

Real Property, Financial Services, & Title Insurance Update: Week Ending April 24, 2020

April 24, 2020

Real Property Update

- **Foreclosure / Vacate Sale:** Trial court applied an incorrect legal standard in denying a motion to vacate a foreclosure sale and failed to allow a hearing for the lender to prove its allegations that the loan had been reinstated - [Gavidia v. Specialized Loan Servicing LLC](#), No. 2D19-1069 (Fla. 2d DCA Apr. 24, 2020) (reversed and remanded)

Financial Services Update

- **FCRA / Sovereign Immunity:** Denying petition for certiorari, which requested the Supreme Court to review whether the general civil enforcement provisions of the FCRA, 15 U.S.C. §§ 1681n-1681o, waived the federal government's sovereign immunity for FCRA civil enforcement suits - [Robinson v. Dep't of Educ.](#), No. 19-512 (U.S. Apr. 20, 2020)
- **TCPA / Damages Award:** Denying motion to reconsider seeking reduction of \$267 million damages award as unconstitutionally excessive - [Perez v. Rash Curtis & Assocs.](#), No. 4:16-cv-03396 (N.D. Cal. Apr. 17, 2020)
- **TCPA / Service Award:** Based on the totality of the circumstances, the court decreased the class representative's service award from \$50,000 to \$25,000 - [Perez v. Rash Curtis & Assocs.](#), No. 4:16-cv-03396 (N.D. Cal. Apr. 17, 2020)
- **FDCPA / Definition of Debt Collector:** Plaintiff failed to adequately allege that the defendant was a "debt collector" under the FDCPA; courts widely consider mortgage servicers to be creditors and not debt collectors - [Torliatt v. Ocwen Loan Servicing, LLC](#), No. 3:19-cv-04303 (N.D. Cal. Apr. 17, 2020) (granting motion to dismiss)

Title Insurance Update

- **Subrogation:** Title insurer who, in moving for summary judgment, failed to submit the "jacket" of the title insurance policy containing the policy's subrogation provision was not entitled to express subrogation to enforce the terms of its insured lender's mortgage against the borrower even though it had paid off that borrower's first mortgage - [Stewart Title Guar. Co. v. Kelly](#), No. 19-P-41 (Mass. App. Apr. 17, 2020) (affirming summary judgment against title insurer's claim for express subrogation)
- **Subrogation:** Title insurer was not entitled to implied subrogation where it, through its agent, knew of the first mortgage and negligently failed to disclose it to its insured lender - [Stewart Title Guar. Co. v. Kelly](#), No. 19-P-41 (Mass. App. Apr. 17, 2020) (affirming summary judgment against title insurer's claim for implied subrogation)
- **Subrogation:** Borrower entitled to summary judgment as to title insurer's claim for equitable subrogation notwithstanding title insurer's defense of unjust enrichment because borrower was not aware at the time the title insurer paid off his prior mortgage that the title insurer was going to pay and expect borrower to compensate it for its actions - [Stewart Title Guar. Co. v. Kelly](#), No. 19-P-41 (Mass. App. Apr. 17, 2020) (affirming summary judgment in favor of borrower on title insurer's claim for subrogation)
- **Measure of Damages:** Insured lender sustained "actual loss" of only \$108,000, when it purchased property at tax deed sale for \$150,000, \$108,000 of which went to satisfy a prior mortgage lien; the correct method of calculating damages was not the fair market value of the property less the amount of the tax lien - [RCN Capital, LLC v. Chicago Title Ins. Co.](#), No. AC 42082 (Conn. App. Mar. 17, 2020) (opinion affirming judgment of damages under title insurance policy)
- **Coverage:** Covenant running with the land contained in a purchase agreement entered into by insured lender's borrower and recorded prior to mortgage was covered by title insurance policy where it was not expressly excepted from coverage - [Bank of Am., N.A. v. Chicago Title Ins. Co.](#), No. 1:17-cv-00407 (N.D. Ill. Apr. 17, 2020) (memorandum opinion and order granting insured lender's motion for summary judgment and denying title insurer's motion for summary judgment)
- **Exclusion 3(a):** Summarizing federal circuit split in whether Exclusion 3(a) requires misconduct or inequitable dealings (7th Cir.) or not (1st Cir.) and finding that where title agent listed documents in the title insurance policy, it - and the insured - could not claim unawareness of the contents of those documents - [Bank of Am., N.A. v. Chicago Title Ins. Co.](#), No. 1:17-cv-00407 (N.D. Ill. Apr. 17, 2020) (memorandum opinion and order granting insured lender's motion for summary judgment and denying title insurer's motion for summary judgment)

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