

HOA COMMUNICATOR

THE LOWDOWN ON LEDGERS

Associations that employ management companies often rely on their management companies to keep track of the accounting for homeowners' payment of dues and assessments. Self-managed Associations handle this pesky task themselves. The idea of tracking what homeowners owe for dues, assessments, fines, attorneys' fees, etc., seems like a relatively straightforward task. So, why are we devoting an entire article to this subject? An inaccurate or confusing ledger can create legal issues for both the Association, its managing agent and possibly its law firm. Relying on a confusing or inaccurate ledger in court can lead to possible legal issues as discussed later in this article. You do not want to be in court explaining problems with the ledger. Thus, we feel it is worth our readers re-examining their preparation of ledgers for collection cases so that they ensure they communicate to the courts a clear accounting that supports the amounts they are trying to recover.



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possible legal issues as discussed later in this article. You do not want to be in court explaining problems with the ledger. Thus, we feel it is worth our readers re-examining their preparation of ledgers for collection cases so that they ensure they communicate to the courts a clear accounting that supports the amounts they are trying to recover.

In a legal action for the collection of past dues, the ledger is the key piece of evidence that the Association must rely upon. If the ledger is inaccurate or confusing, courts will not likely provide the Association the remedy they are seeking, even if the homeowner does not dispute the debt. The goal of a collection lawsuit is a money judgment. Courts require Associations to provide documentation to support the judgment they are seeking. The ledger is the key document in that documentation. Clearly, the ledger tracks the unpaid dues, late charges, any unpaid assessments that are applicable, fines, and of course, attorneys' fees and costs. When the ledger is inaccurate or confusing, the Association and its counsel face potential problems.

What could be so wrong in a ledger? We have seen different problems with ledgers. One problem is the ledger that is set up so that it is impossible to follow. Such ledgers make it impossible for the Association's law firm to tell the homeowner how much is owed. In this situation, much time is spent between the attorney and the Association's bookkeeper discussing how to revamp the ledger. A ledger should follow basic accounting principals and clearly show credits and debits. It should also be easy to follow the accounting that leads to the current balance. Correcting this type of ledger is draining for everyone involved, because the ledger format has to be fixed and redone. The origin of the problem for these types of ledgers is usually that the Association or

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TENANTS AND YOUR ASSOCIATION

As a firm that was founded on representing landlords, it is fair to say we have quite a bit of experience in dealing with tenant issues and disputes. We tell clients on a weekly basis, when asked about handling evictions and other landlord issues, it is never boring. People do the strangest things (landlords and tenants) and it can be very interesting.

As far as Associations, one of the many side effects of current economic conditions is an increase in the number of units that are being used for rent-



als. This raises many issues for Associations. This article will address some of the issues surrounding tenants in Associations, and provide guidelines for Associations that allows Owners to lease units.

TENANTS AFFECT ASSOCIATIONS

1) "Crash pads" or short-term rentals

Interestingly, our office has seen several situations where owners are treating the units as hotels. In some cases, investors make quick purchases of condominium units, get a great deal, and then

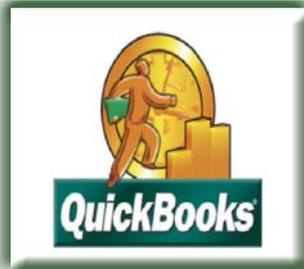
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its managing agent is manually creating the ledger and has no set program to create the ledger such as QuickBooks or some other accounting software.



Another frequent problem we see, which leads to trouble, is when there are accounting errors, such as double charges for the same item or forgotten credits. We see items that are accidentally assessed twice such as late fees. An even worse accounting problem is when the ledger changes over time, so that when you compare a ledger from say October of 2007 to May of 2008, it does not jive. For example, the ledger from 2007 may say the homeowner's balance due was \$850.00 as of December of 2007, but the 2008 ledger shows a balance due of \$1,300 as of December of 2007. Sometimes this type of error is the result of the Association or its management company trying to fix various errors in the past accounting without making sure that the ledgers reconcile with one another. Also, this situation arises when Associations or their managing agents change their bookkeeping method or software. Either way, these type of problems give homeowners a defense to a collection action or even a basis for a lawsuit or counterclaim..

Unfortunately, many homeowners' balance on their ledgers grow over time. You want to make sure the ledger does not cause confusion due to mistakes that have to be cleared up later. This type of problem can definitely lead to various issues that can hurt the Association. When there is a mistake, it is best to find it fast and fix it immediately. Mistakes in ledgers cause more than clerical errors for the courts. They can also cause actual legal problems for the Association and its law firm.

When an Association turns a homeowner over to its law firm or collection agent for collections, the federal and state Fair Debt Collection Practices Acts (FDCPA) applies to the third-party handling the collection action. The federal and state FDCPA almost always pertains to attorneys who regularly collect on delinquent HOA dues. The FDCPA is a hyper-technical law and requires strict compliance.

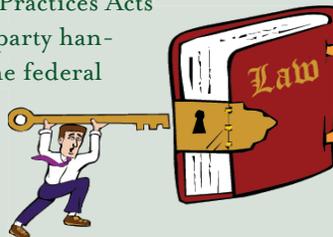
Law firms collecting HOA debt have to be sure the amounts they are trying to recover are accurate or it can create possible FDCPA issues. Further, homeowners are considered consumers under these laws and consumers are entitled to validation of their debts. Having an accurate and clear ledger is critical to law firms validating debts

when homeowners request such validation. Another problem that arises with ledgers, that actually leads to validation requests from homeowners, is when the Association charges for something it normally does not charge for. It is helpful in those instances to have some further explanation on the ledger for what the charge pertains to.

Non-compliance with the FDCPA can lead to the homeowner being entitled to damages. The FDCA allows for a \$1,000 statutory award for violations, compensation for any actual damages, and attorneys' fees and costs. The FDCPA has a provision that allows for damages if the nature of the debt is mischaracterized. We are currently defending such a lawsuit right now. The allegation is that a confusing ledger and our lawsuit based on that ledger somehow mischaracterized the debt. While we believe we have a number of defenses to this lawsuit, the fact that some attorney filed it is evidence of the problem we are describing. FDCPA suits are time consuming, cost money to defend, and truly detract from the task at hand: which is simply getting a homeowner to pay his or her dues.

Finally, ledgers can create evidence to be used against the Association in other instances. For example, if an Association decided not to charge late fees for any homeowners during a certain period, but accidentally charged late fees during that period to one homeowner, the homeowner could claim foul play and even allege a possible fair housing violation. Also, ledgers can create arguments of "waiver" for a homeowner. For example, if an Association forgets to charge late fees for several months, but then tries to catch them up before sending the homeowner to the law firm, the homeowner could claim that the Association waived such late fees by not collecting them each month. If the homeowner has inconsistent ledgers and can show older ledgers where no late fees were assessed, a judge might not agree with the amount the Association is seeking and side with the argument that the Association waived its right to recover late fees. Accordingly, it is very important for Associations to be consistent.

In order to avoid the type of issues discussed in this article, we recommend the following. First, make sure you currently use a ledger format that is easy to follow, showing all credits, debits, and the total balance. If this is difficult because of the program you are using, then it might be time to reconsider the program. Second, make sure you are accurate in updating the ledger. Have some type of checks and



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advertise them as “crash pads” where people in various industries, like the airline industry, can rent a room for the night. This type of unique situation raises obvious issues. Not only is this disruptive to other owners, it can be a drain on a community if the tenants are over using the common



areas or Association amenities. Short-term leases can be viable, if the owner/landlord is complying with local laws and ordinances and their actions are not prohibited by the declaration. However, in the cases that our office has seen, some owners are violating both the

community covenants and Colorado law. One law that often is at issue is the local ordinance on occupancy. Many short-term rentals have the potential of violating these laws because of the number of short-term renters the owners are trying to attract. In addition, some of these landlords are neglecting to even pay their Association dues.

2) Long-term rentals can be valuable asset to the community

Associations are less likely to have issues with owners not paying the bills if the units are rented. While often times our office gets to witness the negatives of the landlord tenant relationship (why else would our firm be involved?) we have been assured by many clients that there can be excellent landlord tenant relationships. If there were not, then the market would dictate that it was a poor business opportunity and there would be fewer landlords. Our position on allowing renters in communities is based on the assumption that not all tenants are bad for a community.

3) Prohibiting rentals is bad business for Associations

Associations can take matters to an extreme and bar owners from renting their units to tenants. This may be the approach for some associations, but in our opinion, this is a mistake for the vast majority of associations. What happens when owners go to sell their property? The market of potential purchasers is smaller because investors will not be interested in purchasing the property.

4) Some Associations try to micro manage tenants

Associations are not set up to be landlords, and they should not be landlords. What associations can and should do, is provide the guidelines that will require owners that choose to be landlords to make the proper decisions that will promote



being a good landlord. While an Association is entitled to receive copies of the leases, they often mandate that the owner who leases, or the owners' residential management company, provide confidential information on the tenant, such as date of births and social security numbers. Owners and/or their management companies really cannot furnish the Association with this type of confidential information on the tenant, because in our opinion, doing so potentially violates credit-reporting laws such as the federal Fair Credit Reporting Act.

THE BEST APPROACH FOR AN ASSOCIATION TO HANDLE RENTALS

The key is **COMMUNICATION**. Communication is the cornerstone of successful governance. An association is a form of governance; the will of the people should change the direction the Association takes on any given issue. Below are guideposts for any Association dealing with rentals, if your Association is struggling with rental issues, you should consult with your legal counsel.

1) Clearly defined requirements for having a rental unit, such as no leases shorter than 30 days, and leases must be given to the Association or Management company.

2) Require tenants to be given copies of the governing documents.

3) Your governing documents should provide for a clear enforcement path if an owner violates the rental policy.

4) Your governing documents should provide for a clear enforcement path if a tenant violates the Association rules.

5) Associations are not the mechanism to approve or deny tenant applicants. While Associations are subject to Fair Housing laws, by stepping into the role of deciding who is approved as a tenant, Associations can expose themselves to additional liability under state and Federal Fair Housing laws.

6) Association governing documents should limit the amount of rentals. It is best that an association not exceed 50% renter occupied. If an Association exceeds 50%, then purchasers will not be eligible for federal financing packages, and again the Association is limiting the market of potential purchasers.

7) Owners must also take responsibility for their renters. One problem that arises is when an owner has not notified the Association of their new address. A landlord owner should notify the Association of their mailing address and phone number if it is not the unit on-site, as well as the

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