Top 10 Real Estate Laws of 2015

By Andrew Lieb

Now that 2016 is here it is important to be aware of the changes in the law for our industry. This is not a list about the best events from 2015, but, instead, a list that highlights the new legal landscape that you face as real estate attorneys in 2016. Being familiar with these laws, regulations and opinions may help you to better address your customer/client goals and to make you money while helping you to avoid malpractice.

1. TILA-RESPA Integrated Disclosure (TRID) implemented

The Loan Estimate and Closing Disclosure were implemented in October 2015 for most closed-end consumer credit transactions secured by real property. No more are the days of the HUD-1 settlement form, Good Faith Estimate and TILA disclosure forms. TRID is an implementation of Dodd-Frank Act requirements designed to make consumers better informed about the nature and costs of the residential settlement process. Under TRID, the Loan Estimate is to be given to consumers within three business days of application and the Closing Disclosure is to be received by consumers three days before the closing. TRID does not apply to commercial real estate, HELOCs, reverse mortgages or mortgages secured by a mobile home or by a dwelling that is not attached to real property. However, it is applicable to 1-4 unit rental apartments. To learn more, go to consumerfinance.gov.


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2. Disparate impact housing discrimination prohibited

In June 2015, the US Supreme Court broadened the nation's understanding of the Fair Housing Act's prohibition against housing discrimination in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.* Therein, the court held that the Fair Housing Act prohibits not only disparate treatment claims, but also disparate impact discrimination. Disparate impact refers to conduct that appears neutral on its face, but which nonetheless has a discriminatory effect. So, "covert and illicit stereotyping" is now actionable. Nonetheless, the court was clear that even claims of such disparate impact discrimination have their limits. Specifically, the court stated that even where "a statistical disparity" indicates that a policy adversely impacts a protected class, such claim can be defended by a demonstration that such policy was implemented to further a significant non-discriminatory business objective where such justification is not "artificial, arbitrary, and unnecessary."

3. Foreclosure standing requirement clarified

In *Aurora Loan Services v. Taylor*, the Court of Appeals clarified that "the note, and not the mortgage, is the dispositive instrument that conveys standing to foreclose under New York law." As a consequence, the foreclosure defense jurisprudence from the dicta in *Bank of New York v. Silverberg*, that Mortgage Electronic Recording Systems, Inc.'s (MERS) involvement may have resulted in an improperly assigned mortgage (i.e., where MERS was only listed as nominee for recording purposes), is over. Now, practitioners must focus solely on the note's chain of title.

4. Deficiency judgments got easier to obtain

In *Flushing Savings Bank v. Bitar*, the Court of Appeals mandated that the trial courts give out second chances to lenders who fail to satisfy the rigid steps of RPAPL §1371, which are required to secure a deficiency judgment against a borrower in a foreclosure action. Specifically, the court directed that the appropriate remedy, where a lender fails to submit sufficient proof to establish its entitlement to a deficiency judgment, by way of only submitting a "conclusory" expert appraiser's report without "any specific information regarding how he reached his fair market value determination," was to direct the lender to "submit additional proof," but not to

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dismiss the motion for a deficiency judgment. It's anticipated that the court's aspirational conclusion to its decision, that "[l]enders seeking deficiency judgments, however, must always strive to provide the court with all the necessary information in their first application," will only work as lip service because the court has stripped the trial courts of their authority to enforce the aspiration with any teeth (i.e., can no longer deny the application for insufficient proof in the first instance).

5. Chapter 7 cram downs eliminated

In *Bank of America v. Caulkett*, the US Supreme Court eliminated the ability of debtors to void a wholly underwater junior mortgage lien by way of 11 USC §506(d). This decision furthers the court's prior decision in *Dewsnup v. Timm* where a strip down was previously disallowed. Whereas a strip down seeks to reduce the value of a lien, which is partially secured, to only the value of such collateral, a cram down seeks to totally remove the lien as there exists no collateral whatsoever. As a result of Caulkett, post-bankruptcy debtors, who retain ownership of their homes, will no longer be able to realize any appreciation in their real estate until their liens are first satisfied.

6. Mortgage Debt Forgiveness Relief Act extended through 2016

The income tax exemption available to underwater homeowners who earn phantom income (i.e., cancellation of debt income), which arises when a debt is forgiven incident to a principal reduction, short sale or a deed-in-lieu of foreclosure, was extended through the end of 2016 by the Protecting Americans from Tax Hikes Act of 2015 (PATH Act). This is the first proactive extension of the Mortgage Debt Forgiveness Relief Act of 2007 since the law was first enacted (PATH retroactively applies it to 2015). In 2013 and 2014 the law was retroactively extended at the end of the calendar year. Finally, 2016 will be a year of certainty where homeowners in foreclosure will be able to make strategic decisions in agreeing to a principal reduction, short sale or a deed-in-lieu of foreclosure while knowing that they can avoid a significant tax bill. Furthermore, the PATH Act protects homeowners who are in contract before January 1, 2017 from phantom income tax regardless if their transaction (e.g., short sale) closes after the end of 2016. The best resource to understand cancellation of debit income is the IRS' Publication 4681 or the IRS website.

7. Foreign Investment in Real Property Tax Act (FIRPTA) rate increase

The Protecting Americans from Tax Hikes Act of 2015 (PATH Act) increases the withholding amount under the Foreign Investment in Real Property Tax Act (FIRPTA) from 10 percent to 15 percent. However, the PATH Act continues the 10 percent withholding rate where both the "amount realized does not exceed $1,000,000" and the property will be used "by the transferee as a residence." The new rate and exclusion is applicable starting on February 16, 2016.

8. Premises Liability: Clarification of the Trivial Defect Doctrine

In *Hutchinson v. Sheridan Hill House Corp.*, the Court of Appeals clarified its Trivial Defect Doctrine by analyzing three separate cases involving a protrusion from a sidewalk, a chip on the edge of a stair, and a painted clump on a stair thread. The court held that "small defects" may be actionable dependent on "their surrounding circumstances or intrinsic characteristics [which] make them difficult for a pedestrian to see or to identify as hazards or difficult to traverse safely on foot." In such, the court expressly held that "specific circumstances" and not "whether a defect is a 'trap'" is the operative inquiry. Moving forward, Hutchinson furthers the court's prior rejection of the "minimal dimension test", in *Trincere v. County of Suffolk*, and should result in more slip and fall cases ending at trial, not summary judgment.

9. Reciprocal right to attorneys' fees in eviction

In *Graham Court Owner's Corp. v. Taylor*, the Court of Appeals eliminated any possibility for landlords to have their cake and eat it too when it comes to the availability of collecting attorneys' fees incident to an eviction while avoiding a tenant's reciprocal right to such fees, pursuant to Real Property Law §234. The court broadly interpreted the statute in extending its application to a uniquely drafted lease. The lease, at issue, only provided the landlord with a right to attorneys' fees as a deductible cost of reletting the premises before crediting the relet rents to mitigate the tenant's damages, but did not provide a right to attorneys' fees concerning the eviction proceeding itself. In such, the court clarified the issue before it as "whether the lease provides that 'in any action or summary proceeding' the landlord may recover attorneys' fees incurred as the result of the tenant's breach," without restriction to the "underlying proceeding against the tenant for the breach." Moving forward, landlords seeking to avoid §234 better avoid any mention of a right to attorneys' fees whatsoever in their leases.

10. Tax grievance limited if property not owner-occupied

In the *Matter of Mehran Manouel v. Board of Assessors*, the Court of Appeals denied jurisdiction for a Small Claims Assessment Review (SCAR Proceeding) in obtaining judicial review of a tax grievance where the property was "occupied during the relevant tax period by an owner's relative but not by the owner." A SCAR Proceeding is a "low-cost, expeditious tax assessment review" alternative to a traditional tax certiorari appeal, and is designed for non-income producing property. Nonetheless, the court strictly construed the term "owner-occupied" within RPTL §730(1)(b)(i) and dispensed with the petitioners' statutory purpose arguments (i.e., it concerned non-income producing property). Now there is an increased cost in being a nice relative — higher taxes.

Bonus concept: The Court of Appeals clarified in *Faison v. Lewis and Bank of America* that since a "a forged deed is void ab initio," "any encumbrance upon real property based on a forged deed is null and void," and as such, the statute of limitations concerning "an action based upon fraud" is inapplicable as the action would not be based upon fraud, but instead based upon a void deed, which is distinct from fraud.

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