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TRENDS IN BOARD MEMBER LIABILITY

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Community Association board members need to consider the developing law concerning individual liability with regard to the operation and management of the association. Recent case law on this issue should give directors some pause when considering what actions should be taken on behalf of the association.

As you should all be aware, board members owe a fiduciary duty to the members of the association and the corporate entity itself.

This fiduciary duty is explicitly defined in the general standards for directors of not-for-profit corporations (which include condominiums and homeowners associations) located in Section 617.0830, Florida Statutes, which states:

General standards for directors:

(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.

Complying with the requirements listed above is a challenging task, made more challenging by the interpretation of these and other statutes by the judiciary. The law, however, clearly states that board members owe a fiduciary duty to the unit owners. A fiduciary duty exists when there is a special relationship between two parties, one who is bound to act in good faith and due regard for the interests of the other. It is well established

that community association officers and directors owe a duty to the members of the association, and that the members of the board can be held liable for breaching that duty.

Directors are protected, to some extent, by a grant of immunity in the not-for-profit corporation statutes. Section 617.0834, Florida Statutes, provides immunity from civil liability to board members in certain instances. Specifically, this section provides:

- (1) An officer or director of a nonprofit organization . . . is not personally liable for monetary damages to any person for any statement, vote, decision, or failure to take an action, regarding organizational management or policy by an officer or director, unless:
 - (a) The officer or director breached or failed to perform his or her duties as an officer or director; and
 - (b) The officer's or director's breach of, or failure to perform, his or her duties constitutes:
 - 1. A violation of the criminal law . . . ;
 - 2. A transaction from which the officer or director derived an improper personal benefit, either directly or indirectly; or
 - 3. Recklessness or an act or omission which was committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

Despite the immunity afforded by this section of the Florida Statutes, recent decisions by Florida courts suggest that members of the board should not ignore the potential liability for their actions. The seminal case governing individual director liability is *Perlow v. Goldberg*, 700 So2d 148 (Fla. 3d DCA 1997). In *Perlow* unit owners brought an action for breach of fiduciary duty against directors in their individual capacities alleging what amounted to mere negligence in administering insurance funds. The *Perlow* court upheld the rule that directors will not

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“A fiduciary duty exists when there is special relationship between two parties one who is bound to act in good faith and due regard for the interests of the other.”

be held personally liable for their actions, including negligent actions, absent allegations of criminal activity, fraud, willful misconduct or self-dealing. The recent cases seem to indicate a trend towards director liability that chips away at the *Perlow* standard.

A very recent appeals case allowed a trial to go forward against directors in their individual capacities. In this case, the unit owner claimed that the directors deliberately abdicated their responsibilities with respect to the annual budget, the levying of assessments, and the holding of board meetings and that such actions were taken in bad faith with a malicious purpose. The court found that these allegations were sufficient to deny the director's motion for summary judgment based upon Section 617.0834 immunity. *Berg v. Wagner*, 935 So. 2d 100 (Fla. 4th DCA August 9, 2006).

In the *Aza* case, the court of appeals reinstated a matter, after it had been dismissed by the trial court, against a corporate officer in her individual capacity for fraud and negligent misrepresentation, for acts within the course and scope of her employment as president of the corporation. In this case, the corporate officer simply signed loan documentation in her capacity as president. The court reinstated the case, finding that if a director or officer commits, or participates in the commission of a tort she is liable to third persons injured thereby. *Home Loan Corporation v. Aza*, 930 So. 2d 814 (Fla. 3rd DCA May 31, 2006).

Another case allowed discovery to be taken that would potentially establish that a condominium association's refusal to repair a leaky roof for several years constituted a breach of the board members' fiduciary duty. In this case, the unit owner made several complaints to the board members over several

years, and ultimately his unit was so badly damaged by the leaks that it was condemned by the local governing authority. Although the court did not legally determine whether these actions by the members of the board constituted a breach of fiduciary duty, the court did allow the unit owner to take discovery from the association's insurance carrier to establish that fact. *Allstate Insurance Co. v. Cambron*, 31 Florida Law Weekly D2326 (Fla. 5th DCA September 8, 2006).

These recent decisions suggest a trend toward director liability for merely negligent acts, but none of the cases above have abrogated *Perlow*, and *Perlow* remains the seminal case on this issue. It is important to note that the courts will protect the association and its directors as long as they operate reasonably and in good faith. It is only when the members of the board overstep these boundaries, that they should fear legal action. Allegations of board member misconduct generally arise due to poor communication, and general confusion as to what the law provides in this area. Ultimately, the directors must direct their actions for the benefit of the unit owners.

In furtherance of that goal, there are certain steps the board of directors can take to minimize their exposure:

1. Board members should stay informed of all issues facing the association. Before making a decision, directors should consult with legal counsel, management, and experts. The advice provided by these professionals should be considered before making a decision.
2. The directors should keep accurate minutes of all meetings and votes. Specific attention should be paid to documenting not only the decisions made by

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Editor's note: Insurance reform legislation resulting from the Special Session of the Legislature (HB 1A) and modifications to the Condominium, Cooperative and Homeowners' Associations Acts created by HB 7031 provide mechanisms for community associations to self-insure. As few as three (3) associations can join together, but the coverage must be sufficient to fund the probable losses from a 250-year windstorm event. The self-insurance fund must comply with regulations set forth in the Commercial Self Insurance Fund Act. The following is an Advisory (reprinted in full) from the Office of the Florida Insurance Consumer Advocate.



ADVISORY FROM THE OFFICE OF THE FLORIDA INSURANCE CONSUMER ADVOCATE

Robert F. Bob Milligan, Insurance Consumer Advocate

In 2007, the Florida Legislature enacted a number of changes to property insurance laws.

Condominium, homeowner, and other residential associations may now participate in a Commercial Self Insurance Fund (SIF) to insure common property such as a condominium building. If your association is considering participation in a self-insurance fund, please take time to carefully consider the differences between insurance provided through a self-insurance fund and insurance provided by an insurance company.

Self-insurance funds do not operate like insurance companies.

The policy (contract) issued to an association member of a self-insurance fund must contain the following statement:

“This is a fully assessable policy. In the event the fund is unable to pay its obligations, policyholders will be required to contribute on a pro rate earned premium basis the money necessary to meet any unfilled obligations.”

- Once an insurance policy premium is paid to an insurance company, the company cannot come back later and ask for more money because the company paid more claims than they expected.

o This is not true for self-insurance funds. In a self-insurance fund, unit owners can ultimately be responsible for the shortfall of the self-insurance fund.

- Insurance policies issued by insurance companies that are authorized to do business in Florida are protected by the Florida Insurance Guaranty Association (FIGA) in the event that the authorized insurance company goes bankrupt.

o Participants in a self-insurance fund are not protected by FIGA. If a self-insurance fund becomes bankrupt, associations participating must pay the unpaid claims – this could result in assessments being levied by the association against individual property owners who are members of the association.

If your association is considering membership in a self-insurance fund, please be aware of all the contract clauses – and be sure you understand at what dollar amounts your association would have to assess your individual homeowners or unit owners to pay damages for your buildings or for the damages to another member's buildings after a windstorm or hurricane event. ■

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the directors but the basis and reasoning for such decisions. By properly documenting these decisions, and the reasoning behind them, the board creates a record that can be used in defense of an action against the directors in their individual capacity.

3. The members of the board should know what their governing documents require of them, and should make every effort to comply.
4. The directors should consult with legal counsel whenever making a decision that they believe may result in litigation. Specific attention should be paid to how the directors' actions in these instances may be perceived by the unit owners and third parties.
5. The directors should ensure that all procedural requirements provided for in the Condominium Act, Homeowners Association Act, and governing documents are fulfilled. For example, failing to notice meetings properly would invalidate all actions taken at a board meeting.
6. Members of the board should make every effort to avoid self-dealing, conflicts of interest, and acts in bad faith.
7. Members should be responsive to requests for information, complaints, and concerns of the unit owners. Serious issues brought up by unit owners should not be ignored, should be discussed at duly called meetings of the board, and reflected in the minutes.
8. The directors should assure that the provisions of the governing documents are enforced consistently and equally amongst the unit owners so as to prevent claims of discrimination and bad faith application.

Although this is not an all-inclusive list, members of the association's governing bodies should keep these points in mind when acting. If the directors communicate as they should with the unit owners, and follow the requirements of Florida Statutes and the governing documents, they would arguably be protected from individual liability. ■



**Legislative Proposals are
already being discussed –
Please be sure to log on to
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DIRECTORS NEEDED, ONLY THOSE WITH THICK SKINS NEED APPLY - TEMPORARY INJUNCTIONS AGAINST VIOLENCE LIMITED



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Violent acts occur with increasing frequency throughout the State for different reasons. The Florida legislature has recognized the need to provide a mechanism for the residents to protect themselves and thus the law provides for three (3) different types of orders of protection against violence (generally referred to as restraining orders) called injunctions. The Court is authorized to enter Protective Injunctions against repeat violence, sexual violence and dating violence – all of which include the term “violence” in the title.

The term “violence” is specifically defined by the statute as:

“any assault, aggravated assault, battery, aggravated battery, sexual assault, sexual battery, stalking, aggravated stalking, kidnapping or false imprisonment, or any criminal offense resulting in physical injury or death, by a person against another person.”

The Florida Supreme Court has promulgated forms to pursue an injunction against violence. All courts use the Supreme Court’s temporary injunction and final judgment forms to promote predictability and recognition by the various law enforcement departments throughout the state. The forms, including petitions, various motions and orders are available at the courthouses and online for viewing, printing, and/or downloading at www.flcourts.org.

Unfortunately, violent acts sometimes occur as a result of association disputes. While many pro-active boards, believing that one or more of their members may become violent or engage in undesirable behavior, hire security or off-duty law enforcement personnel to attend association meetings or patrol the community, a board cannot often predict whether a resident (or guest) will attempt to harm another resident, board member, management or an employee simply as a result of enforcing the association’s regulations. Under some circumstances, obtaining a temporary injunction against repeat violence is an appropriate step to take while either the Association (depending upon the nature of the actions) or the individual pursue other civil action to prevent further incidents in the future. However, the injunction (restraining order) most typically sought in the association setting is an injunction against repeat violence, which is only available if two (2) incidents of violence or stalking

have been committed, one of which is within six (6) months of filing the petition. The incidents of violence must be committed against the person seeking the injunction or their immediate family member.

A recent case arising out of a dispute over easement rights (access to a lake through a residential property) demonstrates how simple matters can get out of hand, but the specifics of the statute control whether an injunction should be issued. In *Clement v. Ziemer*, 32 Fla.L.Weekly D901, (Fla. 5th DCA 2007), there were various allegations made about incidents or examples of behavior that did not rise to the level of repeat violence. Peter Clement has an easement over a ten (10) foot wide piece of property owned by Lanelle Ziemer for access to a lake. Ziemer claimed that Clement said “she would be sorry” if she did not permit Clement unfettered access, drove like a madman through the property, screamed obscene names, “terrorized” the neighborhood, argued with the sheriffs that responded to complaints and the like. While the trial court initially granted injunctive relief, the appellate court reversed and remanded the case with instructions to vacate (lift) the injunction indicating that threats that “Zeimer would be sorry may have placed her in fear, but, without more, are not qualifying acts of violence”. The Court relied upon a previous case which stated:

“Mere shouting and obscene hand gestures, without an overt act that places the victim in fear, does not constitute the type of violence required for an injunction Even a representation that the offender owns a gun and is not afraid to use it is insufficient to support an injunction absent an overt act indicating an ability to carry out the threat or justifying a belief that violence is imminent.”

Santiago v. Towle, 917 So.2d 909 (Fla. 5th DCA 2005).

Community leaders must develop conflict resolution skills, learn to withstand criticism and also learn techniques to prevent casual disputes from leading to incidents of violence. At the same time, community leaders must also recognize trends or behaviors that may lead to injuries to themselves, employees or other residents. With good management, good communication, strong education of members and a diverse group of community volunteers, dispute resolution practices should occur at every level – hopefully preventing verbal altercations from escalating into something else. ■

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Budgeting and Fiscal Planning: Managing Your Community's Funds

Banking, legal and accounting professionals will provide the "must know" information about reserves management, pooling reserves, collecting assessments, and money management.

2008 Outlook: What's New, What's Coming

Learn about the New Year's hot topics in the areas of legislation, insurance rates and coverage, property management, bank lending policies, financial reporting, and money management.

The Insurance Crisis: What Board Members Need to Know

Get insight into Florida's insurance crisis, including ways to minimize rate increases and coverage limitations on your community.

Fiduciary and Legal Responsibilities of Board Members

What are your responsibilities as a board member? Attend this session to learn about legal obligations, fiduciary liability, risk management, financial reporting, asset protection and more.

Disaster Planning: Is Your Association Ready?

Attendees will learn about pre-disaster planning for a recovery, mandatory evacuation policies, premises access after a storm, filing insurance claims, coordinating repairs, securing financing, and building code compliance.

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