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May the Association Pay the Legal Expenses to Defend a Director When an Owner Seeks an Injunction Against Harassment?

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It's a Thursday evening and the President of XYZ Association ("Association") is sitting at home when there is a knock at the door. It turns out to be a process server serving the President with a Petition seeking an Injunction Against Harassment and Notice to appear at a hearing in the local Justice Court the following Tuesday. This is a scenario that is not as uncommon as you would think...a homeowner seeking an Injunction Against Harassment against a director. The question quickly becomes: may (or must) the Association pay the legal fees to defend that director in court against the owner's claims? The usual attorney response applies here...it depends.

The Arizona Nonprofit Act permits the corporation (assuming the XYZ Corporation is incorporated as a nonprofit corporation) to pay the attorneys' fees to defend a director. A.R.S. § 10-3853 (Advance for Expenses) provides that a corporation may pay for or reimburse the reasonable expenses incurred by a director who is a party to a lawsuit before the lawsuit is resolved if the director who was sued (1) makes a "written affirmation" that the director believed in good faith that his or her conduct meets the required standard (discussed below) and (2) promises in writing to repay the expenses for attorneys' fees if it is ultimately determined that the director did not meet the required standard.

What is the standard? A.R.S. §10-3851 (Authority to indemnify) requires the following conditions to exist: (a) The individual's conduct was in good faith; and (b) The individual reasonably believed: (i) In the case of conduct in an official capacity with the corporation, that the conduct was in its best interests; (ii) In all other cases, that the conduct was at least not opposed to its best interests; and (c) In the case of any criminal proceedings, the individual had no reasonable cause to believe the conduct was unlawful.

Our experience reveals that directors often are targeted and accused of "harassment" simply because they are on the board and the board is doing nothing more than enforcing the governing documents. An owner may perceive the director's actions as harassing or the owner may actually be harassing the director in order to sway the board in their (the owner's) favor. To prevail, the claimant has the burden of proving a series of harassing events that would cause a reasonable person to be seriously alarmed, annoyed or harassed and the conduct in fact seriously alarms, annoys, or harasses the person and serves no legitimate purpose. It is not uncommon for there to be insufficient

evidence to prove harassment. The prevailing party may ask for the recovery of attorneys' fees, if any. The judge has the discretion to award such fees.

It is also our experience that boards almost never ask for the "written affirmations" required by A.R.S. § 10-3853. It is a best practice, however, for board members who are sued (and where there is no insurance coverage providing an attorney for the directors who were sued) to be required to meet the obligations of the statute in order to have the association hire an attorney to defend the director who is the target of the injunction against harassment.

For further information, contact Maura Abernethy or any attorney in the firm.

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