

Real Property, Financial Services, & Title Insurance Update: Week Ending May 1, 2020

May 01, 2020

Real Property Update

- **Foreclosure / Note:** Trial court could not challenge authenticity of note as copy where borrower had not pleaded defenses and lender was not afforded advanced notice of dispositive issue to be tried - [Bank of N.Y. Mellon v. Barber](#), No. 1D18-2097 (Fla. 1st DCA May 1, 2020) (reversed and remanded)
- **Condo / Mandatory Arbitration:** Unit owner that litigated claim against the association for many years was not entitled to dismiss the association's counterclaim for its failure to engage in mandatory arbitration per section 718.1255(4)(a), Florida Statutes - [CWELT-2008 Series 1045 LLC v. Park Gardens Ass'n, Inc.](#), No. 3D19-1341 (Fla. 3d DCA Apr. 29, 2020)
- **Foreclosure / Condition Precedent:** When the note or mortgage specifically requires a default notice be sent to the borrower before foreclosure, the plaintiff must prove that it complied with the notice provisions or that the borrower actually received the default notice - [Raleigh v. Cornerstone Quarry 2010 A Trust](#), No. 5D19-1692 (Fla. 5th DCA May 1, 2020)

Financial Services Update

- **TCPA / Consent / Unilateral Revocation:** Agreeing with the Second Circuit's decision in *Reyes v. Lincoln Automotive Financial Services* and concluding that consent given as a mutually agreed-upon term in legally binding contract is not revocable - [Medley v. Dish Network, LLC](#), No. 18-13841 (11th Cir. May 1, 2020) (affirming order granting summary judgment motion in part on TCPA claims)

- **TCPA / Consent / Unilateral Revocation:** Consumer's contention that unilateral revocation of consent given in a legally binding agreement should be allowed because it comports with the consumer protection purposes of the TCPA not found persuasive - [Medley v. Dish Network, LLC](#), No. 18-13841 (11th Cir. May 1, 2020) (affirming order granting summary judgment in part on TCPA claims)
- **TCPA / Liability / "Called Party":** Recipient of call made to number that was then forwarded to third party is not a "called party" under the TCPA - [Thompson v. Portfolio Recovery Assocs., LLC](#), No. 0:19-cv-62220 (S.D. Fla. Apr. 25, 2020) (granting summary judgment motion on TCPA claims)
- **TCPA / Liability / ATDS:** Avaya Proactive Contact dialing system is not an ATDS - [Thompson v. Portfolio Recovery Assocs., LLC](#), No. 0:19-cv-62220 (S.D. Fla. Apr. 25, 2020) (granting summary judgment motion on TCPA claims)
- **RESPA / Standing / Actual Damages:** To survive a motion to dismiss, a plaintiff must allege actual pecuniary damages as a result of a RESPA violation - [Catherine v. Wells Fargo Bank N.A.](#), No. 2:19-cv-01487 (E.D. Cal. Apr. 24, 2020)
- **FDUTPA / Pleading Requirements:** Rule 9(b) pleading requirements do not apply to FDUTPA claim that does not sound in fraud - [Parziale v. HP, Inc.](#), No. 5:19-cv-05363 (N.D. Cal. Apr. 24, 2020)
- **RESPA / Standing / Actual Damages:** Failure to establish actual damages from an alleged RESPA violation is fatal to the claim - [Naimoli v. Ocwen Loan Servicing, LLC](#), No. 6:18-cv-06180 (W.D.N.Y. Apr. 29, 2020) (granting summary judgment in favor of defendant after plaintiff failed to demonstrate any damages stemming from defendant's alleged failure to respond to or acknowledge plaintiff's RFIs)
- **RESPA / Recovery / Statutory Damages:** In order to recover statutory damages, a plaintiff must establish a pattern or practice of noncompliance with the requirements of section 2605 by the defendant - [Naimoli v. Ocwen Loan Servicing, LLC](#), No. 6:18-cv-06180 (W.D.N.Y. Apr. 29, 2020)
- **FCRA / Liability / Reporting Obligations:** Furnisher is not liable if it discontinues reporting an account as "disputed" if disputed information is determined to be accurate after investigation - [Lichtman v. Chase Bank USA, N.A.](#), No. 7:18-cv-10960 (S.D.N.Y. Apr. 27, 2020) (granting summary judgment in favor of defendant on FCRA claims)

Title Insurance Update

- **Discovery:** Insured lender entitled to information concerning the reserves set aside to cover its claims under the title insurance policy in breach of contract action, even if such information is ultimately not admissible evidence - [Wells Fargo Bank, N.A. v. Stewart Title Guar. Co.](#), No. 2:19-cv-00285 (D. Utah Apr. 28, 2020) (memorandum decision and order granting motion to compel discovery regarding insurance reserves)

- **Liability for Title Agent:** A title insurer is not liable as to the fraudulent acts of its title insurance agent as those would be outside the scope of any agency relationship - [Juarez v. Trillo](#), No. 32745/2019E (N.Y. Sup. Ct. Mar. 6, 2020) (decision granting title insurer's motion to dismiss)

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