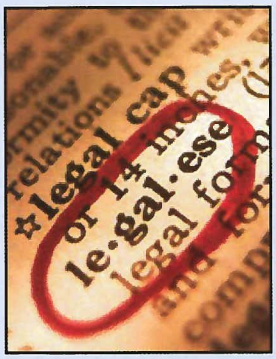

The Legal Pad

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A Closer Look at an HOA Board Member's Duty to Homeowners

Whenever a homeowner association (HOA) starts thinking in terms of a construction defect lawsuit against its developer and/or builder, its board members will inevitably be confronted with the purported risk and liability to their homeowners if they do not pursue the alleged defects and deficiencies brought to their attention.

Not surprisingly, the board members are on occasion led to believe that pursuing such claims is synonymous with acting in the homeowners' "best interests." Further—and unfortunately—board members often feel as though they will breach their obligation to the homeowners if they don't agree to proceed with such claims.

Nevertheless, how well do we really know what the board members' duty actually consists of, when it applies, and what potential liability exists for a board member's breach of same? The answers might surprise you.

Colorado's Common Interest Ownership Act, which was enacted ideally to "establish a clear, comprehensive, and uniform framework for the creation and operation of common interest communities" – but which in reality provides the statutory basis for most multi-family construction defect lawsuits – describes a board member's duty of care in express and unequivocal terms:

Except as otherwise provided in subsection (2.5) of this section [pertaining to the investment of the association's reserve funds]:

(a) If appointed by the declarant, in the performance of their duties, the officers and members of the executive board are required to exercise the care required of fiduciaries of the unit owners.

(b) If not appointed by the declarant, no member of the executive board and no officer shall be liable for actions taken or omissions made in the performance of such member's duties except for wanton and willful acts or omissions.

C.R.S § 38-33.3-303(2) (emphasis added). To be sure, as set forth in subsection (2)(a) above, an officer or board member appointed by the declarant, .i.e., the developer/builder, does indeed have a fiduciary duty to the homeowners. Accordingly, it is common for such declarant-appointed officers to be named personally in construction defect lawsuits.


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Subsection (2)(b), in contrast, makes it very clear that HOA-appointed or elected officers and board members shall not be liable for their actions or omissions made within the performance of their duties, except for wanton or willful acts or omissions. In such instances, Colorado courts have determined that the board member's conduct will be measured against the "business judgment rule," which generally holds that board members will not be held liable for errors or mistakes in judgment, pertaining to law or fact, when they have exercised their judgment or discretion in good faith.

Furthermore, Colorado law makes it clear that courts will generally not interfere with a board member's decision regarding whether to pursue a claim, provided they engage in a "reasonable and honest exercise of [that] judgment." See Rywalt v. Writer Corp., 526 P.2d 316 (Colo. 1974).

In the context of a board member's decision to [or not to] pursue claims against a developer or builder for alleged construction defects, it reasonably follows that such a board member will not be subject to liability unless they willfully or wantonly fail to exercise judgment and discretion in good faith.

Given Colorado's construction litigation climate, where homeowners and communities are subjected to long and frustrating legal battles with uncertain results (while the attorneys and forensic experts profit), it begs the question whether the board members' decision to pursue such claims was really in the homeowners' best interests in the first place.

For additional information regarding this or other construction law issues in Colorado, you can reach Derek Lindenschmidt by e-mail at lindenschmidt@hhmrlaw.com or by telephone at (303) 987-9814.

HHMR is a Denver-based law firm devoted to construction law and the litigation of construction-related claims.