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## **THE INS AND OUTS OF CORAL LAKES**

**By: Clayton & McCulloh, P.A.**

Many Associations, in light of the recent decision handed down by Florida's First District Court of Appeals in Coral Lakes Community Association v Busey Banks, 35 Fla. L. Weekly D431, have increased concerns about their ability to collect past due assessments on properties that are subject to foreclosure. This article is an attempt to address these concerns, as well as clarify and shed light on the impact of the Coral Lakes decision. Ultimately, it is impossible to know the full and complete impact of the Coral Lakes decision, however, it is clear that the immediate practical impact and level of harm it may cause Homeowners Associations is significantly dependent upon the facts of each separate and distinct mortgage foreclosure lawsuit to which the Homeowners Association is now or will be a party.

As a preliminary matter, the Coral Lakes decision applies only to Homeowners Associations that are governed under Chapter 720 of the Florida Statutes and does NOT apply to Condominium Associations governed under Chapter 718 of the Florida Statute. As such, any impact that the Coral Lakes decision may have is limited to Homeowners Associations that are seeking to collect the 12 months of past due assessments provided for under *Section 720.3085, Florida Statutes*. Additionally, the Coral Lakes decision only applies to Homeowners Associations that are named Defendants in foreclosure actions where the Plaintiff Bank is the first mortgagee and is foreclosing on its own mortgage that was recorded prior to 2007, and the Homeowners Association is seeking to collect past due assessments under *Section 720.3085, Florida Statutes*.

The First District Court of Appeals actual ruling in Coral Lakes is that the holder of a first mortgage is a third party beneficiary of the contract between the Association and homeowner (i.e., the Declaration). As a third party beneficiary, the first mortgagee has vested contractual rights at the time it makes the loan and takes back the mortgage on the property. Hence, if, at the time the first mortgagee is granted the mortgage by the homeowner, the Association's Declaration stated that the Association's lien is subordinate to and inferior to the first mortgage, then any subsequent statute (i.e., *Section 720.3085, Florida Statute*) that purports to create liability where none existed would constitute an unconstitutional impairment of contractual rights. Therefore, the Court determined that a mortgage entered into prior to 2008 was not bound by the 2008 Amendments to the statute, but rather would be subject to the statute as it existed at the time the mortgage was created. In other words, if there was no applicable overriding statute at the time the mortgage was given, then the Association's Declaration would control.

While the above discussion to some degree does limit the right to collect past due assessments by some Homeowners Associations under Section 720.3085, *Florida Statutes*, there are other factors which are critical to performing a thorough and complete analysis of each individual mortgage foreclosure lawsuit. Before any determination can be made as to whether or not the rights of a Homeowners Association under Section 720.3085 have been limited in light of the Coral Lakes decision, the Association and the Association's law firm must consider, at a minimum, the following; (1) is the Plaintiff in the foreclosure lawsuit the true first mortgage holder; (2) has the Homeowners Association been named a party Defendant; (3) does the Declaration incorporate future statutory amendments; (4) when was the mortgage recorded; (5) when was the Association's lien recorded; (6) was the Association named a party Defendant in the mortgage foreclosure case; and, (7) whose name appears on the Certificate of Title and Certificate of Sale.

Given the above, it is important that the Association and the Association's law firm evaluate each mortgage foreclosure separately, as the application of Coral Lakes will be dependent upon a number of individual factors that must be evaluated in each and every single mortgage foreclosure lawsuit prior to making the determination of the effect, *if any*, of the Coral Lakes decision.

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