

“Charging Excessive Fees Could Spell Big Trouble,” FLCAJ

September 25, 2019

By: Rosa M. de la Camara



Condominium associations are limited by statute on the amount of fees which can be charged in connection with the transfer of a unit. An association in Miami just learned this lesson the hard way.

A recent class action lawsuit in Miami-Dade County alleging a condominium was charging excessive fees resulted in the association settling for \$300,000. These charges may be called “transfer fees” or “screening fees” or “move in-move out fees”, but regardless of what they are called, they can be dangerous quicksand if the condominium association is overly ambitious in the amount it charges.

To begin with, unless the condominium association has the right in its governing documents to approve a sale, mortgage, lease, sublease, or other transfer of a unit, it cannot charge a fee in connection with such transfer. In addition, Section 718.112(2)(i), Florida Statutes provides that no such fee shall exceed \$100 per applicant other than husband/wife or parent/dependent child, which are considered one applicant. This \$100 state-mandated cap includes all non-refundable fees charged for interviews, background checks, credit reports, and other costs when people seek to buy or lease a condominium unit in Florida.

This transfer fee should not be confused with a security deposit which may be required, in addition to the transfer fee, if the authority to do so appears in the declaration or bylaws. The amount of the security deposit is also subject to statutory limitations. Section 718.112(2)(i), Florida Statutes provides that an association may, if the authority to do so appears in the declaration or bylaws, require that a prospective lessee place a security deposit, in an amount not to exceed the equivalent of one month’s rent, into an escrow account maintained by the association. This security deposit is intended to protect against damages to the common elements or association property.

Security deposits and transfer fees are separate and distinct charges. A security deposit is to be held by the association and returned to the tenant when the lease is up if the common elements were not damaged by the tenant.

Many associations charge greater fees because \$100 usually does not cover the cost of the background screening report, which is typically done by a third-party provider. The association may not be looking to make a profit, just to cover its actual costs in effecting the background check. Nonetheless, the amount which can be charged is capped, and the association may have to take a loss when processing such applications. Exceeding this amount can lead to costly problems as this recent case pointed out.

The lawsuit in question was filed by tenants who entered into a one year lease paying \$2,100 per month for a one-bedroom apartment at The Plaza 851 Brickell Condominium Association in Miami. The tenants alleged that the association had overcharged them, as well as hundreds of others, by charging mandatory, non-refundable fees greater than \$100 when they applied for their lease. Not unlike other associations, this one required applicants to pay a \$150 screening fee and a \$200 move in-move out fee. The tenants alleged a \$250 overcharge, which individually does not sound like a lot of money. But because it was a class action lawsuit, the eligible participants were a total of 588 persons who were charged similar transfer fees from January 5, 2014-June 3, 2019.

From the settlement, each participant who formed part of the lawsuit will receive a refund for the "\$250 overcharge." While the recovery to the members of the class action lawsuit may seem modest, the judge awarded the plaintiff's attorneys the sum of \$95,000 in attorney's fees. The attorneys who represented the association said their client decided to settle because of the favorable settlement terms that were presented and the uncertainty and costs of protracted litigation. An important factor here is that this case was settled at the will of the parties before trial and before a court order was issued. Thus, the reality is that we have no court order on this lawsuit confirming that the fees were excessive. A mere settlement between two parties is not considered case law precedent that would be binding on other associations.

According to a Miami Herald analysis of real estate listings, roughly four in ten condos listed for rent or sale charge transfer fees in excess of \$100. According to the Herald analysis of the Multiple Listing Service (MLS) database used by real estate professionals, 42 percent of Miami-Dade condominium units listed for rent or sale still require more than \$100 per person in transfer fees, down from 46 percent in 2016. The Miami Association of Realtors, reportedly ran an unofficial check in MLS in March 2019 and found that 8,200 out of almost 21,000 condo listings had transfer fees that exceed \$100.

There are plausible explanations for why an association would charge more than the \$100 transfer fee cap. Many associations are simply unaware of the law and the limitation on what can be charged. In addition, South Florida is

home to many foreign residents whose background checks become even more difficult and expensive. Despite the self-serving comments made by plaintiff's counsel, associations generally are not trying to "fatten their coffers" by collecting higher transfer fees but are merely trying to cover the actual costs incurred in the screening process.

Issues raised in Southeast Florida litigation are oftentimes a bellwether for those to follow in other areas. As of today, four other class action lawsuits involving alleged excessive fees charged by associations have been filed in Miami-Dade County and perhaps will follow in other counties as well. Certainly most reasonable-minded persons would agree that the association, and consequently its members, should not be required to absorb the additional cost of a tenant's background check not covered by the screening fee. The legislature must increase the amount of fees which can be charged or that is exactly what will happen—the association owners end up having to defray the cost of screening their neighbor's prospective tenants. The statutes once again have not caught up to today's actual costs and practices.

In the meantime, what can associations do to address the transfer fee issue? Condominium association unit owners should consider lobbying their legislators to pass a bill increasing the amount an association can charge as a transfer fee if they believe the state's \$100 cap is due for an increase. Otherwise, associations are unfairly impacted by not covering their actual expenses for these background checks. Associations should also speak to their counsel to determine whether there are other types of charges which could be legally imposed through an amendment to the Declaration of Condominium. Until there is clear instruction from either the courts or the legislature, associations should steer clear of overcharging to avoid the possibility that a zealous attorney will pursue a class action lawsuit against an unwitting association.

Rosa de la Camara concentrates her practice on representing community associations and has immersed herself in the many complex issues facing boards of directors, unit owners, managers, and state and local policymakers for more than 30 years. Her duties encompass a general counsel role including drafting, analysis of issues and recommended course of action, prosecuting violations, attending administrative hearings, and organizing elections. She also represents hotel condominiums and is familiar with the unique issues faced by these. Ms. de la Camara is also one of only 190 attorneys statewide who is a Board Certified Specialist in Condominium and Planned Development Law. For more information, visit www.beckerlawyers.com.