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NEWSLETTER

Member of Condominium Association Lacks Standing to Sue Condominium Board's D&O Insurer

February 2003

A California appellate court, in an unpublished opinion applying California law, held that an individual member of a condominium association lacked standing to sue an insurance company that had issued a D&O policy to the board of directors of the condominium association and had tendered a defense to the insurer in an action brought by the individual member. *Walsh v. Truck Ins. Exch. Co.*, No. 318289, 2003 WL 121997 (Cal. App. Jan. 13, 2003).

An individual member of a condominium association sued her condominium association's board of directors, as well as certain non-insureds, including the property manager and other tenants of the condominium, claiming that the board had permitted the unit owners above her to remove carpet and padding, thereby damaging her unit. The insurer provided a defense to the board members and agreed to extend its defense to the non-insureds. The individual member subsequently sued the insurer alleging that by providing a "courtesy" defense to non-insureds, the insurer had breached an implied covenant of good faith and fair dealing and aided and abetted the board's breach of the fiduciary duty it owed to her.

The appellate court held that the individual member of the association lacked standing to sue the insurer. The court initially noted that "an insurer's duty of good faith and fair dealing is owed *solely to its insured and, perhaps, any express beneficiary of the insurance policy.*" The court pointed out that the individual member was not a party to the D&O policy or a named or additional insured under the policy. The court rejected the argument that the individual member nevertheless had standing because she was a "mandatory member" of the condominium association, reasoning that the association was a distinct entity from its individual members who "stand in the same position as shareholders to a corporation."

The court also rejected the individual member's argument that she had standing to sue as a third-party beneficiary because the board's D&O policy was purchased by the condominium association and paid for with dues from individual members. The court stated that this fact was insufficient to establish standing and also pointed out that the individual member was the plaintiff in the underlying action. She therefore had no defense to tender or liability to be indemnified under the policy.

The court next rejected the individual member's argument that the insurer was estopped from denying her benefits of the policy because it had extended a defense to non-insureds. The court explained that a necessary element of estoppel was to show ignorance of the true facts, and the individual member could not make this showing because her allegation that the insurer was wrongfully extending defense to non-insureds demonstrated she was aware of the relevant facts. The court further explained that the individual member could not establish the necessary elements of estoppel because she failed to proffer facts that she detrimentally relied on the insurer's decision to provide a "courtesy" defense to non-insureds. Thus, even setting aside the fact that the individual member had no defense to tender because she was the plaintiff in the underlying action, the court still found she lacked standing.

Finally, the court rejected the individual member's claim that the insurer aided and abetted the board's breach of a fiduciary duty it owed to her. The court explained that even though insurers and insureds have a special relationship, it does not give rise to a fiduciary duty. If an insurer has no fiduciary duty to an insured, the court stated that an insurer, *a fortiori*, has no duty to a non-insured. In addition, the court reasoned that the insurer, as a non-fiduciary, could not be found to have aided and abetted the board in breaching its duty because non-fiduciaries cannot conspire to breach a duty that only a fiduciary owes.

For more information, please contact one of WRF's Professional Liability Attorneys at 202.719.7130.