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The Recovery of Incidental Charges in the Collection of Assessments By: Ursula A. Koenig and Rory K. Nugent

When owners become delinquent in the payment of their community association assessments, there are often additional charges that are imposed – late fees, interest, charges from the management company for letters, legal fees, court costs and even charges incurred by the association for returned checks. Over time, many of us come to believe that these charges are indisputable – if the owner has failed to pay the assessment, he or she must pay these additional charges as well.

Unfortunately, many associations discover too late that this may not be the case. The 20/20 vision of hindsight often reveals ambiguities and inconsistencies in the association’s legal documents that may not have been previously apparent. As the law is constantly changing, it becomes worthwhile to frequently revisit your association’s collection policies.

As you may be aware, §55-509.3 of the Virginia POA Act was recently amended to specify that an association may not impose any assessment or charge that is unrelated to use of the common area or is for services provided, unless provided by law or the

association’s governing documents. Because the statute just went into effect, we do not know how expansively the Courts will interpret this provision. However, for any charge imposed by our Virginia clients, the Board should carefully consider whether the charge is authorized by your Declaration, or is for services provided, or is related to use of the common area. This would include returned check charges, certified mailing costs and other management charges.

Because this memo addresses the collection of assessments, we must remind our clients that the process is largely governed by the Fair Debt Collections Practices Act (FDCPA). For purposes of this memo, it is critical to note that (1) the Act strictly prohibits the collection of any charge that isn’t authorized by the association’s legal documents and/or state law; and (2) we may not engage in any action that is deceptive, misleading or confusion to the association’s debtors. As a result, the collection of these incidental charges is also governed by Federal law, in addition to the association’s

legal documents and the applicable state statutes.¹

LATE FEES

In the State of Maryland, late fees are codified in both the Condominium and Homeowners Association Acts. Both Acts permit an Association to impose one late fee of \$15.00 or one-tenth of the amount of the delinquent assessment installment, whichever is greater, for each assessment installment that remains unpaid for more than fifteen days after the due date. Notably, the Condominium Act requires the authorization to impose late fees to be included in the Bylaws.

In the Commonwealth of Virginia, however, the story is quite different. The Virginia Courts have consistently held that the Declaration and Bylaws constitute a contract between the owners and the association. As such, any term or power that is not explicit in the Declaration or Bylaws may not be enforced. Accordingly, if the Declaration and Bylaws have no authority for an association to impose a late fee, it will not be permitted by the court – even if the Board of Directors has adopted a resolution authorizing the imposition of late fees. So, each association should review its governing

documents to confirm that this authority is present.

We are often finding that our clients may have the authority to charge a late fee, but are charging the late fee improperly. If the association's legal documents grant the Board the authority to increase the amount of the late fee, we recommend that the Board memorialize any such decision in a resolution. Ultimately, the amount of the late fee to be charged should be well documented in order to prevent challenges from owners.

We have also found that the local courts will routinely refuse to award a late fee during a month when the assessment or installment was paid on time. We have found that this situation typically arises when an account is carrying a past due balance, but the owner continues to pay the assessments as they come due. Although the association may be within its rights in charging late fees in this manner, the courts simply see it as an abusive practice and will likely strike the late fees.

Finally, if the association's Declaration and Bylaws do not provide for a late fee, we are prohibited by the FDCPA from attempting to collect a late fee created purely by policy resolution. Recent developments in the case law have lead us to believe that the Federal Courts will view any such late fee as an overextension of the association's authority to adopt rules and regulations. In short, the argument is that the association cannot grant itself a power by resolution that it does not have according to its Declaration and

¹ Under the FDCPA and the supporting body of case law, neither the association nor the managing agent are considered debt collectors. Therefore, the association and management are not required to comply with the Act. However, for the sake of consistency and best practice, we recommend that associations and management refrain from engaging in any practices that are prohibited by the Act.

Bylaws. Rather than adopt a resolution, the association should instead amend its Declaration and Bylaws in order to allow the imposition of a late fee.

LEGAL FEES

One of the biggest expenses incurred by community associations in collections actions are legal fees. For obvious reasons, associations are as anxious to recover their legal fees as the unpaid assessments themselves. Unfortunately, many associations do not realize that their authority to collect legal fees is not always absolute. Depending on the applicable statutes or the wording of the association's governing documents, courts may limit or restrict the amount an association is permitted to recover.

Some older associations may have provisions in their documents that are very ambiguous, or their documents may not mention the recovery of legal fees at all. However, a typical association's Declaration or Bylaws will provide for "reasonable" attorney's fees incurred in a "proceeding" or an "action." Accordingly, the Courts will routinely interpret this language to mean that only the Court may determine what amount of attorney's fees is "reasonable." It probably goes without saying that "reasonable" rarely means "all." In addition, Courts may also interpret such language to mean that only those legal fees incurred in connection with a lawsuit are recoverable; any other legal fees cannot be claimed by the association. However, even if your documents contain similar language, that

does not mean the association cannot claim its legal fees prior to determination by a Court.

Thankfully for our clients in the Old Dominion, both the Virginia POA and Condominium Act permit recovery of attorney's fees and costs. However, the language warrants a close review. The language in both Acts is identical, so we shall note §55-515A of the POA Act:

Any lack of such compliance shall be grounds for an action or suit to recover sums due, for damages or injunctive relief, or for any other remedy available at law or in equity.....The prevailing party shall be entitled to recover reasonable attorney's fees and costs expended in the matter.

Typically, the statutory provisions are a secondary argument, as most associations have provisions authorizing the recovery of legal fees in their governing documents. Again, please note the presence of the word "reasonable" and that it occurs in the context of an "action or suit." Courts have held that unless the association's Declaration or Bylaws provides for the recovery of all legal fees and costs incurred, a judge will likely award only the legal fees related to the court action. Of course, not all Courts have ruled this way, but we raise this issue so that you are aware that it exists.

In Maryland, while there is express language confirming the recovery of legal fees in lien foreclosure actions, the right to recover legal fees is completely document driven and

must be expressly stated in the governing documents.

Ultimately, and as foreshadowed by the FDCPA, the association should be careful as to how it articulates its claim for legal fees. The association's collection policies, late notices and other communications should be consistent with the language in its Declaration and Bylaws.

MANAGEMENT CHARGES AND OTHER COSTS

Similar to attorney's fees, the Courts will read the association's governing documents narrowly rather than broadly when it comes to costs incurred by the association in the collection of an account. Usually, before a delinquent owner's account is referred to counsel's office for collection action, at least one late notice is sent by management. Generally, the cost of the notice sent by management is added to the owner's assessment account. Unfortunately, the courts may hold that these charges are uncollectible when the Declaration and Bylaws lack express language authorizing the association to collect these charges. Most documents have fairly general language authorizing the collection of "costs of collection." However, this language is often located in a section dealing specifically with a lawsuit having been filed against the owner. If you have this sort of language in your governing documents, we may be able to assist the Board in adopting a policy resolution that essentially defines "costs of collection" in order to recoup additional costs. Again, in Maryland, the

language of the governing documents controls.

In our practice, we have found that these costs and charges are where an association is most likely to run afoul of the FDCPA. These charges are comparatively insignificant, and so they are not given much thought and are often overlooked. However, even a technical violation of the FDCPA can expose us to enormous liability. If these costs and charges are not expressly authorized by your association's governing documents, they may be unrecoverable.

RETURN CHECK CHARGES

Fortunately in Virginia and Maryland, there are specific statutes which permit recovery by a party who was given a check which was subsequently returned for insufficient funds. In Virginia, you must send a notice to the owner by certified mail, return receipt requested giving the owner 30 days to replace the check, plus the charges assessed against the association by the bank, the costs for the certified mailing, plus interest. If the owner fails to comply, the association has the right to sue for the amount of the check plus three times the amount of the check or \$250.00, whichever is less. In Maryland, the owner may be charged for two times the amount of the check or \$1000.00, whichever is less.

Navigating the association's governing documents and determining what charges may be assessed against delinquent owners is a process that we regularly undertake in representing our association clients. We

would recommend that you likewise do the same so that you are clear on the recovery that the association can undertake.

As always, please contact one of our community association attorneys if you have any questions or concerns regarding the scope of your Association's authority to impose and collect these additional charges.