

# Community Association Management *Insider*®

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## New Laws Tighten Standards in Centennial State

Colorado legislation passed this year will tighten standards for homeowners associations in the Centennial State. The legislation, which affects debt collections and manager licensing, was prompted by scandals and horror stories from associations over the past few years, including embezzlement.

The debt collection law requires all associations to set up a policy detailing basic information for homeowners. Associations must also offer delinquent homeowners a six-month payment plan at least once before taking severe action. Under the licensing law, all community association managers and management company CEOs and executives will be required to attain a state license by July 1, 2015.

Two other notable new laws are prohibiting any association from requiring the installation of turf grass, such as Kentucky bluegrass, or other extremely

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## FEATURE

## Adopt Effective Collection Policy for Delinquent Members

In an economy where many associations are still struggling to overcome challenges like vacancies and foreclosures, it's as important as ever for associations to avoid depleting their reserves and, as a result, making trade-offs about what bills to pay and what services to forgo. That's where on-time payment of assessments becomes very important. Your community association can face a serious financial crisis if even a small percentage of members don't pay their assessments on time.

Members who don't make timely payments may be in financial trouble. But in some cases, members who don't pay are the ones who simply don't understand why they have to pay and how their delinquencies affect everyone else. Educating these members about the consequences of late or nonexistent payments may help.

Communicate clearly the reasons why it's important for them to pay, the fact that you have a legal duty to collect, and the progres-

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## RISK MANAGEMENT

## Take Immediate Action After Member's Discrimination Claim

Fair housing claims often stem from adverse actions taken against members for violating community policies or rules. A member may claim that the rules are being selectively enforced against him because of his race or other characteristic protected under the federal Fair Housing Act (FHA). The FHA prohibits discrimination in housing on the basis of race, color, religion, sex, national origin, familial status (that is, families with children), or disability. State and local fair housing laws may add more protected characteristics to that list—such as sexual orientation, age, or marital status—so check with your association's attorney to find out what your current state and local laws cover.

Discrimination claims against an association should be taken very seriously. They can lead to expensive lawsuits, and also reflect poorly on your community. After all, you want all owners to feel comfortable and, especially if you have vacancies or foreclosures, you don't want

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## Effective Collection Policy (continued from p. 1)

sively more serious steps you'll have to take if a member lets things go too far. What's the best way to do this? We'll tell you how to adopt a tough but fair written assessment collection policy and give you a Model Policy: Inform Members about Late Payment Consequences.

### Include Nine Elements

Before putting together a collection policy, check to see whether your community already has the basics in an existing board resolution. Whether you create a brand new policy or mesh old and new language, make sure that it's easy to understand. Consider adapting the following nine elements for your policy. (Consult with your association's attorney before adopting the policy; state law and your governing documents may dictate changes to this information.)

**Element #1: Explain effects on community.** Appeal to members' sense of community by telling them that assessments represent shared costs they would have to bear alone if they weren't part of a community association. Remind them that nonpayment threatens their neighbors' property values as well, not just theirs [Policy, intro.].

**Element #2: Explain board's authority.** Make members understand that you *must* pursue delinquent accounts and that state laws and your governing documents will support this when you do [Policy, intro.].

**Element #3: List all charges.** A member who pays regular assessments on time may delay paying other charges, such as fines and bills for common area damage the member caused. Your policy—and the consequences it sets for late payment or nonpayment—should cover these other charges, too. Also, it should state that any charges you bill to a member will be considered common expenses [Policy, par. 1].

**Element #4: Give remittance address.** Make it easy for members to make payments. Tell them where to send a check or, if payments can be made online, include that information [Policy, par. 2].

**Element #5: Set "annual assessment" with monthly payments.** It may help to have members realize that they owe a total amount for the year for their regular assessment and that you're allowing them to pay in monthly installments for their convenience. So, instead of thinking that they owe, say, \$200 per month, they should be thinking that they owe, in that case, \$2,400 per year. That's an important point because it makes members see the big picture: Their contributions are important. And they may be more inclined to pay those monthly installments on time [Policy, par. 3]. You can also explain the basis for the assessment—that is, how the board calculated the annual amount based on the projected budget.

**Element #6: Set clear due dates.** Set due dates for regular assessments—for example, your community may use the first of the month, as well as due dates for other charges. Also, state that any common expense becomes delinquent the day after its due date [Policy, par. 3].

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## MODEL POLICY

## Inform Members About Late Payment Consequences

This collection policy will help members understand the consequences of late payments and show them that you intend to apply your collection policy uniformly, fairly,

and consistently. Show the policy to your association's attorney before adopting it. (State law and your governing documents may require changes and deletions.)

## SHADY ACRES COMMUNITY ASSOCIATION COLLECTION POLICY

One of the many advantages of living in a community association is sharing with other members the costs of certain maintenance, repairs, and amenities that are often too expensive for a single-family homeowner. All Shady Acres members are legally bound to share those costs.

## WE'RE IN THIS TOGETHER

To properly maintain Shady Acres' common areas, it's imperative that all assessments, whether regular or special, be paid in full and on time. Delinquencies throw the association's entire budget off course and negatively affect all members' property values and lifestyles.

## KEEPING UP OUR END OF THE BARGAIN

To adequately maintain our community, state statutes and our governing documents give Shady Acres' board of directors the authority to impose and collect assessments and other allowable charges from members. In fact, the board owes a duty to all members to make sure everyone pays. The board has adopted the following policy to fulfill its duty in a fair, systematic, and impartial manner.

- 1. Common Expenses.** The term "common expense" refers to any amount a member must pay to Shady Acres. Among the charges it includes are regular annual assessments, special assessments, rules and violation fines, late fees, common area repairs, and any other fees, interest, or charges imposed under this policy.
- 2. Where to Send Payment.** Deliver all payments to the management office:  

Shady Acres Community Association  
 Management Office  
 1234 Shady Acres Ln.  
 Tampa, FL 33629
- 3. When Common Expenses Are Due.** Annual assessments are due the first day of January and apply to that calendar year. For convenience, members may pay their annual assessments in equal monthly installments on the *[insert day, e.g., first, 15th]* day of each month. Unless otherwise stated, other common expenses are due *[insert time period, e.g., within 30 days of, on the first day of the month following]* notice of members' obligation to pay. If a member does not pay in full any common expense by its due date, that payment is delinquent.
- 4. Late Payments.** Once a common expense is delinquent, Shady Acres may take any or all of the following actions:

- a. Accelerate the balance for the rest of the year.** If payment is not received by the due date, Shady Acres will send a written delinquency notice to the member within *[insert time period, e.g., 10, 15, 30]* days of the due date. If Shady Acres does not receive full payment of the amount owed within *[insert time period, e.g., 10, 15, 30]* days of the date on that notice, the delinquent member may not take advantage of Shady Acres monthly payment plan for the rest of the year. The member will have to pay the entire remaining balance of the annual assessment immediately.
- b. Late fees.** If Shady Acres does not receive payment for any common expense in full on or before the *[insert day, e.g., third, fifth, 10th, 15th]* day after it becomes due, the delinquent member shall pay liquidated damages for Shady Acres time, inconvenience, and overhead in collecting the late payment, as follows: a \$*[insert amt., e.g., 25]* late fee. This charge will be treated as a common expense.
- c. Returned check fees and bank charges.** In addition to any late fee that may be applicable, for each check to Shady Acres that is returned by a bank for any reason, the member who wrote the check shall pay the following charges:
  - i. liquidated damages in the amount of \$*[insert amt., e.g., 25]*; and
  - ii. any related bank charges that Shady Acres incurs because of the returned check.
 These charges will be treated as common expenses.
- d. Suspend privileges and access to amenities.** If an account contains delinquencies for more than *[insert time period, e.g., 30, 45, 60]* days or has an outstanding balance of \$*[insert amt., e.g., 200, 500]* or more, Shady Acres will give the member *[insert time period, e.g., 10, 15, 30]* days' notice of intent to suspend any or all of the following privileges:
  - i. Voting privileges;
  - ii. Use of pool, playground, park, club facilities, lake, tennis courts, golf course, and other recreational amenities;
  - iii. Use of common laundry facilities;
  - iv. Use of storage facilities;
  - v. Parking privileges; and/or
  - vi. *[optional—discuss with attorney]* Association-provided utilities.

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### SHADY ACRES COMMUNITY ASSOCIATION COLLECTION POLICY (continued)

Unless Shady Acres receives full payment by the end of the notice period, the privileges or amenities listed in the notice will be suspended.

- e. Account referred to an attorney.** Shady Acres may, in its sole discretion, refer a delinquent account to an attorney for further action. The attorney may do any or all of the following:
- i. File a lien against the unit in accordance with state law and Shady Acres' governing documents;
  - ii. File a lawsuit to collect the amount owed;
  - iii. Foreclose on the property;
  - iv. Take any and all other appropriate legal action.
- f. Attorney's fees and costs of collection.** The delinquent member shall be responsible for all of Shady Acres' attorney's fees and costs of collection, including court costs. These charges will be treated as common expenses.

**5. Crediting Late Payments.** All delinquent accounts remain delinquent until paid in full. No partial payments will waive Shady Acres' right to pursue full payment and/or to enforce the provisions of this policy. Shady Acres will apply partial payments to the outstanding balance in the following order: fines, late fees, and interest; court costs, attorney's fees, and other costs of collection; special assessments; and regular assessments, with payment being applied to the oldest balance first.

**6. Notices, Payments, and Consequences of Non-payment.** Unless otherwise required by law, all notices will be sent by first-class mail, postage prepaid, to the delinquent member's address as shown in Shady Acres' books and records on the date the notice goes out. All amounts due must be paid in full before the notice period expires. If the notice period expires without full payment, the consequences set forth in the notice and/or in this policy shall apply.

## Effective Collection Policy

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**Element #7: Set consequences.** Setting progressively more serious consequences for a payment as it becomes more overdue can be the most effective way to motivate late-paying members. But note that this is an area where you should tread lightly since some of these consequences may be prohibited in your state, or even by your own governing documents. Make sure that you're within the bounds of state law and your governing documents to avoid having penalties imposed on the association. You can do this by getting the association's attorney's approval before adopting any of these methods. Among other consequences for late payment, these are some methods that have been used by some associations, depending on where they are located:

◆ **Accelerating balance.** Give yourself the right to demand payment of the outstanding amount of the entire annual assessment if monthly payments are not made

on time. This can be a powerful incentive. Faced with the prospect of paying a large annual assessment all at once, the member might get a new perspective on the smaller monthly bill. Because this is a severe remedy, you should give written notice of your intent to invoke it. The policy also gives members a grace period from the time they get the written notice to pay the monthly installment and avoid balance acceleration [Policy, par. 4(a)].

◆ **Charging late fees.** Charge a late fee for any common expenses that a member doesn't pay by a set time after the due date. The late fee should be high enough to be an incentive but not so high that a court will find it an unenforceable penalty. Unfortunately, there's no magic number. What's reasonable varies from state to state and even from court to court. Speak to your attorney about what amount to set.

To improve the chances that a court will enforce your late fee, your policy should state that late fees are so-called "liquidated damages." This means that the fee

you've set is a reasonable approximation of the expected damages you'll suffer if members pay late. In other words, you're seeking reimbursement for the time and expense of record keeping, sending notices, making phone calls, and meeting with the delinquent member, if that's necessary [Policy, par. 4(b)].

◆ **Charging for returned checks.** Paying on time with a bad check is as bad as not paying at all. To avoid this scenario, say that in addition to whatever late fee applies, the member must pay you for your trouble if the check is returned. Your policy could contain two charges for returned checks: a set fee that covers your administrative hassles—for example, \$25—and reimbursement for whatever bank charges you incur as a result of the returned check. Again, call the set fee liquidated damages to increase the chances that a court will enforce it [Policy, par. 4(c)].

◆ **Suspending privileges and amenities.** Members' assessments pay for or make possible a number of privileges, including voting and

use of recreational facilities, among others. Why should a delinquent member get a say in association business and enjoy privileges that other members have paid for? If you legally can do it, suspend those privileges until the member pays.

As with balance acceleration, because these are extreme remedies, give the member notice and time to make good before suspending anything. Check your governing documents and state law [Policy, par. 4(d)].

One particularly effective strategy is termination of association-supplied utilities. Certain states and localities prohibit this. But if it's allowed, use it as a last resort because it tends to get immediate results [Policy, par. 4(d)(vi)].

◆ **Referring matter to attorney.** Let members know that you'll hire an attorney when you have to. Describe what you may have the attorney do—file a lien against the member's unit, sue the member for

payment, and/or foreclose on the unit [Policy, par. 4(e)]. Tell members that if this becomes necessary, they'll be on the hook for attorney's fees and collection costs if allowed by your governing documents and state law [Policy, par. 4(f)].

**Element #8: Set how partial payments will be applied.**

Tell members how you'll apply partial payments to what's owed. As a general rule of thumb, regular assessments should be the last thing paid off. That's because you have the clearest legal authority for collecting assessments; courts may be less willing to award you other charges. Consider putting items in this order: (1) fines and late fees; (2) legal fees, collection costs, and court costs; (3) special assessments; and (4) regular assessments.

When you start applying a partial payment to regular assessments, you should start with the oldest month's delinquency first. That way, members have a greater

incentive to pay everything they owe. If they don't, they'll keep facing new late fees as each deadline goes by [Policy, par. 5].

**Element #9: Set method of notice.** Make giving notices easy on yourself. Unless the law requires you to do otherwise, use first-class mail. State that you'll send notices to the most current address on record, and encourage nonresident members to give you updated information [Policy, par. 6].

**Putting Policy into Play**

In order to make the policy work for you and the association, you'll need to adopt it, communicate it, and enforce it. Have your board pass a resolution adopting the policy. Once passed, distribute the policy with assessment bills, print it in your association's newsletter, and post it on the association's Web site. Swift and uniform enforcement is the best way to prevent delinquencies. ◆

## RECENT COURT RULINGS

### ► **Board Must Give Equal Access to Association Media During Elections**

**Facts:** A homeowners association's board of directors sought to amend the bylaws. The amendment initially failed, and the board announced that it would continue holding elections until the amendment passed. In the association's newsletter, the board told members to vote for the amendment. The board refused to publish an article opposing the amendment, didn't allow members access to the association Web site or bulletin board, refused a homeowner's request to use a common area for a rally that opposed the amendment, and charged another homeowner who didn't support the amendment a rental fee for use of a common area. The amendment passed the third time an election was held.

Two owners sued to void the result of the election, claiming that the board didn't comply with a California law that governs the use of "association media," such as a newsletter or Web site, during a campaign.

Under that law, if an association permits any "candidate or member" to advocate a point of view using association media, the association must give members with opposing viewpoints equal access to the same media. The law also requires an association to permit free access to common areas for purposes reasonably related to an election.

A trial court ruled in favor of the association, stating that the homeowners association had not violated equal-access requirements. The owners appealed.

**Decision:** A California appeals court reversed the trial court's ruling.

**Reasoning:** The appeals court noted that the Davis-Stirling Common Interest Development Act, which governs homeowners associations in California, contains an equal-access provision that's triggered any time a member advocates a point of view using association media. Thus, to the extent board members who are members of the

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## Recent Court Rulings (continued from p. 5)

association advocate their point of view in association media, whether expressing a personal viewpoint or a collective viewpoint shared by a majority of the board members, the text of the equal-access provision straightforwardly applies. The law states that equal access must be granted to members advocating a point of view, including those not endorsed by the board. This provision demonstrates the legislature's particular concern that viewpoints opposing the board be heard, noted the appeals court.

The appeals court decided that the association had violated the law when its board members engaged in advocacy in favor of the amendment while denying other members equal access to association media. The association had also violated the law by denying free access to common areas during a campaign. This gave the trial court discretion to void the election results or impose civil penalties.

- Wittenburg v. Beachwalk Homeowners Assn., June 2013

### ► Owner Sued to Enforce Association's View Restriction Provisions

**Facts:** A homeowner bought a property in a subdivision specifically because it had a mountain view. Several years later, the owner notified the association's architectural review board (ARB) that certain cottonwood trees on her neighbor's property were obstructing her view. She requested that the association remedy the situation either through extensive pruning or removal of the trees.

The association's governing documents had been recorded in 1982. They contained a duration clause, which provided that for 50 years, only the developer of the community and not homeowners could amend the documents. The governing documents stated: "No shrub, hedge, tree or other landscaping which interferes with the view, solar access and/or privacy of any lot shall be planted, permitted or maintained on any Lot, Living Unit or Parcel or upon any Common Area." The owner argued that her neighbor's trees violated that.

However, the ARB denied the owner's request to enforce the view restriction. She unsuccessfully appealed to the association's board of directors. The owner later opted to withdraw her request from the ARB and file a lawsuit against her neighbor, in which she sought to enforce the view restriction rule in the governing documents.

A member of the ARB circulated ballots among the subdivision's homeowners proposing to amend that rule by deleting the word "view." The association didn't hold meetings in regard to the proposed amendment. Instead, it included a letter with the ballots discussing the reasons for the amendment and requesting the homeowners to return the ballots directly by mail.

The amendment received majority support by the homeowners. As a result, the amended governing documents no longer restricted foliage from obstructing homeowners' views. The owner then sued the association, arguing that the duration clause prohibited the amendment and, therefore, it was void.

The association asked the court for a judgment in its favor without a trial. It claimed that the amendment was properly adopted and, as such, that the governing documents no longer contained the view restriction that served as the basis for the owner's lawsuit. The district court granted the request. It ruled that the amendment was valid and dismissed the case. The owner appealed.

**Decision:** A New Mexico appeals court reversed the trial court's ruling.

**Reasoning:** On appeal, the owner argued that an amendment to the governing documents that terminated the view restriction was improper during the 50-year term of its duration clause. She also contended that the voting procedures used to adopt the amendment didn't comply with the amendment procedures of the governing documents.

The appeals court agreed with the owner that the governing documents gave only the developer, not the homeowners, the right to amend them. However, the appeals court also noted that the governing documents also contained conflicting provisions on which the association relied in trying to amend the view restriction. The appeals court concluded that the governing documents are ambiguous. It also pointed out that the issue of the validity or nonvalidity of the amendment wasn't a matter that was appropriate for the district court to determine. The appeals court reversed the district court's conclusion that the vote exercised by the majority of the lot owners was proper. ♦

- Lawton v. Schwartz, June 2013

## Risk Management

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to scare away potential home buyers. If you're faced with a claim by an owner, you can try to minimize the damage. Recently, an Illinois community association lost a fair housing lawsuit based on racial discrimination brought by one of its members. But you can learn from that association's mistakes to avoid the same situation in your community.

### Owner Can Sue Association for Discrimination

In that case, an owner who was of Indian heritage sued the homeowners association, two board members, and two employees of his condo complex for discrimination and retaliation, claiming that they had discriminated against his family on the basis of their national origin by depriving them of services provided to white residents. The district court concluded that the owner's allegations were "insufficient to state plausible claims of discrimination or retaliation under the Fair Housing Act."

But after the owner appealed, an Illinois appeals court vacated the district court's ruling and sent the case back for a new trial. That was because the appeals court disagreed with the district court's assertion that the owner hadn't presented facts that could support his claims of discrimination and retaliation. The appeals court explained that the owner alleged all of the elements of an FHA discrimination and retaliation case. He alleged that: (1) the association doled out privileges and services to white homeowners, while withholding them from his Indian family; (2) the association failed to maintain the owner's home's aluminum siding, roof, sump pump,

sidewalk, and parking space, while providing those services to white homeowners; (3) the association engaged in preferential treatment when maintaining the grounds of the subdivision; and (4) an association employee shouted at him in racial terms.

Moreover, said the appeals court, the owner gave fair notice of his retaliation claim because he alleged that, after he complained of discriminatory treatment, the association retaliated by placing his family's account on delinquent status, changing the gate to his home without notice, and fining him [Mehta v. Beaconridge Improvement Assn., July 2011].

### Investigation Is Key

You should always investigate allegations of discrimination by owners. And all claims of discrimination should be investigated by someone *other than* the individuals involved—especially those against employees of the association, says Colorado attorney Loura K. Sanchez.

It's crucial to document your investigation of any claims. This provides information that's essential in defending a lawsuit and should be undertaken when the allegations first arise. After reviewing the Illinois case, San-

chez says that, given those allegations, the person in charge of the investigation should've prepared summaries of interviews conducted with employees regarding all interactions with the owner and alleged statements made, and gathered the following: (1) documents that related to services requested by and/or provided to all owners on siding, roofs, sump pumps, parking spaces, and sidewalks; (2) contracts and policies that set forth the association's landscaping schedules; (3) evidence of all prior gate replacements done by the association; (4) all letters to the owner regarding the gate replacement; and (5) current policies allowing fining and correction of violations.

### Handle Employees Appropriately

"If some or all of the allegations have merit, immediate action should be taken to remedy the situation and appropriately discipline any employees involved," Sanchez stresses. She says that appropriate discipline could be counseling and training, write-ups in a personnel file, suspension (with or without pay), or even termination, depending upon the circumstances.

Do not, however, take any adverse action against an employ-

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## New Laws Tighten Standards (continued from p. 1)

water-dependent landscaping, and requiring all associations to register with the state.

The Community Associations Institute (CAI), which represents associations and community managers, estimates there are between 12,000 and 15,000 associations in the state of Colorado. CAI officials have noted that community managers and boards need to be aware of the debt collection law, since their policies may not match the new law's requirements. Managers also need to pay attention to the licensing law, since those without certification need to set aside time to become certified and take a test on Colorado law. ♦

## Risk Management

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ee who has tried to *help* a member pursue his rights under fair housing law—even if he ultimately fails to prove discrimination. Taking action against employees who try to help owners who allege discrimination is considered retaliation, and the FHA’s ban on retaliation applies not only to residents and prospective members who claim to be victims of housing discrimination, but also to anyone who helps or encourages alleged discrimination victims to pursue their rights under fair housing law. Those provisions protect employees from adverse employment actions—such as being fired, demoted, or harassed—for opposing discriminatory practices or advising aggrieved residents to contact

fair housing agencies. That means that, in addition to any liability to the victims of alleged discrimination, an association or management company could be required to pay damages to any employee who was subjected to disciplinary action because she supported the alleged victims in pursuing their rights.

### Further Action Could Support Retaliation

Sanchez warns that associations should be cautious when taking enforcement action after discrimination has been alleged. Considering the Illinois owner’s account as delinquent after he had complained of discrimination created grounds for a second claim against the association for retaliation, she points out.

“Once an owner asserts discrimination, all further enforcement—whether fines, suspension of privileges, or other legal action—should be taken only after consultation with legal counsel and evaluation of the potential impact on discrimination allegations,” she emphasizes.

In the Illinois case, the association prevailed at the district court level. But discrimination lawsuits can drag on. “It’s not over till it’s over,” says Sanchez. “If you win at a lower court don’t count it as a victory until all times for appeal have passed,” she warns. ♦

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