

Real Property, Financial Services, & Title Insurance Update: Week Ending February 26, 2021

February 26, 2021

Real Property Update

- **HELOC / Authentication:** A home equity line of credit is not a negotiable instrument, is not self-authenticating, and must be proven in support of summary judgment – [Demakis v. Suntrust Bank](#), No. 2D19-3751 (Fla. 2d DCA Feb. 24, 2021) (reversed and remanded)

Financial Services Update

- **FCCPA / Preemption:** Argument that TILA and Regulation Z preempt provision of FCCPA is insufficient basis for removal – [Hargrave v. Capital One Bank, N.A.](#), No. 8:20-cv-01231 (M.D. Fla. Jan. 7, 2021)
- **TCPA / Online Fax Service / Standing:** Users of an online fax service do not endure the type of harm Congress intended to protect against under the TCPA and lack standing – [Scoma Chiropractic, P.A. v. Mastercard Int'l, Inc.](#), No. 2:16-cv-00041 (M.D. Fla. Jan. 29, 2021)
- **TCPA / Fax / Class Certification:** Plaintiffs failed to prove that stand-alone fax machine class was ascertainable and, in any event, plaintiffs' proposed method for determining class membership required many individualized inquiries and, thus, common questions did not predominate – [Scoma Chiropractic, P.A. v. Mastercard Int'l, Inc.](#), No. 2:16-cv-00041 (M.D. Fla. Jan. 29, 2021)
- **TCPA / Constitutionality:** Supreme Court's opinion in *Barr v. American Association of Political Consultants Inc.* did not render entire TCPA unconstitutional – [Johansen v. Loandepot.com LLC](#), No. 8:20-cv-00919 (C.D. Cal. Jan. 31, 2021)
- **TCPA / Arbitrability:** Claim premised on unwanted text messages subject to arbitration provision contained within terms of service – [Regan v. Pinger, Inc.](#), No. 5:20-cv-02221 (N.D. Cal. Feb. 23, 2021)

- **TCPA / ATDS / Plausibility:** Allegations of two calls from defendant, along with a pause after each call, were insufficient to raise the assertion that defendant used an ATDS above a speculative level – [Hildre v. Heavy Hammer, Inc.](#), No. 3:20-cv-00236 (S.D. Cal. Feb. 25, 2021) (granting motion to dismiss with leave to amend)
- **FDCPA / Debt Collector:** Creditors and those that acquire debts not “in default” are not “debt collectors” under the FDCPA – [Avent v. Platinum Plus Auto Prot.](#), No. 1:19-cv-01494 (N.D.N.Y. Feb. 23, 2021)
- **FCRA / Actionable Conduct / Personal Jurisdiction:** Failure to investigate and remove disputed information does not “arise from” mailing of loan-related communications – [Mednik v. Specialized Loan Servicing, LLC](#), No. 1:20-cv-00427 (E.D.N.Y. Feb. 23, 2021)

Title Insurance Update

- **Conversion:** Georgia law precluded plaintiff’s conversion claim against title insurer where plaintiff failed to allege a specific and identifiable amount of money lost – [First IC Bank v. N. Am. Title Ins. Co.](#), No. 1:19-cv-05055 (N.D. Ga. Jan. 21, 2021) (order granting defendant’s motion to dismiss)
- **Breach of Contract:** Plaintiff could not sue title insurer for breach of contract where title insurer’s closing protection letter was not the operative letter at closing, as the closing attorney obtained a subsequent closing protection letter and title policy from another title insurance company – [First IC Bank v. N. Am. Title Ins. Co.](#), No. 1:19-cv-05055 (N.D. Ga. Jan. 21, 2021) (order granting defendant’s motion to dismiss)
- **Coverage / Specific Use:** Title insurer did not have a duty to cover costs associated with re-platting the insured property to allow for residential development where the policy did not provide insurance for a specific use and instead insured title subject to the conditions of the original plat – [VACC LLC v. Chicago Title Ins. Co.](#), Nos. 1 CA-CV 19-050, 1 CA-CV 20-0075 (Ariz. Ct. App. Feb. 23, 2021) (affirmed)
- **Unmarketability:** Plaintiff’s argument that the restrictions, as incorporated into the plat, rendered the property unmarketable for the use plaintiff intended (residential development) failed where plaintiff could have sold the property in the same manner that it acquired it and plaintiff’s hope that the property could be marketed for a use inconsistent with the plat was not insured under the policy – [VACC LLC v. Chicago Title Ins. Co.](#), Nos. 1 CA-CV 19-0508, 1 CA-CV 20-0075 (Ariz. Ct. App. Feb. 23, 2021) (affirmed)
- **Title Delivery:** Plaintiff’s argument that title was not properly delivered as described in Schedule A of the purchase agreement failed where Schedule A and the warranty deed contained the same legal description – [VACC LLC v. Chicago Title Ins. Co.](#), Nos. 1 CA-CV 19-0508, 1 CA-CV 20-0075 (Ariz. Ct. App. Feb. 23, 2021) (affirmed)

- **Bad Faith:** Title insurer did not act in bad faith where it had a reasonable basis for denying plaintiff's claims – [VACC LLC v. Chicago Title Ins. Co.](#), Nos. 1 CA-CV 19-0508, 1 CA-CV 20-0075 (Ariz. Ct. App. Feb. 23, 2021) (affirmed)

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