



Make Sure Your Enforcement Charges are Collectible

By Steve Guerra

In the course of running a Condominium Association, various charges may be provided by the Condominium Documents to be assessed against or posted to the accounts of co-owners who are either delinquent or in violation of other provisions of the Condominium Documents. These charges are variously referred to as interest, late fees, fines and attorney's fees. Many times we find that due to procedural errors, or because the lack of understanding of the uniqueness of each type of charge, the charges become subject to legal objection as being excessive, constitutionally invalid, unreasonable or in violation of statute. For these reasons, it is important that Associations understand the nature of each of these charges, the legal requirements for validity, and the proper procedures to follow in order for these charges to be enforceable.

There are two main enforcement categories facing all Associations from which these charges flow. The first is in the area of collection of delinquent assessments. The second is in the area of enforcement of behavioral-based restrictions contained in the Condominium Documents, including the Bylaws and Rules and Regulations. Common to both areas are attorney's fees and, potentially, fines.

Specifically related to the collection of delinquent assessments are interest and late fees. The right to collect interest is generally stated in the Condominium Bylaws. For the most part, Condominium Documents in this State either refer to a 7% per annum rate of interest, or interest at the highest rate allowable by law. Interest is defined as "the compensation allowed by law for the use or forbearance or detention of money". In other words, it is the compensation payable to a party for the time during which they do not have money that they would otherwise be entitled to. This is also referred to as "lost investment income". In Michigan, as in most states, permissible rates of interest are set by statute. These limitations are referred to as the "usury laws." Since interest on a condominium assessment is not generally considered by the Courts to be a commercial transaction, the usury limit for the rate of interest is currently set by statute at 7% per annum. Consequently, as this time, whether the Bylaws state 7% per annum or the highest rate allowable by law, the terms are synonymous in meaning. This will hold true until and unless the usury limit is raised by legislative action. The most serious mistake made by Associations is misinterpreting the meaning of 7% per annum. This does not mean that the Association can charge 7% of the delinquent amount each month that it is delinquent. This instead means that interest must be figured at the rate of 7% based on a 365 day year. Since each individual assessment has a separate due date, individual calculations must be applied to each single assessment. In the case of a \$200.00 monthly assessment, this would amount to only \$1.15 for each 30 days that the delinquent assessment is outstanding. The important thing to note under the Michigan usury statute is that if interest is calculated and charged improperly, all interest is lost, not just that portion which is usurious. It is therefore important that Associations properly calculate interest if it is in fact being charged.

Late fees are either specifically mentioned in the Condominium Bylaws, or are usually enacted as a duly promulgated Rule and Regulation of the Association. Section 106(c) of the Michigan

Condominium Act (MCL 559.206(c)) specifically authorizes the enactment of late fees via Rule and Regulation. Late fees are generally stated as a fixed dollar amount, or some percentage of the assessment which is delinquent, and are usually imposed after expiration of a certain stated grace period after the assessment is due. If properly established, late fees are distinguished from fines as not being penalties, but instead, being reimbursement for reasonable administration expenses incurred by the Association as a result of the delinquency in question. By this very limitation, late fees are viewed under a reasonableness standard and cannot exceed that which reasonably compensates the Association for its administrative costs. When late fees are found to exceed this reasonable standard, they are deemed to be penalties and will be treated the same as fines. It is important to note that if a late fee is deemed to be excessive, and therefore a penalty, the enforceability of the late fee as a penalty will be subject to the same legal requirements as fines discussed below.

Absent legal action against a co-owner, or alternative dispute resolution procedures, the imposition of fines stands as the only other remedy that an Association has to punish violations of the Condominium Documents. As mentioned above, in addition to interest and late charges, fines can also be imposed if a co-owner is delinquent in paying assessments so long as specifically provided for in the Condominium Documents. Fines are designed to be a penalty. They are meant to deter conduct in violation of the Condominium Documents. In most cases, the Condominium Bylaws will contain provisions expressly setting forth the authority of the Association to fine, a fine schedule, and the procedures for levying fines. In other Condominium Documents, the reference may be cursory, leaving it to Rules and Regulations to establish procedures and fine amounts. Again, by virtue of Section 106(c) of the Michigan Condominium Act, fines may be established by Rules and Regulations even if no provision is made in the Condominium Bylaws.

Due to the fact that fines are indeed penalties, strict legal requirements must be followed for fines to be enforceable. These are often referred to as “due process” requirements. The most common error made in attempting to fine co-owners is ignoring the strict legal requirements and procedures necessary for fines to be enforceable. While the common law requires only an opportunity for a hearing, the specific language of the Michigan Condominium Act requires more. The provisions of Section 106 (c) of the Michigan Condominium Act state:

“A default by a co-owner shall entitle the Association of co-owners to . . . other reasonable remedies the Condominium Documents may provide, including but without limitation, the levying of fines against co-owners after notice and hearing thereon”.

This language makes a hearing mandatory. Whether the co-owner shows up and presents evidence in defense, or is found in default for failure to appear, is immaterial. What is important is that the Board make sure a hearing date is established and that the co-owner is notified of that hearing date. Consequently, notices that only allow a co-owner to request a hearing within a given period of time will not suffice. Associations should therefore issue two separate notices. The first notice should specify the conduct giving rise to the potential violation and the specific rule or restriction that potentially has been violated. The same notice should indicate the date, time and place of the hearing and should put the co-owner on notice that they may provide evidence in defense of the alleged violation. The Board will make a decision at the scheduled hearing as to the existence of the violation and the fine to be levied. The second notice should be

sent after the hearing and indicate whether a violation has been established and, if so, the fine that has been levied and when payment of that fine will be due.

The final category of charges to be collected when the Condominium Documents are violated is attorneys fees. The Condominium Act obligates courts to award attorney's fees to prevailing Condominium Associations in accordance with the provision contained in the Condominium Documents. It is therefore important to make sure that your Condominium Documents require the award of attorney's fees, rather than leave the award up to the discretion of the Judge. .

A thorough understanding of the differences between the various charges to be collected for violations of the Condominium Documents, and the legal requirements for their enforceability, is necessary for an Association to obtain the full benefit of its enforcement powers. Missing any key step may render the charge unenforceable and uncollectible. Following these referenced requirements should enhance the Association's ability to effectively and efficiently enforce the provisions of the Condominium Documents.