On Law

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Attorneys and Counselors At Law

Does the Board of a Condominium Association or HOA have a Duty to Enforce the Master Deed, Bylaws or Other Restrictive Covenants as Written?

Kevin M. Hirzel

In Michigan, the terms of a master deed, bylaws or other restrictive covenants are contractual in nature. The Michigan Courts have generally held that a master deed, bylaws or other restrictive covenants are to be enforced as written. *Terrien v Zwit*, 467 Mich 56, 65; 648 NW2d 602, 607 (2002).

The governing documents often require a board to enforce the governing documents. Similarly, the terms of the governing documents and the Michigan Condominium Act require every owner to "…comply with the master deed, bylaws, and rules and regulations of the condominium project…" MCL 559.165. As a general rule, the board of a condominium or homeowner association is required to enforce the governing documents as written.

The Michigan Nonprofit Corporation Act, specifically MCL 450.2541, imposes a duty on a director of nonprofit corporation to act in good faith and with the care of an ordinarily prudent person. The Michigan Supreme Court has previously held that acts of directors that are ultra vires subject a director to liability as they cannot be in good faith, reasonably prudent and/or in the best interests of the corporation. *Dodge v Ford Motor Co*, 204 Mich 459, 489; 170 NW 668, 678 (1919).In the context of community associations, numerous courts have held that directors are subject to liability for failing to comply with the plain language of the governing documents. The South Carolina Supreme Court recently stated as follows:

> "[A] corporation may exercise only those powers which are granted to it by law, by its charter or articles of incorporation, and by any bylaws made pursuant thereto; acts beyond the scope of the powers so granted are *ultra vires*." The business judgment rule only applies to *intra vires* acts, not *ultra vires* ones. **A homeowners association is bound to follow its covenants and bylaws and cannot defend something that violates those documents on the basis that is a reasonable alternative.**

Fisher v Shipyard Vill Council of Co-Owners, Inc, 409 SC 164, 180-81; 760 SE2d 121, 129-30 (2014).

It is likely that Michigan Courts would follow suit and hold that a director's failure to enforce the plain language of the governing documents is a breach of fiduciary duty. As with any rule, there will always be exceptions. Potential exceptions to the enforcement of the plain language of the governing documents, include, but are not limited to:

- **Reasonable Accommodations.** The Michigan Condominium Act and the Fair Housing Act require the Board of Directors to provide a reasonable accommodation to someone with a disability, even if the accommodation is contrary to the language of the governing documents.
- **Illegality.** The governing documents were not validly enacted and/or violate Michigan Law or Federal Law.
- **Equity.** The terms of the governing documents are not required to be enforced based on: (1) technical violations and absence of substantial injury, (2) changed conditions, and (3) limitations and laches. See *Webb v Smith*, 224 Mich App 203, 211; 568 NW2d 378, 382 (1997). The cases in which these exceptions have been applied are highly fact specific, and a Board of Directors should use caution before relying on one of the above circumstances to avoid enforcement of an association's governing documents.

As a general rule, a community association should enforce its governing documents according to the plain language. If a board believes that there may be a valid reason not to enforce the governing documents as written, the board should consult with an

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Does the Board of Directors have a Duty (cont.)

attorney to obtain an opinion as to whether or not there is a legal justification for deviating from the enforcement of the governing documents. Pursuant to MCL 450.2541, a board that relies on the opinion of counsel, will likely have the protections of the business judgment rule and be deemed to have been acting in good faith and in the best interests of the association. In contrast, a board that arbitrarily decides not to enforce certain provisions of the governing documents, or makes decisions without the opinion of legal counsel, is subjecting themselves to potential liability.

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The Growth of Community Associations

Matthew A. Heron

A community association is a group of owners who have agreed to share certain aspects of their community. In *Cohan v Riverside Park Place Condo Ass'n, Inc*, 123 Mich App 743, 746–748 (1983), relating to a condominium, the Michigan Court of Appeals described this relationship as follows:

> Every man may justly consider his home his castle and himself as the king thereof; nevertheless his sovereign fiat to use his property as he pleases must yield, at least in degree, where ownership is in common or cooperation with others. The benefits of condominium living and ownership demand no less. The individual ought not to be permitted to disrupt the integrity of the common scheme through his desire for change, however laudable that change might be.

Cohan, 123 Mich App at 748. With a condominium, there is shared ownership of common elements. The concept of a community association, however, is not limited to communities which share common ownership. Many homeowners share only the limitations and covenants contained in deed restrictions and yet still benefit from a community association. As to both types of such community associations, owners give up a certain level of control in order to live within a common community; however, it is most likely because of this shared control that community association living has seen tremendous growth since they first started to become popular in the early 1970s.

As of 2012, more than 63 million people lived in community associations throughout the United States, and 24% of all homes in the U.S. are in community associations. Community associations have grown from 701,000 housing units in 1970 to nearly 26 million housing units in 2012. The value of all homes in community associations as of 2012 ($4.237 trillion) exceeded the gross domestic product of all countries in the world except for the United States ($17.419 trillion); China ($10.355 trillion), and Japan ($4.601 trillion). In 2012 community associations collected $51 billion in assessments, and spent over $20 billion from accumulated reserve funds for capital improvements. The value of the time spent each year by association board and committee members, which is almost always performed on a volunteer basis, is $1.6 billion. In other words, community associations have grown to constitute a significant aspect of our economy and everyday living.

California and Florida lead the way in sheer numbers, with these two states having 88,500 community associations between them, or over a quarter (27.3%) of all associations in the U.S. Michigan has 7,900 community associations, or 2.4% of all U.S. associations. Homeowner associations account for about 50% of associations, condominiums about 45-48%, and cooperatives 3-5%.

There are several reasons why people like living in community associations. From a monetary perspective, community associations help maintain property values, minimize social costs by reducing the amount each resident needs to spend for common expenditures, and expand affordable home ownership. From an aesthetic perspective, community associations help maintain a community's appeal by landscaping common areas and requiring owners to adhere to agreed standards on a home's appearance and limitations on use. According to the Foundation for Community Association Research, more than 92% of residents rate their living experience as positive (70%) or neutral (22%), and 81% of residents say that they get a "great" or "good" return on their investment. Since community associations are almost always governed by residents with a vested interest in the longevity of the community, resident satisfaction should remain relatively constant as the number of community associations continues to grow.

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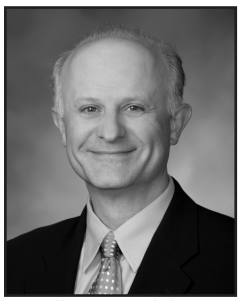
Legal Update: How Changes to Periodic Garnishments in Michigan Affect Condominium Collection Practices



William Z. Kolobaric

The Board of Directors for condominium associations are often faced with delinquent co-owners who fail to pay assessments or fines. Typically, an Association will seek voluntary compliance with a co-owner to obtain payment, but sometimes the Association is forced to pursue a judgment against the delinquent co-owner. After the Judgment is entered, the Association may pursue collection efforts against the co-owner by sending a periodic garnishment to the co-owner's employer.

On April 16, 2015, Michigan Governor Rick Snyder signed into law House Bill 4119 (the Bill), which affects periodic garnishments sent to employers. The Bill amended MCL 600.4012 by making the following changes, which became effective immediately:

- Periodic garnishments will now remain in effect until the balance of the judgement is satisfied rather than having to renew the garnishment every 182 days as previously provided. MCL 600.4012(1);
- The garnishee fee has risen from $6.00 to $35.00. MCL 600.4012(12);
- The periodic garnishment is not valid or enforceable unless it is served in accordance with the Michigan Court Rules. MCL 600.4012(4);
- Although default judgments will still be allowed against an employer that fails to fully comply with a periodic garnishment, creditors will be required to give employers ample notification, via a multi-step process, when they are not in compliance. Employers will then have 28 days to rectify the situation and after entry of a default but prior to entry of a default judgment. MCL 600.4012(6)-(8); and
- Even if a default judgment is entered against an employer, the employer will have 21 days after entry of the default judgment to petition the court to limit the amount of the judgment to the amount that would have been withheld if the garnishment had been in effect for 56 days, rather than entering the judgment for the full amount of the debt. MCL 600.4012(9)-(10).

How the Recent Changes Affect Your Association

The good news for condominium associations is that only a single writ of garnishment to the delinquent co-owner's employer will be needed to pursue collection of the entire judgment. This translates into savings to the Association whereby it will no longer incur additional attorney fees and costs in having to prepare and reissue supplemental writs of garnishment if the initial garnishment and/or subsequent writs expired with a balance still due and owing on the judgment.

However, there is a "but" to the recent amendment. Since priority of payment on the garnishment is established in the order that the garnishments are received—except for child support withholding orders and tax levies, which have priority over a creditor garnishment order regardless of when received—it is imperative for Board of Directors to act promptly in pursuing garnishments against a delinquent co-owner. If another creditor files a wage garnishment first, the Association may have to wait years until the first garnishment is paid off.

How the New Law Changes the Employer's Responsibility

Under the former garnishment provisions, if an employer failed to timely respond to a writ of garnishment, the Association's attorney could pursue the employer for the full amount remaining due on the judgment set forth in the garnishment against the employee. Thus, the old statute provided a hefty incentive for employers to comply with garnishment requests. Under the new changes to the statute, the Michigan legislature made it much more difficult to hold an employer liable for failing to comply with a garnishment request related to its employees. As described above, the Michigan legislature added numerous notice provisions, allowed the employer 28 days to rectify a default and further allowed an additional 21 days to petition the Court to limit the total amount.

How the New Law Changes a Former Collection Tactic

Under the former garnishment provisions, garnishments only lasted 182 days and could not be renewed until the 182 days had expired. A clever collection attorney for the Association could establish writ priority by submitting the Association's garnishment a couple of days prior to the expiration of the writ that had priority. Thus, the Association would often obtain at least some funds during the year from the co-owner's employer. Regrettably, with the new amendment to Michigan's statute, the Association may have to wait years to see a dime. However, the Board will still want to direct its attorney to prepare and file the garnishment with the co-owner's employer in order to establish priority since the employer will be required to begin paying the Association once any prior garnishments have been paid in full or withdrawn.

Conclusion

It is important for the Board of Directors for the Association to continually review the Association's receivables and aggressively pursue the collection of any delinquent accounts. With the recent changes to Michigan's statute, any delays may impact how quickly the Association will obtain garnishment payments.

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Our Vision

To meld our legal expertise, professional support staff, technical resources and variety of locations to deliver first rate legal services at a fair value to a full range of business, municipal, insurance and individual clients.

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