



YOU AS A FIDUCIARY

by Neal McCulloh, Esquire

Managers and directors of condominiums and homeowner association are used to hearing that they owe a "fiduciary" duty to the members of their associations. What does this really mean? Generally speaking, a fiduciary is a "trustee" with respect to the trust and confidence involved in a given undertaking, and the scrupulous good faith and candor which it requires. "Fiduciary Duty" is a duty to act for someone else's benefit while subordinating one's personal interests to those of the other person's. That means, while serving as a manager or director for a community association, your own interests must be subordinate to the interests of the association. One's own interests must always take back seat behind the interests of the association in conducting association affairs. The law implies a standard of duty to fiduciaries which is higher than any other standard of duty. In fact, as a fiduciary, you bear the highest standard of duty implied by law.

Practically speaking, this means that managers and directors must be scrupulously honest in the conduct of their duties. Moreover, if one acts in his or her own personal self interest before that of the association, despite being scrupulously honest, one runs the risk of breaching that fiduciary duty. In fact, one's role as a fiduciary is fraught with potential risks and liabilities. Because of the special trust and confidence imposed on a fiduciary, and the reliance of members, directors and managers, one always runs the risk of being accused of a breach of fiduciary duty despite one's best good faith effort to avoid doing so.

For this reason, Clayton & McCulloh always recommends that directors have "Director and Officer" liability insurance to insure against the risk of liability based on breach of fiduciary duty. Generally speaking, a breach of fiduciary duty occurs when one, through acts or omissions, violates the terms of the fiduciary relationship. Those terms may be express terms, such as those found a Declaration of Covenants and Restrictions, Bylaws, or Articles of Incorporation, or may be implied by law. Taking "kick-backs" from a contractor, for example, or other self-dealing in the conduct of the association's affairs, or using one's position as a Director for personal gain, are all breaches of fiduciary duty and can expose the individual director, and the association, to liability and damages.

"Is this the right thing to do?" is a question frequently asked by Directors and Managers. The answer is never an easy one, but will often be found by looking to the best interests of the association and membership as a whole. ☞