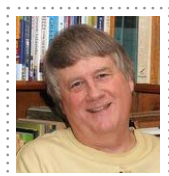


Overcoming Chargeback Hazards

By J. Robert Gardiner



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Chargeback claims against a unit owner often turn into a dispute unless clearly documented evidence and adherence to a set of chargeback procedures can convince the owner that the corporation's claim is valid. Two recent cases highlight the need to take care.

In *Beswick v. YRCC 1175*, the court held that a condo should not have charged back the cost to repair some townhouse owners' exclusive-use common elements without first advising them of the anticipated repair costs. In *Beswick*, the townhouse owners were obligated to maintain and repair the steps and interlock on the exclusive use common elements in front of their units, but the condo advised them it would be doing the replacement work at the townhouse owners' cost. The court disallowed the condo's chargeback claim because the corporation's notice did not advise

those owners of the expected cost of the work and, therefore, had not fulfilled its duty to provide reasonable notice to the owners before undertaking that maintenance work. The owners should have been given an opportunity to obtain their own quotes or do the work themselves. This case inherently imposes additional work and complications for a corporation to process its chargeback claim.

A recent endorsement in *PCC 223 v. Tung* provides another cautionary tale. In *Tung*, the judge dismissed the corporation's motion for summary judgment regarding a lien registered against the owner's unit. The lien was a chargeback to repair damage to the roof when Ms. Tung improperly removed HVAC equipment. The judge found that the condo and owner provided insufficient evidence and that it would be unfair to resolve the dispute by way of a summary judgment motion lacking clear documentary evidence. Had the condo provided more detailed evidence documenting the roof

damage and responsibility to repair this damage, the corporation might have inexpensively resolved its chargeback lien claim on its summary judgment motion.

An S. 92 Chargeback Checklist

Before exerting any chargeback claim, the condo should:

- Carefully analyze the evidence and statutory criteria to ascertain whether the chargeback is authorized by any of sections 57, 92, 98, 105 or 134 of the *Condo Act*;
- Since most chargebacks arise under s. 92 (work is done for the unit owner) or s. 105 (an insurance deductible claim), check your declaration to determine if the owner is required to maintain and repair the defective portion of the unit or common elements;
- Carefully document, photograph and assemble evidence at the outset to support the need for the work and the owner's failure to do it;
- Where the owner is unresponsive in an emergency or where damage is

continuing to occur, immediately do the work necessary to minimize damage, loss or potential injury. Issue an s. 92 notice requiring the owner to fix remaining, non-emergency damage;

- Give the owner a specific but reasonable deadline to obtain quotes from their contractor to complete the work, taking into account that extra time may be required if the declaration or an s. 98 agreement requires the board to provide its prior written consent. If so, allow time for the board

to approve the owner's scope of work, plans, drawings, specifications and choice of contractor;

- Advise the owner of any applicable declaration provisions and renovation rules (and any s. 98 criteria if common elements will be modified);

- Make sure the owner knows that if the owner does not undertake the work before the deadline, the corporation will complete the work at the owner's cost;

- Include an s. 19 notice of entry in

the s. 92 notice for a day or two after the work deadline, to allow the corporation to inspect whether the work has been completed;

- Obtain at least two quotes if the owner's work is not done by the deadline. The proposed contractor should preferably inspect the failed component and confirm in writing that the component needs to be repaired or replaced. The report should include dated photos and explain the required materials, scope, method and cost of repairs;

- Forward the chosen contractor's quote to the owner, particularly advising the owner of the anticipated costs (as now required by the *Beswick* case);

- After the contractor completes its work, send the owner a demand letter indicating a specific due date for payment deadline (at least 30 days), and attach the contractor's invoice and detailed report proving completion of its work;

- Instruct the corporation's lawyer to register a lien to collect the chargeback amount if not paid within seventy days after the due date. Standard lien procedures, notices and expiry of lien deadlines continue to apply using the date of default in payment;

- When a chargeback arises under an insurable event of damage, provisions in the corporation's declaration, standard unit by-law and insurance deductible by-law provisions can give rise to varying results affecting the corporation's ability to recover repair expenses and legal costs. Expect that the lawyer will often need to respond to a chargeback dispute by a careful analysis of the facts and all legal requirements;

- Recognizing that chargeback lien claims often become contentious, the corporation cannot expect the lawyer to guarantee the collection of its legal fees from the unit owner; however, in most cases, lien legal fees are, in fact, recovered from the owner under sections 85, 92 and 105 of the *Condo Act*.

You can overcome the hurdles often presented by chargeback liens and avoid contentious disputes, but recent cases have not made this easier. ■

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