COMMUNITY COUNSEL

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RECENT CASES

- A QUESTION OF FACT FOR JURY DECISION REMAINED WHERE OWNER KNEW ABOUT DANGEROUS CARPET ON COMMON ELEMENTS, AS DID ASSOCIATION, BUT IT FAILED TO FIX THE PROBLEM. THE QUESTION TO BE ANSWERED IS WHETHER ASSOCIATION LEFT AN UNREASONABLE RISK OF HARM.
- FLORIDA SUPREME COURT COMPLETES CIRCLE, GUTTING APPLICATION OF ECONOMIC LOSS RULE.

THE INFORMATION GIVEN IS SUMMARY IN NATURE, FOR EDUCATIONAL PURPOSES. IT IS NOT INTENDED AS SPECIFIC OR DETAILED LEGAL ADVICE. ALWAYS SEEK INDEPENDENT LEGAL COUNSEL FOR ADVICE ON YOUR UNIQUE SITUATION.

KAUFMAN? WHO IS THIS GUY KAUFMAN?

This is a question I hear with some frequency. "Kaufman language" (named after the 1977 case of *Kaufman v. Shere*) is documentary language that has the effect of incorporating later-enacted "substantive" statutory changes into the governing documents of a community. Usually the doctrine relates to condominiums, since they are wholly creations of statute. In order to create a condominium it is necessary to reference an intent to create a condominium under the enabling statute, which means there has to be a specific reference to Chapter 718, Fla. Stat. in the Declaration.

Typical Kaufman language might read like this: "*This community shall be governed by Chapter 718 of the Florida Statutes as same exists on the date hereof, and as same may be amended from time to time.*" The last phrase after the coma is the Kaufman language. In the absence of that language - at least in theory - the statute as it exists on the date that the governing documents are recorded governs the substantive rights and duties of the parties. If Kaufman language is present, at least in theory, subsequent changes in the law – whatever they may be – are automatically available to reek havoc on innocent communities.

The impact of the doctrine has been overblown for a couple of reasons. First, as a result of case decisions from the highest levels of state and federal courts, most "procedural" and "remedial" statutes can already apply to existing associations, even though they may be adopted after the governing documents are written. This is the courts' way of limiting the operation of the constitutional doctrine that a new law can not impair existing contract rights. They reason that no one has a constitutional right to a specific procedure or to a specific remedy as long as the law affords a workable procedure and a workable remedy. Hence, the presence of Kaufman language in the governing documents only operates to apply new "substantive" statutes, i.e. to statutes that directly impact the economic or property rights of parties - such as who has to insure something; or who has repair something; or who has to pay for something; or who can do what with his or her property. The constitutional prohibition against impairment of contracts by new laws applies only to this latter type of statute - one that impacts the substantive rights of parties to existing contracts – unless by virtue of Kaufman language the contract incorporates those statutory changes.

Aside from this distinction, which acts to marginalize and limit the importance of Kaufman language, the operation of the entire doctrine also has been further watered down by the Florida Supreme Court in the 2003 case of *Woodside Village v. Jahrens*. That case involved an attempt by the members of a condo community to thwart the intentions of the owner of a large number of units by amending the governing documents to prohibit rentals of more than 9 months in any 12 month period, thereby impairing the unit owner's ability to use its many units to generate income. The Florida Supreme Court upheld the unit owners' amendment but reasoned that since condominiums are creations of statute, the Condo Act could be amended by the Florida Legislature to restrict the actions that members could take via the amendment process. Since such amendments can and do directly impact owners' substantive rights, just as they did in *Jahrens*, the comment by the court represents a further erosion of the potential impact of Kaufman language, since the court approved after-the-fact legislative action to regulate substantive actions that could be taken by owners and associations in the condo context.

The main fear about the existence of such language is that something potentially disastrous could be made law and that it would apply to an existing condominium by virtue of the existence of Kaufman language in the documents. However, even without Kaufman language in recent years the Florida Legislature has amended the way ALL condos pay for and repair damage after insurance claims; has allowed for suspension of common element use rights by certain owners; has tried to require retrofitting of highrise condo fire safety and elevator systems (until they were both legislatively reversed), and a has made a myriad of other changes that are fairly characterized as "substantive." So relax, its not Kaufman you have to fear. It's fear itself.

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RECENT CASE SUMMARIES

In **Wieder vs. King Cole Condominium Association, Inc.**, 38 Fla. L. Weekly D698a (Fla. 3rd DCA March 27, 2013) Owner filed suit against Association claiming that when returning to her unit after walking her dog, her foot got caught on a portion of the carpet in her hallway which had buckled after being shampooed. As a result of the fall, Owner alleged that she injured her arm, hand and neck. The record demonstrated that Owner (as well as other unit owners) had complained to Association's Board about the buckling carpet. Apparently, the buckling was worse immediately after the carpet was cleaned and while still wet. It was undisputed that Association did nothing to remedy the situation. Owner filed suit alleging Association had a duty to maintain the hallways in a reasonably safe and serviceable condition and that notwithstanding this duty, it negligently failed to meet it's duty and wrongfully permitted the hallways to be maintained in a defective condition. Association filed a motion for summary judgment arguing that the condition of the hallway carpet was obvious and known to Owner and therefore Association could not be held liable. The trial court granted Association's motion for summary judgment and denied Owner's motion for rehearing. On appeal to the Third District Court of Appeal, the appellate court noted that Owner testified at her deposition that she had seen and avoided the buckled carpet several times. However, her testimony also demonstrated that multiple condominium residents had complained to Association about the problem with the carpet, and that Association had taken no action. The appellate court acknowledged that, given Owner's familiarity with, and knowledge of, the carpet's condition, "… her decision to proceed to encounter the risk does, of course, raise the question whether she was comparatively negligent." Nonetheless, the underlying case involves a hallway and carpet on Association's property and provided for use by the condominium residents. As such, the appellate court reversed the summary judgment finding that there remained a factual issue in this case as to whether, notwithstanding the obvious nature of the buckling, Association could have anticipated the continued traversing of the hallway and buckled carpet by condominium residents and that they might be harmed by so doing. Whether Association should have anticipated an unreasonable risk of harm to the residents requiring it to take action is a question of fact for the jury to decide.

In **Tiara Condominium Association, Inc., vs. Marsh, McLennan Companies, Inc.**, 38 Fla. L. Weekly S151a (Florida Supreme Court, March 7, 2013) Association retained Broker as its insurance broker. One of Broker's responsibilities was to secure condominium insurance coverage. Broker secured windstorm coverage through Citizen's Property Insurance Corporation, which issued a policy that contained a loss limit in an amount close to $50 million. In September 2004, Association sustained significant damage caused by hurricanes' Frances and Jeanne. Association began the process of loss remediation. After being assured by Broker that the loss limits coverage was *per occurrence* (meaning Association would be entitled to almost $100 million, rather than coverage in the aggregate, which would be half of that amount), Association proceeded with more expensive remediation efforts. However, when Association sought payment from Citizens, Citizens claimed that the loss limit was $50 million *in the aggregate*, not per occurrence. Eventually, Association and Citizens settled for approximately $89 million, but that amount was less than the more than $100 million spent by Association. In October 2007, Association filed suit against Broker alleging 1) breach of contract; 2) negligent misrepresentation; 3) breach of the implied covenant of good faith and fair dealing; 4) negligence, and 5) breach of fiduciary duty. The trial court granted summary judgment in favor of Broker on all claims. On appeal to the Eleventh Circuit, the appeals court concluded that summary judgment was proper as to the breach of contract, negligent misrepresentation, and breach of implied covenant of good faith and fair dealing claims. The Eleventh Circuit concluded that Broker properly interpreted the insurance policy as containing a per occurrence limit of liability. However, the appeals court did **not** affirm the summary judgment on the negligence and breach of fiduciary duty claims. As to these two claims, the appeals court certified a question to the Florida Supreme Court whether the economic loss rule prohibits recovery, or whether an insurance broker falls within the professional services exception that would allow Association to proceed with the claims. The Florida Supreme Court examined in detail the history of the economic loss rule in Florida and receded from prior case law and held that the economic loss rule is limited only to cases involving products liability. Thus, Broker was not shielded from potential liability for negligence and breach of fiduciary duty claims involving its duties owed to Association in the procurement of its insurance.

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