

# Guarding Yourself from Liability Using the Business Judgment Rule

September 1, 1997

By: Steven B. Lesser

The Florida Business Judgment Rule protects the business decisions of a Condominium Association's Board of Directors as long as the Board acts in a reasonable manner. This issue often arises when the Board elects to perform remedial repairs to the common elements of a condominium. Frequently, the Association must raise sufficient funds, through a special assessment, to pay for these repairs. In response to receiving a Notice of Special Assessment, unit owners frequently object and sue members of the board of Directors for breach of their fiduciary duty pursuant to Chapter 718, Florida Statutes.

As will be discussed in this Article, the Board of Directors of a Condominium Association can assure that its actions will be viewed as "reasonable" by soliciting the opinions of appropriate professionals to acquire sufficient background to enable it to make an informative decision. Relying upon qualified engineers to guide the Association in determining whether an immediate need exists to expend funds to repair portions of a condominium will enable a Court to decide whether the Association's decision was reasonable and appropriate.

## Governing Law and Statutes

In *P. S. Farrington v. Casa Solana Condominium Association, Inc.*, 517 S. 2nd 70 (Fla. 3d DCA 1987), the Court discussed the Business Judgment Rule in a condominium context. In *Casa Solana*, the Board of Directors of an Association adopted a special assessment for external building repairs, replacement of windows and interior unit repairs because of cracks permeating the exterior of the condominium building. In reaching a decision to specially assess its members for the cost to rectify the defective building conditions, the Association obtained reports from Engineers, and Architects to determine the best method to address the problem.

The Declaration of Condominium, as well as the By-laws of the Association allowed the Board to adopt a special assessment in the event of immediate or emergency need. After hearing the opinion of the professionals, the Board determined that in its "business judgment," there is "immediate" need for the repairs and levied the special assessment.

Thereafter, the unit owners filed a lawsuit requesting that the Board be enjoined from contracting for the repairs and collecting the special assessment. The unit owners claimed that since the problems have been ongoing for several years, there was no "immediate" need for the repairs. However, the Trial Court refused to enjoin the work of the assessment and agreed with the Association. The unit

owners appealed and the Third District Court of Appeals upheld the decision of the Trial Court.

In affirming this decision, the Court found that the Business Judgment Rule protects a corporate Board of Directors' business decisions as long as the Board acted in a "reasonable" manner in passing the special assessment. By virtue of the Board following the proper procedures under the Condominium Act, Chapter 718, Florida Statutes, the Court found the actions to be reasonable and enforced the special assessment. The significance of the Casa Solana decision is that the Board can ensure that it will be seen as acting in a "reasonable" fashion by soliciting the opinions of proper professionals to acquire sufficient background to enable it to make an informed decision.

As long as the Association relies upon the advice of Engineers and Architects indicating immediate repairs are necessary, this action will be considered reasonable and a Court will not substitute its decision for the Board. If the Board of Directors operates in a vacuum and does not obtain input from knowledgeable professionals such as Engineers, it may expose itself to liability.

The Business Judgment Rule is further discussed in Chapter 617.0830, Florida Statutes, which establishes the general standards for directors. This section requires that if the director discharges his duties in good faith, in the best interests of the corporation, then the actions of directors will be upheld. Most importantly, statutory authority indicates that a director may rely upon information, opinion, reports or statements, prepared by "legal counsel, public accountants, or other persons as to the matters the Director reasonably believes are within the person's professional or expert confidence."

## **Conclusion**

As long as the Association, through its Board of Directors, acquires sufficient supporting documentation from its Engineers that the problems associated with the repairs to the common elements are justified, the Association and its Board of Directors should not be subject to liability. If a Board of Directors operates in a vacuum, and does not obtain input from knowledgeable professionals, it may open itself to attack.

When your Board of Directors is confronted with decisions related to the operation and maintenance of the condominium, the Board should consult professionals who have knowledge of matters relating to that decision. Further, as most decisions are impacted by your condominium documents as well as the Condominium Act, reviewing the matter with your Association attorney can only serve to further protect the Board's decision and guard individual Board members from liability based upon the Business Judgment Rule.