

Real Property, Financial Services, & Title Insurance Update: Week Ending October 1, 2021

October 01, 2021

Real Property Update

- **Foreclosure / Modification Agreement:** Lender was entitled to judgment of foreclosure upon proving borrower made three payments before breaching the loan modification agreement – [Carus v. VRMTG Asset Tr.](#), No. 3D20-1355 (Fla. 3d DCA Sept. 29, 2021) (affirming in part, reversing in part, and remanding)
- **Partition of Commercial Property:** Trial court's order of partition was based on competent and substantial evidence that tenants in common agreed and intended to divide their commercial property 50/50 – [Pena v. Rincon](#), Nos. 3D19-2225 & 3D19-2308 (Fla. 3d DCA Sept. 29, 2021) (affirmed)

Financial Services Update

- **FCRA / Arbitration:** Court compelled arbitration of plaintiff's FCRA claim pursuant to parties' arbitration agreement, except for (1) the clause regarding prevailing party attorneys' fees, which is severable and which the court had stricken from the agreement; and (2) the clause placing venue for the arbitration in North Carolina, as defendant had agreed to hold the arbitration in Florida or remotely – [Lichtman v. Bar Educ., Inc.](#), No. 8:21-cv-01370 (M.D. Fla. Sept. 30, 2021)
- **FDCPA / TILA / RESPA / FCRA / Res Judicata:** Plaintiff's consumer protection claims barred by doctrine of res judicata because they were precluded by his 2011 action seeking a loan modification after defendant filed a default on plaintiff's mortgage – [Cherifi v. Select Portfolio Servicing, Inc.](#), No. 8:21-cv-00001 (C.D. Cal. July 30, 2021) (granting motion to dismiss)

- **FDCPA / TILA / Definition of Debt Collector & Creditor:** Plaintiff failed to allege facts sufficient to show that defendants, one being a law firm acting as an appointed substitute trustee to initiate the nonjudicial foreclosure process, and the other an attorney acting as the substitute trustee law firm's authorized agent to record the notice of default, were “debt collectors” within the meaning of the FDCPA and were not “creditors” within the meaning of TILA – [Dare v. Inku Nam](#), No. 3:19-cv-01765 (S.D. Cal. Sept. 27, 2021) (granting motion to dismiss)
- **FDCPA / Time-Barred Lawsuit:** Defendant’s filing of a time-barred lawsuit was a violation of the FDCPA – [Stinson v. Houslanger & Assocs., PLLC](#), No. 1:18-cv-11350 (S.D.N.Y. Sept. 28, 2021)

Title Insurance Update

- **Agent Liability / Duty to Defend:** Title agent’s E&O carrier had duty to defend agent in underlying state court action brought by underwriter arising from fraudulent transaction in which agent also issued over-limit lender’s policy without approval from title underwriter; although exclusion for claims arising out of or related to theft or conversion of funds might apply, underlying claim also alleged agent’s lack of authority in issuing over-limit policy, which triggered duty to defend – [Houston Specialty Ins. Co. v. Fontecilla](#), No. 1:20-cv-20725 (S.D. Fla. Sept. 30, 2021) (dismissing without prejudice declaratory judgment claim as to duty to indemnify; granting summary judgment with respect to duty to defend)
- **Settlement and Release:** Release given by insured in favor of insurer in settlement of title claim arising from overlooked easement interest barred subsequent claim against insurer for contribution and/or indemnity brought by insured as assignee of closing attorneys; release applied broadly to all claims “relating in any way to the [e]asement,” including claims assigned to insured by closing attorneys – [ALR Oglethorpe, LLC v. Fidelity Nat’l Title Ins. Co.](#), No. A21A0989 (Ga. App. Ct. Sept. 27, 2021) (affirming summary judgment)
- **Class Action / Duty to Defend:** Professional liability insurer had no duty to defend insured closing agent in putative class action alleging that closing agent improperly charged buyer a closing fee where real estate contract required that seller pay the closing fee, where policy did not cover “the return, reduction or dispute over any fees ... charged ... by” closing agent, among other exclusions – [RLI Ins. Co. v. Baywalk Title Inc.](#), No. 8:20-cv-01143 (M.D. Fla. Sept. 27, 2021) (granting summary judgment for insurer)
- **Coverage / Loss:** Title insurer entitled to summary judgment on insured’s claim seeking damages after insured lost title to certain units for loss of right to construct new single-family residences in the airspace over certain common elements of a condominium comprising the units, where the Rhode Island Supreme Court had earlier determined that insured could not build houses on the units as improvements; without the ability to construct improvements in the airspace comprising the units, their economic value was zero and insured had no loss – [IDC Props., Inc. v. Chicago Title Ins. Co.](#), No. 1:09-cv-00632 (D.R.I. Sept. 7, 2021) (granting summary judgment on reconsideration)

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