

16--Can Board Members Be Held Personally Liable for Their Actions?

Individual Board Members can be held personally liable for their actions. Board Members and officers of common interest communities owe a duty of care to their Associations and to individual Owners. They owe a lesser duty of care to members of the public. An Association can be held liable if its Board Members breach their duty, but courts avoid holding a Board Member personally liable unless the member engages in intentional misconduct, self-dealing, or otherwise operates in bad faith.

Liability of the Association

In most cases, individual Board Members are protected by statute¹ 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 an Owner's right to recover from the Association for a Board Member's breach of his or her duty of care.² However, courts are hesitant to substitute their judgment for that of a Board 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.³

Board Members' Personal Liability

Under certain circumstances, as described further below, individual Board Members may be held liable for breach of their duty of care. By statute,⁴ 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.⁵

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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.”⁶

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.⁷ In other words, a Board Member’s failure to act in good faith would constitute gross negligence (and possibly worse), and accordingly a breach of the duty of care.⁸

Association’s Assumption of Risk for Board Member Liability

Regardless of the legal standards for a Board Member’s personal liability, most Associations are required by their Governing Documents to indemnify (protect) volunteer Board Members from liability arising from the performance of their duties as Board Members⁹. Indemnification provisions generally cover nearly all circumstances except willful misconduct and criminal acts by a Board Member. A Board Member for an Association with a valid indemnification provision is protected financially even if a court finds the Board Member personally liable. In that case, the Association is responsible for any judgment against the Board Member arising from a breach of their duty of care.

¹ 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.

² 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

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recover from the association if it could prove a Board member's breach of the duty of care and resulting injury.

³ See *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.

⁴ RCW 4.24.264(1).

⁵ 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 (i.e. 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.)

⁶ RCW 24.06.035(2).

⁷ *Schwarzmann*, 33 Wn. App. at 403. ("[Piercing the corporate veil] is only appropriate where an officer or director commits or condones a wrongful act in the course of carrying out his duties and a lack of good faith can be shown.")

⁸ Actions alleging discrimination are a context in which board members could be subject to personal liability for breaching their duty of care. In *Fielder v. Sterling Park Homeowners Ass'n*, 914 F.Supp.2d 1222 (W.D. Wash. 2012), the court found that alleged discrimination, if true, was sufficient to show the board member's actions were grossly negligent. ("Taking Plaintiff's allegations as true, the Court has no trouble finding that the board member's actions could constitute gross negligence. For example, violations of the [Washington Law Against Discrimination] can never be made in good faith." *Fielder* at 1229 (citing RCW 49.60.010)). *Fielder* illuminates the connection between the standard of care and the substantive claim: where a substantive violation can be established by a showing of bad faith, a board member who committed the substantive violation will probably be found to have acted in a grossly negligent way.

⁹ RCW 64.34.304 (m) allows for indemnify board members. RCW 64.90.405 (m) allows for indemnify board members. Both Non-Profit Corporation Acts also allow for indemnification of board members.