



Common Interest Community Board

PROPOSED Guidance Document: Procedure for Consideration of Claims for Recovery from the Common Interest Community Management Recovery Fund

Adopted March 3, 2022

Effective upon conclusion of the public comment period required pursuant to § 2.2-4002.1 of the Code of Virginia

I. Background

Section 54.1-2354.5 of the Code of Virginia establishes the Common Interest Community Management Recovery Fund ("the Fund"). The section states, in part:

A. There is hereby created the Common Interest Community Management Recovery Fund, referred to in this section as "the Fund," to be used in the discretion of the Board to protect the interests of associations.

Section 54.1-2354.1 of the Code of Virginia provides the following definitions as related to the Fund:

"Claimant" means, upon proper application to the Director, a receiver for a common interest community manager appointed pursuant to § 54.1-2353 in those cases in which there are not sufficient funds to restore all funds that were or ought to have been held in a fiduciary capacity by the subject common interest community manager or to pay an award of reasonable fees, costs, and expenses to the receiver.

"Director" means the Director of the Department of Professional and

Occupational Regulation.

Section 54.1-2353 of the Code of Virginia provides for the fiduciary obligations a common interest community manager has to associations to which it provides management services, and states, in part:

A. A common interest community manager owes a fiduciary duty to the associations to which it provides management services with respect to the manager's handling the funds or the records of each association.

This section of the statute authorizes the Board to seek court appointment of a receiver in cases where a common interest community manager is not able to discharge its fiduciary duties, and states, in part:

C. If the Board has reasonable cause to believe that a common interest community manager is unable to properly discharge its fiduciary responsibilities to an association to which it provides management services, the Board may file a petition with the circuit court of the county or city wherein the subject common interest community manager maintains an office or is doing business. The petition may seek the following relief: (i) an injunction prohibiting the withdrawal of any bank deposits or the disposition of any other assets belonging to or subject to the control of the subject common interest community manager and (ii) the appointment of a receiver for all or part of the funds or property of the subject common interest community manager.

The section further outlines the duties of the receiver and the process for distribution of assets:

E. The court shall describe the powers and duties of the receiver in its appointing order, which may be amended from time to time. The receiver shall, unless otherwise ordered by the court in the appointing order, (i) prepare and file with the Board a list of all associations managed by the subject common interest community manager; (ii) notify in writing all of the associations to which the subject common interest community manager provides management services of the appointment and take whatever action the receiver deems appropriate to protect the interests of the associations until such time as the associations have had an opportunity to obtain a successor common interest community manager; (iii) facilitate the transfer of records and information to such successor common interest community manager; (iv) identify and take control of all bank accounts, including without limitation trust and operating accounts, over which the subject common interest community manager had signatory authority in connection with its management business; (v) prepare and submit an accounting of

receipts and disbursements and account balances of all funds under the receiver's control for submission to the court within four months of the appointment and annually thereafter until the receivership is terminated by the court; (vi) attempt to collect any accounts receivable related to the subject common interest community manager's business; (vii) identify and attempt to recover any assets wrongfully diverted from the subject common interest community manager's business, or assets acquired with funds wrongfully diverted from the subject common interest community manager's business; (viii) terminate the subject common interest community manager's business; (ix) reduce to cash all of the assets of the subject common interest community manager; (x) determine the nature and amount of all claims of creditors of the subject common interest community manager, including associations to which the subject common interest community manager provided management services; and (xi) prepare and file with the court a report of such assets and claims proposing a plan for the distribution of funds in the receivership to such creditors in accordance with the provisions of subsection F.

F. Upon the court's approval of the receiver's report referenced in subsection E, at a hearing after such notice as the court may require to creditors, the receiver shall distribute the assets of the common interest community manager and funds in the receivership first to clients whose funds were or ought to have been held in a fiduciary capacity by the subject common interest community manager, then to the receiver for fees, costs, and expenses awarded pursuant to subsection G, and thereafter to the creditors of the subject common interest community manager, and then to the subject common interest community manager or its successors in interest.

H. The court may determine whether any assets under the receiver's control should be returned to the subject common interest community manager.

The section authorizes the receiver to make a claim against the Fund when the common interest community manager does not have sufficient funds to pay the receiver's costs and expenses:

G. A receiver appointed pursuant to this section shall be entitled, upon proper application to the court in which the appointment was made, to recover an award of reasonable fees, costs, and expenses. If there are not sufficient nonfiduciary funds to pay the award, then the shortfall shall be paid by the Common Interest Community Management Recovery Fund as a cost of administering the Fund pursuant to § 54.1-2354.5, to the extent that the said Fund has funds available. The Fund

shall have a claim against the subject common interest community manager for the amount paid.

Subsection H of § 54.1-2354.5 of the Code of Virginia outlines the process for a claimant to make a claim for recovery from the Fund, and states, in part:

H. A claimant may seek recovery from the Fund subject to the following conditions:

1. A claimant may file a verified claim in writing to the Director for a recovery from the Fund.
2. Upon proper application to the Director, in those cases in which there are not sufficient funds to pay an award of reasonable fees, costs, and expenses to the receiver or to restore all funds that were or ought to have been held in a fiduciary capacity by the subject common interest community manager, the Director shall report to the Board the amount of any shortfall to the extent that there are not sufficient funds (i) to pay any award of fees, costs, and expenses pursuant to subsection G of § 54.1-2353 by the court appointing the receiver; or (ii) to restore all funds that were or ought to have been held in a fiduciary capacity by the subject common interest community manager, as certified by the court appointing the receiver.
3. If the Board finds there has been compliance with the required conditions, the Board shall issue a directive ordering payment of the amount of such shortfall to the claimant from the Fund, provided that in no event shall such payment exceed the balance in the Fund. When the Fund balance is not sufficient to pay the aggregate amount of such shortfall, the Board shall direct that payment be applied first in satisfaction of any award of reasonable fees, costs, and expenses to the receiver and second to restore the funds that were or ought to have been held in a fiduciary capacity by the subject common interest community manager. If the Board has reason to believe that there may be additional claims against the Fund, the Board may withhold any payment from the Fund for a period of not more than one year. After such one-year period, if the aggregate of claims received exceeds the Fund balance, the Fund balance shall be prorated by the Board among the claimants and paid in the above payment order from the Fund in proportion to the amounts of claims remaining unpaid.
4. The Director shall, subject to the limitations set forth in this subsection, pay to the claimant from the Fund such amount as shall be directed by the Board upon the execution and delivery to the Director by such claimant of an assignment to the Board of the claimant's rights

on its behalf and on behalf of the associations receiving distributions from the Fund against the common interest community manager to the extent that such rights were satisfied from the Fund.

5. The claimant shall be notified in writing of the findings of the Board. The Board's findings shall be considered a case decision as defined in § 2.2-4001, and judicial review of these findings shall be in accordance with § 2.2-4025 of the Administrative Process Act (§ 2.2-4000 et seq.).

6. Notwithstanding any other provision of law, the Board shall have the right to appeal a decision of any court that is contrary to any distribution recommended or authorized by it.

7. Upon payment by the Director to a claimant from the Fund as provided in this subsection, the Board shall immediately revoke the license of the common interest community manager whose actions resulted in payment from the Fund. The common interest community manager whose license was so revoked shall not be eligible to apply for a license as a common interest community manager until he has repaid in full the amount paid from the Fund on his account, plus interest at the judgment rate of interest from the date of payment from the Fund.

II. Issues/Concerns

Since the Fund was established by the General Assembly in 2008, the Department has never received a claim seeking recovery from the Fund. Section 54.1-2354.5 of the Code of Virginia requires a claimant to file a “verified claim” in writing to the Director. However, the term “verified claim” is not defined in Chapter 23.3 of Title 54.1 of the Code of Virginia. This is in contrast to provisions in the Virginia Contractor Transaction Recovery Act (“Contractor Recovery Act”) (§ 54.1-1118 et seq. of the Code of Virginia) and Virginia Real Estate Transaction Recovery Act (“Real Estate Recovery Act”) (§ 54.1-2112 et seq. of the Code of Virginia).

The Contractor Recovery Act and the Real Estate Recovery Act each provide a definition for “verified claim.” Sections 54.1-1118 and 54.1-2112 provide, in pertinent part:

“Verified claim” means a completed application, on a form designed by the Board, the truthfulness of which has been attested to by the claimant before a notary public, along with all required supporting documentation, that has been properly received by the Department in accordance with this chapter.

The statute also provides that upon “proper application” to the Director, that the Director report to the Board the amount of the shortfall “...to the extent that there are

not sufficient funds (i) to pay any award of fees, costs, and expenses pursuant to subsection G of § 54.1-2353 by the court appointing the receiver; or (ii) to restore all funds that were or ought to have been held in a fiduciary capacity by the subject common interest community manager, as certified by the court appointing the receiver.” However, the statute does not stipulate what information and documents must be submitted to the Director in order for a claim to be considered by the Board.

Section 54.1-1122 of the Contractor Recovery Act states, in part:

A. The claimant shall submit the following supporting documentation with the claim:

1. Copies of the contract with the regulant and all written change orders to the contract. If no written contract between the regulant and the claimant is available, the claimant may submit an affidavit attesting to the terms of the agreement, promise, or other contractual obligation;
2. All pleadings or other documents filed with the court from which judgment was obtained;
3. All orders and opinions of the court from which judgment was obtained, including the final judgment order;
4. The transcript of the debtor's interrogatories, if conducted, or if no transcript is available, a sworn affidavit affirming that debtor's interrogatories were conducted, or evidence that debtor's interrogatories were attempted if not conducted; a description of assets of the judgment debtor disclosed in the debtor's interrogatories; and a description of all steps taken for the sale or application of those disclosed assets in whole or partial satisfaction of the judgment, or a statement why no means are legally available for the sale or application of those disclosed assets, or a statement that the value of the disclosed assets is less than the cost of levying upon and selling such assets including reasonable estimates of the fair market value of the disclosed assets and costs of levying upon selling such assets;
5. A statement of the balance of the judgment remaining unpaid at the time the claim is submitted to the Department, and a statement that the claimant agrees to notify the Department of any additional payment that may be received in whole or partial satisfaction of the judgment during the pendency of the claim before the Board; and
6. Any other documentary evidence or exhibits the claimant wishes the Board to consider with the claim.

Further, the Contractor Recovery Act and the Real Estate Recovery Act outline a process for consideration of claims. Section 54.1-1122 of the Contractor Recovery Act states, in part:

B. The Department shall promptly consider the verified claim of the claimant administratively. If the claim form is incomplete or not properly notarized, or if all required supporting documentation is not included with the claim, then the Department may provide the claimant with notice of any deficiency and an additional opportunity to submit a corrected verified claim. The burden shall be on the claimant to comply with all claim requirements and to submit the necessary documentation within 12 months of the initial claim submission. Once the Department confirms that the verified claim is complete, it shall present such verified claim, along with a recommendation regarding payment, to the Board for the Board's consideration and shall notify the claimant of the Board's recommendation.

C. The Department's and Board's consideration of the claim shall be based solely on the contents of the verified claim. Neither an informal fact-finding conference pursuant to § 2.2-4019 nor a formal hearing pursuant to § 2.2-4020 shall be required, unless requested by the claimant.

Section 54.1-2114 of the Real Estate Recovery Act states, in part:

C. The Department shall promptly consider the verified claim. If it appears that a prima facie case has been made for payment of the claim, the Department shall provide the regulant with a notice offering the opportunity to be heard at an informal fact-finding conference pursuant to § 2.2-4019 of the Administrative Process Act (§ 2.2-4000 et seq.). Such notice shall state that if the regulant does not request an informal fact-finding conference within 30 days, with three days added in instances where the notice is sent by mail, the Department shall present the claim to the Board with a recommendation to pay the verified claim.

The statute further provides that upon payment of a claim from the Fund that the Board “immediately revoke” the license of the subject common interest community manager; and bars the common interest community manager from eligibility to reapply for a license until the common interest community manager has repaid the Fund. However, the statute is not clear as to what extent notice must be given to the common interest community manager prior to the imposition of these sanctions by the Board.

III. Board Guidance

The Board adopts a guidance document that establishes the following:

1. A verified claim to the Director must include the following:
 - a. A completed application, on a form designed by the Board, the truthfulness of which has been attested to by the claimant before a notary public, along with all required supporting documentation. Until such time as the prescribed form has been designed, a claimant may submit a claim in writing by letter containing the required information which includes the required supporting documents;
 - b. Name of the claimant; mailing address of the claimant; and other contact information for the claimant, such as telephone number or email address;
 - c. Name and license number of the common interest community manager that will be the subject of the claim;
 - d. The amount of the claim to include:
 - i. The amount to restore all funds that were or ought to have been held in a fiduciary capacity by the subject common interest community manager for which there were not sufficient funds.
 - ii. The amount of fees, costs, and expenses awarded to the receiver by the appointing court for which there were not sufficient non-fiduciary funds;
 - e. A copy of the court order appointing the receiver as described in § 54.1-2353(E) of the Code of Virginia;
 - f. A copy of the receiver's report to the court as described in § 54.1-2353(E)(xi) of the Code of Virginia;
 - g. A copy of the order of the court approving the receiver's report;
 - h. A copy of the order of the court awarding fees, costs, and expenses to the receiver; and
 - i. An acknowledgement from the claimant that upon approval by the Board of the claim, and prior to payment any payment of the claim, the claimant will execute and deliver to the Director an assignment to the Board of the claimant's rights on its behalf and on behalf of the associations receiving distributions from the Fund against the common interest community manager to the extent that such rights were satisfied from the Fund.
2. Upon receipt of a claim, the Board's office will perform a review of the claim to determine whether the claim meets the requirements outlined in Item #1 above. If the claim is deficient, then the Board's office will provide the claimant with notice of any deficiency and an opportunity to submit a corrected claim. The burden will be on the claimant to comply with all claim

requirements.

3. Upon determination by the Board's office that the claim meets the requirements of Item #1 above, the Board's office will notify the claimant and the common interest community manager that the claimant has made a proper application of a verified claim to the Director. The Board's office will schedule the verified claim for review and consideration by the Board at its next available meeting.
4. In accordance with § 54.1-2354.5(H)(3) of the Code of Virginia, the Board will consider the verified claim and determine whether the conditions required for payment of a verified claim have been met. To the extent the Board may require additional information in order to appropriately consider the claim, the Board may refer the claim for an informal-fact finding in accordance with § 2.2-4019 of the Code of Virginia.
5. If the verified claim meets the requirements for payment, the Board will issue an order directing payment of the claim in accordance with the limitations specified under § 54.1-2354.5(H) of the Code of Virginia. Such order will also impose revocation of the license of the common interest community manager as required under § 54.1-2354.5(H)(7) of the Code of Virginia. If the verified claim does not meet the requirements for payment, the Board will issue an order denying the claim. Such order will specify the findings upon which denial of the claim is based.

The Board's office will notify the claimant and the common interest community manager of the Board's decision. Prior to issuing payment for any approved claim, the claimant must execute and deliver to the Director the assignment of the claimant's rights as described in § 54.1-2354.5(H)(4) of the Code of Virginia.

The Common Interest Community Board will be taking public comment on this proposed guidance document. A 30-day comment period will begin on March 28, 2022.

If you wish to comment on the proposed guidance document, you may do so via the Town Hall website or you may submit written comments so that they are received no later than April 27, 2022 to:

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