint)
- **Policy Construction:** Title insurer's obligations are defined by the terms of the policy and cannot be enlarged by judicial construction – [Dudek v. Commonwealth Land Title Ins. Co.](#), No. 2:19-cv-03237 (D.S.C. June 12, 2020) (order denying plaintiffs' motion for summary judgment and granting defendant's motion for summary judgment)
- **Policy Construction:** Title insurance policy must be liberally construed in favor of coverage while exclusions are strongly construed against the insurer who bears the burden of establishing the applicability of an exclusion – [Dudek v. Commonwealth Land Title Ins. Co.](#), No. 2:19-cv-03237 (D.S.C. June 12, 2020) (order denying plaintiffs' motion for summary judgment and granting defendant's motion for summary judgment)
- **Duty to Defend:** Duty to defend is determined based on the allegations of the underlying complaint, construed liberally, so that if there is any possibility of coverage there is a duty to defend – [Dudek v. Commonwealth Land Title Ins. Co.](#), No. 2:19-cv-03237 (D.S.C. June 12, 2020) (order denying plaintiffs' motion for summary judgment and granting defendant's motion for summary judgment)

- **Duty to Defend:** Title insurer has no duty to defend where the damage to insured was caused by a matter unambiguously excluded under the policy – [Dudek v. Commonwealth Land Title Ins. Co.](#), No. 2:19-cv-03237 (D.S.C. June 12, 2020) (order denying plaintiffs’ motion for summary judgment and granting defendant’s motion for summary judgment)
- **Duty to Defend:** Where policy excludes matters arising from specifically named lawsuits, subsequent lawsuit brought by same plaintiff attacking outcome of the prior excluded litigation is also excluded – [Dudek v. Commonwealth Land Title Ins. Co.](#), No. 2:19-cv-03237 (D.S.C. June 12, 2020) (order denying plaintiff’s motion for summary judgment and granting defendant’s motion for summary judgment)
- **Duty to Defend:** Insurer not obligated to defend tort claims because the title insurance policy only covers risks to title to the insured property – [Dudek v. Commonwealth Land Title Ins. Co.](#), No. 2:19-cv-03237 (D.S.C. June 12, 2020) (order denying plaintiffs’ motion for summary judgment and granting defendant’s motion for summary judgment)
- **Exclusions:** Title insurance policy that extends coverage for easements but then contains exclusions for recorded and unrecorded easements provides no coverage at all and is illusory such that the court will not enforce the exclusions because to do so would lead to unreasonable results – [Dudek v. Commonwealth Land Title Ins. Co.](#), No. 2:19-cv-03237 (D.S.C. June 12, 2020) (order denying plaintiffs’ motion for summary judgment and granting defendant’s motion for summary judgment)
- **Exclusion 3(a):** By consenting to an addendum requiring that it grant an easement to adjoining property, insured created risk that adjoining owner would seek to enforce the easement, and thus the insured “created, agreed to, or, at the very least, knew of the risk” – [Dudek v. Commonwealth Land Title Ins. Co.](#), No. 2:19-cv-03237 (D.S.C. June 12, 2020) (order denying plaintiffs’ motion for summary judgment and granting defendant’s motion for summary judgment)
- **Duty to Defend:** Insurer’s duty to defend is a legal determination, and the insured’s interpretations of the legal implications of the complaint are irrelevant and cannot create the possibility of coverage – [Dudek v. Commonwealth Land Title Ins. Co.](#), No. 2:19-cv-03237 (D.S.C. June 12, 2020) (order denying plaintiffs’ motion for summary judgment and granting defendant’s motion for summary judgment)
- **Class Action:** Granting in part (as to RICO) and denying in part (as to RESPA) motion to dismiss putative class action against mortgage company alleging scheme between mortgage company and title company involving kickbacks in violation of section 8 of RESPA and RICO – [Donaldson v. Primary Residential Mortg., Inc.](#), No. 1:19-cv-01175 (D. Md. June 12, 2020)

Related Practices

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