

# COMMUNITY COUNSEL

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## Recent Cases

- ♦ **Is a Cooperative unit an interest in real property for purposes of the decedent and devise of property under a will? Reluctantly an appellate court says no, but asks the Florida Supreme Court to decide.**
- ♦ **Condo Association has the right to rent docks and keep the proceeds after the rights of another expire.**

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## What Foreclosures Mean to Associations

The tide has certainly turned in the real estate market and not for the best. Since the beginning of the new year, there have been over 45,000 mortgage foreclosure cases filed in Florida, up 55 percent over last year. With increasing insurance premiums, property taxes and adjustable mortgage rates changing, owners are facing an uphill battle in keeping their homes. What does this mean for Associations? You need to closely monitor delinquent accounts.

If a property goes into mortgage foreclosure, Associations should turn the case over to their attorney for monitoring. The attorney will determine the priority of the Association's interest. You would be surprised at the number of homes that have multiple mortgages so it is definitely worth reviewing the issue of priority. Unfortunately, Associations do stand to lose all or a substantial portion of the amounts owed, if the property is foreclosed and the first mortgagee takes title. In a condominium, the Association, pursuant to Section 718.116(1), F.S., can recover only the lesser of one percent of the original mortgage amount or six months of the past due assessments from the first mortgagee. With homeowners' associations, there is no statutory equivalent, so the first mortgagee has no liability for any portion of the past due assessments. As to secondary mortgage holders, condominium associations are also statutorily protected in that Section 718.116(5)(a), F.S., provides that the Association's claim of lien is superior to a second mortgage and thus the junior mortgage holder is responsible for paying all of the past due assessments owed to the Association if the junior lienholder takes title.

Again, there is no similar statutory provision relating to homeowners' associations so you would need to look at the Association's governing documents for specific language stating that the Association's lien is superior to second mortgage holders.



All may not be lost if the property is purchased by a third party bidder rather than the first mortgagee at the foreclosure sale. If the sale produces surplus funds, the Association can certainly petition the Court for distribution of these funds to pay the amounts owed to the Association. In order to be entitled to the surplus funds, the Association has to be first in line after the first mortgage, or there must be sufficient surplus funds to pay all lienholders.

**IN 2007, THERE HAVE BEEN OVER 45,000 MORTGAGE FORECLOSURE CASES FILED IN FLORIDA; UP 55% OVER 2006.**

Many Associations will see multiple units going into mortgage foreclosure in light of the current market. It is best to cease any collection activity on the part of the Association after a mortgage foreclosure case has been filed. Why spend money on collections if the return on that money is

probably zero? Associations need to watch the monies spent since the budget may be affected if too many properties fall into foreclosure. Boards may want to consider working out short payment arrangements with the owners in an effort to collect the monies owed instead of forcing the owner into mortgage foreclosure where the Association may not recover any of the past due amounts. Although mortgage foreclosure in some cases may be inevitable, Associations must take a proactive approach to collections.

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## RECENT CASE SUMMARIES

In **Phillips vs. Hirshon**, 32 Fla. L. Weekly D1151a (Fla. 3<sup>rd</sup> DCA May 2, 2007), Phillips, as the ex-wife of Owner, brought an action on behalf of her minor son to impress a cooperative ("coop") residential apartment with the character of protected homestead for purposes of the devise and descent provision of Florida's homestead law, and the Florida Constitution. The Florida Constitution prohibits the devise of homestead property to a third person where the owner is survived by a spouse or minor child. Phillips argued that because the coop was occupied under a long term proprietary lease received in conjunction with the purchase of an interest in the coop, the property was protected homestead property under Florida law. Owner died on April 1, 2003, survived by two children. When Owner died, one of his children was still a minor. In his will, Owner devised a life estate in the coop property to "his lifetime friend" without regard to his child's interest. Phillips' main argument was that the coop was homestead property in the hands of Owner at the time of his death, and therefore was not subject to devise by him to a third party under Article X, section 4(c) of the Florida Constitution, which declares that "homestead shall not be subject to devise if the owner is survived by a spouse or minor child." Because there was a minor child at the time of Owner's death, Phillips claimed that the bequest of the homestead failed as a matter of law. The trial court dismissed the action with prejudice and held that a coop is not homestead for the purpose of devise and descent as provided by the Florida Constitution. On appeal, the Third District Court of Appeal noted that homestead under Florida law is given meaning in three different contexts: taxation, exemption from forced sale, and devise and descent. The protection from taxation is governed by Article VIII, Section 6 of the Florida Constitution. The latter two benefits, forced sale and devise and descent, are governed by Article X, section 4, of the Florida Constitution. The appellate court noted that the Florida Supreme Court had previously ruled on this exact issue and held that ". . . a cooperative apartment may not be considered homestead property for the purpose of subjecting it to Florida Statutes regulating the descent of homestead property." Phillips conceded that unless the prior Florida Supreme Court case could be distinguished, then the appeal lacked merit. Phillips argued however, that since the prior holding of the Florida Supreme Court, the Florida Legislature adopted a new Cooperative Act outlined in Chapter 719, Florida Statutes. Phillips argued that the purpose and intent of the new Cooperative Act was to put coops on an equal footing with all other interests in real property. The appellate court found Phillips arguments intriguing. However, the appellate court noted that its proper institutional role obligated the appellate court to adhere to the prior decision of the Florida Supreme Court and thereby it was prohibited from overruling established precedent. Therefore, the appellate court affirmed the decision of the trial court and upheld the dismissal of the claim. However, the appellate court certified the question to the Florida Supreme Court as a question of great public importance. More on this as the case advances.

In **Thornhill vs. Admiral Farragut Condominium Apartments Association, Inc.**, 32 Fla. L. Weekly D1347(a) (Fla. 3<sup>rd</sup> DCA May 23, 2007), Owner brought an action for declaratory and other relief against Association. Owner claimed that the condominium declaration was ambiguous, or alternately that the declaration contained a requirement for a unit owner vote to permit Association to continue renting the dock facilities. As originally written, the declaration expressly authorized the rental of docking facilities. The declaration conferred the right on Robert Madison Company, Inc., to be the initial manager of dock rentals, but upon expiration of that company's management rights, Association was free to take over responsibility for management of those rentals. All of the proceeds of the rentals were to be payable to Association for its own use and benefit. The declaration granted to Robert Madison Company, Inc., the right to manage the common element docking facilities for a term of ten (10) years. Owner alleged that once this term expired, Association could not continue to charge rentals for the common element docking facilities. The trial court granted a partial final judgment in favor of Association. On appeal to the Fourth District Court of Appeal affirmed the judgment in favor of Association.