

## **Board of Directors: Can Board members be held liable for their actions?**

Board members and officers of both HOAs and condo Associations owe a duty of care to their Associations and to individual owners. They also owe a lesser duty of care to members of the general public.<sup>1</sup> An Association can be held liable if its Board members breach the applicable duty and, under certain circumstances, individual Board members can also be held personally liable for their actions.

### **Liability of the Association**

In most cases, individual Board members are protected by statute<sup>2</sup> from personal liability for breach of the duty of care. However, the statute does not protect the Association itself from liability for the Board members' acts or omissions. Thus, courts have recognized owners' right to recover from the Association for Board members' breach of their duty of care.<sup>3</sup>

However, courts are hesitant to substitute their judgment for that of Board members on matters related to the execution of Board related duties. It is unlikely a court would find a breach of duty without an affirmative showing of fraud, dishonesty, or incompetence.<sup>4</sup>

### **Board Members' Personal Liability**

Under certain circumstances, as described further below, individual Board members may be held liable for breach of the duty of care.

By statute,<sup>5</sup> Board members of an Association incorporated as a nonprofit corporation may be held personally liable to members of the general public for acts and omissions that amount to gross negligence. They can be liable to Association members for

ordinary negligence, i.e., failure to fulfill Board related duties with ordinary and reasonable care.<sup>6</sup>

HOA Board members subject to RCW 24.06 can be held personally liable for “acts or omissions that involve intentional misconduct or a knowing violation of the law, or that involve a transaction from which the Board member or officer will personally receive a benefit in money, property, or services to which the Board member or officer is not legally entitled.”<sup>7</sup>

Likewise, if an “officer or [Board member] commits or condones a wrongful act in the course of carrying out his duties...and a lack of good faith can be shown,” courts may “pierce the corporate veil” of the Association and impose individual liability on the offending Board member.<sup>8</sup>

If an Association is not incorporated under the laws of Washington, Board members do not have the same protection from personal liability for breach of the duty of care.

### **Association’s Assumption of Risk for Board Member Liability**

Regardless of the standards set by statute and the courts for a Board member’s personal liability, most Associations are required by their Governing Documents to indemnify (protect) volunteer Board members from any liability arising from the fulfillment of their duties as Board members. Indemnification provisions generally cover virtually all circumstances except willful misconduct and criminal acts by the Board member. A Board member for an Association with a valid indemnification provision would be protected financially even if a court found the Board member personally liable. In that case, the Association would be responsible for any judgment against the Board member arising from a breach of the Board member’s duty of care.

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<sup>1</sup> See chapter entitled: “Board of Directors: What is a Board member’s duty of care?”

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<sup>2</sup> RCW 4.24.264(1) (“a member of the [Board] or an officer of any nonprofit corporation is not individually liable for any discretionary decision or failure to make a discretionary decision within his or her official capacity as [Board member] or officer unless the decision or failure to decide constitutes gross negligence”); *Waltz*, 183 Wn.2d at 91.

<sup>3</sup> For example, in *Alexander v. Sanford*, 181 Wn. App. 135 and *Schwarzmann v. Ass’n of Apt. Owners*, 33 Wn. App. 397. In both cases, the Washington Court of Appeals acknowledged the owners’ right to recover from the Association if it could prove a Board member’s breach of the duty of care and resulting injury.

<sup>4</sup> Such was the case in *Schwarzmann*, 33 Wn. App. at 403, where the court refused to “second-guess the actions of directors” of a condo Association without evidence of bad faith or improper motive by the Board members.

<sup>5</sup> RCW 4.24.264(1).

<sup>6</sup> *See also, Waltz v. Tanager Estates Homeowner’s Ass’n*, 183 Wn. App. 85 (2014) (In this case, owners challenged an HOA Board’s denial of their building plans. The court agreed with the owners that the Association and/or individual Board members could be found liable to the owners for ordinary negligence. That is the failure to exercise the care of an ordinarily prudent person under the circumstances. But, interpreting RCW 4.24.264, the court also acknowledged that a higher standard of gross negligence governed Association and Board member liability for harm to members of the general public.)

<sup>7</sup> RCW 24.06.035(2).

<sup>8</sup> *Schwarzmann*, 33 Wn. App. at 403.