

Recovering Legal Fees

Fact or Fiction?

By Julie Dymowski, Jason Fisher, and Lucia Anna "Pia" Trigiani

The cost of pursuing litigation has become a determinative factor for community associations when evaluating cases for litigation.

Recovery of legal fees is somewhat cloaked in myth and mystery. The ability of a community association to recover legal fees may be one of the most commonly misunderstood aspects of the relationship between attorney and client.

In most circumstances, each party to litigation is responsible to pay the legal fees incurred in pursuing or defending the litigation. However, the governing documents for community associations and the statutes, which govern community associations, offer authority for a community association to recover legal fees when the community is pursuing enforcement of its documents.

As with many legal issues, legal fees are treated somewhat differently in each of the three jurisdictions, which are served by the Washington Metropolitan Chapter Community Associations Institute. Practitioners who focus their practices in these jurisdictions offer a review of the law in the District of Columbia, Maryland, and Virginia.

District of Columbia

The Superior Court for the District of Columbia will award legal fees to an association if the governing documents contain a provision for recovery of such fees. Most governing documents do have a provision for the recovery of legal fees. Sometimes the legal fee language is limited to the association pursuing enforcement or collection action. Other times, the document language is broader and states that the "prevailing party" in an action is entitled to legal fees. Either of these provisions will be acceptable to the judge when an association seeks to recover legal fees. If the community is located in the District of Columbia, the first step would be to pin-point the language in your governing documents on this issue.

Once it is determined that the governing documents contain a legal fee recovery provision, the actual amount recovered will depend on the branch of the D.C. Superior Court in which the claim is brought. In the event, the association is in the Small Claims and Conciliation Branch of the Court (for claims \$5,000.00 or less), recovery of legal fees is strictly limited by the Court's Rules to 15% of the principal amount being sought. To obtain a 15% award, the association's attorney must execute and file in the case a Rule 19 Certification Form with a copy of the relevant section of the governing documents attached. As a result of the Rules in this Branch of the Superior Court, there should be no surprise for the association on the issue of legal fee recovery.

In the District of Columbia, claims greater than \$5,000, as well as various equitable ac-

tions, including judicial foreclosure actions, are brought in the Civil Division of the Superior Court. Unlike Small Claims, the Civil Division Rules do not set a percentage recovery for legal fees. Generally, such an award is not tied to a percentage of the principal amount being sought. Instead, the Civil Division Judges will likely base an award on a review of the work performed in the case and the hourly rates charged. As a result of this process, the association has a greater chance of recovering most, if not all, of its legal fees in a Civil Division case.

Prior to bringing an action in the District of Columbia, an association should review with its counsel the various causes of action and amounts involved in a case. If the case may be framed to fall within the jurisdiction of the Civil Division of the Superior Court, the association may very well benefit from seeking a resolution there and having the potential to collect all of its legal fees.

Maryland

Attorneys' fees in the state of Maryland are only recoverable if provided for in a contract between the parties or if specifically permitted by statute. Often, the issue of attorneys' fees arises in situations when an owner fails to pay common area or maintenance assessments and the association is forced to bring a suit to collect the unpaid fees. Generally, the Declaration will provide that when an owner fails to pay assessments, they become responsible for the attorneys' fees incurred as a result of the default. For purposes of the law in Maryland, the deed for the property in combination with the decla-

ration, constitutes an agreement between the parties that allows the recovery and award attorneys' fees in such an action.

Other situations that arise where the ability to recover attorneys' fees is a concern is when an association is forced to file an action seeking enforcement of its covenants or rules against an owner. In such cases, once again, it is necessary for the Declaration to specifically provide for the recovery of attorneys' fees as part of such enforcement actions. Although the Declaration may be silent, some associations try to regulate this issue through the adoption of a rule or other resolution. A recent Maryland case reviewing this issue, determined that a corporate resolution adopted by the Board vote was not sufficient to authorize the recovery of attorneys' fees. Specifically, the court determined that since the resolution adopted by the Board dealt with an enforcement issue that was specifically addressed in the Declaration, a change to this procedure giving the right to recover attorneys' fees would require a vote by the owners, the same as any other amendment to the declaration. Since the change was not voted upon by the owners, the court determined that the authorization for attorneys' fees was an improper amendment to the declaration/contract and not permitted. As such, this

case suggests that absent language in the Declaration itself or a proper vote of the members, a rule is not sufficient to give authority for recovery of attorneys' fees.

Beyond such situations, attorneys' fees may also be authorized by statute for associations. Although the Maryland Homeowners Association Act is silent as to such action and a homeowners association or community association is left relying on the Declaration, Maryland condominium associations have specific authority, as provided by statute. Specifically, § 11-113 of the Maryland Condominium Act 11-113 provides:

(c) If any unit owner fails to comply with this title, the declaration, or bylaws, or a decision rendered pursuant to this section, the unit owner may be sued for damages caused by the failure or for injunctive relief, or both, by the council of unit owners or by any other unit owner. *The prevailing party in any such proceeding is entitled to an award for counsel fees as determined by court.* (Emphasis added).

As emphasized above, the statute specifically authorizes the recovery of attorneys' fees in a situation where an association is forced to file a lawsuit to enforce its governing documents.

Attorneys' fees is often a great area of concern for community associations in that they are vested with the obligation to enforce its

governing documents and collect fees, but the documents are sometimes lacking the specific authority for recovering attorneys' fees when action is required. Even in situations where attorneys' fees are authorized, the court will often not award the dollar-for-dollar amounts expended by an association in pursuing the action, since the judge may, in their discretion, reduce the award of attorneys' fees to what he or she believes is "reasonable."

Virginia

The Virginia Courts require specific authority in the governing documents (or in a contract) or in statute in order to determine whether to award legal fees. The authority to recover legal fees and costs in pursuing litigation is typically found in the recorded covenants and restrictions for a property owners association and in the bylaws (also recorded) of a condominium unit owners association.

That language is most commonly found in the portion of the governing documents that addresses remedies available to the association to enforce the covenants and restrictions. The language varies from document to document. Typically, the language is:

Costs and Attorneys Fees. In any proceedings arising out of any alleged default by a unit

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owner, the prevailing party shall be entitled to recover the costs of such proceeding and such reasonable attorneys' fees as may be determined by the court.

The language of the governing documents is important to consider carefully and is best understood when broken down into component parts. The analysis of this sample language below, can serve as a helpful guide for analyzing these document provisions.

First, the language provides that costs and attorneys' fees can be recovered in *proceedings arising out of a default by a unit owner*. This language makes no reference to recovering legal fees in litigation that involves the failure by the association to perform some duty or responsibility.

Second, the language also provides that the *prevailing party is entitled to recover costs and legal fees*. Thus, the party must be victorious in order to be entitled to recover costs and attorneys' fees. Note that the language provides that the individual is merely "entitled" to recover costs and legal fees. This is further discussed below.

Third, the *attorneys' fees must be reasonable*. Independent determination must

be made about the reasonableness of attorneys' fees. In the routine assessment collection case, the attorney files an affidavit with the pleadings that outlines in detail the legal fees and costs that have been incurred by the association. But, in more significant cases, the court may require an expert to offer testimony on what are reasonable attorneys' fees.

Fourth, and finally, it is *legal fees as may be determined by the Court*. This is particularly important. Often, there is a misunderstanding that the community association is entitled to legal fees, regardless of whether the court has acted to award legal fees. This misunderstanding seems to emerge most often in assessment collection cases.

The misunderstanding is also that an association will recover all legal fees, including fees incurred prior to action by the court. That is not the case. Community association practitioners routinely request the recovery of legal fees, where permitted by the governing documents, but the association may or may not be awarded the full amount expended by the association.

Also, it is a judge's discretion as to what constitutes "reasonable" attorneys' fees. In many

instances, "reasonable" means the amount of fees incurred to obtain judgment. In collection cases, however, "reasonable" is a percentage (i.e., 33%) of the principal of the judgment. The percentage varies from jurisdiction to jurisdiction and from judge to judge.

Amendments to the Virginia Condominium Act and the Virginia Property Owners' Association Act in recent years, have been helpful to those communities for which the governing documents do not address legal fees. In the Virginia Condominium Act, the recovery of legal fees is addressed in Section 55.79.53 A. In the Virginia Property Owners' Association Act, the recovery of legal fees and costs is addressed in Section 55-515 A. In both statutes the language is the same:

The prevailing party shall be entitled to recover reasonable attorneys' fees and costs expended in the matter.

This language refers to matters initiated by or on behalf of the association or by individual owners to insure compliance with the condominium instruments or the declaration of a property owners association.

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man of the Virginia Cooperative Extension Leadership Council, overseeing Extension offices throughout the Commonwealth. He has been an Assistant Scoutmaster at Troop 143 for over 15 years where he helps train young men as they grow into Troop and community leadership positions.

As an Elder in the Presbyterian Church USA and an active volunteer, Linc recently completed a month long trip to Kenya where he conducted day-long leadership workshops for pastors and lay leaders throughout the country. Because of the success of his workshops, Linc has been invited to return next year for a more extended training program.

While you may find it hard to believe he had the time, Linc has four grown children, three grandchildren and is married to Marty, an attorney, master gardener, and constant companion.


CAI and the greater community has had the benefit of Linc's creativity, persistence, endurance, commitment, and caring for more than 30 years. We hope that those valuable attributes and his enduring energy will continue in the decades to come. 

Rick Leeds works for R/L Associates in Bethesda, Md.

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Conclusion

In considering litigation, the cost of litigation will always be a factor. In bringing an action involving an issue of compliance with the governing documents for the community association - whether the action is initiated by the association or by an individual owner - consideration should be given to the ability to recover legal fees and court costs. And, other drafting contracts, associations should also give consideration to the recovery of legal fees.

A basic understanding of the ability to recover legal fees is helpful when considering the benefit of litigation and establishing the annual budget for legal fees, and more importantly, when setting expectations about the success of litigation. 

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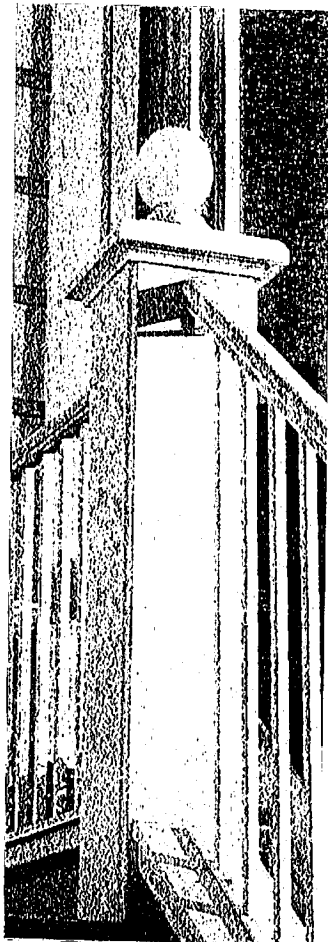


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