

Real Property, Financial Services, & Title Insurance Update: Week Ending October 29, 2021

October 29, 2021

Real Property Update

- **Foreclosure / Default:** Trial court did not abuse discretion in determining that plaintiff's counsel was not aware of the defaulting party's intention to defend against foreclosure lawsuit – [College Health II, GP, Inc. v. Depau](#), Nos. 3D19-1315 & 3D20-1179 (Fla. 3d DCA Oct. 27, 2021) (affirmed)
- **Foreclosure / Delivery of Promissory Note:** Trial court erred in concluding that two promissory notes signed by defendant's agent were unenforceable on the basis that they were not delivered to plaintiff – [Asgard Fund, L.P. v. MM80 Oceanside Holdings, LLC](#), No. 3D19-2126 (Fla. 3d DCA Oct. 27, 2021) (reversing final judgment against plaintiff)
- **Foreclosure / Amendment:** Defendant should have been allowed to assert compulsory counterclaim for fraud in the inducement – [Asgard Fund, L.P. v. MM80 Oceanside Holdings, LLC](#), No. 3D19-2126 (Fla. 3d DCA Oct. 27, 2021) (reversing denial of defendant's motion for leave to amend)
- **Nuisance / Voluntary Dismissal / Attorneys' Fees as Sanction:** Entry of sanction in form of attorneys' fees against plaintiff who voluntarily dismissed nuisance claims not warranted where plaintiff had asserted a viable nuisance claim based on noise from neighbor's batting cage – [Reyes v. Cosculluela](#), No. 3D21-0127 (Fla. 3d DCA Oct. 27, 2021) (reversing and remanding)
- **Foreclosure / Administrative Dissolution of Foreclosing Entity:** Administrative dissolution of foreclosing entity did not render that entity unable to foreclose under section 607.1405, Florida Statutes – [Morburger v. Yellow Funding Corp.](#), Nos. 3D21-318 & 3D21-881 (Fla. 3d DCA Oct. 27, 2021) (affirmed)

Financial Services Update

- **FDCPA / Standing & Use of Vendors:** Transmittal of information to a vendor for preparation of a dunning letter constitutes a violation of section 1692c(b), which gives rise to a concrete injury in fact under Article III – [Hunstein v. Preferred Collection & Mgmt. Servs., Inc.](#), No. 19-14434 (11th Cir. Oct. 28, 2021)
- **FDCPA / Standing & Use of Vendors:** Transmittal of information to law firm to prepare collection letters provides concrete injury in fact under FDCPA – [Peraga v. McMichael Taylor Gray, LLC](#), No. 1:21-cv-22415 (S.D. Fla. Oct. 25, 2021)
- **Cable Communications Policy Act of 1984 / Third-Party Subpoenas & TCPA:** Defendants’ objections to third-party subpoenas to identify whether fax recipients use stand-alone fax machines or online fax services were overruled without addressing deference to FCC’s rulings that the TCPA does not apply to online fax services – [Scoma Chiropractic, P.A. v. Nat’l Spine & Pain Ctrs. LLC](#), No. 2:20-cv-00430 (M.D. Fla. Oct. 27, 2021)
- **FCRA / Reporting Obligations:** How third-party companies choose to use algorithms to decipher accurate information reported by consumer reporting agencies has no bearing on the accuracy of the reports themselves – [O’Neal v. Equifax Info. Servs., LLC](#), No. 9:21-cv-80968 (S.D. Fla. Oct. 27, 2021) (dismissing complaint with prejudice)

Title Insurance Update

- **Attorneys’ Fees:** Title insurer was not liable for attorneys’ fees under the Uniform Declaratory Judgments Act but was liable for attorneys’ fees under section 12.002(a) of the Texas Civil Practice and Remedies Code relating to liability for a fraudulent court record or fraudulent lien or claim filed against real property – [Nationstar Mortg. LLC v. Barefoot](#), No. 14-19-00750-CV (Tex. App. Oct. 28, 2021) (rejecting title insurer’s argument that no statute applies under which it may be assessed fees)
- **Intent to Injure / Fraudulent Lien:** Title insurer did not establish that the trial court reversibly erred in concluding that title insurer intended to cause financial injury to the insured when title insurer violated the Texas Civil Practice and Remedies Code governing fraudulent liens – [Nationstar Mortg. LLC v. Barefoot](#), No. 14-19-00750-CV (Tex. App. Oct. 28, 2021) (affirming trial court’s decision as to this issue)
- **Damages / Mental Anguish:** Title insurer was not liable for mental anguish damages when all of the alleged conduct occurred before the conduct that the title insurer was held liable for in the underlying lawsuit – [Nationstar Mortg. LLC v. Barefoot](#), No. 14-19-00750-CV (Tex. App. Oct. 28, 2021) (reversing trial court’s award of mental anguish damages)

- **Leave to Amend:** Court denied insured's motion for leave to amend to join title insurance company's affiliate as a defendant due to affiliate's alleged role as escrow agent – [Hayward Prop., LLC v. Commonwealth Land Title Ins. Co., No. 4:17-cv-06177 \(N.D. Cal. Sept. 28, 2021\)](#) (denying plaintiff's motion)
- **Leave to Amend:** Bank sued title insurer following insurer's declination of coverage under a title insurance policy that was issued to the bank, and district court erred in not allowing leave to amend after it dismissed the complaint – [Deutsche Bank Nat'l Tr. Co. v. Fidelity Nat'l Title Ins. Co., No. 20-15849 \(9th Cir. Oct. 28, 2021\)](#) (reversing district court's ruling)
- **Motion to Disqualify Expert:** Expert witness was not disqualified after switching sides in closely related actions – [Hayward Prop., LLC v. Commonwealth Land Title Ins. Co., No. 4:17-cv-06177 \(N.D. Cal. Sept. 28, 2021\)](#) (denying defendant's motion to disqualify)

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