

Real Property, Financial Services, & Title Insurance Update: Week Ending February 1, 2019

February 02, 2019

Real Property Update

- **Foreclosure / Surplus Funds:** sections 45.032 and 45.033, Florida Statutes, create a rebuttable presumption that the owner of record of real property on the date of the filing of a lis pendens is entitled to surplus funds - [2017 Bell Ranch Residential Land Trust v. Burrill](#), No. 2D17-4871 (Fla. 2d DCA Feb. 1, 2019) (reversed and remanded)
- **Foreclosure / Statute of Limitations / Estoppel:** trial court erred in granting summary judgment based on statute of limitations and estoppel defenses as missing payments occurred within five-year limitation period for filing a foreclosure action and after dismissal of initial foreclosure action - [Nationstar Mortg., LLC v. LHF Hudson, LLC](#), No. 3D18-443 (Fla. 3d DCA Jan. 30, 2019) (reversed and remanded)
- **Foreclosure / Dismissal:** trial court erred in finding appellant was not properly represented by counsel as counsel filed a notice of appearance pursuant to Florida Rule of Judicial Administration 2.505(e)(3), appellant's prior counsel did not withdraw, and appellant was therefore represented by both law firms - [U.S. Bank Nat'l Ass'n, Trustee v. Bell](#), No. 5D17-2983 (Fla. 5th DCA Feb. 1, 2019) (reversed and remanded)

Financial Services Update

- **FCRA / Consumer Reporting Agency:** Fannie Mae is not deemed a "consumer reporting agency" under the Fair Credit Reporting Act ("FCRA") by virtue of licensing a proprietary software to lenders who use same to determine whether Fannie Mae will purchase a prospective loan on the secondary market. Fannie Mae purchases mortgage loans from certain sellers. Fannie Mae licenses its software, Desktop Underwriter to Lenders who in turn use that software to determine if Fannie Mae will purchase the loans that the lenders originate. Plaintiffs attempted to refinance their mortgage, and a number of lenders used Desktop Underwriter to determine whether a loan to the plaintiffs would be eligible for purchase by Fannie Mae. Desktop Underwriter indicated that the plaintiffs' prospective loan would be ineligible for purchase by Fannie Mae because plaintiffs had a previous foreclosure on their record. This was, however, inaccurate, because the plaintiffs only had a short sale on their record. Plaintiffs sued Fannie Mae pursuant to the FCRA for falsely communicating to potential mortgage lenders that they had a prior foreclosure on their records. The district court found that Fannie Mae was a consumer reporting agency pursuant to the FCRA. The Ninth Circuit reversed the district court's ruling that Fannie Mae constituted a consumer reporting agency under the FCRA because (1) Fannie Mae does not assemble or evaluate information when a lender uses Desktop Underwriter; (2) Desktop Underwriter is just a tool for lenders to process credit reports and other information; and (3) Fannie Mae does not furnish consumer reports to third parties because the purpose of using Desktop Underwriter is to facilitate a transaction between the lender and Fannie Mae - [Zabriskie v. Fed. Nat'l Mortgage Assoc.](#), 912 F. 3d 1192 (9th Cir. 2019)

Title Insurance Update

- **Subrogation Rights:** title insurer who is subrogated to foreclosure sale purchaser's rights is entitled to purchase price together with interest from the foreclosing lender as damages for breach of contract (foreclosure deed) where lender failed to comply with the terms of the mortgage in foreclosing, thus resulting in the foreclosure sale being voided - *Stewart Title Guar. Co. v. Emigrant Mortg. Co.*, No. 1581-cv-06127 (Mass. App. Dec. 4, 2018) (memorandum of decision and order on cross summary judgment motions)
- **Policy Liability:** borrower lacks standing to bring a breach of lender's title insurance policy claim against the insurer, as the borrower is at most an incidental beneficiary to that policy - [Watson v. Nebraska](#), No. 18-1978 (Neb. App. Jan. 17, 2019) (affirming district court's dismissal of claims)
- **Agency Liability:** title insurer may recover a loss under agency agreement for "negligent, willful or reckless conduct" of the agent even though negligence is not pled and notwithstanding Colorado's economic loss rule - [Fidelity Nat'l Title Ins. Co. v. Pitkin Cnty. Title, Inc.](#), No. 18-1128 (10th Cir. Jan. 23, 2019) (opinion and judgment affirming district court's judgment)

Related Practices

[Real Property Litigation](#)

[Title Insurance](#)

[Consumer Finance](#)

©2024 Carlton Fields, P.A. Carlton Fields practices law in California through Carlton Fields, LLP. Carlton Fields publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information and educational purposes only, and should not be relied on as if it were advice about a particular fact situation. The distribution of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship with Carlton Fields. This publication may not be quoted or referred to in any other publication or proceeding without the prior written consent of the firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our Contact Us form via the link below. The views set forth herein are the personal views of the author and do not necessarily reflect those of the firm. This site may contain hypertext links to information created and maintained by other entities. Carlton Fields does not control or guarantee the accuracy or completeness of this outside information, nor is the inclusion of a link to be intended as an endorsement of those outside sites.