

## ATTORNEY FEES

# WHO PAYS ATTORNEY FEES — AND WHEN

Every proprietary lease has a section that deals with attorney fees and who is responsible for paying them in a litigation. Many provisions are one-sided, basically saying that if your co-op has to sue a shareholder because they are in default, have stopped paying maintenance or have broken some other type of rule, it can recover the attorney fees from the person being sued. A recent court decision involving The Dakota co-op, however, called this practice into question. It said that the section in The Dakota's proprietary lease that allowed the co-op to recover attorney fees from its shareholders was "unconscionable" and therefore "unenforceable." William McCracken, partner at Moritt Hock & Hamroff, offers the following to help navigate this issue, understand the legal context and evaluate your governing documents.



**WILLIAM  
MCCRACKEN**

Partner  
Moritt Hock &  
Hamroff

## ✓ BOARD CHECKLIST

### 1. Understand the Legal Landscape

Under most proprietary leases, only the co-op (acting like a

landlord) is allowed to recover attorney fees if it wins a case against a shareholder — for example,

if the shareholder didn't pay maintenance or broke house rules. New York's Real Property Law Section 234, however, levels the playing field. It says: If the lease gives the

landlord (or co-op) the right to recover attorney fees in a dispute, then the tenant or shareholder automatically gets the same right.

- Stay abreast of court rulings that have

struck down overly broad or ambiguously drafted fee provisions as “unconscionable.”

## 2. Review Your Proprietary Lease Carefully

- Identify what your lease currently says about attorney fees.
- In classic proprietary leases (the bare-bones form from the 1970s), the attorney fees clause is usually narrow and tied to a shareholder default. Those are generally safe.
- Expanded or amended leases may attempt to broaden recoverability beyond litigation or prevailing party contexts.
- Pay special attention to amendments — language that fails to explicitly condition recovery on being the prevailing party may create legal risks.

## 3. Consult Legal Counsel Promptly

- Ask your attorney directly: “Are there circumstances under which the co-op could be entitled to legal fees even if it is not the prevailing or nondefaulting party?”
- The problem arises when boards expand or amend the attorney fees clause, for example by adding language that entitles the co-op to fees if a shareholder sues it. If that language isn’t precise, courts may view it as unfair.
- If your provisions are vulnerable, discuss potential fixes such as adding “savings” clauses to your proprietary lease, clarifying recovery only when the co-op is the prevailing party. A savings clause makes explicit that the co-op can recover attorney fees only if it is either the prevailing party or if the shareholder is in default. It is added to save the attorney fee

clause from being struck down by making clear it applies only in fair, legally defensible situations (like when the co-op actually wins).

- Weigh the costs and difficulty of amending the proprietary lease (typically requiring a supermajority of shareholder approval).

## 4. Evaluate Practical Implications

- Routine attorney letters, collection notices or fee charge-backs for nonlitigation matters may not be directly affected by recent court decisions.
- Recognize that failed or unenforceable provisions can lead to significant financial exposure, especially if banks or lenders exploit weaknesses in fee recovery.

## 5. Plan for Shareholder Engagement

- If an amendment to the proprietary lease

is necessary regarding attorney fees, prepare for the challenge of securing shareholder approval (usually 66.6%).

- Be ready to explain clearly why the amendment matters and how it protects the building financially.
- Anticipate resistance: Asking shareholders to authorize language that allows charge-backs can be a “tough ask.”

## 6. Stay Informed and Proactive

- Monitor new rulings and industry commentary, as this is an evolving area of law.
- Make review of governing documents — including proprietary leases — a standing board responsibility, not a one-time exercise.
- Prioritize fairness: Provisions seen as penalizing shareholders unfairly are at the highest risk of being invalidated by courts.