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INSIDE THIS ISSUE

- Model Policy:** Inform Members About Internet Usage Rules 3
Model Letter: Warn Members About Proper Use of Internet Access 4
Recent Court Rulings 5
▶ Owner's Claims Didn't "Arise from" Speech Protected by Anti-SLAPP Statute
▶ Manager Didn't Exercise Control Over Contractor's Work

Sinkhole Swallows Condo Community

Luxury resort condominiums crumbled into a massive sinkhole a few miles from Disney World, displacing dozens of guests at the Summer Bay Resort in Clermont, Fla., some of whom had only a few minutes to escape the cracking building. The building that fell into the sinkhole is one of several at the private community, which is governed by a homeowner's association.

The HOA president was upset but grateful that there were no injuries because the building had been quickly evacuated by a security guard for the community and local firefighters. The building houses 24 units and was sheared nearly in half. The HOA president said the displaced guests were relocated to other buildings in the community. An adjacent building was also evacuated. Sinkhole experts were evaluating whether the sinkhole would continue to spread. The American Red Cross provided assistance at the scene. ♦

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FEATURE

Minimize Risks When Providing High-Speed Internet Access

Internet access is no longer an optional amenity for most Americans—it's a necessity. Members of your community may use it to run home-based businesses, socialize online, shop, pay bills, or watch TV shows and movies. With such high demand for Internet access, should your association provide this "amenity" for members or leave it to members to arrange for service individually?

It depends on several factors. It may sway prospective members who are considering whether your association is right for them. It can make the association seem modern, tech-savvy, and considerate of members' business and personal needs. But this amenity can present problems, too—possible liability for inappropriate use, extra administrative work to set up the system, and an ongoing need to solve any problems that pop up. Before providing Internet access for your community, consider the following points that can help the association protect itself from any associated risks.

(continued on p. 2)

DEALING WITH MEMBERS

Set Communication Policy for Responding to Member Requests

Some aspects of association management will never change: You'll always have to be aware of financial issues, deal with maintenance situations, hire and train staff, and work with board members to take the best possible care of the community. And there will always be a need for good and effective communication between managers and the association's board members and residents. But rapid advances in technology, namely texting and social media like Facebook and Twitter, have changed the way that managers must respond to messages and requests from the board or community members.

Because it's quicker and easier than ever to get in touch using texts and social media, those who are sending messages assume that it's quick and easy for the recipients to respond. As a result, the same technology that's a time-saver in some circumstances can actually make a manager's job harder because she must strike a balance between getting all aspects of the job done while also respond-

(continued on p. 7)

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Internet Access (continued from p. 1)**Weigh the Pros and Cons**

Whether associations cover the cost of Internet access in members' units or common areas like a clubhouse, or charge for the service as part of members' monthly assessments often depends on the type of community. "Internet access is a very popular benefit in resort communities and is generally paid for by the association as an amenity of the association," says Colorado attorney Loura K. Sanchez. "In non-resort communities, it's not as common, but when it's done it's usually paid for by the association as an amenity through assessments," she notes.

Sanchez says that it's also common for an association to have Internet access available in a common area like a clubhouse or recreation room so that owners can have access when they're in that area—but that presents some problems when it's not password protected and could be used for illegal purposes.

"There are pros and cons to providing high-speed Internet access to every member in the community," says Sanchez. On one hand, there are generally cheaper rates because it's billed in bulk and faster service because there's guaranteed income for the provider, she points out. On the downside, if service goes out for one unit, all units are affected, and service may not be equal to all units, especially when WiFi is part of the setup, she cautions.

Sanchez warns that the association will probably have to get involved in service calls and technical issues. That's because owners look at it as if the association is the provider since the association either bills members for it through monthly assessments or provides it as a benefit. So be aware that when you provide Internet access, you also add another responsibility for you and your staff.

Set Policy for Internet Usage

If Internet service is used for any illegal purposes, could the association be liable? "Yes," says Sanchez, who has seen a few associations whose Internet providers have shut down their access as a result of illegal use. "It's a difficult and expensive thing to control," she adds.

A good first step for association boards is to establish a clear Internet usage policy, Sanchez recommends. Your policy, like our Model Policy: Inform Members About Internet Usage Rules, should do the following:

Outlaw certain programs. Forbid residents from using Peer-to-Peer (P2P) file-sharing programs [Policy, par. 1]. Blocking P2P file-sharing applications (such as Morpheus, BitTorrent, Limewire, Kazaa, and Gnutella) that people use to illegally share copyrighted movies, songs, and other content can head off liability for the association.

"Blocking these P2P applications can be effective, but it involves an advanced firewall, also known as a 'network security appliance,'" notes Sanchez. "These advanced firewalls are like the ones most people have in their routers at home, but they are much 'smarter'—and

more expensive, at roughly \$1,000 to service 30 units plus an annual fee of \$300," she says.

Describe service. Specify where in the community Internet access will be available so members know where they must be in order to use the service and can plan accordingly [Policy, par. 2].

Discuss password protection. Password protect WiFi and don't offer guest access. "Associations should never offer 'open' WiFi," emphasizes Sanchez—the potential cost of a copyright infringement complaint is too high to offset the convenience. At a minimum, encryption should be enabled and the encryption keyphrase (WEP-key) should be given only to residents with the stipulation that they never share the key, she advises [Policy, par. 3].

Spell out consequences. Set strict consequences for violating the policy [Policy, par. 4]. For example, indefinitely terminate access for anyone using P2P file sharing. This is critical because P2P file sharing can result in an expensive legal claim for copyright infringement against the association and increased costs to maintain the network equipment, stresses Sanchez.

Let's say one resident who's using the association's WiFi to share movies consumes so much of the association's network bandwidth that the association gets complaints and hires a network specialist to resolve the problem. Your association would face expenses that it hasn't budgeted—and worse.

"These copyright complaints are serious and Internet service providers (ISPs) are compelled to take action and will probably permanently close accounts for asso-

MODEL POLICY

Inform Members About Internet Usage Rules

This Internet usage policy will help members understand how they should use association-provided Internet access and the consequences of improper usage. Show the policy to your association's attorney before adopting it.

SHADY ACRES COMMUNITY ASSOCIATION INTERNET USAGE POLICY

One of the many advantages of living in a community association is the opportunity to enjoy amenities provided and maintained by the association. Shady Acres will be providing high-speed Internet service for all members. Some types of Internet usage expose Shady Acres to liability. This policy sets out the way in which Shady Acres will provide this amenity, the rules members must follow when using it, and the consequences of violating the policy.

1. Members are prohibited from using Peer-to-Peer (P2P) file-sharing programs, which are used illegally to share copyrighted movies, songs, and other content. This includes [*list P2P file-sharing applications that are blocked, e.g., Morpheus*].
2. Internet access will be provided to members' units [*optional: and in [list common areas or other areas where access will be provided]*].
3. WiFi service will be password protected. An encryption key-phrase (WEP-key) will be given to members. Members should never share their key with guests.
4. Violating the policy will result in consequences including, but not limited to, the association indefinitely terminating access for any member who has used P2P file-sharing programs.

ciations that accumulate multiple complaints," warns Sanchez.

PRACTICAL POINTER: Complaints are raised under the Digital Millennium Copyright Act (DMCA), which contains a safe harbor provision that should protect associations, if several criteria are met. For answers to frequently asked questions, go to www.chillingeffects.org/dmca512/faq.cgi, which discusses the DMCA safe harbor in detail.

Send Letter to Educate Members

A policy is effective only if members know about it. After establishing a clear Internet usage policy, send a letter, like our Model Letter: Warn Members About Improper Use of Internet

Access, to members. Include the following points:

Point #1: What's prohibited and why. Emphasize the ban on using P2P file-sharing programs [Ltr., par. 1]. Many people may not know anything about or understand P2P file-sharing programs. Educate owners about how they work and their potential high costs to the association [Ltr., par. 2].

Point #2: Liability. Specify the legal consequences for the association from violations of the policy [Ltr., par. 3].

Point #3: Protection. Let members know that WiFi will be password protected and that they shouldn't share this password with guests [Ltr., par. 4].

(continued on p. 4)

MODEL LETTER

Warn Members About Proper Use of Internet Access

Here's an example of a letter you can send to your members to announce that the association will be providing high-speed Internet service for all members and, if applicable, common areas.

The letter should also include a copy of your Internet usage policy and explain to members important points that will help them appropriately use the Internet access the association provides and let them know the kind of use that's banned. It should stress that proper usage will help ensure that the whole community can enjoy this amenity and also avoid legal ramifications for the association. It should mention the consequences of violating the policy. Instruct members to provide the policy to renters with whom they sign a lease for their unit.

Before you adapt this letter to meet the needs of your community and tailor it to your specific policy, consult your attorney.

[Insert date]

Dear Member:

Shady Acres Community Association provides amenities for its members to make living in the community convenient and enjoyable. To make your experience here even more convenient, Shady Acres will provide high-speed Internet access to all members' units [optional: and in *[list common areas or other areas where access will be provided]*].

While Shady Acres is happy to make life in the community more convenient for members by providing this service, improper use of this amenity creates liability and unnecessary costs for Shady Acres. To ensure that we can continue providing Internet access for all members, Shady Acres has adopted an Internet usage policy, a copy of which is provided here for you to look over.

I'd like to tell you about some important points in the policy that you should note to help minimize any risks the association might face. Please keep in mind the important reasons behind Shady Acres' Internet usage policy, and follow it at all times.

1. Members are prohibited from using Peer-to-Peer (P2P) file-sharing programs. This includes *[list P2P file-sharing applications that are blocked, e.g., Morpheus]*.
2. P2P programs are used illegally to share copyrighted movies, songs, and other content.
3. P2P file sharing can result in an expensive legal claim for copyright infringement against the association and increased costs to maintain the network equipment. These copyright complaints are serious and our Internet service provider (ISP) will be compelled to take action, which could include permanently closing its account with Shady Acres.
4. WiFi service will be password protected. Members should not give this password to guests.
5. Violating the policy will result in consequences including, but not limited to, the association indefinitely terminating access for any member who has used P2P sharing programs.

Shady Acres' amenities help make it a great place to live, and as long as you abide by its rules for these amenities, including association-provided Internet access, I'm sure you'll be pleased with the convenience of having the association provide this service for you. Please feel free to call me at any time with questions or concerns.

Thank you for your cooperation.

Yours truly,
Jane Manager

Internet Access

(continued from p. 3)

Point #4: Violations. State the consequences of violating the policy [Ltr., par. 5].

Consider Additional Protections

You can also protect yourself by using commercial-grade WiFi equipment that provides individual authentication and logging. Associations should install commercial-grade WiFi equipment like those installed in hotels, airports, or other public buildings and make sure they offer individual authentication and connection logging, says Sanchez.

Besides the increased signal strength and security features, these systems also provide individual authentication—that is, every resident has his or her own username and password, and the ability to monitor activity and shut off a resident who's violating the policy. If you don't have individual authentication and logging, then you'll have no way to prove who's responsible.

Depending on your resources, you may be able to monitor your network. If an association currently has an on-going problem with file sharing then monitoring the network traffic is one possibility to consider. Some routers (even some home/small business Linksys models) have the ability to do connection logging, and a network engineer can usually tell if there's file sharing going on. If not, the free program Wireshark will record network traffic, but it's somewhat complicated to use and interpret the results.

"This may not be the best solution, because someone has to always be going through enormous log files to identify P2P traffic," notes Sanchez. And if you do find it, unless you have the individual authentication enabled, you won't know who is doing it. You can identify the MAC address of the offending computer and block it

from your network, but that's only a temporary solution for blocking someone who's serious about sharing.

Finally, think about using an advanced firewall with P2P file-sharing blocking. This is the only effective way to completely solve the problem, and most firewalls also include the ability to do indi-

vidual authentication and connection logging, says Sanchez. ♦

Insider Source

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RECENT COURT RULINGS

► Owner's Claims Didn't "Arise from" Speech Protected by Anti-SLAPP Statute

Facts: A homeowner in an association renovated his three-level unit in order to use the first level, a garage area, as living space. The garage had a "man door," an entryway that allows access without opening the garage door. The renovation was permitted by the City of San Diego. The association sued the owner, challenging the renovation. A trial court ruled in favor of the association. It ordered the owner to undo the changes. The owner complied with the court's order, and the city performed a final inspection and issued a certificate of occupancy.

Several years later, the association sought to assess several hundreds of dollars from each condominium owner to pay for extensive exterior renovations. In response to the association's ballot seeking a vote on the contemplated renovation, the owner provided approval, subject to the conditions that the association's renovation not interfere with his use of the garage as a living area and that he could keep his existing garage door, with the man door, with the understanding that the exterior would be updated to remain consistent with the remainder of the units. The association agreed.

Near the completion of the exterior renovation, the owner confirmed that his man door wouldn't be affected when new garage doors would be installed in all units in the community. Over the course of the next six months, he and the association negotiated a solution for a new garage facing to be installed to his unit such that the exterior of all units would appear "consistent" while allowing him to keep his man door. However, the plan was never executed.

Instead, the association contacted the city, claim-

ing that the owner hadn't fully complied with the court's order from several years before. The city said that the owner had complied and no further action was required by him. The association then complained to the city that the owner's renovation had violated light and ventilation codes. The city sided with the owner.

The owner contacted the association to make another request that the man door that had been there for years be installed pursuant to the agreement previously reached with the association. He informed the association that if the agreement wasn't carried out within 90 days, he would sue the association. The association informed the owner that the board had determined that his garage door must be consistent with all the other garage doors in the community, none of which had man doors.

The owner sued the association, alleging that the association had breached its fiduciary duties and obligations under the declaration of restrictions by: (1) providing false assurances that his garage-level unit wouldn't be interfered with as a result of the exterior renovation; (2) renegeing on the agreement to update the exterior of his garage level as agreed; and (3) making two baseless complaints to the city that cost him nearly \$50,000 to defend. The association asked the court to dismiss the case under California's anti-SLAPP statute.

Decision: A California trial court ruled in favor of the owner.

Reasoning: The association sought to have the case dismissed on the basis that the allegations against it arise out of activities protected under California's anti-SLAPP statute. The court explained that California's anti-SLAPP statute was enacted to allow early

(continued on p. 6)

Recent Court Rulings (continued from p. 5)

dismissal of “meritless First Amendment cases aimed at chilling expression through costly, time-consuming litigation.” Specifically, the anti-SLAPP statute allows a defendant to move to strike a plaintiff’s complaint if it “arises from any act of the defendant in furtherance of the defendant’s right of petition or free speech under the United States or California Constitution in connection with a public issue,” the court added.

A court considering a motion to strike under the anti-SLAPP statute must take into account two things. First, the party moving to strike must show that the plaintiff’s suit arises from an act in furtherance of the defendant’s rights of petition or free speech. If the moving party—here, the association—fails to carry its initial burden, the anti-SLAPP motion must be denied. Second, once the defendant has made a showing, the burden shifts to the plaintiff to demonstrate a probability of prevailing on the challenged claims. Only a cause of action that satisfies both prongs of the anti-SLAPP statute—that is, it arises from protected speech or petitioning and lacks even minimal merit—is subject to being stricken under the statute, the court stressed.

The association contended that the owner’s complaint arises from protected activities—specifically, the board’s action of petitioning the city regarding perceived violations relating to the garage conversion. The two petitions to the city are a protected form of speech in the nature of a petition of redress to a governmental entity, the court pointed out. As such, the association argued that ruling in favor of the owner would effectively restrain the association’s rights to petition the city regarding potential code violations in the future.

The owner argued that his complaint doesn’t arise from protected speech—that is, the association’s petitions to the city—but rather the association’s ongoing breaches of fiduciary duty and contract by refusing to honor the agreement not to let the exterior renovation affect his use of his garage level as a living area, and their subsequent agreement to have his unit be updated consistent with the other units while allowing him to retain his man door. The owner argued that since the complaints to the city are merely incidental to his claims, they don’t fall under the purview of the anti-SLAPP statute.

The court agreed that the association hadn’t demonstrated that the claims “arise from” protected

speech. A cause of action doesn’t arise from activity protected by California’s anti-SLAPP statute simply because it’s filed and an allegedly protected activity took place; nor does the fact that a cause of action arguably may have been triggered by protected activity necessarily mean that it arises from such activity, the court specified. The court noted that the main point of the owner’s claims is that the association reneged on its assurances and agreement that his garage door would be updated consistent with the other units while allowing him to retain a man door. His claims are based essentially on nonprotected activity: alleged conduct in breach of the declaration and the association’s fiduciary duty to him.

“Although the rift between the parties may have initially arisen in part due to the association’s complaints to the city regarding potential code violations relating to the garage renovation, the association’s communications with the city evidence the homeowner’s claims but do not constitute the alleged wrongful conduct themselves,” stated the court. Here, the core injury-producing conduct underlying the complaint is the association’s alleged ongoing refusal to update his garage door pursuant to the negotiations between the parties, not their communications with the city regarding potential code violations, the court determined. Accordingly, the owner’s complaint doesn’t arise from protected activity under California’s anti-SLAPP statute, the court concluded.

- Schwartz v. At the Cove Mgmt. Corp., August 2013

► Manager Didn’t Exercise Control Over Contractor’s Work

Facts: The employee of a general contractor was hired by an association to do work in the community. He was injured after he separated a two-part extension ladder owned by his employer. Using the part of the ladder that didn’t have traction feet, he gained access to a roof. On the way down the ladder, which was neither secured to the building nor being held by another person, he slipped and fell. He sued the association’s management company, which he claimed was liable for his injury because it supposedly “directed and controlled” the manner in which he performed his work. A trial court ruled in favor of the employee. The management company appealed.

Decision: A Florida appeals court reversed the trial court’s decision.

Reasoning: The appeals court pointed out that the general rule is that one who hires an independent

contractor is not liable for injuries suffered by that contractor's employees in performing their work. An exception to this general rule of non-liability occurs where the employer of an independent contractor—in this case, the management company on behalf of the association—actively participates in or interferes with the job to the extent that it directly influences the manner in which the work is performed. The employee in this case argued that the exception applies to him. The appeals court noted that the theory is that the person who exercised control of the work was in the best position to prevent the harm that occurred. "The purpose of the exception is not to spread a cost among many actors, but to allocate risk to the entity best situated to prevent the loss," it added.

To prove the requisite control over an independent contractor in the absence of a written contract,

a plaintiff must show that the employer actually exercised control over the manner in which the independent contractor's work was performed. Merely exercising a general right to recommend a safe manner for the independent contractor's employees to perform their work is insufficient to subject a party to liability. The appeals court determined that the evidence at trial demonstrated that the management company didn't participate in the details of the work to the extent necessary to make it liable to an employee of an independent contractor for the negligence of the contractor. "The subcontractor was in total control of the ladder and how it was used, so it therefore had the responsibility of preventing the risk, and bearing and distributing it," the appeals court concluded. ♦

• *Sterling Fin. & Mgmt. v. Gitenis, June 2013*

Dealing with Members (continued from p. 1)

ing quickly to digital requests or comments from the board and members.

If you feel like you're being pulled in all directions, there's a way to get back the balance you had before technology changed the rules of communication with your board members and residents: Set a protocol for your and your staff's communication obligations in a communication policy.

Benefit and Burden of Technology

Technology changes are one of the most common issues that associations must deal with now, says Seattle property management expert Paul D. Grucza. As the director of education and client satisfaction at his management company, Grucza uses new technology to his advantage but notes that it can be a benefit *and* a burden.

"From a management perspective, board members' and residents' ability for instantaneous

communication has heightened their expectations for an immediate response, whether that's practical and reasonable or not," he stresses. "From a communication standpoint, it's great that people have ways to get in touch aside from making a phone call; the difficulty is establishing boundaries for the perceived urgency of a response," Grucza says.

Previously, depending on the type of request, managers would make a phone call or send a letter that would be responded to with a return call or letter. There would be a visit to fix a problem that required personal attention. "For responding to requests or problems, there was an appropriate pace that fit the particular situation being handled; that pace has been changed—sometimes for the worse," says Grucza, a past president at Community Association Institute and the Inaugural Chair for the Association of Professional Community Managers Board of Directors.

Increasingly, there has been a sense of urgency for a return response that doesn't correlate to the priority of the actual type of request to management, and that's a problem, says Grucza. Managers need to be able to carry out tasks away from smart phones and computers. Some companies are setting email response policies to give themselves time to deal with other issues or room to be unavailable while still reassuring people that their requests won't be disregarded or ignored.

Outline Response Obligations

To avoid having to comply with artificial deadlines, Grucza recommends using a communication policy that sets out management's response obligations—namely, a time frame for getting back to those who've contacted them. The key is to clearly provide that policy to prospective residents, in particular, Grucza says. "A policy

(continued on p. 8)

Dealing with Members

(continued from p. 7)

sets the tone from the beginning of the relationship with anyone who is thinking of becoming part of the community,” he points out. Many companies are setting up email response protocols—such as directing residents that have email requests after hours to a call service—and including the protocols in materials given to people who are interested in the communities they manage. A policy for after-hours communication should state that if something isn’t an emergency, the board member or resident may leave a message and someone will reply in a timely manner the next day.

Grucza has found no pushback from such a policy if a *reasonable* expectation is set right from the beginning. “If an association is reasonable in making communication protocols and clearly pres-

ents them, reasonable people will understand the logic behind them. Just like management staff, residents and board members have lives away from smart phones and social media,” he says. A policy shouldn’t just set the expectation for when messages will be returned, it should also stress that everyone in the community is important and that by setting this policy, management is actually better able to carve out time for everyone’s needs.

Be Selectively Available

“If you constantly make yourself available, you’ll soon be expected to be available at all times, whether that’s realistic or not,” Grucza warns. Eventually, that takes a toll on the ability to get day-to-day management tasks done. While responding to a resident at, say, 2 a.m. sets a bad precedent, you can consider responding to interof-

fice messages at your convenience, even if it’s before or after normal business hours. For instance, Grucza responds to interoffice emails outside of business hours if that’s convenient for him, but returns those from clients or vendors during business hours.

Although the anticipation for an immediate response being unrealistically heightened has created some setbacks for managers initially, a communication policy is an effective way of helping members to use but not abuse the availability of constant contact and for relieving the pressure on managers. “We’re now relearning the appropriate way to communicate,” says Grucza. ♦

Insider Source

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