

FIDUCIARY DUTY

COMMUNITY ASSOCIATION DIRECTOR OBLIGATIONS

- **What is a “fiduciary duty”?**

The affairs and business dealings of a corporation, both for profit and not for profit, are managed by the corporation’s board of directors. A community association director, generally, owes a **Duty of Care** and a **Duty of Loyalty** to the corporation and the shareholders or members of the corporation. These two duties are generally defined as follows:

Duty of Care

- A Director must discharge duties in good faith, with the care of a reasonably prudent person in a similar position, and in the best interest of the corporation.

Duty of Loyalty

- A Director must not “self-deal”, must avoid/disclose conflicts, and maintain confidentiality.

Further, association directors are obligated to **prudently** manage and invest corporate funds with the best interest of the corporation and the membership in mind. These obligations impose a requirement that the association director acts in good faith when making decisions for the corporation and imposes an obligation of trust and confidence in favor of the association and its members.

- **Where is this “duty” found or defined?**

Section 718.111(1)(a) and (d) of THE FLORIDA CONDOMINIUM ACT, and Section 720.303(1) of THE FLORIDA HOMEOWNERS ASSOCIATION ACT both provide that an association’s directors have a fiduciary relationship with the membership.

Further, a Florida Not for Profit Community Association must also observe the requirements of Chapter 617, THE FLORIDA NOT FOR PROFIT CORPORATIONS ACT. Section 617.0830, *Florida Statutes*, reads 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.

- **How do I demonstrate that I am upholding my fiduciary duty/responsibilities?**

The primary claim received by insurance companies who provide directors and officers insurance coverage, are allegations of breach of fiduciary duty by one or more of the directors related to decisions made or actions taken or not taken by the board. While the definitions listed above provide a framework for good director conduct, the following are some “common sense” actions that ensure that a director is not only well informed on a particular issue, but is also acting in good faith and in the best interest of the corporation:

- ✓ *Attend Board Meetings.*
- ✓ *Attend Annual and Special Membership Meetings.*
- ✓ *Communicate with fellow directors and exhibit professionalism in your interactions with other directors, management, members, and association vendors.*
- ✓ *Utilize experts (CPA, Attorney, Engineer, etc.) when making decisions related to those specialties.*
- ✓ *Perform adequate due diligence on every issue to ensure that your vote is informed.*
- ✓ *Exercise your independent judgment.*
- ✓ *Review and understand your governing documents and the laws that apply to your community association.*

This list is by no means exhaustive. Your community may generally present special or unique needs or the specific circumstances may require additional action, not listed above, to ensure that the director's vote is independent, informed, and in the best interest of the corporation. Knowing and understanding your association's governing documents (Articles of Incorporation, Corporate Bylaws, Declaration of Covenants and Restrictions, Rules & Regulations, and any amendments to the foregoing), with the help of your attorney, will provide a great base of understanding the rights and obligations of your specific board of directors.

Lastly, ensure that you and your fellow directors are covered by Directors and Officers Liability Insurance.

- **What is the “Business Judgment Rule”?**

Many decisions of the community association board of directors are protected by what is called the **Business Judgment Rule**. This rule generally favors the board of directors. Specifically, the Florida Supreme Court defined this rule as follows:

[T]he management of corporate business is vested in the directors of a corporation, the directors having wide discretion in the exercise of business judgment in the performance of their duties... While directors are required to discharge their duties with the diligent care and skill which ordinarily prudent men would exercise under similar circumstances in like positions, they incur no liability to the corporation for issues of business expediency which they resolve through the mere exercise of their business judgment. Schein v. Caesar’s World, Inc., 491 F.2d 17, 18 (Fla. 1975).

Thus, this rule generally provides that a court will not step in to the shoes of a director and change the decision or vote on an issue that was before the board. The rule will protect the board where the decision/vote was made after reasonable due diligence on the matter and absent any apparent conflict of interest.

A few examples of day to day decisions that will usually be left up to the board’s “business judgment” are vendor contract awards, payment of operating expenses, hiring of experts (CPA, engineer, attorney, management company, etc.), and/or establishment of best practice policies and protocols. This list is not exhaustive as each community association is unique. Generally, decisions related to the operation of the business are left to the discretion of the board. However, every community association director should be familiar with their governing documents as there may be limitations within those documents that the directors and the board may be subject to.

- **What is the “Reasonableness Standard”?**

The **Reasonableness Standard** applies when making decisions related to the enforcement of the documents against an owner or when making fact specific determinations. For example, the enforcement of rental restrictions or approval of an Architectural Review Application presented by an owner/member would invoke the “reasonableness standard.”

When making these types of decisions, the board, or committee working at the discretion of the board, must consider the following:

- *Is this decision within the authority of the board or committee to make?*
- *Is this decision consistent with the association’s covenants and restrictions?*
- *Is this decision consistent with historical treatment of similar or identical issues?*
- *Was the meeting at which the decision was made subject to meeting notice requirements?*

Generally, the directors must enforce the documents objectively and in good faith. Essentially, the court will ask two questions when reviewing a challenged decision of the board of directors: 1) was the decision informed and in the best interest of the community as a whole (*business judgment*), and 2) was the decision reasonable under the specific circumstances.

- **Can I be held personally liable for a Board’s decisions?**

The simple answer is, yes. Under certain circumstances, a director may be held personally liable for the decisions he or she makes. Directors are human, and people make mistakes. Every member is not going to agree with every decision made by the association's board of directors. What must a director do to protect him or herself from liability?

As quoted above, Section 617.0830(4), *Florida Statutes*, provides that a director is not liable for any action taken that is consistent with the directors fiduciary duty and obligations to the membership. A director may be personally liable for decisions where the directors conduct constitutes a breach of fiduciary duty **AND**:

- Violates criminal law;
- Results in the director obtaining an improper personal benefit from the action;
- Constitutes a conscious disregard for the best interests of the corporation, or;
- Constitutes a reckless act where it was committed in bad faith or with malicious intent or purpose.

Generally, “[a]ctual wrongdoing in the form of fraud, self-dealing unjust enrichment would have to be established in order to trigger individual liability.” Taylor v. Wellington Station Condominium Assoc., Inc., 633 So.2d 43 (Fla. 1994).

This presentation/information was provided by Erik Whynot, Esq., founding partner of the Whynot Law Firm in Casselberry, Florida. The firm represents all types of community associations throughout the State of Florida on issues ranging from assessment collection and covenant enforcement to vendor contract negotiation, document amendments, and construction defect matters.



**WHYNOT
LAW FIRM**

1280 Seminola Blvd.
Casselberry, Florida 32707

Phone: 407-541-0050
Fax: 407-205-0030
www.whynotlaw.com

The information provided herein should not be acted upon or relied upon without professional legal advice. The opinions and information provided herein are as of the date stated herein and this law firm and this law firm undertakes no obligation to advise of subsequent changes in the law.