

BY JOHN J. D'ATTOMO

Condo Officers and Directors Beware

Potential defendants in litigation arising under the Condominium Property Act include officers and directors in their individual capacity.

DISPUTES OFTEN ARISE BETWEEN UNIT OWNERS AND THEIR CONDOMINIUM ASSOCIATION.

These disputes frequently lead to litigation. A preliminary step for unit owners seeking to assert claims in litigation is to identify the proper parties to name as defendants.

Illinois law permits unit owners to assert claims against various potential defendants, including the condominium association and the board of the condominium association. Although often overlooked or misunderstood, unit owners may also assert claims against the officers of the association in their individual capacity and board members in their individual capacity. A unit owner armed with this knowledge may achieve significant legal and practical advantages in litigation.

A statutorily imposed fiduciary duty

The Illinois Condominium Property Act is a comprehensive statute governing the affairs of Illinois condominium associations.¹ Among its provisions, the Act sets forth many duties and obligations owed to unit owners. Section 18.4 of the Act expressly provides that the officers of the association and the members of the board owe a fiduciary duty to unit owners when performing their duties and obligations.²

A person serving in a fiduciary capacity must act with the highest level of honesty, good faith, and fairness when performing their duties. In the context of condominium associations, this fiduciary duty requires that the officers and directors “strictly comply” with the condominium declaration, bylaws, and the provisions of the Act.³ The high standard of conduct imposed on a fiduciary, coupled with the requirement for “strict compliance” with the condominium instruments, creates fertile ground for unit owners seeking to assert claims in litigation.



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1. 765 ILCS 605/1, *et seq.*

2. *Id.* at § 605/18.4 (“In the performance of their duties, the officers and members of the board, ... shall exercise the care required of a fiduciary of the unit owners.”).

3. See *Duffy v. Orlan Brook Condominium Owners' Ass'n*, 2012 IL App (1st) 113577, ¶ 21.



TAKEAWAYS >>

- Illinois law imposes a fiduciary duty for strict compliance with condominium instruments.

- A condominium association board may be sued under the Illinois Condominium Property Act, despite some common-law cases suggesting otherwise.

- Officers and directors can also be sued individually for breaches of fiduciary duty, potentially leading to personal liability and claims against their personal assets, giving unit owners a powerful tool to pursue their claims.

THE HIGH STANDARD OF CONDUCT IMPOSED ON A FIDUCIARY, COUPLED WITH THE REQUIREMENT FOR “STRICT COMPLIANCE” WITH THE CONDOMINIUM INSTRUMENTS, CREATES FERTILE GROUND FOR UNIT OWNERS SEEKING TO ASSERT CLAIMS IN LITIGATION.

The entity defendants

There is general agreement that the condominium association—as a collective entity—is a proper defendant where unit owners assert claims under the Act. The Act makes clear that the “association is responsible for the overall administration of the property”⁴ Consistent with this delegation of responsibility, Illinois decisions recognize that the association owes a fiduciary duty to unit owners—separate and apart from the fiduciary duty owed by the officers and directors.⁵ These decisions support the conclusion that the association is a proper defendant where unit owners assert claims under the Act.

Policy considerations also support this conclusion. A rule that recognizes the association as a proper defendant protects unit owners when they cannot identify which officer or board member engaged in the wrongful conduct.⁶ This rationale suggests that liability is imposed on the association based on a vicarious-liability theory.⁷

The “board of managers” is another potential “entity” defendant. The board serves as the agent of the condominium association and carries out the duties of the association.⁸ Numerous decisions recognize that the board—separate and apart from its constituent members—owes a fiduciary duty to unit owners.⁹ Accordingly, the board—as a collective entity—is also a potential defendant for claims under the Act.

ISBA RESOURCES >>

- Kadijah Hall, *The Condominium Act Does Not Specifically Authorize All Authority for an HOA Board*, Real Property (April 2022), law.isba.org/3VcwGJF.
- Richard Lee Stavins, *A Weapon Against Condominium Deconverters: The Fiduciary Duty of Directors*, Real Property (April 2021), law.isba.org/4bPASEA.
- Ellis B. Levin, *Power to the Condo Unit Owner*, 107 Ill. B.J. 34 (Sept. 2019), law.isba.org/3yvWJCV.

The board is a “suable” entity under the Act

A few decisions suggest that a “board” cannot be sued.¹⁰ However, these cases are likely not applicable to claims under the Act.

In *Willmschen v. Trinity Lakes Improvement Ass’n*, the Third District of the Illinois Appellate Court held that a board, as a collective entity, cannot be subject to liability and is not even capable of being sued.¹¹ There, certain homeowners in a common-interest community sued their homeowners association and its board of directors alleging that they breached covenants in the declaration by failing to properly maintain certain common areas on the property. The trial court dismissed the claim against the board for failure to state a claim. In affirming the trial court, the Third District noted: 1) that “under the common law,” a corporation is a legal entity separate and distinct from its shareholders, officers, and directors; and 2) that shareholders, officers, and directors are, as a general rule, not liable for the corporation’s obligations.¹²

Similarly, in *Novak v. State Parkway Condominium*, the U.S. District Court for the Northern District of Illinois dismissed a claim against a condominium board finding it was “a non-suable entity.”¹³ The *Novak* court reasoned that a corporation’s board is not a legal entity separate and distinct from the corporation itself, and therefore not amenable to suit. In so ruling, the court noted “the general common-law principle that a board of directors can neither sue in its own name nor be sued.”¹⁴

A unit owner asserting claims against a condominium board can distinguish *Willmschen* and *Novak* on the ground that neither case involved claims under the Act. Both courts relied on common-law principles when reaching their decisions.¹⁵ By contrast, the Act supplies a statutory basis for imposing liability against the board as a collective entity.¹⁶ Indeed, the *Novak*

4. 765 ILCS 605/18.3.

5. See, e.g., *V & T Investment Corp. v. West Columbia Place Condominium Ass’n*, 2018 IL App (1st) 170436, ¶ 39 (citing *Duffy*, 2012 IL App (1st) 113577, ¶ 18).

6. See *Boucher v. 111 East Chestnut Condominium Ass’n, Inc.*, 2018 IL App (1st) 162233, ¶ 54 (“The imposition of fiduciary duties on the association ensures that when a unit owner can show that some association employee or board member has violated fiduciary duties, the unit owner may recover from the association, even if the unit owner cannot specify which employee or board member breached fiduciary duties.”).

7. See *id.*

8. 765 ILCS 605/18.3 (“The unit owners’ association is responsible for the overall administration of the property through its duly elected board of managers.”); *id.* at § 605/18.4 (“The board of managers shall exercise for the association all powers, duties and authority vested in the association by law or the condominium instruments”).

9. See *D’Attomo v. Baumbeck*, 2015 IL App (2d) 140865, ¶ 67 (“The fiduciary duty set forth in section 18.4 is owed by the condominium’s board as well as the board’s individual members.”); *Palm v. 2800 Lake Shore Drive Condominium Ass’n*, 2014 IL App (1st) 111290, ¶ 94 (“This fiduciary duty is owed by boards as well as their individual members.”) (citations omitted).

10. See, e.g., *Willmschen v. Trinity Lakes Improvement Ass’n*, 362 Ill. App. 3d 546 (2d Dist. 2005); *Novak v. State Parkway Condominium*, No. 13 C 8861, 2015 WL 1058014 (N.D. Ill. March 6, 2015).

11. *Willmschen*, 362 Ill. App. 3d at 551-52.

12. *Id.* at 551.

13. *Novak*, 2015 WL 1058014, *3.

14. *Id.* (citing *Willmschen*).

15. See *Willmschen*, 362 Ill. App. 3d at 551; *Novak*, 2015 WL 1058014, *3.

16. See *D’Attomo v. Baumbeck*, 2015 IL App (2d) 140865, ¶ 67; *Palm v. 2800 Lake Shore Drive Condominium Ass’n*, 2014 IL App (1st) 111290, ¶ 94; *LaSalle National Trust, N.A. v. Board of Directors of the 1100 Lake Shore Drive Condominium*, 287 Ill. App. 3d 449, 454 (1st Dist. 1997).

court acknowledged that the board would be a proper defendant in cases involving “breaches of fiduciary duty related to the management of a homeowners’ association under the Illinois Condominium Property Act”¹⁷ *Willmschen* is arguably further distinguishable because it involved a “common interest community” governed by the Common Interest Community Association Act¹⁸ rather than a condominium governed by the Act.¹⁹ However, two decisions involving common-interest associations may undercut this distinction.²⁰

Individual defendants: officers and directors

As noted, section 18.4 of the Act imposes a fiduciary duty on the officers of the association and the members of the board. Numerous published decisions reaffirm that officers and directors owe a fiduciary duty and are subject to liability for breach of that duty.²¹ These decisions support the conclusion that officers and directors are potential defendants for claims under the Act. More significantly, the officers and directors may be sued in their individual capacity and in their official capacity.

In *Taghert v. Wesley*, a unit owner sued two board members alleging that they violated the Act by failing to comply with his request for certain financial records of the condominium association.²² The trial court entered judgment in favor of the plaintiff. On appeal, the board members argued that they lacked the capacity to be sued and that the association was the only proper defendant. The court rejected this argument, finding that “plaintiff properly filed his complaint against defendants individually and in their capacity as members” of the board.²³

Taghert supports an argument that a unit owner may name officers and directors as defendants both in their capacity as officers and directors, and also in their individual capacity.²⁴ A judgment against the officers and directors in their official capacity will result in vicarious liability for the association.²⁵ Perhaps more significantly, a judgment against the

officers and directors in their individual capacity will result in personal liability for the officers and directors. A unit owner who obtains a money judgment against an officer and/or director in their individual capacity could seek to enforce the judgment against the personal assets of such officers and directors.

Is “personal participation” required?

The broad language in some decisions arguably suggests that each board member is vicariously liable for any breach of fiduciary duty.²⁶ However, no court has expressly adopted this view. On the other hand, some caselaw suggests that the imposition of individual liability requires some degree of participation in the alleged wrongful conduct.

In *Kelley v. Astor Investors, Inc.*, the Second District of the Illinois Appellate Court affirmed the dismissal of directors named as defendants in their individual capacity where they served as board members for only three days and the alleged wrongdoing occurred before their appointment as directors.²⁷ The *Kelley* court acknowledged that officers and directors in nonprofit organizations are subject to claims of breach of fiduciary duty, but stated that liability attaches only where there is “sufficient evidence of active participation” in the wrongful conduct, “substantial control over the corporation,” or “disregard of corporate formalities.”²⁸

Kelley does not alter the rule that officers and directors are subject to liability in their individual capacities. The *Kelley* court simply held that board members who were not serving as board members at the time of the alleged wrongful conduct were not proper defendants. The Second District’s reference to “active participation” and/or “substantial control over the corporation” when addressing individual liability is arguably mere *dicta* given the facts presented in that case. Nonetheless, one could argue that *Kelley*

A UNIT OWNER WHO OBTAINS A MONEY JUDGMENT AGAINST AN OFFICER AND/OR DIRECTOR IN THEIR INDIVIDUAL CAPACITY COULD SEEK TO ENFORCE THE JUDGMENT AGAINST THE PERSONAL ASSETS OF SUCH OFFICERS AND DIRECTORS.

19. A “common interest community association” is a type of homeowners’ association where, similar to a condominium association, the owner of each private residence pays its proportionate share of the costs for maintaining and operating the shared community facilities. The private residences comprising a common interest community consist of individual townhouses, villas, or single-family homes situated on land separately owned by each owner, whereas the private residences comprising a condominium consist of individual condominium “units” separately owned by each owner within a condominium building.

20. See *Chiurato v. Dayton Estates Dam & Water Co.*, 2017 IL App (3d) 160102, ¶ 47 (observing that the “fiduciary principles” applicable to condominium board members are likewise applicable to “common interest community association directors”); *Schweickart v. Powers*, 245 Ill. App. 3d 281, 290 (2d Dist. 1993) (noting that a common interest community association “is similar to a condominium association” and that board members owe duties to the association members in both settings).

21. See, e.g., *Alliance Property Management, Ltd. v. Forest Villa of Countryside Condominium Ass’n*, 2015 IL App (1st) 150169, ¶ 28; *Henderson Square Condominium Ass’n v. LAB Townhomes, L.L.C.*, 2014 IL App (1st) 130764, ¶ 126; *Palm*, 2014 IL App (1st) 111290, ¶ 94; *Board of Managers of Weathersfield Condominium Ass’n v. Schaumburg Ltd. Partnership*, 307 Ill. App. 3d 614, 622 (1st Dist. 1999).

22. *Taghert v. Wesley*, 343 Ill. App. 3d 1140 (1st Dist. 2003).

23. *Id.* at 1144.

24. See also *Novak v. State Parkway Condominium*, No. 13 C 8861, 2015 WL 1058014, at *3 (N.D. Ill. March 6, 2015) (noting that *Taghert* “affirmed the ability of condo board members to be sued individually and in their official capacity as board members under Illinois law”).

25. See *Boucher v. 111 East Chestnut Condominium Ass’n, Inc.*, 2018 IL App (1st) 162233, ¶ 54.

26. See, e.g., *Palm*, 2014 IL App (1st) 111290, ¶ 94 (“Because the association officers and board members owe a fiduciary or quasi-fiduciary duty to the members of the association, they must act in a manner reasonably related to the exercise of that duty, and the failure to do so will result in liability not only for the association but also for the individuals themselves.”) (emphasis added).

27. *Kelley v. Astor Investors, Inc.*, 123 Ill. App. 3d 593 (2d Dist. 1984).

28. *Id.* at 597.

17. *Novak*, 2015 WL 1058014, *3 (citing *LaSalle National Trust*, 287 Ill. App. 3d at 449).

18. 765 ILCS § 160/1-1, *et seq.*

supports the conclusion that some level of personal involvement or participation is required to assert valid claims against officers and directors.²⁹

Defenses and risk mitigation

The liability of officers and directors may be mitigated or eliminated in various ways. First, the condominium declaration and/or bylaws may contain provisions that limit the scope of the fiduciary duty owed by the officers and directors.³⁰ One common provision is an “exculpatory clause” that provides that officers and directors are immune from liability for any acts or omissions except those that a court has found to constitute “willful misconduct,” “gross negligence,” or fraud. Importantly, an exculpatory clause will not protect officers and directors from liability for conduct involving violations of the duties of honesty, candor, loyalty, and good faith.³¹ The condominium declaration and/or bylaws may also include an indemnification provision whereby the association agrees to reimburse the officers and directors for any litigation expenses, judgments, or fines arising from their duties as officers or directors.

Second, the liability of officers and directors may be mitigated or eliminated by operation of the “business judgment rule.” The business judgment rule is a legal doctrine that shields officers and directors from liability for decisions made in furtherance of the corporation’s business so long as the officers and directors act with “due care” and “loyalty” when reaching those decisions. Stated differently, the rule protects officers and directors from liability for “honest mistakes of judgment.” Similar to an exculpatory clause, the protections of the business judgment rule do not apply where the challenged conduct constitutes bad faith, fraud, illegality, or gross overreaching.³²

Third, the Act authorizes the board “[t]o obtain adequate and appropriate kinds of insurance.”³³ Among other insurance coverage, the board should obtain an “errors and omissions” policy providing coverage for officers and board members and ensure that such policy includes coverage for individual capacity claims. However, similar to an exculpatory clause and the business judgment rule, such insurance

policies will likely exclude coverage for claims involving fraud or illegality.

Conclusion

Illinois law is replete with judicial decisions addressing disputes between unit owners and their condominium association. The provisions of the Act and Illinois caselaw provide authority for naming officers and board members as defendants in litigation arising under the Act. The officers and directors can be sued in both their official capacity and their individual capacity, the latter exposing them to potential personal liability. The threat of personal liability serves as a potent weapon for unit owners asserting claims under the Act. **E**

29. See also *Boucher*, 2018 IL App (1st) 162233, ¶ 64 (affirming dismissal of claim against three directors who “did not take part in the decision” of the board giving rise to plaintiff’s claim).

30. *LaSalle National Trust, N.A. v. Board of Directors of the 1100 Lake Shore Drive Condominium*, 287 Ill. App. 3d 449, 454 (1st Dist. 1997).

31. *Boucher*, 2018 IL App (1st) 162233, ¶ 52.

32. *Palm*, 2014 IL App (1st) 111290, ¶ 111 (quotations omitted).

33. 765 ILCS § 605/18.4(f).