

# Real Property, Financial Services, & Title Insurance Update: Week Ending November 12, 2021

November 12, 2021

## Real Property Update

- **Cross-Easement Agreement / Res Judicata:** Doctrine of res judicata is not applicable where the claims in the two cases concern different periods of time, and the facts that were essential to maintain the association's claims regarding endorsement of an easement differed – [Crescent Shore Condo. Ass'n, Inc. v. Lani Kai, L.P.](#), No. 2D21-234 (Fla. 2d DCA Nov. 10, 2021) (reversed and remanded)
- **Condo Association / Summary Judgment / Unconscionability:** The Declaration of Covenants, Restrictions and Reciprocal Easement Agreement (REA) and the Declaration of Condominium were neither procedurally nor substantively unconscionable because the commercial association members purchased their condo units with the ability, as sophisticated businesspeople, to understand the terms in the publicly recorded REA and the declaration, and the association's argument that the REA and the declaration contain terms that cannot be found in similar condo arrangements was not evidence that the terms are legally unconscionable – [12550 Biscayne Condo. Ass'n, Inc. v. NRD Invs., LLC](#), Nos. 3D19-1893, 3D20-752, 3D20-292 (Fla. 3d DCA Nov. 10, 2021) (affirmed)
- **Condo Association / Summary Judgment / Common Elements:** Summary judgment was appropriately granted because no material issue existed as to whether the antennas are on appellee's rooftop limited common elements or the appellant association's common elements (i.e., exterior walls) where the building was built in 1972, and at the time appellee purchased it in 2006, antennas have existed on the roof (or otherwise) of the building in the same location and the express terms of the declaration and REA (both recorded in 2007) set forth clear and unambiguous rights and reservations that permit appellee to maintain and operate the antennas – [12550 Biscayne Condo. Ass'n, Inc. v. NRD Invs., LLC](#), Nos. 3D19-1893, 3D20-752, 3D20-292 (Fla. 3d DCA Nov. 10, 2021) (affirmed)

- **Foreclosure / Right of Redemption (Fla. Stat. § 45.0315) / Judicial Sales Procedure (Fla. Stat. § 45.031):** While a foreclosure sale can still be prevented even after the public auction, the mortgagor failed to timely object to the procedure of the sale before its right of redemption expired upon the clerk filing of the certificate of sale, as provided by law and not modified under the operative judgment here. Thus, the trial court acted within its discretion in denying the motion to vacate and ordering the clerk to issue the certificate of title. *See Fla. Stat. § 45.031(5) – 2275 NE 120 Street, LLC v. Sanchez Struve Bus. Advisors, LLC*, No. 3D20-1277 (Fla. 3d DCA Nov. 10, 2021) (affirmed)
- **Landlord / Tenant:** Upon landlord’s proper confession of error, tenant’s motion for determination of rent, pending and unresolved in the trial court, precluded the entry of default and final judgment of removal rendered in favor of landlord – *Prince v. MCR Apts. 1, LLC*, No. 3D21-2050 (Fla. 3d DCA Nov. 10, 2021) (reversed and remanded)
- **Foreclosure / Notice of Default:** While the foreclosure judgment was affirmed, the dissent found that where there was no evidence that the mortgagor provided the post office box address used by the servicer and the notice of default was returned unclaimed, the servicer’s failure to prove that it provided said notice pursuant to the terms of the mortgage, a condition precedent to filing suit, should have resulted in dismissal – *Israel v. U.S. Bank Nat’ Ass’n*, No. 4D20-2331 (Fla. 4th DCA Nov. 10, 2021) (affirmed)

## Financial Services Update

- **ECOA / Immigration Status:** While Wells Fargo argued that the ECOA implementing regulations permit lenders to take into account an applicant’s immigration status when deciding whether to extend credit, plaintiffs’ 42 U.S.C. § 1981 claim survived a motion to dismiss because discrimination on the basis of alienage was the centerpiece of plaintiffs’ claim – *Maystrenko v. Wells Fargo, N.A.*, No. 3:21-cv-00133 (N.D. Cal. Nov. 10, 2021)
- **FCRA / 1681s-2(b) Claim:** Plaintiffs’ belief that they were released of their payment obligation because landlord breached lease was an unresolved legal conclusion, i.e., “tethered to a legal dispute,” and was therefore not a viable claim under the FCRA – *Mohnkern v. Equifax Info. Servs., LLC*, No. 6:19-cv-06446 (W.D.N.Y. Nov. 10, 2021)
- **TCPA / Discovery:** Court found plaintiffs’ request to conduct additional discovery to determine whether defendant’s dialer was an ATDS futile because courts have already rejected the theory that a device would qualify as an ATDS if it used a random number generator to determine the order in which to pick phone numbers from a preproduced list and stored the numbers to be dialed at a later time – *In re Portfolio Recovery Assocs., LLC, TCPA Litig.*, No. 3:11-md-02295 (S.D. Cal. Nov. 9, 2021)

# Title Insurance Update

- **Unfair Claims Settlement Practices / Claims Manuals Potentially Relevant:** Leave to amend should have been considered after dismissal of lender's claims against title insurer based on newly discovered evidence in the form of title insurer's claims manuals, which are potentially relevant to lender's statutory claim for unfair claims settlement practices and misrepresentation under NRS section 686A.310 and for breach of contract, since Nevada law permits courts to consider custom and practices of the trade even in construing an unambiguous contract – [Wells Fargo Bank, N.A. v. Fidelity Nat'l Title Ins. Co.](#), No. 19-17332 (9th Cir. Nov. 5, 2021) (reversed and remanded)

## Related Practices

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