

Real Property & Title Insurance Update: Weeks Ending September 8 & 15, 2017

September 20, 2017

REAL PROPERTY UPDATE

- **Summary judgment:** trial court erred by denying borrower's motion to amend answer and defenses, and therefore erred in entering summary judgment in favor of lender. [Reyes v BAC Home Loans Servicing LP](#), Case No. 2D15-3495 (Fla. 2d DCA Sept. 6, 2017) (reversed and remanded).

FINANCIAL SERVICES UPDATE

- **TILA:** borrower could not sustain cause of actions for violation of TILA for failing to disclose private mortgage insurance charges because lender corrected error and refunded premiums within 60 days after discovering the error, in accordance with 15 U.S.C. § 1640(b). [Bennett v MERS, Inc., et al.](#), Case No. 3D17-0001 (Fla. 3d DCA Sept. 6, 2017) (summary judgment affirmed).

TITLE INSURANCE UPDATE

- **Class Action/Reissue Credit:** putative class action against six title insurers alleging unlawful conspiracy to defraud purchasers of title insurance in Georgia by scheming to eliminate discounts from published premiums dismissed with prejudice because, *inter alia*, alleged misrepresentations of law are not actionable, and even if actionable, were not proximate cause of alleged injury to plaintiff – [Downing v. Fidelity Nat'l Title Ins. Co.](#), No. 3:16-cv-119-TCB (N.D. Ga. Sept. 13, 2017) (granting motions to dismiss with prejudice) [*Ed. Note: Carlton Fields attorneys Marty Solomon, Dane Blunt, and Scott Feather represented Stewart Title Guaranty Company in this action*]

- **Arbitration:** title insurer may not move to compel arbitration under loan policy against individual members of class action where (1) insured's owner and loan policies both contain an arbitration clause; (2) owner's policy, but not loan policy, contains an arbitration endorsement that amended arbitration provision to require both parties to consent to arbitration; (3) closing service letter incorporates terms of both policies; and (4) Third Circuit previously affirmed trial court's order compelling arbitration as to other class members (836 F.3d 291) in action alleging insurer overcharged for title policies – [Chassen v. Fidelity National Financial, Inc.](#), No. 15-2814 (3d Cir. Aug. 3, 2017) (unpublished opinion affirming denial of motion to compel arbitration)
- **Professional Liability Coverage:** no indemnification for title insurer under professional liability policy where (1) insurer's underlying complaint for negligence against former agent lacked factual specifics demonstrating agent's failure to properly supervise or maintain escrow accounts; (2) insurer's allegation against former agent of failing to train and supervise employees is not a "professional service" as defined in liability policy; and (3) clear and unambiguous exclusion in liability policy provided that it did not apply to claims arising from failure to safeguard accounts and funds – [Fidelity Nat'l Title Ins. Co. v. Maxum Indemnity Co.](#), Civ. Action No. 16-1360 (E.D. Pa. Sep. 12, 2017) (granting summary judgment)
- **Professional Liability Coverage:** no indemnification for title insurer under professional liability policy where (1) insurer's underlying complaint for negligence against former agent lacked factual specifics demonstrating any kind of negligent supervision or maintenance of the escrow account or failure to properly supervise employees; (2) exclusion barred coverage for claims arising out of breach of fiduciary duty; (3) exclusion barred coverage for claims arising out of dishonest, fraudulent, criminal or malicious acts; and (4) insurer did not argue that "innocent insured" provision of liability policy saved coverage under claim arising out insured's breach of fiduciary duty – [Fidelity Nat'l Title Ins. Co. v. Maxum Indemnity Co.](#), Civ. Action No. 16-1360 (E.D. Pa. Sep. 12, 2017) (granting summary judgment)
- **Notice:** Late notice given by insured to insurer following a foreclosure action, in violation of provision in lender's policy requiring timely notice of claim, resulted in actual prejudice justifying denial of entire claim because insurer was unable to assert either an equitable subrogation argument lessening the amount of the claim, or asserting a defense of an invalid deed of trust which would have defeated foreclosure action altogether – [Wells Fargo Bank, N.A., etc., v. First American Title Ins. Co.](#), Civ. No. WMN-15-2882 (D. Md. Sep. 5, 2017) (granting insurer's motion summary judgment and denying lender's motion for summary judgment)

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