

What NC Community Associations Need to Know about Fair Debt Collection

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Nearly all Community Associations ("Associations") must cope with owners who fail or refuse to pay their periodic assessments (also known as "Dues"). When this happens, the Association, typically acting through its property manager, may first attempt to collect the delinquent dues themselves, rather than referring the matter to an attorney. In such cases, Associations should be aware of the federal Fair Debt Collection Practices Act (the "FDCPA") and its North Carolina counterpart, the North Carolina Debt Collection Act (the "NCDCA"), both of which, depending on

the circumstances, may apply to Associations or their agents in the collection of delinquent Dues.

Both the FDCPA and NCDCA prohibit various unfair, deceptive, or abusive actions by debt collectors in the collection of consumer debts. While some of these legal requirements (those in the FDCPA in particular) may not apply to the collection activities of Associations and their property managers in most instances, Associations and their agents should nonetheless be aware of these laws or they could unknowingly commit a violation and incur liability for unfair debt collection practices.

The Fair Debt Collection Practices Act

Under the FDCPA, a "debt collector" is anyone who regularly collects or attempts to collect debts that are owed to another. And a "consumer debt" under the FDCPA includes any obligation of a person to pay money arising out of a transaction where the goods, services, or property that are the subject of the transaction are primarily for personal, family, or household purposes.

Association Dues meet the definition of "consumer debt" if the debtor is a natural person who purchased the property for which the Dues were assessed with the intention of occupying it, either full or part time, at some point in the future. Fortunately for Associations, the FDCPA almost never applies to their efforts to collect delinquent Dues because Associations are not considered "debt collectors" under the FDCPA so long as they are not attempting to collect the Dues using an assumed name. This is because an Association collecting delinquent Dues from its own members is collecting debts owed to it, rather than collecting a debt owed to someone else.

As for property managers collecting Dues on behalf of Associations, they are also not considered "debt collectors" under the FDCPA in most cases. The FDCPA specifically exempts from its applicability persons who collect debts incident to a "fiduciary obligation," and persons who acquired the authority to collect the debt

before it became delinquent. Because a property manager's collection of Dues is usually one of many duties that a property manager performs under a contract with the Association (a type of "fiduciary obligation"), and because a property manager's collection efforts normally include routine, pre-default invoicing for the same Dues that later became delinquent, a property manager typically meets one or both of these exemption criteria and, therefore, is not subject to the FDCPA.

There are, however, circumstances in which a property manager might become subject to the FDCPA. For example, a few courts have suggested that a property manager may qualify as a "debt collector" under the FDCPA if the manager's contract with the Association is so limited that the manager's main purpose is to collect delinquent debts.

In making such a determination, a court would likely consider:

- The extent to which the property manager was performing other management services, in addition to debt collection; and,
- Whether the property manager acquired the right to collect the Dues before or after they became delinquent.

If a property manager's contract with an Association is primarily limited to Dues collection, and if, at the inception of the manager's contract with the Association, the manager is handed a portfolio of delinquent Dues to collect, then it is quite possible that a court would find the property manager is a "debt collector" subject to the requirements of the FDCPA. An Association or property manager found to violate the FDCPA may incur liability for the consumer-debtor's actual damages, statutory damages, and the consumer-debtor's reasonable attorneys' fees.

The North Carolina Debt Collection Act

North Carolina's own fair debt collection statute—the NCDCA—is similar to the FDCPA in some respects. Like the FDCPA, Association Dues are likely to be considered "consumer debts" under the NCDCA so long as the property in question was purchased by an owner who is a natural person for family or household purposes. Critically, however, unlike the FDCPA, a "debt collector" under the NCDCA is *any person* engaging in debt collection from a consumer, not just persons who collect debts on behalf of others. Consequently, the NCDCA applies to both Associations and their property managers in their routine collection of delinquent Dues from a consumer.

The NCDCA prohibits debt collectors, such as Associations and their property managers, from using threats, coercion, harassment, unreasonable publication, deceptive representations, and unconscionable means when collecting consumer debts. A list of all actions prohibited by the NCDCA is beyond the scope of this article, but some examples include:

- Failing to disclose in all collection communications with a debtor that the purpose of the communication is, in fact, to collect the delinquent debt;
- Placing telephone calls to a debtor with unreasonable frequency, during the debtor's normal sleeping hours, or at the debtor's place of employment contrary to the debtor's instructions;
- Communicating with a debtor directly (other than sending routine invoices) after receiving notification from an attorney for the debtor that the attorney represents the debtor;
- Communicating the existence or details of the debt to third parties who are not authorized by law or the written permission of a debtor to receive such communications;
- Representing that a debtor may be charged additional fees or charges if such fees or charges are not authorized by the Association's documents and applicable law; and,

- Using profane or obscene language, or language that would abuse a typical person.

Again, the above is only a partial list of actions that may violate the NCDCA. Associations and property managers that violate the NCDCA may be liable for three times a debtor's actual damages sustained as a result of a violation (so-called "treble damages"), civil penalties up to \$4,000 for each violation, and, in some circumstances, the debtor's reasonable attorneys' fees.

Avoiding Violations of the NCDCA

Although most Association members and property managers would never intentionally engage in conduct that violates the NCDCA, mistakes do happen and the NCDCA imposes "strict liability" for such violations. "Strict liability" means that the Association or the manager need not *intend* to act unfairly or mislead a consumer for a violation to occur. In some cases, all that matters is whether the act in question may have had a tendency to mislead or deceive. Furthermore, in any court action by the Association to collect, consumers may go to great lengths to assert apparently harmless conduct as a violation of the NCDCA in order to create leverage against the Association.

To avoid violations of NCDCA, some good rules of thumb include the following:

- Ensure that all written communication to a debtor clearly identifies the Association as the party to which the debt is owed and, if applicable, the property manager acting on behalf of the Association to collect the debt.
- Ensure that all communications with a debtor are truthful, legally accurate, and clearly disclose that the communication is an attempt to collect a debt.
- Never disclose the debt or any of its details to third parties who are not authorized by law or the written permission of a debtor to receive the information.
- Always verify the accuracy and, if there is any doubt, the legal basis for all Dues, interest, fees, and other charges that are included in a debtor's statement of account.
- Never send any communications or commit any other acts that are specifically designed to intimidate, coerce, or shame a debtor into paying delinquent obligations, because such communications or actions are more likely to constitute a legal violation.
- Ensure that all communications with a debtor remain professional (i.e. non-inflammatory) and avoid any use of profane, obscene, or abusive language, even if the debtor does not adhere to the same standard of conduct.

The above is a non-exhaustive list of guidelines and not a substitute for legal advice in a given situation. If there is any doubt concerning the legality of a communication or action, or the legal rights of the Association or a debtor in a given situation, then the Association or property manager should seek the advice of an attorney familiar with both community association law and debt collection law.

Conclusion

The FDCPA and its North Carolina counterpart, the NCDCA, are complex statutes that impose a long list of nuanced requirements on debt collectors who collect consumer debts. While Associations and property managers may not be considered "debt collectors" under the FDCPA, in most instances, they will usually be considered "debt collectors" under the NCDCA. Both the FDCPA and NCDCA impose strict liability for any violation, so Associations and property managers should take steps to confirm that their collection practices are in compliance with both the FDCPA and NCDCA.

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