

Real Property, Financial Services, & Title Insurance Update: Week Ending March 2, 2018

March 05, 2018

REAL PROPERTY UPDATE

- **Foreclosure/Standing:** borrower's standing arguments failed because they were based on notion that note changed hands after it was delivered to World Savings Bank in 2007, when in fact the note continued to be held by original lender - [Heyward v. Wells Fargo Bank, N.A.](#), No. 2D16-339 (Fla. 2d DCA Mar. 2, 2018) (affirmed)
- **Foreclosure/Standing:** bank failed to offer proof of successor's authority to assign note to bank, and, therefore, bank failed to establish standing - [Arcuri v. HSBC USA Nat'l Ass'n, as Trustee](#), No. 2D16-4201 (Fla. 2d DCA Mar. 2, 2018) (reversed and remanded for entry of order of involuntary dismissal)
- **Foreclosure/Statue of Limitations:** affirming order vacating default against bank and order dismissing with prejudice complaint against bank seeking to quiet title to property and alleging that enforcement of mortgage was barred by statute of limitations, but dismissing appeal of sanctions order as premature - [Kelly v. HSBC USA Nat'l Ass'n, etc.](#), No. 3D16-2830 (Fla. 3d DCA Feb. 28, 2018) (reversed and remanded)
- **Foreclosure/Standing:** genuine issue of material fact existed regarding bank's standing at inception of lawsuit because endorsement on note attached to complaint was different than endorsements on original note subsequently filed with court - [Russell v. BAC Home Loan Servicing, LP](#), No. 4D16-3908 (Fla. 4th DCA Feb. 28, 2018) (reversed and remanded)
- **Foreclosure/Statute of Limitations:** because bank's complaint included allegations of missed payments subsequent to the dismissal of first lawsuit, dismissal of bank's complaint was improper - [HSBC Bank USA, Nat'l Ass'n, as Trustee v. Sanchez](#), No. 4D17-1085 (Fla. 4th DCA Feb. 28, 2018) (reversed and remanded)

- **Foreclosure/Sufficiency of Testimony:** after excluding power of attorney in favor of corporate representative court erred in striking testimony of corporate representative, since proof of contractual authority to testify is not required for witness to lay foundation for business records exception to hearsay and witness may testify to matters within his or her personal knowledge - [Deutsche Bank Trust Co. Americas, as Trustee v. Merced](#), No. 5D16-3486 (Fla. 5th DCA Mar. 2, 2018) (reversed and remanded)

FINANCIAL SERVICES UPDATE

- **FDCPA:** Neither lender nor its counsel qualified as “debt collectors” under the FDCPA for conduct taken in connection with enforcement of security interest in non-judicial foreclosure proceedings. [Lucore v. Zeff](#), Case No. 15-cv-910 JLS (S.D. Cal. Feb. 26, 2018) (granting defendants' motions to dismiss with prejudice).
- **TCPA:** Rite Aid did not violate TCPA by making pre-recorded call regarding availability of flu shot; although call had marketing purpose, it also had a health care purpose such that the calls fell within the health care exemption. [Zani v. Rite Aid Hdqtrs. Corp.](#), Case No. 17-1230-CV (2d Cir. Feb. 21, 2018) (affirming summary judgment for defendant).

TITLE INSURANCE UPDATE

- **Damages:** an assignee and current holder of a deed of trust has the contractual right under California Civil Code § 2941(b)(6) to seek damages against a title company that allegedly recorded a release of the deed of trust in error, because an unqualified assignment of a contract vests all rights and remedies in the assigned contract to the assignee - [SMS Financial XXIII, LLC v. Cornerstone Title Co.](#), 19 Cal. App. 5th 1092 (Cal. Jan. 26, 2018) (reversing motion to dismiss)
- **Exceptions to Policy:** title insurer adequately disclosed and excepted an easement in a title policy and was not liable to insured for fraud or unfair trade practices, where exception to title policy listed an abstract which referenced a certificate of survey which provided information on the easement, and by listing abstract insurer fulfilled its contractual obligations and statutory and regulatory requirements to “show” an easement in a policy - [Parks v. Stewart Title Guaranty Co.](#), - Case No. DA 17-0336 (Mt. Jan. 3, 2018) (unpublished opinion affirming summary judgment)
- **Exclusion 3(a):** Exclusion 3(a) applies under Missouri law even if the insured did not engage in intentional misconduct or inequitable dealings, and it is error to prevent insurer from presenting Exclusion 3(a) defense to jury of lender's intentional conduct (not misconduct) of acting improvidently in opening and monitoring multi-million dollar construction loan and failing to protect itself from mechanics' liens - [Captiva Lake Investments, LLC v. Fidelity Nat'l Title Ins. Co.](#), Case Nos. 16-1854 and 16-1923 (8th Cir. Feb. 28, 2018) (vacating judgment and award of attorneys' fees and remanding for further proceedings)

- **Mechanics' Liens:** a lender has the authority and responsibility to discover, monitor and prevent the risk of loss from mechanics' liens, and a title insurer does not bear the risk of insufficient construction funding if lender fails to do so - [Captiva Lake Investments, LLC v. Fidelity Nat'l Title Ins. Co.](#), Case Nos. 16-1854 and 16-1923 (8th Cir. Feb. 28, 2018) (vacating judgment and award of attorneys' fees and remanding for further proceedings)
- **Tortious Interference:** under paragraph 4(b) of a title policy, insurer acts within its rights to control litigation, evaluate claims, and decide whether to litigate or settle claims, and does not tortiously interfere with insured when it directs appointed counsel to undertake actions in litigation or limit defense coverage to activity involving only the validity and priority of insured lien - [Captiva Lake Investments, LLC v. Fidelity Nat'l Title Ins. Co.](#), Case Nos. 16-1854 and 16-1923 (8th Cir. Feb. 28, 2018) (affirming insurer's motion for judgment as a matter of law on tortious interference count)
- **Unmarketability of Title:** insurer not liable under provision governing unmarketability of title, where insured failed to show that title was rendered unmarketable by mechanics' liens or that it suffered resulting damages as a result of insurer's failure to resolve liens that were inchoate as of the date of title policy - [Captiva Lake Investments, LLC v. Fidelity Nat'l Title Ins. Co.](#), Case Nos. 16-1854 and 16-1923 (8th Cir. Feb. 28, 2018) (vacating judgment and award of attorneys' fees and remanding for further proceedings)

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