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The costs of condominium documents and disclosures in condo sales

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Section 765 ILCS 605-22.1 of the Illinois Condominium Property Act requires that the condominium association provide certain documents along with answers to very specific questions about the association and its finances. These are commonly known as "22.1 Disclosures".

With regard to amounts that can be charged for 22. 1 Disclosures, Section 22.1(c) of the above-cited statute provides: "A reasonable fee covering the direct out-of-pocket cost of providing such information and copying may be charged by the association or its Board of Managers to the unit seller for providing such information."

There is growing concern among real estate practitioners that management companies view these charges as a gravy train in that most of the information being provided is completely automated. Nowadays, management companies often use a website to enable the client to order these documents. Budgets and condo documents are generally sent as PDFs at the click of a mouse, and the questions being asked are generally addressed in condo minutes. In light of this automated method of delivery, is a $300-$500 fee really "reasonable"?

Absent a legislative cap as to what can be charged, and without case law defining the reasonable limits of such charges, we are left with the current reality that if you want to sell your condominium, you had better get that fee paid. Most sellers are not willing to challenge these charges. As practitioners, we must make sure to warn our clients about these charges in advance.

The materials and information being provided under the 22.1 Disclosure must be presented within 30 days of a request. It is therefore essential to coordinate the securing of the Disclosures as early as possible in the process. Management companies are known to charge "expedited fees" if disclosures are required in shorter periods of time. This shorter period of time could be 48 hours or even a week.

The materials being disclosed under Section 22.1 are as follows:

(1) A copy of the Declaration, by-laws, other condominium instruments and any rules and regulations.

(2) A statement of any liens, including a statement of the account of the unit setting forth the amounts of unpaid assessments and other charges due and owing as authorized and limited by the provisions of Section 9 of this Act or the condominium instruments.

(3) A statement of any capital expenditures anticipated by the unit owner's association within the current or succeeding two fiscal years.

(4) A statement of the status and amount of any reserve for replacement fund and any portion of such fund earmarked for any specified project by the Board of Managers.

(5) A copy of the statement of financial condition of the unit owner's association for the last fiscal year for which such statement is available.

(6) A statement of the status of any pending suits or judgments in which the unit owner's association is a party.

(7) A statement setting forth what insurance coverage is provided for all unit owners by the unit owner's association.

(8) A statement that any improvements or alterations made to the unit, or the limited common elements assigned thereto, by the prior unit owner are in good faith believed to be in compliance with the condominium instruments.

(9) The identity and mailing address of the principal officer of the unit owner's association or of the other officer or agent as is specifically designated to receive notices.

As indicated above, the question of what is a "reasonable fee" has yet to be determined. I have seen parties charged in excess of $500 for a full set. This charge can create a problem for all involved in the real estate transaction, and is an issue that attorneys representing buyers, sellers and associations keep in mind.

According to real estate lawyer, Joseph Fortunato, "While most owners would agree that notice of the amount charged by management for the delivery of disclosure documents is essential, the fact is that sellers rarely have any idea that such charges even exist. Absent a requirement in the governing documents of the association that a management company publish a fee schedule for the disclosure of 22.1 documents or some sort of legislative enactment requiring management to disclose such charges, many sellers are faced with significant unanticipated expenses at closing for such charges."

As an attorney for a condominium association, you should try to make sure that the agreement with the management company expressly states how much they will be charging for all sale related documents, questionnaires and disclosures. Make sure all charges are covered, including the 22.1 disclosure, the budget, the condominium declaration and bylaws, and any other statutory compliance. Often management companies will have different fee structures in place depending on which items are ordered. Find out what they charge for expedited requests and find out how they define "expedited." You may want to push back if the charges seem "unreasonable." Perhaps ask them to explain why they think the charge is reasonable. If they don't have a good explanation, perhaps you should counsel the association to use of a different management company.

Condominium attorney, Joel Chupak notes that an attorney representing an association should also find out whether the management company (1) can outsource document/statutory compliance and (2) what cost limitations, if any, are put on the 3rd party document provider.

According to noted real estate attorney, Myles Jacobs, "Often, the order form does not include everything that the contract or the Buyer's lender needs and this creates a major problem since the management company will only accept the order from the form on the internet. The condo or homeowners' attorney must take a more forceful position and tell the management company that their contract is with the association. The attorney should not accept the fact that all management companies charge as they see fit. I actually threatened our management company not to sign their contract unless they agreed to provide the necessary letter of compliance where an owner was refinancing. They did agree to provide one letter every year at no charge. I told them if they refused, we would have the secretary provide the information to the Buyer."

Joseph Fortunato provides additional insights on hidden charges that may be identified within the 22.1 Disclosure. He state, "Another important consideration is the possibility that an association may attempt to add accrued and unpaid attorney's fees associated with the seller's delinquent account pursuant to subsection (2) above ("unpaid assessments and *other charges due and owing*…"). In instances where an association claims to have "taken action" to collect a delinquent account, attorney's fees can be assessed by the association even where the seller has had no prior notice of such assessment. There are no expressed statutory limits on the amount of fees that can be charged to the account in this instance, and the "action" taken by the association to collect need not involve the initiation of litigation. Attorneys have shared anecdotes where associations may have inflated the amount of fees due for a particular account because they do not fear reprisal from the seller, who merely

wants to close and who is likely to incur an even greater amount of fees contesting such inappropriate action by the association."

Finally, you should advise the association to notify all unit owners of these costs so they are not taken by surprise when it comes time to sell or refinance their unit.

As an attorney for a seller, you should check on the fees charged by the association for the above-stated items and determine against whom they are assessed. Make sure there is no markup by the association above and beyond the fees charged by the management company. Inform your selling client as soon as possible as to how much these fees will cost. I suggest putting a warning about these costs in your retainer letter to start priming the client to be prepared for this cost. This is also an issue that should be addressed with the seller during attorney review as it may affect how willing the seller is to provide credits to the buyer. It is common practice for attorneys to hold off on ordering 22.1 disclosures until the parties have resolved all Attorney Review and Inspection issues. However, this can mean the Seller does not find out about these charges until just before this closing. People do not like surprises in real estate transactions, and the person who generally gets blamed is the attorney!

As an attorney for the buyer, it is important to push for the 22.1 disclosures as early as possible in the attorney review process. I do not like waiting until after the attorney review period is over to obtain these disclosures because the information they contain is essential and material to the Buyer's decision to purchase. It is far easier to cancel the transaction during the attorney review period because of information discovered in the disclosure materials. Otherwise, you should reserve the right to cancel based on a subsequent review of the 22.1 disclosures. The problem is, as you get closer to the closing date, the parties have both started to make their moving preparations and negotiation leverage has changed. As far as costs are concerned, the statute expressly states that the association charges the seller for these costs, notwithstanding attempts by the seller, association or management company to assess the buyer for these charges. Again, you should warn the buyer about the possibility of these charges in your attorney retainer letter.

The fees associated with 22.1 Disclosures are simply another cost of doing business. The best way to deal with these costs is to make sure all parties are informed about them at the very earliest stages of the transaction. Perhaps the charge could be given and/or requested in the real estate contract itself as a contractual disclosure. Even better, perhaps real estate agents should include such charges in the MLS listing. If all parties are aware of these costs early in the process, it is less likely they will generate stress, confusion or problems down the line. □

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