

Real Property, Financial Services, & Title Insurance Update: Week Ending April 30, 2021

April 30, 2021

Real Property Update

- **Commercial Lease / Contract Interpretation:** Trial court erroneously interpreted the lease as capping landlords' damages for tenant's breach of contract to the tenant's security deposit – [Nunez v. Aviv Air Conditioning, Inc.](#), No. 3D21-44 (Fla. 3d DCA Apr. 28, 2021) (reversed and remanded with instructions)
- **Promissory Note / Usury:** Neither 10% interest rate imposed on the principal nor 18% interest rate imposed upon principal and past due interest upon default violated usury statute – [Marchelos v. Adao](#), No. 4D18-1873 (Fla. 4th DCA Apr. 28, 2021) (affirmed)

Financial Services Update

- **Vapor Money Theory:** Rejecting borrower's theory that he may pay off note with a fictitious credit agreement – [Price v. Lakeview Loan Servicing, LLC](#), No. 2:19-cv-00655 (M.D. Fla. Apr. 26, 2021)
- **FCRA / Arbitration:** FCRA claim was subject to arbitration provision set forth in a terminated subscriber agreement – [Hearn v. Comcast Cable Commc'ns, LLC](#), No. 19-14455 (11th Cir. Apr. 5, 2021)
- **FCRA / Investigation:** Credit reporting agency's investigation procedures in response to a consumer's dispute are not per se reasonable where the consumer provides a sufficiently detailed notice to the credit reporting agency to investigate an inaccuracy and the credit reporting agency does nothing other than forward the information to the furnisher of information – [Losch v. Nationstar Mortg. LLC](#), No. 20-10695 (11th Cir. Apr. 28, 2021)

- **FCRA / Standing:** Plaintiff lacked standing to assert a violation of the Fair and Accurate Transactions Act amendment to the FCRA where vendor issued a receipt reflecting the first digit, last four digits, and the expiration date of plaintiff's credit card, because the plaintiff's injuries were not sufficiently concrete – [Keim v. S. Fla. Fair & Palm Beach Cty. Expositions, Inc.](#), No. 9:20-cv-80506 (S.D. Fla. Apr. 23, 2021) (granting defendants' dismissal motion)

Title Insurance Update

- **Duty to Cooperate:** Insured did not violate its duty to cooperate with title insurer's defense when the insured independently settled with a third-party claimant where its insurer agreed to defend the insured but reserved the right to challenge coverage – [Fidelity Nat'l Title Ins. Co. v. Osborn III Partners LLC](#), No. 1 CA-CV 18-0040 (Ariz. Ct. App. Mar. 9, 2021) (affirmed in part, reversed in part, vacated in part)
- **Coverage / Mechanic's Liens:** Provision in title insurance policy denying coverage for liens or other defects "created, suffered, assumed or agreed to by the insured claimant" applies to mechanic's liens that arise because of insufficient funds when a lender cuts off funding for a construction project – [Fidelity Nat'l Title Ins. Co. v. Osborn III Partners LLC](#), No. 1 CA-CV 18-0040 (Ariz. Ct. App. Mar. 9, 2021) (affirmed in part, reversed in part, vacated in part)
- **Fraudulent Joinder / Snap Removal:** Insured's breach of contract and bad faith claim against title insurer could not be removed from state court to federal court on diversity jurisdiction grounds where title insurer attempted to remove the case before the forum defendant had been served – [U.S. Bank Nat'l Ass'n v. Fidelity Nat'l Title Ins. Grp. Inc.](#), No. 2:20-cv-02084 (D. Nev. Apr. 28, 2021)
- **Breach of Policy / Insurable Interest:** Title policy did not preclude insured from bringing a claim for breach of the policy where the insured maintained an interest in the property after deeds previously transferring insured's interest were declared null and void – [53 Spencer Realty LLC v. Fidelity Nat'l Title Ins. Co.](#), No. 520249/16 (N.Y. Sup. Ct. Apr. 22, 2021)
- **Coverage / Date of Loss:** Insured's claim did not post-date the policy where the alleged title defect and insured's alleged loss took place three years prior to insured losing title to the property for failing to pay its mortgage – [53 Spencer Realty LLC v. Fidelity Nat'l Title Ins. Co.](#), No. 520249/16 (N.Y. Sup. Ct. Apr. 22, 2021)
- **Summary Judgment / Burden of Proof:** Title insurer was not entitled to summary judgment rescinding the title policy because it failed to prove that the insured had knowledge of its representative's actions, which was the basis of the insurer's claim of fraud in the inducement – [53 Spencer Realty LLC v. Fidelity Nat'l Title Ins. Co.](#), No. 520249/16 (N.Y. Sup. Ct. Apr. 22, 2021)

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