

Real Property & Financial Services Update: Week Ending October 26, 2018

October 29, 2018

Real Property Update

- **Imputation of Implied Actual Notice:** the fact that an unrelated purchaser of property was aware that seller was being sued on an unsecured indebtedness did not create a legal duty on the part of purchaser to assure that specific unsecured creditors were paid. [Villamizar v. Luna Capital Partners, LLC](#), No. 3D18-112 (Fla. 3d DCA Oct. 24, 2018) (affirmed)

Financial Services Update

- **FDCPA / Dismissal:** dismissing FDCPA claims based on state court action as untimely under §1692k(d) because general course of litigation did not give rise to continuing violations, and dismissing remainder FDCPA claims under §1692e after applying heightened pleading standard under Rule 9(b)–[Melford v. Kahane & Assocs.](#), No. 18-cv-60881 (S.D. Fla. Oct. 17, 2018)
- **FDCPA & FCCPA / Mortgage Statements, Mortgage Assistance Letter, & Escrow Letter:** mortgage statements were not debt collection communications under either statute, where they were “substantially in compliance with TILA”, and did “not materially deviate in substance from the Regulation X model form”; mortgage assistance letter providing information regarding foreclosure alternatives was not debt collection; but escrow letter including language regarding attempt to collect a debt was debt collection, and failure to comply with notice and cure provisions of mortgage was not proper basis for dismissal of FDCPA and FCCPA claims – [Mills v. Select Portfolio Servicing, Inc.](#), No. 18-CV-61012, 2018 WL 5113001, at *1 (S.D. Fla. Oct. 19, 2018) (granting in part and denying in part motion to dismiss FDCPA and FCCPA claims)

- **TCPA & FCCPA / ATDS Allegations:** holding “[s]ince the statutory definition of an ATDS (as opposed to the FCC’s interpretation of an ATDS) was not questioned in ACA Int’l, the FCC’s guidance does not alter the statutory definition of an ATDS.” Therefore, Plaintiff’s allegations Defendant called her using an ATDS as defined in the statute, i.e., “the capacity to store or produce telephone numbers to be called using a random or sequential number generator (including but not limited to predictive dialer) or an artificial or prerecorded voice”, were sufficient at the motion to dismiss stage. FCCPA claims plausibly alleged frequency of calls for harassment element of 559.72(7); statute of limitations did not provide basis for dismissal where some of the alleged conduct fell within the limitations period – [Whitehead v. Ocwen Loan Servicing, LLC](#), No. 2:18-CV-470-FTM-99MRM, 2018 WL 5279155, at *5 (M.D. Fla. Oct. 24, 2018) (denying motion to dismiss TCPA and FCCPA claims).
- **FDCPA Disclosure Requirement / Formal Pleading:** Debt-collector who obtained judgment against plaintiff, and subsequently mailed discovery interrogatories in aid of execution, followed by Motion for Contempt when plaintiff failed to respond, was not liable for FDCPA violations under 15 USC 1692e(11) for failure to include disclosures. The Court observed that “[a]lthough § 1692e(11) provides a right to receive certain disclosures, the same subsection specifies that the disclosure requirement ‘shall not apply to a formal pleading made in connection with a legal action.’ ... [W]hile a violation of the FDCPA’s disclosure requirement can confer standing, there can be no violation—and thus no injury—if the document at issue falls under this exception.” Noting that the Eleventh Circuit has not yet defined what constitutes a formal pleading, the Southern District of Florida held, in accordance with several other courts finding a variety of litigation-related pleadings to meet the exception, and in accordance with principles of logic, that the interrogatories and motion to compel were “formal pleadings” and therefore the exception applied– [D’Altilio v. Noam J. Cohen, P.A.](#), No. 1:18-CV-21394, 2018 WL 5263972, at *2 (S.D. Fla. Oct. 23, 2018).

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