

Real Property, Financial Services, & Title Insurance Update: Week Ending February 7, 2020

February 19, 2020

Real Property Update

- **Fraudulent Transfer:** Real property that was worth less than mortgage encumbering it was not an asset per the plain language of section 726.102(2) and, therefore, could not support fraudulent transfer claim – [2-Bal Bay Props., LLC v. Asset Mgmt. Holdings, LLC](#), No. 2D18-2873 (Fla. 2d DCA Feb. 7, 2020) (reversed, in part, and affirmed, in part)
- **Unjust Enrichment:** Damages recoverable on claim for unjust enrichment is the enhanced value of property and not the cost of the improvements – [2-Bal Bay Props., LLC v. Asset Mgmt. Holdings, LLC](#), No. 2D18-2873 (Fla. 2d DCA Feb. 7, 2020) (reversed, in part, and affirmed, in part)
- **Condo Law / Attorneys' Fees:** Provision in master declaration of condominium that provides for recovery of attorneys' fees incurred enforcing the declaration from the noncomplying party did not support recovery of fees on action for declaratory relief – [S.K. Condo. II Ass'n, Inc. v. NS/CSE Siesta Key, LLC](#), No. 2D18-4483 (Fla. 2d DCA Feb. 5, 2020) (reversed)
- **Foreclosure / Statute of Limitations:** Borrower's surrender of property through Chapter 13 bankruptcy proceeding does not begin the statute of limitations because the surrender does not have the effect of accelerating the mortgage debt, and the secured creditor reserved the right to accelerate on future default – [BMG Realty Grp., LLC v. U.S. Bank Nat'l Ass'n](#), No. 2D18-5124 (Fla. 2d DCA Feb. 7, 2020) (affirmed)
- **Foreclosure / Jurisdiction:** Trial court that rendered judgment of foreclosure sale retained jurisdiction to consider third-party purchaser's claims for reimbursement/contribution after it vacated sale – [Griffin v. LaSalle Bank, N.A.](#), No. SC18-1132 (Fla. Feb. 6, 2020) (quashing First District Court of Appeal's decision and remanding for further proceedings)

Financial Services Update

- **FDCPA / Section 1692a(6) / Guaranty Agency:** A guaranty agency acts “incidental to a bona fide fiduciary obligation” when it attempts to collect a federal student loan debt, and is not considered a “debt collector” under section 1692a(6) – [Darrisaw v Penn. Higher Educ. Assistance Agency](#), No. 17-12113 (11th Cir. Feb. 7, 2020) (affirmed)
- **TCPA / FCCPA / Jury Trial Waivers:** Jury trial waivers contained in promissory note and credit card account agreement applied to TCPA and FCCPA claims brought by borrower against bank – [Norris v. SunTrust Banks, Inc.](#), No. 5:19-cv-00430 (M.D. Fla. Feb. 3, 2020) (striking jury demand)
- **TCPA / Sufficiency of Allegations:** Plaintiff who allegedly received “numerous nonconsensual autodialed” text messages from bank where he had no account stated cause of action under the TCPA; allegations were sufficient to suggest inference that texts were generated by an ATDS – [Hoagland v. Axos Bank](#), No. 3:19-cv-00750 (S.D. Cal. Feb. 6, 2020) (denying motion to dismiss or stay)
- **TCPA / Stay Request:** Request to stay proceedings while FCC considers promulgating new regulations denied because stay could be indefinite, and it is unclear whether new regulations would simplify or save judicial resources – [Hoagland v. Axos Bank](#), No. 3:19-cv-00750 (S.D. Cal. Feb. 6, 2020) (denying motion to dismiss or stay)
- **TCPA / Text Messages / Improper Venue:** Defendant who allegedly sent unsolicited text messages was not subject to venue in the Southern District of California merely by contacting phone numbers with area codes in the district; both parties reside in other districts, and defendant did not initiate the text messages from that district – [Griffith v. Boll & Branch, LLC](#), No. 3:19-cv-01551 (S.D. Cal. Feb. 3, 2020) (granting motion to dismiss for improper venue)
- **Foreclosure:** Pro se plaintiff who filed multiple actions arising out of state court foreclosure judgment, which were all dismissed, would be enjoined from initiating any further litigation regarding the foreclosure judgment without first obtaining leave of court – [Weaver v. Schiavo](#), Nos. 1:17-cv-01406 (S.D.N.Y. Jan. 30, 2020) (dismissing case and entering injunction)

Title Insurance Update

- **Agent E&O Policy:** Post-judgment subpoena issued to third-party agent to enforce a judgment was not a “related claim” to subsequent lawsuit and thus did not render notice of actual subsequent claim untimely or render insured’s representation in its application false – [Protective Specialty Ins. Co. v. Castle Title Ins. Agency, Inc.](#), No. 7:17-cv-08965 (S.D.N.Y. Feb. 3, 2020) (opinion and order granting defendant’s motion for summary judgment)

- **Class Action:** Although common issues did not predominate in “loan tie-in” fee class because proving materiality of and reliance on alleged misrepresentation required individual inquiries unsuitable for common proof, trial court should not have denied certification outright and instead certified appropriate subclasses – [Wilmot v. First Am. Title Co.](#), No. B289375 (Cal. Ct. App. Jan. 31, 2020) (unpublished opinion reversing order denying class certification and remanding to trial court for further proceedings)

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Consumer Finance

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