

Real Property, Financial Services, & Title Insurance Update: Week Ending July 10, 2020

July 10, 2020

Real Property Update

- **Foreclosure / Standing:** Servicer had standing to foreclose where asset management agreement authorized predecessor-in-interest to delegate service of loan and ability to bring foreclosure action and where duties were properly delegated under delegation agreement - [Foley & Lardner, LLP v. Unknown Heirs](#), No. 2D18-2929 (Fla. 2d DCA July 10, 2020) (reversed and remanded)
- **Easement / Taking:** County's petition in eminent domain to condemn easements over five properties failed because (1) the defective legal descriptions of the properties to be acquired provided two potential easement boundaries, rendering them unclear; and (2) the county failed to establish a reasonable necessity for the public use aspect of the taking - [Altman v. Brevard Cty.](#), No. 5D19-1839 (Fla. 5th DCA July 10, 2020) (reversed and remanded)

Financial Services Update

- **FDCPA / Standing:** Consumers, who asserted that collection letters they received from debt collector might have been misleading to others but did not allege that such letters substantially increased risk of harm to themselves, failed to sufficiently allege that they suffered a particularized, concrete injury, as required to demonstrate injury-in-fact necessary to establish Article III standing with respect to Fair Debt Collection Practices Act (FDCPA) claim against collector; while consumers alleged that letters might have led others receiving similar correspondence to have paid debts that were not collectable, these allegations did not support plausible inference that consumers themselves were at substantial risk of making any payment - [Trichell v. Midland Credit Mgmt., Inc.](#), No. 18-14144 (11th Cir. July 6, 2020) (vacating judgments and remanding with instructions)

- **TCPA / Government-Debt Exception / Constitutionality:** Government-debt exception to TCPA's robocall restriction impermissibly favored debt-collection speech over political and other speech, in violation of First Amendment - [Barr v. Am. Ass'n of Political Consultants](#), No. 19-631 (U.S. July 6, 2020) (affirming judgment)
- **FCRA / Maintenance of Reasonable Procedures / Affirmative Defense:** Maintaining reasonable procedures is an affirmative defense under the FCRA, and thus plaintiff was not required to anticipate and negate this defense in his pleading - [Weiss v. Equifax, Inc.](#), No. 2:20-cv-01460 (E.D.N.Y. July 8, 2020)

Title Insurance Update

- **Commitment:** The purpose of a title commitment is to prepare for the issuance of a policy; it is not a promise or undertaking by the insurer that further work will be performed or that a risk will be insured - [Mazel v. Las Cruces Abstract & Title Co.](#), No. 1:18-ap-01057 (Bankr. D.N.M. July 2, 2020) (opinion granting summary judgment)
- **Commitment:** Simply because a requirement in a title commitment is the release of a prior mortgage, the insurer has no duty to secure the release - [Mazel v. Las Cruces Abstract & Title Co.](#), No. 1:18-ap-01057 (Bankr. D.N.M. July 2, 2020) (opinion granting summary judgment)
- **Commitment:** Requirements in the title commitment are not representations about the policy's benefits, advantages, conditions, or terms but are conditions to the insurer's obligation to issue the policy - [Mazel v. Las Cruces Abstract & Title Co.](#), No. 1:18-ap-01057 (Bankr. D.N.M. July 2, 2020) (opinion granting summary judgment)
- **Commitment:** A title insurer may adhere or waive the requirements in a title commitment in its discretion - [Mazel v. Las Cruces Abstract & Title Co.](#), No. 1:18-ap-01057 (Bankr. D.N.M. July 2, 2020) (opinion granting summary judgment)
- **Commitment:** A title insurer's issuance of a title commitment does not shift its role in the transaction to that of a closing agent and fiduciary - [Mazel v. Las Cruces Abstract & Title Co.](#), No. 1:18-ap-01057 (Bankr. D.N.M. July 2, 2020) (opinion granting summary judgment)
- **Commitment:** A title insurer's issuance of a policy when one or more of the requirements set forth in the title commitment that are not met or satisfied does not amount to a false statement or misrepresentation - [Mazel v. Las Cruces Abstract & Title Co.](#), No. 1:18-ap-01057 (Bankr. D.N.M. July 2, 2020) (opinion granting summary judgment)
- **Commitment:** A title insurer's issuance of a policy with exception to one or more of the requirements set forth in the title commitment that are not met or satisfied does not amount to a false statement or misrepresentation - [Mazel v. Las Cruces Abstract & Title Co.](#), No. 1:18-ap-01057 (Bankr. D.N.M. July 2, 2020) (opinion granting summary judgment)

- **Bad Faith:** Inherent in the requirement that an insurer attempt, in good faith, to effectuate fair and equitable settlements is that the insurer properly investigate the insured's claim - [Mazel v. Las Cruces Abstract & Title Co.](#), No. 1:18-ap-01057 (Bankr. D.N.M. July 2, 2020) (opinion granting summary judgment)
- **Bad Faith:** A title insurer's investigation need not be perfect nor lead to a correct determination of coverage, and an adequate investigation need only allow the insurer to form an honest judgment as to the merits of the claim and satisfy the basic standard of diligence and competence - [Mazel v. Las Cruces Abstract & Title Co.](#), No. 1:18-ap-01057 (Bankr. D.N.M. July 2, 2020) (opinion granting summary judgment)
- **Bad Faith:** A title insurer's investigation must not be unfounded or unreasonable - [Mazel v. Las Cruces Abstract & Title Co.](#), No. 1:18-ap-01057 (Bankr. D.N.M. July 2, 2020) (opinion granting summary judgment)
- **Equitable Subrogation:** Equitable subrogation applies where a lender's funds are used to satisfy an existing mortgage lien but another lien, unknown to the lender, is senior to the lender's but junior to the one satisfied; in order to avoid unjust enrichment, the lender is entitled to be subrogated to the rights of the senior lien - [Bayview Loan Servicing, LLC v. Laper](#), No. 11727/2015 (N.Y. Sup. Ct. June 24, 2020) (order denying summary judgment motions)
- **Equitable Subrogation:** The doctrine of equitable subrogation operates to erase the lender's mistake in failing to discover the intervening liens and grants it the benefit of having obtained an assignment of the senior lien that it caused to be discharged - [Bayview Loan Servicing, LLC v. Laper](#), No. 11727/2015 (N.Y. Sup. Ct. June 24, 2020) (order denying summary judgment motions)
- **Exclusion 3(a):** Where insured obtains a survey that discloses encroachments and takes premises subject to those encroachments and neighbor's possessory rights, it fails to state a cause of action against title insurer for breach of policy - [1267 Rogers Ave., LLC v. First Am. Title Ins. Co.](#), No. 502465/2019 (N.Y. Sup. Ct. July 6, 2020) (order granting motion to dismiss)
- **Easements:** Policy does not cover claims for easements by implication based on encroachments and possessory rights is excluded from coverage - [1267 Rogers Ave., LLC v. First Am. Title Ins. Co.](#), No. 502465/2019 (N.Y. Sup. Ct. July 6, 2020) (order granting motion to dismiss)

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