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# Community Associations –

# Legal Battles and Future Implications

The law regarding Community Associations ("Associations") has been in constant flux over the last few years due in large part to the foreclosure crisis. Associations and financial-institution mortgagees have been battling in the courts and the Florida Legislature over what little value remains in the liens and mortgages on Florida homes. Below, we discuss some of the recent fights and future implications.

Associations fired the first shots when they began using § 718.116 and § 720.3085, Fla. Stat., to hold prior mortgagees that take title through foreclosure liable for a portion of the past due assessments owed by the prior owner. (Supporters of mortgagees in the legislature had already statutorily limited the liability of such prior-mortgagees to 6 and 12 months, respectively, or 1% of the original value of the foreclosed mortgage debt.) Mortgagees struck back in Coral Lakes Community Assoc., Inc. v. Busey Bank, N.A., 30 So. 3d 579 (Fla. 2d DCA 2010). Most homeowners association declarations prior to the enactment of § 720.3085, Fla. Stat., in 2007 provided mortgagees taking title through foreclosure or deed in lieu thereof with total immunity from liability for the unpaid assessments of the prior owner. Many if not most such declarations incorporated the law as it was at the time of recording the declaration, *but did not explicitly incorporate future revisions to the law*. The Third District Court of Appeals determined in Coral Lakes that application of § 720.3085(2), Fla. Stat., regarding joint liability for the unpaid assessments of the prior owner, was unconstitutional where the lender obtained its mortgage under a declaration that provided mortgagees greater protection than does § 720.3085, Fla. Stat., and the declaration did not incorporate future revisions to the law. This decision was followed on March 30, 2011 by a similar ruling by The Fifth District Court of Appeals in Ecoventure WGV, Ltd. v. St. Johns Northwest Residential Ass'n, 56 So. 3d 126 (Fla. 5th DCA 2011). Lenders were relieved that they would not be liable for past due assessments on many of their mortgages. However, homeowners associations that had not been receiving payment of assessments because their homeowners were in foreclosure suddenly learned that they would now receive no recovery of past due assessments following foreclosures that were dragging on for years.

Simultaneously, Associations and mortgagees were battling on a second front. Associations began obtaining rulings that mortgagees are liable for assessments that come due during the mortgage foreclosure process if the mortgagee has delayed the foreclosure process. However, victory was again short lived. On December 2, 2009, The Third District Court of Appeals decided U.S. Bank National Ass'n v. Tadmore, 23 So. 3d 822 (Fla. 3rd DCA 2009). The court held that because both § 718.116 and § 720.3085, Fla. Stat., determine the liability of mortgagees, taking title through foreclosure, based on the date that the Clerk of Court issues the Certificate of Title, courts cannot force a mortgagee to pay assessments until such title transfer. Thus, it became clear that while Associations could try to move the case along more quickly (through setting status conferences and setting cases for trial) mortgagees could draw out actual payment to the Associations for years. All the while, the Associations would have to pay for any upkeep done to the properties because the delinquent owners had stopped doing so long ago. Associations would have to await recovery until the mortgagee obtained final judgment of foreclosure, held the foreclosure sale and obtained title through the Clerk of Court. Moreover, in many cases where a homeowners association was involved, the new owner would not have to pay any of the delinquent assessments based on the holding in Coral Lakes.

However, Associations found a champion in the bankruptcy court. On July 13, 2011, the United States Bankruptcy Court for the Southern District of Florida decided In re Spa at Sunset Isles Condominium Ass'n, 2011 Bankr. LEXIS 2867 (Bankr. S.D. Fla. July 13, 2011), that despite any prohibition under Florida law against requiring mortgagees to pay assessments prior to taking title, 11 USC § 506(c) permits the court to require that where a debtor-association expends a reasonable amount to pay for a necessary expense, a creditor can be required to contribute funds if the creditor benefited from the expenditure. Nevertheless, Associations must file for bankruptcy before 11 USC § 506(c) can apply. Consequently, this ruling is unlikely to tilt the balance significantly in favor of Associations.

In desperation, Associations through their supporters in the Florida Legislature opened another front, this time targeting delinquent owners that use their property for investment purposes. Amendments last year to both § 718.116 and § 720.3085, Fla. Stat., allow Associations to demand that tenants of owners delinquent in paying assessments for more than 90 days pay a portion of their rent directly to the association or face eviction by the association. Because delinquent owners now faced the possible loss of paying tenants through forced eviction, many quickly paid the outstanding amounts. Amendments in 2011 now allow the Associations to demand that the tenants pay all such rents to the association, and the association can apply the rents to both present and past obligations of the owner. However, the shadow of Coral Lakes's unconstitutionality looms over association forces here again. On April 29, 2011, TCR Holdings, Inc v. Windsor West Condominium Association, Inc. was filed in the Middle District of Florida claiming that the tenant demand process permitted by Florida Statutes deprives owners of their property without due process as afforded by the Fourteenth Amendment to the U.S. Constitution. If the Associations fail here yet again, their options for revenue will continue to dry up. If Associations are further starved of revenue, expect to see increased use of 11 USC § 506(c) as more Associations seek bankruptcy protection.

*Dean Mead assists lenders, associations, developers and owners navigate the foreclosure morass. Please speak with one of our attorneys for more information regarding how we can assist you with your particular needs. You may contact Mr. Pugh at jpugh@deanmead.com.*