

Real Property, Financial Services, & Title Insurance Update: Week Ending September 27, 2019

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Real Property Update

- **Construction Lien:** a delinquency charge of 1.5 percent found in materialman's contract with general contractor is not a finance charge recoverable under the materialman lien statute, Florida Statutes section 713.06(1) - [Fernandez v. Manning Bldg. Supplies, Inc.](#), No. 1D18-4819 (Fla. 1st DCA Sept. 25, 2019) (affirmed in part, reversed in part, and remanded)
- **Partition:** where property was titled as joint tenants with rights of survivorship and the facts created the presumption of a gift from one co-tenant to the other, the co-tenant paying the obligations of the property was entitled to a credit from the proceeds of the partition sale for the other co-tenant's proportionate share of those expenses - [Fernandez v. Marrero](#), No. 3D16-2931 (Fla. 3d DCA Sept. 25, 2019) (affirmed and remanded)
- **Original Jurisdiction / Aggregation:** plaintiffs, each former tenants in an apartment complex, not permitted to aggregate claim to meet the \$15,000 threshold for circuit court jurisdiction, where the plaintiffs' claims were similar, but based on different factual situations - [Bejarano v. City of Hollywood](#), No. 4D18-2613 (Fla. 4th DCA Sept. 25, 2019) (affirmed in part, reversed in part, and remanded for transfer to the county court)
- **Partition / Attorney Fees:** Florida Statutes section 57.041(1) mandates that the standard used to determine an award of court costs is the "party recovering judgment" and not the "prevailing party" standard - [Sherman v. Sherman](#), No. 4D18-3578 (Fla. 4th DCA Sept. 25, 2019) (reversed and remanded)

Financial Services Update

- **TCPA / ATDS / Definition:** TCPA's definition of ATDS compels conclusion that to constitute an ATDS, the system must possess the capacity to: (1) store telephone numbers using a random or sequential number generator; or (2) produce telephone numbers using a random or sequential number generator - [Denova v. Ocwen Loan Servicing](#), No. 8:17-cv-02204 (M.D. Fla. Sep. 24, 2019) (reasoning that under ACA International, FCC's 2003 and 2008 declaratory rulings merit no deference)
- **TCPA / ATDS / Predictive Dialer:** Ocwen's Aspect predictive dialer system does not constitute an ATDS under the TCPA - [Denova v. Ocwen Loan Servicing](#), No. 8:17-cv-02204 (M.D. Fla. Sept. 24, 2019) (granting summary judgment against plaintiff)
- **FDCPA / False Service:** practice of obtaining a default judgment by filing false affidavits of service is actionable under the FDCPA - [Carroll v. U.S. Equities Corp.](#), No. 1:18-cv-00667 (N.D.N.Y. Sept. 24, 2019)

Title Insurance Update

- **Insured Legal Access:** title insurer entitled to new trial on liability and damages on insured's claim for lack of access through an existing gated community and over the private roads contained therein where (i) in a prior action, insured had been granted easement by necessity through the gated community and over the roads therein; but (ii) trial court erroneously interpreted prior ruling as "finally determin[ing]" that insured had no right to enter and use the roads within the gated community - [Rio Mesa Holdings, LLC v. Fidelity Nat'l Title Ins. Co.](#), No. F074641 (Cal. Ct. App. Sept. 24, 2019) (reversed and remanded for new trial on liability and damages)

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