

Real Property, Financial Services, & Title Insurance Update: Week Ending May 27, 2022

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Real Property Update

- **Foreclosure / Service of Process:** Trial court properly denied the estate's motion to quash service in a foreclosure lawsuit filed by the bank for the court's failure to conduct an evidentiary hearing because, while a party contesting service of process is ordinarily entitled to an evidentiary hearing, the sum of the estate's evidence consisted of self-serving allegations by the personal representative and a neighbor's testimony that, even if accepted as true, would be insufficient as a matter of law to invalidate the facially valid return of service – [Estate of Torres v. U.S. Bank, N.A.](#), No. 3D21-1334 (Fla. 3d DCA May 25, 2022) (affirmed)
- **Chapter 718 / Condominium Act / Association / Special Assessment / Injunction:** Trial court appropriately dissolved the unit owners' preliminary injunction, which invalidated the special assessment levied due to insurance proceeds being insufficient to cover the cost of restoring a condominium building partially destroyed by fire, halted construction, and mandated the association convene a membership meeting and communitywide vote, where the association, as the sole governing entity, was authorized to operate the 17 buildings as a single condominium for financial purposes; thus, association was permitted to collect assessments for common expenses from all unit owners, as though each maintains ownership in a single condominium, and by way of a properly noticed meeting declaring the amount of the proposed assessment and its intended purpose due to the common elements needing repair urgently – [Lecorps v. Star Lakes Ass'n, Inc.](#), No. 3D21-2195 (Fla. 3d DCA May 25, 2022) (affirmed)

- **Chapter 718 / Condominium Act / Special Assessment / Injunction / Equity:** Dissolution of the unit owners' preliminary injunction was appropriate because allowing the injunction to stand would have been incompatible with equity principles where, by the time the trial court rendered its ruling, all but 17 of the nearly 400 unit owners had paid the assessment and the restoration was 80% complete – [Lecorps v. Star Lakes Ass'n, Inc.](#), No. 3D21-2195 (Fla. 3d DCA May 25, 2022) (affirmed)
- **Homeowners Association / Finality / Attorneys' Fees:** Given that an attorneys' fee award does not become final and ripe for review until the amount is set, HOA prematurely appealed a portion of the final judgment finding that its claim for unpaid assessments, fees, expenses, and court costs had been satisfied by prior payments from the homeowners because the trial court had not yet determined the HOA's entitlement nor an amount for the fees – [Sherbrooke Homeowners Ass'n, Inc. v. Chan](#), No. 4D21-385 (Fla. 4th DCA May 25, 2022) (affirmed in part and dismissed in part)
- **Real Property Ownership / Ecclesiastical Abstention Doctrine / Summary Judgment:** Pursuant to the ecclesiastical abstention doctrine, the trial court was obligated to defer to appellant church's characterization of its organization as hierarchical in nature and to recognize, as a matter of law, that it is a hierarchical church, and summary judgment resolving the dispute of ownership of real property in favor of the appellee church was inappropriate where there was a genuine issue of material fact as to appellee church's affiliation with and subordination to the appellant church – [Dist. Advisory Bd. of the S. Fla. Dist. v. Centro de Alabanza Oasis W. Palm Beach, Inc.](#), No. 4D21-756 (Fla. 4th DCA May 25, 2022) (reversed and remanded)

Financial Services Update

- **TILA & FDCPA Claims / Arbitration / Delegation Provision:** Mortgagor and mortgage servicer clearly and unmistakably agreed to delegate the question whether the parties' agreement to arbitrate the mortgagor's claims was enforceable under the Dodd-Frank Act to an arbitrator where two separate provisions of the third-party payment service provider's terms and conditions included an express delegation clause and an incorporation of the AAA's rules for consumer arbitrations – [Attix v. Carrington Mortg. Servs., LLC](#), No. 20-13575 (11th Cir. May 26, 2022) (reversed and remanded)
- **TILA & FDCPA Claims / Arbitration / Delegation Provision:** Compelling arbitration where the mortgagor did not specifically challenge the enforceability of the delegation agreement between the mortgagor and mortgage servicer, and thus the enforceability of the parties' agreement to arbitrate the mortgagor's claims under the Dodd-Frank Act with respect to his use of the third-party payment service provider's service was, under the parties' separate delegation agreement, a threshold issue for an arbitrator to decide – [Attix v. Carrington Mortg. Servs., LLC](#), No. 20-13575 (11th Cir. May 26, 2022) (reversed and remanded)

- **TILA, FDCPA & FCCPA / Mortgage Statements:** Mortgage statement containing additional debt collection language not required by TILA may constitute communication in connection with collection of a debt when —as here — they contain debt collection language that is not required by TILA or its regulations and the context suggests that they are attempts to collect or induce payment on a debt – [Daniels v. Select Portfolio Servicing, Inc.](#), No. 19-10204 (11th Cir. May 24, 2022) (reversing dismissal of complaint with prejudice)
- **FCCPA / Section 559.72(7) / Harassment:** Although mortgage servicer called debtor 372 times, it averaged less than one call per day and did not call him in rapid succession and thus did not rise to the level of harassment under the FCCPA – [Barlow v. NewRez, LLC](#), No. 8:20-cv-02451 (M.D. Fla. Mar. 7, 2022) (granting summary judgment for defendant on FCCPA claim)
- **TCPA / ATDS & Prior Consent:** There was no evidence that mortgage servicer used an ATDS to call debtor, but disputed issues of fact remained as to whether it used a prerecorded voice without consent – [Barlow v. NewRez, LLC](#), No. 8:20-cv-02451 (M.D. Fla. Mar. 7, 2022) (granting summary judgment in part for defendant)
- **FDCPA / FCCPA:** Purported misrepresentations in notice of default and claim of lien were not material enough to be actionable – [Toussaint v. Katzman Chandler, P.A.](#), No. 0:21-cv-60635 (S.D. Fla. Apr. 1, 2022) (granting defendant’s motion for summary judgment)
- **TCPA / Arbitration:** Arbitration clause in subscriber agreement did not cover TCPA claims involving marketing calls made after canceling their subscriptions – [Kelly v. McClatchy Co.](#), No. 2:21-cv-01960 (E.D. Cal. May 26, 2022) (denying motion to compel arbitration)
- **TILA:** Where borrowers defaulted on mortgage loan, resulting in increase to interest rate and change in payment schedule, there was no violation of TILA because lender is not required to disclose charges for actual unanticipated late payments, delinquency, default, or a similar occurrence – [Saint-Jean v. Emigrant Mortg. Co.](#), No. 1:11-cv-02122 (E.D.N.Y. May 24, 2022) (denying plaintiff’s motion for entry of judgment)

Title Insurance Update

- **Equitable Lien:** Remedy of constructive trust or equitable lien against homestead property was not warranted where there was no knowing conduct by debtors leading to their alleged unjust enrichment caused by receiving excess sales proceed that should have been paid to HUD – [In re Rodriguez](#), No. 8:21-ap-00318 (Bankr. M.D. Fla. May 10, 2022) (dismissing plaintiff’s claims)
- **Snap Removal:** Insured’s claims against title insurer could not be removed 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 Grp., Inc.](#), No. 2:21-cv-00257 (D. Nev. May 24, 2022) (granting motion to remand)

- **Snap Removal:** Insured's claims against title insurer could not be removed to federal court on diversity jurisdiction grounds where title insurer attempted to remove the case before the forum defendant had been served – [Wilmington Tr., N.A. v. Fidelity Nat'l Title Grp., Inc.](#), No. 2:21-cv-00406 (D. Nev. May 24, 2022) (granting motion to remand)
- **Snap Removal:** Insured's claims against title insurer could not be removed 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 Grp., Inc.](#), No. 2:21-cv-00273 (D. Nev. May 24, 2022) (granting motion to remand)

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