

## Florida Continuing Care Retirement Communities (CCRC) Regulatory Issues Update

Article By:

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On January 11 the First District Court of Appeal, State of Florida issued its opinion in the *Devonshire* case discussed in our earlier blog of October 25, 2012 overturning the lower court ruling and holding that the Department of Financial Services ("DFS") does not have the authority to act as receiver of a provider or impose its power of stay under Chapter 631 by virtue of the circumstances of the case and the application of section 651.114(8) (a). The appellate court upheld the facility's position that the DFS has no jurisdiction if the mortgagee agrees to honor the contract rights of the residents in the underlying mortgage in light of the subordination of the rights of the DFS under 631 to the rights of a mortgagee under that section of Chapter 651. DFS is not challenging the order but the Office of Insurance Administration may be looking into legislative amendments to address the issue.

The ruling creates a number of concerns. Section 651.114 (8)(a) was implemented to address a vacuum in the provisions of Chapter 651 regarding the rights of a mortgagee or trustee and the Department of Insurance in the context of enforcement proceedings filed by the mortgagee or trustee. It was not intended to insulate a provider from the regulatory powers granted to DFS under 631 or OIR under 651 by virtue of the inclusion of the resident right protection language in a mortgage which is not the subject of enforcement action by the mortgagee or trustee. If the mortgage or trustee prefers to have the DFS or OIR proceed to exercise their respective rights and remedies under 631 or 651 rather than foreclose and seek such other relief in that proceeding such as the appointment of a receiver and rent sequestration it was intended that it be able to do so. There may be many situations in which this would be not only beneficial to the lender but also to the residents and the overall financial condition of the facility. Benefits to a cooperative approach in the regulatory process such as sharing of regulatory and industry experience, cooperation in the pursuit of common goals including value preservation and expense reduction may be adversely affected if the lender is required to foreclose to protect its position and its collateral because there is no alternative regulatory remedy available. The true beneficiaries of section 651.114 (8) are the residents not the borrower/provider. Legislative clarification is necessary to correct this judicial oversight for all participants in the industry including providers.

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