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Attorney Fee Awards in Association Lawsuits

By Adam J. Cohen, Esq.

One of the most common questions clients ask their lawyers is whether they can force their adversary in a lawsuit to reimburse their attorney's fees. The answer isn't simple.

Connecticut follows the "American Rule" which says that, most of the time, each side pays for its own lawyer no matter who wins the case. Various rationales have been offered for this rule, such as that a "loser pays" system would discourage valid claims, especially by the poor, or add unfair punishment after a close case. The rule does, however, have limited exceptions. Where either a statute or contract entitles one side to recover its attorney's fees from the other, a court will generally enforce it. In addition, a court might decide that actions or allegations of a party during the litigation were so unjustifiable that the party should be ordered to reimburse the attorney's fees incurred by the other side as a matter of equity. The courts exercise this power in only the most outrageous cases.

The overwhelming majority of lawsuits between community associations and their residents involve collection of unpaid assessments or to otherwise enforce provisions of the declaration, bylaws, or rules. The Common Interest Ownership Act does contain a number of "fee shifting" clauses which authorize courts to make reimbursal of the winning party's attorney's fees part of the final judgment in these cases. The Act also does this in certain types of lawsuits brought by associations against their original developers.

The fee-shifting provisions of the Act do not, however, apply to litigation against outside vendors. Any right the association may have to recover its attorney's fees for successfully bringing or defending such a suit will depend on the language of the vendor's contract. For example, a contract that says a vendor can sue for its collection expenses including attorney's fees if the association defaults in payment generally would not allow an association to recover its own attorney's fees for defeating such a lawsuit by the vendor. Such a "one-way" fee shifting clause also would not apply to other kinds of litigation the association might bring against the vendor, such as for providing a defective product or shoddy services. Other kinds of contracts, such as most insurance policies, do not authorize attorney's fee awards in any kind of disputes between the parties. The language of the contract will control, so associations should read their vendor contracts carefully to determine whether they contain fee-shifting clauses at all, whether they are "reciprocal" or "one-way," and whether they apply to all or only certain kinds of disputes which might come up.

Other fee-shifting statutes may apply to different kinds of lawsuits. For example, various state and federal laws allow unit owners to add their attorney's fees to any damages recovered for racial, handicap, or age discrimination and similar illegal conduct by the association. These statutes are often one-way, so the association might have to bear its own attorney's fees even if it wins. In almost any kind of case, if a court believes that a defendant's wrongdoing was deliberate or reckless, it may also award punitive damages which are typically equal to

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the amount of the plaintiff's own attorney's fees. This might apply in the case of a trespasser who vandalized a condominium's facilities or a board member who embezzled funds.

This past July, a Connecticut condominium became one of few litigants to successfully invoke a state law authorizing triple attorney's fees. The statute is designed to compensate defendants sued "without probable cause, and with a malicious intent unjustly to vex and trouble." The court found that a unit owner who unsuccessfully sued his association's board members and attorneys while threatening to "see you all destroyed" for foreclosing his unit was acting maliciously. The court awarded him to pay the defendants their litigation expenses including attorney's fees three times over.

Notably, even when a court is willing to order that a party's attorney's fees be reimbursed, the court will nearly always limit the award to a "reasonable" amount. The rationale is that a person and his lawyer can agree to whatever fee arrangement they wish, but the law will only hold the adversary responsible for fees which are reasonable under the circumstances. This determination will be made in light of the complexity of the matter, the amount of time the attorney devoted to it, the extent of the attorney's expertise, prevailing rates in the community, and other factors. A special hearing may be necessary to review these considerations.

Associations which are considering bringing lawsuits, or learn they are being sued, should talk to their counsel at the earliest stages about the likelihood of getting their attorney's fees reimbursed by their adversaries. These discussions should also be considered during negotiations with outside vendors over the terms of their contracts and nearly any time the association is or might foreseeably become forced to pay for legal services in an adversarial situation. ■

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