Helping You Run Your Condo or Homeowners Association Legally and Efficiently

FEBRUARY 2017

FEATURE

Avoid getting dragged into member-to-member disputes about accident-related unit damage.

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Use Governing Documents to Determine Responsibility for Multiple-Unit Damage

The nature of condominium buildings—that is, units stacked on each other—means that occasionally an accident in one condo will affect the adjacent unit. Flooding is a common cause of damage to multiple units, and it can happen from appliances like dishwashers and washing machines that leak. So when an adjacent unit is affected by a leak in the original unit, who is responsible for fixing the damage? Does the association have a duty to get involved?

Avoid Becoming Embroiled in Dispute

These situations typically are unit-owner-to-unit-owner disputes. However, the situation can be complicated depending on the exigencies of the situation, which may include the possibility of damage to the common elements between units. It's important to be aware of the insurance issues that can become part of the equation.

Master policy. A key factor in disputes over damage is the association's "master policy." Although an association is generally not responsible for damage to units from other units or to the common elements (unless, of course, the damage occurs due to the negligence of the association), owners may well have a claim against the association's master policy of insurance for any damage done to their units—no matter who is at fault.

However, it's not just the master policy that comes into play. Suppose that, in a leaking washing machine scenario, the hose break in that appliance causes damage to drywall, paint, flooring, and furniture in the other two units adjacent and some damage to a common element electrical circuit running between the units. Assume that the association had no prior notice of a defect with a common element for which it was responsible. In this situation, there would be no negligence on the part of the board. There may not even be negligence on the part of the owner whose hose burst.

Under these circumstances, the master policy will typically pay for

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Multiple-Unit Damage

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the damages to the units and common elements—but not for damage to personal property within units. Also, the master policy has a deductible amount that will have to be paid by someone.

Condo insurance. HO-6 insurance policies—an individual insurance policy that covers the personal possessions, structural improvements made to a unit, and additional living expenses of a condo owner in case of fire, theft, flooding, or other disasters and items excluded from the association's master policy—are another consideration. If the owners each have HO-6 policies covering their possessions, the insurers will work out among themselves which will pay what portion of those damages. In addition to insuring personal property inside the condo unit, an HO-6 policy with a "building coverage" rider may cover special assessments by the association for rebuilding if there are insufficient funds to cover a community's property damage deductible or exclusions in the master policy.

If some damages remain unpaid by the various insurers involved, one or more of the owners may have to pay the remainder. If there was no negligence, there may still be a provision in the governing documents assigning responsibility to the owner of the unit in which the problem originated. If there is no such provision, each owner may have to bear the remaining cost of the damage to his unit.

Remain Neutral No Matter What

Despite the role that insurance plays in accidents that affect multiple units, there could be some initial panic on the part of the affected owners and demands made upon the association to "do something" about the problem. You, your

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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 16, Issue 8

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 Stone at *hstone@vendomegrp.com* or call (212) 812-8436.

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Multiple-Unit Damage
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management staff, and the board should refrain from the knee-jerk reaction of calling contractors in and expending common funds. It's easier not to spend them in the first place than to have to recover them later. If the board or management simply must facilitate the necessary immediate repairs, the owners should be put in touch with a contractor that can do the work—but the contractor should be advised up front that it won't be paid by the association. The contractor may rightfully require payment from each unit owner, who, in turn, will have to get reimbursed by the appropriate insurer.

Use a No-Fault Provision from the Outset

To protect other owners from an uninsured negligent owner, the governing documents should contain a "no-fault" provision like our *Model Clause: Don't Let Uninsured Member's Mistake Affect Other Units.* If yours don't include this protection, consider amending them so that the owner of a unit from which a problem originates must pay for all damages to his unit, other units, and the common elements caused by the incident. Although the association (or other members who suffer damages) may still have to sue the negligent member, the association won't have to prove negligence; just that the damage was caused by something in the unit.

PRACTICAL POINTER: It's important to note that master policies usually cover unit owner negligence, so a no-fault provision may come into play only for the deductible or for specific types of losses not covered by the policy. ♦

MODEL CLAUSE

Don't Let Uninsured Member's Mistake Affect Other Units

Ask your association's attorney about tailoring this clause so you can amend your governing documents if your community doesn't have a "no-fault" provision. It requires an owner of a condo unit from which a problem originates to pay for all damages to his unit, other units, and the common elements caused by the incident.

NO-FAULT PROVISION

In the event of an insured loss to a Unit or common element under the Association's master casualty insurance policy, if the loss is caused by anything in a Unit or anything deemed to be part of the Unit, the Owner of said Unit shall bear the responsibility for all costs, including the insurance deductible, without regard to the negligence of the Unit Owner or his or her tenant, guest, or invitee. In the event there are contributing sources to the damage, all costs, including the payment of the insurance deductible, shall be apportioned as determined by the Board of Directors, in its sole discretion. The amount of the insurance deductible owed by a Unit Owner shall be charged as an Assessment and may be collected in the same manner as an Assessment. If the loss originates from the common elements, the insurance deductible shall be paid by the Association as a common expense. If the amount of damage does not meet the deductible, no claim shall be filed against the master casualty insurance policy, even if the loss is an insured loss, and the costs shall be apportioned as described hereinabove.

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RECENT COURT RULINGS

➤ Evidence Showed Association Removed Member's Trees

FACTS: The owner of property in a planned community sued the homeowners association under Oregon's timber trespass statute, after several trees were cut down and removed from his land without his permission. The association claimed that an adjacent golf club with an easement on the owner's land had removed the trees. A trial court determined that the association was responsible, it ruled in favor of the owner, and it tripled the damages award that the association had to pay, which was allowed for violations of the statute.

DECISION: An Oregon appeals court upheld the lower court's decision.

REASONING: The association argued that the evidence was insufficient to permit the jury to find that the HOA, and not the golf club, directed the removal of the trees. In response, the owner argued that the evidence proved that the HOA was responsible.

The appeals court agreed with the owner, because the HOA was the sole recipient of a fire reduction grant from the county that suggested that the trees be removed; the HOA coordinated the tree removal; and the HOA, not the golf club, paid the contractor who cut down the trees with grant funds from the county. In addition, there is evidence that the HOA, not the golf club, communicated with the owner about the tree removal, including evidence that a representative of the HOA called about the tree removal and sent several written communications, including a letter from the HOA president explaining that the tree removal was allowed by the HOA's governing documents. ♦

- Cohen v. Awbrey Glen Homeowners Association, Inc., December 2016

Q&A

Using Management Staff to Uncover Drug Operations

Q One of my management staff members suspects that a homeowner in our planned community is manufacturing illegal drugs. I'm concerned about the implications of illegal drugs of any kind in our community, and that the association could somehow be in trouble for this activity. What can I do going forward to get a handle on this type of situation?

A The best thing you can do long term is train your staff to recognize these drug operations so you can get a jump on shutting them down. With increasing frequency, methamphetamine production operations are routinely discovered across the country. And you might think that these drug operations are most common in low-rent communities, but that's not always true. A shock-

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Q&A
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ing number of so-called "meth labs" have been discovered in planned communities or condominium buildings, even those dubbed "luxury" communities. Drug manufacturing can mean big profits for private individuals. But illegal drug activity, especially drug manufacturing in make-shift meth labs in units at your community can be dangerous, even creating health issues with lasting effects. In some cases, homes that were the site of drug manufacturing have had to be torn down after their building materials had becoming toxic beyond remediation.

Don't let your association or management company become liable for health issues that come up, which can happen even if you had no idea that drugs were being used, distributed, or manufactured in your community. Here's what to do:

Put Maintenance Staff on Alert

Because your maintenance staff are occasionally inside members' units for repair calls, they're the best people to detect potential illegal drug activities there. But they may not know what to be on the lookout for. To train your staff appropriately, do the following:

Tell staff to look for warning signs, not search for evidence. You don't want to suggest that your maintenance staff should use an opportunity inside a member's unit to actively search for signs of illegal drug activity, because that can be viewed as an invasion of privacy and can open you up to liability.

Instead, tell staff that they should be on the lookout for signs of illegal drug activity in "plain view," but that they shouldn't open drawers or closets or look under beds or anywhere else where a member would have a reasonable expectation of privacy. Explain that items in plain view are things that can be seen without having to conduct an actual search for them—for example, a scale and bags filled with a white powdery substance on a kitchen counter.

Distribute a list of warning signs of drug sales and manufacturing. Include these telltale signs of drug sales or manufacturing in a unit:

- **Blacked-out windows.** People committing crimes in their homes often put up material such as tin foil or black trash bags on their windows to prevent others from seeing in.
- **Grow lights.** If a unit is filled with special high-intensity lights, known as "grow lights," this can be a sign that the person living there is growing marijuana.
- **Odors.** Almost all drug manufacturing produces an odor. Sometimes the odor can be extremely foul-smelling, and even dangerous. The growth of marijuana plants inside a unit gives off a strong, sweet-smelling odor. The manufacture of methamphetamine creates a very strong, pungent odor, described as similar to urine, ether, or ammonia. And the heating of crack cocaine often produces a smell similar to the smell of burning electrical wires.
- **"Chemistry" setups.** Methamphetamine and other drugs produced in crystal form are usually produced with what looks like an old chemistry set. Maintenance staff should look for items such as glass beakers, hot

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Q&A

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plates, glass cookware, funnels, coffee filters, and plastic tubing. These items will often be set up on bathroom or kitchen countertops, near sources of water and drains.

- **Large amounts of chemicals.** Large amounts of chemicals, such as antifreeze, camp stove fuel, gasoline, or ether, in a unit may indicate that illegal drugs are being manufactured there.
- **Many packages of cold pills.** Pills containing ephedrine, such as cold pills, are used to manufacture methamphetamine. One or two packs of cold pills lying around a member's unit are probably normal. But if tens or hundreds of packs are lying around, the owner could be using them to produce illegal drugs.
- **Baby food jars with milky liquids inside.** This is an example of how a common household item can be used in connection with the manufacture of illegal drugs. People who produce crack cocaine often cook and store the drug in baby food jars.
- **Large quantities of baking soda.** This is used to make crack cocaine, and small, empty bags of junk food. These are often used to surreptitiously store drugs.
- **Weight scales and packaging materials.** A common sign of drug selling is the presence of a weight scale and large amounts of small plastic bags for packaging drugs.
- **Plumbing alterations.** Sometimes, someone setting up a drug-manufacturing operation will remove the fixtures in a sink or even remove a toilet to use the water pipes. So exposed pipes in a kitchen or bathroom may be a sign that illegal drugs are being manufactured in the unit.
- **Deadbolt locks or hasps on doors.** The installation of a deadbolt lock or a hasp on a door in the unit may be a sign that illegal drug activity is occurring there.
- **Stained walls, windows, or carpets.** The manufacture of drugs such as methamphetamine can leave mustard-colored stains on walls and ceilings and dark brown or orange stains on carpets. And it can leave burgundy-colored stains on aluminum windows.

Take the Next Steps

Tell your maintenance staff to immediately report to management any suspicions they have that an owner is engaging in illegal drug activity in his unit. It's also critical to consult the association's attorney before taking any action. Although the presence of these signs implies that illegal drug activity might be occurring in a unit, you shouldn't jump to conclusions if your staff informs you that they noticed any of them. Keep in mind that there could be perfectly legitimate explanations for the presence of any of these signs in a unit. So if your staff alerts you to any of the signs mentioned above, speak with your attorney and with local law enforcement before taking any direct action. ♦

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RISK MANAGEMENT

Tread Carefully When Revealing Information About Former Employees

It's typical for the prospective new employer of one of your former employees to call for a reference. If the employee in question was a stellar part of your management team, it's a no-brainer. A glowing report will most likely be appreciated by the former employee. But what should you do when you're asked for a reference for someone who was not a good employee, or worse, was fired?

If you're not careful in your statements about former employees, you might find yourself facing a defamation lawsuit. Some job applicants sue their former bosses when they think an unfavorable reference costs them a new job. To prove defamation, a former employee typically must show that you intentionally damaged his or her reputation by making harmful statements about the employee that you knew to be false.

It would seem as though only spiteful employers would get caught in a defamation trap. But this is not the case. If you make an unflattering statement that you don't absolutely know to be true, it could happen to you. Most reasons for firing make the employee look bad. And an employer often cannot prove what he or she believes to be true, such as incompetency, or initial lies about job qualifications. A management company executive who makes such statements about a former employee could get into trouble. To avoid lawsuits, management companies should set policies for giving outsiders information about ex-employees and make sure everyone who works for them follows those policies. Here's how you can do this.

Use Company-Wide Reference Policy

Even managers who think they're safe because their policy is to say little about ex-employees could become the target of a defamation lawsuit. For example, suppose an untrained employee gets a call asking for a reference about a former coworker. The employee tells the caller all the negative things that come to mind, not realizing she's supposed to direct all such calls to the personnel department, which will release only limited information. The manager doesn't learn of the incident until the former employee sues for defamation.

A written reference policy is the best way to avoid lawsuits like this. You should distribute your policy to all employees. Include it in the manuals you give to employees and supervisors.

Points to Include in Policy

Like Our *Model Policy: Put Safeguards Against Defamation in Employee Reference Policy,* yours should include these safeguards:

Centralize reference responsibility. Make one person or office responsible for

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Risk Management

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giving references and tell all of your employees to direct inquiries to that person or office. Directing all inquiries to a central office is important.

Get reference requests in writing. Instruct the person in charge of handling references to get all requests in writing. Never answer oral requests. Getting a written request on the questioner's letterhead will help you verify the identity of the reference checker. You want some proof that you're responding to inquiries from an employer who's thinking about hiring the former employee, not creditors and others who might pose as prospective employers to "dig up dirt."

Respond in writing. Give written references only, especially when dealing with prospective employers you don't know. Avoid oral responses, or you may end up in a dispute over who said and didn't say what. Oral references also leave owners vulnerable to "tone of voice" arguments, since tone can alter meanings.

Decide what information to disclose. One critical area for reference policies to address is the type of information you're willing to disclose about former employees and under what conditions. To lower the risks of a defamation lawsuit, many employers opt for what they consider a "safe" approach—that is, to say as little as possible. For example, by limiting references to verification of employment dates, positions held, and, in some cases, salary history.

Consider requiring release. If you want to give more information to prospective employees than employment dates and job titles, think about requiring former employees to sign a release agreement. It's much harder for an ex-employee to win a defamation lawsuit after signing such an agreement. Here's how to get the most protection from a release:

- **Apply release rules consistently.** Some managers get a release only when they have something negative to say. They don't think they need it before giving a good reference. That's a mistake, because you may say something negative without even realizing it.
- **Get release signed immediately before giving the reference.** Some management companies have applicants sign releases when applying for a job or when they start work. But a release signed this early might not be enforceable. Also, rely on a prospective employer's release if you must. Using your own form is much more effective than relying on somebody else's. As a practical matter, though, you might not be able to get employees to sign your form once they leave. As a last resort, find out if the prospective employer has gotten a release from the job applicant. If so, and if the release covers third parties who provide information, you can disclose the information.
- **Have proof of information you disclose.** Don't disclose information unless you can prove it's true. Each of the specific items you mention about the former employee should come from and be supported by written materials in your files. This "hard" information includes performance evaluations, memoranda, reprimands, member questionnaires or complaints, and any other writings. ♦

➤ ➤ ➤ *Model Policy follows* ➤ ➤ ➤

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MODEL POLICY

Put Safeguards Against Defamation in Employee Reference Policy

The following policy requires former employees to sign a release authorizing the disclosure of information on employment dates, job titles, and salary. Some managers get a release only when their references go beyond that limited information. Review the policy with your attorney and decide which approach works best for you.

EMPLOYEE REFERENCES

1. **PURPOSE:** To ensure that information regarding former and current employees remains confidential and that dispensing of information that could place the Company in a legally vulnerable position does not occur.

2. **SCOPE:** This policy applies to all divisions and facilities of the Company and to all supervisory/management employees.

3. **RESPONSIBILITY:** The interpretation and administration of this policy shall be the responsibility of the Vice President, Human Resources.

4. **POLICY:** Due to potential legal issues covering information dissemination, and in an effort to establish positive employee relations, information relating to employees and former employees may not be communicated outside the Company except in accordance with the procedures described herein. No member of management or employee may release information, verbally or otherwise, regarding any employee or former employee. All requests for information from sources outside the Company must be referred to the Human Resources Department. Employees releasing information without authorization may be subject to disciplinary action up to and including termination.

5. **PROCEDURE:**

   (a) **Former employees:** Any inquiry regarding a former employee must be referred to the Human Resources Department.

   (b) **Release:** The Human Resources Department may release information concerning former employees as follows:

      (i) In response to written reference checks from bona fide sources (e.g., on the requesting party's letterhead; no oral requests regarding a former employee will be responded to), the Human Resources Department may provide the following information in writing only if the former employee has submitted a signed authorization to release information: dates of employment, job titles, and pertinent salary data. But the Human Resources Department may release certain information at its discretion, where it deems the release of such information appropriate (e.g., in response to inquiries from local law enforcement officials).

      (ii) In response to a telephone reference check concerning a former employee, the Human Resources Department will instruct the caller to submit the request in writing to the Company.

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IN THE NEWS

➤ HOA Bookkeeper Diverted $95K for Personal Use

A Florida homeowners association manager called police after discovering that the community's bookkeeper allegedly used nearly $95,000 of the association's money for personal expenses, including a diamond engagement ring and luxury handbags. The employee was arrested for larceny and fraud. The missing money was discovered after the association's property manager reviewed the association's credit card bills and saw charges for personal types of products and services. Much larger losses, not just from association credit cards but in missing cash deposits that homeowners had made, were later uncovered.

The association's president noted that the employee had worked in the community for nearly six years, during four of which she used the community's funds for personal expenditures since 2011 and doctored the books to hide that.

➤ Class Action Lawsuit Alleges Excessive Charges in Florida Associations

A Miami condominium association is faced with a class-action lawsuit that claims that Sunshine State associations routinely overcharge consumers far more than the legally capped amount. The association member who initiated the lawsuit claimed that he was charged fees that violated the Florida Condominium Act, passed in 1990. The act prohibits more than $100 in fees "in connection with the sale, mortgage, lease, sublease, or other transfer of a unit." Covered fees include registration, background checks, and move-in costs, among other costs. The plaintiff was asked to pay charges in excess of the allowable amounts under the law and told that he wouldn't be allowed to move into a condo he had purchased.

Multiple attorneys are currently preparing other lawsuits around the state to be filed soon against smaller condo associations, not just the ones associated with luxury condos. They claim associations have been disregarding the act for many years.

The class-action lawsuit also claims the fees charged to the plaintiff violate Florida's Deceptive and Unfair Trade Practices Act, which aims to "protect the consuming public and legitimate business enterprises from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce."

Florida condominium associations typically claim that the $100 cap only applies to charges from them, not from third parties. Oftentimes outside businesses conduct things like background checks. ♦

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