



## Court Ruling in Coral Lakes Foreclosure Discussed

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Before addressing reader questions, I would like to report on a very important case for homeowners' associations regarding assessment collections and mortgage foreclosures.

On February 19, 2009, Florida's Second District Court of Appeal (which has jurisdiction over Lee, Collier, and Charlotte Counties, among others), issued an opinion in the case of Coral Lakes Community Association, Inc. v. Busey Bank, et al. The appeal arises from a first mortgage foreclosure action filed by Busey Bank (the "Bank") against homeowners who had allegedly defaulted in the payment of their mortgage. Coral Lakes Community Association, Inc. (the "HOA") was also named as a defendant in the action because of its interest in the property relating to unpaid assessments. The Bank obtained a final judgment foreclosing its mortgage. The final judgment determined the Bank had no liability to the HOA for past due assessments.

The HOA claimed that it was entitled to past due assessments pursuant to Section 720.3085(2) of the Florida Statutes, a law commonly called the Florida Homeowners' Association Act. The relevant subsection of the statute provides if a first mortgagee takes title to a parcel in a homeowners association through foreclosure, the mortgage holder is obligated to pay twelve months of unpaid assessments which accrued immediately preceding

the transfer of title, or one percent of the original mortgage debt, whichever is less. However, the HOA's Declaration of Covenants and Restrictions in this case provided that if any person acquired title as a result of foreclosure of a first mortgage, the party acquiring title would not be liable for any delinquent assessments owed to the HOA, and which accrued prior to the time of taking title.

The appellate court concluded the Declaration's plain and unambiguous language controlled over the liability established by the statute. The court reasoned that the Bank was a "third party beneficiary" of the Declaration, which is a contract between the HOA and its members, and that the application of the statutory liability upon the Bank would impair the Bank's contractual rights. The court explained "the HOA could have protected itself if, in drafting its Declaration, it had included language that its lien for unpaid assessments related back to the date the Declaration was recorded or that it otherwise had lien superiority over intervening mortgages." The court continued, "however, the HOA took the opposite tack to entice lenders to finance in its community. The statutory change is section 720.3085 cannot disturb that prior, established contractual right."

Since the decision was announced, there has been a great deal of debate as to how far-reaching its impact will be. Clearly, the decision has no effect

on condominium associations, where the law was changed back in 1992 to establish the responsibility of foreclosing lenders regarding payment obligations for past due assessments (in general, a foreclosing lender in the condominium context must pay six months of unpaid assessments or one percent of the original mortgage debt, whichever is less).

Interestingly, the Coral Lakes case arose under a previous version of the Homeowners' Association Act, which has since been amended. Further, the decision hinged upon the specific language found in that community's documents.

Undoubtedly, this case will be argued by lenders as precedent, although how far those arguments will carry remains to be seen. One thing is for certain. Every homeowners' association should look at the provisions of its covenants to determine how they allocate past-due assessment liability.

**Q:** Several members of my condominium association cannot agree on a very basic issue. Specifically, our bylaws have many notice requirements for member meetings and board meetings that are in stricter than those contained in the Florida Condominium Act. Several members think that the statute takes priority over the bylaws and that we can ignore the bylaws. But I, and a

few others, believe that the association has the right to add additional notice requirements and that those additional requirements are valid. Who is correct? **G.A. (via e-mail)**

**A:** The example you cite of having greater notice requirements in the bylaws than are set forth in the statute is not a conflict. The statute sets out the minimum notice requirements. However, at least in my opinion, more restrictive notice requirements may be included in the governing documents. Remember, the Condominium Act is, in many ways, a consumer protection act that sets out minimum protections for condominium unit owners. It is not a conflict and not a violation of the Condominium Act to require a 30-day notice for a special members' meeting, although the Statute only requires 14 days notice. Clearly, in that situation, the Condominium Act provision is satisfied.

An example of a more restrictive requirement in the other direction involves the recall provisions in the Condominium Act. The Condominium Act provides that a director can be recalled upon approval of a majority of all unit owners. If a governing document provision called for the approval of two-thirds of the members to recall a director, then the majority requirement of the Condominium Act would control.

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