

Real Property, Financial Services, & Title Insurance Update: Week Ending October 22, 2021

October 22, 2021

Real Property Update

- **Foreclosure / Dismissal:** Trial court erred in relying on judicially noticed records from a prior foreclosure action in dismissing foreclosure complaint – [Bayview Loan Servicing, LLC v. Brown](#), No. 2D20-1824 (Fla. 2d DCA Oct. 21, 2021) (reversing and remanding)

Financial Services Update

- **FDCPA, FCCPA / Bankruptcy / Judicial Estoppel:** A debtor in bankruptcy who fails to disclose in the bankruptcy that the debtor is pursuing a lawsuit against a creditor for violations of the FDCPA and the FCCPA may be judicially estopped from pursuing the FDCPA and FCCPA claims – [Storey v. Capital Link Mgmt., LLC](#), No. 2:21-cv-00293 (M.D. Fla. Oct. 19, 2021) (denying creditor’s motion for judgment on the pleadings because debtor’s failure to disclose lawsuit was not “calculated to deceive, conceal, or make a mockery” of the bankruptcy proceeding or FDCPA/FCCPA lawsuit)
- **Foreclosure / FDCPA:** A debtor is not a third-party beneficiary of an assignment of a mortgage and therefore lacks standing to challenge the assignment – [Hendrix-Smith v. JP Morgan Chase Bank, N.A.](#), No. 20-10831 (11th Cir. Sept. 7, 2021) (affirming district court’s order dismissing homeowner’s complaint against loan servicer and mortgagee)
- **FDCPA / Banks / Debt Collectors:** Generally, banks are not debt collectors when their principal purpose of business is not to serve as third-party debt collectors – [Hendrix-Smith v. JP Morgan Chase Bank, N.A.](#), No. 20-10831 (11th Cir. Sept. 7, 2021) (affirming district court’s order dismissing homeowner’s complaint against loan servicer and mortgagee)

- **FDCPA / Creditors & Servicers:** Creditors and servicers are not typically subject to the FDCPA, as evidenced by section 1692a(6)(F)'s language – [Hendrix-Smith v. JP Morgan Chase Bank, N.A.](#), No. 20-10831 (11th Cir. Sept. 7, 2021) (affirming district court's order dismissing homeowner's complaint against loan servicer and mortgagee)
- **FDCPA / Standing:** Debtor did not have standing to pursue FDCPA claim against a debt collector who accidentally left a five-second voicemail on the debtor's phone that included a reference to "in the shadows"; court concluded that debtor's allegations that the voicemail was confusing and made her upset were merely conclusory statements on emotional distress and offense taken over bare FDCPA violations – [Santiago v. Hunter Warfield, Inc.](#), No. 8:20-cv-02823 (M.D. Fla. Oct. 20, 2021) (granting debt collector's motion for summary judgment)

Title Insurance Update

- **Coverage / Condition 9 / Post-Policy Matters / Agency:** Fact questions remained regarding coverage for insured's claim based on damages allegedly suffered as a result of municipal liens recorded more than 20 years before date of policy, which insurer's issuing agent paid more than two years after closing, for which insured obtained a judgment against agent post-policy; questions included whether judgment obtained by insured was based on excluded post-policy matters or related back to the covered pre-policy municipal liens, whether Condition 9 relieved insurer of any obligation to pay judgment after paying liens off, whether judgment included consequential damages not covered under policy, and relationship between issuing agent and insurer vis-à-vis the policy and the judgment – [Rutkowski v. Fidelity Nat'l Title Ins. Co.](#), No. 2021 IL App (1st) 201022-U (Ill. App. Ct. Oct. 15, 2021) (reversing summary judgment in title insurer's favor and remanding)
- **Insurer Negligence / Accurate Legal Description:** Insured's leave to amend to add breach of contract claim granted in face of title insurer's summary judgment motion on negligence count for failing to include accurate legal description of insured property in policy; although title insurer had no duty to search for and disclose potential defects to insured (i.e., no negligence claim), policy does cover loss or damage sustained by title being vested other than as stated in policy (i.e., potential breach of contract claim) – [Mansur Props. LLC v. First Am. Title Ins. Co.](#), No. 3:21-cv-05491 (W.D. Wash. Oct. 20, 2021) (granting motion for leave to amend)

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