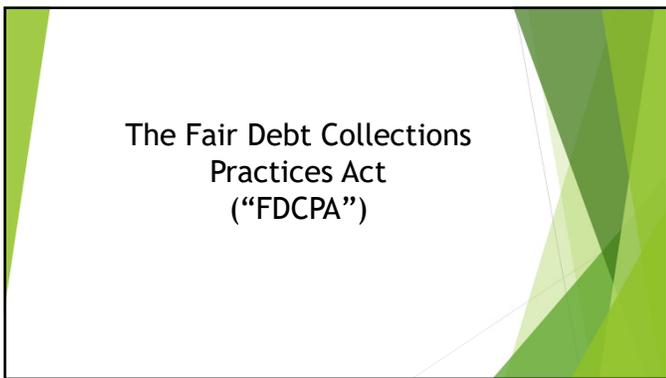
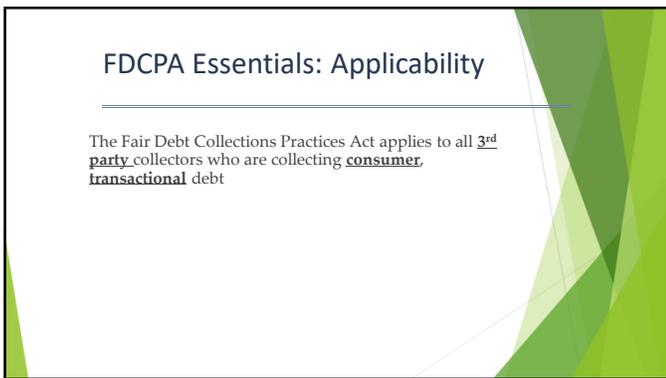


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FDCPA Essentials: Applicability

The FDCPA considers you a 3rd party debt collector if...

- ▶ You are collecting for a client vs. collecting for yourself;
- ▶ Debt collection is (or becomes) the "principal purpose" of your representation;
- ▶ You "regularly" undertake debt collection in your practice

4

FDCPA Essentials: Applicability

- ▶ **Consumer Debt** - debt incurred personally or for a household (as opposed to business debt);
- ▶ **Transactional Debt**
 - Judgments based on tort and personal injury are not transactional;
 - Judgments based on contract and real estate transactions are transactional;

5

FDCPA Essentials: Applicability

Obduskey v. McCarthy & Holthus LLP
139 S. Ct. 1029 (2019)

US Supreme Court case that held that an attorney hired only to initiate and administer a nonjudicial foreclosure is not necessarily subject to the FDCPA

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FDCPA Essentials: Conduct

Prohibited Conduct

- ▶ Abusive, false, and unfair practices
- ▶ Disclosure of any information to a 3rd party without written or verbal authorization from the debtor

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FDCPA Essentials: Conduct

Required Conduct

- ▶ "Miranda" notice in first, written communication: "this is an attempt to collect a debt and any information obtained will be used for that purpose"
- ▶ "Mini Miranda" notice in all correspondence after the first written, correspondence: "this communication is from a debt collector"
- ▶ Debt information in initial correspondence:
 - Precise amount of the debt plus notice of any charges that accrue daily, weekly, etc.
 - Name of the creditor
 - Statement that debt will be assumed valid if not disputed within 30 days
 - Notice of opportunity to dispute the debt, in which case the collector will send the debtor validation
- ▶ If debt is disputed, halt collections until validation is sent

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Legal Remedies for Collections

9

Pre-Judgment Remedies: Confessions of Judgment



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Pre-Judgment Remedies: Statutory Liens

Attorney's Liens (Utah Code § 38-2-7)

- ▶ Commences at the time of employment
- ▶ Covers all money and property that is the subject of or connected with the legal representation
- ▶ Perfection: record a Notice of Lien with the county (if real property is involved) or file a notice in the pending litigation

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Pre-Judgment Remedies: Statutory Liens

Community Association Liens (Utah Code §§ 57-8-44, 57-8a-301)

- ▶ Covers all amounts owing to the association
- ▶ Enforceable as if it were a deed of trust (but not subject to one-action rule)
- ▶ Perfection: record a Notice of Lien with the County Recorder

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Pre-Judgment Remedies: Statutory Liens

Mechanic's Liens (Utah Code § 38-1a-101 et al)

- ▶ Available to suppliers of labor or materials for improving, repairing, or maintaining real or personal property
- ▶ Use the State Construction Registry

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Post-Judgment Remedies: Form of Judgment

- ▶ An "Order" is usually not sufficient for enforcement purposes
- ▶ Interest (whether contractual or statutory) is not enforceable if not provided for in the Judgment
- ▶ Reserve your right to augment the judgment in the amount of additional fees incurred in collections (Rule 73 permits this)

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Post-Judgment Remedies: Wage Garnishments

- ▶ File an Application for Writ of Continuing Garnishment
- ▶ Send signed Writ, instructions, interrogatories, notice of exemptions, and Request for Hearing form to employer who will then serve the debtor
- ▶ Employer is required to send you and the debtor answers to interrogatories every pay period
- ▶ If another garnishment is served on the employer, yours will only be good for another 120 days

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Post-Judgment Remedies: Bank Garnishments

- ▶ Start with a subpoena if you don't have banking information
- ▶ File an Application for Writ of Garnishment
- ▶ Consider moving for an ex parte Writ

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Post-Judgment Remedies: Writs of Execution

- ▶ Available for real and personal property
- ▶ File an Application for Writ of Execution
- ▶ Serve on debtor and each person with an interest in the property: signed writ, notice of exemptions, reply and request for hearing
- ▶ Deliver above documents to Sherriff along with fee and Preacipe

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Post-Judgment Remedies: Rent Garnishments

Available to community associations by statute

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Common Issues



- Poor Accounting
- "Paid in Full"
- Bankruptcy

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What Every Attorney Should Know About Real Estate Developments

Presented by
Vial Fotheringham, LLP

20

Creation and Early Stages

- Step 1: Creation of Declarant business entity
- Step 2: Entitlements
 - ▶ Process driven by municipality
 - ▶ Often handled in-house
 - ▶ Involves advocacy in front of municipality
- Step 3: Creation of HOA business entity
- Step 4: Creation of Declaration and Bylaws
 - ▶ Condominium vs PUD
 - ▶ Declaration and Bylaws should be distinct

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Governing Documents

Hierarchy of Documents:

1. State Statutes
Condo/non-condo act control over non-profit act
2. CC&Rs AND Plat
To be construed together pursuant to case-law
3. Articles
4. Bylaws
5. Rules

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The Declaration

Purpose

- Creates the association and grants authority
- Establishes covenants
- Reserves easements and similar encumbrances

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The Bylaws

Purpose

- Organize the entity
- Establish administrative procedures and processes
- Clarify the roles of board members and officers

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Rules and Regulations

- May be adopted and amended unilaterally by the Board;
 - PUD-specific: written notice to owners 15-days before adopting and written notice 15 days after adopted
 - PUD-specific: owners can vote to overturn rule within 60 days of passage
- May not contradict the Declaration or Bylaws;
- Similarly situated homeowners must be treated equally;
- May not treat landlords differently from other owners
- Must be reasonable

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Operation and Expansion

- ▶ The Declarant Control Period
- ▶ Process for expanding the development in phases
 - Supplemental Declarations
 - Master associations and sub-associations
- ▶ Expiration of the Declarant Control Period in a PUD (57-8a-502)
 - 60 days after 75% of the lots that may be created are conveyed to lot owners other than a declarant;
 - Seven years after all declarants have ceased to offer lots for sale in the ordinary course of business; or
 - The day the declarant, after giving written notice to the lot owners, records an instrument voluntarily surrendering all rights to control activities of the association.

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Construction Defect: Davencourt Duties

Davencourt at Pilgrims Landing Homeowners Ass'n v. Davencourt at Pilgrims Landing, LC, 2009 UT 65, 221 P.3d 234

“Until the developer relinquishes control of the association to the members, the developer owes the following duties to the association and its members:

- (1) to use reasonable care and prudence in managing and maintaining the common property;
- (2) to establish a sound fiscal basis for the association by imposing and collecting assessments and establishing reserves for the maintenance and replacement of common property;
- (3) to disclose the amount by which the developer is providing or subsidizing services that the association is or will be obligated to provide;

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Construction Defect: Davencourt Duties

(4) to maintain records and to account for the financial affairs of the association from its inception;

(5) to comply with and enforce the terms of the governing documents, including design controls, land-use restrictions, and the payment of assessments;

(6) to disclose all material facts and circumstances affecting the condition of the property that the association is responsible for maintaining; and

(7) to disclose all material facts and circumstances affecting the financial condition of the association, including the interest of the developer and the developer's affiliates in any contract, lease, or other agreement entered into by the association."

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Construction Defect: Preliminary Requirements

Before filing a legal action worth \$75K or more, the association must:

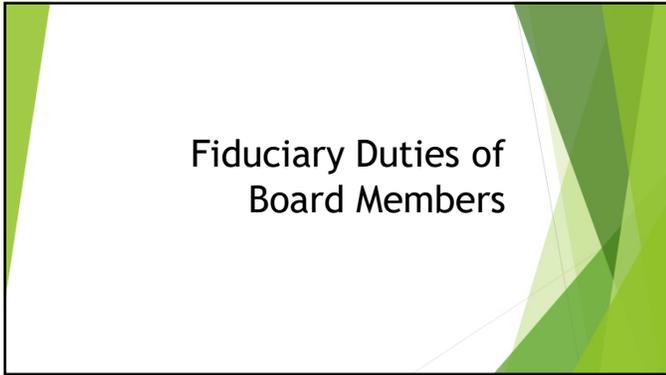
- ▶ Obtain approval from the members at a meeting or by ballot
- ▶ Provide each owner with notice and analysis including a legal opinion regarding:
 - The likelihood of success
 - The likely cost of resolving the action favorably
 - The likely effect the litigation will have on a potential buyer's ability to obtain financing
- ▶ Set aside 10% of the estimated cost of the litigation

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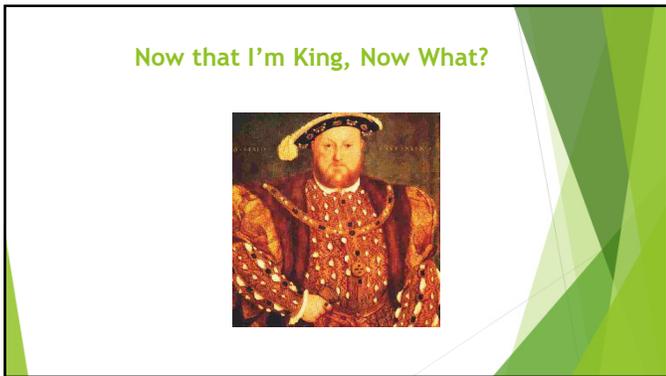
What Every Attorney Should Know About Governance of Small Corporations

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What is a Fiduciary?

A person to whom property or power is entrusted for the benefit of another.
Usually involves managing someone else's assets.

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#1 - Duty of Care

- Act prudently with the care of an ordinary prudent person;
- Act in the best interests of the Association; and
- To do so in the Good Faith
 - o Business Judgment Rule
- This Requires:
 - o Regular Attendance at Meetings
 - o Independent Judgment
 - o Be informed; rely on Expert Advice

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#2 - Duty of Undivided Loyalty

- Conflicts of Interest
 - o Disclosure
 - o Abstention from Voting
- Self-Dealing

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#3 - Duty to Act Within Scope of Authority

- Know and understand your duties as outlined in the Declaration, Bylaws, and Utah Code.
- Where Directors exceed their authority, and damage results, Directors may be personal liable for their unauthorized actions.
- The Board as a body has authority to act for the Association; No individual Board member has any authority to act independently for the Association unless the Board has delegated that member specific authority for specific tasks

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#4 - Duty to Enforce Governing Documents

- Failure to Enforce Governing Documents
 - o Board Complaint
 - o Owner Complaint

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#5 - Duty to Preserve and Maintain Common Property

- Perhaps the most important Board duty is protecting and preserving the property values within the community.
- This includes the maintenance, repair, and replacement obligations imposed on most Associations.
- This maintenance duty is generally declared in the Association's governing documents.

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#6 - Duty to Comply with State and Federal Laws

- Reserves
 - o Reserve study required every 5 years.
 - o Must be reviewed and updated every 3 years
 - o Funds set aside for reserves shall only be used for the purpose for which it was set aside, unless a majority of the members approve otherwise.
 - o Reserves shall be kept in a separate account from other Association accounts

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Business Judgment Rule

- o A legal principle that makes officers, directors, managers, and other agents of a corporation immune from liability to the corporation for loss incurred in corporate transactions that are within their authority and power to make when sufficient evidence demonstrates that the transactions were made in Good Faith
- o RELY ON EXPERTS !
- o Using formal resolutions for important decisions will help create a written record of the reasoning behind a decision, which will support a business judgment defense in case of a lawsuit

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Insurance Protection Against Breaches of Fiduciary Duty

- Boards should be advised to maintain D&O/E&O coverage
- Boards should be encouraged to involve their general counsel in preparing tender to their D&O/E&O insurance

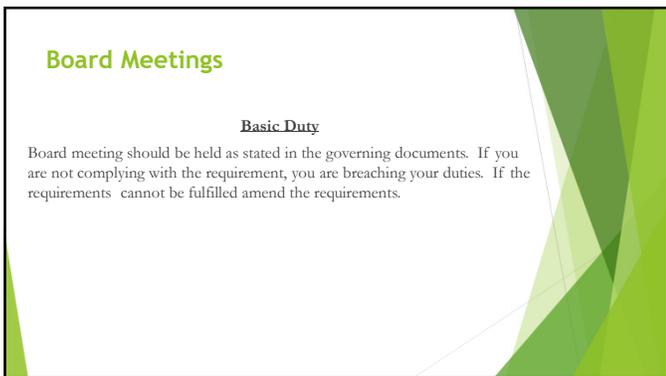
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Board Meetings

- ▶ "Action without a meeting" is permitted
- ▶ In written correspondence, state date by which all board members must respond
- ▶ If a board member asks for a meeting on the matter, the board must comply
- ▶ Best practice is to read and ratify any action taken without a meeting at the next open meeting

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Corporate Records

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Maintaining Permanent Records

Utah Code 16-10a-1601; 16-6a-1601:

A corporation shall keep as permanent records:

- ▶ minutes of all meetings of its shareholders/members and board of directors,
- ▶ a record of all actions taken by the shareholders/members or board of directors without a meeting,
- ▶ a record of all actions taken on behalf of the corporation by a committee of the board of directors in place of the board of directors,
- ▶ a record of all waivers of notices of meetings of shareholders, meetings of the board of directors, or any meetings of committees of the board of directors.

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Records

- ▶ Utah Code 16-10a-1601; 16-6a-1601 contain other provisions regarding maintenance of various other records
- ▶ Utah Code 16-10a-1602 and 16-6a-1602 require corporations to comply with a records request from a shareholder or member that is properly made. Often, the corporation only has 5 days to comply.

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