"THE GAME-CHANGING KAUFMAN ANALYSIS: AN EXPLANATION OF WHAT LAW APPLIES TO YOUR COMMUNITY ASSOCIATION."

BY:

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I. WHAT LAW DOES (OR DOES *NOT*) APPLY?

This is the first question EVERY attorney should be asking anytime a legal question is presented. We deal with contracts, legislatively-created statutes, decisions from cases known as common law, and the constitution, just to name a few. Reading, interpreting and applying the wrong law to a legal issue may even result in bad legal advice, filing a lawsuit in the wrong court, making business decisions based upon misinformation, and countless others. If you are not an attorney licensed by the state, interpreting law also constitutes the "Unlicensed Practice of Law", or "UPL", which is discussed more later on in this handout.

II. "KAUFMAN LANGUAGE" – WHAT IT IS (AND ISN'T).

In 1977, one of the most important cases in community association law was decided and is known as *Kaufman v. Shere*, 347 So.2d 627, 628 (Fla. 3d DCA 1977). This case dealt with the question of whether a brand-new statute in the Condominium Act, prohibiting escalation of rent clauses in condo recreation leases, could be applied retroactively (backward in time) to existing declarations that already allowed such rent increases. Because this new law did not go into effect until June 5, 1975, it was argued that the law was unconstitutional because it took away a previously existing substantive right and violated two parties' constitutional right to and freedom of contract.

The trial court did not agree with this argument for one very specific reason—the association's declaration contained what is now known as "Kaufman language", which reads:

> The provisions of the Condominium Act as presently existing, or ***as it may be amended from time to time***, including the definitions therein contained, are adopted and included herein by express reference.

Because the Kaufman Declaration expressly incorporated the Condominium Act "as it may be amended from time to time," the court agreed that the brand-new law prohibiting escalation clauses automatically became part of the Declaration as of June 5, 1975, as if it was expressly written in.

Without Kaufman language, an association's declaration generally must be applied according to the Condominium (or Homeowners' Association) Act as it existed on the date the declaration is recorded, ***not*** the current date.

So, if your association's declaration does ***not*** include Kaufman language, it might read something like this:

> Developer is the owner of record of this Condominium Property and does hereby submit same to condominium ownership pursuant to the Condominium Act, Chapter 718, Florida Statutes, ***as amended through the date of recording this Declaration.***

III. WHY THIS MATTERS TO YOU.

New laws get passed all the time, and Kaufman can apply in a wide variety of contexts. In June of 2021, for instance, in the case of *De Soleil S. Beach Residential Condo. Ass'n, Inc. v. De Soleil S. Beach Ass'n, Inc.*, No. 3D19-2013, 2021 WL 2212867, at *1 (Fla. 3d DCA 2021), association members learned that their voting rights were being improperly suspended.

In De Soleil, a Residential Association tried to suspend the voting rights of a majority of its members. Its legal basis was that in 2010, Section 718.303, Florida Statutes, was amended to add subsection (5), for the first time permitting an association to "suspend the voting rights of a member due to nonpayment of any monetary obligation." Prior to that amendment, however, the Condominium Act did not give an association the right or remedy to impair or suspend the voting rights of its members for nonpayment. The court found that the Declaration, recorded in 2006, had no Kaufman language, meaning that the Declaration adhered only to the Condominium Act as it existed in 2006. Further, suspension of voting rights was not among the remedies listed in the Declaration for nonpayment.

Take assessment liens as another example. At least as to a surplus from the sale of a tax foreclosure, an association generally does not need to record its assessment lien in order argue it has priority over and is entitled to the surplus because its "statutory lien" found in F.S. 718.116(5)(a) relates back in time to the date the original declaration is recorded. This was the case in *Calendar v. Stonebridge Gardens Section III Condo. Ass'n, Inc.*, 234 So. 3d 18, 19 (Fla. 4th DCA 2017), where Unit Owner Mrs. Calendar unsuccessfully argued she was entitled to the surplus. However, the statutory lien did not exist until April 1, 1992. Had the condominium existed prior to that date, its declaration would not permit the association to claim relation back priority unless it contained Kaufman language (i.e., "as amended from time to time"). HOAs have a similar statutory lien, but it did not go into effect until July 1, 2008. Prior to that date, unless the declaration included language the lien relates back to the date it was recorded, there would need to be Kaufman language to incorporate new provisions.

As yet another example can be found regarding Board of Director term limits. Effective July 1, 2018, Section 718.111(2)(d)(2) was amended to read as follows:

> A board member may not serve more than 8 consecutive years ~~four consecutive 2 year terms~~, unless approved by an affirmative vote of unit owners representing two-

thirds of all votes case in the election ~~the total of voting interests of the association~~ or unless there are not enough eligible candidates to fill the vacancies on the board at the time of the vacancy.

There is no language at any place in the 2018 amendments suggesting that the new law is to apply retroactively (more on that later). In the Arbirtration Case of *Glanz v. Hidden Lake of Manatee Owners Association, Inc.*, Arb. Case No. 2019-01-5048, the question was whether Mr. Glanz was improperly denied a seat on the board of directors following a contested election, due to his consecutive years of previous service on the board. The association's declaration was recorded in June of 2005 and did not include Kaufman language. Our office successfully argued (and the arbitrator agreed), that the director terms limit statute above does not apply retroactively and, therefore, will only apply if Kaufman language is present. Because Mr. Glanz was tied with two other candidates for the most votes for five open seats, and because his years of service on the board prior to the 2018 amendment should not have been included, he was reinstated to the board to fill the unexpired term of one of the vacant seats.

IV. BUT WAIT, THERE'S MORE. LOTS MORE!

So, your attorney looked at your declaration, and determined that there is Kaufman language, in which case the most recent version of the Condominium or Homeowners' Association Act applies, or that there isn't Kaufman language, in which case the Act in existence when the declaration was recorded applies. We now know what law applies, right? Not necessarily. Without the magic Kaufman language, newly enacted statutes can still apply retroactively.

Article I, Section 10 of the Florida Constitution provides that "no...law impairing the obligation of contracts shall be passed." The legislature cannot retroactively impair, alter, or create substantive rights of parties to preexisting contracts. However, one example of laws that do not do this are procedural laws. So, the next step in the analysis is to look at whether the law is "substantive" or "procedural" in nature. This is because only substantive laws create, alter, or impair substantive rights.

For instance, the collections laws changed effective July 1, 2021 that Notices of Intent to Record a Claim of Lien and Intent to Foreclose changed from 30 days to 45 days. This is a procedural change, so there is no concern that the law impairs substantive rights under a preexisting contract.

Examples of substantive laws may involve a wide variety of things, such as what constitutes a "unit" in a condominium, what are the voting rights of a member and how those rights may be suspended, and the ownership share in the common expenses and common surplus. Laws affecting these types of rights would be substantive in nature, so the law expresses concern that the constitution is offended.

Because condominium and homeowners' association declarations are creatures of contract, caselaw holds that legislative amendments to the statutes are to apply prospectively only unless the legislature either intended for it to either apply retroactively, or to be remedial in nature and simply designed to clarify law already in existence. *See Dimitri v. Com. Ctr. of Miami Master Ass'n, Inc.*, 253 So.3d 715, 719 (Fla. 3d DCA 2018); *Tropicana Condo. Ass'n, Inc. v. Tropical Condo., LLC*, 208 So.3d 755, 758 (Fla. 3d DCA 2016)

(retroactive application of Condominium Act amendments "impermissible" because it would alter and thereby detract from unit owner rights).

Consider Section 718.113, Florida Statutes, the "material alterations" statute" which states:

> (2)(a) Except as otherwise provided in this section, there shall be no material alteration or substantial additions to the common elements or to real property which is association property, except in a manner provided in the declaration as originally recorded or as amended under the procedures provided therein. If the declaration as originally recorded or as amended under the procedures provided therein does not specify the procedure for approval of material alterations or substantial additions, 75 percent of the total voting interests of the association must approve the alterations or additions before the material alterations or substantial additions are commenced. **This paragraph is intended to clarify existing law and applies to associations existing on July 1, 2018.**

Another example where the legislature clearly expressed intent for a new law to apply retroactively can be found in amended Section 718.117, F.S., known as the "termination statute", effective July 1, 2017:

> (21) APPLICABILITY.—This section applies to all condominiums in this state **in existence on** or after July 1, 2007.

If there is no expressed intent by the legislature for the new law to be remedial in nature or apply retroactively, then there is no need to move to the second prong.

If a new law passed in the Condominium or Homeowners' Association Act affects substantive rights, and that law is expressed by the legislature to apply retroactively, then there is a final hurdle that must be passed. This final hurdle asks three questions, and is known as Pomponio balancing test as set forth by the Florida Supreme Court in *Pomponio v. The Claridge of Pompano Condominium, Inc.*, 378 So.2d 774 (Fla. 1979):

1. Is the source of the legislature's authority to pass the new law (for instance, the Constitution) more important than the party's right not to have his or her contract impaired? If the court answers "yes" to this question, then you move on to the second question.

2. Is the evil the new law is designed to eradicate more significant than the party's right to have his or her contract left unimpaired? If the court answers "yes" to this question, then you move on to the last part of the test.

3. Does the new law act as a severe impairment of the contract at issue or does it only impair the contract minimally? It should be noted that in answering this question, there is a bit of a "balancing test" within this balancing test, where courts may (although are not necessarily required to) consider several factors, including:

    a. Was the law enacted to deal with a broad, generalized economic or social problem?

b. Does the law operate in an area which was already subject to state regulation at the time the parties' contractual obligations were originally undertaken, or does it invade an area never before subject to regulation by the state?
c. Does the law effect a temporary alteration of the contractual relationships of those within its coverage, or does it work a severe, permanent, and immediate change in those relationships irrevocably and retroactively?

The Florida Supreme Court is very deferential to the Constitution's clear statement that "no...law impairing the obligation of contracts shall be passed." It has recognized that **"[v]irtually no degree of contract impairment has been tolerated in this state."** *Yamaha Parts Distributors, Inc. v. Ehrman*, 316 So. 2d 557, 559 (Fla. 1975) (holding retroactive application of a statute regulating franchise agreements unconstitutional); *Department of Transportation v. Edward M. 4 Chadbourne, Inc.*, 382 So. 2d 293, 297 (Fla. 1980) ("This Court has generally prohibited all forms of contract impairment.").

The bottom line is that it is very difficult for the legislature to pass laws that retroactively affect substantive rights to of community associations and their unit owners. And as the above tests indicate, determining what law applies is an even more complicated matter without Kaufman language. Whether your declaration should be revised to include Kaufman language, if it does not already, should be a discussion with the association's attorney.

V. DETERMINING WHAT LAW APPLIES = UNLICENSED PRACTICE OF LAW

Section 454.23, Florida Statutes, provides that "**any person not licensed or otherwise authorized to practice law in this state who practices law in this state** or holds himself or herself out to the public as qualified to practice law in this state, or who willfully pretends to be, or willfully takes or uses any name, title, addition, or description implying that he or she is qualified, or recognized by law as qualified, to practice law in this state, **commits a felony of the third degree**."

The Florida Supreme Court has defined the practice of law as follows:

> . . .if the giving of [the] advice and performance of [the] services affect important rights of a person under the law, and if the reasonable protection of the rights and property of those advised and served requires that the persons giving such advice possess legal skill and a knowledge of the law greater than that possessed by the average citizen, then the giving of such advice and the performance of such services by one for another as a course of conduct constitute the practice of law.

The Florida Bar v. Sperry, 140 So.2d 587, 591 (Fla. 1962).

The legislature has defined "community association management" as follows:

> any of the following practices requiring substantial specialized knowledge, judgment, and managerial skill when done for remuneration and when the association or associations served contain more than 10 units or have an annual budget or budgets in excess of $100,000: controlling or disbursing funds of a community association, preparing budgets or other financial documents for a community association, assisting in the noticing or conduct of community association meetings, determining the number of days required for statutory notices, determining amounts due to the association, collecting amounts due to the association before the filing of a civil action, calculating the votes required for a

quorum or to approve a proposition or amendment, completing forms related to the management of a community association that have been created by statute or by a state agency, drafting meeting notices and agendas, calculating and preparing certificates of assessment and estoppel certificates, responding to requests for certificates of assessment and estoppel certificates, negotiating monetary or performance terms of a contract subject to approval by an association, drafting prearbitration demands, coordinating or performing maintenance for real or personal property and other related routine services involved in the operation of a community association, and complying with the association's governing documents and the requirements of law as necessary to perform such practices. A person who performs clerical or ministerial functions under the direct supervision and control of a licensed manager or who is charged only with performing the maintenance of a community association and who does not assist in any of the management services described in this subsection is not required to be licensed under this part.

Subsection 468.431(2), Florida Statutes (2014).

Does anyone see carryover between these two definitions?

Determining what law applies absolutely, unequivocally, and without a doubt constitutes the practice of law. Unfortunately for CAMS, many of the duties above require knowing what law applies.

This was precisely why the Florida Supreme Court was asked to provide an opinion addressing 14 activities typically engaged in by CAMS specifically (although it would apply to any activities of a nonlawyer) in *THE FLORIDA BAR: RE: ADVISORY OPINION – Activities of Community Association Managers*, 164 So.3d 650 (Fla. 2015).

1. Preparation of a Certificate of assessments due once the delinquent account is turned over to the association's lawyer;

2. Preparation of a Certificate of assessments due once a foreclosure against the unit has commenced;

3. Preparation of Certificate of assessments due once a member disputes in writing to the association the amount alleged as owed;

In the *1996 opinion* the Court found that the preparation of certificates of assessments were ministerial in nature and did not require legal sophistication or training. Therefore, it was not the unlicensed practice of law for a CAM to prepare certificates of assessments.

It is the opinion of the Standing Committee that a CAM's preparation of these documents would not constitute the unlicensed practice of law.

4. Drafting of amendments (and certificates of amendment that are recorded in the official records) to declaration of covenants, bylaws, and articles of incorporation when such documents are to be voted upon by the members;

In the *1996 opinion,* the Court held that the drafting of documents which determine substantial rights is the practice of law. The governing documents set forth above determine

substantial rights of both the community association and property owners. Consequently, under the *1996 opinion,* the preparation of these documents constitutes the unlicensed practice of law.

It is the opinion of the Standing Committee that the Court's holding in the *1996 opinion* should stand and nonlawyer preparation of the amendments to the documents would constitute the unlicensed practice of law.

5. Determination of number of days to be provided for statutory notice;

In the *1996 opinion,* the Court found that determining the timing, method, and form of giving notices of meetings requires the interpretation of statutes, administrative rules, governing documents, and rules of civil procedure and that such interpretation constitutes the practice of law. Thus, if the determination of the number of days to be provided for statutory notice requires the interpretation of statutes, administrative rules, governing documents or rules of civil procedure, then, as found by the Court in 1996, it is the opinion of the Standing Committee that it would constitute the unlicensed practice of law for a CAM to engage in this activity. If this determination does not require such interpretation, then it would not be the unlicensed practice of law.

6. Modification of limited proxy forms promulgated by the State;

In the *1996 opinion,* the Court found that the modification of limited proxy forms that involved ministerial matters could be performed by a CAM, while more complicated modifications would have to be made by an attorney. The Court found the following to be ministerial matters:

• modifying the form to include the name of the community association;

• phrasing a yes or no voting question concerning either waiving reserves or waiving the compiled, reviewed, or audited financial statement requirement;

• phrasing a yes or no voting question concerning carryover of excess membership expenses; and

• phrasing a yes or no voting question concerning the adoption of amendments to the Articles of Incorporation, Bylaws, or condominium documents.

For more complicated modifications, the Court found that an attorney must be consulted.

If no discretion is involved, it does not constitute the unlicensed practice of law to modify the question.

On the other hand, if the question requires discretion in the phrasing or involves the interpretation of statute or legal documents, the CAM may not modify the form

7. Preparation of documents concerning the right of the association to approve new prospective owners;

In the *1996 opinion,* the Court found that drafting the documents required to exercise a community association's right of approval or first refusal to a sale or lease may or may not constitute the unlicensed practice of law depending on the specific factual circumstances. It may require the assistance of an attorney, since there could be legal consequences to the decision. Although CAMs may be able to draft the documents, they cannot advise the association as to the legal consequences of taking a certain course of action. Thus, the specific factual circumstances will determine whether it constitutes the unlicensed practice of law for a CAM to engage in this activity.

This finding can also be applied to the preparation of documents concerning the right of the association to approve new prospective owners. While there was no testimony giving examples of such documents, the Court's underlying principle that if the preparation requires the exercise of discretion or the interpretation of statutes or legal documents, a CAM may not prepare the documents. For example, the association documents may contain provisions regarding the right of first refusal. Preparing a document regarding the approval of new owners may require an interpretation of this provision. An attorney should be consulted to ensure that the language comports with the association documents. On the other hand, the association documents may contain a provision regarding the size of pets an owner may have. Drafting a document regarding this would be ministerial in nature as an interpretation of the documents is generally not required.

8. Determination of affirmative votes needed to pass a proposition or amendment to recorded documents;

9. Determination of owners' votes needed to establish a quorum;

In the *1996 opinion,* the Court found that determining the votes necessary to take certain actions—where the determination would require the interpretation and application both of condominium acts and of the community association's governing documents—would constitute the practice of law. Thus, if these determinations require the interpretation and application of statutes and the community association's governing documents, then it is the opinion of the Standing Committee that it would constitute the unlicensed practice of law for a CAM to make these determinations. If these determinations do not require such interpretation and application, it is the opinion of the Standing Committee that they would not constitute the unlicensed practice of law.

10. Drafting of pre-arbitration demand letters required by 718.1255, Fla. Stat.;

As the Division of Florida Condominiums, Time Shares, and Mobile Homes has held that a nonlawyer may prepare the letter, the activity is authorized and not the unlicensed practice of law.

11. Preparation of construction lien documents (e.g. notice of commencement, and lien waivers, etc.);

In the *1996 opinion,* the Court found that the drafting of a notice of commencement form constitutes the practice of law because it requires a legal description of the property and this notice affects legal rights. While the *1996 opinion* did not specifically address the preparation of lien waivers, the *1996 opinion* found that preparing documents that affect legal rights constitutes the practice of law. A lien waiver would certainly affect an association's legal rights. Therefore, it is the Standing Committee's opinion that the preparation of construction lien documents by a CAM would constitute the unlicensed practice of law.

12. Preparation, review, drafting and/or substantial involvement in the preparation/execution of contracts, including construction contracts, management contracts, cable television contracts, etc.;

In the *1996 opinion,* the Court found that the preparation of documents that established and affected the legal rights of the community association was the practice of law. Further, in *Sperry,* the Court found the preparation of legal instruments, including contracts, by which legal rights are either obtained, secured or given away, was the practice of law. Thus, it is the Standing Committee's opinion that it constitutes the unlicensed practice of law for a CAM to prepare such contracts for the community association.

13. Identifying, through review of title instruments, the owners to receive pre-lien letters;

It is the opinion of the Standing Committee that if the CAM is only searching the public records to identify who has owned the property over the years, then such review of the public records is ministerial in nature and not the unlicensed practice of law. In other words, if the CAM is merely making a list of all record owners, the conduct is not the unlicensed practice of law.

On the other hand, if the CAM uses the list and then makes the legal determination of who needs to receive a pre-lien letter, this would constitute the unlicensed practice of law. This determination goes beyond merely identifying owners. It requires a legal analysis of who must receive pre-lien letters. Making this determination would constitute the unlicensed practice of law.

14. Any activity that requires statutory or case law analysis to reach a legal conclusion.

In the *1996 opinion,* the Court found that it constituted the unlicensed practice of law for a CAM to respond to a community association's questions concerning the application of law to specific matters being considered, or to advise community associations that a course of action may not be authorized by law or rule. The court found that this amounted to non-lawyers giving legal advice and answering specific legal questions, which the court

specifically prohibited in *In re: Joint Petition of The Florida Bar and Raymond James & Assoc.*, 215 So.2d 613 (Fla. 1968) and *Sperry.*

Further, in *Florida Bar v. Warren,* 655 So.2d 1131 (Fla. 1995), the Court held that it constitutes the unlicensed practice of law for a nonlawyer to advise persons of their rights, duties, and responsibilities under Florida or federal law and to construe and interpret the legal effect of Florida law and statutes for third parties. In *Florida Bar v. Mills,* 410 So.2d 498 (Fla. 1982), the Court found that it constitutes the unlicensed practice of law for a nonlawyer to interpret case law and statutes for others.

Thus, it is the Standing Committee's opinion that it would constitute the unlicensed practice of law for a CAM to engage in activity requiring statutory or case law analysis to reach a legal conclusion.

VI. RECOMMENDATION.

Don't be afraid to tell your CAMS, "Yes, I know this will cost some money, but please go to the Association's attorney!" Let them know you read this Handout and you understand the tight rope your CAM walks everyday. If your association doesn't have an attorney, get one. Don't put yourself or anyone else at risk of a felony. The whole goal is to make decisions for your association based upon competent, ethical, and responsible advice and representation.

The only way to know what law applies begins with Kaufman. After that, contracts and statutes need interpreted.

Kaufman Language Analysis