Community Association Management Insider®

DECEMBER 2010

INSIDE THIS ISSUE

Bedbug Protection for NY Condo, Co-op Buyers

The New York State Legislature passed a law requiring city landlords to disclose any history of bedbug infestation before leasing an apartment. Real estate lawyers say that even though the law was intended to address rentals, bedbug disclosure has become an issue in the sales market as well.

The law requires landlords to give renters written notice before a lease is signed indicating whether the apartment being considered, or any other apartment in the building, has been infested within the past year. Anyone renting out an apartment in a co-op or condo would also have to comply with the law.

Some lawyers representing co-op and condo buyers have already made bedbug disclosure a part of contract negotiation. Assemblywoman Linda B. Rosenthal says that she plans to introduce a separate disclosure law for co-ops and condos next year.

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FEATURE

Implement Safety Plan to Avoid CO Poisoning, Liability

With colder weather approaching, condominium associations with gas or oil heat need to worry about carbon monoxide (CO), a hazardous gas that's invisible and odorless. At least several hundred people die each year from CO poisoning, and thousands more become ill.

In one recent incident, a 24-year-old woman in Pittsburgh, Pa., was pulled unconscious from her unit after carbon monoxide had been leaking into her condominium building. Crews from the gas company determined the toxic gas was leaking from a faulty furnace.

Recognizing its dangers, more state legislatures are implementing stricter compliance standards for CO detector installations. The most recent state to begin to enforce stricter codes is Washington. The building code it adopted this year has a new provision that requires CO detectors in the immediate vicinity of the bedroom in all dwelling units. For new construction this requirement takes effect on Jan. 1,

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PREMISES LIABILITY

Four Tips to Minimize Winter Slip-and-Fall Liability

At the beginning of every winter season, many associations begin to worry about the possibility of being hit with slip-and-fall lawsuits filed by members or guests. Although it's inevitable that accidents will occur, the association can try to make the community as safe as possible for members and consequently avoid liability for any slip-and-fall accidents.

We'll give you four tips to follow, and provide a Model Letter: Remind Members of Hazardous Winter Conditions, which you can send to your members at the beginning of winter. It gives them guidelines to follow to avoid injury and asks them to be cautious.

Tip #1: Check Your State and Local Law

Ask your attorney what your state and local laws say about snow and ice removal. Some states or localities may require you to remove snow and ice—and give you a deadline for doing the job. For example, own-

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Community Association Management Insider (ISSN 1537-1093) is published by Vendome Group, LLC, 149 Fifth Avenue, New York, NY 10010-6823.

Volume 10, Issue 6

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CO Poisoning (continued from p. 1)

2011. But more important, existing dwelling units, which include condominiums, must be equipped with CO alarms by July 1, 2011.

If CO poisons your members, your condominium association could be liable, since the building's water boiler and heating systems are under its control. But properly maintaining these systems minimize the chance of CO leaks, poisoning, and lawsuits. We'll discuss possible sources of CO and present a safety plan to prevent heating system failures that might cause a CO hazard in your community.

CO Leaks and the Danger to Members

CO is a poisonous gas produced when fuel burns incompletely. Appliances like gas and oil furnaces, water heaters, wood-burning stoves, and fireplaces emit CO. But as long as the appliances are working the way they're supposed to, the gas flows into a chimney or other venting system. As a result, if the system isn't clogged, the CO produced is vented outside.

But if an appliance, chimney, or venting system isn't working or becomes clogged, CO builds up and seeps into the building, warns

REGULATIONS UPDATE

FHA Condo Recertification Due Dec. 7, 2010

On Dec. 7, 2010, the Federal Housing Administration (FHA) condominium recertification process must be completed by each individual condominium complex in order to be eligible for homebuyers to receive FHA financing in their building.

Back in November 2009, when the U.S. Department of Housing and Urban Development (HUD) issued new guidelines for FHA condo mortgages, one of the items was the recertification provision. Under the new guidelines condos must be recertified every two years for HUD/FHA approval. Condominium complexes that were approved prior to implementation of the new guidelines were given a transition period to obtain recertification. The expiration date for recertification for condominiums that obtained FHA approval prior to Oct. 1, 2008, is Dec. 7, 2010.

If your condominium community received FHA approval after Jan. 1, 2000, it is eligible for the recertification process. The recertification process for these condominiums is less involved than condominiums requiring full project approval. If your condominium received FHA approval prior to Jan. 1, 2000, full project approval is required.

To check whether or when your condominium was approved by the FHA, you can check the following Web page: *https://entp.hud.gov/idapp/html/condlook.cfm.* The search will tell you if and when your condominium received FHA approval.

Merton Bunker, a fire protection consultant.

Depending on the concentration, death from CO poisoning can occur in only a few minutes. The gas is invisible, tasteless, and odorless. If the leak occurs when members are asleep, they could lose consciousness before noticing anything is wrong. If they are awake, they may have early symptoms of CO poisoning such as headache, dizziness, or nausea, but mistake them for the flu and not seek help in time.

IMPLEMENT FOUR-STEP SAFETY PLAN

Fortunately, there are things you can do to prevent a heating system failure from causing CO poisoning, or at least to show that you took the right steps so you can reduce the risk of liability if a problem does occur. Ask your attorney and insurance broker what you might need to add to the plan.

Step 1: Inspect Heating System Annually

The first step in a CO safety plan is to have your heating system checked at least once a year by a representative of your oil or gas company. Gas and oil furnaces, water heaters, wood stoves, fireplaces, and all fossil fuel-burning appliances should be inspected. The representative should also inspect the venting system.

The service people from the company that supplies your gas and oil are the ones who should perform this annual inspection. If you hire an independent company to service your system—because the local gas or oil company has no such service—have it do the annual inspection, says Bunker. If your condominiums have fireplaces, hire a chimney cleaning company to inspect chimneys, chimney connectors, and insulation for cracks, blockages, and leaks, he adds.

The best time to inspect the heating system is in the fall, before cold weather sets in, Bunker adds. Problems may develop in the spring and summer, when heating systems aren't in use. For example, birds or rodents may build nests in the venting system. Bunker recalls an Ohio family of seven who died from CO poisoning because a bird had built a nest in a chimney the summer before.

Keep records of these inspections to prove your association has maintained its heating system in case the association is ever sued for negligence. If you don't inspect your heating system and CO leaks out, failure to inspect will be used as evidence in court to show that you were negligent. If your records show that the system is inspected annually, the association will be in a good position to defeat a possible negligence claim and a large damage award.

Step 2: Follow Inspector's Recommendations

After looking at the heating system, the person who performs the annual inspection will point out any problems and recommend corrective actions. The inspector may tell you, for instance, to make a specific repair or to perform a test to make sure the furnace is working properly.

But if you ignore instructions and an accident happens, your failure to follow advice may hurt you in court. For example, if an inspector notices any holes or cracks in the ceiling of a boiler room or some sort of obstruction over a fresh air ventilation outlet, it is best to remedy the problem right away. In one case, because of these issues, excessive amounts of CO seeped from the boiler room into units of an apartment building. Two residents died and two residents were injured as a result [Stoeckel v. Fraydun Manocherian, January 2010].

Step 3: Reinspect if Members Complain

Inspecting the heating system once a year is generally enough to detect problems and prevent leaks. But the once-a-year inspection rule does not always work. Problems can develop at any time and for any reason. Therefore, dealing with unexpected problems should be part of your safety program.

Members may complain about heating system problems—for example, sooty smoke. More ominously, they may come down with flu-like symptoms—headache, nausea, dizziness—that clear up when they leave the building. This could be a sign of CO poisoning. The association should respond to these complaints immediately and not just wait for the next annual inspection. Ask the gas or oil company or the fire department to check your heating system for CO leaks.

Step 4: Reinspect After Disaster or Damage to Building

You should also have your heating system reinspected after a major storm, fire, or other disaster damages your building. Any structural damage to your building could also

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CO Poisoning

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damage the heating or venting system. In one instance, a court found fault for CO poisoning because an apartment building owner failed to test the venting system after a tornado had severely damaged the building [Ashley v. R.D. Columbia Associates, May 1995].

Insider Source

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Search Our Web Site by Key Words: risk management; carbon monoxide; liability; maintenance

RECENT COURT RULINGS

➤ Association Liable for Sewage Backup Damage

Facts: A member sued a condominium association and its managing agent for negligence for failing to maintain and repair the association's sewer pipes in the common areas. Since 1999, the member experienced repeated plumbing backups in his unit. In 2003, the member wrote a letter to the board complaining of the persistent problem and reported that the plumber who responded to the latest call had recommended annual maintenance of the drain lines serving the building.

When the kitchen sink backed up in 2005, the member complained again, and this time the association entered into a five-year contract with a plumbing contractor to perform annual routine maintenance on the main plumbing lines. The plumbing contractor conducted a hydro-jet cleaning of the main lines, but less than two weeks later, a major sewage backup damaged the member's condominium. Sewage overflowed onto the floors of the master bathroom and adjoining bedroom. When the member eventually filed his complaint against the association several months later, the association had not done any additional repair or remediation work beyond the emergency cleanup of the unit. Both parties agreed that the unit was uninhabitable.

The trial court ruled against the member, applying the rule of judicial deference to ordinary maintenance decisions of associations. Under the rule, where an association board upon reasonable investigation, in good faith, and with regard for the best interests of the association and its members exercises discretion to select among means for discharging an obligation to maintain and repair a development's common areas, courts should defer to the board's authority and presumed expertise. The member appealed.

Ruling: A California appeals court reversed the lower court's ruling.

Reasoning: The appeals court stated that the judicial deference rule did not apply to the managing agent because it was not an association. Also, the rule did not shield the association from liability for ignoring problems. The member sued the association for a 10-year failure to undertake any maintenance of the condominium building's main plumbing lines, despite knowledge of a recurring plumbing problem in first-floor units. The association's decision was not between different methods of addressing a maintenance problem, but rather, the issue was that the association did nothing to act on the problem for such an extended period of time.

■ Affan v. Portofino Cove Homeowners Association, October 2010

➤ Investor-Member Required to Pay Special Assessment

Facts: An investor bought eight condominium units within an association, giving him approximately 18 percent ownership of the building. The investor consistently paid maintenance fees for common expenses, and he also paid special assessments as needed for roofing repairs and painting.

At one point, the board met to discuss a special assessment for replacing the siding in the building. The members who attended this meeting did not object to the proposed special assessment, and the board approved the replacement of the siding of all the units in the building.

The investor did not pay the special assessment until he was informed the association was pursuing foreclosure on his property due to his failure to pay. He then sued, alleging that the board violated the governing documents when it approved the special assessment without the prior written approval of 95 percent of the members. At trial, he testified that the complex did not need new siding and it could have benefited to the same degree by completing a few repairs and painting. Another member testified

that the investor was at the meeting during which the board discussed the special assessment. He further testified that the investor did not object and that the windows, balconies, and doors were falling off the units due to the fact that the siding was "rotted out in some places." The trial court ruled for the association, and the investor appealed.

Ruling: A Texas appeals court agreed with the lower court's ruling.

Reasoning: The governing documents authorized the association to pay maintenance and operation expenses. The association presented evidence that its board had determined that the siding was in disrepair and needed to be replaced. The court found that a rational jury could have determined that the costs associated with repairing the siding were a valid maintenance expense and the association's exercise of authority was not arbitrary or discriminatory. The governing documents did not require the members' consent to all maintenance and repair decisions.

- Bosch v. Open Pines Condominium Owners Assoc., November 2010

➤ Member Allowed to Keep Her Dog

Facts: A condominium association asked a court to declare that a member was in violation of the condominium's governing documents and community rules for having a dog. The house rule, made by the board, states, "Positively no pets are allowed in the building for any reason."

A dispute arose between the member and the association after she had bought a dog after her previous dog had died. No one disputed that the member transports the dog through the common areas in a shoulder bag, and the board conceded that no one outside of the member's apartment has heard the dog bark when it's inside her unit. Therefore, there is no issue regarding nuisance or respecting the common elements of the condominium.

At all relevant times, the condominium's bylaws have included no restrictions on pet ownership, and the bylaws further state that members "and their pets" shall not disturb other members. The board argues that it is empowered to amend the condominium's bylaws and to make regulations restricting the use of the condominiums, and that the house rule was a valid exercise of its authority. The trial court ruled in favor of the association, and the member appealed.

Ruling: A New York appeals court reversed the lower court's decision.

Reasoning: The court found that the association's governing documents required approval of 80 percent of the members at a duly-noticed meeting to amend the association's bylaws. The bylaws did not contain any prohibition against pet ownership. As a result, the member is allowed a court declaration that the house rule, completely banning pets from the condominium, is invalid.

- Board of Managers of Village View Condominium v. Forman, November 2010

➤ Association May Be Liable for Disability Discrimination

Facts: A member suffers from a paralyzed diaphragm and a thyroid disorder. These conditions limit her ability to walk significant distances without shortness of breath. The member qualifies for and uses a disabled parking permit. Also, diaphragm paralysis is a disability covered by the protections of the Fair Housing Act because the condition substantially limits one or more of the member's daily life activities.

The condominium community is set within a multi-acre campus with facilities located at significant distances from each other and the member's unit. When the member purchased a condominium within the community, she had to undergo an interview with the board. At the interview, the board approved the member's request to use a golf cart on the premises. The board, at the time, asked that she obtain a doctor's note, which she promptly provided.

She used her golf cart for five years until she received a letter from the newly elected president of the board requesting updated medical documentation. The letter threatened removal of the golf cart if the requested medical report was not received by the board within 30 days. The member provided the report, but the board didn't respond. The member claims that by failing to respond to her request for reasonable accommodation of a golf cart, they effectively denied her request. She then filed a complaint with the county office of human rights. And not long after the complaint was filed, a letter was sent out under the name "Condo Helpers" to current members criticizing the disabled member and her husband.

The member sued the association for retaliation and asked the court to order the association to allow her continued use of the golf cart. The association asked the court to dismiss her lawsuit for failing to state a claim upon which relief may be granted.

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Recent Court Rulings (continued from p. 5)

Ruling: A Florida district court denied the association's request and ordered the trial to continue.

Reasoning: The court found that allowing the member to use the golf cart to enjoy the amenities of the community would outweigh any potential injury to the association, especially since the association did not have a policy in place prohibiting the use of golf carts on the premises.

Also, the court found that filing a complaint with the human rights office for violation of the Fair Housing Act is a constitutionally protected activity, and the complaint's references to the letter shows that the necessary elements are in place for a trial to occur.

- Alley v. Les Chateaux Condominium Assoc., November 2010

Premises Liability (continued from p. 1)

ers in New York City must remove snow from sidewalks within four hours after the snow stops falling if the snow stops anytime between 7 a.m. and 9 p.m. If you don't comply with state and local laws, you could face a fine. Also, if a member is injured, your violation of the law could be used to prove you were negligent.

In other states and localities, you may have no legal duty to remove snow and ice from common areas. And if you do make efforts to remove snow and ice in these states or localities, you can't be found liable if a member injures himself.

For example, under Illinois law, anyone in charge of residential property is not liable for any personal injuries allegedly caused by a sidewalk's snowy or icy condition unless the person's acts amount to clear wrongdoing. In one case, a member sued his condo association and the management company for injuries he suffered when he slipped on an ice patch. The association had a contract with a snow removal service. The member claimed that because of the negligent removal of snow, several large patches of ice accumulated on the walkway.

The trial court dismissed the member's lawsuit, and the appeals court agreed. The court ruled that the snow removal company was an agent of the association. The court stated that, except in cases of clear wrongdoing, lawmakers had intended the law, with the immunity, to encourage people to clear their sidewalks of snow and ice. Therefore, it would be undesirable for any person or agent to be found liable for personal injury damages due to his snow removal efforts [Divis v. Woods Edge Homeowners' Assn., October 2008].

However, even in places such as Illinois, you should make sure you have a clear understanding of the law. A case that was decided this year made a distinction between efforts to remove snowfall from sidewalks and efforts made on driveways. In this case, a member sued his condominium association, the management company, and a snow removal company for injuries he suffered when he slipped on a recently plowed pathway to his garage. The association had hired the snow removal company to clear snow from the community's common areas. Included in the common areas was a driveway leading to the member's garage.

After a snowfall, the company plowed a single, narrow path up the middle of the driveway, creating a snow mound in front of the garage door that impeded access to the garage by foot or car. The company also did not salt or sand the path, nor was any warning posted regarding the conditions of the driveway. The court ruled that the state law applies only to injuries sustained on sidewalks and not those sustained on driveways. The court looked at the common definitions of sidewalks and driveways to make the distinction [Gallagher v. The Union Square Condominium Homeowner's Assoc., January 2010].

Tip #2: Don't Allow "Unnatural" Snow and Ice Accumulation

You can be held responsible for "unnatural accumulations" of snow and ice on your property, whether or not your state or local law requires snow and ice cleanup.

Under the natural accumulation rule, an association has no duty to remove or warn of the dangers of natural accumulations of snow, ice, and freezing rain, and it is not liable for injuries caused by natural accumulations of snow. A rationale for the natural accumulation rule is that natural accumulation of ice and snow is open and obvious and associations have a right to expect that members and

guests will recognize the danger and proceed carefully.

It follows that an association is liable if it creates an unnatural accumulation of ice and snow or makes a natural accumulation of ice or snow worse. An unnatural accumulation of ice and snow results from the act of a person, rather than an act of nature. To establish that there is an unnatural accumulation of ice or snow, an injured member or guest must prove that the association created the hazard or added to it, that the association knew or should have known of the hazard, and that the condition was substantially more hazardous than it would have been if it were in its naturally accumulated state.

An example of an unnatural accumulation of ice is where water drips or runs out of a gutter and freezes on an area, such as a sidewalk, where the association should know people will walk. Or if a staff member shovels snow into a large pile and it begins to melt and the runoff refreezes, this is also unnatural accumulation.

MODEL LETTER

Remind Members of Hazardous Winter Conditions

If you clean up ice and snow on your property, here's a letter you can adapt to send to members advising them of winter weather hazards. Check with your attorney about using a similar letter at your community.

Dear Member:

Winter is approaching. We're writing to remind you to take extra precautions at this time of year to avoid slipping on snow and ice. We try to make living here comfortable for you and to remove snow and ice hazards. But it's impossible for us to remove all hazards and to guarantee your safety. So we ask that you be very careful during snowy or icy weather.

Here are some guidelines to help you avoid injury:

- Stay indoors if possible when you see snow and ice accumulations.
- If a snow or ice storm strikes during the night, try to alter your morning schedule. If possible, don't hurry out before plowing has been completed.
- Be extra alert for and extremely careful of "black ice." This is a thin layer of invisible ice that can form on concrete. You might think that the sidewalk is clear, step on black ice, and slip. In particular, check for ice before walking on the pavement in the morning if you see snow on the ground or know there was precipitation and the temperature was near or below freezing during the night.
- Walk slowly and hold onto railings when walking in icy weather.

[*Insert your community's parking policy in snow conditions, e.g.:* We may ask you to move your car during a snowstorm so we can plow the entire lot.]

Please let us know if we can be of any assistance or answer any questions. We wish you a safe winter.

Yours truly,
[*Insert name of property manager*]

Tip #3: If You Remove Snow and Ice, Do It Right

Whether or not local law requires it, most associations where snow falls try to clean up snow and ice. Members do not want to live in your community if you don't clean the sidewalks and parking lots.

But if you plow, shovel, or sand, be sure you do it right. You can be liable if you don't do a good job—even if you are removing snow and ice voluntarily and not because local law requires it. Once you begin removing snow and ice, you create an obligation to do it properly, advises Ohio attorney James Bownas. If you do a bad job or stop plowing when you have been plowing all winter, you could be liable if someone falls.

Tip #4: Send Members a Letter with Safety Tips

It's a good idea to send members a letter at the beginning of winter alerting them to snow and ice hazards. If you have a community newsletter, you can include it there, either in addition to or in place of a letter to each member.

The letter should say that the association cannot guarantee anyone's safety in snow and ice and that members must be careful. Our Model Letter also gives them guidelines to follow to avoid injury. You can include additional logistical information, too. In our letter, we tell members that they might have to move their cars to facilitate your plowing. You can adapt the letter to include your specific parking policy.

Insider Source

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