

# An excerpt of an article that discusses the Fair Debt Collection Act and how it can affect the Association when contracts are not followed.

*Submitted by Lynne Rice, a homeowner in a Santa Fe, NM HOA*

## Adding Collection Fees

A reoccurring situation that our agency, as well as other collection agencies face is the request to add-on or collect the collection fees charged to the client for the collection of the account. While tempting, adding interest, service fees and collection costs to a delinquent account could result in unwanted legal attention.

Section 808(1) of the FDCPA [15 U.S.C 1692f(1)] state that the collection of interest, service fees, collection cost or other expenses to the original debt is permitted when “such amount is expressly authorized by the agreement creating the debt or permitted by law” (emphasis added). The contract that creates the debt must specify what the interest rate, late fees, services fees, or other charges are going to be and must be signed by the consumer before a creditor can legally add them on to the debt. Be careful, just because you have a contract stating collection fees will be added, doesn’t always make them collectible.

The fees being added must also be permitted by law. For example, if the consumer signs a contract stating they will be charged a \$500 collection fee if the account is referred to collections, and the state law prohibits the collection of such fee from the consumer, it won’t matter what the contract says, the creditor will not be allowed to charge that fee.

Secondly, here is a court case where late fees were overruled because of "contract specificity."

This is the full case :

[https://scholar.google.com/scholar\\_case?case=17769794733495224706&q=bylaws+late+fees&hl=en&as\\_sdt=6,33](https://scholar.google.com/scholar_case?case=17769794733495224706&q=bylaws+late+fees&hl=en&as_sdt=6,33)

## IV. Late Payment Assessment

In its second point DCW asserts that the trial court erred in finding that the bylaws allow the board to impose a late payment assessment. It contends Section 12(C)'s specific provision allowing a 6% interest charge on delinquent payments prohibits the board from implementing any other charges in relation to late payments. We agree.

It is a well-settled rule of contract construction that a court must resolve a conflict or ambiguity in a written instrument by applying specific provisions over general provisions. Tri-County

Retreading v. Bandag, Inc., 851 S.W.2d 780, 783-84 (Mo.App.1993). We have held that under this rule, a board's power to collect delinquent assessments is limited to the specific provision in a neighborhood indenture dealing with the collection of assessments regardless of its general power to bring suits under the indenture. Phillips v. Authorized Investors Group, 625 S.W.2d 917, 921 (Mo.App.1981).

Here, sections 8(A) and 12(A) of the association's by-laws do vest the board with broad discretion in levying assessments against the members. Section 8(A) of the bylaws provides: "The powers and duties hereby vested in the Board of Directors shall include the authority to make and collect assessments against members to defray the costs and expenses of the Association." Also, Section 12(A) states: "It shall be the duty of the Board of Directors to levy assessments against each member in such amount as may be necessary for the proper administration and operation of the association." However, section 12(C) provides that delinquent assessments shall bear interest at the rate of 6% per annum.

The existence of a specific provision for 6% interest on delinquent assessments in section 12(C) creates an ambiguity as to whether the broad grant of authority to levy "assessments" in sections 8 and 12(A) of the Association's by-laws encompasses the imposition of late fees on delinquent assessments. Thus, under our holding in Phillips, the Association's power to impose late fees on delinquent assessments is limited by section 12(C) which specifically regulates the interest the Association may charge for delinquent assessments. Because section 12(C) provides that delinquent assessments shall bear interest at 6% per year, and makes no provisions for late payment fees, we conclude the Association was without authority under its by-laws to impose the 10% late fee.

Therefore, we must reverse the portion of the trial court's judgment denying DCW's request for a declaration that the Association's by-laws prohibited the board from imposing the 10% late fee.

The judgment of the trial court is affirmed in part and reversed and remanded in part with instructions to declare that the Association did not have the power to impose the 10% late payment fee. On remand, the trial court shall determine DCW's claims for a refund of the 10% late payment fee under Count I of DCW's petition. In all other respects, the judgment is affirmed.

KAROHL and CRANE, JJ., concur.