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16 Condominium Litigation

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I. [16.1] INTRODUCTION

This chapter is intended to acquaint the attorney with the common theories and issues raised when a condominium-related dispute is litigated. The chapter discusses the statutes and defining documents that establish the duties and rights of a condominium board member or unit owner. The chapter also focuses on the typical theories of liability in cases between condominium owners and associations. The chapter then briefly discusses those situations involving litigation with outside parties such as developers, property managers, or injured nonresidents. Finally, procedural issues, standing, and insurance considerations are visited.

II. ACTIONS BETWEEN CONDOMINIUM UNIT OWNERS AND THE ASSOCIATION

A. Sources of the Defining Rights

1. [16.2] Statutes: Condominium Property Act, General Not For Profit Corporation Act, Business Corporation Act

Condominiums are creatures of statute, and the affairs of a condominium association are governed by the Condominium Property Act, 765 ILCS 605/1, *et seq. Board of Directors of 175 East Delaware Place Homeowners Ass'n v. Hinojosa,* 287 Ill.App.3d 886, 679 N.E.2d 407, 223 Ill.Dec. 222 (1st Dist. 1997); *Apple II Condominium Ass'n v. Worth Bank & Trust Co.,* 277 Ill.App.3d 345, 659 N.E.2d 93, 213 Ill.Dec. 463 (1st Dist. 1995). Thus, any action taken on behalf of a condominium must be authorized by statute. *Hinojosa, supra,* 679 N.E.2d at 409.

A purchaser of condominium property is charged with knowledge of the Condominium Property Act. It is "clear that the Condominium Property Act is designed to encourage associations to be self-governing and that it is the members themselves who are in the best position to make determinations regarding restrictions." *Apple II, supra,* 659 N.E.2d at 97 – 98. "[T]here is a clear intent [under the Condominium Property Act] that the Board Members have broad authority to manage and administer the property, including the Common Elements and Limited Common Elements." *Schaffner v. 514 West Grant Place Condominium Ass'n,* 324 Ill.App.3d 1033, 756 N.E.2d 854, 863, 258 Ill.Dec. 580 (1st Dist. 2001).

Section 18.4 of the Condominium Property Act, entitled "Powers and Duties of Board of Managers," is often the subject of condominium litigation. Initially, it is important to note that the duties set forth in §18.4 are imposed on all condominiums in Illinois. The section states that "[a]ny portion of a condominium instrument which contains provisions contrary to these provisions shall be void as against public policy and ineffective." 765 ILCS 605/18.4. Likewise, "[a]ny such instrument that fails to contain the provisions required by this Section shall be deemed to incorporate such provisions by operation of law." *Id.*

Section 18.4 of the Condominium Property Act imposes such duties on the board of managers as listed in subsections (a) through (r).

The duty established by §18.4 of the Condominium Property Act that seems most prone to litigation, as it is certainly open to interpretation, is that "[i]n 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.*” [Emphasis added.] The court in *LaSalle National Trust N.A. v. Board of Directors of 1100 Lake Shore Drive Condominium,* 287 Ill.App.3d 449, 677 N.E.2d 1378, 1382, 222 Ill.Dec. 579 (1st Dist. 1997), interpreting §18.4, held that “[t]he failure of condominium board members to act in a manner reasonably related to their fiduciary duty results in ‘liability for the Board and its individual members.’ ” Quoting *Carney v. Donley,* 261 Ill.App.3d 1002, 633 N.E.2d 1015, 1022, 199 Ill.Dec. 219 (2d Dist. 1994). A more detailed discussion of fiduciary duty is set forth in §16.6 below.

The General Not For Profit Corporation Act of 1986, 805 ILCS 105/101.01, *et seq.,* also has been invoked in condominium litigation. *See, e.g., Robinson ex rel. Estate of Robinson v. LaCasa Grande Condominium Ass’n,* 204 Ill.App.3d 853, 562 N.E.2d 678, 150 Ill.Dec. 148 (4th Dist. 1990). In *Robinson,* the court explained that an “association has all the powers and responsibilities of a not-for-profit corporation, as specified in the Not For Profit Corporation Act . . . regardless of whether the association is incorporated . . . so long as such powers and responsibilities are not inconsistent with the Condominium [Property] Act.” [Citations omitted.] 562 N.E.2d at 681.

Of course, another statute practitioners might attempt to invoke in the setting of condominium litigation is the Business Corporation Act of 1983, 805 ILCS 5/1.01, *et seq.* Nevertheless, to date, litigation involving condominium associations rarely turns on the legalistic formalities that might be seen in a suit between two Fortune 500 corporations or in a shareholder derivative suit.

2. [16.3] Defining Documents

In addition to the Condominium Property Act, the operation and administration of the condominium are governed by three principal documents: the declaration, bylaws, and rules and regulations. *Board of Directors of 175 East Delaware Place Homeowners Ass’n v. Hinojosa,* 287 Ill.App.3d 886, 679 N.E.2d 407, 409, 223 Ill.Dec. 222 (1st Dist. 1997). When litigation regarding the rights of a condominium unit owner in a condominium arises, a court “must examine any relevant provisions in the Act and the Declaration or bylaws and construe them as a whole.” *Carney v. Donley,* 261 Ill.App.3d 1002, 633 N.E.2d 1015, 1020, 199 Ill.Dec. 219 (2d Dist. 1994). *See also LaSalle National Trust, NA v. Board of Directors of State Parkway Condominium Ass’n,* 327 Ill.App.3d 93, 762 N.E.2d 609, 261 Ill.Dec. 40 (1st Dist. 2001).

The *LaSalle* court noted that the Condominium Property Act was silent as to whether a developer has the right to create a perpetual easement after ceding control of the board to unit owners while the developer still retains an interest in the property. Because the Condominium Property Act is silent on this issue, the court indicated that “the resolution of this issue rests upon the provisions of the Declaration.” 762 N.E.2d at 612. Therefore, the outcome was determined by the court’s interpretation of the declaration provisions. The court’s interpretation was based, in part, to avoid interpreting declarations in a manner that would undermine the provisions of the Condominium Property Act. 762 N.E.2d at 614 – 615.

The Condominium Property Act defines the “declaration” as the “instrument by which the property is submitted to the provisions of [the] Act.” *Hinojosa, supra,* 679 N.E.2d at 409, quoting

765 ILCS 605/2(a). The declaration's primary function is to provide a "constitution for the condominium — to guide the condominium development throughout the years." 679 N.E.2d at 409. The declaration sets forth the property's legal description, defines the units and common elements, indicates the percentage of ownership interests, establishes the rights and obligations of owners, and describes any restrictions on the use of property. 679 N.E.2d at 409, citing Ronald L. Otto, Ch. 1, *The Illinois Act and Condominium Titles,* ILLINOIS CONDOMINIUM LAW §1.15 (IICLE, 1994).

"The declaration and bylaws form the basic framework of the administration, and the day-to-day operations are managed by board rules and regulations." 679 N.E.2d at 409. Bylaws may be embodied in the declaration or by a separate document, but in either case, "the bylaws must be recorded with the declaration." *Id.* When a conflict arises between the declaration and the bylaws, the declaration prevails. *Id.*

The board's rules and regulations govern the requirements of day-to-day living in the association. "Board rules must be objective, evenhanded, nondiscriminatory, and applied uniformly." 679 N.E.2d at 410, citing Jordan I. Shifrin, Ch. 11, *Cooperative, Condominium, and Homeowners' Association Litigation,* REAL ESTATE LITIGATION §11.20 (IICLE, 1994).

3. [16.4] Covenants Running with the Land

The most obvious example of a covenant running with the land in the context of condominiums is the declaration. *See LaSalle National Trust, N.A. v. Board of Directors of 1100 Lake Shore Drive Condominium,* 287 Ill.App.3d 449, 677 N.E.2d 1378, 222 Ill.Dec. 579 (1st Dist. 1997). The rule for interpreting such covenants is "to expound them so as to give effect to the actual intent of the parties as determined from the whole document construed in connection with the circumstances surrounding its execution." 677 N.E.2d at 1383, quoting *Amoco Realty Co. v. Montalbano,* 133 Ill.App.3d 327, 478 N.E.2d 860, 863, 88 Ill.Dec. 369 (2d Dist. 1985). "[C]ondominium declarations are covenants running with the land." *LaSalle National Trust, NA v. Board of Directors of State Parkway Condominium Ass'n,* 327 Ill.App.3d 93, 762 N.E.2d 609, 612, 261 Ill.Dec. 40 (1st Dist. 2001).

According to the Illinois Supreme Court, in order for a covenant to run with the land, "three criteria must be met: (1) The grantor and grantee must have intended the covenant to run with the land; (2) the covenant must touch and concern the land; (3) there must be privity of estate between the party claiming the benefit of the covenant and the party resting under the burden of the covenant." *Streams Sports Club, Ltd. v. Richmond,* 99 Ill.2d 182, 457 N.E.2d 1226, 1230, 75 Ill.Dec. 667 (1983) (court found mandatory membership in sports club adjacent to condominium was covenant running with land pursuant to declaration).

B. Theories of Liability in Typical Cases

1. [16.5] Breach of Declaration or Other Defining Documents

Unit owners typically allege violations or breaches of the declaration or other defining documents. Courts, consequently, will need to construe the declaration and the defining

documents to determine whether the alleged actions of a defendant board or unit owner were proper.

Against a defendant board, such theories have included that the board allegedly violated a declaration or other defining documents in failing to secure a necessary vote prior to acting (*Carney v. Donley,* 261 Ill.App.3d 1002, 633 N.E.2d 1015, 199 Ill.Dec. 219 (2d Dist. 1994)); that the board failed to give proper notice of possible action or a vote as required by the Condominium Property Act or defining documents (*Board of Managers of Village Square I Condominium Ass'n v. Amalgamated Trust & Savings Bank,* 144 Ill.App.3d 522, 494 N.E.2d 1199, 98 Ill.Dec. 872 (2d Dist. 1986); *Stuewe v. Lauletta,* 93 Ill.App.3d 1029, 418 N.E.2d 138, 49 Ill.Dec. 494 (1st Dist. 1981)); and that such breaches constituted a breach of the board's fiduciary duty (*Wolinsky v. Kadison,* 114 Ill.App.3d 527, 449 N.E.2d 151, 70 Ill.Dec. 277 (1st Dist. 1983); *Scialabba v. Sierra Blanca Condominium Number One Ass'n,* No. 00 C 5344, 2001 WL 803676 (N.D.Ill. July 16, 2001)).

Possible theories against a defendant unit owner may include an alleged violation of the declaration through business use of a unit when the declaration prohibits nonresidential use (*400 Condominium Ass'n v. Gedo,* 183 Ill.App.3d 582, 539 N.E.2d 256, 258, 131 Ill.Dec. 903 (1st Dist. 1989) (McMorrow, J., dissenting); *Village Square, supra*); an alleged violation of the declaration through prohibited use of common elements (*Schaffner v. 514 West Grant Place Condominium Ass'n,* 324 Ill.App.3d 1033, 756 N.E.2d 854, 863, 258 Ill.Dec. 580 (1st Dist. 2001); *Stuewe, supra; 334 Barry in Town Homes, Inc., v. Farago,* 205 Ill.App.3d 846, 563 N.E.2d 856, 150 Ill.Dec. 729 (1st Dist. 1990)); or a violation of a covenant running with the land in failing to pay assessments (*Streams Sports Club, Ltd. v. Richmond,* 109 Ill.App.3d 689, 440 N.E.2d 1264, 65 Ill.Dec. 248 (2d Dist. 1982)). These theories and others are discussed in more detail in §16.9 below.

2. [16.6] Breach of Fiduciary Duty

In *Wolinsky v. Kadison,* 114 Ill.App.3d 527, 449 N.E.2d 151, 70 Ill.Dec. 277 (1st Dist. 1983), alluded to in §16.5 above, allegations of a board's alleged breach of the defining documents (bylaws) were taken a step further when the plaintiff successfully alleged that this breach constituted a breach of the board's fiduciary duty.

The plaintiff, Ms. Wolinsky, contracted to buy unit 21F in the condominium building and then entered into a contract to sell a unit she already owned in the building, unit 4D. The board, however, exercised its right of first refusal with respect to unit 21F, and the seller terminated the contract with the plaintiff. The appellate court found that Ms. Wolinsky had stated a cause of action for breach of fiduciary duty by alleging that the board, in violation of its own bylaws, had failed to secure a two-thirds vote requirement in exercising its right of first refusal. The court further held that "a board's proper exercise of its fiduciary or quasi-fiduciary duty requires strict compliance with the condominium declaration and bylaws." 449 N.E.2d at 157.

In *Robinson ex rel. Estate of Robinson v. LaCasa Grande Condominium Ass'n,* 204 Ill.App.3d 853, 562 N.E.2d 678, 683, 150 Ill.Dec. 148 (4th Dist. 1990), the court stated that "[t]he law in Illinois is that breach of a fiduciary duty is not a tort," and is "controlled by the substantive

laws of agency, contract and equity." The court went on to hold that individual "members of the board of managers cannot be liable for *negligent* performance of their duties." [Emphasis added.] *Id.*

Furthermore, it has been held that the scope of this fiduciary duty may be limited by the declaration. *Kelley v. Astor Investors, Inc.,* 106 Ill.2d 505, 478 N.E.2d 1346, 88 Ill.Dec. 620 (1985). For example, in *Kelley,* the declaration essentially limited the scope of possible liability for breach of fiduciary duty to willful misconduct. Yet, because exculpatory clauses generally are not favored, such clauses are strictly construed. For example, in *LaSalle National Trust, N.A. v. Board of Directors of 1100 Lake Shore Drive Condominium,* 287 Ill.App.3d 449, 677 N.E.2d 1378, 1382, 222 Ill.Dec. 579 (1st Dist. 1997), the court held that an exculpatory clause in a declaration stating that the directors, board, officers, or developer should not be held personally liable "except for any acts or omissions found by a court to constitute gross negligence or fraud" did not protect board members from allegations that they committed constructive fraud and breached their fiduciary duty to the plaintiff.

Indeed, the current state of the law indicates that a breach of fiduciary duty claim can be stated against a board as well as its individual members, and no distinction seems to be made between a board and its members when describing fiduciary duty. *LaSalle National Trust, supra.*

Because of the potentially broad scope of *LaSalle National Trust,* its facts are worth noting. The litigation arose from extensive construction performed by the plaintiff in her penthouse condominium, originally commenced by her without a permit. The board was cited by the City of Chicago for the plaintiff's failure to get a building permit, and other units were allegedly damaged by the demolition. Thereafter, the board passed a resolution that all expenses incurred by the board in connection with a unit owner's renovation to a unit would be assessed to the unit owner. The board submitted a proposed agreement to the plaintiff that would require her to agree to certain conditions, such as replacing the roof, reimbursing the board for any expenses incurred, and having a full-time on-site representative present during construction, before the board would approve her plans and allow her renovation project to recommence. 677 N.E.2d at 1381. The construction went on for years, as well as numerous disputes between the plaintiff and the board, leading to litigation initiated by the plaintiff. Ultimately, she was successful in her claim that a breach of the defendants' fiduciary duty sprang from the board's constructive fraud in engaging in obstructive acts, failing to cooperate with her in the renovation project, and, as the court phrased it, virtually holding "her penthouse for ransom." 677 N.E. 2d at 1384.

Again, the possible magnitude of the *LaSalle National Trust* decision cannot be overstated as it demonstrates the volatility of a breach of fiduciary duty claim and the potential for being held personally liable as a member of a condominium board.

Unit owners may bring a claim for breach of fiduciary duty against a former or current director who violates a bylaw, the Condominium Property Act, or other statute and thereby causes harm to the condominium association. *Davis v. Dyson,* 387 Ill.App.3d 676, 900 N.E.2d 698, 712 – 714, 326 Ill.Dec. 801 (1st Dist. 2008). For example, the board's failure to purchase adequate insurance, including coverage for fraud, may be grounds for a claim for breach of fiduciary duty. 900 N.E.2d at 713 – 714.

3. [16.7] No-Pet Rules and Other Rules Promulgated by Boards

Unlike *LaSalle National Trust, N.A. v. Board of Directors of 1100 Lake Shore Drive Condominium,* 287 Ill.App.3d 449, 677 N.E.2d 1378, 222 Ill.Dec. 579 (1st Dist. 1997), discussed in §16.6 above, other cases such as *Board of Directors of 175 East Delaware Place Homeowners Ass'n v. Hinojosa,* 287 Ill.App.3d 886, 679 N.E.2d 407, 223 Ill.Dec. 222 (1st Dist. 1997), finding in favor of a board, stress the deference to be given to the actions of self-governing condominium boards and associations.

In *Hinojosa,* the defendant unit owners argued that the board had no authority to pass a no-dog rule because the rule conflicted with the declaration and the bylaws, which were silent on the matter of pets. The court set forth a detailed discussion of the principles underlying condominium law and, after an analysis of the Condominium Property Act and the defining documents, reasoned that the declaration clearly gave the board the authority to promulgate reasonable rules "for the general welfare of the owners." 679 N.E.2d at 410. Furthermore, because the declaration and bylaws were silent on the issue of pets, the no-dog rule did not conflict with them. Since "the Board applied the rule to all owners and the purpose for the rule was rational," the *Hinojosa* court concluded that "the rule is reasonable under the specific facts of this case." 679 N.E. 2d at 411.

Again, in reaching its decision, the *Hinojosa* court commented generally on a board's authority to promulgate rules:

> **The board shall exercise for the association all powers, duties, and authority vested in the association by law or the condominium documents. It generally has broad powers and its rules govern the requirements of day-to-day living in the association. Board rules must be objective, evenhanded, nondiscriminatory, and applied uniformly.** 679 N.E.2d at 410, citing Jordan I. Shifrin, Ch. 11, *Cooperative, Condominium, and Homeowners' Association Litigation,* REAL ESTATE LITIGATION §11.20 (IICLE, 1994).

4. [16.8] Property Rights on Common and Limited Common Elements

One of the leading Illinois cases involving litigation over common elements in a condominium setting is *Stuewe v. Lauletta,* 93 Ill.App.3d 1029, 418 N.E.2d 138, 49 Ill.Dec. 494 (1st Dist. 1981). In *Stuewe,* the defendants entered into a real estate contract with the developer of the condominium building and contracted for two parking spaces inside the garage. It was later determined that two spaces were not available inside the garage, and the developer designated to the defendants a new parking space outside the garage that was not identified previously on the survey. The building was not yet fully occupied when the defendants moved in and began using the additional space. When the association took over management of the building from the developer, it offered the defendants a different space, but that was refused, and litigation ensued.

The *Stuewe* court agreed with the condominium association's position that the survey attached to the recorded declaration controlled, and allowing the space to be used solely by the defendants as a parking space would diminish the common elements of all other tenants. 418 N.E.2d at 140. In rejecting the defendants' argument that the rules of equity demand that they be

allowed to use the disputed space, the court held: "[W]here the Declaration establishes the rights inherent in unit ownership and provides for the procedures in order to effect an amendment to it, equity cannot aid in effecting what ought to have been done, in contravention of the Declaration, particularly when other unit owners' rights are involved." 418 N.E.2d at 141.

Litigation over parking and common elements also arose in *334 Barry in Town Homes, Inc. v. Farago,* 205 Ill.App.3d 846, 563 N.E.2d 856, 150 Ill.Dec. 729 (1st Dist. 1990). There, the condominium association sought a determination that the defendant unit owners were in violation of the condominium declaration enjoined by their continued use of an area in the condominium parking garage near their assigned parking space that they used as an additional parking space. In examining the declaration's language, the court found that the area was part of the common elements. It was determined further that neither the duration of time of use of the area nor the defendants' real estate contract indicating that two parking spaces were included in their purchase was dispositive. The First District Appellate Court affirmed the trial court's decision permanently enjoining the defendants "from their exclusive, personal use of that space" and the award of attorneys' fees to the association. 563 N.E.2d at 858.

In *Carney v. Donley,* 261 Ill.App.3d 1002, 633 N.E.2d 1015, 199 Ill.Dec. 219 (2d Dist. 1994), the plaintiff unit owner brought a suit against fellow unit owners and the board of managers of the association seeking injunctive relief to prevent the defendants from widening balconies appurtenant to their units and to restore the common elements infringed on to their original condition. The plaintiff's attempts to gain injunctive relief at the trial court level were unsuccessful, and the balconies were constructed. On appeal, the *Carney* court agreed with the plaintiff's interpretation of the declaration that "his interest in the common elements may not be diminished without the unanimous vote of the unit owners." 633 N.E.2d at 1020. Accordingly, while the declaration did provide the board with broad authority to manage and administer the property, the board's authority did not extend to "approving the diminishment of the common elements by granting an individual unit owner exclusive use of some part of the common elements." *Id.*

In *Schaffner v. 514 West Grant Place Condominium Ass'n,* 324 Ill.App.3d 1033, 756 N.E.2d 854, 857 – 858, 258 Ill.Dec. 580 (1st Dist. 2001), a unit owner in a three-unit condominium sought a declaration invalidating an amendment to the declaration designating two outdoor parking spaces as limited common elements for the exclusive use of the two other unit owners, as well as damages for breach of fiduciary duty. The original declaration did not mention the outdoor parking spaces. The amended declaration reflected that the two outdoor parking spaces would be designated limited common elements and reserved for the exclusive use of each defendant's unit. 756 N.E.2d at 858. The defendants had more votes than the plaintiff (two to one) to amend the declaration, claiming a scrivener's error existed that required correction by vote of two thirds of the members of the board of managers pursuant to §27(b)(2) of the Condominium Property Act (765 ILCS 605/27(b)(2)). 756 N.E.2d at 861.

The *Schaffner* court noted that the correction of a scrivener's error is mechanical and technical in nature, not decisional or judgmental. *Id.* Despite that, board members have broad authority to manage and administrate property pursuant to the Condominium Property Act; the amendment voted on in *Schaffner* "diminishes the common elements by granting the defendants

exclusive use of some part of the common elements, *i.e.,* the two outdoor parking spaces. For this, a unanimous vote of the unit owners is required by . . . the Declaration.” 756 N.E.2d at 863. The court upheld the trial judge finding that the amendment to the declaration executed and recorded by the defendants was invalid and of no force and effect. *Id.*

One court noted that water pipes and water supply lines, specifically in the kitchen of the unit owner, were common elements as these conduits supplied all of the units throughout the building. Sections of water supply lines within the individual units were considered part of the common elements. The water pipes, which supplied the entire building, were not used exclusively by any one unit, so they constituted part of the common elements. *Fireman’s Fund Insurance Co. v. Pierre-Louis,* 367 Ill.App.3d 790, 856 N.E.2d 649, 305 Ill.Dec. 844 (1st Dist. 2006). Fireman’s Fund issued a general liability policy to the condominium association. A unit owner’s kitchen faucet supply line leaked. Water was observed under the unit owner’s kitchen sink and on other floors within the unit; from that source, water leaked in 22 other units in the building. The unit owner was sued by another unit owner for property damage. The unit owner tendered his defense to Fireman’s Fund, instead of his own property insurer, claiming the leak stemmed from a common element, not an element within his own possession and control, although the leaking occurred visibly in his kitchen faucet supply line.

Fireman’s Fund denied coverage and filed a suit against the unit owner seeking a declaration that it did not have a duty to defend him in the underlying property damage lawsuit. Both the trial court and the appellate court held that Fireman’s Fund had a duty to defend the unit owner. The court examined whether the underlying suit for property damage alleged damages that arose out of the unit owner’s ownership, maintenance, or repair of a portion of the condominium unit that was not owned solely by him and not reserved for his exclusive use or occupancy. The court agreed with the unit owner that the water supply line, despite existing in his unit and not within the walls of the condominium building, was part of the building’s pipe system and therefore a common element. 856 N.E.2d at 651. Therefore, the association’s general liability insurer, Fireman’s Fund, was obligated to pay the defense. The court noted: “The insurance policy covers all of the unit owners with respect to those portions of the premises which are not reserved for their exclusive use.” 856 N.E.2d at 652.

Given the court’s conclusion that there were portions within the individual units that were part of the common elements, which includes water pipes, the opinion may be interpreted to expand what may be included as a common element, even though it is arguably in the sole possession and use of a unit owner. The court was aided in its decision by reviewing the association’s declarations. The declarations identified a common element as all portions of the property except the units but later specifically identified as a common element “pipes.” *Id.* There was no language in the declarations limiting pipes to those existing within the unit as opposed to those within the walls.

5. [16.9] Use and Occupancy Restrictions

Use and occupancy restrictions also have become the subject of condominium litigation, which by their very nature is not altogether surprising. For example, in *400 Condominium Ass’n v. Gedo,* 183 Ill.App.3d 582, 539 N.E.2d 256, 131 Ill.Dec. 903 (1st Dist. 1989), a section of the

declaration entitled "Use and occupancy restrictions" stated that units located on floors 1 – 7 and floor 40 could be used for purposes other than housing and related common purposes. Relying on this section of the declaration, the board sought injunctive relief to prevent the defendant doctors from rendering professional services in the units they owned on floors 8 – 39. The *400 Condominium Ass'n* court first noted that "[b]ecause restrictions on the free use of property are disfavored . . . restrictive covenants are to be strictly construed and will be enforced only if they are reasonable, clear and definite." [Citation omitted.] 539 N.E.2d at 257. "However, a covenant restricting the use of property for residential purposes is valid and will be enforced where the intent of the drafter to impose the restriction is clearly manifested." *Id.* The majority found that the provision could be read only as prohibiting nonresidential uses on floors 8 – 39. Justice McMorrow dissented based on her interpretation of the declaration that "no restriction [was] stated in section 21" and "one should not be read into or inferred from it." 539 N.E. 2d at 258.

Another example of a use restriction is discussed in *Board of Managers of Village Square I Condominium Ass'n v. Amalgamated Trust & Savings Bank,* 144 Ill.App.3d 522, 494 N.E.2d 1199, 98 Ill.Dec. 872 (2d Dist. 1986). The board was successful in seeking injunctive relief to prevent a commercial babysitting and day care service in a unit. Again, the board relied on provisions of the declaration that prohibited any nonresidential use of the units.

In *Apple II Condominium Ass'n v. Worth Bank & Trust Co.,* 277 Ill.App.3d 345, 659 N.E.2d 93, 99, 213 Ill.Dec. 463 (1st Dist. 1995), the court held that "an Illinois condominium association may prohibit the leasing of units either by Board action or by a vote of the entire association pursuant to the terms of the condominium declaration." When the restriction is passed by the association's membership and part of the declaration, it is presumed valid, and the restriction will be upheld unless shown to be "arbitrary, against public policy or [to violate] some fundamental constitutional right." *Id.* When such a rule is adopted unilaterally by the board or requires some board discretion in enforcing, courts will scrutinize it and uphold the leasing restriction only if it is "affirmatively shown to be reasonable in its purpose and application." *Id.*

6. [16.10] Actions for Fines Levied or Attorneys' Fees

Oftentimes, an action by a board is initiated following a failure to collect a fine assessed to a unit owner. This occurred in several of the cases discussed in previous sections. For example, in *Streams Sports Club, Ltd. v. Richmond,* 99 Ill.2d 182, 457 N.E.2d 1226, 1230, 75 Ill.Dec. 667 (1983), the action was initiated when the board brought a breach of contract action and asserted its right to foreclose on a lien that the board claimed had arisen due to the defendants' refusal to pay the annual dues to the sports club. Likewise, in *Board of Directors of 175 East Delaware Place Homeowners Ass'n v. Hinojosa,* 287 Ill.App.3d 886, 679 N.E.2d 407, 223 Ill.Dec. 222 (1st Dist. 1997), the action was initiated when the board sought to foreclose on a lien pursuant to 765 ILCS 605/9(h), following the defendants' refusal to pay fines levied against them for a violation of the recently promulgated no-dog rule.

In *Board of Managers of Village Square I Condominium Ass'n v. Amalgamated Trust & Savings Bank,* 144 Ill.App.3d 522, 494 N.E.2d 1199, 1202, 98 Ill.Dec. 872 (2d Dist. 1986), the declaration provided that, in the event the board had to initiate a suit following a unit owner's violation of the Condominium Property Act, declaration, bylaws, or rules and regulations of the

board, "[a]ll expenses of the Board in connection with any such actions or proceedings, including court costs and attorneys' fees . . . shall be charged to and assessed against such defaulting Unit Owner." 494 N.E. 2d at 1204 – 1205. In challenging the board's position that it was entitled to fees following its success in seeking injunctive relief to discontinue the defendants' babysitting service, the defendants argued that the board was attempting to levy a fine or penalty under §18.4(*l*) of the Condominium Property Act that could not be imposed absent "notice and an opportunity to be heard." 494 N.E. 2d at 1203. The Second District Appellate Court rejected the defendants' argument, holding that "[a] suit for injunctive relief and attorney fees is not an attempt to levy a reasonable fine, and so, the mandatory provision for notice and opportunity to be heard, under this section, is not relevant in this case." *Id.*

A 1999 condominium litigation case reiterated the general principle that, absent a statutory or contractual provision allowing the successful party to recover fees, attorneys' fees cannot be sought. *Hofmeyer v. Willow Shores Condominium Ass'n,* 309 Ill.App.3d 380, 722 N.E.2d 311, 242 Ill.Dec. 822 (2d Dist. 1999). In *Hofmeyer,* the plaintiffs were certain unit owners who brought a declaratory judgment action against the association seeking a determination of their rights under an amendment to the declaration. The trial court awarded the plaintiffs attorneys' fees, but the appellate court reversed as to the issue of fees on the basis that no such right was grounded in the Condominium Property Act, and the declaration gave the board the right to recover its attorneys' fees only "in any action taken against a unit owner to enforce the declaration's provisions." 722 N.E.2d at 315. The court therefore held: "Because there is no statutory or contractual basis for an award of attorney fees, that portion of the judgment must be reversed." *Id.*

An award of legal costs and fees was upheld in *Taghert v. Wesley,* 343 Ill.App.3d 1140, 799 N.E.2d 377, 278 Ill.Dec. 659 (1st Dist. 2003). In *Taghert,* the plaintiff unit owner brought suit against the president and director of the association. The plaintiff alleged that the president and director refused to provide the records of the association's finance committee and thereby failed to adhere to the provisions of the declaration and its bylaws. The trial court found that the plaintiff stated a proper purpose for inspection of the documents and entered an award totaling $2,274.34 for the plaintiff's costs and fees. 799 N.E.2d at 380. The appellate court upheld the award, noting that "under section 19(e) of [the Condominium Property Act] . . . after a member prevails in an action to compel examination of records, the member is entitled to petition the court for attorney fees." 799 N.E.2d at 382. When a plaintiff succeeds in an action against a condominium association to compel disclosure of books and records, the plaintiff is entitled to legal fees. *Id. See Verni v. Imperial Manor of Oak Park Condominium, Inc.,* 99 Ill.App.3d 1062, 425 N.E.2d 1344, 55 Ill.Dec. 171 (1st Dist. 1981).

7. [16.11] Personal Injury/Negligence Cases Brought by Unit Owners or Occupants

As noted in §16.6 above, *Robinson ex rel. Estate of Robinson v. LaCasa Grande Condominium Ass'n,* 204 Ill.App.3d 853, 562 N.E.2d 678, 150 Ill.Dec. 148 (4th Dist. 1990), involved a negligence lawsuit brought against a condominium board and certain individual members of the board following the drowning of a ten-year-old girl in the association's swimming pool. The girl's parents owned and lived in one of the units of the condominium. This appeal involved only the count brought against the individual board members by the

administrator of the decedent's estate who alleged that the individually named defendants were negligent in breaching their alleged duties to maintain the pool in a safe condition and to exercise due care so that the decedent could recreate in the pool. The *Robinson* court affirmed the dismissal with prejudice of the negligence count against the individual board members based on the following reasoning:

> **The members of the board of managers cannot be liable for negligent performance of their duties. The Condominium Act specifically makes the members of the board of managers fiduciaries of the unit owners. . . . The law in Illinois is that breach of a fiduciary duty is not a tort. The Illinois Supreme Court has regarded the breach of a fiduciary duty as controlled by the substantive laws of agency, contract and equity. . . . Thus the members of the board of managers cannot be liable in tort for breaches of their fiduciary duties to the unit owners.** [Citation omitted.] 562 N.E.2d at 683.

The *Robinson* court distinguished *Wolinsky v. Kadison,* 114 Ill.App.3d 527, 449 N.E.2d 151, 70 Ill.Dec. 277 (1st Dist. 1983), "because it was not a negligence action, as is this case." 562 N.E.2d at 684. Also distinguishable, according to the *Robinson* court, was *Schoondyke v. Heil, Heil, Smart & Golee, Inc.,* 89 Ill.App.3d 640, 411 N.E.2d 1168, 44 Ill.Dec. 802 (1st Dist. 1980), because the plaintiff in that case (a nonowner occupant) "sued the unit owners' association, the condominium association, and Tekton Corporation, not the individual members of the board of managers of the condominium association." 562 N.E.2d at 684.

In *Scialabba v. Sierra Blanca Condominium Number One Ass'n,* No. 00 C 5344, 2001 WL 803676 (N.D.Ill. July 16, 2001), the plaintiffs alleged against the condominium association negligent breach of fiduciary duty for a violation of the declaration and bylaws. The condominium association asserted it could not be liable for negligence because the declaration limited the liability of board members, providing that they should not be personally liable for any mistake of judgment or any acts or omissions made in good faith. The defendant cited *Robinson, supra,* for the assertion that a claim for negligent breach of fiduciary duty was not cognizable. 2001 WL 803676 at *11. The federal district court noted that board members cannot be liable for negligent performance of their duties, yet the condominium association could be sued in negligence for breach of any duty set forth in §18.4 of the Condominium Property Act (765 ILCS 605/18.4). *Id.* One of the duties in §18.4 is levying fines for a violation of the governing documents, and because the only issues in the case dealt with the levy of fines and the alleged failure to provide proper notice of hearing, the court denied the condominium association's motion for summary judgment on the negligence count.

A condominium association defeated a negligence suit in *Belluomini v. Stratford Green Condominium Ass'n,* 346 Ill.App.3d 687, 805 N.E.2d 701, 282 Ill.Dec. 82 (2d Dist. 2004). The plaintiff unit owner brought a negligence action against the association for injuries sustained when she tripped over a bicycle in the hallway of the building. The trial court determined as a matter of law that the bicycle was an open and obvious condition and entered summary judgment for the defendant association. 805 N.E.2d at 703. On appeal, the court upheld the trial court's findings regarding the duty owed to the plaintiff. The court agreed that the bicycle in the hallway was an open and obvious danger. 805 N.E.2d at 708. The appellate court further held that the association owed no duty to the resident because it was neither likely nor reasonably foreseeable

that, without being distracted, a resident would be injured by the bike. *Id.* The magnitude of the burden on the association of guarding against injury was significant, and both the resident and the owner of the bicycle were in superior positions to prevent the injury. *Id.*

More recently, *Schoondyke, supra,* was again distinguished in *Divis v. Woods Edge Homeowners' Ass'n,* 385 Ill.App.3d 636, 897 N.E.2d 375, 377, 325 Ill.Dec. 127 (1st Dist. 2008). The *Divis* court found the condominium homeowners' association, condominium association, management company, and snow removal service were immune from a resident's personal injury claim for negligent removal of snow based on the Snow and Ice Removal Act, 745 ILCS 75/1, 75/2. *Divis* notes that *Schoondyke* was decided before the Snow and Ice Removal Act was passed. 897 N.E.2d at 377. *Flight v. American Community Management, Inc.,* 384 Ill.App.3d 540, 893 N.E.2d 285, 323 Ill.Dec. 271 (1st Dist. 2008), similarly applied the Snow and Ice Removal Act and affirmed summary judgment for the condominium association and condominium management company in the owner's personal injury action for a slip and fall.

However, the Second District Appellate Court of Illinois declined to adopt the First District's interpretation of the Snow and Ice Removal Act established in *Flight, supra.* In *Gallagher v. Union Square Condominium Homeowner's Ass'n,* No. 2-09-0271, 2010 WL 338816 (2d Dist. Jan. 27, 2010), the plaintiff unit owner suffered personal injuries when he slipped walking to his unit, the area leading to which was recently plowed by a defendant under contract to remove snow in common areas and driveways. Gallagher alleged the plowing caused an unnatural formation of snow on his driveway. 2010 WL 338816 at **1 – 2. The Second District held that "the plain language of the Act does not provide immunity for injuries sustained on driveways. Section 2 of the Act specifically provides that defendants 'shall not be liable for any personal injuries allegedly caused by the snowy or icy condition of the *sidewalk.*'" [Emphasis in original.] 2010 WL 338816 at *3, quoting 745 ILCS 75/2. Since a driveway is for motor vehicles and is not commonly understood to be synonymous with a sidewalk for walking or foot passengers, the court refused to extend the scope of the Act to include driveways. *Id.* The court stated, "we must limit the Act's application to injuries suffered on sidewalks, as the Act refers only to sidewalks and makes no mention of driveways or any other type of surface." 2010 WL 338816 at *5. It refused to apply the Act to provide immunity for injuries sustained on driveways and reversed the trial court's dismissal of the complaint.

The *Gallagher* court noted that, "We are aware that in many modern housing developments the driveway is the only paved means of ingress and egress to and from homes for both vehicle and foot traffic and that, as a result, public policy would be well served to encourage the clearing of such surfaces. These considerations, however, do not alter the plain language of the Act, by which we are constrained." 2010 WL 338816 at *8. Given the Second District holding that the Snow and Ice Removal Act does not provide immunity for injuries sustained on driveways, and the comment that the driveway is often the only paved means to a unit in a development or condominium association, the authors see *Gallagher* as significant in the personal injury context creating enhanced exposure to condominium associations and condominium management companies. The exposure exists because inapplicability of the Act removes an immunity defense.

8. [16.12] Discrimination

P.A. 94-729 (eff. Jan. 1, 2007) amended the Illinois Condominium Property Act to prohibit condominium association rules that prohibit the reasonable accommodation of religion. 765 ILCS 605/18.4(h). The statute now reads:

> [N]**o rule or regulation may impair any rights guaranteed by the First Amendment to the Constitution of the United States or Section 4 of Article I of the Illinois Constitution including, but not limited to, the free exercise of religion, nor may any rules or regulations conflict with the provisions of this Act or the condominium instruments. No rule or regulation shall prohibit any reasonable accommodation for religious practices, including the attachment of religiously mandated objects to the front-door area of a condominium unit.** *Id.*

In *Bloch v. Frischholz,* 587 F.3d 771 (7th Cir. 2009), the Seventh Circuit addressed a unit owner's causes of action against a condo association for discrimination, based on the Fair Housing Act (FHA), 42 U.S.C. §3601, *et seq.,* and the Civil Rights Act, 42 U.S.C. §1982. The Seventh Circuit en banc opinion on November 13, 2009, partially reversed the Seventh Circuit's panel decision and remanded to the district court. This case involved religious discrimination against Jewish unit owners through strict enforcement of a condominium rule that prohibited any objects on doorways, including a mezuzah that the owners alleged their religion required them to hang on the door. The main issue was the extent to which a unit owner may bring a claim against the condo association for discrimination which takes place *after* sale of the unit. The court analyzed four causes of action: three causes of action under the FHA (42 U.S.C. §§3604(a), 3604(b), and 3617) and a claim under the Civil Rights Act (42 U.S.C. §1982). 587 F.3d at 787.

Section 3604(a) of the FHA states it is unlawful "[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." This statute focuses on availability of housing; it prohibits the refusal of sale or constructive eviction for discriminatory reasons. 587 F.3d at 776. Therefore, a condo association's post-sale conduct may violate §3604(a) if it amounts to a constructive eviction, thereby making housing "unavailable." To prove constructive eviction, a plaintiff generally must show the residence is "unfit for occupancy," meaning more than a mere drop in value or desirability. 587 F.3d at 777. For example, courts previously found the discriminatory act of spraying a yard with harmful chemicals did not constitute a §3604(a) violation, as the statute protects availability of housing, not habitability. 587 F.3d at 777, citing *Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n,* 388 F.3d 327 (7th Cir. 2004). The *Bloch* court explored the possibility that the owners could state a §3604(a) claim based on the unavailability of housing due to constructive eviction but found no constructive eviction as the owners never moved out of their unit or surrendered the premises. 587 F.3d at 778. The court refrained from determining whether a tenant must necessarily move out to state a claim under §3604(a) but noted that a tenant's decision to remain in his or her residence weighs against a finding that the unit was unavailable. The court noted there potentially could be a §3604(a) violation if the owners were unable to sell to other Jews but declined to make such a finding, as there was no evidence the

owners were attempting to sell their unit. 587 F.3d at 778 – 779. Accordingly, the motion for summary judgment on the §3604(a) claim was affirmed in favor of the condo association. 587 F.3d at 787.

Section 3604(b) of the FHA states it is unlawful "[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin." Section 3604(b) protects all privileges of sale, including the owner's right to inhabit the condominium unit, and further protects owners from discriminatory enforcement of rules, even facially neutral rules. 587 F.3d at 780. An owner can bring a §3604(b) claim for discrimination in connection with the terms, conditions, or privileges related to their purchase of the property, including discriminatory restrictions imposed by the condominium board. Unlike for §3604(a) claims, the discriminatory conduct need not rise to the level of constructive eviction, although §3604(b) generally does not protect against "isolated acts of discrimination." *Id.*

To prove discrimination under §3604(b), the plaintiff must show discriminatory intent or discriminatory impact (or disparate impact in certain circumstances). 587 F.3d at 784. Discriminatory intent, usually proved by circumstantial evidence, is difficult to prove when the rule is facially neutral, such as a prohibition against objects in the hallway. 587 F.3d at 786. The *Bloch* court found sufficient evidence of discriminatory intent to survive a motion for summary judgment on the §3604(b) claim and accordingly remanded the case for further evaluation of the extent of discriminatory conduct. 587 F.3d at 787.

Section 3617 of the FHA states it is unlawful "to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 3603, 3604, 3605, or 3606 of this title." A plaintiff must prove the following elements to state a §3617 claim: (a) the plaintiff is a protected individual under the FHA; (b) the plaintiff engaged in the exercise or enjoyment of fair housing rights; (c) the defendants coerced, threatened, intimidated, or interfered with the plaintiff on account of his or her protected activity under the FHA; and (d) the defendants were motivated by an intent to discriminate. 587 F.3d at 783. The Blochs clearly satisfied the first two elements, so the Seventh Circuit remanded to determine whether the Blochs could present sufficient evidence of discrimination to prove elements three and four. *Id.* The court declined to determine whether a §3617 violation must be in connection with a violation of another provision of the FHA. 587 F.3d at 781. The court overruled the interpretation of §3617 in *Halprin, supra,* by holding the statute protects from *post-sale* coercion, intimidation, and threats. 587 F.3d at 782. Section 3617 protects from a broader range of discriminatory conduct than §3604 encompasses, and a claimant need not prove constructive eviction. 587 F.3d at 782.

A claim pursuant to 42 U.S.C. §1982 requires proof of discriminatory intent. 587 F.3d at 775 – 776 n.5. Since the Blochs raised a triable issue of discriminatory intent, the §1982 claim was remanded, along with the claims under §§3604(b) and 3617 of the FHA. 587 F.3d at 787.

A related case, *Bloch v. Frischholz,* No. 06 C 4472, 2008 WL 244287 (N.D.Ill. Jan. 24, 2008), *motion denied, costs and fees proceeding,* 2008 WL 4889091 (N.D.Ill. June 26, 2008),

discusses a unit owner's cause of action for FHA retaliation against a condominium board that purportedly retaliates against a unit owner who files a Fair Housing Act lawsuit. Seventh Circuit caselaw on FHA retaliation is still developing.

For a prima facie case for FHA retaliation, other jurisdictions require the unit owner to prove: (a) the plaintiff engaged in statutorily protected activity; (b) the defendants took adverse action against the plaintiff; and (c) a causal connection between (a) and (b) exists (in this context, the owner would need to prove a causal connection between the initial FHA lawsuit and the board's adverse action). 2008 WL 244287 at *2. There is also the possibility the Seventh Circuit may adopt the same test it applies to retaliation claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.*, which would require plaintiff to prove he or she engaged in protected activity and the defendants subjected the plaintiff to adverse action to which they did not subject any similarly situated employees (meaning the plaintiff would need to show that similar unit owners who did not file a FHA lawsuit escaped adverse treatment). 2008 WL 244287 at *2. The Northern District of Illinois held that the owner was unable to satisfy either test. *Id.*

An earlier decision allowed the plaintiffs' action to proceed. *Scialabba v. Sierra Blanca Condominium Number One Ass'n,* No. 00 C 5344, 2000 WL 1889664 (N.D.Ill.Dec. 27, 2000). The plaintiffs sued the condominium association under federal civil rights laws for discriminatory restrictions on an occupant's use of condominium facilities, intimidation, harassment, fostering a hostile environment in violation of the FHA, failure to provide a reasonable accommodation in violation of the FHA, and various breaches of fiduciary duty. In *Scialabba,* the plaintiffs' son was severely injured in a car accident. He suffered traumatic brain injury, resulting in cognitive defects and personality disorder. The plaintiffs alleged that their son was routinely harassed and intimidated by the residents of the condominium. Their complaints to the association and property manager fell on deaf ears. The condominium association sued the plaintiffs in state court for their son's alleged repeated violations of association rules, and a lien was filed for costs and expenses allegedly incurred. 2000 WL 1889664 at *2.

The federal district court in *Scialabba* permitted the plaintiffs to pursue their cause of action against the condominium association for a violation of the FHA because it prohibits discrimination and intimidation in regard to one's use and enjoyment of one's residence. The court also allowed the plaintiffs to allege that the association's actions gave rise to a hostile housing environment in violation of the FHA and that the association refused to make any accommodation for their son's disability. The court indicated that "[d]efendants allegedly violated the Association's bylaws when they filed liens with the discriminatory intent of forcing [the plaintiffs] out of their condominium. These facts are adequate to state a claim for breach of fiduciary duty." 2000 WL 1889664 at *4. The court also found that the plaintiffs adequately stated a claim for breach of fiduciary duty by alleging failure to reasonably accommodate the needs of a handicapped unit owner. *Id.*

C. [16.13] Defenses

Robinson ex rel. Estate of Robinson v. LaCasa Grande Condominium Ass'n, 204 Ill.App.3d 853, 562 N.E.2d 678, 150 Ill.Dec. 148 (4th Dist. 1990), discussed in §16.11 above, provides an appropriate segue into a brief discussion of defenses in condominium litigation. In *Robinson,* a

successful defense was that the individual members of the board cannot be held liable in negligence, as pursuant to the Condominium Property Act they are fiduciaries to unit owners.

Indeed, the notion that a board's acts are entitled to deference as a self-governing body has also proven successful in many cases as evidenced in §16.7 above. *See Stuewe v. Lauletta,* 93 Ill.App.3d 1029, 418 N.E.2d 138, 49 Ill.Dec. 494 (1st Dist. 1981). Again, courts often will defer to a board's proper exercise of business judgment that is in accordance with the Condominium Property Act and the association's defining documents. *See 334 Barry in Town Homes, Inc. v. Farago,* 205 Ill.App.3d 846, 563 N.E.2d 856, 150 Ill.Dec. 729 (1st Dist. 1990); *Board of Managers of Village Square I Condominium Ass'n v. Amalgamated Trust & Savings Bank,* 144 Ill.App.3d 522, 494 N.E.2d 1199, 98 Ill.Dec. 872 (2d Dist. 1986); *Apple II Condominium Ass'n v. Worth Bank & Trust Co.,* 277 Ill.App.3d 345, 659 N.E.2d 93, 213 Ill.Dec. 463 (1st Dist. 1995); *Spiegel v. Hollywood Towers Condominium Ass'n,* 283 Ill.App.3d 992, 671 N.E.2d 350, 219 Ill.Dec. 436 (1st Dist. 1996); *Board of Directors of 175 East Delaware Place Homeowners Ass'n v. Hinojosa,* 287 Ill.App.3d 886, 679 N.E.2d 407, 223 Ill.Dec. 222 (1st Dist. 1997).

If the board uses its business judgment when interpreting its declaration, there is no breach. The ultimate question is the reasonableness of the board's actions. *Carney v. Donley,* 261 Ill.App.3d 1002, 633 N.E.2d 1015, 1022, 199 Ill.Dec. 219 (2d Dist. 1994). Illinois recognizes that a board reasonably may rely on its attorney's interpretation of the Condominium Property Act and governing documents.

The federal district court in *Scialabba v. Sierra Blanca Condominium Number One Ass'n,* No. 00 C 5344, 2001 WL 803676 (N.D.Ill. July 16, 2001), precluded the condominium association from relying on its attorney's advice as a shield or a sword in the plaintiffs' action. The basis for this ruling was that the defendant did not permit its attorney to disclose the communications it had with the association. The association would not permit the plaintiffs to discover the communication; therefore, the court would not permit the defendant to establish a defense based on its attorney's advice. "Disclosure of communications between an attorney and his client is required once the client injects a good faith reliance defense into the proceedings." 2001 WL 803676 at *7. Accordingly, for a condominium association to avail itself of a defense that it acted in good faith based on the legal advice it received, it must not only disclose the legal advice it received but also establish that it reasonably followed that legal advice.

It is also important to note that in *334 Barry in Town Homes, supra,* a condominium association was not estopped from asserting a claim against a unit owner alleging impermissible use of a parking space despite the unit owner's 12-year use of it before action was taken.

On the other hand, a unit owner may have a viable defense if he or she can demonstrate that the board did not act in accordance with the defining documents or did not act in a manner reasonably related to its fiduciary duty to all unit owners. *See Carney, supra; Wolinsky v. Kadison,* 114 Ill.App.3d 527, 449 N.E.2d 151, 70 Ill.Dec. 277 (1st Dist. 1983); *LaSalle National Trust, N.A. v. Board of Directors of 1100 Lake Shore Drive Condominium,* 287 Ill.App.3d 449, 677 N.E.2d 1378, 222 Ill.Dec. 579 (1st Dist. 1997).

III. ACTIONS INVOLVING OUTSIDE PARTIES

A. [16.14] Construction Matters: Suits Against the Developer and Repair Contractors

Illinois courts have long allowed suits by a condominium association against a developer. *Tassan v. United Development Co.,* 88 Ill.App.3d 581, 410 N.E.2d 902, 43 Ill.Dec. 769 (1st Dist. 1980); *Herlihy v. Dunbar Builders Corp.,* 92 Ill.App.3d 310, 415 N.E.2d 1224, 47 Ill.Dec. 911 (1st Dist. 1980); *Briarcliffe West Townhouse Owners Ass'n v. Wiseman Construction Co.,* 118 Ill.App.3d 163, 454 N.E.2d 363, 73 Ill.Dec. 503 (1983), *aff'd,* 134 Ill.App.3d 402 (2d Dist. 1985); *Siegel v. Levy Organization Development Co.,* 153 Ill.2d 534, 607 N.E.2d 194, 180 Ill.Dec. 300 (1992); *Board of Directors of Bloomfield Club Recreation Ass'n v. Hoffman Group, Inc.,* 186 Ill.2d 419, 712 N.E.2d 330, 238 Ill.Dec. 608 (1999).

Tassan, supra, was the first decision to hold that the implied warranty of habitability applies against a developer-seller of new condominium units. Two later Illinois appellate court cases held that the warranty of habitability applies to an action arising from defects in the common elements that interfere with the residences' habitability (*Herlihy, supra*) and to an action arising from defects in common land that affected the habitability of living quarters in a townhouse development (*Briarcliffe, supra*). An association may waive the implied warranty of habitability, but for a waiver to be effective, the burden is high. *Board of Managers of Chestnut Hills Condominium Ass'n v. Pasquinelli, Inc.,* 354 Ill.App.3d 749, 822 N.E.2d 12, 19, 290 Ill.Dec. 730 (1st Dist. 2004). In *Pasquinelli,* the court held that a waiver of the implied warranty of habitability was not effective. 822 N.E.2d at 19 – 20. There was no evidence that the developer called the purchasers' attention to the waiver provision or instructed the purchaser to initial the provision. *Id.* Additionally, the provision did not set forth the consequences of the waiver. *Id.* However, a party may disclaim an implied warranty of habitability as long as express terms are used; the disclaimer is in a conspicuous location in the contract, in large print, and in plain language; and it is agreed to between the parties. *Breckenridge v. Cambridge Homes, Inc.,* 246 Ill.App.3d 810, 616 N.E.2d 615, 622, 186 Ill.Dec. 425 (2d Dist. 1993). *See also Petersen v. Hubschman Construction Co.,* 76 Ill.2d 31, 389 N.E.2d 1154, 27 Ill.Dec. 746 (1979).

An Illinois Supreme Court case, however, has narrowed the scope of the breach of warranty of habitability claim that an association can bring, and though not reversed, the potential scope of *Herlihy* and *Briarcliffe* was certainly limited. *Bloomfield Club, supra.* In *Bloomfield Club,* the board of directors of an association brought a two-count complaint against the defendant entities that "created the development and constructed and sold all of the residential units and common areas in Bloomfield Club," including a clubhouse ("a freestanding building that includes a library, a hospitality room, an exercise room, an indoor pool, and restrooms") with alleged defects that were the subject of the lawsuit. 712 N.E.2d at 332. The first count alleged breach of fiduciary duty and was not subject to the appeal. The second count alleged a breach of warranty of habitability in that there were several alleged construction defects. The Supreme Court affirmed the dismissal with prejudice of the second count on the grounds that there was "no connection between the defects of the clubhouse and the habitability of the homeowners' dwelling units." 712 N.E.2d at 336.

Nevertheless, the *Bloomfield Club* court also went on to explain that its decision "is by no means intended to absolve defendants of their responsibility to construct nonresidential buildings

free of latent defects." *Id.* Indeed, the court suggested other possible theories under which the association had not attempted to state a cause of action, such as "breach of contract" and "breach of implied warranty of workmanship." 712 N.E.2d at 337 n.1, 336.

Also, although the focus of this chapter is condominiums, practitioners should consult developing caselaw in related areas such as cooperatives, townhome associations, and planned unit developments. See, *e.g.,* John F. Dixon, *Real Estate Law: The Expanding Liability of Illinois Developers and Directors,* 88 Ill.B.J. 226 (2000).

In *Poulet v. H.F.O., L.L.C.,* 353 Ill.App.3d 82, 817 N.E.2d 1054, 288 Ill.Dec. 404 (1st Dist. 2004), the First District held that unit owners of a condominium lacked standing to bring a claim, in fraud, against a developer of the condominium because the Condominium Property Act allows the association exclusive standing to sue on all matters affecting more than one unit. There, the unit owners' claims were based on the developer's actions against the association as an entirety. The appellate court distinguished *Tassan, supra,* in that the individual unit owners in *Tassan* were asserting claims sounding in the contractual breaches from the original purchase agreement. In contrast, the plaintiffs in *Poulet* were claiming to themselves that ability to bring the action for more generalized defects in the condominium property, a matter that could be asserted only by the association.

Prior to the election of the initial board of directors, the developer is to act as the interim board on behalf of the condo association and is to perform all duties of the association that normally would be performed by the board. *Glickman v. Teglia,* 388 Ill.App.3d 141, 902 N.E.2d 1256, 1260 – 1261, 327 Ill.Dec. 870 (1st Dist. 2009). The developer owes a fiduciary duty to unit owners in carrying out such duties. *Id.* These duties include maintaining common areas, hiring personnel, collecting and expending assessments, and obtaining insurance. 902 N.E.2d at 1261. Because the developer has an inherent conflict of interest during the period he or she is acting as the interim board, §18.2 of the Condominium Property Act (765 ILCS 605/18.2) requires him or her to provide a detailed accounting to the initially elected board. 902 N.E.2d at 1262, citing 765 ILCS 605/18.2. The developer is able to take advantage of provisions in the declarations that insulate board members from liability for negligence, meaning it may be difficult to prove the developer breached his or her fiduciary duty. 902 N.E.2d at 1263 – 1264.

A prospective buyer's suit against the developer for return of his earnest money deposit, when he entered a purchase agreement but failed to close, was dismissed for failure to state a cause of action in *Burke v. 401 N. Wabash Venture, LLC,* No. 08 C 5330, 2009 WL 2252194 (N.D.Ill. July 28, 2009).

B. [16.15] Personal Injury Cases When Plaintiff Is Nonresident

Presumably, premises liability law and general negligence principles would apply in personal injury cases brought by nonresidents against a condominium association or board. Depending on the facts of the case, however, it certainly would be worthwhile for individual board members sued in tort by injured nonresidents to make the argument successfully made in *Robinson ex rel. Estate of Robinson v. LaCasa Grande Condominium Ass'n,* 204 Ill.App.3d 853, 562 N.E.2d 678, 150 Ill.Dec. 148 (4th Dist. 1990), *i.e.,* that individual members of the board of managers cannot be held liable for negligent performance of their duties.

IV. SUBSTANTIVE AND PROCEDURAL ISSUES

A. [16.16] Standing and Capacity

A leading case on standing in a condominium litigation setting is *Wolinsky v. Kadison,* 114 Ill.App.3d 527, 449 N.E.2d 151, 70 Ill.Dec. 277 (1st Dist. 1983). The court held that the plaintiff had standing to challenge a board's exercise of its right of first refusal to purchase the unit the plaintiff had contracted to buy. According to the court, "[i]n determining whether a party has standing, the primary focus is upon the personal stake in the outcome of the controversy of the person seeking adjudication of a particular issue." 449 N.E.2d at 155. Furthermore, "[t]he standing doctrine is not meant to preclude a valid controversy from being litigated, but rather, to preclude persons having no interest in a controversy from bringing suit." *Id. See also Adams v. Meyers,* 250 Ill.App.3d 477, 620 N.E.2d 1298, 190 Ill.Dec. 37 (1st Dist. 1993) (unit owners had standing to raise claim attacking board's proxy resolution).

As to the standing of a plaintiff condominium association or board, one obvious source is the Condominium Property Act. For example, in *Spiegel v. Hollywood Towers Condominium Ass'n,* 283 Ill.App.3d 992, 671 N.E.2d 350, 219 Ill.Dec. 436 (1st Dist. 1996), the court held that the condominium association had standing to bring an action for forcible entry and detainer against a tenant pursuant to §18(n)(ii) of the Condominium Property Act (765 ILCS 605/18(n)(ii)). *See also Board of Managers of Village Square I Condominium Ass'n v. Amalgamated Trust & Savings Bank,* 144 Ill.App.3d 522, 494 N.E.2d 1199, 98 Ill.Dec. 872 (2d Dist. 1986) (association had standing to seek injunctive relief against tenant operating commercial day care business in unit). The holding in *Spiegel* was affirmed by the Illinois Supreme Court in *Knolls Condominium Ass'n v. Harms,* 202 Ill.2d 450, 781 N.E.2d 261, 269 Ill.Dec. 464 (2002) (association had standing to bring forcible entry and detainer action against condominium owner for nonpayment of maintenance assessments).

A plaintiff unit owner may bring suit against association board members, both in their individual capacities and as board members. *Taghert v. Wesley,* 343 Ill.App.3d 1140, 799 N.E.2d 377, 278 Ill.Dec. 659 (1st Dist. 2003). In *Taghert,* the defendants challenged their standing to be sued under §19(e) of the Condominium Property Act. The plaintiff filed his suit against the president and director of the association in their individual capacities and as board members, rather than against the association. 799 N.E.2d at 380. The court held that the plaintiff properly filed his complaint. *Id.*

Individual unit owners may not be able to bring suit on behalf of all unit owners. In *Poulet v. H.F.O., L.L.C.,* 353 Ill.App.3d 82, 817 N.E.2d 1054, 288 Ill.Dec. 404 (1st Dist. 2004), the court ruled that a group of individual unit owners did not have proper standing to bring a class action against the developer and others. The unit owners claimed the defendants mishandled funds in the association's account. While the members of the association had some interest in the claim, the association had primary responsibility to protect those interests. 817 N.E.2d at 1067. Allowing individual owners to assert claims in connection with the association's funds would deprive the association of its right to act on behalf of all unit owners. *Id.*

Similarly, in *Board of Directors of Kennelly Square Condominium Ass'n v. MOB Ventures, LLC,* 359 Ill.App.3d 991, 836 N.E.2d 115, 296 Ill.Dec. 700 (1st Dist. 2005), the association

brought an action against a commercial property owner seeking damages and injunctive relief for noise and vibrations. Individual unit owners subsequently intervened as additional plaintiffs alleging trespass, fraud, and nuisance, and the trial court dismissed the trespass claim. On appeal, the court held that the intervenors did not have standing to bring the trespass claim. 836 N.E.2d at 116. The court, relying on *Poulet,* reasoned that when the association has filed a claim on behalf of the owners, to allow piecemeal litigation by the unit owners would frustrate the statutory scheme whereby the association acts as the representative of all owners in common. *Id.*

Unit occupants (in contrast from unit owners) do not have standing to bring a claim for breach of fiduciary duty. *Bloch v. Frischholz,* No. 06 C 4472, 2007 WL 1455826 (N.D.Ill. May 11, 2007). To have standing to bring a Fair Housing Act claim, the plaintiff must allege a particular and concrete injury but need not be a unit owner. 2007 WL 1455826 at *3.

Davis v. Dyson, 387 Ill.App.3d 676, 900 N.E.2d 698, 326 Ill.Dec. 801 (1st Dist. 2008), discusses unit condominium owners' capacity to sue derivatively and individually. Unit owners may file a derivative action on behalf of a condominium association against the condominium board if the board fails to assert a claim against third parties. 900 N.E.2d at 705. In suing derivatively, the unit owners must allege the board's refusal to bring suit was a violation of the business-judgment rule (such as if the board ignored important information that would indicate it should file suit). 900 N.E.2d at 710. *Davis* clarifies that the right to sue derivatively relates to claims against third parties, including former board members, not just to claims against the current board of directors. 900 N.E.2d at 705. By suing derivatively, the unit owners step into the shoes of the condominium association and accordingly have the right to sue any party that the association itself would be able to sue. 900 N.E.2d at 706. *Poulet* is distinguishable because it did not involve a derivative action brought on behalf of a condominium association. 900 N.E.2d at 708, *citing Poulet, supra,* 817 N.E.2d at 1057 – 1058.

While the derivative action is the standard method for unit owners to seek relief for damage to the condominium association, unit owners also may sue individually if they can allege a "separate and distinct" injury or an injury existing independently of harm to the condominium association. 900 N.E.2d at 710. Harm can be separate and distinct to each unit owner even if all owners suffer the same injury, such as the same decline in property value. 900 N.E.2d at 711. However, when unit owners suffer harm indirectly or as a byproduct of harm to the condominium association, such that the primary damage is to the association rather than to individuals, unit owners do not have standing to sue individually. 900 N.E.2d at 712.

Bylaws placing limits on the board's capacity to sue are generally upheld if they do not conflict with the Condominium Property Act. For example, the court in *River Plaza Homeowner's Ass'n v. Healey,* 389 Ill.App.3d 268, 904 N.E.2d 1102, 1112, 328 Ill.Dec. 592 (1st Dist. 2009), upheld a bylaw requiring the board to obtain two-thirds consent before bringing suit, finding this bylaw did not conflict with §9.1(b) of the Condominium Property Act (which grants the board standing and capacity to sue), and dismissed the suit because the board failed to obtain consent of two thirds of its members.

B. [16.17] Notice and Opportunity To Be Heard

The meaning of “notice and opportunity to be heard” in a condominium litigation setting has been debated. The requirement of notice and opportunity to be heard is contained in §18.4(*l*) of the Condominium Property Act, which states that the board of managers has the right “[t]o impose charges for late payment of a unit owner’s proportionate share of the common expenses, or any other expenses lawfully agreed upon, *and after notice and an opportunity to be heard, to levy reasonable fines for violation of the declaration, by-laws, and rules and regulations of the association.*” [Emphasis added.] 765 ILCS 605/18.4(*l*).

The Historical and Practice Notes to the Condominium Property Act interpret §18.4(*l*) as requiring that at a minimum, the association procedure must meet fundamental due-process standards. Ellis B. Levin, Historical and Practice Notes, S.H.A. (1992) c. 30, ¶318.4. In further comments regarding §18.4(*l*), Mr. Levin states that a unit owner or tenant must be informed in writing that he or she is entitled to a hearing if he or she so requests before a fine or penalty can be imposed, and at such hearing, the unit owner or tenant should be allowed to have counsel present. *Id.* The authors herein consider this perhaps too broad an interpretation.

For example, it has been held in at least one case that notice and opportunity to be heard are not due when a board or association seeks injunctive relief and attorneys’ fees. Specifically, the issue as to what process is due, if any, before a condominium association can seek injunctive relief against a unit owner and attorneys’ fees for bringing such a suit was addressed in *Board of Managers of Village Square I Condominium Ass’n v. Amalgamated Trust & Savings Bank,* 144 Ill.App.3d 522, 494 N.E.2d 1199, 98 Ill.Dec. 872 (2d Dist. 1986). There, the court held that this did not equate to the levy of a fine, and therefore, notice of the suit and an opportunity to be heard beforehand were not required. As such, under *Village Square,* there is no requirement of a prior hearing before a board or association seeks injunctive relief.

Even when notice and opportunity to be heard do seem to be required, the authors herein are of the opinion that such “due process” cannot rise to the level of due process in a criminal setting. Indeed, a condominium association certainly does not invoke any form of “state action.” Consequently, the process that is “due” is likely minimal, certainly no more than process due as to charges filed before an administrative agency. *See Siddiqui v. Illinois Department of Professional Regulation,* 307 Ill.App.3d 753, 718 N.E.2d 217, 225, 240 Ill.Dec 736 (4th Dist. 1999) (“Due process is a flexible concept and requires only such procedural protections as fundamental principles of justice and the particular situation demand.”); *Willis v. Illinois Department of Human Rights,* 307 Ill.App.3d 317, 718 N.E.2d 240, 246, 240 Ill.Dec. 759 (4th Dist. 1999) (“While due process requirements apply to administrative proceedings . . . the full panoply of judicial procedures does not apply to the fact-finding investigation [by the Department of Human Rights].” [Citation omitted.]).

It is also worth noting again that, in *Spiegel v. Hollywood Towers Condominium Ass’n,* 283 Ill.App.3d 992, 671 N.E.2d 350, 219 Ill.Dec. 436 (1st Dist. 1996), the court specifically noted that a court of review should give deference to the findings of a condominium board following a hearing and that there is no need to hold a trial de novo on the underlying facts of an alleged violation.

Without strict compliance, Illinois courts will dismiss a condominium association's suit against a unit owner to enforce complaints against the unit owner if the unit owner was not given an opportunity to be heard. *See Scialabba v. Sierra Blanca Condominium Number One Ass'n,* No. 00 C 5344, 2001 WL 803676 (N.D.Ill. July 16, 2001) (failure of board of managers to follow its own rules providing that signed complaint must be submitted and unit owner given written notice informing him or her of time and place when board will conduct hearing on complaint is fatal to action).

C. [16.18] Class Actions and Representative Status of the Board

In *Tassan v. United Development Co.,* 88 Ill.App.3d 581, 410 N.E.2d 902, 43 Ill.Dec. 769 (1st Dist. 1980), the court faced as an issue whether, as a matter of law, a proposed class action brought on behalf of past and present condominium unit owners was inappropriate. The court generally discussed the basic rules and criteria for bringing a class action. Also, the court reiterated the general principle that it is a matter of discretion for the trial court whether a class is certified and who are appropriate members of a class. Ultimately, regarding whether a class action is wholly inappropriate in a condominium litigation setting, the *Tassan* court held: "[W]e must reject [the defendant developer's] attack on the propriety of a class action at this stage of the proceedings." 410 N.E.2d at 913. Accordingly, under *Tassan,* a class action on behalf of past and present unit owners is not barred as a matter of law, and whether a class can be certified is a matter of discretion for the trial court in applying the general rules and criteria for class certification.

In any event, as to the representative status of the board of managers, the authors submit that a board of managers can be essentially a class representative on behalf of condominium association members, as demonstrated by several of the cases cited in §16.16 above, in what is otherwise not a class action. *Compare Tassan, supra,* with *Poulet v. H.F.O., L.L.C.,* 353 Ill.App.3d 82, 817 N.E.2d 1054, 288 Ill.Dec. 404 (1st Dist. 2004) (holding that owners of individual units did not have standing in class action to bring conversion and constructive fraud claims that concerned mishandling of funds in association's account).

The district court had jurisdiction under the Class Action Fairness Act when the amount in controversy was over $5 million and one of the unit owners was a citizen of a different state than the condo development limited-liability company. *Burke v. 401 N. Wabash Venture, LLC,* No. 08 C 5330, 2009 WL 2252194 (N.D.Ill. July 28, 2009).

V. [16.19] CONDOMINIUM PROPERTY MANAGER AS DEFENDANT

A property manager of a condominium association is certainly a potential defendant in actions brought by a unit owner or a nonresident. Under the doctrines of agency or perhaps apparent agency, a property manager likely would be susceptible to the same theories of liability as a board of managers, with the possible exception of breach of statutorily created fiduciary duty. The court in *Scialabba v. Sierra Blanca Condominium Number One Ass'n,* No. 00 C 5344, 2000 WL 1889664 (N.D.Ill.Dec. 27, 2000), held that although the Condominium Property Act imposes a fiduciary relationship on the board of managers, claims for breach of fiduciary duty

will not stand against a property manager. The court's basis: "The property manager, unlike the association board, does not have a contractual relationship with owners to support a fiduciary duty. The property manager's contractual duties lie with the association board, not the tenants." 2000 WL 1889664 at *5.

Accordingly, a condominium association or board also must be wary of a possible argument that the association is bound by the statements, actions, and records of a property manager and should seek to ensure that the property manager is professional and conscientious. Additionally, implied ratification of the property manager's actions must be guarded.

The federal district court in *Scialabba, supra,* denied the property manager's motion for summary judgment in a discrimination claim. The property manager argued that it did not have the authority to modify the association's rules and regulations and could not effect what would be a reasonable accommodation for the disabled plaintiff. The plaintiffs argued that the property manager participated in reaching an initial accommodation, which they alleged was not enforced. *Id.* The property manager failed to demonstrate that any agreements the plaintiffs may have entered into were with the board and not it.

VI. [16.20] LIABILITY INSURANCE FOR THE ASSOCIATION, THE BOARD, INDIVIDUAL DIRECTORS, AND THE PROPERTY MANAGER

Note that P.A. 92-517 (eff. June 1, 2002) and P.A. 92-518 (eff. June 1, 2002) amended, respectively, the Condominium Property Act's §12 regarding insurance and §12.1 regarding insurance risk pooling trusts. 765 ILCS 605/12, 605/12.1. Section 12 provides that no policy of insurance shall be issued to a condominium association unless coverage includes (a) property insurance on common elements, including limited common elements, that provides coverage in a total amount of not less than the full insurable replacement costs of the insured's property, including coverage for the increased cost of construction due to building code requirements; (b) general liability insurance against claims and liabilities arising in connection with the ownership, existence, use, or management of the property in a minimum amount of $1 million to insure the board, the association, the management agent, and all respective employees and agents; the developer as an additional insured in its capacity as a unit owner, manager, board member, or officer; and even unit owners as additional insured parties but only for claims and liability arising in connection with the ownership, existence, use, or management of the common elements; and (c) fidelity bond and directors' and officers' coverage, particularly including any managing agent or its employees who control or disburse funds of the association if the association has six or more units. The board of directors must obtain directors' and officers' liability coverage at a level deemed reasonable by the board, if not otherwise established by the declaration or bylaws. 765 ILCS 605/12(a).

Section 12(b) requires that the property insurance maintained must include units, limited common elements, and common elements. Common elements include fixtures located at any interior surfaces of the walls, floors, and ceilings of the individual units originally installed by the developer but shall exclude floor, wall, and ceiling coverings. Section 12(e) also requires that an

insurer waive its right to subrogation under the policy against any unit owner of the condominium or members of the unit owner's household and that the unit owner waive his or her right to subrogation as well.

The board of directors may require unit owners to obtain insurance covering their personal liability for damages sustained to another unit caused by their negligence. In fact, if the unit owner does not purchase or produce evidence of insurance under this section, the directors may purchase the insurance coverage and charge the premium costs back to the unit owner, although the board may not be liable to any person if it fails to purchase the insurance. 765 ILCS 605/12(h). Finally, any insurer defending a liability claim filed against a condominium association must notify the association of the terms of the settlement no less than ten days before settling the claim, although the association cannot veto the settlement unless otherwise provided by contract or statute. 765 ILCS 605/12(k).

Given the general increase in condominium litigation, it appears the Illinois legislature found it necessary to impose insurance requirements on the board of managers and unit owners to limit potential liability exposure. The authors suggest that the failure of a board to comply with certain sections of these rather specific requirements may result in increased litigation.

Section 12.1 pertains to insurance risk pooling trusts. Section 12.1 provides that two or more condominium associations may form a trust fund for the purpose of providing protection against financial loss due to damage or destruction of property or other liability. The authors are not aware of any specific litigation pertaining to §12.1.