Community Association Management Insider®

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INSIDE THIS ISSUE

Owner Sees Red After HOA Insists on Painting Handicap Lift

When a Durham, N.C., association told a homeowner she needed to paint her handicap lift to match the new paint color of her and her neighbors' porches or face fines, she refused. The owner argued that prior to the repainting of porches in the community, the lift didn't match the original paint color of her porch, so it shouldn't be a problem now. The owner told the association that the installer of the lift didn't recommend repainting over the factory paint because it would interfere with future repairs.

The owner received a notice that charged her with violating the HOA covenants. She

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FEATURE

Avoid Liability When Enforcing Debt Collection Policy

From time to time, members of the association you manage may have financial trouble and get behind on their assessments or other amounts that are owed, such as costs for things like a storage area or parking. And that can be compounded when fees, fines, and interest are added due to delinquency. Sometimes, late payments aren't because of financial hardship—a member may be upset about something in the community and feel that he's "taking a stand" by not paying what he owes.

In either scenario, as the manager you'll be left in the sometimes uncomfortable position of having to start the process of trying to get the member to pay what he owes. But the way you conduct yourself in your role during the process—and whether you hand the case off to the association's attorney sooner rather than later—could determine whether you'll simply feel uncomfortable or be on the hook legally if the member complains about the treatment he's received and sues the association.

We'll explain why it's important to protect yourself from liability for your role in collecting unpaid assessments. And, if your association doesn't already have a collection policy in place, we'll give you a Model Policy: Set Clear-Cut Collection Policy for Delinquent Members, that you can encourage your board to adopt. If your association already has a collection policy, consider having it reviewed periodically to make sure that it's still airtight.

Are Managers 'Debt Collectors'?

It's crucial for managers who are involved in dealing with a delinquent member to comply with the federal Fair Debt Collections Practices Act (FDCPA), stresses community association attorney P. Michael Nagle. This law was passed to bar "debt collectors" from harassing debtors. It applies to anyone who regularly collects or attempts to collect debts owed to someone else. It doesn't apply to a creditor that's trying to collect its own debts—for example, an association that sends a member a demand for a past-due assessment. But there are conflicting opinions about whether the law applies to managing agents of community associations.

Nagle notes that, in the past few years, there has been an uptick in lawsuits filed by members alleging that even innocent mistakes made

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Editor: **Elizabeth Purcell-Gibney, J.D.**

Executive Editor: **Heather Ogilvie**

Director of Production: **Kathryn Homenick**

Director of Operations: **Michael Koplin**

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To Place an Advertisement, Please email Erin Tyler, *etyler@vendomegrp.com*, or call (216) 373-1217.

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by managers and their staff have violated their consumer protection rights under the FDCPA. He has seen associations forced to settle cases with members when faced with the enormous legal fees required to defend a lawsuit, no matter how frivolous it may be. "Managers need to follow the FDCPA to the letter of the law to avoid trumped-up lawsuits," he warns.

The issue of whether an association manager is an extension of the association or a separate entity for debt collection purposes has been controversial. Any person who's a separate entity absolutely must comply with the FDCPA. While it can be argued that a manager is an extension of the association, the only safe way to avoid litigation is to follow the law, emphasizes Nagle. The best way to do this is to encourage the board to establish a collections policy that limits your role in collections.

Adopt Written Policy, Enforce It Uniformly

Uniformity is key when enforcing a collection policy, says Nagle. "Every member should be treated the same way, even board members who are behind on their payments," he says, stressing that there should be no special treatment or exceptions made. "If the policy provides for, say, a late fee notice on the fifteenth day after the payment is missed, a letter on the thirtieth day, and a turnover of the case to an attorney on the forty-fifth day, that system should be used for everyone, otherwise you could be accused of an equal protection violation," he notes.

That's why it's so important for the board to have a written collection policy. "A policy helps the board and manager to know what the procedure is for late assessments or payments, and can be given to all members ahead of time to put them on notice," Nagle adds.

What goes into a collection policy will vary from association to association. For example, time frames will vary for sending letters about delinquency depending on whether assessments are monthly, quarterly, or annual. The association's governing documents might

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appealed to the board, but lost and was told that she had 30 days to paint the lift or she'd be fined $25 a day.

Fearing a lien on her home, the owner worked with a local consumer protection news team and the association's attorney to come to an agreement. Ultimately, the association said that while it would like for the lift color to match the porch, it understood the concern from the lift manufacturer. The association decided to make an exception so the owner could keep the lift the original color. ♦

MODEL POLICY

Set Clear-Cut Collection Policy for Delinquent Members

Ask your board to consider including the following language, drafted by attorney P. Michael Nagle, in your collections policy. It specifies how collections will be handled by management and when the case will be turned over to an attorney. Following this policy can help you avoid liability for violating the Fair Debt Collections Practices Act. Note that this language reflects the state law of Maryland; have your association attorney review this language to make sure it conforms with your state law and governing documents before adding it to your association's policy.

DELINQUENT PAYMENTS

NOW, THEREFORE, BE IT RESOLVED THAT the Board of Directors of Shady Acres Community Association, on behalf of the Association, duly adopts the following delinquent payment collection procedures:

1. **LATE FEES AND INTEREST:** A delinquent account which is not paid within fifteen (15) days after the installment due date will be assessed a late fee charge. A late fee may be charged fifteen dollars ($15) or 1/10th of the total amount of any delinquent assessment or installment, whichever is greater each month that the account remains delinquent. A delinquent account shall bear interest on the unpaid assessment after it becomes due, until paid, at the rate of eighteen percent (18%) per annum. In addition, a $25 returned check charge and any related bank charges will be assessed against the account of the Unit Owner responsible for payment if the payment is returned.

2. **LATE NOTICES:** If full payment of an assessment is not received by the Association's managing agent within fifteen (15) days after the due date, the managing agent will send a delinquency notice to the Unit Owner by first class mail requesting immediate payment and advising the Owner of the late fee and of any other and further consequences of the failure or refusal to pay assessments and related charges that are due and owing, including but not limited to suspension of the right to vote, suspension of the privilege to use and enjoy certain common elements and amenities, and ineligibility to serve as a member of the Board of Directors. If payment is not received by the thirtieth (30th) day, the managing agent will send a "final warning" advising that if payment is not received within fifteen (15) days interest will begin to accrue on the unpaid balance at the rate of eighteen percent (18%) per annum. Furthermore, the late notice shall also inform the Owner that, if payment is not received within fifteen (15) days of the date of the letter, the Unit Owner's assessment will be accelerated through the fiscal year and the account will be forwarded to the Association's attorney for collection.

3. **NOTICE OF INTENT TO CREATE LIEN AND ATTORNEY'S FEES:** If an account is forwarded to the Association's attorney for collection, a Notice of Intent to Create a Lien will be forwarded to the delinquent Unit Owner by means of first class and certified or registered mail, return receipt requested, to the Unit Owner's address on the Association's books or by personal delivery or as set forth in the Maryland Contract Lien Act. The Notice of Intent to Create a Lien will inform the delinquent Unit Owner of the amount of the outstanding balance, including all past due assessments, acceleration, interest of 18% per annum, costs of collection, and all attorney's fees actually incurred. The Notice of Intent to Create a Lien will conform to the requirements of the Maryland Contract Lien Act and to all other applicable laws.

4. **LEGAL ACTION:** Once a delinquent Unit Owner has been served with the Notice of Intent to Create a Lien, the delinquent Unit Owner must, within thirty (30) days of service of the lien warning letter, either forward payment in full or file a complaint in the Circuit Court for Baltimore City to determine whether probable cause exists for the Association to file a lien against the delinquent Unit Owner's property. If the delinquent Owner does not forward full payment or file a timely complaint, the Association will file a lien against the delinquent Unit Owner's property after the thirty (30) day period has expired.

   Once a lien has been filed, the Association's attorney will proceed with further legal action, including but not limited to, foreclosing on the Unit Owner's property, and/or filing a lawsuit against the Unit Owner in order to collect past due amounts owed to the Association. The Unit Owner shall be responsible for all collection costs and attorneys' fees added to the Unit Owner's account, regardless of whether legal action is taken.

Board of Directors, Shady Acres Community Association

President's Signature _____ Date_____

Debt Collection Policy

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also come in to play. Collection issues are also state-specific in many cases—for example, in Maryland, a letter must be sent within 15 days of the missed due date. Therefore, associations and managers should work closely with their attorneys when drafting and enforcing policies.

When coming up with the time frames for your policy, you may be tempted to give members more time to pay, thinking that it will give them an opportunity to come up with the late payment. But in reality, the sooner you can collect, the better. That's because the past due balance and any associated fines or fees will be lower and more manageable. Try to avoid giving too much time that could allow payments to spiral out of control, advises Nagle.

PRACTICAL POINTER: Ask your attorney to vet the standard notices you send to delinquent members to make sure these communications comply with the FDCPA.

Know When to Call It Quits

Often, late payments happen because a member claims that he's not receiving adequate service or he's unhappy with some other aspect of the association. For example, a member may withhold a payment because his grass hasn't been mowed as often as he'd like.

When confronted with this complaint, you may be able to encourage the member to get back on track by explaining that the association is doing the best it can and that paying assessments on time will make it easier to get services to members. Point out that associations have no funds other than what they get in assessments, says Nagle. Remind the member that letting assessment debts become too large creates unfair burdens on paying members and the association.

If that doesn't work, you need to know when to step back from the gray area that can lead to litigation and hand the case over to an attorney for further action, such as placing a lien on the member's unit.

A lien is a legal claim against a property that must be paid off when the property is sold. It puts the public on notice that the member owes money to the association, and secures the association's position and protects its interest in the property. That means that, if the member transfers title to a third party or files for bankruptcy, the association is still protected. The lien ensures, in most cases, that the total amount owed by the member will be paid, if and when the property is sold. The lien amount should cover the amount of the assessment owed and include all fees and charges associated with the default payments.

"As a manager, stay away from filing liens," stresses Nagle. He says that intense involvement in the collections process creates more opportunity for managers and associations to be sued because they did something wrong or procedurally incorrect. "There's an increase in potential liability when you increase the number of letters or phone calls," states Nagle. By the time the member's delinquency justifies a lien, the matter should already be in the hands of an attorney.

Once the case is out of your hands, you should cut contact with the delinquent member. It's appropriate to try to resolve late payments at the beginning by following the association policy, but once you turn over the account to an attorney, you should have absolutely no communications with the debtor, stresses Nagle. That includes engaging in phone calls, sending notices, or quoting a payoff amount. Flag the member's account to help avoid slip-ups among your staff.

Management also shouldn't accept funds once a case is turned over to an attorney. The goal is to recoup what is owed to the association in unpaid bills plus the cost of having to collect from the member, so that the association is whole again, says Nagle. But after the case goes to an attorney, more fees, interest, and other collection charges will have mounted, and if you quote the member a payoff amount that's lower than the growing balance and the member pays it, you could be stuck accepting that lower amount.

If the member presses you about the issue, refer him to the attorney who's handling the case. Keep in mind, however, that complaints or issues unrelated to the debt collection, such as a maintenance problem or security issue, should be addressed as usual. ♦

Further reading: See "Cut Monthly Assessment Delinquencies with Tough Acceleration Policy," and "Enforce Late Fee Policy Consistently to Avoid Fair Housing Claims," available at *www.CommunityAssociationInsider.com*.

Insider Source

P. Michael Nagle, Esq.: Nagle & Zaller, P.C., Columbia, MD; *www.naglezaller.com*.

RISK MANAGEMENT

Set Sports Court Rules to Minimize Association Liability

Sports courts, such as basketball, volleyball, and tennis courts, are a great amenity for a community. But they can also lead to problems—for example, members arguing over how much time should be allotted on a court—or serious injuries. Creating a set of rules that govern the use of sports courts is a smart way to avoid liability for injuries and to head off member disputes. Consider adapting our Model Rules: Tell Members What to Expect When Using Sports Courts, for your community and post them at the entrance to your sports courts, list them in your newsletter, and distribute them to new members at move-in time. ♦

MODEL RULES

Tell Members What to Expect When Using Sports Courts

Setting the following rules for the use of your community's sports courts is a risk management strategy that will protect the association from liability for accidents and injuries that take place there. The rules not only prevent injuries, but also disputes between members.

SPORTS COURT RULES

Shady Acres Community Association's sports courts, including our [*insert types of sports courts in community, e.g., basketball, tennis, and volleyball*] courts, are for the use and enjoyment of all members and residents. To use them, you must comply with the following rules:

1. **USE BY CHILDREN.** For safety reasons, all children under age 14 must be accompanied by a parent, guardian, or other adult 18 years of age or older. This adult is responsible for supervising the children to ensure their safety and compliance with these rules.
2. **MEMBERS, RESIDENTS, AND GUESTS ONLY.** Only members, residents, and guests accompanied by a member and/or resident may use sports courts. No more than two guests per member or resident are allowed on a sports court without prior written approval from the manager.
3. **PROPER ATTIRE.** All players must wear proper attire while on sports courts. This includes T-shirts, shorts, sweat suits, or other appropriate athletic clothes. With the exception of sand volleyball courts, shirts must be worn at all times. All players must wear sneakers when playing on tennis or basketball courts.
4. **HOURS.** Hours for sports courts are 8 a.m. to 10 p.m. Outdoor courts will be closed if management decides that wet or icy weather conditions make play unsafe.
5. **TIME LIMITS.** There is a one-hour time limit for a singles tennis match and a one-hour and 15-minute time limit for doubles play. Volleyball games have no time limit, but players waiting on the sidelines must be rotated into play as soon as possible. Basketball games must end as soon as a team has scored 11 points if each basket is worth one point or 22 points if each basket is worth two points. The winning team is allowed to stay on the court. For basketball games, it is not necessary for a team to win by two points.
6. **NO FOOD OR DRINKS.** No food or drinks are allowed on the sports courts. Water in plastic bottles may be consumed courtside.
7. **BAD BEHAVIOR.** Profane language and shouting are prohibited. No roughhousing, shoving, or fighting is permitted on sports courts.
8. **BANNED SPORTS EQUIPMENT.** No roller skates, in-line skates, skateboards, bicycles, or tricycles are allowed on sports courts.
9. **NO PETS.** No pets are allowed on sports courts.
10. **USE AT OWN RISK.** All members, residents, and their guests using sports courts do so at their own risk. Neither the association nor its manager shall be responsible for injuries or accidents.
11. **VIOLATIONS.** If you violate any of these rules, the association and/or manager reserve(s) the right to bar you from using these sports courts.

Q & A

Preventing Defamation Claims Arising from Newsletter, Website

Q My association publishes a community newsletter and hosts a community website. I'm worried that at some point there will be a situation in which a disgruntled member or someone outside the community falsely accuses the board of defamation for something that may be published in the newsletter or on the website. What are the defenses against defamation lawsuits?

A Not all lawsuits play out the same way. Generally speaking, defamation is the issuance of a false statement about another person, which causes that person to suffer harm. Specifically, slander is a form of defamation that involves the making of oral defamatory statements. And libel involves the making of defamatory statements in a printed or fixed medium, such as a magazine or newspaper.

There are three hurdles that a defamatory statement must meet in order for a member or business to prevail in a defamatory lawsuit against an association:

Statement must be untrue. To be defamatory, the statement must be untrue. If the association is ever sued for defamation based on something it published in the community newsletter, a court will dismiss the case if the association can prove that the statement in question was true. Truth is an absolute defense to an action for defamation. Therefore, it's wise to print only those facts that you can verify.

Statement must be damaging. The member or other party must show that the alleged defamatory statement caused real and substantial harm to its reputation or business.

Statement must be knowingly false. A suing member or other party must also show that the association knew the statement was untrue, but published the statement despite that knowledge. An association may have transmitted a message without awareness of its content, and in this case may raise the defense of "innocent dissemination." ♦

RECENT COURT RULINGS

➤ Association's Late Assessment Notice Didn't Excuse Payment

Facts: A townhome owner in a planned community didn't pay his annual assessments for seven years. The association sued him for the delinquent amount. A trial court ruled in favor of the association and awarded full payment of unpaid annual assessments plus attorney's fees and costs.

The owner appealed, arguing that the association failed to follow the assessment procedures mandated in its bylaws. The bylaws authorize the board to determine an assessment against each lot within the subdivision to provide for required maintenance, and to give homeowners notice of each assessment within 10 days of that determination.

Decision: A Pennsylvania appeals court upheld the trial court's decision.

Reasoning: The trial court acknowledged that the assessment notices may have gone out more than 10 days after they'd been established, but concluded that not so much time had passed as would render such notice prejudicial or ineffective against the homeowners, and stated that strict adherence to this requirement could allow homeowners to obtain the benefits of the association's services without paying for them.

The appeals court agreed, concluding that any breach the association may have made with regard to a failure to issue assessment notices within 10 days of the date they were determined is immaterial, especially here, where the $75 assessment amount was established by the developer over 10 years ago and has remained the same for every year since.

The appeals court pointed out that the bylaws don't establish a consequence for the failure to issue an assessment notice within 10 days of its determination. The bylaws do, however, provide that if payment of the assessment isn't made within 45 days following the issuance of the notice, interest shall be applied at a specific rate, and they further mandate

the institution of collection proceedings by the board if the assessment is still unpaid six months after the due date.

- Parkview Heights Homeowners Assn. v. Levine, April 2014

➤ Vacation Rentals Didn't Violate Ban on Commercial Use of Units

Facts: Homeowners sought to invalidate a covenant adopted by their community association prohibiting the rental of their homes for less than 30 days. A trial court ruled in favor of the homeowners without a trial.

The association appealed, claiming that the trial court wrongly ruled that: (1) short-term vacation rentals were consistent with single-family residential uses; (2) a majority of the homeowners in the community couldn't amend the governing covenants to prohibit short-term vacation rentals; and (3) a survey and testimony from several homeowners were inadmissible.

Decision: The Washington Supreme Court upheld the trial court's ruling in the homeowners' favor.

Reasoning: The appeals court held that short-term vacation rentals didn't violate existing covenants barring commercial use of the property or restricting lots to single-family residential use. It also determined that the community association exceeded its power to amend the covenants when it prohibited short-term vacation rentals.

Finally, the appeals court agreed with the trial court's decision to strike certain witness declarations because the declarations were not made on the witnesses' own personal perceptions as required by state law pertaining to cases against homeowners associations. The evidence was properly excluded because it constituted "double hearsay" and didn't have the hallmarks of inherently reliable evidence, concluded the appeals court.

- Wilkinson v. Chiwawa Cmtys. Association, April 2014

➤ Owner Couldn't Establish Retaliation by Association

Facts: A homeowner reported to the New Mexico Department of Agriculture an incident of hazardous environmental exposure to an employee of a landscaping company that had been hired to do lawn maintenance by the association. The employee was African American. According to the homeowner, the landscaping company used "unsuspecting" African-American employees to apply toxic pesticides without any training or knowledge.

The homeowner later claimed that as a result of this report, the association and the community's management personnel retaliated against him by allegedly intentionally declining to provide certain information to a plumbing company performing emergency work at his residence, resulting in flood damage to his home, among other incidents.

Two years later, the homeowner reported to the New Mexico Environment Department an environmental hazard that occurred at the community during work performed by a different landscaping company. As a result of this report, and his earlier report, the association issued him a letter warning that it would take action against him if he harassed landscaping crews or interfered with their work again. He claimed that the letter was written to defame him and was in retaliation for his "protected activity"—that is, making the complaint based on racial discrimination. The owner sued the association.

The association asked a district court to dismiss the case for failure to state a claim upon which relief could be granted. In other words, the association asserted that the homeowner's complaint about the landscaping employee didn't qualify as protected activity.

The district court dismissed the lawsuit. The homeowner appealed.

Decision: A New Mexico appeals court upheld the district court's decision.

Reasoning: The appeals court noted that to establish a case of retaliation, the homeowner must show that: (1) he engaged in protected opposition to discrimination; (2) he suffered an adverse action; and (3) there is a causal connection between the protected activity and the adverse action.

The appeals court agreed with the district court that the complaint failed to allege the violation of another person's "contract-related" right and that such violation was race-based—also requirements for the claim the homeowner made. "The complaint doesn't, as it must, identify 'an impaired' contractual relationship,'" or even allege a contractual relationship between the African-American employee and the association, stated the appeals court. "Such facts are

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necessary to demonstrate that [the owner] engaged in protected opposition to race-based discrimination—that is, that he was retaliated against for complaining about the violation of another person's contract-related right," the appeals court stressed.

Moreover, as the district court found, the owner's claim that it appeared that the landscaping company used only "unsuspecting" African Americans to apply pesticides was speculative at best, the appeals court concluded. ♦

- Muller v. Islands at Rio Rancho Homeowners Assn., April 2014