2025 HOA DIRECTOR LEGAL UPDATE COURSE

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1. UNLICENSED PRACTICE OF LAW ("UPL")

1.1 SECTION 454.23, FLORIDA STATUTES:

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, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

1.2 SECTION 468.431(2), FLORIDA STATUTES:

(1) **"Community association"** means a residential homeowners' association in which membership is a condition of ownership of a unit in a planned unit development, or of a lot for a home or a mobile home, or of a townhouse, villa, condominium, cooperative, or other residential unit which is part of a residential development scheme and which is authorized to impose a fee which may become a lien on the parcel.

(2) **"Community association management"** means 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:

(a) controlling or disbursing funds of a community association,

(b) preparing budgets or other financial documents for a community association,

(c) assisting in the notice or conduct of community association meetings,

(d) determining the number of days required for statutory notices,

(e) determining amounts due to the association,

(f) collecting amounts due to the association before the filing of a civil action,

(g) calculating the votes required for a quorum or to approve a proposition or amendment,

(h) completing forms related to the management of a community association that have been created by statute or by a state agency,

(i) drafting meeting notices and agendas,

(j) calculating and preparing certificates of assessment and estoppel certificates,

(k) responding to requests for certificates of assessment and estoppel certificates,

(l) negotiating monetary or performance terms of a contract subject to approval by an association,

(m) drafting pre-arbitration demands,

(n) coordinating or performing maintenance for real or personal property,

(o) and other related routine services involved in the operation of a community association,

(p) 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.

1.3 SECTION 468.436(2), FLORIDA STATUTES

(1) The department shall investigate complaints and allegations of a violation of this part, chapter 455, or any rule adopted thereunder, filed against community association managers or firms and forwarded from other divisions under the Department of Business and Professional Regulation.
…
(2) **The following acts constitute grounds for which the disciplinary actions in subsection (4) may be taken:**

(a) **Violation of any provision of s. 455.227(1).**

(b)

1. Violation of any provision of this part.

…

3. **Being convicted of or pleading nolo contendere to a felony in any court in the United States.**

…

5. Committing acts of gross misconduct or gross negligence in connection with the profession.

6. Contracting, on behalf of an association, with any entity in which the licensee has a financial interest that is not disclosed.

7. Failing to disclose any conflict of interest as required by s. 468.4335.

8. Violating chapter 718, chapter 719, or chapter 720 during the course of performing community association management services pursuant to a contract with a community association as defined in s. 468.431(1).

1.4 SECTION 468.4334, FLORIDA STATUTES

(1)(a) **A community association manager or a community association management firm is deemed to act as agent on behalf of a community association as principal within the scope of authority authorized by a written contract or under this chapter**. A community association manager or a community association management firm may not knowingly perform any act directed by the community association if such an act violates any state or federal law. A community association manager and a community association management firm shall discharge duties performed on behalf of the association as authorized by this chapter loyally, skillfully, and diligently; dealing honestly and fairly; in good faith; with care and full disclosure to the community association; accounting for all funds; and not charging unreasonable or excessive fees.

(b) If a community association manager or a community association management firm has a

contract with a community association that is subject to the milestone inspection requirements in s. 553.899, or the structural integrity reserve study requirements in ss. 718.112(2)(g) and 719.106(1)(k), the community association manager or the community association management firm must comply with those sections as directed by the board.
(c) Each contract between a community association and a community association manager or community association management firm for community association management services must include the following written statement in at least 12-point type, if applicable to the type of management services provided in the contract:

> **The community association manager shall abide by all professional standards and record-keeping requirements imposed pursuant to part VIII of chapter 468, Florida Statutes.**

(d) A contract between a community association manager or community association management firm and a community association may not waive or limit the professional practice standards required pursuant to this part.
(2)(a) A contract between a community association and a community association manager or a contract between a community association and a community association management firm may provide that the community association indemnifies and holds harmless the community association manager and the community association management firm for ordinary negligence resulting from the manager or management firm's act or omission that is the result of an instruction or direction of the community association. This paragraph does not preclude any other negotiated indemnity or hold harmless provision.
(b) Indemnification under paragraph (a) may not cover any act or omission that violates a criminal law; derives an improper personal benefit, either directly or indirectly; is grossly negligent; or is reckless, is in bad faith, is with malicious purpose, or is in a manner exhibiting wanton and willful disregard of human rights, safety, or property.
(3) A community association manager or community association management firm that is authorized by contract to provide community association management services to a community association shall do all of the following:
(a) Attend in person at least one member meeting or board meeting of the community association annually.
(b) Provide to the members of the community association the name and contact information for each community association manager or representative of a community association management firm assigned to the community association, the manager's or representative's hours of availability, and a summary of the duties for which the manager or representative is responsible. The community association shall also post this information on the association's website or mobile application, if the association is required to maintain official records on a website or application. The community association manager or community association management firm shall update the community association and its members within 14 business days after any change to such information.
(c) Provide to any member upon request a copy of the contract between the community association manager or community association management firm and the community association and include such contract with association's official records.
(4) A community association manager or a community association management firm shall return all community association official records within its possession to the community association within 20 business days after termination of a contractual agreement to provide community association management services to the community association or receipt of a written request for return of the official records, whichever occurs first. A notice of termination of a contractual

agreement to provide community association management services must be sent by certified mail, return receipt requested, or in the manner required under such contractual agreement. The community association manager or community association management firm may retain, for up to 20 business days, those records necessary to complete an ending financial statement or report. If an association fails to provide access to or retention of the accounting records to prepare an ending financial statement or report, the community association manager or community association management firm is relieved from any further responsibility or liability relating to the preparation of such ending financial statement or report. Failure of a community association manager or a community association management firm to timely return all of the official records within its possession to the community association creates a rebuttable presumption that the community association manager or community association management firm willfully failed to comply with this subsection. A community association manager or a community association management firm that fails to timely return community association records is subject to suspension of its license under s. 468.436, and a civil penalty of $1,000 per day for up to 10 business days, assessed beginning on the 21st business day after termination of a contractual agreement to provide community association management services to the community association or receipt of a written request from the association for return of the records, whichever occurs first. However, for a timeshare plan governed by chapter 721, s. 721.14(4) applies.

***1.7 THE FLORIDA BAR: RE: ADVISORY OPINION – Activities of Community Association Managers*, 681 So.2d 1119 (Fla. 1996).**

Not the Practice of Law:

The Florida Supreme Court found that the following activities, when performed by a **CAM, do not constitute the unlicensed practice of law**:

- drafting certificates of assessments,
- drafting first and second notices of date of election,
- drafting ballots,
- drafting written notices of annual or board meetings,
- drafting annual meeting or board meeting agendas, and
- drafting affidavits of mailing.

The Practice of Law:

The Florida Supreme Court found that the following activities, when performed by a **CAM, constitute the unlicensed practice of law**:

Completion of DBPR Form 33-032 (Frequently Asked Questions and Answers Sheet) requires the interpretation of community association documents. The decision to purchase a unit is often based largely on the information on this sheet. Because this form could significantly affect an individual's legal rights, misleading or incorrect information could harm the purchaser. Therefore, initial completion of this form requires the assistance of a licensed attorney. However, subsequent updates which do not modify the form can be completed without the assistance of an attorney.

Drafting both a claim of lien and satisfaction of claim of lien requires a legal description of the property; it establishes rights of the community association with respect to the lien, its duration, renewal information, and action to be taken on it. The claim of lien acts as an encumbrance on

the property until it is satisfied. Because of the substantial rights which are determined by these documents, the drafting of them must be completed with the assistance of a licensed attorney.

Drafting of a notice of commencement form constitutes the practice of law. This notice affects legal rights as well. *See, e.g.,* **§ 713.135, Fla. Stat**. (1995). Failure to complete or prepare this form accurately could result in serious legal and financial harm to the property owner.

Determining the timing, method, and form of giving notices of meetings requires the interpretation of statutes, administrative rules, governing documents, and **rule 1.090(a) and (e), Florida Rules of Civil Procedure**. Such interpretation constitutes the practice of law.

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 therefore also constitute the practice of law. *Id.*

It also clearly constitutes the 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. This amounts to nonlawyers giving legal advice and answering specific legal questions; this Court has specifically prohibited this behavior.

The Gray Areas:

The remaining activities exist in a more grey area; the specific circumstances surrounding their exercise determine whether or not they constitute the practice of law.

A CAM may modify BPR Form 33-033 (Limited Proxy Form) to the extent such modification involves ministerial matters contemplated by the description in **section 468.431(2)**. This includes 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. As to more complicated modifications, however, an attorney must be consulted.

As to drafting a limited proxy form, those items which are ministerial in nature, such as filling in the name and address of the owner, do not constitute the practice of law. However, if drafting of an actual limited proxy form or questions in addition to those on the preprinted form is required, the CAM should consult with an attorney.

Drafting the documents required to exercise a community association's right of approval or first refusal to a sale or lease may also 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.

***1.8 THE FLORIDA BAR: RE: ADVISORY OPINION – Activities of Community Association Managers*, 2015 WL 6510426 (Fla. 2015)**

In this follow-up to its 1996 UPL advisory opinion, the Florida Supreme Court addressed 14 specific activities.

Although the request for opinion addresses CAMS specifically, the Standing Committee's opinion would apply to the activities of any nonlawyer.

> **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.

> Further, in *Florida Bar v. Town,* 174 So.2d 395 (Fla.1965), the Court held that a nonlawyer may not prepare bylaws

, articles of incorporation, and other documents necessary to the establishment of a corporation, or amendments to such documents. Amendments to a community association's declaration of covenants, bylaws, and articles of incorporation can be analogized to the corporate documents discussed in *Town.* Therefore, 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. The *1996 opinion* did not provide any examples of more complicated modifications which would require consultation with an attorney. The Standing Committee believes this activity requires further clarification by example.
Using the examples given by the Court, the types of questions that can be modified without constituting the unlicensed practice of law do not require any discretion in the phrasing. For example, the sample form provided by the state has the following question: "Do you want to provide for less than full funding of reserves than is required by § 718.112(2)(f), Florida Statutes, for the next fiscal/calendar year? ___ YES ___ NO." There is no discretion regarding the wording, it is a yes or no question. The question could be reworded as follows: "Section 718.112(2)(f), Florida Statutes, discusses funding of reserves. Do you want to provide for less than full funding of reserves than is required by the statute for the next fiscal/calendar year? ___ YES ___ NO." It is still a yes or no question. As 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. After the above question regarding the reserves the form states "If yes, vote for one of the board proposed options below: (The option with the most votes will be the one implemented.) LIST OPTIONS HERE." Listing the options would be a modification of the form. If what to include in the list requires discretion or an interpretation of statute, an attorney would have to be consulted regarding the language and the CAM could not make a change. For example, § 718.112(f) has language regarding when a developer may vote to waive the reserves. The statute discusses the timing of the waiver and under what circumstances it may occur. As a question regarding this waiver requires the interpretation of statute, a CAM could not modify the form by including this question without consulting with a member of The Florida Bar. As found in the *1996 opinion,* making such a modification would constitute the unlicensed practice of law.

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.;

Under Section 718.1255, Fla. Stat., prior to filing an action in court, a party to a dispute must participate in nonbinding arbitration. The nonbinding arbitration is before the Division of Florida Condominiums, Time Shares, and Mobile Homes (hereinafter “the Division”). Prior to filing the petition for arbitration with the Division, the petitioner is required to serve a pre-arbitration demand letter on the respondent, providing:

1. advance written notice of the specific nature of the dispute,
2. a demand for relief, and a reasonable opportunity to comply or to provide the relief, and
3. notice of the intention to file an arbitration petition or other legal action in the absence of a resolution of the dispute.

Failure to include the allegations or proof of compliance with these prerequisites requires the dismissal of the petition without prejudice.

In the *1996 opinion,* the Court found that if the preparation of a document requires the interpretation of statutes, administrative rules, governing documents, and rules of civil procedure,

then the preparation of the documents constitutes the practice of law. It is the opinion of the Standing Committee that the preparation of a pre-arbitration demand letter would not require the interpretation of the above-referenced statute. The statutory requirements appear to be ministerial in nature, and do not appear to require significant legal expertise and interpretation or legal sophistication or training. Consequently, the preparation of this letter would not satisfy the second prong of the *Sperry* test, which requires that the person providing the service possess legal skill and a knowledge of the law greater than that possessed by the average citizen. For these reasons, it is the opinion of the Standing Committee that the preparation of a pre-arbitration demand letter by a CAM would not constitute the unlicensed practice of law.
Moreover, an argument can be made that the activity, even if the practice of law, is authorized. As noted in the Petitioner's March 28, 2012, letter, the Division has held that the statute does not require an attorney to draft the letter. (Formal Advisory Opinion request.) In *Florida Bar v. Moses,* 380 So.2d 412 (Fla.1980), the Court held that the legislature could oust the Supreme Court's authority to protect the public and authorize a nonlawyer to practice law before administrative agencies. 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, 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. Further, failure to complete or prepare this form accurately could result in serious legal and financial harm to the property owner.

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. Further, as suggested by one of the witnesses, the area of construction lien law is a very complicated and technical area. (Tr., p. 40, l.10–19.) 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;

The testimony on this subject was mixed. Some witnesses felt that this activity was ministerial and would not be the unlicensed practice of law (written testimony of Jeffrey M. Oshinsky, Mark

R. Benson, and R.L. Reimer), while others thought that this would constitute the unlicensed practice if performed by a CAM (written testimony of Nicholas F. Lang, Shawn G. Brown, and Emily L. Lang). However, none of the testimony defined what was meant by identifying 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 nonlawyers 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 an activity requiring statutory or case law analysis to reach a legal conclusion.

2. KAUFMAN ANALYSIS AND WHY IT MATTERS TO HOA DIRECTORS

2.1 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.

2.2 "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**.*

2.3 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 Arbitration 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.

2.4 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 the ***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.

2.4 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.*

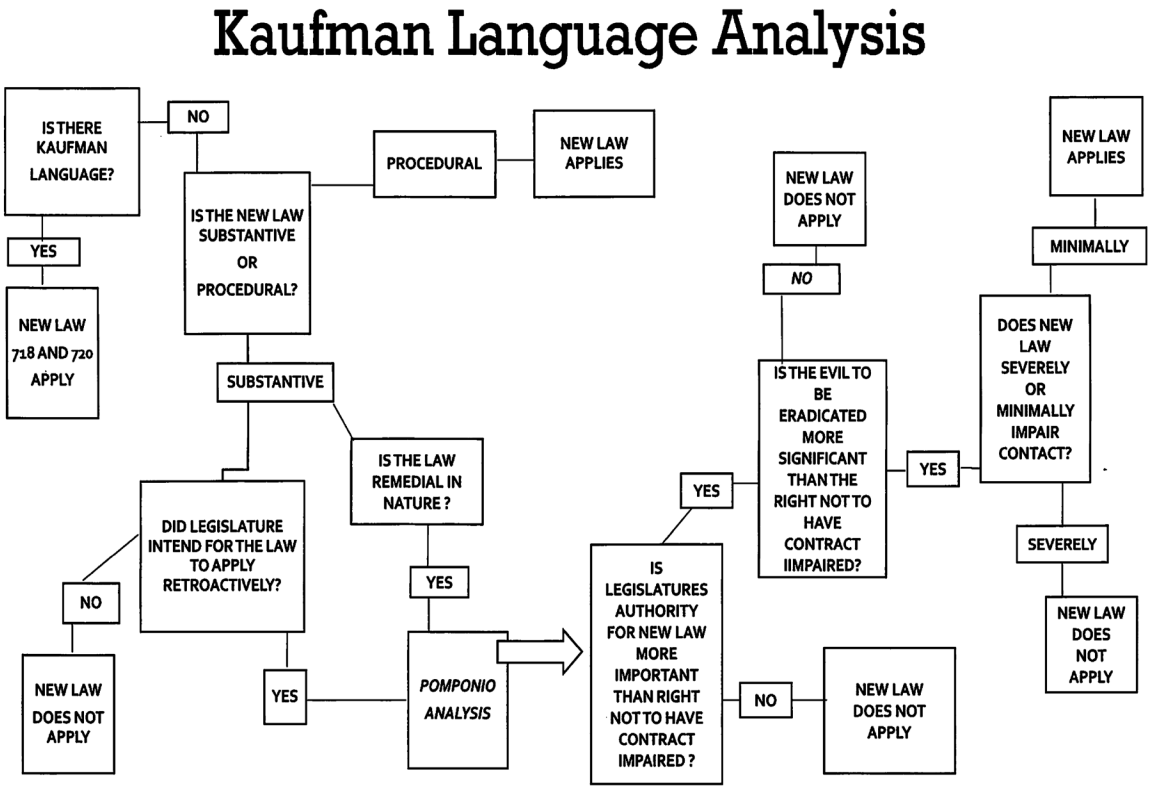
The Florida Bar v. Sperry, 140 So.2d 587, 591 (Fla. 1962).

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 pre-arbitration 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.

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.



3. HOA SPECIAL ASSESSMENTS

> **"Nothing is more central to condominium governance than the manner in which a board raises money from unit owners and then spends it."**
>
> *Smulders for 129-31 Harrison Street LLC v. Thirty-Three Sixty Condominium Association, Inc.*, 245 So. 3rd 802, 804 (Fla. 4th DCA 2018).

3.1 DOCUMENT OR STATUTORY AUTHORITY TO LEVY SPECIAL ASSESSMENTS; EXCEPTIONS

As a fundamental threshold issue, the Homeowners Association ("HOA") must closely review its recorded governing documents (with the recommended assistance of its attorney) to determine if there is clear legal authority for the Board to levy a special assessment for the intended purpose(s). If the governing documents do not explicitly provide for such authority, then it probably does not exist. Except under limited circumstances, Chapter 720, Florida Statutes, does not expressly provide an HOA statutory special assessment authority.

Hypothetical: The HOA's clubhouse needs its 30-year-old tile roof replaced. The relevant special assessment provision of the declaration of covenants provides:

> *The Board of Directors has the authority to levy special assessments to cover unanticipated expenditures that may be incurred during the fiscal year.*

Special assessment authority? Sure. But notice the limiting language in the declaration. Is a replacement of the roof of the clubhouse that has reached its anticipated useful life's end after 30 years an "unanticipated expenditure"? There is a strong argument that the answer is probably not. Contrast this factual situation with an increase in the Association's insurance premiums that was substantially more than budgeted. If there is time, the Association should consider first amending its Declaration to provide clear special assessment authority for common area maintenance, repair, and replacement costs and associated expenses without such limiting language.

FIRST EXCEPTION: THE STATUTORY AND SUBSTANTIAL "EMERGENCY POWERS" AUTHORITY OF THE BOARD OF DIRECTORS

So, your Association's governing documents do not expressly provide for clear special assessment authority, or the authority it does provide for is limited or inapplicable to your situation and needs. That means no authority, right? Not necessarily. HOA Boards, in response to damage or injury caused by or anticipated in connection with an emergency, for which an official state of emergency is declared by the Governor in the locale in which the Association is located, may have an option.

"Emergency" in this context means any occurrence, or threat thereof, whether natural, technological, or manmade, in war or in peace, which results or may result in substantial injury or harm to the population or substantial damage to or loss of property.

Section 720.316(1)(j), Florida Statutes (emphasis added) provides as follows:

> (1) To the extent allowed by law, unless specifically prohibited by the declaration or other recorded governing documents, and **consistent with s. 617.0830**, the board of directors, in response to damage or injury caused by or anticipated in connection with an emergency, as defined in s. 252.34(4), for which a state of emergency is declared pursuant to s. 252.36 in the area encompassed by the association, may exercise the following powers:
>
> * * *
>
> (j) **Notwithstanding a provision to the contrary, and regardless of whether such authority does not specifically appear in the declaration or other recorded governing documents, levy special assessments without a vote of the owners.**
>
> (2) The authority granted under subsection (1) is limited to that time reasonably necessary to protect the health, safety, and welfare of the association and the parcel owners and their family members, tenants, guests, agents, or invitees, and to mitigate further damage, injury, or contagion and make emergency repairs.

Section 617.0830, Florida Statutes ("General Standards for Directors") (emphasis added) provides as follows:

> (1) **A director shall discharge his or her duties as a director**, including his or her duties as a member of a committee:
>
> (a) **In good faith;**
>
> **(b) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and**
>
> **(c) In a manner he or she reasonably believes to be in the best interests of the corporation.**
>
> (2) **In discharging his or her duties, a director may rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by**:
>
> (a) One or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matters presented;
>
> **(b) Legal counsel, public accountants, or other persons as to matters the director reasonably believes are within the persons' professional or expert competence; or**
>
> (c) A committee of the board of directors of which he or she is not a member if the director reasonably believes the committee merits confidence.
>
> (3) A director is not acting in good faith if he or she has knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (2) unwarranted.
>
> (4) **A director is not liable for any action taken as a director, or any failure to take any action, if he or she performed the duties of his or her office in compliance with this section.**

SECOND <u>POSSIBLE</u> EXCEPTION: Urgently Needed Repairs (At least in the condominium context):

***Lecorps v. Star Lakes Ass'n, Inc.*, 346 So. 3d 1222, 1227–28 (Fla. 3rd DCA 2022):**

> "Appellants alternatively argue the assessment was invalid because the Association failed to convene a vote of all unit owners, as opposed to board members. A well-developed body of decisional authority holds that an association need not conduct a vote of unit owners before levying assessments for **<u>urgently needed repairs</u>** to the common elements. *See Farrington v. Casa Solana Condo. Ass'n, Inc.*, 517 So. 2d 70, 72 (Fla. 3rd DCA 1987); *Cottrell v. Thornton*, 449 So. 2d 1291, 1292 (Fla. 2nd DCA 1984). No provision of the Act suggests otherwise. Instead, all that is required is a properly noticed meeting declaring the amount of the proposed assessment and its intended purpose. *See* § 718.112(2)(c)1., Fla. Stat."

Takeaway: As with the reconstruction of the fire-damaged buildings in *Lecorps*, the board may <u>potentially</u> be able to rely on general decision-making power to levy a special assessment for "urgently needed repairs" to the common elements where the declaration is silent as to express authority to levy a special assessment.

3.2 Statutory Notice of Board's Meeting to Levy a Special Assessment

Section 720.303(2)(c)2., Fl. Stat.

- **Assessment Statement. <u>An assessment may not be levied at a Board meeting unless the notice of the meeting includes a statement that assessments will be considered and the nature of the assessments.</u>**

- **Agenda Items.** <u>Notices of all Board meetings must specifically identify agenda items for the meetings and must be posted in a conspicuous place in the community at least 48 hours in advance of a meeting</u>, except in an emergency. In the alternative, if notice is not posted in a conspicuous place in the community, notice of each board meeting must be mailed or delivered to each member at least 7 days before the meeting, except in an emergency.

> **Practice Note:** A **substantive agenda** is now required for all Board of Directors' meetings. The agenda must include a description of all substantive items to be discussed at the Board meeting.

3.3 Definition of Assessment

"Assessment" means a sum or sums of money payable to the Association, to the developer or other owner of common areas, or to recreational facilities and other properties serving the parcels by the owners of one or more parcels as authorized in the governing documents, which if not paid by the owner of a parcel, can result in a lien against the parcel.

- **Sharing of Expenses.** For any community created after October 1, 1995, the governing documents must describe the manner in which expenses are shared and specify the member's proportional share thereof.

- **Proportionate Share**. Assessments levied pursuant to the annual budget or special assessment must be in the member's proportional share of expenses as described in the governing document, which share may be different among classes of parcels based upon the state of development thereof, levels of services received by the applicable members, or other relevant factors.

- **Due Date.** Assessments are due on the date or dates as provided in the governing documents. The governing documents may provide that assessments are due annually, semiannually, quarterly, or monthly.

- **Interest.** Assessments and installments on assessments that are not paid when due bear interest from the due date until paid at the rate provided in the declaration of covenants or the bylaws of the Association, which rate may not exceed the rate allowed by law. If no rate is provided in the declaration or bylaws, interest accrues at the rate of 18 percent per year.

- **Late Fees.** If the **declaration or bylaws** so provide, the Association may also charge an administrative late fee not to exceed the greater of $25 or 5 percent of the amount of each installment that is paid past the due date. Notwithstanding the declaration or bylaws, compound interest may not accrue on assessments and installments on assessments that are not paid when due.

> **Practice Note:** Section 720.3085(3), Florida Statutes states that **if the declaration or bylaws so provide**, the association may also charge an administrative late fee not to exceed the greater of $25 or 5 percent of the amount of each installment that is paid past the due

- **Application of Owner Payments.** Any payment received by an Association and accepted shall be applied first to any interest accrued, then to any administrative late fee, then to any costs and reasonable attorney fees incurred in collection, and then to the delinquent assessment. This paragraph applies notwithstanding any restrictive endorsement, designation, or instruction placed on or accompanying a payment. A late fee is not subject to the provisions of chapter 687 and is not a fine. The foregoing is applicable notwithstanding s. 673.3111, any purported accord and satisfaction, or any restrictive endorsement, designation, or instruction placed on or accompanying a payment. The preceding sentence is intended to clarify existing law.

3.4 Special Assessment Statutory Procedure

Section 720.303(2)(c)2., Fl. Stat.

(c) The bylaws shall provide the following for giving notice to parcel owners and members of all board meetings and, if they do not do so, shall be deemed to include the following:

- **Notice.** Written notice of any meeting at which special assessments will be **considered** must be mailed, delivered, or electronically transmitted to the members and parcel owners **and** posted conspicuously on the property or broadcast on closed-circuit cable television not less than 14 days before the meeting.

> **Practice Note:** Please note that Section 720.303(2)(c)2., Florida Statutes provides that any Board meeting at which special assessments will be **"CONSIDERED"** must be specially noticed.

- **Statutory Notice and Procedure.** Notices of all board meetings must specifically identify agenda items for the meetings and must be posted in a conspicuous place in the community at least 48 hours in advance of a meeting, except in an emergency.

- In the alternative, if notice is not posted in a conspicuous place in the community, notice of each board meeting must be mailed or delivered to each member at least 7 days before the meeting, except in an emergency. An assessment may not be levied at a board meeting unless the notice of the meeting includes a statement that assessments will be considered and the nature of the assessments. Written notice of any meeting at which special assessments will be considered will be considered must be mailed, delivered, or electronically transmitted to the members and parcel owners and posted conspicuously on the property or broadcast on closed-circuit cable television not less than 14 days before the meeting.

- As a best practice, we recommend the Association utilize a written **special assessment resolution** and that the Board read and approve the special assessment resolution at a duly-noticed Board meeting. The special assessment resolution should include the authority to levy the special assessment, the specific amount, the amount due per lot, what happens upon the transfer or sale of a lot, the due date(s) of the special assessment, etc.

3.5 Voting to Approve a Special Assessment

- A director is prohibited from voting by proxy and secret ballot to approve a special assessment.

- A director is prohibited from voting via email to approve a special assessment.

- Minutes of all meetings of the board of directors of must be maintained in written form or in another form that can be converted into written form within a reasonable time. A vote or abstention from voting on each matter voted upon for each director present at a board meeting must be recorded in the minutes.

3.6 First Mortgagee Liability for Special Assessments:

Section 720.3085(2)(c), Florida Statutes (emphasis added):

(c) Notwithstanding anything to the contrary contained in this section, the liability of a first mortgagee, or its successor or assignee as a subsequent holder of the first mortgage who acquires title to a parcel by foreclosure or by deed in lieu of foreclosure for the unpaid assessments that became due before the mortgagee's acquisition of title, ***shall be the lesser of:***

1. The parcel's unpaid common expenses and regular periodic or ***special assessments that accrued or came due during the 12 months immediately preceding the acquisition of title*** *and for which payment in full has not been received by the association; or*

2. ***One percent of the original mortgage debt.***

The limitations on first mortgagee liability provided by this paragraph apply only if the first mortgagee filed suit against the parcel owner and initially joined the association as a defendant in the mortgagee foreclosure action. Joinder of the association is not required if, on the date the complaint is filed, the association was dissolved or did not maintain an office or agent for service of process at a location that was known to or reasonably discoverable by the mortgagee.

3.7 Invoice for a Special Assessment:

Section 720.3085(3)(c), Florida Statutes (emphasis added):

(c) 1. If an association sends out an invoice for assessments or a parcel's statement of the account described in s. 720.303(4)(a)10.b., the invoice for assessments or the parcel's statement of account must be delivered to the parcel owner by first-class United States mail or by electronic transmission to the parcel owner's e-mail address maintained in the association's official records.

2. Before changing the method of delivery for an invoice for assessments or the statement of the account, the association must deliver a written notice of such change to each parcel owner. The written notice must be delivered to the parcel owner at least 30 days before the association sends the invoice for assessments or the statement of the account by the new delivery method. The notice must be sent by first-class United States mail to the owner at his or her last address as reflected in the association's records and, if such address is not the parcel address, must be sent by first-class United States mail to the parcel address. Notice is deemed to have been delivered upon mailing as required by this subparagraph.

3. A parcel owner must affirmatively acknowledge his or her understanding that the association will change its method of delivery of the invoice for assessments or the statement of the account before the association may change the method of delivering an invoice for assessments or the statement of account. The parcel owner may make the affirmative acknowledgment electronically or in writing.

3.8 Estoppel Certificates:

Section 720.30851, Florida Statutes:

(1) An estoppel certificate may be completed by any board member, authorized agent, or authorized representative of the association, including any authorized agent, authorized representative, or employee of a management company authorized to complete this form on behalf of the board or association. The estoppel certificate must contain all of the following information and must be substantially in the following form:

…

ASSESSMENT INFORMATION:

1. The regular periodic assessment levied against the parcel is $ per (insert frequency of payment) .
2. The regular periodic assessment is paid through (insert date paid through) .
3. The next installment of the regular periodic assessment is due (insert due date) in the amount of $.
*4. **An itemized list of all assessments, special assessments, and other moneys owed on the date of issuance to the association by the parcel owner for a specific parcel is provided.***
***5. An itemized list of any additional assessments, special assessments, and other moneys that are scheduled to become due for each day after the date of issuance for the effective period of the estoppel certificate is provided.** In calculating the amounts that are scheduled to become due, the association may assume that any delinquent amounts will remain delinquent during the effective period of the estoppel certificate.*

3.9 Developer Levied Special Assessments:

***720.315 Passage of special assessments**.—**Before turnover**, the board of directors controlled by the developer may not levy a special assessment unless a majority of the parcel owners other than the developer has approved the special assessment by a majority vote at a duly called special meeting of the membership at which a quorum is present.*
History.—s. 28, ch. 2010-174.

3.10 Disclosure Summary

Section 720.303(4), Florida Statutes:

(4) OFFICIAL RECORDS.—
(a) The association shall maintain each of the following items, when applicable, for at least 7 years, unless the governing documents of the association require a longer period of time, which constitute the official records of the association:
11. A copy of the disclosure summary described in s. 720.401(1).

Section 720.401(1), Florida Statutes:

720.401 Prospective purchasers subject to association membership requirement; disclosure required; covenants; assessments; contract cancellation.—

(1)(a) A prospective parcel owner in a community must be presented a disclosure summary before executing the contract for sale. The disclosure summary must be in a form substantially similar to the following form:

DISCLOSURE SUMMARY FOR (NAME OF COMMUNITY)

1. AS A PURCHASER OF PROPERTY IN THIS COMMUNITY, YOU WILL BE OBLIGATED TO BE A MEMBER OF A HOMEOWNERS' ASSOCIATION.

2. THERE HAVE BEEN OR WILL BE RECORDED RESTRICTIVE COVENANTS GOVERNING THE USE AND OCCUPANCY OF PROPERTIES IN THIS COMMUNITY.

3. YOU WILL BE OBLIGATED TO PAY ASSESSMENTS TO THE ASSOCIATION. ASSESSMENTS MAY BE SUBJECT TO PERIODIC CHANGE. IF APPLICABLE, THE CURRENT AMOUNT IS $ PER . YOU WILL ALSO BE OBLIGATED TO PAY ANY SPECIAL ASSESSMENTS IMPOSED BY THE ASSOCIATION. SUCH SPECIAL ASSESSMENTS MAY BE SUBJECT TO CHANGE. IF APPLICABLE, THE CURRENT AMOUNT IS $ PER .

4. YOU MAY BE OBLIGATED TO PAY SPECIAL ASSESSMENTS TO THE RESPECTIVE MUNICIPALITY, COUNTY, OR SPECIAL DISTRICT. ALL ASSESSMENTS ARE SUBJECT TO PERIODIC CHANGE.

5. YOUR FAILURE TO PAY SPECIAL ASSESSMENTS OR ASSESSMENTS LEVIED BY A MANDATORY HOMEOWNERS' ASSOCIATION COULD RESULT IN A LIEN ON YOUR PROPERTY.

3.11 Fidelity Bonding/Employee Theft Insurance Policy

Section 720.3033(5), Fl. Stat.:

- The Association shall maintain insurance or a fidelity bond for all persons who control or disburse funds of the Association. The insurance policy or fidelity bond must cover the maximum funds that will be in the custody of the association or its management agent at any one time.

- As used in this subsection, the term "persons who control or disburse funds of the association" includes, but is not limited to, persons authorized to sign checks on behalf of the association, and the president, secretary, and treasurer of the association. The Association shall bear the cost of any insurance or bond. If annually approved by a majority of the voting interests present at a properly called meeting of the association, an association may waive the requirement of obtaining an insurance policy or fidelity bond for all persons who control or disburse funds of the association.

> **Practice Note:** The association should include in its calculation of its "maximum funds" all anticipated special assessments. If necessary, the Association must promptly increase the amount of its insurance or fidelity bond to cover any unexpected funds such as insurance payments for hurricane or other damage.

- As a best practice, we recommend the Association utilize a written special assessment resolution and that the board read and approve the special assessment resolution at a duly-noticed Board meeting.

3.12 Appellate Case Law on Special Assessments

***Coral Way Condo. Invs., Inc. v. 21/22 Condo. Ass'n, Inc.*, 66 So. 3d 1038 (Fla. 3rd DCA 2011)—**repayment of assessments

> Allegation that a special assessment would not have been necessary if not for the condominium association's breach of fiduciary duty was not a defense to the condominium unit owner's obligation to pay the special assessment and, thus, did not preclude an award of summary judgment to the Association on its claims to foreclose claims of lien against owner's units; the assessment was passed to pay for maintenance and repair of common elements and was passed in the manner required by condominium's bylaws, and insufficiency of funds was not a prerequisite to the passing of a special assessment.

Takeaway: The avoidance of the payment of a valid assessment is not a remedy available to unit owners to cure unauthorized acts by officers or directors of an association.

***Ocean Two Condo. Ass'n, Inc. v. Kliger*, 983 So. 2d 739 (Fla. 3rd DCA 2008):**

> **Refusal of a condominium association and its management company of tendered payments of undisputed maintenance fees by condominium unit owners was improper and rendered premature the association's lien foreclosure action involving owners' units; condominium statute provided that such payments were to be applied on account, without** prejudice to association's and unit owners' respective positions, even if unit owners placed a restrictive endorsement, designation, or instruction on or accompanying the payment, and, had association accepted and applied tendered payments, dispute would have been reduced to an inconsequential amount, and association's attorneys could not in good faith have filed to foreclose the miniscule claim remaining.

Takeaway: The Association should always accept payment and apply such payments to the Owner's account, notwithstanding whether the account is in collections, with the attorney, or otherwise.

Some Owners will still tender payments directly to Association or management despite the account being placed with an attorney. Associations and management companies should not otherwise restrict an owner's ability to pay (e.g., locking out of online payment portals or refusing payments).

If an Association receives direct payment incident to the collection, Association should immediately contact counsel regarding how to process payment.

***Star Lakes Ests. Ass'n, Inc. v. Auerbach*, 656 So. 2d 271 (Fla. 3rd DCA 1995):**

> **To foreclose on a condominium unit based upon the unit owner's failure to pay a special assessment, the condominium association has the burden of**

proof that it properly sent written notice of the specific purpose or purposes of the assessment to each unit owner.

The condominium association failed to prove that it mailed notice of special assessment to condominium unit owners where the association's affidavit alleged that notice was sent to the address listed in the association's records but did not list the actual address to which the notice was allegedly mailed, and association's attorney mailed notice of claim of lien for failing to pay special painting assessment to condominium unit, even though owners were no longer living there and despite fact that owners had given association new mailing address; thus, association was not entitled to summary judgment in its lien foreclosure action.

Takeaway: The Association and its management company must be certain that all notices are being transmitted to the correct address for the Owner. Ideally, notices should contain the actual physical address of the Owner as contained in the official records of the Association or any other address designated by the Owner to receive official notices.

***Gilmore v. Ciega Verde Condo. Ass'n, Inc.*, 601 So. 2d 1325, 1326 (Fla. 2nd DCA 1992):**

"Paragraph 21B of the Declaration of Condominium states that "[n]o amendment may ... materially alter or modify the appurtenances to the unit ... unless all record owners of units and all record holders of first mortgages approve the amendment." *See* § 718.110(4), Fla. Stat. (1989); *Young v. Ciega Verde Condominium Association, Inc.*, 600 So.2d 528, (Fla. 2d DCA 1992). The condominium documents show that the tennis court is an appurtenance common to all unit owners. Because Ciega Verde did not obtain the consent of "all" of the unit owners for the conversion of the tennis court into a parking area, the trial court erred in entering judgment against Gilmore for that portion of the special assessment. **Ciega Verde does have the authority to make the special assessment for the cost of necessary repairs to the condominium buildings."**

Takeaway: Associations should be mindful that a valid defense to a foreclosure action due to non-payment of a special assessment can be an attack on the underlying purpose of levying such a special assessment.

Here, the Association needed to obtain the unanimous consent of all owners for a material alteration—converting a tennis court into a parking lot. By the Association failing to obtain such unanimous consent, the Owner could not be held liable for the portion of a special assessment paid towards the unauthorized tennis court conversion project.

4. LEVYING OF HOA ENFORCEMENT FINES

4.1 Statutory Fining Authority

Section 720.305(2), Florida Statutes:

- An association may levy reasonable fines for violations of the declaration, association bylaws, or reasonable rules of the Association.

4.2 Amount of Fines – Section 720.303(2), Florida Statutes

- A fine may not exceed $100 per violation against any member or any member's tenant, guest, or invitee for the failure of the owner of the parcel or its occupant, licensee, or invitee to comply with any provision of the declaration, the association bylaws, or reasonable rules of the Association unless otherwise provided in the governing documents.

- A fine may be levied by the Board for each day of a continuing violation, with a single notice and opportunity for hearing, except that the fine may not exceed $1,000 in the aggregate unless otherwise provided in the governing documents.

> **Practice Note:** **"Governing Document"** means the recorded declaration of covenants and all duly adopted and recorded amendments, supplements, and recorded exhibits thereto, the articles of incorporation, the bylaws, and any duly adopted amendments thereto. *See*, Section 720.301(8), Florida Statutes. Rules and regulations are no longer included in this definition.

- A fine of less than $1,000 may not become a lien against a parcel.

- In any action to recover a fine, the prevailing party is entitled to reasonable attorney fees and costs from the nonprevailing party as determined by the court.

4.3 Mandatory Statutory Procedures

Section 720.305(2)(b), Florida Statutes:

- A fine or suspension levied by the Board of Directors may not be **imposed** unless the Board first provides at least 14 days' written notice of the parcel owner's right to a hearing to the parcel owner at his or her designated mailing or e-mail address in the association's official records and, if applicable, to any occupant, licensee, or invitee of the parcel owner, sought to be fined or suspended.

- Such hearing must be held within 90 days after issuance of the notice before a committee of at least three members appointed by the board who are not officers, directors, or employees of the Association, or the spouse, parent, child, brother, or sister of an officer, director, or employee.

- The committee may hold the hearing by telephone or other electronic means.

- **The notice must include a description of the alleged violation; the specific action required to cure such violation, if applicable; and the hearing date, location, and access information if held by telephone or other electronic means.**

- A parcel owner has the right to attend a hearing by telephone or other electronic means.

- If the committee, by majority vote, does not approve a proposed fine or suspension, the proposed fine or suspension may not be imposed. The role of the committee is limited to determining whether to confirm or reject the fine or suspension levied by the Board.

- Within 7 days after the hearing, the committee shall provide written notice to the parcel owner at his or her designated mailing or e-mail address in the association's official records and, if applicable, any occupant, licensee, or invitee of the parcel owner, of the committee's findings related to the violation, including any applicable fines or suspensions that the committee approved or rejected, and how the parcel owner or any occupant, licensee, or invitee of the parcel owner may cure the violation, if applicable, or fulfill a suspension, or the date by which a fine must be paid.

- If a violation has been cured before the hearing or in the manner specified in the written notice required in paragraph (b) or paragraph (d), a fine or suspension may not be imposed.

- If a violation is not cured and the proposed fine or suspension levied by the board is approved by the committee by a majority vote, the committee must set a date by which the fine must be paid, which date must be at least 30 days after delivery of the written notice required in paragraph (d).

- Attorney fees and costs may not be awarded against the parcel owner based on actions taken by the Board before the date set for the fine to be paid.

- If a violation and the proposed fine or suspension levied by the Board is approved by the committee and the violation is not cured or the fine is not paid per the written notice required in paragraph (d), reasonable attorney fees and costs may be awarded to the association. Attorney fees and costs may not begin to accrue until after the date noticed for payment under paragraph (d) and the time for an appeal has expired.

4.4 Limitation on Fines – Section 720.305(7), Florida Statutes

- Notwithstanding any provision to the contrary in an association's governing documents, an association may not levy a fine or impose a suspension for any of the following:

  (a) Leaving garbage receptacles at the curb or end of the driveway within 24 hours before or after the designated garbage collection day or time.

  (b) Leaving holiday decorations or lights on a structure or other improvement on a parcel longer than indicated in the governing documents, unless such decorations or lights are left up

for longer than 1 week after the association provides written notice of the violation to the parcel owner.

4.5 Waiver of Fines

Section 720.303(14), Florida Statutes:

> *(14) **REQUIREMENT TO PROVIDE AN ACCOUNTING**.—A parcel owner may make a written request to the board for a detailed accounting of any amounts he or she owes to the association related to the parcel, and the board shall provide such information within 15 business days after receipt of the written request. After a parcel owner makes such written request to the board, he or she may not request another detailed accounting for at least 90 calendar days. **Failure by the board to respond within 15 business days to a written request for a detailed accounting constitutes a complete waiver of any outstanding fines of the person who requested such accounting which are more than 30 days past due and for which the association has not given prior written notice of the imposition of the fines.***

Section 720.306(9)(b), Florida Statutes:

> *(b) **A person who is delinquent in the payment of any fee, fine, or other monetary obligation to the association on the day that he or she could last nominate himself or herself or be nominated for the board may not seek election to the board, and his or her name shall not be listed on the ballot.***
>
> ***A person serving as a board member who becomes more than 90 days delinquent in the payment of any fee, fine, or other monetary obligation to the association shall be deemed to have abandoned his or her seat on the board, creating a vacancy on the board to be filled according to law**.*
>
> *For purposes of this paragraph, the term "any fee, fine, or other monetary obligation" means any delinquency to the association with respect to any parcel..*

4.6 Appellate Case Law of Fines

***Dwork v. Executive Estates of Boynton Beach Homeowners Association, Inc.*, 219 So.3d 858 (Fla 4th DCA 2017).**

The appellate court held that **strict compliance** with the notice provision of the statute was a necessary prerequisite for HOA to impose fines. Accordingly, because the HOA provided appellant with only thirteen (13) days' notice of the hearing, we reverse the money damages awarded to HOA for the unpaid fines, even though the owner had actual notice of the hearing.

***Gillis v. Jackson Shores Townhomes Association, Inc.*, 351 So.3d 668 (Fla. 2d DCA 2022):**

The court held that a homeowners association could not impose fine on homeowner one day after discovering violations of association's rules and regulations where the declaration of covenants and restrictions only allowed fine to be imposed ten days after discovery of violations, association did not send statutorily required 14-day notice that association sought to fine homeowner.

The fine was not approved by Association's Board or fine committee, and it was irrelevant that Association sent second letter to homeowner several months after imposing fine which advised him that he had 14 days to contest the fine.

Compliance with the homeowners association statute is a prerequisite for an association to impose a fine