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Collection of Late Fees in Virginia and Maryland

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Late fees are a necessary evil in the collections process. They encourage all property owners to pay assessments on time. Although they may provide unbudgeted revenue to the association, their primary purpose is to help correct the shortfall in unpaid assessments, so that the association can meet its financial obligations. However, because they are a source of aggravation to many homeowners and are one of the most frequently disputed items by delinquent homeowners, it is crucial that they also be legally supported by the governing documents of the association. Collection of late fees is not a right, it is a privilege reserved for those with well-drafted governing documents.

Associations have great discretion in deciding whether to collect late fees and/or interest charges from delinquent owners. In some cases, such as the first time that an owner with an otherwise spotless payment record is delinquent, the Board of Directors may opt to waive the late fees assessed to the owner's account. However, in cases where an Association is seeking a court judgment to compel an owner to pay their delinquent assessments, the decision of

whether or not the late fees imposed against the account can be collected by the Association will be made by the court.

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. Consequently, since the late fees imposed by Maryland associations, are expressly authorized by state law, any late fees imposed in compliance with the guidelines set forth in the Acts are rarely overturned by the Maryland courts.

In the Commonwealth of Virginia, however, the story is quite different. If a delinquent homeowner challenges the late fees imposed by an Association in a court proceeding to obtain a judgment in the amount of the delinquent assessments, Virginia courts have routinely refused to include late fees in the amount of a judgment entered in

favor of the Association for the delinquent assessments if the late fees imposed by the Association are not expressly authorized by the terms of the Association's Declaration or recorded Bylaws. In the Virginia courts, the judges rarely include in any judgment entered on behalf of an Association the late fees that have been imposed by an Association in accordance with Policy Resolution that has been adopted by the Association's Board of Directors and published to the members of the Association. Moreover since the Virginia legislature has not yet codified the amount of late fees that an Association can impose for assessment payments that are received after the due date, the judges that review an assessment collection case often substitute their judgment for that of the Board of Directors to determine that the late fees imposed by an Association are unreasonably high. Consequently, in some cases, an Association must write-off as uncollectible months of late fees imposed against a delinquent owner, even in cases where the delinquent owner has failed to pay any assessments and has offered no legal defense to the debt.

In addition to the Virginia courts reluctance to enter a judgment for late fees imposed in accordance with a duly adopted Policy Resolution, in both jurisdictions, the Federal Fair Debt Collections Practices Act ("FDCPA") prohibits "collection of any amount (including any interest, fee, charge, or expense incidental to the principal

obligation) unless such amount is expressly authorized by the agreement creating the debt or is otherwise permitted by law." 15 U.S.C. Section 1692f(1). In the case of assessment debt, the agreement that creates the debt is the Association's recorded Declaration or Bylaws, and any recorded amendments thereto. Therefore, if an Association's recorded Declaration or Bylaws do not authorize the imposition of a late fee, the FDCPA prohibits any agents of the Association, i.e. the Association's management agent or attorney, from demanding payment of the unpaid late fees. In order to be collectible under the FDCPA, an Association's recorded Declaration or Bylaws do not have to specify the amount of the late fee that may be imposed by the Association, but a late fee that is authorized only by a Board adopted Policy Resolution cannot be collected under the FDCPA by any agents of the Association. Since Maryland law regulates late fees, any late fees imposed in accordance with law are collectible by an Association's managing agents or attorneys under the FDCPA.

In summary, we are counseling our Virginia clients to beware of the implications of going to trial on a case in which late fees have been challenged. Consequently, we often recommend that our clients remove late fees from an account statement in specific cases where we have reviewed the Association's recorded Declaration or Bylaws, and found the charges to be

unauthorized and therefore legally uncollectible.

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 late fees for delinquent assessment payments.