Condominium and Homeowner Association Board Member Fiduciary Duties. The Impending Statute of Limitation for Hurricane Wilma Claims.

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Board members of homeowner's associations and townhome associations owe fiduciary duties to the other homeowners for whom they serve. When particular attention is not paid, board members may inadvertently breach their duties and thereby expose themselves to liability and expense. This article looks at the general rules governing Board member duties with a special emphasis on the law in Florida. We then examine how a failure to properly investigate a loss or damage to the association's property may breach a director's duties and cause an association to lose valuable property rights – currently or in the future. Property managers should be alert to these issues and assist their association clients in identifying issues where these principles lie. The principles discussed often apply in other states as well.

Under the common law (judge made, non-statutory law) a board member owed a fiduciary duty to the shareholders or members of the company they served. Much of the common law has been codified, but where it is not common law principles continue to apply to and impact director duties. This results in both statutory and case law defining what is required of board members. These duties require loyalty, good faith, fair dealing and prudence in how one gathers information and makes decisions on behalf of the entity for whom the board member serves.

A disinterested director is subject to the business judgment rule, which creates a rebuttable presumption that the director's decisions are in good faith and for proper purposes; under this doctrine, courts generally defer to the board's decisions. The presumption can be overcome and the burden to show proper action returned to board members where they are not acting in a disinterested capacity (i.e. there is a potential or actual conflict) or where the director has failed to carry out his or her basic duties of loyalty, good faith, fair dealing and informed decision making. Generally, the court's inquiry is (a) whether the director is acting in good faith, (b) in a manner with the care that an ordinarily prudent person would exercise under similar circumstances and (c) the director believed he or she was making the decision which was in the best interest of the corporation.

As a practical matter the inquiry is (a) whether there is a rational reason for the decision (b) did the person making the decision do his or her homework to gather relevant facts and investigate other considerations necessary to make the decision and (c) do the actions exhibit good faith. Examples of bad faith are dereliction of duty, failing to act or acting for the board member's personal interests.

Under Florida law the director's duty has been codified under F.S. 607.0830 (1) (2008):

- 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.
Florida statute specifically states that boards of homeowner associations owe fiduciary duties to the homeowners.[6]

Boards traditionally perform a decision making function, such as evaluating and, if appropriate, approving significant business transactions and investments. Directors have a duty to inform themselves, prior to making a business decision, of all material information reasonably available. This inquiry does not require every fact to be known but the director must discover and consider material information and facts reasonably available. Boards are expected to act “in a deliberate and knowledgeable way in identifying and exploring alternatives.” [7]

The Florida Business Corporation Act, F.S. §607.0830(2), permits Board members to rely on the reports of officers, experts, other professionals and legal and accounting expertise, so long as the Board in good faith believes the information to be reliable and competent. In relying on others, Board members may not abdicate their decision making authority and must exercise independent business judgment.[8]

Some factors courts view to determine whether board members are discharging their duties include (a) whether agendas and materials are provided to directors prior to meetings, (b) whether directors are prepared and participate actively in discussions, (c) whether the board receives advice, when and where appropriate, and (d) whether the board devotes the time to deliberate carefully, including possibly considering the issue at multiple meetings.[9]

Directors are expected to “exercise a good faith judgment that the corporation's information and reporting system is in concept and design adequate to assure the board that appropriate information will come to its attention in a timely manner as a matter of ordinary operations….“[10]

Under Florida law the business judgment rule protects directors no matter how poor their business judgment, unless they acted fraudulently, illegally, oppressively, or in bad faith. So long as due care was exercised, the rule protects a “good director” (one who did not act fraudulently, illegally, oppressively, or in bad faith) who made an honest error or mistake in judgment, but not a “bad director” (one who acted fraudulently, illegally, oppressively, or in bad faith) who made a bad decision. [11]

To establish a board has acted properly and deliberately, it is wise to have good minutes that evidence the factors considered, the alternatives discussed and examined, what outside reports or investigations were relied on, the process followed and where appropriate, that the matter was considered at more than one meeting.[12]

Where a director has a conflict of interest, he or she should disclose the conflict (or potential conflict) and any decision affected by the conflict or potential conflict should only be approved by a majority of disinterested directors.[13]

The ABA Corporate Director Handbook recommends that the disinterested director should seek to determine the following when confronted with a decision involving another director's conflict or potential conflict of interest:

- First determine whether the terms of the proposed transaction are at least as favorable to the corporation and its shareholders as might be available from unrelated persons or entities; secondly determine whether the proposed transaction is reasonably likely to further the corporation's business activities; and third ensure that the process by which the decision is approved or ratified is fair.[14]

In Florida, where hurricanes have been prevalent, directors currently serving are now confronted with a dilemma in light of the impending deadline of the 5-year statute of limitation to sue on insurance contracts covering losses caused by Hurricane Wilma, October 24, 2010.[15] These same points apply with even more force if the loss is from an earlier hurricane, such as Hurricane Katrina which struck east Florida (approximately August 24, 2005).

To discharge their duties, Board Members must be cognizant that:

1. The association's property insurance policy is a substantial asset purchased by the association and constitutes part of the association's capital.
2. Board members are responsible as fiduciaries to the association members to capture all available benefits under the association's insurance policies.
3. In the event of a catastrophic loss such as Hurricane Wilma, one and possibly more association policies are likely to provide replacement coverage for most association property damaged in the loss, including major building components such as sliding glass doors, windows, roof, exterior cladding and interior damaged by water intrusions through openings or leaks created by the storm.
4. In Florida if any damage to association property was caused by Hurricane Wilma, the property insurance policy is triggered, regardless whether the damage caused by the storm may have been originally estimated by an insurance company to amount to less than the deductible under the policy - it is highly likely that original estimate is low because many types of damage require expert evaluation to verify. The accuracy of the insurance company’s estimate must be verified by the Board using its own experts. Relying on the insurance company’s experts is not reasonable.

5. In order to satisfy the fiduciary duty Board members owe to association members, Board members should have a credible opinion from someone with verifiable expertise in evaluating insurance claims for Policyholders about whether the response of an insurance company to a loss claim was reasonable – Board members cannot reasonably rely on the insurance company’s determination.

6. The coming crisis for Board members is the statute of limitation for Wilma claims, which will bar any claim against an insurance company that is not filed in court by October 24, 2010.

7. Whether current Board members properly met their fiduciary duties to obtain all available insurance benefits for a Wilma property loss will be revealed during the next catastrophic loss cycle – insurance companies will deny coverage for damages they can argue were caused by Hurricane Wilma, and never repaired, when claims are made for the next major wind or other large loss event.

8. Whether Board members sitting at the time the statute of Limitation passed met their duties to pursue insurance claims for Wilma losses before October 24, 2010 will be examined by a later Board faced with a denial of coverage at the time of the next large loss. Current Board members need to have the insurance carrier’s claim decision regarding Hurricane Wilma losses properly evaluated well in advance of the October 24, 2010 deadline. If further action in the claim process must be taken, a reasonable period of time is necessary to either resolve the claim, or know suit must be filed before October 24, 2010.

9. Claims already adjusted may be reopened, if appropriate, even if a payment was made or the loss was estimated below the deductible. Legal practitioners have seen a pattern of chronic underpayment of claims by insurance carriers where policyholders do not have proper representation.

10. Finally, current Board members may reasonably rely on the opinions of persons with verifiable expertise, such as Public Adjusters and certain law firms who emphasize in their practice first party insurance coverage representing only Policyholders. An opinion from a person with verifiable expertise that benefits under an insurance policy have, or have not been, sufficiently pursued will protect Board members in the discharge of their fiduciary duties.

The above points apply to a hail loss in Minnesota or any other incident that is covered under an insurance policy. Boards must thoroughly and competently review the association’s rights under its insurance policies and must consult with independent experts who represent the interests of the association and not the insurance company. Failure to meet such standards prior to the expiration of applicable statutes of limitation can expose directors to avoidable individual liability exposure.

It is clear when serving on a homeowner board, board members must understand their duties. They must also understand where failure to properly investigate and act is a potential breach of their fiduciary duties. Boards must act to protect their homeowners’ substantial capital investment, being cognizant that the association’s insurance policy represents a valuable form of capital that must also be protected. To do so requires expert investigation and review of property conditions and policy coverage. Failure to engage experts with knowledge of coverage and property damage can lead directors to fail to discharge their duties and can subject such directors to personal liability.\[16\]

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occupy a trustee-like position: unlike trustees, directors do not themselves have legal ownership interests in transferable property beneficially owned by others, but like trustees, directors are entrusted with powers to use in the interest of others. Invested by corporation statutes with discretionary authority to manage or supervise the management of the corporation's business, directors are bound by fiduciary principles.


[3] E.g. Bolander v. Bloander, 703 N.W.2d 529, 556 (Ct. App. Minn. 2005); Stamp, 263 Ill. App. 3d at 1015. In Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006), the Delaware Supreme Court ruled that “although good faith may be described colloquially as part of a ‘triad’ of fiduciary duties that includes the duties of care and loyalty, the obligation to act in good faith does not establish an independent fiduciary duty that stands on the same footing as the duties of care and loyalty.”


[5] A self-interested transaction is not afforded the protection of the business judgment rule. E.g. U.S. v. De La Mata, 266 F.3d 1275, 1297 (11th Cir. 2001) (“The business judgment rule protects disinterested directors. Disinterested directors neither appear on both sides of a transaction nor expect to derive any personal benefit from it in the sense of self-dealing -- as opposed to a benefit which devolves upon the corporation or all stockholders generally.”); FDIC v. Stahl, 89 F.3d 1510, 1516 (11th Cir. 1996); Int'l Ins. Co. v. Johns, 874 F.2d 1447, 1460 (11th Cir. 1989); Citron v. Fairchild Camera & Instrument Corp., 569 A.2d 53, 64 (Del. 1989) ("[T]he presumption initially attaches to a director-approved transaction within a board's conferred or apparent authority in the absence of any evidence of fraud, bad faith, or self-dealing in the usual sense of personal profit or betterment. The burden falls upon the proponent of a claim to rebut the presumption by introducing evidence either of director self-interest, if not self-dealing, or that the directors either lacked good faith or failed to exercise due care." (Citations omitted)); Shlensky v. South Parkway Bldg. Corp., 19 Ill. 2d 268, 280-281 (1960) (The Illinois Supreme Court states "transactions between corporations with common directors may be avoided only if unfair, and that the directors who would sustain the challenged transaction have the burden of overcoming the presumption against the validity of the transaction by showing its fairness," which is to say the court will not defer to the interested directors judgment in the way it would for disinterested directors.); In re UnitedHealth Group Inc. Shareholder Derivative Litigation, 754 N.W.2d 544, 551 (Minn. 2008); Bernard S. Sharfman, Being Informed Does Matter: Fine Tuning Gross Negligence Twenty Plus Years After Van Gorkom, 62 Bus. Law. 135, 147 (2006).


[7] Citron v. Fairchild Camera and Instrument Corp., 569 A.2d 53, 66 (Del. 1989). See also Stamp v. Touche Ross & Co., 263 Ill. App. 3d 1010, 1015 (1993)(directors “may not close their eyes to what is going on about them in corporate business, and must in appropriate circumstances make such reasonable inquiry as an ordinary prudent person under similar circumstances”); Janssen v. Best & Flanagan, 662 N.W.2d 876, 888-889 (Minn. 2008) (board’s special litigation committee “gave no indication that [it] had undertaken the careful consideration of all the germane benefits and detriments to [the corporation] that is indicative of a good faith business decision,” causing the board to lose the benefit of the protections of the business judgment rule).

[8] See In re Walt Disney Co. Derivative Litigation, 906 A.2d 27, 55-58 (Del. 2006), for a good discussion of satisfaction of these requirements in a fact-specific context.


[12] Davis supra note 9, at 40.


