Community Association Management Insider®

Helping You Run Your Condo or Homeowners Association Legally and Efficiently

NOVEMBER 2015

FEATURE

Control renters' behavior by requiring members to attach an addendum to any lease they sign for their unit.

IN THIS ISSUE

PRODUCED IN CONSULTATION WITH

community ASSOCIATIONS INSTITUTE

Pass Rule Requiring Lease Addendum for Renters

Many associations allow their members to rent out their units, provided they follow association guidelines regarding how this is done. Renters can help a community by taking care of units that would otherwise sit empty, and by financially relieving a member who's having trouble paying her mortgage or assessments and fees. But the transient nature of renters creates risks for the association. It's hard to make renters have the same vested interest in the well-being of the community that members have. After all, at some point they'll move out, so what happens to the community in the future doesn't affect them. While your member may benefit from renting, on a day-to-day basis, the association has the sometimes onerous task of controlling renters' behavior, which can range from being a nuisance to being downright dangerous.

You can control the behavior of renters in your community by creating a lease addendum containing protections for you with regard to renters, and passing a rule requiring members to attach the addendum to any lease they sign for their unit.

Members Must Use Attachment

To get members to attach the association's lease addendum to the primary lease they sign with renters, pass a rule requiring them to do so. Your rule needn't be long, and in fact, shouldn't go into detail about what the addendum should say. That's best left for the addendum itself. By keeping the rule basic, you'll have the flexibility to change the addendum from time to time without having to pass a new rule. Since the association can't anticipate everything that could happen, it will probably want to change its addendum as new situations arise.

Your rule should simply say that any member who rents his unit must have the renter sign, in addition to the primary lease, the lease addendum provided by the association. And your rule should say that the association can change the terms of its lease addendum from time to time. Ask your association's attorney about adapting this language for your rule:

(continued on p. 2)

Addendum for Renters

(continued from p. 1)

Model Language

For any Unit being leased or any lease renewal occurring after the effective date of the Rule, Members must attach to the Primary Lease a Lease Addendum, signed by both the Member and the Renter, in the form provided by the Association, as amended from time to time, and incorporated herein by reference. Members may include in the Primary Lease any provisions they desire, provided such provisions do not contradict the Lease Addendum, Declaration, Bylaws, other governing documents of the Association, or applicable law or public policy.

Include Six Key Items in Lease Addendum

A comprehensive lease addendum should cover these six important items:

Renter must follow association's governing documents. Your lease addendum should hold renters to the same standard of behavior expected of members. You want renters to know that they must follow the association's rules and other requirements of the governing documents. So say in your lease addendum that the renter must abide by all of the association's governing documents, including its declaration, bylaws, and community rules.

To ensure that the renter knows the rules, require the member to attach the governing documents to the lease, and say in your addendum that the renter acknowledges that he has received copies of those governing documents. Finally, say that the renter's failure to abide by the governing documents will constitute a lease violation.

(continued on p. 3)

Editor: Elizabeth Purcell-Gibney, J.D. **Executive Editor:** Heather Ogilvie **Production Director:** Kathryn Homenick **Director of Operations:** Michael Koplin

COMMUNITY ASSOCIATION MANAGEMENT INSIDER [ISSN 1537-1093 (PRINT), 1938-3088 (ONLINE)] is published by Vendome Group, LLC, 216 East 45th St., 6th Fl., New York, NY 10017.

Volume 15, Issue 4

SUBSCRIPTIONS/CUSTOMER SERVICE: To subscribe or for assistance with your subscription, call 1-800-519-3692 or go to our website, *www.CommunityAssociationManagementInsider.com*. Subscription rate: $370 for 12 issues. **TO CONTACT THE EDITOR:** Email: *egibney@vendomegrp.com*. Call: Elizabeth Purcell-Gibney at (212) 812-8434. Fax: (212) 228-1308. **TO PLACE AN ADVERTISEMENT:** Please contact Heather Ogilvie at *hogilvie@vendomegrp.com* or call (212) 812-8436.

Addendum for Renters

(continued from p. 2)

Model Language

Renter agrees to abide by all provisions of the Association's Declaration of Covenants, Conditions, and Restrictions; Bylaws; Rules and Regulations; and all other applicable governing documents (the "Governing Documents"). Renter acknowledges receipt of a copy of the Governing Documents. Renter further acknowledges that Renter's failure to abide by the terms of the Governing Documents shall constitute a material breach of this Lease Addendum and the Lease.

Lease addendum takes precedence over primary lease. Say in your lease addendum that if there's a conflict between the terms of the primary lease and the lease addendum, the lease addendum's terms will take precedence. Doing so will help avoid misunderstandings that tend to create unhappy renters, who are more likely to cause problems in the community. For example, say a renter's lease states that he can keep as many pets as he wants, but your lease addendum says that renters can keep only one pet. Making it clear up front that the terms of the lease addendum take precedence over the terms of the primary lease should prevent the renter from arguing that he should be able to keep as many pets as he wants. And saying that the lease addendum's terms will take precedence over those of the lease should dissuade renters in general from bringing lawsuits to enforce their primary leases, which will save you time and money.

Model Language

The parties agree that all the covenants and agreements contained in this Lease Addendum shall be deemed to be part of the Primary Lease and incorporated entirely therein as if included originally. The parties further agree that, in case of a conflict between the terms of this Lease Addendum and the Primary Lease, the terms of this Lease Addendum shall take precedence.

Governing documents take precedence over lease. Say in your lease addendum that if there's a conflict between the lease and governing documents, the governing documents will take precedence over the entire lease—including both the primary lease and lease addendum. Doing so will help avoid disputes between the association and the renter. For example, say the primary lease says that the renter can use the association's swimming pool at any time of day, but the association typically closes the pool from 3 p.m. to 4 p.m. for lap swimming. By clarifying in your lease addendum that the governing documents take precedence over the lease, the renter won't be able to argue that it should be able to use the pool during the hour that the pool is typically closed.

Model Language

The Lease is subject to and consistent with the provisions of the Governing Documents, as the same may be amended from time to time. In the event of any inconsistency between the Lease and the provisions of the Governing Documents, the provisions of the Governing Documents shall take precedence.

Common elements can be used by renter or member, but not both. Members who rent out their units sometimes try to continue using the association's common areas, such as the fitness room or parking lot. But if the renter also uses the common areas, the association may face overcrowding in those areas and complaints from other members. To avoid this problem, say in your lease adden-

(continued on p. 4)

Addendum for Renters

(continued from p. 3)

dum that the member is giving the renter his right to use common areas. Also say that the association has the right to bar the renter from using the common areas for any reason that it could bar the member from using them. That way, if the renter violates association rules, the association could bar him from using the common elements. You can adapt and use this language:

Model Language

Member/Landlord hereby transfers and assigns to Renter for the term of the Lease any and all rights and privileges that Member/Landlord has to use the Association's common elements, including, but not limited to, the use of any and all recreational facilities and amenities. Member/Landlord and Renter acknowledge that the Association reserves the right to withhold access to common elements amenities from Renter for any reason that it would, under the terms of the Governing Documents, be authorized to refuse a member such access, including Renter's failure to comply with any of the provisions of the Governing Documents, or Member's/Landlord's failure to pay monthly assessments when due.

Renter must register car with association. It's important for you to maintain control over your association's parking lot with regard to rentals. Otherwise, you could face a variety of problems. For instance, if members see unfamiliar cars in the parking lot, they may complain that you're not maintaining adequate security. Or if a renter parks more cars than the number of cars allowed for the unit he's renting, or if the member continues to park in the association lot, the parking lot could become overcrowded.

So say in your lease addendum that the renter must register his car or cars with the association. And require the renter to provide the association with a copy of his lease when registering his car(s). That way, you'll have proof that the person is really a renter, and not just someone to whom the member rented his parking space. Also, say that the renter must follow the association's parking rules. And either attach a copy of those rules to the addendum, or refer the renter to the section of your governing documents where the rules are published.

Model Language

Renter shall have the right to park [*insert #*] automobile(s) in the Association parking lot. All vehicle(s) must be registered with the Association, and must have a parking permit affixed to its [*insert area of car on which permit should be affixed*]. Before getting a permit to park the vehicle(s) in the Association parking lot, Renter must provide an executed copy of the Lease and Lease Addendum to the Association. Renter must follow all of the Association's parking rules, which can be found at [*insert citation to parking rules in governing documents*], and is subject to the penalties stated therein for all violations.

Association authorized to enforce lease. It's essential that your lease addendum give the association the authority to enforce the lease against the renter in the event the member doesn't do so. Members sometimes don't care if their renters are violating association rules or otherwise being a problem, as long as they are getting their monthly rent check.

So say in your lease addendum that if the renter violates his lease—including violating the association's governing documents—the association will notify

(continued on p. 5)

Addendum for Renters

(continued from p. 4)

the member of the violation and the member must resolve the problem within a set period of time, such as 30 days. Also say that if the member can't resolve the problem within that time, the member must evict the renter. And say that the member may not settle any such eviction case without the association's approval.

In addition, say that the association is appointed as the member's "attorney in fact," meaning that it can enforce the lease against the renter in the member's place if the member doesn't take action against the renter.

Try to strengthen your hand by saying that the association is a "third-party beneficiary" of the lease, meaning that it has a legitimate interest in the lease even though it's not a party to it. Many courts give greater weight to the association's needs when they see this language.

Finally, say that if the association incurs any costs (including attorney's fees) in enforcing the lease and/or governing documents, or evicting the renter, that amount will be assessed against the member's unit and will be a lien on the unit.

Model Language

In the event of a default by Renter in the performance of the terms of the Primary Lease or this Lease Addendum, or of the Declaration, Bylaws, and/or Rules and Regulations of the Association, then, in addition to all other remedies that it may have, the Association or its representative shall notify the Member/Landlord of the default(s) and demand that they be corrected through the Member's/Landlord's efforts within 30 days after such notice. If the default(s) is not corrected within the 30-day period, the Member/Landlord shall immediately thereafter, at his or her own cost and expense, institute and diligently prosecute an eviction action against Renter. The eviction action shall not be settled without the prior consent of the Association or its representative. In the event the Member/Landlord fails to fulfill the foregoing obligation, the Association shall have the right, but not the duty, to institute and prosecute an action as attorney-in-fact for the Member/Landlord, at the Member's/Landlord's sole cost and expense, including all legal fees incurred. The Member/Landlord hereby irrevocably names, constitutes, appoints, and confirms the Association as his or her attorney-in-fact to take all such actions as it deems appropriate on his/her behalf. All costs and attorney's fees incurred by the Association to enforce the terms of the Primary Lease or of this Lease Addendum, or of the Declaration, Bylaws, and/or Rules and Regulations of the Association, or to evict Renter pursuant thereto, will be assessed against the Unit and the owner thereof, and shall be deemed to constitute a lien on the Unit Involved. The Association may enforce collection of the lien in the same manner as an assessment. Both the Member/Landlord and Renter acknowledge that the Association is a third-party beneficiary of the Primary Lease and Lease Addendum. ♦

RISK MANAGEMENT

Show You Took Reasonable Care to Avoid Common Area Injuries

Safety hazards in the community you manage can result in, at best, minor accidents and, at worst, personal injury lawsuits. You and your staff should have a risk management strategy set up that covers all of the issues that could lead to liability for the association. The common areas in your community or condominium building are rife with risk—especially high-traffic common areas, which are used by not just members, but also visitors, and can get wear and tear or damage that could cause slips, trips, and falls. That's why it's important to inspect them at regular intervals for safety hazards that can be eliminated.

Your maintenance staff members are perfect for this job. After all, they spend a lot of time in the common areas anyway, cleaning or making repairs, so they are the most likely to notice things that are amiss, such as a broken step or slippery surface that could lead to a fall.

An effective way to make inspections a no-hassle task is to conduct them in 10-minute sessions and to have a variety of people—to get the benefit of different perspectives—help.

A checklist, like our *Model Checklist: Inspect Common Areas for Safety Hazards,* can focus the inspector's attention on important items, make sure that none are missed, provide a record of repairs that were made, and document when repairs were made.

The checklist can also be used to show a court that you took reasonable care by inspecting your common areas regularly for hazards, and correcting any you found. Keep the completed checklists on file. ♦

➤ ➤ ➤ *Model Checklist follows* ➤ ➤ ➤

COMMON AREA INSPECTION CHECKLIST

DATE _____ **INSPECTED BY** _____

ENTRANCE AREAS & HALLWAYS

a. Carpets tacked down/floor tiles in good condition?
❑ Yes ❑ No
Date repaired _____
Comments _____

b. Lights working? ❑ Yes ❑ No
Date repaired _____
Comments _____

STAIRWAYS

a. Steps free from wear and in good repair?
❑ Yes ❑ No
Date repaired _____
Comments _____

b. Free from trip hazards (e.g., slippery, uneven)?
❑ Yes ❑ No
Date repaired _____
Comments _____

c. Clear of obstructions (e.g., bicycles)? ❑ Yes ❑ No
Date repaired _____
Comments _____

d. Railings in good repair? ❑ Yes ❑ No
Date repaired _____
Comments _____

e. Lights working? ❑ Yes ❑ No
Date repaired _____
Comments _____

EMERGENCY EXITS

a. Unlocked from the inside and free of obstructions?
❑ Yes ❑ No
Date repaired _____
Comments _____

b. Well marked? ❑ Yes ❑ No
Date repaired _____
Comments _____

c. Emergency lights working? ❑ Yes ❑ No
Date repaired _____
Comments _____

FIRE PROTECTION EQUIPMENT

a. Smoke detectors working? ❑ Yes ❑ No
Date repaired _____
Comments _____

b. Fire extinguishers inspected and accessible?
❑ Yes ❑ No
Date repaired _____
Comments _____

OTHER

a. Item: _____
Date repaired _____
Comments _____

b. Item: _____
Date repaired _____
Comments _____

RECENT COURT RULINGS

➤ Arbitration Award in Favor of Association Wasn't Appealable

FACTS: A corporation owned several units in a condominium building governed by an association. After the corporation stopped paying assessments for its units, the association resorted to arbitration, in accordance with its bylaws. A representative of the corporation didn't attend the arbitration meeting and didn't contest the decision of the arbitrator in favor of the association. The arbitration award was confirmed by the court. Both after the award and the confirmation of the award, the corporation was sent notices by email and by certified mail. After the confirmation, the corporation appealed the arbitration award.

DECISION: The Superior Court of Pennsylvania ruled in favor of the association.

REASONING: The court "quashed"—that is, rejected—the corporation's appeal, which would have reopened the arbitration award. The court noted that the award of an arbitrator in a nonjudicial arbitration is binding and may not be vacated or modified unless it's clearly shown that a party was denied a hearing or that fraud, misconduct, corruption, or other irregularity "caused the rendition of an unjust, inequitable, or unconscionable award." But here, there was no evidence of such an irregularity. And although the corporation claimed that it hadn't known about the arbitration hearing to begin with, the court pointed out that the corporation was aware of the ongoing dispute with the association regarding the nonpayment of assessments. There was no evidence that the corporation had been denied a hearing. Moreover, there was a 30-day window between the arbitrator's award and the confirmation of the award during which the corporation could've challenged the decision, but it didn't.

- Cigar Factory Condo Assn. v. Cigar Factory, October 2015

➤ New Unit Owner on Hook for Existing Special Assessment Debt

FACTS: Condominium unit owners owed several thousand dollars in unpaid assessments, including their share of the cost of a special assessment. The special assessment could be paid by unit owners in a lump sum or split into a several-year monthly payment plan. The unit owners had opted for the payment plan. The unit went into foreclosure and a board member bought it. Under the bylaws, outstanding amounts for unpaid assessments were transferable to new unit owners. The member refused to pay the monthly special assessment amounts. The association sued her. The member asked a circuit court for a judgment in her favor without a trial. The circuit court granted her request. The association appealed.

DECISION: An Illinois appeals court reversed the circuit court's decision.

REASONING: The appeals court determined that the lower court had erred in ruling in favor of the member as to her liability on the monthly special assessment

(continued on p. 9)

Recent Court Rulings

(continued from p. 8)

charges. She was liable for paying the remainder of what was owed for the special assessment, even though the special assessment payment plan had originated prior to her purchase of the unit. That was because the member had failed to extinguish the special assessment lien on the property by not paying any portion of that special assessment upon purchase of the unit. Therefore, she was required to continue the payment plan. A board resolution before the sale of the unit provided that "upon the sale of a unit during the life of the term of the association's special assessment payment plan, the buyer is permitted to assume the special assessment in lieu of the lump sum payoff of outstanding loan indebtedness." But a buyer couldn't fail to make a lump-sum payoff, and then not make monthly payments either. Accordingly, the board was entitled to recoup both the special assessment charges and attorney's fees.

- Board of Managers of Cornell Columbian Condominium Assn. v. Smith, September 2015

➤ Association Management Company Wasn't 'Debt Collector'

FACTS: The management company for a homeowners association sent a letter to a homeowner who was delinquent after failing to make several monthly payments to the association. The letter was a notice that the association, pursuant to its governing documents, held a lien on the homeowner's property in the amount of the past-due payments. The notice was written on association letterhead, and had the association's name printed above the signature line. The letter was signed by the president of the management company under "Power of Attorney" for one of the association board members. The notice stated: "This is an attempt to collect a debt and any information obtained will be used for that purpose. This communication is from a debt collector."

The homeowner filed a class action lawsuit against the management company, alleging that the company had violated the Federal Debt Collection Practices Act by failing to make the required disclosures regarding his debt to the association under the act. The management company and the homeowner each asked a trial court for a judgment in its favor without a trial.

DECISION: An Indiana trial court ruled in favor of the association.

REASONING: The management company argued that it wasn't bound by the act's requirements because it is not a "debt collector" under the act. The act defines a debt collector as "any person who…regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." The act excludes from the definition of "debt collector" any person who tries to collect money owed to himself and any person who tries to collect a debt that "was not in default at the time it was obtained by such person."

Generally, a property management firm "obtains" the debts owed to the association or lessor for whom it works when it becomes the association's or lessor's agent, said the court. Thus, a management firm is not a "debt collector" unless the given debt was in arrears when the firm assumed its role with the association or lessor, it explained.

(continued on p. 10)

Recent Court Rulings

(continued from p. 9)

Here, the management company became the association's property manager in 2010. At that time, the homeowner was current on his association fees. Given that the homeowner wasn't in arrears when the management company "obtained" his debt, it isn't a "debt collector" under the act, the court determined.

The homeowner didn't refute that; instead, he argued that after he became delinquent on his association dues, the management company "crossed the line from servicing the account, to engaging in conduct that is debt collection." His statement is correct to the extent that the management company was attempting to collect a debt from him, said the court. But the express purpose of the act is to "eliminate abusive debt collection practices by debt collectors." The exclusions from the definition of the term "debt collector" demonstrate Congress's intent to distinguish between "creditors, 'who generally are restrained by the desire to protect their good will when collecting past due accounts,'" and "debt collectors, who may have 'no future contact with the consumer and often are unconcerned with the consumer's opinion of them,'" the court stressed.

Previous case law makes it clear that those excluded from the definition of "debt collector" fall outside the act, said the court. Therefore, because the management company isn't a "debt collector" under the act, its actions need not conform to the FDCPA's standards, the court concluded. ♦

- Gonon v. Community Management Services, Inc., September 2015