

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

March 26, 2021

Real Property Update

- **Foreclosure:** Trial court cannot arbitrarily reject evidence or testimony in a mortgage foreclosure proceeding, and lender that proved elements was entitled to foreclosure judgment – [U.S. Bank, N.A. v. Devoe](#), No. 5D20-7 (Fla. 5th DCA Mar. 26, 2021) (reversed and remanded)
- **Foreclosure / Hearsay:** Upon a timely hearsay objection, a witness may not testify about the contents of a business record if that record was not properly introduced into evidence, and witness's failure to testify as to lender's mailing procedures and failure to introduce business record to support mailing of notice was a failure to prove with paragraph 22 notice requirement required to support entry of judgment of foreclosure – [Cook & Support 100 Prop. Mgmt., LLC v. Bank of America](#), No. 5D19-3649 (Fla. 5th Mar. 25, 2021) (reversed and remanded)

Financial Services Update

- **TILA:** Credit card consumer stated a TILA claim based on bank's pursuit of a credit card charge that the consumer alleged was fraudulent – [Braun v. TD Bank, N.A.](#), No. 8:20-cv-02951 (M.D. Fla. Mar. 23, 2021) (denying dismissal motion)
- **FCCPA:** Credit card consumer stated a FCCPA claim because bank's letter to consumer requesting payment on account occurred after consumer advised bank that \$1,700 charge was fraudulent – [Braun v. TD Bank, N.A.](#), No. 8:20-cv-02951 (M.D. Fla. Mar. 23, 2021) (denying dismissal motion)

- **FCRA:** Credit card consumer failed to state a FCRA claim based on bank's alleged failure to conduct a proper investigation regarding the consumer's disputed charge because consumer did not specify how the bank's investigation failed to meet the statutory requirements – [Braun v. TD Bank, N.A.](#), No. 8:20-cv-02951 (M.D. Fla. Mar. 23, 2021) (granting dismissal motion)
- **FCRA:** Genuine issue of material fact existed as to whether inaccurate credit report caused plaintiffs to suffer credit denials where plaintiffs testified at deposition that they believed the inaccurate reports contributed to their inability to get a mortgage loan of their choice – [Santos v. Healthcare Revenue Recovery Grp., LLC](#), No. 1:19-23084 (S.D. Fla. Mar. 23, 2021) (denying CRA's summary judgment motion)
- **TCPA / Vicarious Liability:** Plaintiff alleged sufficient facts to state a claim based on vicarious liability pursuant to TCPA based on phone calls made by corporate entity's agents – [Ewing v. Freedom Forever LLC](#), No. 3:20-cv-00880 (S.D. Cal. Mar. 22, 2021) (denying dismissal motion)

Title Insurance Update

- **CPL/Closing Agent Liability:** In lender's action against title insurer for indemnification under CPL, breach of title insurance policy, negligent misrepresentation, factual questions remained regarding whether title agent actually closed transaction for which title agent had issued CPL and purported to issue title commitment, and therefore judgment on the pleadings was inappropriate, although summary judgment in favor of title insurer may ultimately be appropriate after discovery – [Corevest Am. Fin. Lender, LLC v. Stewart Title Guar. Co.](#), No. A20A1785 (Ga. Ct. App. Jan. 29, 2021) (reversing judgment on pleadings)
- **Lack of Access / Duty to Defend:** Title insurer's failure to provide a defense to insureds in underlying lawsuit seeking to block insureds' access to driveway, a portion of which was on insureds' property and a portion of which was on underlying plaintiff's property, was arbitrary and capricious where claim could potentially interfere with insureds' use of their own property; however, title insurer correctly refused coverage for lack of access where insureds had legal access, despite their claim that such access was not reasonable – right of access as insured by title insurer does not equate to reasonable access nor vehicular access – [Chicago Title Ins. Co. v. Jen](#), No. 2015, Sept. Term 2019 (Md. Ct. Spec. App. Jan. 28, 2021) (reversed and remanded)

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