

Real Property, Financial Services, & Title Insurance Update: Week Ending September 3, 2021

September 03, 2021

Real Property Update

- **Foreclosure / Usury / Continuance:** Trial court did not err in determining that subject notes and subsequent default rate interest were not usurious, nor in denying motion for continuance – [Temnikova v. E. Fin. Mortg. Corp.](#), No. 3D21-759 (Fla. 3d DCA Sept. 1, 2021) (affirmed)
- **Equitable Lien / Priority:** Trial court erred in prioritizing equitable lien over earlier recorded first mortgage – [Mortg. Assets Mgmt., LLC v. Terraces/Banyan - 2, Inc.](#), No. 4D20-1845 (affirmed in part, reversed in part, and remanded)
- **Residential Purchase & Sale / Defects:** Trial court erred in granting summary judgment on residential property buyer's counterclaims, as court failed to consider whether a prior flood was a defect that was "readily observable" in context of buyer's specific counterclaims – [Lorber v. Passick](#), No. 4D20-393 (Fla. 4th DCA Sept. 1, 2021) (reversed and remanded)

Financial Services Update

- **TCPA / ATDS:** The court denied plaintiff's motion to amend complaint where the alleged ATDS used by defendants did not have the capacity to generate random telephone numbers to call. This decision was based on the Supreme Court's narrower view of what constitutes an "autodialer" under the TCPA in *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163 (2021) – [Tehrani v. Joie De Vivre Hosp., LLC](#), No. 3:19-cv-08168 (N.D. Cal. Aug. 31, 2021)
- **FDCPA / Consumer Debt:** Genuine issue of material fact regarding whether plaintiff's debt was a consumer debt for purposes of the FDCPA where debt at issue was an expense personally incurred to promote a campaign for municipal office – [Kershner v. Hillcrest, Davidson, & Assocs. LLC](#), No. 2:19-cv-00747 (E.D. Cal. Aug. 30, 2021)

Title Insurance Update

- **Verdict / Setoff:** Title insurer was not entitled to a setoff from the total verdict where title insurer failed to carry the burden of proving that any portion of the settlement sum paid by a former co-defendant to insured was attributable to the same injuries for which the title insurer was found liable – [FDIC v. Chicago Title Ins. Co.](#), No. 20-1572 (7th Cir. Aug. 31, 2021)
- **Duty to Defend:** Title insurer did not breach its duty to defend where the insured sought indemnification for expenses paid to defend against matters uninsured under the policy – [Stewart v. Old Republic Nat'l Title Ins. Co.](#), No. FSTCV206045119S (Conn. Super. Ct. Aug. 10, 2021) (granting insurer's motion for summary judgment)
- **Coverage / Eminent Domain:** Title policy excluded coverage for insured's claims where insured sought indemnification for expenses paid to defend title to property subject to eminent domain – [Stewart v. Old Republic Nat'l Title Ins. Co.](#), No. FSTCV206045119S (Conn. Super. Ct. Aug. 10, 2021) (granting insurer's motion for summary judgment)
- **Coverage / Post-Policy Claims:** Title policy excluded coverage for insured's claims where insured engaged in affirmative conduct that gave rise to its claim after the policy was issued – [Stewart v. Old Republic Nat'l Title Ins. Co.](#), No. FSTCV206045119S (Conn. Super. Ct. Aug. 10, 2021) (granting insurer's motion for summary judgment)
- **Fraud:** Insured failed to state a claim for fraud where insured failed to plead the particulars of the title insurer's alleged scheme to defraud the insured – [Amran Prop. Invs., LLC v. Fidelity Nat'l Title Co., LLC](#), No. 1:20-cv-07464 (N.D. Ill. Aug. 31, 2021)
- **Negligence / Negligent Misrepresentation:** Insured failed to state claims for negligence and negligent misrepresentation where insured failed to plead facts showing that title insurer had a duty to prevent seller or seller's counsel from taking certain actions when title insurer was not alleged to be aware, or would have discovered with reasonable care, that seller or its counsel took such actions – [Amran Prop. Invs., LLC v. Fidelity Nat'l Title Co., LLC](#), No. 1:20-cv-07464 (N.D. Ill. Aug. 31, 2021)

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