

Real Property, Financial Services, & Title Insurance Update: Week Ending December 17, 2021

December 18, 2021

Real Property Update

- **Taking Order:** Rejecting property owner's argument that the Florida Department of Transportation failed to make a good faith estimate of value required by statute based upon a disagreement between experts concerning the methodology of FDOT's appraisal - [Tidewater Preserve Master Ass'n, Inc. v. Fla. Dept. of Trans.](#), No. 2D21-223 (Fla. 2d DCA Dec. 17, 2021) (affirmed)
- **Eviction / Section 83.60(2) / Payment of Rent Into Court Registry:** Even if, as alleged in complaint, "rent is not a factor" in action seeking eviction, Florida's relevant statutory scheme requires the tenant to (i) pay rent into the court's registry as alleged and as it becomes due or (ii) seek an order for determination if unclear as to the rent owed - [Gill v. Parvez](#), No. 3D21-0796 (Fla. 3d DCA Dec. 15, 2021) (affirming default judgment of eviction)
- **Foreclosure / Prevailing Fees:** Based upon the Florida Supreme Court's ruling in *Page v. Deutsche Bank Trust Company Americas*, a unilateral attorneys' fee provision in a note and mortgage is made reciprocal to a borrower under section 57.105(7) when the borrower prevails in a foreclosure action in which the plaintiff bank established standing to enforce the note and mortgage at the time of trial but not at the time suit was filed - [Nationstar Mortg. LLC v. Faramarz](#), No. 4D18-347 (Fla. 4th DCA Dec. 15, 2021) (affirming trial court's award of prevailing party attorneys' fees and costs)
- **Foreclosure / Motion to Vacate:** A successor judge has the authority to vacate a final judgment entered by a predecessor judge, and trial court erred in denying motion to vacate without considering and addressing the merits - [Samoilova v. Loginov](#), No. 3D21-1144 (Fla. 3d DCA Dec. 15, 2021) (reversed and remanded)

Financial Services Update

- **TCPA / ATDS:** Rejecting plaintiff's contention that numbers were stored using a random or sequential number generator by virtue of the fact that database used a sequential number generator to store telephone numbers and created a unique identifier for each entry, as inconsistent with the reasoning and holding in *Facebook, Inc. v. Duguid* - [Pascal v. Concentra, Inc.](#), No. 3:19-cv-02559 (N.D. Cal. Dec. 14, 2021) (granting summary judgment in defendant's favor and dismissing case with prejudice)
- **TCPA / ATDS:** Defendant entitled to summary judgment where plaintiff acknowledged that the defendant's dialing system did not have the capacity to randomly or sequentially generate *telephone* numbers and instead relied solely on the system's purported capacity to use randomly or sequentially generated numbers to determine the storage or dialing order of telephone numbers entered by other means, which the court held did not make the system an ATDS under the TCPA - [Cole v. Sierra Pac. Mortg. Co.](#), No. 3:18-cv-01692 (N.D. Cal. Dec. 15, 2021) (granting summary judgment in defendant's favor)
- **TCPA / Consent:** Plaintiff consented to receiving calls by an ATDS and never revoked that consent - [Kuch v. PHH Mortg. Corp.](#), No. 1:16-cv-00056 (W.D.N.Y. Dec. 15, 2021) (granting defendant's summary judgment motion)

Title Insurance Update

- **Breach of CPL:** Lender had no valid or enforceable closing protection letter against title insurer (North American), where lender subsequently received from the same issuing agent a closing protection letter from a second title insurer, because lender did not plead it ever validly accepted North American's CPL offer - [First IC Bank v. N. Am. Title Ins. Co.](#), No. 21-10537 (11th Cir. Dec. 15, 2021) (affirming dismissal of breach of contract claim against title insurer)
- **Breach of CPL / Agency:** Rejecting lender's argument that it accepted title insurer's CPL offer when lender sent closing funds to title insurer's former issuing agent, without actual knowledge that issuing agent was no longer title insurer's authorized issuing agent, because agent was lender's closing attorney and agent for the transaction, and, accordingly, lender (as the principal) was charged with constructive knowledge that agent was no longer an issuing agent of title insurer and had procured title insurance and a closing protection letter from subsequent title insurer - [First IC Bank v. N. Am. Title Ins. Co.](#), No. 21-10537 (11th Cir. Dec. 15, 2021) (affirming dismissal of breach of contract claim against title insurer)

- **Conversion Against Title Insurer / Agent's Misappropriation of Funds:** Lender not liable for conversion of funds by its former issuing agent because issuing agent was no longer title insurer's agent at the time lender sent issuing agent closing funds, and the knowledge that the issuing agent was no longer title insurer's issuing agent was imputed to lender when, shortly before closing, issuing agent received termination letter from title insurer - [First IC Bank v. N. Am. Title Ins. Co.](#), No. 21-10537 (11th Cir. Dec. 15, 2021) (affirming dismissal of conversion and estoppel claims against title insurer)
- **Conversion of Closing Funds / Identifiable Funds:** Although, under Georgia law, money transferred via wire and other electronic means has been held to constitute specific and identifiable funds for purposes of conversion action, lender was not seeking to recover all closing funds it wired to agent but, instead, was seeking to recover other sums it had subsequently paid to borrowers' prior lender due to title insurer's alleged breach of contract, and, therefore, lender failed to state a claim for conversion against title insurer - [First IC Bank v. N. Am. Title Ins. Co.](#), No. 21-10537 (11th Cir. Dec. 15, 2021) (affirming dismissal of conversion claim against title insurer)
- **Title Insurer's Manuals / Probative Value:** Insured was entitled to amend its claims against title insurer where title insurer's manuals were probative as to the protections offered and sold to the insured and therefore could support insured's claims for breach of contract and fiduciary duties - [HSBC Bank USA, N.A. v. Fidelity Nat'l Title Ins. Co.](#), No. 20-15387 (9th Cir. Dec. 9, 2021) (vacating and remanding the trial court's judgment on the pleadings in favor of title insurer and its denial of the insured's motion for leave to amend)
- **Settlement Agreement / Subsequent Claims Against Title Company:** Settlement agreement resolving then-pending claim regarding disbursement of earnest money funds did not preclude potential buyer from amending its complaint to add claims against title company where insured's claims were not pending at the time the settlement agreement was executed - [Spiritos v. Metro. Title of Ind., LLC](#), No. 21A-PL-892 (Ind. Ct. App. Nov. 30, 2021) (reversing trial court's denial of insured's motion for leave to amend)
- **Settlement Agreement / Third-Party Beneficiary:** Title company was not a third-party beneficiary of settlement agreement it did not execute, as agreement did not express a clear intent to benefit title company, nor did it clearly impose an obligation on one of the contracting parties in favor of title company - [Spiritos v. Metro. Title of Ind., LLC](#), No. 21A-PL-892 (Ind. Ct. App. Nov. 30, 2021) (reversing trial court's denial of insured's motion for leave to amend)

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