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## **FIDUCIARY DUTY AND THE BUSINESS JUDGMENT RULE**

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THIS OUTLINE INCLUDES MORE MATERIAL THAN WILL BE COVERED DURING THE SEMINAR DUE TO TIME CONSTRAINTS. THE PORTIONS WHICH ARE NOT COVERED CAN PROVIDE SOME GENERAL GUIDANCE FOR ASSOCIATION ISSUES. KEEP IN MIND THAT THE SEMINAR IS NOT INTENDED TO AND WILL NOT PROVIDE LEGAL ADVICE ABOUT SPECIFIC ISSUES BUT RATHER WILL PROVIDE GENERAL INFORMATION ON THE TOPICS.

### **A. QUOTATIONS**

“Fiduciary Duty: A duty to act for someone else’s benefit, while subordinating one’s personal interests to that of the other person. It is the highest standard of duty implied by law (*e.g.*, trustee, guardian).”

*Black’s Law Dictionary, Sixth Edition*

“In the performance of their duties, the officers and members of the board, whether appointed by the developer or elected by the unit owners, shall exercise the care required of a fiduciary of the unit owners.”

*Illinois Condominium Property Act, Section 18.4*

“A fiduciary has the duty of loyalty and the duty of care. The *duty of loyalty* requires the fiduciary to minimize potential and actual conflicts of interests and to place loyalty to the association above other interests. The *duty of care* requires the fiduciary to exercise the skill and care that a reasonable person would use under similar circumstances.”

*CAI GAP Report #20: Conflicts of Interest by Tonia C. Sellers / Jay S. Lazega (1996)*

“The business judgment rule insulates an officer or director of a corporation from liability for a business decision made in good faith if he is not interested in the subject of the business judgment, is informed with respect to the subject of the business judgment to the extent he reasonably believes to be appropriate under the circumstances, and rationally believes that the business judgment is in the best interests of the corporation.”

*Cuker v. Mikalauskas, 692 A.2d 1042, 1045 (1997) Pennsylvania Supreme Court*

## **B. PROTECTION OF ASSOCIATION FUNDS**

1. Accounting Procedures
  - a. Annual Audit
  - b. Approval of Expenditures
  - c. Check Writing Practices
  
2. Assessment Procedures
  - a. Annual Budget
    - i. Notice to Members
    - ii. Adoption by Board
    - iii. Review / Approval by Members
  - b. Reserves
    - i. Amount
    - ii. Waiver
  - c. Separate Assessments
    - i. Notice to Members
    - ii. Adoption by Board
    - iii. Review / Approval by Members
  - d. Collection Procedures
    - i. Delinquency Reports
    - ii. Referral to Legal Counsel
    - iii. Remedies
    - iv. Possession
    - v. Judgment

**C. PROTECTION OF ASSOCIATION PROPERTY**

1. Maintenance and Repair
  - a. Useful Life Study
  - b. General and Restricted Reserve Accounts
  - c. Limited Common Elements
  - d. Funding Alternatives
2. Association Insurance
  - a. Property Damage Coverage
  - b. Liability Coverage
  - c. Directors & Officers / Errors & Omissions

**D. BUSINESS JUDGMENT RULE**

1. Tool for Judicial Review
  - a. Business Decision
  - b. Disinterested and Independent Action
  - c. Due Care
  - d. Good Faith
  - e. No Abuse of Discretion
2. Board Action
  - a. Within Scope of Board Authority
  - b. Taken in Good Faith
  - c. Legitimate Association Interest
3. Reasonableness
  - a. Not Arbitrary or Capricious Decision
  - b. Non-Discriminatory and Even-Handed
  - c. Made in Good Faith for the Common Welfare

**E. CONFLICTS OF INTEREST**

1. Potential or Actual
2. Outside Influences
3. Duties to Separate Entities
4. Confidentiality
5. Related Vendors

**F. QUESTIONS AND ANSWERS**