

Real Property, Financial Services, & Title Insurance Update: Week Ending June 28, 2019

June 29, 2019

Real Property Update

- **Foreclosure / Res Judicata:** res judicata did not apply where later foreclosure action was based on different period of default than the prior action on same loan - [Bullock v. Bayview Loan Servicing, LLC](#), No. 1D18-3130 (Fla. 1st DCA June 28, 2019) (affirming foreclosure judgment)
- **Foreclosure / Dismissal / Attorney's Fees:** if borrower prevails on lack of standing defense resulting in dismissal, borrower cannot rely on mortgage contract to obtain attorney's fees - [Nationstar Mortg. LLC v. Faramarz](#), No. 4D18-347 (Fla. 4th DCA June 26, 2019) (reversing award of attorney's fees)

Financial Services Update

- **TCPA/ Text Messages:** rejecting argument on motion to dismiss that "job recruitment" related text messages are not actionable as a matter of law under section 227(b)(1); the potential exemptions for commercial phone calls, "which could conceivably include job opportunity information," do not apply to text messages - [Gerrard v. Acara Sol. Inc.](#), 18-cv-1041v(f) (W.D.N.Y. June 27, 2019) (report and recommendation)
- **TCPA / Willful or Knowing Violation:** following jury trial awarding plaintiff \$925k in minimum statutory damages under the TCPA, the court rejected plaintiffs' request to find the defendant willfully or knowingly violated the TCPA. To sustain an award for treble damages requires proof that the defendant knew or had reason to know that it was engaging in the conduct that gave rise to liability, including that the person being called had not given prior express written consent - [Wakefield v. ViSalus, Inc.](#), 3:15-cv-1857-SI (D. Ore. June 24, 2019) (opinion and order)

- **FDCPA:** collection letter offering to settle debt that was time-barred not actionable where it included disclaimer at the bottom that said: "[t]he law limits how long you can be sued on a debt. Because of the age of your debt, we will not sue you for it[]" - [Pariot v. Portfolio Recovery Assocs., LLC](#), 2:18-cv-09614-SJO (C.D. Cal. June 25, 2019) (dismissing complaint without leave to amend)
- **RESPA / Application Completeness / Emotional Distress Damages:** section 1024.41 does not relieve a loan servicer of the obligation, on subsequent resubmissions, to respond to an application's incompleteness; instead, it requires an adequate response for why the subsequent filings in support of the initial application were deemed inadequate. Also, emotional distress damages are sufficient under RESPA - [Yepez v. Specialized Loan Servicing, LLC](#), No. 18-c-7422 (N.D. Ill. June 27, 2019) (denying motion to dismiss).
- **TILA/ Continuing Violation Doctrine:** the continuing violation doctrine does not extend the statute of limitations for a claim based on periodic statements under section 12 C.F.R. 1026.7, "because to do so would expose [the defendant] to a prolonged and unforeseeable liability that Congress did not intend[]" - [Taylor v. Bosco Credit, LLC](#), 18-cv-06310-JSC (N.D. Cal. June 27, 2019)

Title Insurance Update

- **Title Insurance Coverage:** title insurer had no duty to defend or indemnify insured owner who purchased property and policy, then obtained survey that incorrectly caused him to build with a large encroachment onto neighboring property and, eventually, to be sued by person who bought the property from him. Claims were not covered because they arose post-policy and were based on insured's own alleged fraudulent acts - [Mortazavi v. Federal Ins. Co.](#), No. D072923 (Cal. App. June 26, 2019) (affirming summary judgment / unpublished).

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