

Recovering Attorneys' Fees: Be Careful What You Wish For

By Bruce A. Cholst



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The threat of a claim for reimbursement of attorneys' fees in the event of litigation is a co-op/condo board's "nuclear option" when it comes to rule enforcement against recalcitrant owners.

Such a threat often induces compliance from owners who calculate that the specter of paying their board's litigation costs is too high a price for continued defiance of the rules. However, owners sometimes don't fall for this gambit and opt to continue their resistance. When they call the board's bluff, the board is faced with a classic "Hobson's choice." It has two options: (1) disengage from the confrontation, or (2) proceed with the litigation. Disengagement will result in a total loss of credibility, leaving the owner with no incentive to capitulate or discontinue their course of conduct. Conversely, litigation could be costly, with the board having to front its legal fees. And, for the reasons detailed below, these fees may not be recoverable. In fact, the board may even find itself exposed to an award of legal fees in the owner's favor should it not prevail in litigation.

Thus, while the threat to pursue legal fees may be an enticing weapon in the board's arsenal against unruly owners, its deployment could lead down a treacherous road. This article will explore that road and help you decide whether to take the gamble of traveling it. Of course, that decision should be made only after consultation with counsel.

Pursuit of an attorneys' fee award is risky because American (and especially New York state) courts adhere rigidly to the concept that each party is responsible for their own litigation costs. Courts are loath to permit the winning party to recoup expenses from the loser. This innate judicial

hostility to the idea of permitting a litigant — even the winning party — to recover litigation costs has resulted in the emergence of at least four different legal doctrines, which converge to severely constrict the frequency and amount of fee awards.

The most basic of these precepts is that any right to recoup legal fees from another litigant must be predicated upon either a specific statute or a contract that expressly provides for recovery under a defined set of circumstances. Absent a specific statutory or contractual right, attorneys' fees are simply not recoverable.

With one exception noted below, there are no statutes permitting recovery of legal fees in a co-op or condo setting. Most co-op proprietary leases and condo bylaws (i.e., contracts) provide for some form of attorney fee recovery. However, judicial hostility toward legal fee awards (as referenced above) translates into exceedingly strict construction of these fee provisions against boards when they seek recovery from owners. For example, the seemingly broad fee clause in the typical co-op proprietary lease has been interpreted to apply only when the dispute entails a violation of the lease. The clause may not apply to injunction or declaratory judgment actions. Moreover, the fee clause typically contained in condominium bylaws generally applies only to suits involving monetary defaults; again, not to injunction or declaratory judgment actions. As such, the circumstances under which boards can even dream about recovery of legal fees from an owner are severely limited.

Even if the attorneys' fee provision in an association's governing documents are airtight in terms of draftsmanship, the courts will not allow a fee recovery unless, after the litigation is concluded,

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they deem the board to be the "prevailing party." As a practical matter, very few co-op and condo disputes conclude with the association winning 100% of the relief they seek. Courts routinely hold that such mixed results do not render the association a prevailing party and therefore deny them any fee award.

Even when an association's fee clause is perfectly drafted and it is deemed the prevailing party in its underlying litigation with the owner, the board may recover only a small portion of the legal fees it has actually incurred. Courts will only award what they determine to be "reasonable" legal fees. Almost universally judges conclude that lawyers have an exaggerated sense of the reasonableness of their fees and therefore limit the amount of the fee award. As a rule of thumb in New York courts, a fee recovery of 60 cents on the dollar of what was actually expended is considered a sizeable award.

Finally, Real Property Law Section 234, which does not apply to condos, stipulates that when a residential lease permits landlords (i.e., co-op boards) to recover attorneys' fees in disputes with tenants (i.e., tenant-shareholders), tenants have a reciprocal right of recovery in the event they are the prevailing party in the litigation. Thus, if the co-op initiates litigation and loses, not only does it end up without a fee award, but it could also face liability to the shareholder for their legal fees.

So, in view of the obstacle course faced by boards contemplating recovery of legal fees in

connection with litigation against recalcitrant owners, there are three basic rules to follow:

1. Have your attorney analyze your governing documents to insure they in fact authorize recovery of attorneys' fees. If they do not, have your attorney amend the documents to provide for such a right.
2. If your governing documents do contain a recovery fee provision, have your attorney analyze its language to insure the clause is drafted in an airtight manner and cannot be construed to restrict your right of recovery. If the language is insufficiently precise or too narrow in scope, amend the provision so it will survive a legal challenge.
3. Prior to the initiation of any litigation, engage your attorney in a hard-nosed evaluation of its legal merits. Your attorney must determine your risk of not being deemed the prevailing party, and thus exposed to potential liability for the owner's legal fees. As a practical matter, any perception that your case lacks merit will also impact the judge's determination of the reasonableness of your fees. ▲

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