

How to be a Good FID Dude!

Meeting your fiduciary duty as an association board member and saving your assets

As a board member for your condominium association, you are responsible for the operation, care, upkeep, maintenance, replacement, and improvement of the common elements. In addition, board members are required to prepare, adopt and amend administrative rules and regulations governing the day-to-day operation of the association, formulate annual operating budgets, respond to litigation, review and approve building additions and alterations, and generally accommodate the endless needs of unit owners. In short, the association has all of the powers and responsibilities of a not-for-profit corporation. Board members are required to do all of this in their free time, without compensation, and most often times without praise. The most important requirement for acting as a board member, however, is that you carry out your responsibilities according to the elevated standard of a fiduciary!

Illinois law requires that in performance of their duties, the officers and members of the board are required to exercise, whether appointed by the developer or elected by the unit owners, the care required of a fiduciary of the unit owners. The courts have defined the fiduciary relationship as a special confidence reposed in one who, in equity and good conscience, is bound to act in good faith with due regard to the interests of the other and requiring strict compliance with the condominium declaration and bylaws. Simply stated, a board, through its members, must act reasonably in its administration of the association by following all of its bylaws, rules and regulations as well as abiding by the declaration and the Condominium Property Act.

When the Board and/or its members either negligently conduct the business of the association, or worse, willfully and wantonly disregard their duty, it is likely that a court will find liability on behalf of the board and its members for breaching their fiduciary duty. Many associations, in an effort to shield its board members from liability, have included an exculpatory clause to their declaration limiting the scope of fiduciary duty to willful misconduct. For example, the declaration may state “[n]either the directors, Board, officers of the Association, Trustee, nor Developer shall be personally liable to the Unit Owners for mistake of judgment or for any other acts or omissions of any nature whatsoever as such directors, Board, officers, Trustee or Developer, except for any acts or omissions found by a court to constitute gross negligence or fraud.” The purpose of such clauses is to allow board members and officers to act with a certain level of protection so as to not unduly hinder their ability to perform the day-to-day administration of the association. In an era of increasing litigation, one could imagine that an association may become virtually deadlocked if every decision a board member made could subject them to personal liability. Even worse, an individual’s willingness to volunteer to become a member of the board would disappear if not for some type of protection.

Illinois courts have found boards and their members to be in breach of their fiduciary duty by disregarding the association's bylaws, impeding a unit owners right to free enjoyment of her unit, or failing to properly prepare the annual budget. Specifically, in one case, a court found a board and its members guilty of constructive fraud and in willful breach of their fiduciary for refusing to approve a unit owners plans for the reconstruction and renovation of her penthouse, following the demolition phase which caused numerous problems and damage to the common elements and other units. The court awarded plaintiff \$869,609.32 finding that the Board's extreme lack of cooperation and unreasonable delay in approving construction plans amounted to a willful breach of their fiduciary duty.

In another case, the court sustained a unit owner's complaint against the board and its members for willful and wanton misconduct, for exercising its right of first refusal with respect to the sale of a unit, without obtaining the requisite affirmative vote of 2/3 of the ownership of the association. The court reasoned that the board and its members were cloaked with full knowledge of the declaration and bylaws, therefore requiring strict compliance thereof. The case involved allegations of discrimination and violations of civil rights, which could result in substantial damages, including punitive damages. Cases of this nature are occurring more frequently because board members fail to read the declaration and bylaws; and more importantly fail to seek legal advice regarding the interpretation or effect of certain governing rules and regulations.

In many lawsuits by unit owners, the Association's general liability insurance carrier provides a legal defense for the board and its individual members. However, most policies exclude indemnification for willful and wanton acts, including fraud and constructive fraud which are common theories pled against a board and its members in breach of fiduciary duty cases. Moreover, as discussed above, if the court finds willful and wanton misconduct, the member is also not entitled to indemnification by the association. As such, a board member may be subject to personal liability and responsible for contributing to the payment of a judgment award. Consequently, each time a board member makes a decision regarding the affairs of the association, he or she is potentially placing their personal assets at risk if they act in contradiction to their fiduciary duty.

In order to be a good fiduciary, each board member should read or review their respective declaration and bylaws. When making decisions, one should ask themselves if the choice they are making is reasonable and fair to all members of the association. And lastly, in particularly complicated matters or matters of potential or actual litigation, the board should seek the advice of an attorney experienced in the highly technical area of association law.