

KEOUGH & MOODY WEBINARS!

**Disclosure Requirements and Lender
Questionnaires: What are they asking and
how
should you answer**

March 1, 2022 at 12:00 p.m.

**Pending approval for continuing education*



Join us on Tuesday, March 1, 2022, from 12:00 p.m. to 1:30 p.m., for a discussion on Fannie Mae/Freddie Mac's new underwriting requirements. During this webinar, we will discuss what is required by Illinois law versus what lenders are requesting. We will discuss the importance of answering the questions correctly and after completing due diligence. Finally, all of this takes time, so we will further discuss how management companies and associations can seek reimbursement for the costs incurred to provide these accurate disclosures. Come learn how to best tackle these questions and get YOUR questions answered!

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COLLECTION POLICIES: A GREAT TOOL FOR BOARDS

As we begin a new year, it is a good time for Boards to review their collection procedures. A community association's ability to collect unpaid assessments from unit owners will generally be outlined in its recorded declaration. However, most declarations only discuss the Board's authority to collect common expenses, including delinquent assessments. Therefore, it is incumbent on the Board to decide what steps it will follow when collecting delinquent assessments. A collection policy is a good roadmap not only for the Board but also for its managing agent and attorney. It also helps owners understand what will happen if they are delinquent on the payment of assessments by establishing expectations.

A written collection policy can take a number of forms. Many associations include their collection policy in the association's written rules and regulations. Other associations choose to have a separate stand alone collection policy, which is properly adopted by the Board. Further, each of these methods may contain very detailed collection procedures or very basic collection

procedures. The collection policy should be customized to fit the needs of the particular association. Yet, what should be included within a collection policy?

1. When will the Board refer the matter to the association's legal counsel?

Every collection policy should be clear as to when the Board will turn a delinquent account over to the association's legal counsel for the collection. The association's declaration should be reviewed to determine if there is a certain period of time that an account must be delinquent before the Board can initiate collections. If the declaration is silent, the Board should determine the period of time it will wait prior to turning a file over. Depending on the amount of assessments, it is common for a collection policy to provide that an account that is 90 days delinquent will be referred to legal counsel. While it can be uncomfortable to send a neighbor to collection, delaying the referral can actually make it more difficult for a delinquent owner to "catch up." A collection policy helps ensure that all similarly situated owners (i.e., 90 days delinquent) are referred to the attorney, as opposed to a "pick and choose" policy, where the Board selects who to turnover for collection. "Pick and choose" policies can subject an association to claims that it is not enforcing its governing documents in a consistent and non-discriminatory manner. Also, remember, referring a matter to legal does not mean that the association will no longer work with the owner. It's just that some owners will not take the matter seriously until they see an attorney is involved.

2. What happens once an account is referred to the association's legal counsel?

The collection policy should address what it means once a matter is referred to legal counsel. The collection policy should provide that all communication will only be with the delinquent owner and legal counsel. This ensures that legal knows exactly what is said and by whom, so as to avoid a "he said/she said" dispute. The collection policy should also allow the attorney to determine if circumstances warrant a further demand before filing a lawsuit.

3. What payment arrangements will be accepted?

The collection policy should state what, if any, payment plans will be accepted by the association. A collection policy may distinguish a payment plan established before and after a file is referred to legal counsel. The collection policy should include a maximum length of a payment plan, such as 6 months or 12 months. It also could state how many payment plans a unit owner can obtain within a certain period of time. Further, the terms of acceptable payment plans can vary for a first time offender to the chronic offender. Including the terms of acceptable payment plans ensures that all owners are treated the same. It also ensures that everyone knows what will be accepted. The goal is to collect assessments and outlining acceptable payment plan terms helps to achieve that goal. The collection policy should also address if late fees will continue to be assessed when an owner is subject to a payment plan.

4. What happens if a delinquent owner files for bankruptcy protection or his lender files a foreclosure?

The collection policy should address what steps the association will take to protect its interest

when the owner files for bankruptcy protection or the unit is the subject of a mortgage foreclosure action. The policy should address what will be done if the owner files for bankruptcy pursuant to Chapter 13 for Chapter 7. The policy can even address the steps to be taken if the owner has already been referred to legal counsel. Similarly, the policy should address what action the association's legal counsel is authorized to take, when a foreclosure involving a delinquent owner has been filed. While the facts and circumstances may differ for each case, the policy should allow the Board to follow the recommendation and guidance of its legal counsel.

While adopting a collection policy does not guarantee that unit owners will pay their assessments, having a policy in place will make it easier for a Board to proceed with collection of delinquent accounts. A Board should have fewer judgment calls to make on whether a unit owner should be turned over to the attorney. A collection policy provides a clear path for Boards to follow and ensures that they are doing everything to maximize collection. It also should lead to less disputes from unit owners claiming they have been treated unfairly, as the policy will treat all owners the same.

Collection policies do not come in a one-size-fits-all. They vary from one community to the next. While collection policies will differ from one association to the next, one thing that is for certain, is that the only terms that should be included in a collection policy are those that the Board is ready to follow exactly as written, regardless of how delinquent the owner is or who the owner is.

Common Mistakes in Handling Collection and Violation Matters

Managing a community association can encompass a diverse and wide range of issues. From negotiating contracts and adopting budgets to paying for community expenses, to resolving disputes and ensuring that the association's business is operating as effectively and efficiently as possible. Yet, day to day, more than any other areas, community association managers and boards are traversing individual owner issues related to violations of governing documents and collection of delinquent accounts. As a result, and despite the routine nature of collections and violation matters, there are common mistakes that our office often sees that, if corrected at the front end, can help protect your association in ensuring that the end result is as favorable as possible. A few of these common mistakes include:

1. Beginning Balances from Prior Management

Often times, when there has been a transition or change to a new management company, the new management company's ledger will show a "beginning balance." This beginning balance will not be detailed or otherwise show what comprises this lump sum. While we understand that sometimes it can be difficult to obtain a full account statement from prior management, unless your association can show or otherwise provide a breakdown of what makes up the beginning balance on an account statement, more likely than not a judge reviewing said

statement will not award that beginning balance. How should this issue be addressed? At the time of transition, the association should ensure that the full accounting is provided by prior management. A requirement to provide this information should be added to any management agreement. If a beginning balance breakdown cannot be obtained, the association can attempt to rely on other documents within its books and records and work with legal counsel to try and determine what amounts are included in the beginning balance. Unfortunately, sometimes, the Board will need to determine whether to waive an undocumented beginning balance rather than risk jeopardizing the association's ability to recover the balance of what is due and owing, including attorney's fees.

2. Lack of Documentation

For every charge on an account, we must be able to show a judge documentation to support the amount assessed. This can include copies of invoices or contracts. It may include letters or cashed checks. ***The association has the burden of proving all fees it seeks to collect.*** Be sure you can connect the dots! When referring a matter to legal, include the documentation to support each charge the association seeks to recover. It can take time to locate these documents, but it is worth the time, when it ensures collecting the amounts due and owing.

3. Failure to Provide an Opportunity for a Hearing

Unfortunately, for associations, violations of the association's governing documents can occur on an almost daily basis. When violations do occur, it is important for associations to enforce their governing documents by issuing the offending owner a notice of violation. The notice must state what the offender did and what provision of the governing documents was violated. More importantly, contained within this notice of violation should be an opportunity for the owner to have a hearing with the Board. This notice can provide a specific date and time for the hearing or it can advise the owner what he needs to do to request a hearing with the Board. Even if the owner does not strictly comply with how he should have requested a hearing, the owner should always be given a hearing. No judge wants to hear that an owner asked for a hearing and did not get it because he did not request in writing, did not do it by a date certain, or cancelled and asked for it to be rescheduled. All the judge wants to know is that the Board gave an owner the opportunity for a hearing. Remember, both the Condominium Property Act and the Common Interest Community Association Act **require** this opportunity to be given before a fine is assessed. Even without, the climate in the courtroom is to ensure these opportunities are given to owners. Successfully collecting fines requires this opportunity to be given.

4. Failure to Provide a Witness

For every violation, we need a witness. We need someone who can state with certainty how they know the owner in question committed the act. As stated before, it is the association's burden to prove a violation occurred. The way to do that is through one's firsthand experience. Without it, a case likely cannot be won. People do not want to get involved for many different reasons. Therefore, before an association pursues collecting a fine, it should be certain that the

complaining witness is willing to cooperate and testify at trial, if needed. This is especially important for those fines for violations that the association has issued based upon complaints from those other than Board members or the managing agent.

5. Failure to Follow the Association's Own Procedures

An association's rules and regulations often outline both the violation and collection process. It is important that the association follow those processes to the letter. Therefore, if the rules and regulations require that the Board provide a specific date/time for a hearing before a fine is levied, the Board cannot shift the burden to the owner to request the hearing in its violation notice – it must follow its documented procedure. If the rules and regulations require a written determination within a certain time frame, the Board needs to provide that written determination. If the procedures, as drafted, are too onerous for the Board to strictly follow, rules and regulations should be updated to provide for a different procedure. Otherwise, the expectation is that the association will follow its procedures and failure to do so may result in fines being invalidated and other costs, including attorney's fees not being awarded to the association by a judge.

If you have any questions about anything within this newsletter or if we can be of assistance, please reach out to us.

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