

COMMUNITY COUNSEL

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RECENT CASES

- ◆ APPELLATE COURT WRONGLY CONSTRUES COMMON AREAS TO BE EQUIVALENT TO COMMON ELEMENTS AND PROHIBITS DELINQUENT TAX SALE OF CONDOMINIUM SWIMMING POOL.
- ◆ COURT STRIKES FORECLOSURE JUDGMENT FOR SPECIAL ASSESSMENTS WHICH WERE NOT LISTED IN EITHER THE CLAIM OF LIEN OR THE LAW-

THE INFORMATION GIVEN IS SUMMARY IN NATURE, FOR EDUCATIONAL PURPOSES. IT IS NOT INTENDED AS SPECIFIC OR DETAILED LEGAL ADVICE. ALWAYS SEEK INDEPENDENT LEGAL COUN-

Red Flag Rules

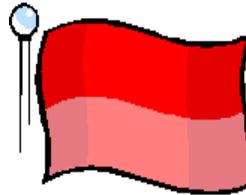
“Red Flag Rules” are new regulations promulgated by the Federal Trade Commission that will apply to any entity that extends credit for goods or services.

They are designed to mandate that such entities prepare and implement reasonable internal procedures to catch warning signs (the red flags) of possible identity theft, and to minimize both the possibility of theft and the damage that could occur if identity theft takes place.

Both lawyers and community associations have been taking action to try to exempt themselves from the scope of these rules so that they do not have to undertake the burden of creating and implementing red flag rules.

In the case of the Bar, last week a federal court entered an injunction prohibiting the rules from being applied to lawyers. In the case of community associations, there is considerable doubt as to whether the obligation to comply with the FTC’s mandate applies, and if so, which types of community associations must comply. Perhaps because of the recent court decision and the general uncertainty over which businesses are covered by the rules, late last week the FTC delayed the effective date of the Red Flag Rules from November 1, 2009 to June 1, 2010. The issue for community associations is

whether they can be said to accept installment payments in the form of periodic payment of regular and special assessments, or other required payments. The answer may depend both on what type of community is involved and how the governing documents of the community are written.



For example, in a condominium, Chapter 718 discusses annual and special assessments. While both the statute and the governing documents may refer to payment installments, is this an extension of credit or is the assessment completely due, and merely payable according to a set schedule?

KEEP A WATCH FOR RED FLAG RULES AND BE PREPARED TO ADOPT AND IMPLEMENT YOUR OWN .

The Community Associations Institute (“CAI”) has prepared a short analysis of the current version of the

FTC’s Red Flag Rules, and has also prepared a model template for internal procedures it believes meet the requirement of the current draft rules. These documents are available at the following the CAI website:

[http://www.caionline.org/govt/news/PoliticalHeadsUpPublicDocumentLibrary/FTCRedFlagRuleHead'sUp\(New\).pdf](http://www.caionline.org/govt/news/PoliticalHeadsUpPublicDocumentLibrary/FTCRedFlagRuleHead'sUp(New).pdf)

But stay tuned for likely changes.....

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RECENT CASE SUMMARIES

In **Village of Doral Place Association, Inc., vs. RU4Real, Inc., et al.**, 34 Fla. L. Weekly D2106a (Fla. 3rd DCA October 14, 2009), Association brought suit to determine whether Association's common area, namely a swimming pool, could be sold by tax deed to Buyers after the Association failed to pay the tax bill. Association operates a 331 unit condominium located in Miami, Florida. On January 1, 1998, the date for assessment of the 1998 taxes, the developer was in control of Association and was the record owner of Tract F, on which the condominium swimming pool was located. In June 1998, developer turned over control to Association. By quitclaim deed, developer conveyed title to Tract F to Association. The public property record was changed to reflect that Association was the new owner of Tract F. The property appraiser placed a value of \$83,464 on Tract F and a tax bill for \$2,593.85 was sent to the property manager for Association. The property manager failed to pay the taxes and, according to Association, failed to inform Association about the tax bill. In due course, a tax certificate was sold to a local bank, which in turn conveyed it to appellee Buyers. After two years, Buyers applied for a tax deed. Notice of the application was addressed to Association and mailed to property manager. Buyers purchased Tract F for \$57,000 at the public sale. Buyers came to the property and installed fences which barred access to the swimming pool. Association filed suit in circuit court seeking an injunction to restore access to the swimming pool. Association requested that the tax deed be set aside and request a declaratory judgment. The trial court issued a temporary injunction allowing swimming pool access to the unit owners, and requiring Association to maintain the pool. The court declined to set aside the tax deed, accepting the argument of the property appraiser and the tax collector that this relief was barred by the tax non-claim statute. Finally, the court granted declaratory relief, holding that when Buyers bought Tract F at the public sale, Buyers took the property subject to the already existing condominium declaration, and that Association and unit owners are entitled to the exclusive use and enjoyment of the swimming pool. Association appealed and Buyers cross appealed. On appeal to the Third District Court of appeal, the court held that the tax deed sale was illegal because it violated Section 718.107, Fla. Stat. Specifically, Tract F is part of the condominium property which is not subject to exclusive ownership and therefore by definition Tract F is a common element. Under the plain language of the statute, a separate sale of a condominium's common elements is prohibited.

In **Miller vs. Evergreen Lakes Homeowners Association, Inc.**, 34 Fla. L. Weekly D2038a (Fla. 4th DCA, October 7, 2009) Owner appealed a judgment of foreclosure entered in favor of Association. Association filed a claim of lien against Owner's unit, and thereafter filed a foreclosure complaint against Owner because Owner neglected to pay certain maintenance assessments. The final judgment of foreclosure awarded Association a total of \$4,432.34 in past due maintenance assessments, late fees, and special assessments and reserved jurisdiction to award attorneys' fees and costs. Owner had closed on the purchase of a unit in Association in December of 2005. As a unit owner, Owner was a member of Association and was obligated to pay assessments. When Owner closed on the home, he paid an assessment equal to the first three months of assessments. Owner neglected to make any timely maintenance assessment payment for April, May or June of 2006, so Association notified Owner of his outstanding debt and filed a formal claim of lien. When Owner failed to make payments, Association filed the action for foreclosure and breach of contract. Following a bench trial, the trial court entered a final judgment of foreclosure, awarding Association maintenance assessments from April 2006 through April 2008, as well as corresponding late fees, and two \$390.72 special assessments that had been due on May 15, 2007, and June 15, 2007, plus their corresponding late fees. On appeal, the Fourth District Court of Appeal affirmed the trial court's award as to the maintenance assessments. However, the appellate court reversed that portion of the award related to the two special assessments because these assessments were not contained in the pleadings and were not secured by the claim of lien for continuing maintenance assessments.