KEOUGH MOODY

June 2023 Newsletter

KEOUGH & MOODY WEBINAR

SHOW ME THE MONEY!

July 18, 2023, 12:00 p.m.
Pending approval for continuing education

Join Karen Beverly and Jonathan Wassell on Tuesday, July 18, 2023, 12:00 p.m.-1:30 p.m., for our next webinar, "Show Me the Money." In this webinar, Karen and Jon will provide a roadmap for managers and members of the board of directors for financial planning, and best practices for implementing that plan. Come hear about the processes to follow and mistakes to avoid when adopting a budget, determining the amount of assessments, adopting a special assessment, and obtaining third-party financing. More than ever, we are seeing owners challenge these basic decisions and actions by the board of directors. This webinar will ensure that as you prepare for budgeting season (which is not too far away), you are ready to address the legal requirements and practical (and now too common) issues. In this webinar, Karen and Jon will empower you with the knowledge to help your community's financial planning for the rest of 2023 and for 2024. Come with questions, as, of course, Karen and Jon will allow time to provide answers.

Registration is **required**. Please register in advance for this webinar below.

When registering, please be sure to include your first and last name to ensure receipt of your continuing education certificate.

Register Now

TIPS FOR ASSESSING CHARGES TO AN OWNER'S ACCOUNT

As community associations are not-for-profit corporations, collecting money due and owing to these communities is critical. Over the years, K&M has written many articles and participated in many presentations about the collection process. For this reason, many of you understand the importance of collecting assessments. However, a key component of this collection process that we do not talk about often is the process to be followed and the pitfalls to avoid when assessing amounts to an owner's account.

The following are tips for assessing charges to an owner's account to ensure collectability.

Assessing Charges for Expenditures Related to Property Exclusively Enjoyed by an Owner (Or Less Than All of the Owners)

It is not uncommon that a condominium association's declaration will provide that the association is responsible for performing maintenance, repairs, and replacements to the limited common elements. Remember, limited common elements are portions of the common elements that are for the exclusive use of one or less than all of the unit owners within the association, i.e., balconies.

Section 9(e) of the Illinois Condominium Property Act states that the condominium instruments may provide for the assessment in connection with expenditures for the limited common elements of only those units to which the limited common elements are assigned (765 ILCS 605/9(e)). This means that the costs incurred by the association can ***only*** be assessed back to an owner's account if the association's condominium instruments specifically state that the owner is responsible for the expenditures.

Therefore, before assessing the fees to an owner's account it is important to confirm that the condominium instruments authorize this assessment. Some older declarations do not contain this language. Without it, the expense should be treated as a common expense. A common mistake we see is managers and boards assume because the expense is related to the limited common elements, it is the owner's responsibility to pay for the expense. This is not always the case—make sure to connect the dots before such an expense is assessed to an owner's account!

If the condominium instruments authorize the assessment, the board still needs to take the necessary steps to approve the expenditure, i.e., move to approve the contract/authorize the work. It is also best practice to include in the motion that the expenditure will be assessed back to the unit owner's account per the association's condominium instruments.

Some condominium instruments give the board of directors the authority to assess the costs in

whole or in part to the unit owners. When this language exists, the board of directors' motion should make it clear what portion of the expenditure will be assessed back to the owners. Also, the board of directors must be consistent with how it assesses these costs back to owners. That is, all owners should be treated in the same manner. It is common for a board of directors to make a general determination that all costs related to a specific limited common element will be assessed in its entirety to the owners and/or shared equally by the association and the owners. It is sufficient to include this determination one time within the minutes of the board of directors' meeting.

Even after the board has approved the expenditure and determined who will be responsible for the expense, before assessing the cost to the owner's account, it is best practice to send a notification to the affected owners. The notice just has to say what work will be done, when, the approximate cost, and that the owner will be assessed for the costs incurred.

For non-condominium associations, there may be times as well when the association has the responsibility to perform maintenance, repairs, and replacements to a portion of property that is exclusively used by one or less than all of the owners. In those situations, if the association's community instruments are silent on the process to be followed, the above steps can also be followed as all stated above applies except for the language of Section 9(e) of the Illinois Condominium Property Act.

Assessing Charges for Expenditures Related to Damage to the Common Areas Caused by a Unit Owner's Actions

There are times when repairs and replacements are needed to the common areas because of the actions (or inactions) of a unit owner. While maintenance, repairs, and replacements to the common areas are common expenses for the community association, such expenditures incurred because of damage caused by an owner (or his occupant, guest, invitee or pet) may be assessed back to the unit owner's account. Before assessing the expenditure back to the owner's account, the association's community instruments should be reviewed. Once again, we must be sure that the community instruments include language that authorizes the expenditure to be the responsibility of the owner, not the community association.

It is not uncommon that a declaration provides that the expense shall be an owner's responsibility *to the extent that there is no insurance coverage* When this language exists, before assessing the amount to the owner's account, the board of directors must determine if there is insurance coverage. If the amount of the expenditure is less than the deductible, there is no insurance coverage. If the amount of the expenditure exceeds the deductible, then the board of directors may have an obligation to file an insurance claim before it can assess the expenditure to the owner's account. If a claim is filed the owner who caused the damage *may* be responsible for the deductible paid by the association.

Further, before assessing the amount to the owner's account, the specific language within the relevant provision must be analyzed to ensure full compliance. If the provision states that the owner is responsible for the expenditure if his negligence caused the damage, then the board of directors must find that the owner was negligent *before* it assesses the amount to the owner's account. Some declarations simply state that the owner is responsible for the expense if his action or inaction caused the damage.

Regardless of the language, before assessing the expense to the owner's account, the board of directors should take action to affirm this finding and its motion should specifically address why the expenditure is being assessed, i.e., the board of directors hereby moves to assess the $1,000 repairs to the roof to the unit owner who was negligent in causing the damage to the roof, per the association's community instruments.

Also, before assessing this cost to the owner's account, written notice of the same should be sent to the unit owner. The notice should give the owner the opportunity to meet with the board of directors and explain why he is not responsible for this charge. This best practice will assist if the association has to take action to collect the amounts

Assessing Deductible Amounts

As noted above, an association may assess to an owner's account the amount of the deductible incurred by the association as a result of filing an insurance claim. The Illinois Condominium Property Act states that a board of directors for a condominium association, in the case of a claim for damage to a unit or the common elements, ***after*** notice ***and*** an opportunity for hearing, assess the deductible amount against (1) the owners who caused the damage or from whose units the damage or cause of loss originated or (2) it can require the unit owners of the units affected to pay the deductible amount (765 ILCS 605/12(c)). The Condominium Property Act also allows the board of directors to treat the deductible as a common expense (765 ILCS 605/12(c). Note that the Condominium Property Act requires a notice to be sent to the owner *in advance* of the deductible being assessed. In addition, the Condominium Property Act requires the notice to state that the owner has an opportunity to be heard by the board of directors to explain why the owner is not responsible for paying this deductible before the deductible is assessed to the owner's account.

Most often we hear that the deductible will be assessed to the owners who caused the damage. Yet, the Condominium Act also provides that the owners of the units affected (the units damaged) can also be assessed the deductible amount. While the Condominium Property Act does not state that notice and an opportunity for a hearing must be provided to the owner of the units affected, it is best practice to provide such written notice.

While every case is unique and different, the board of directors should follow a consistent policy when assessing deductibles to an owner's account. The board of directors always wants to be certain that it is not selectively enforcing or treating owners differently, as this could adversely affect the association's efforts to collect the amounts due and owing.

For non-condominium associations, the association's community instruments should be reviewed to determine if a process is identified as to how and when deductibles can be assessed to an owner's account. If no policy is identified, the above process may be followed by the board of directors, but it is best to seek the advice of legal counsel before assessing the amount.

Assessing Fines

Most associations impose monetary fines when an owner violates the community instruments. Before fines are assessed, the board of directors must determine a violation has occurred. The association's rules and regulations should identify the process to be followed when a complaint

is received. Owners should receive notice of the alleged violation, and they should be told they have the opportunity for a hearing with the board of directors, and if they do not exercise their right to attend this hearing, the board of directors will make a determination related to the violation without hearing from the owner. After the hearing or after the opportunity for a hearing expires, i.e., the time to request a hearing, the board of directors can then determine if a violation has occurred and the amount of the fine to be assessed to the owner.

Fines should not be assessed to an owner's account until***after*** the opportunity for a hearing has been given. Both the Condominium Property Act and the Common Interest Community Association Act specifically state that the board has the authority to levy a reasonable fine after notice and an opportunity to be heard is given to the owner (765 ILCS 605/18.4(l) and 765 ILCS 605/1-30(g)). Too often fines are assessed to an account before the opportunity for a hearing occurs and this can adversely affect an association's ability to collect assessments.

For every fine assessed, we must have a specific provision within the community instruments that was violated, a notice of a violation, and an opportunity for a hearing given to the owner. It is also best practice to then give the owner written notice of the board's determination to assess a fine to the owner's account.

Assessing Late Fees

When an owner has a balance on his account, it is common for a community association to assess late fees. The late fee must be for a reasonable amount and what is considered reasonable will vary from one county to the next. Also, the association's community instruments, usually the rules and regulations, should identify the amount of the late fee and the date the fee will be assessed. Late fees should not be assessed on top of late fees. That is, for every late fee assessed, there should be a new unpaid assessment, chargeback, deductible, fine, etc. As we often say, we must be able to connect the dots and show a judge why the late fee was assessed.

Assessing Attorney's Fees

Often an association will incur attorney's fees because of an owner's conduct or inaction. The authority to assess these fees to an owner's account is pursuant to the association's community instruments. For condominium associations, it is also pursuant to the terms of the Condominium Property Act. Section 9.2(b) of the Condominium Property Act states that any attorney's fees incurred by the association arising out of a default by any unit owner, his tenant, invitee, or guest in performance of any provisions of the condominium instruments, rules or regulations or any applicable statute shall be added to and deemed a part of the owner's share of the common expense (765 ILCS 605/9.2(b)). The Common Interest Community Association Act also suggests that attorney's fees and costs can be assessed to the owner's account (765 ILCS 605/1-30(h)). However, before a non-condominium association assesses attorney's fees to an account of an owner, the community instruments of the association should be reviewed and/or the advice of legal counsel should be sought. There are other applicable statutes that also may authorize the assessment of attorney's fees and costs, i.e., The Eviction Act, 735 ILCS 5/9-101, *et seq.*

Regardless, before attorney's fees and costs can be assessed, an owner must have defaulted under the terms of the association's community instruments. The association must be able to identify which provision of the community instruments was violated to justify assessing the

fees and costs. If one cannot be identified, the fees may not be able to be assessed to the owner's account.

When litigation is pending, even a collection case, it is best for a community association to wait to assess the attorney's fees and costs to an account after the litigation is completed and/or the fees are awarded by the court. Too often, we see these charges assessed as the association receives our invoices. Many judges frown upon this and, in fact, have entered orders specifically stating that fees cannot be assessed until they are awarded by the court.

To avoid jeopardizing the association's credibility with the court, it is best not to assess attorney's fees and costs to an account until the attorney approves the assessment and/or the judge awards the fees. Remember, the law firm will have a record of all attorney's fees and costs incurred by the association as a result of the owner's default. Hence, it can provide the amounts (and documents to support the assessment) to the association at the appropriate time.

BUT WE HAVE ALWAYS DONE IT THIS WAY....

When an association turns over an owner's account for collection to its attorney, often with the request to initiate collection proceedings, the association sends over a statement of account. Most statements of account identify the name of the owner within the association's books and records, the address of the property, and the amount claimed due and owing. The statement of account also specifically identifies the amounts assessed to the owner's account. However, the statement of account does not always identify the ***offsite address*** for the unit owner.

The Illinois Eviction Act, the statute by which most community associations use to collect unpaid assessments, requires an association to send its collection demand to the "last known address" of the owner. 735 ILCS 5/9-104.1(c). Therefore, the demand must be sent to an owner's offsite address if the association has this address. Failure to send the demand to the offsite address may invalidate a demand for payment.

While associations have always just sent over the owner's statement of account to initiate collection proceedings, to avoid an unfavorable result, prior to sending the authorization to proceed with collection, the association's agent should review the records of the association to confirm if there is any information to indicate that the owner does not live in the unit. Also, the

agent should review the records of the association to confirm that it does not have an offsite address for the owner. If in doubt whether the address is a valid/current offsite address, it is best to err on the side of caution and provide the information to the attorney.

Even though your association has always initiated a collection action by simply sending the owner's current statement of account to the attorney's office, take a few minutes to confirm that there is no offsite address for the owner, and if one exists, send that to the attorney as well. This quick extra step at the front end can save time and money for the association.

If you have any questions or if our office can be of assistance, please do not hesitate to contact us. Enjoy your summer!

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