A QUARTERLY PUBLICATION OF THE FLORIDA APARTMENT ASSOCIATION

multifamily florida

SUMMER 2014

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LEGAL AND LIABILITY ISSUES

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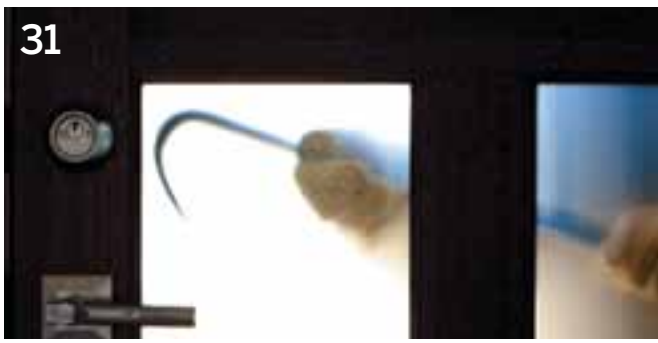

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Legal and Liability

BY **STACEY STUART**, THE BAINBRIDGE COMPANIES

t is with great pleasure that I start my president's message by introducing our new Florida Apartment Association Executive Vice President, Josh Gold.

Josh is an association management professional with more than 20 years of experience in growing and supporting vibrant not-for-profit organizations. Josh was most recently Vice President of Business Development and Conferences for the Institute of Financial Operations, a professional association serving the accounts payable and accounts receivable disciplines. He has previously held management positions with the National Association of Metal Finishers, the Healthcare Distribution Management Association and the International Association of Convention and Visitor Bureaus. Josh holds the Certified Association Executive designation from the American Society of Association Executives and the Certified Meeting Professional credential from the Convention Industry Council. He was named a "Young and Aspiring Association Executive" by Association Trends magazine and has won an Excel Award (Society of National Association Publications), a Gold Circle Award (American Society of Association Executives) and a Charlie Award (Florida Magazine Association). Josh graduated from Ohio University with a Bachelors of Science in Journalism and is a member of both the American Society of Association Executives and the Professional Convention Management Association.

On behalf of the Executive Committee, I would like to offer a warm welcome to Josh. We look forward to working with you and taking FAA to the next level.

Our summer publication is all about legal and liability issues. As many of you know, FAA established its 2014 Legislative Platform in December 2013 at a workshop held in St. Augustine. With it being an election year, we knew our elected officials would lean more towards non-controversial legislation. Subsequently, when identifying our priority issues, we went with the strategy, "First do no harm." Early on, we were advised that a renter's insurance bill was being filed. It was aimed at educating renters to consider carrying separate insurance to protect their personal property. We voiced our support for this

measure and felt it would be a great piece of legislation.

As is often the case, the bill changed shape throughout the 60-day legislative session. We had a lot of people working closely together and monitoring its progress. Our Government Affairs Director, Laura Heiselman; our Session Attorney, Richard Herring; and our lobbyist, Kelly Mallette, worked along with our Government Affairs Council every week to review the changes. The law firm of Heist, Weisse, & Wolk also played an integral part, providing legal advice on the proposed bill.

Ultimately the bill did not pass. We would still like to thank all of the individuals involved in the process on our behalf, particularly those from FCAA, who worked hand-in-hand with Rep. Reggie Fullwood

The Florida Apartment Association's main objective is focused on advocacy and legislation, so it is imperative that we stay up to date on any current issues that may impact our industry.

to improve the legislation. If this bill is introduced again, we are confident that our input will be considered and will make it a positive piece of legislation for our industry.

Some of the other issues that we closely monitored during the session included fair housing, building construction policies, affordable housing funding and flood insurance. For a complete review of our 2014 Legislative Session results, please see the article by Kelly Mallette, featured on page **12** in this issue. I would like to thank all of the FAA members who took the time to share their opinions at the platform-setting workshop in December and those who stayed involved throughout the entire Session.

Be on the lookout for the annual legislative survey that will be sent via email this fall. It is an important tool that helps guide our discussions for future legislative action. Please make every effort to submit your answers to the survey questions. In December, we plan to host another workshop to discuss the 2014 survey results and craft our platform for the 2015 session.

Mark your calendars for our Legislative Days Conference in Tallahassee, which

will be held the third week in February. The Florida Apartment Association's main objective is focused on advocacy and legislation, so it is imperative that we stay up to date on any current issues that may impact our industry. Attending Legislative Days is a great way to be informed about what is happening.

When it comes to the legislative process, your participation is vital for us to continue to have a seat at the table. This means being able to help support the legislators who support us and promote our agenda. Because of our ability to be active participants in the political process, we are able to cultivate beneficial relationships and establish ourselves as an effective association. Get involved by writing a check to show your support. Whether your investment is large or small, please contribute to APAC so that our voice can continue to be heard.

Another way to show your support is to participate in our brand new APAC event, **Color Me Green**. This new event promises to be great fun for all involved! It will be held in the afternoon during our Annual Education Conference, so it gives everyone an opportunity to participate.

We've already had 10 teams sign up and several sponsors grab our "SWAG" opportunities! It is not too late for you and your colleagues to participate in this event that is sure to sell out. We still have a handful of team slots available and many of the "SWAG" options can still be sponsored. A great way for supplier partners to get involved is to sponsor a "Challenge Station." The stations will be run by two supplier representatives. Each team of eight will visit every station to complete their challenge. Challenge stations can also be customized to help market whatever service of product the supplier offers. It is a great way for our supplier companies to showcase their business! Contact Laura Heiselman for more details and check out the ad on page **10** to learn more.

As your President, I support the APAC Board's goal of selling out by our next board meeting in August. I am personally asking each of you to contact your corporate office about signing up a team. As for our valued supplier partners, I'm asking that you sponsor a "SWAG" item or a challenge station. If you don't have an entire team and would like to participate, no problem, we can match you up with other participants! We need everyone's support to make this event successful so sign up a team, sponsor a challenge station or event "SWAG" and get ready to get **COLORFUL**!

The Annual Education Conference will take place on Oct. 22-24, 2014, at the Hilton in Orlando. The conference committee is busy finalizing the details, so mark your calendars now and plan to attend what is sure to be an excellent affair. I am looking forward to seeing everyone soon. ▲

I'm Listening

When I interviewed for this position, I was asked what I would do in my first 90 days as FAA's new executive vice president. My answer? I'd listen. And that's precisely what I've been doing – I've been listening to members, association executives (both those from FAA affiliates as well as association executives serving NAA affiliates across the country), past presidents, former and current board members, key stakeholders, associate members, our lobbyists and, of course, our staff here at FAA headquarters. I've spent much of my first few weeks listening and the information, compliments and concerns I've received will be invaluable as we improve the ways we serve you. In fact, we recently launched an FAA membership survey to discover how our members feel about nearly everything we do – from the annual education conference to our priorities in Tallahassee to this magazine you're reading now. If you've not completed the survey, please make sure to visit the FAA website and follow the link to do so as soon as possible – your candid feedback is encouraged, valued and critical to our continued growth.

"Most of the successful people I've known are the ones who do more listening than talking."

- Bernard Baruch

Opportunities for me to "take the pulse" on what is important to our membership (both locally and nationally) have been plentiful in these initial months. I was delighted to participate in the NAA Education Conference and Exposition in Denver last month – it was a terrific opportunity for me to meet many of the volunteer leaders who drive FAA and our regional affiliates, as well as some key personnel from our national office in Virginia. I had the opportunity to speak to several AAGO members when I attended their NAAPAC fundraiser in early July. In the coming weeks, I'll be traveling to the SEFAA tradeshow in Fort Lauderdale and the SWFAA tradeshow in Bonita Springs. These events will offer me additional opportunities to interact with FAA members and hear what you think we're doing well and areas where you feel we could improve.

I'll also have several opportunities to learn how I can better serve you by attending several conferences designed specifically for association staff. In August, I'll participate in NAA's first-ever association executive brainstorming session, intended as an open forum for state and local association staff to discuss common concerns and potential solutions. I'll also be attending the NAAEI Affiliate Education Conference, as well as the Florida Society of Association Executive's annual education conference.

Listening to the needs and concerns of the membership is not a short-lived phase or special initiative – your association staff will be continually listening, and we want to hear from you. What can we do to make you more productive? What services might FAA provide to make you more profitable? Most of all, how can we make your membership in FAA more valuable?

So consider this your open invitation to write me an email, send me a letter or give me a call. I'm listening. ▲

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APAC is making a BIG splash by hosting its *first ever* Color Me Green event. The only things running in this event are the colors on participants' shirts. There's no need to race from location to location, making it ideal for all participants, regardless of physical ability. Teams of eight must visit the fun challenge stations and complete the necessary task. If the team meets the minimum requirements, they are sprayed with a safe solution of dyed cornstarch. Not to worry, it washes right out! The more colors collected, the easier it will be to complete the final challenge at the end of the event.

Teams meet back at a set time where they find an array of colorful envelopes spread out. If the team has the color on their shirts, they will collect the envelope with the corresponding puzzle piece. Without all the color envelopes, it'll be a bit more challenging to complete the final task, but not impossible! Once all teams are assembled, the first team to correctly solve the puzzle WINS!

WE provide the t-shirt, bandana, sunglasses, and a temporary Color-Me-Green tattoo –

YOU get ready to have fun and help APAC at the same time!

BY KELLY MALLETTE, RONALD L. BOOK, P.A.

FAA 2014 Legislative Session Summary

The 2014 Session began with a spirit of collegiality amongst the state's leaders: Governor Rick Scott, Senate President Don Gaetz and House Speaker Will Weatherford. Perhaps the best news for the Legislature, and our state as a whole, is the continued economic recovery of Florida, which resulted in an additional $2 billion in the state's budget coffers. When all was said and done, the state budget totaled $77.1 billion, with increases in several statewide priorities, including:

- Additional 2.6 percent for per student funding in education;
- $20 million in funds to reduce the wait-list for services for the developmentally disabled;
- Increased funding for the state's child welfare system;
- $11 million in funds for construction of a new state veterans nursing home;
- Three new District Court of Appeals judgeships;
- $30 million for springs restoration;
- $9.2 billion for the Transportation Work Program;
- $167.7 million for Affordable Housing Programs;
- $71 million for Economic Development Incentive Programs;

On a substantive front, leadership priorities included:

- Strengthening laws against sexual predators, in response to a news series by the Sun Sentinel;
- Expanded access to the state's tax credit scholarship program for education;
- Comprehensive legislation to address employment, education, services and benefits for veterans and their families to make Florida the most veteran-friendly state;
- Comprehensive Economic Development package including sales-tax holidays and tax and fee reductions totaling $500 million.

For the Florida Apartment Association, the Session was largely a success. Below, please find an overview of specific issues.

PRIORITY ISSUES

SB 422 and HB 331 – Renter Insurance, by Senator Audrey Gibson and Representative Reggie Fullwood

In its original form, SB 422 and HB 331 would have required landlords to include provisions in the lease to inform tenants about any requirement to obtain renters insurance. It also included provisions requiring the landlord to include a statement to advise tenants that the landlord is not responsible for personal property, and encouraging tenants to purchase renters insurance to cover their personal property. Although there were some technical issues with the early version of the legislation, the FAA supported the bill because of the encouragement for renters to obtain insurance. However, in initial hearings on the bill in the House, the legislation was significantly amended and the changes required additional discussion. The House sponsor, Rep. Fullwood, worked diligently to

address the FAA's concerns and eliminate any "unintended consequences." After two committee hearings in the House and several amendments, the bill was not scheduled for a hearing in the Senate and did not ultimately get through final hearings in the House.

Again, we must extend our sincerest thanks to Rep. Fullwood and his staff for working so closely with the Association on this issue. We also thank our members from the First Coast Apartment Association and Peggy Queen for their efforts to represent the Association's needs when visiting with Rep. Fullwood. It is thanks to their existing relationship with the Representative that we were able to play such an instrumental part in the process!

SB 410 and HB 453 – Fair Housing Act, by Senator Oscar Braynon and Representative Barbara Watson

This bill made several substantial changes to the Fair Housing Act, specifically related to procedures related to complaints made under the Act and relief for those aggrieved. We expressed our concerns about the bill to Senator Braynon and Rep. Watson. Ultimately, the bill was not heard in any committees.

HB 7147 – Building Construction Policies (Includes provision of Building Code bill SB 1106/HB 593)

We closely monitored the 2014 building code package for any issues related to maintenance of public pools. Although no new requirements related to public pools maintenance were proposed, several other provisions of interest were included, specifically related to permits for construction or renovation of public pools. In its original form, the bill had a technical issue related to the process order for permitting on public pools. We worked with sponsors and other stakeholders to address the technical issue. Ultimately, portions of the building code bill were amended to HB 7147 in the final days of session. Below are specific provisions of interest:

- Prohibits local governments from requiring that existing mechanical equipment located on or above the surface of a roof comply with the requirements of the Florida Building code except when equipment is being replaced or removed during re-roofing;
- Allows Department of Health to grant hardship variances on public swimming pools;
- Clarifies requirements related to permitting for construction, development or modification of a public pool, requiring the application for an operating permit to be submitted prior to an application for a building permit.

STATUS: Approved by the Governor; Chapter No. 2014-154.

Perhaps the best news for the Legislature, and our state as a whole, is the continued economic recovery of Florida, which resulted in an additional $2 billion in the state's budget coffers.

AFFORDABLE HOUSING FUNDING

Full funding of affordable housing programs was a high priority for the FAA. We joined a large coalition of other groups supporting the same. The Legislature ultimately decided to allocate $167 million toward affordable housing. The breakdown is below:

- State Housing Initiatives Partnership (SHIP) Program $100 million
- State Apartment Incentive Loan (SAIL) Program $67,660,000

Our lobbying team worked with Senator Andy Gardiner, the Senate leader on affordable housing funding, as well as the incoming Senate President, Senator Joe Negron; the Senate Appropriations Chair, Rep. Seth McKeel; Chair of the House Appropriations committee, Speaker Will Weatherford, and many House and Senate staffers on affordable housing funding. We joined the affordable housing industry and local government entities, successfully conveying one message to secure a significant appropriation.

SHIP: Within the SHIP funding allocation is proviso language that directs each local government to use a minimum of 20 percent to serve persons with special needs. The local government must certify that it will meet this requirement through existing approved strategies in the local assistance plan or submit a new local housing assistance plan strategy for this purpose to the FHFC for approval to ensure that it meets these specifications. The first priority of these special needs funds must be to serve persons with developmental disabilities, with an emphasis on home modifications, including technological enhancements and devices, which will allow homeowners to remain independent in their own homes and maintain their homeownership.

Additionally, $4 million is directed to be used to provide services to homeless persons. Of the $4 million, $3,800,000 is to be transferred to the Department of Children and Families to implement the provisions of section 420.622, Florida Statutes, and $200,000 is to be used by the Department of Economic Opportunity to provide training and technical assistance regarding affordable housing to designated lead agencies of homeless assistance continuums of care.

SAIL: Proviso language directs each SAIL development that receives an award from these funds to be targeted to families, elderly persons and persons who are homeless. Also, these funds must include not less than 5 percent and no more than 10 percent of its units designed, constructed, and targeted for persons with a disabling condition.

FLOOD INSURANCE

Recent Congressional action on flood insurance is a good start to addressing Florida's flood insurance increases. Florida's congressional delegation led the effort to pass bipartisan legislation which will limit flood insurance increases, and allow subsidized premiums to be passed on when a house is sold.

Meanwhile, the Florida Legislature also attempted to address the issue by approving SB 542. The bill allows private insurers to offer flood insurance policies and provides for expedited rate reviews through 2019. The final version of the approved legislation requires that the insurance cover the full

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Toni Blake

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value of the structure rather than an earlier Senate version that would have allowed insurers to offer coverage only up to the amount of the outstanding mortgage. Some in the industry feel that the elimination of the Senate's language will limit the number of insurers who will offer the product.

STATUS: Approved by Governor; Chapter No. 2014-80.

ADDITIONAL ISSUES

SB 1614 and HB 1431 – Playground Safety, by Senator Eleanor Sobel and Representative Jared Moskowitz

This bill would have required new playgrounds and new equipment in existing playgrounds to met ASTM safety standards, beginning on July 1, 2015. The bill required safety inspections and re-inspections. This bill was not heard in any committees.

SB 1146 and HB 849 – Service Animals by Senator Thad Altman and Representative Jimmie Smith

This bill updated definitions and regulations regarding service animals. This bill was heard in several House committees, but did not pass.

SB 154 and HB 705 – Electrical Contracting by Senator Darren Soto and Representative Victor Torres

This bill would have authorized a municipality or county to require that one electrical journeyman who possesses a certificate of competency be present on certain industrial or commercial construction sites. This bill was not heard in any committees.

ALSO OF INTEREST

Tort Reform: Prior to the session, we were expecting comprehensive legislation on tort reform to be proposed by a coalition of Florida's businesses. Although several ideas were discussed, the only tort reform proposal that got any real traction was SB 670, related to nursing home litigation that was supported by the nursing home industry and the trial lawyers. The bill was approved.

Economic Development: A high priority for Governor Scott and the House and Senate leadership was a package of economic development measures. The following are a few highlights included in HB 5601:

- Three tax holidays: Back to School Tax Holiday (Aug. 1-3); Hurricane Supply Holiday (May 31-June 8); Energy Efficient Products Holiday (Sept. 19-21).
- Creates a permanent sales tax exemption for child restraint systems and booster seats;
- Creates a permanent sales tax exemption for youth bicycle helmets;
- Creates a permanent sales tax exemption for therapeutic pet foods;
- Creates a three-year sales tax exemption for cement mixing drums;
- Allows local governments to repeal or reduce the local business tax without establishing an equity study commission.

Finally, we would like to thank the House and Senate leadership who continue to be strong supporters of our industry. We would also once again like to thank Rep. Reggie Fullwood and his staff for their efforts to work with FAA and our lobbying team this session. ▲

BY RYAN R. MCCAIN, ESQ., BARFIELD, MCCAIN, P.A.

Medical Marijuana's IMPACT on Multifamily Housing

In November 2014, Florida voters will determine whether medical marijuana will become legal for "qualifying patients" with a "debilitating medical condition," such as cancer, glaucoma, amyotrophic lateral sclerosis (ALS) (often referred to as "Lou Gehrig's Disease"), HIV/AIDS, and Parkinson's disease, among others (Florida Amendment 2 (2014)). This vote will be on the ballot as Amendment 2 this year as a result of a public citizen's initiative, which, if passed, would result in an amendment to Florida's Constitution. There certainly appear to be valid arguments representing both sides of the debate on this vote; however, this article is limited to a discussion on the implications that such a constitutional amendment, if passed, may have on the multifamily apartment community industry.

BACKGROUND

In 1970, Congress implemented the Controlled Substances Act (CSA), which classified all controlled substances into five schedules based on the substances' potential for abuse and medicinal value. Marijuana was specified as a Schedule I drug, which is the most restricted schedule of substances and indicates that the drafters of the CSA determined that marijuana had a high potential for abuse with no accepted medical significance or use at the time of the CSA's passage. Accordingly, the manufacturing, distribution or possession of marijuana is currently a criminal offense under the CSA, 21 U.S.C. §812, and subjects an offender to criminal penalties, including criminal prosecution, arrest, fines and property forfeiture actions for knowingly violating such laws. 21 U.S.C. §§856(a) and 881(a)(7). However, since the CSA's implementation in 1970, 22 states and the District of Columbia have passed state-specific laws that legalize the medical distribution and use of marijuana, commencing with California in 1996. This year, Florida is among four states (in addition to New York, Ohio and Pennsylvania) that have pending ballot voting or pending legislation to determine whether to legalize medical marijuana.

Based on the federal prohibition of marijuana through the CSA, when states subsequently enact laws legalizing the distribution and use of medical marijuana, it creates potential conflict with federal law making it extremely difficult on apartment community landlords to reconcile such conflict when confronting housing related issues and managing multifamily apartment communities. The myriad questions such landlords may have to confront would include, for example: What effect could such legislation have on Fair Housing laws and reasonable accommodation requests from disabled individuals deemed "qualified patients" entitled to use medical marijuana? What if you are a federally subsidized housing community? What if your apartment community has a "No Smoking" policy and/or a "No Smoking Addendum" to the lease? If an employee (property manager, leasing consultant, maintenance supervisor, etc.) is a "qualified patient" permitted to use medical marijuana, is an employer required to accommodate the use of medical marijuana in the workplace or while the employee is on the job?

MEDICAL MARIJUANA'S IMPLICATION ON MULTIFAMILY HOUSING

Under both the Federal Fair Housing Act and Florida's Fair Housing Act, a landlord is prohibited from discriminating in the sale or rental of housing based on an individual's disability or handicap, among other protected classes.[1] Specifically relating to discrimination against a disabled individual, discrimination can include a "refusal to make reasonable accommodations in rules, policies, practices or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling." (42 U.S.C. §3604(f)(3)(B)). Likewise, Florida's Fair Housing Act tracks the identical quoted language of the Federal Fair Housing Act. See Fla. Stat. 760.23(9)(b). Thus, when reading Florida's Fair Housing Act together with a potential new state law legalizing the use of medical marijuana for qualified patients, it may arguably provide medical marijuana patients with a claim that they should be granted a reasonable accommodation request to use marijuana on the premises and inside their dwelling units because it is legal under state law, and that denying such a request would constitute unlawful discrimination against a disabled individual under the Fair Housing Act.

Under both the Federal Fair Housing Act and Florida's Fair Housing Act, a landlord is prohibited from discriminating in the sale or rental of housing based on an individual's disability or handicap, among other protected classes.

In analyzing currently existing case law and relevant opinions from other jurisdictions on this issue, it appears that a federally subsidized housing community landlord would not violate Federal Fair Housing laws in prohibiting the use of medical marijuana on the premises, nor would such a landlord have a duty to accommodate a tenant's medical marijuana use on the premises. For example, in ***Assenberg v. Anacortes Housing Authority***, 268 Fed. Appx. 643 (Ninth Cir. 2008), a tenant in Washington filed a federal lawsuit against a landlord claiming that the landlord violated the Federal Fair Housing Act and the American with Disabilities Act (ADA) by denying a reasonable accommodation request to allow the tenant to use medical marijuana on the premises pursuant to the state of

Washington's Medical Use of Marijuana Act. The federal district court granted summary judgment in favor of the landlord, and the Ninth Circuit Court of Appeals affirmed the district court's finding that the landlord did not have a duty to accommodate the tenant's marijuana use notwithstanding that the tenant's use of marijuana on the premises was pursuant to the state's medical marijuana statute. The court further found that the landlord was entitled to evict the tenant based on the tenant's illegal drug use under federal law because requiring a federally subsidized housing community to violate federal laws is not considered a "reasonable accommodation" as contemplated by Fair Housing laws. ***Id.*** Moreover, the Federal Fair Housing Act currently provides that "handicap" does not include the "current, illegal use of or addiction to a controlled substance" under the CSA. 42 U.S.C. §3602(h).

In 2011, the Michigan Attorney General's Office issued an opinion with similar findings on this issue relevant to state law, therein basing such opinion on the specific language contained within Michigan's Medical Marijuana Act ("MMMA"). Mich. Comp. Laws Ann. §333.26421 – 333.26430. The MMMA was originated by a citizen initiative vote, like Florida's vote this year, which ultimately passed in Michigan to permit the use of medical marijuana by qualified patients within the state. The MMMA did not amend, supersede or repeal any existing state law otherwise making it unlawful for an individual to possess, use, sell, deliver or manufacture marijuana, but rather, simply permitted seriously ill individuals to use marijuana for its medical effects and avoid criminal prosecution under state law so long as such individuals comply with the procedures set forth in the MMMA. However, in analyzing the MMMA's impact on apartment communities in response to certain questions raised by a State Senator, the Attorney General opined that a landlord still maintains the right to prohibit the smoking of marijuana in public areas within the apartment community in addition to prohibiting individuals from smoking marijuana in their specific dwelling units or other areas not open to the public. In support of his opinion, the Attorney General stated:

Florida's lawmakers and representatives of its Department of Health should consider the impact such medical marijuana laws may have on multifamily apartment communities and should adopt clear language to Florida landlords and tenants alike.

Property owners may want to prohibit smoking marijuana or growing marijuana plants within their privately-owned facilities for a number of reasons. For example, as noted above all marijuana-related activity remains illegal under the Controlled Substances Act. *See* 21 USC 812(c), 823(f), and 844(a). The federal government remains free to enforce the criminal provisions of the Controlled Substances Act against Michigan citizens, regardless of whether they are registered patients or caregivers under the MMMA. Property owners who allow their properties to be used by patients or caregivers for the purposes of using or growing marijuana could be subject to prosecution, civil forfeiture, or other penalty under the Controlled Substances Act. *See* 21 USC 856(a) and 881(a)(7).

In addition, the smoking of marijuana or the possession of marijuana plants within a property may make other tenants or guests within a facility concerned for their own or their family's personal safety. Further, property owners may simply wish to respect the preferences or expectations of other guests or tenants within a facility. Marijuana smoke, like tobacco smoke, has a strong and distinctive odor, which may offend other persons using the facility or discourage future occupancy of the facility. ***Honorable Rick Jones***, 2011 Mich. OAG No. 7261 (2011).

With respect to Fair Housing laws and Michigan's "Persons with Disabilities Civil Rights Act," the Attorney General further indicated that such laws do not prohibit a landlord from denying an accommodation to a disabled individual to smoke medical marijuana on the property because such a denial "would not be based on a patient's disability, but rather on the patient's decision to treat that condition with marijuana," and the MMA does not

specifically require property owners to allow the use of medical marijuana on their properties. ***Id***.

However, not all jurisdictions are in harmony with the above opinions. For example, Rhode Island has enacted a medical marijuana statute that explicitly provides that "***no*** school, employer or ***landlord may refuse to*** enroll, employ or ***lease to or otherwise penalize a person solely for his or her status as a [medical marijuana] cardholder***." RI Gen Laws §21-28.6-4(b). Thus, Rhode Island's laws on this subject expressly prohibit a landlord from taking adverse action (e.g., terminating a lease, filing eviction, refusing a rental application to lease, etc.) against tenants who are medical marijuana cardholders solely based on their status as a medical marijuana user. This type of language in a state statue can place a landlord (who is typically an innocent third party in these situations) in a precarious situation. As discussed by Michigan's Attorney General above, a state statute does not supersede or nullify the federal government's power to enforce criminal penalties or its ability to seize property through a forfeiture action from owners who knowingly violate federal law. ***See also, Gonzales v. Raich***, 545 U.S. 1 (2007) (finding that under the U.S. Constitution's Supremacy Clause, U.S. Const. Art. VI, §2, the Federal CSA trumps California's state medical marijuana laws even though the patients' possession and use of marijuana in this case were in full compliance with California's medical marijuana laws).

In 2009, President Barack Obama's Deputy Attorney General issued a memorandum to selected United States Attorneys to establish guidelines for federal prosecutors in states with medical marijuana laws. The memorandum provided that federal resources should not be focused on "individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana," but also reinforced the Department's duty to continue prosecuting those who use such state laws as a mere pretext for the illegal use of marijuana. ***See "Memorandum for Selected United States Attorneys" from David W. Ogden, Deputy Attorney General*** (Oct. 19, 2009).

While such memorandum may appear to offer some reprieve to an innocent medical marijuana user or apartment community landlord, it does not constitute legal authority upon which reliance can be grounded; and, consequently, the state legislature should pass legislation that provides guidance and protections to affected parties who are clearly striving to comply with state law. Specifically relevant to multifamily housing, the legislature should address concerns of property owners, medical marijuana users who rent property and other tenants of multifamily housing communities to address Fair Housing implications and provide safeguards against criminal and civil liability, including forfeiture actions, as Amendment 2 currently offers such guidance and protections to other affected parties. For example, the current draft of Florida's Amendment 2 includes a limitation stating that "nothing in this section shall require any accommodation of any on-site medical use of marijuana in any place of education or employment, or of smoking medical marijuana in any public place." Thus, it appears that any proposed medical marijuana law would not require employers to allow the use of medical marijuana in the workplace and that medical marijuana use would be prohibited in a public place (which term is not currently defined in Amendment 2). Amendment 2 further provides protections to qualified patients, physicians, caregivers, and treatment centers to be free from criminal and civil liability so long as they comply with the law. Florida Amendment 2 (2014).

However, Amendment 2 is currently devoid of language providing safeguards for such property owners against potential forfeiture actions, addressing private property owners' rights, and/or offering guidance on Fair Housing implications to landlords renting to qualified patients who may submit an accommodation request to use marijuana on the premises. Today, the majority of apartment communities maintain an established "No Smoking" policy inside the apartment buildings and/or require all residents to sign a "No Smoking Addendum" so as to prevent disturbances, disruptions and complaints from neighboring residents about the smell of secondhand smoke and to prevent potential property damages (such as smell in carpet, carpet burns, smoke residue on walls, fire hazards, etc.). Many multifamily communities further maintain a strict "Drug Free/ Crime Free" housing policy. Therefore, an innocent apartment community landlord should not be forced to speculate or haphazardly guess the legislative intent on this issue or subject itself to potentially defending or prosecuting expensive lawsuits for the judiciary to decide a landlord's and tenant's rights with respect to these issues.

If Amendment 2 passes, Florida should consider following the examples of Colorado, Michigan, New Mexico, Oregon and Washington, among other states, which provide safe harbors in their statutes against state property forfeiture actions if property is possessed, owned or used in connection with the lawful medical use of marijuana.[2] If Amendment 2 passes, Florida should also adopt language addressing Fair Housing concerns to landlords and tenants of multifamily communities, which could be supplemented by Florida's Department of Health adopting meaningful rules or policy statements that would assist in providing guidance to landlords and tenants. For example, Michigan's Department of Community Health has enacted administrative rules for the Michigan Medical Marijuana Program and further maintains a Multi-Housing Smoke-Free Apartments webinar on its website discussing the position that smoking medical marijuana in a smoke-free apartment community is not a "reasonable accommodation" if it results in exposure to other residents of secondhand marijuana smoke and other non-smoking methods of using marijuana are available to the tenant.[3]

Unfortunately, similar departments in some states publish statements that appear to be completely inconclusive and offer very little guidance or support, as exemplified by Nevada's Department of Health and Human Services' statement: "It is up to you to decide whether or not to tell your landlord that you are a patient in the [Nevada Medical Marijuana Program] NMMP. Nothing in NRS 453A specifically addresses whether or not you can be evicted because you are a patient in the NMMP, even if you have only the amount of medical marijuana allowed by law. Nothing in NMMP laws specifically addresses whether or not a person can be an NMMP patient and live in subsidized housing. If you have questions about these important issues, the NMMP recommends you talk to an attorney to learn about your rights and protections." http://health.nv.gov/MedicalMarijuana_FAQ.htm. Florida should refrain from similar tactics and, instead, should take affirmative steps, through legislation or otherwise, to provide meaningful guidance and support to persons who may be affected by Amendment 2.

CONCLUSION

Accordingly, if Amendment 2 passes, due to the potential conflict with Federal laws and Fair Housing laws as discussed herein, it would appear that this issue presents fertile ground for litigation. Consequently, Florida's lawmakers and representatives of its Department of Health should consider the impact such medical marijuana laws may have on multifamily apartment communities and should adopt clear statutory language and meaningful guidance to Florida landlords and tenants alike as to the property rights and Fair Housing concerns raised herein, which may assist in avoiding unnecessary litigation and unintended consequences of medical marijuana laws. In addition, any persons who may be impacted by Amendment 2 should strive to stay updated and educate themselves as much as possible on this matter. ▲

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[1] In addition to disability or handicap, the Fair Housing Act further prohibits discrimination in the sale or rental of housing based on an individual's race, color, national origin, religion, gender or familial status. 42 U.S.C. §3604.

[2] Colo. Const. Art. XVIII, §14(2)(e); Mich. Comp. Laws Ann. §333.26424(4)(h); N.M. Stat. Ann. §26-2B-4(G); Or. Rev. Stat. §475.323(2); Wash. Rev. Code Ann. §69.51A.050(1).

[3] The webinar contains a caveat that reasonable accommodation requests from medical marijuana users has risk management and legal implications for multi-unit property owners and that advice of legal counsel is well advised. www.michigan.gov/documents/mdch/Making_Multi-Unit_Housing_Smoke_Free2.24.11_346623_7.pdf

BY NANCY J. BURKE, COLORADO APARTMENT ASSOCIATION

Up in Smoke?

Marijuana laws are changing, but landlords aren't powerless.

Marijuana legalization is sweeping the nation. Twenty states and the District of Columbia have legalized medical marijuana, 17 states have decriminalized marijuana possession and two states have legalized the sale and possession of recreational marijuana. Colorado and Washington approved ballot initiatives to "regulate marijuana like alcohol," and Alaska is poised to do the same.

Thirteen states including Arizona, California, Florida, Maine, Massachusetts, Montana, Nevada and Oregon are seeking legalization through ballot measures. Hawaii, Maryland, New Hampshire, Rhode Island and Vermont are seeking legislative action.

State governments are "smoking this pipe" primarily because proponents point to an additional revenue stream that makes state budgeters instant backers. Colorado, for example, anticipates $65 million in tax revenues from marijuana sales in the first year. These additional funds will assist the state with school funding and other enhancements. If marijuana reform is not yet in your state, don't think it won't be soon.

State laws do not make marijuana legal under federal law. Marijuana remains a Class I Controlled Substance, and therefore is still illegal under federal law. In 2013, the Obama administration said it would not challenge state laws that legalized marijuana as long as the states maintain strict rules on the sale and distribution.

More than 50 percent of Americans support marijuana reform, and more than half of our nation's population resides in states pursuing it. More than one third of Americans are choosing to rent for their housing needs, so this equates to a significant number of marijuana proponents who may be seeking rental housing. The time has come for landlords to understand how marijuana laws could affect them.

Here are some questions to consider:

AS A LANDLORD, DO I HAVE TO ALLOW MARIJUANA SMOKING ON MY PROPERTY?

Because marijuana is still illegal under federal law, landlords may prohibit tenants from possessing marijuana. Although state laws may differ, smoke-free properties can remain smoke free. Add to that zero tolerance for drug possession through a crime-free lease addendum to solidify the prohibition.

DO I NEED TO ADOPT A POLICY TO ADDRESS MARIJUANA USE ON MY PROPERTY?

Ultimately, landlords may either allow or disallow marijuana use. In states where both medical and recreational marijuana exists, landlords should consider adopting a medical marijuana policy and a recreational marijuana policy. Landlords may prohibit the use of recreational marijuana but allow the use of medical marijuana as a reasonable accommodation. Landlords may also choose to adopt a policy that prohibits both or, lastly, none. The medical marijuana and recreational marijuana policies don't need to align, but that could lead to confusion.

SHOULD I ALLOW TENANTS TO GROW MARIJUANA PLANTS?

Growing marijuana requires substantial amounts of electricity, and amateurs will sometimes replace breakers on electrical panels to allow higher amps, which can overload the electrical system and possibly cause a fire. Excessive use of electricity increases utility costs, which could disproportionately impact other tenants under utility billing allocation formulas. Growing marijuana also produces high heat and humidity conditions, and that can cause the growth of mold and mildew if not properly vented. Additionally, leaves of marijuana plants produce oil, which can permeate walls and carpet. Lastly, people who grow marijuana are more likely to sell marijuana; your property could face a higher level of undesirable traffic.

CAN I PROHIBIT MY TENANTS FROM GROWING MARIJUANA PLANTS?

Yes. Despite the allowance of growing plants under some state laws, marijuana is still illegal under federal law.

DO I NEED TO REVISE MY LEASE DOCUMENTS TO PROHIBIT MARIJUANA USE?

Marijuana is legal in some states now, but federal law and some state laws allow landlords to prohibit it. If you choose to prohibit marijuana, stating this up front will avoid the numerous "marijuana is legal" arguments from tenants. For stronger enforcement, your lease or addendums should state that you have the right to terminate marijuana violators without a right to cure.

IS IT LEGAL TO EVICT A TENANT WHO IS DISTURBING OTHER TENANTS WITH MARIJUANA SMOKE?

If you prohibit marijuana, a landlord can demand the tenant to stop smoking marijuana and disturbing others. If you don't prohibit marijuana, then you can demand the tenant stop disturbing other tenants. Regardless of your policy, tenants are never allowed to disturb other tenants. If the behaviour persists, you can begin eviction proceedings.

IF MY PROPERTY IS FEDERALLY SUBSIDIZED, CAN I RENT TO MARIJUANA CONSUMERS?

HUD regulations prohibit marijuana use. If your property or tenants receive federal subsidies and you are subject to federal regulations banning the use of marijuana, you must adopt a policy that prohibits the use of recreational or medical marijuana to avoid violation of federal regulations that could potentially lead to a loss of subsidies.

Training employees on the marijuana policies will help to ensure operational consistency and provide a stronger understanding of the policies.

A DISABLED TENANT REQUESTED AN EXCEPTION TO OUR DRUG-FREE POLICY, STATING HE HAS A MARIJUANA LICENSE AND IS LEGALLY ALLOWED TO USE MARIJUANA. HOW SHOULD WE HANDLE THIS?

Disabled tenants are entitled to make reasonable accommodation requests. To be entitled to a reasonable accommodation under federal law, the tenant must be disabled. Just because a tenant has a marijuana license doesn't necessarily mean the tenant is disabled under fair housing laws and entitled to a reasonable accommodation. Only disabled tenants are entitled to reasonable accommodations. You do not have to accommodate non-disabled tenants.

While you may deny the request under federal law, a disabled tenant could argue or possibly file a fair housing complaint stating that medical use should be allowed as a disability accommodation because it is legal under state law. Denying is not risk-free. It is advisable to have a policy in place to cover these requests.

Landlords should review rental criteria, lease documents and crime-free addendums, and consider adopting marijuana policies. If your policy prohibits marijuana use, possession or grows, lease documents should clearly state that.

Your lease should also state that marijuana use will not be allowed to disturb other tenants' rights, comforts and quiet enjoyment. Training employees on the marijuana policies will help to ensure operational consistency and provide a stronger understanding of the policies. Landlords may want to consider publishing the policies to share with tenants and prospective tenants.

By addressing the issue up front, applicants and tenants will have a better understanding of expectations. This article is not to be construed as legal advice. If you have questions regarding marijuana use on your properties, please consult with an attorney in your state. ▲

Nancy J. Burke is vice president of government affairs for the Colorado Apartment Association.

Fortunately, Mrs. Fields finally got him to the tub. Unfortunately, she didn't get your scheduled water shut-off message.

HOW DO YOU REACH RESIDENTS TO GIVE THEM THE LATEST UPDATES?

With the One Call Now communication system you can be absolutely sure residents get important alerts. Effective, simple and versatile, One Call Now delivers messages quickly, reliably and effortlessly via phone, email or text. Launch alerts anytime, anywhere via our mobile app.

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BY BETSY FEIGIN BEFUS, GENERAL COUNSEL, NATIONAL MULTIFAMILY HOUSING COUNCIL

Music Licensing Issues for Apartment Communities

Determining an appropriate approach to potential music licensing obligations depends on facts and circumstances specific to an individual apartment community. Some questions about music licensing have straightforward answers while others have not been definitively addressed by courts. A recent white paper by Cydney Tune, Senior Counsel with Pillsbury Winthrop Shaw Pittman LLP, published by the National Multifamily Housing Council (NMHC), provides National Apartment Association (NAA) and Florida Apartment Association members with general information about copyright and licensing, as well as a basic framework for considering potential licensing obligations for apartment communities. Some of the topics covered in the white paper are summarized here. Please note that the information contained in this article is limited, and neither this summary nor the white paper is legal advice.

Copyrights in songs are automatic and do not require an application or registration. A copyright owner may license the use of a song, usually through a performing rights organization (PRO). PROs grant, administer and help enforce licenses on behalf of copyright owners. In the U.S., there are three PROs that offer licenses to play copyrighted music: ASCAP, BMI and SESAC.

A "blanket license" gives a licensee the right to play music within a PRO's repertory wherever residents, employees and guests may gather. Whether music is live, broadcast, transmitted or played via MP3 player, CD or video, a PRO license would cover all of the songs in that PRO's repertory. Most businesses that use music in ways that should be licensed have agreements with all three PROs because each songwriter or composer is represented by only one PRO at any given time, and a music license with one PRO allows a licensee business owner to perform only songs represented by that PRO.

An apartment community may need a license to use music if a particular use of copyrighted music is a "public performance," as defined by copyright law. Generally speaking, subject to certain exceptions, music played in a shared space or common area of an apartment community may be a "public performance." Under copyright law, music is "performed" when a song is played, either live or by using an electronic device. A performance is "public" if it takes place in an area that is open or accessible to the public, or made available to people even if they don't hear the music at the same time, or in a single location. Performances in semi-public places accessible to only certain individuals may be considered public performances, too.

To assess whether a license is needed, apartment companies may consider whether music is played in an area of the community that is accessible to residents and/or their guests, prospective residents, company staff, service providers and other non-resident visitors — excluding individual apartment homes. Pool areas, playgrounds, clubhouses, fitness rooms, lobbies, lounges, party rooms, theaters, business centers, leasing offices, etc. may be considered public or semi-public spaces under U.S. copyright law.

Compliance obligations may also depend on the source of music and how it is used, including whether music is played by a live band; via "terrestrial" or satellite radio, music service, CDs/MP3s, television; or through live streaming from the Internet. Also relevant may be the specific device being used; the size, number and locations of screens/monitors; and the number and location of speakers.

Business strategies may be available to apartment firms in addition to agreements with PROs. For example, apartment firms that use "background music" may choose a music service (e.g., Muzak and DMX) because music services often handle public performance licenses necessary for the background music they provide.

More information about music licensing issues is available to members in the NMHC white paper posted on the NAA website. The white paper and this article provide general information only and are not legal guidance or advice. Please consult an attorney for complete information and specific advice. ▲

FIND MORE INFORMATION ONLINE
www.naahq.org/learn/government-affairs/federal-state-local-issues/misc-property-operations

Liquidated Damages

Under The Florida Residential Landlord and Tenant Act

BACKGROUND

It is a well settled law in Florida that the parties to a contract may stipulate in advance to an amount to be paid or retained as liquidated damages in the event of a breach.[1] However, as many residential landlords have learned, such freewheeling ability to contract[2] was not so free before the recent amendments to The Florida Residential Landlord and Tenant Act ("Act").

Prior to 2003, the only statutory provision of the Act which allowed a landlord to assess liquidated damages against a tenant was found in Fla. Stat. §83.682. That section was specifically limited to tenants who were members of the United States Armed Forces and were required to move more than 35 miles away from their dwelling, pursuant to permanent change of station orders. The liquidated damages were limited to one month rent and further depended upon the months of tenancy the service member tenant fulfilled during the lease term.

FLORIDA STATUTE §83.575

Now there are two such sections which authorize a landlord to charge liquidated damages. The first liquidated damages provision is provided by Fla. Stat. §83.575, which applies to tenancies which end, but when the tenant fails to provide notice prior to the end of the lease term. In 2003, the legislature amended §83.682 by removing the liquidated damages portion of that section and creating an entirely new section, §83.575, which made liquidated damages an available remedy for landlords of all tenants. But the liquidated damages were limited to end-of-term breaches by the tenants who failed to give timely notice of their intent to vacate. Section 83.575(2) thus provided that any tenant, not just those tenants who were also members of the United States Armed Forces, may be required to provide the landlord up to 60 days notice before vacating the premises or be liable for liquidated damages.

Still, the statute was silent as to any limitation on the amount of the liquidated damages.

Then in 2004, partially in response to a scathing editorial in the Sun Sentinel, critical of the unbalanced bargaining power the landlord was granted in the landlord-tenant relationship, the legislature amended §83.575 to impose strict procedural requirements.[3] Now the landlord must strictly comply with notice requirements before he or she may assess liquidated damages against a tenant who failed to timely notify the landlord that the tenant intended to vacate at the end of the lease term. The statute requires the landlord provide notice to the tenant of the liquidated damages penalty, within 15 days before the notice period begins. And the landlord must list all fees, penalties and applicable charges in the notice, otherwise the landlord's claim for liquidated damages may be invalidated by the courts.

FLORIDA STATUTE §83.595(4)

The second and more common liquidated damages provision is that provided by Fla. Stat. §83.595(4) (2008), which permits landlords to impose an early termination fee or liquidated damages on tenants who terminate their lease before the expiration of the lease term, i.e. early termination. The genesis of §83.595(4) can be traced back to two South Florida cases which were decided more than a decade ago.[4] Those two cases, ***Yates v. Equity Residential Properties Trust***[5] and ***Olen Residential Realty Corp. v. Romine***,[6] challenged the parties' ability to freely contract and sent shockwaves throughout the residential rental industry that persisted for four more years before the legislature could effectuate change.

Yates was a class action lawsuit representing approximately 4,473 class members. The court found that the landlord's practice of charging tenants an early termination fee, in addition to rent until the apartment was re-rented or until the expiration of the lease, was a violation of The Florida Residential and Landlord and Tenant Act. Specifically, the court found that the early termination fee violated Fla. Stat. §83.47(1)(a), which states: "A provision in a rental agreement is void and unenforceable to the extent that it purports to waive or preclude the rights, remedies, or requirements set forth in this part." The court explained that Fla. Stat. §83.595(1) (2004) set forth the only remedies available to a landlord for a tenant's breach or early termination of the lease agreement. Those remedies were limited to: (1) treating the lease as terminated and retaking possession for the landlord's own account; (2) retaking possession for the account of the tenant and holding the tenant liable for rent due for the remainder of the lease term or until the unit is re-rented; or (3) standing by and doing nothing, holding the tenant liable for rent as due. By charging early termination fees, in addition to actual damages of lost rent, the landlord was receiving rent in excess of the permissible charges allowed under the Act.[7]

The ***Olen*** case, by contrast, was not a class action lawsuit, but involved a business practice similar to that implemented by the landlord in ***Yates***, which included charging liquidated damages in addition to rent due through the term of the lease for early termination by the tenant. The ***Olen*** court, however, viewed the liquidated damages clause as an unenforceable penalty rather than liquidated damages. In reaching this result, the court in part applied the "***Lefemine test***"[8] to the landlord's liquidated damages clause. That test basically states that when the non-breaching party (landlord) is able to choose between two options for damages, one being an agreed upon penalty fee as "liquidated damages" and the other being rent through the end of the lease term as "actual damages," that party will always choose whichever option yields the greater amount of damages. Thus, the option to choose negated the intent of the parties to select liquidated damages.[9]

Prior to 2003, the only statutory provision of the Act which allowed a landlord to assess liquidated damages against a tenant was found in Fla. Stat. §83.682.

These two cases made it obvious to the legislature that landlords and tenants wanted to be able to exercise their freewheeling ability to contract, but their right to do so was stymied by the statutory restrictions imposed by Fla. Stat. §83.595(1) (2004). In 2007, the legislature responded with its solution to the problems faced by the landlords in ***Yates*** and ***Olen***. It passed HB 1277, which included a comprehensive amendment to Fla. Stat. §83.595 by adding an additional remedy to the total universe of choices available to a landlord when a tenant had not completed the term of the lease.[10] The amended statute included a new subsection (4) that allowed landlords to charge up to two months rent as liquidated damages. However, despite HB 1277 passing by a vote of 101 to 14 in the House and unanimously in the Senate, it was vetoed by Governor Charlie Crist who believed that the impact of such liquidated damages would be too great for those Floridians least able to afford it.[11]

The following year, the legislature responded to Governor Crist's veto with a new and improved version of HB 1277, which now empowered the tenant to select which measurement of damages would apply for breach of early termination. In 2008, HB 1489 passed both houses unanimously and was approved by the governor on June 10, 2010.

PRACTICAL ANALYSIS OF §83.575(2) AND §83.595(4)

While the passage of both §83.575(2) and §83.595(4) codified a landlord's ability to charge liquidated damages without fear of running afoul of the Act, these statutes must be strictly complied with, as substantial compliance is not enough. Any party seeking to receive the benefits of a statute in derogation of the common law must demonstrate strict compliance with the statute's provisions.[12] That means a landlord must strictly comply with all the procedural and substantive requirements of the statutes; a landlord must cross all the "t's" and dot all the lower case "j's."

In order to charge liquidated damages under §83.575(2) for a tenant's failure to provide advance notice of his or her intent to vacate at the end of the lease term, the landlord must provide written notice to the tenant 15 days before the notification period begins, specifying the tenant's obligations under the notification provision contained in the lease and the date the rental agreement is terminated and further listing all fees, penalties and applicable charges in the notice.

Let's assume that a lease terminates on Dec. 31 and provides the maximum allowable 60 days notice period. The notice period would therefore begin on Nov. 1 (60 days before Dec. 31). And the landlord would be required to send notice to the tenant sometime between Oct. 17 and Oct. 31, which is within 15 days of the notification period. If the landlord sent the reminder notice before Oct. 17 or after Oct. 31, the landlord would have failed to strictly comply with the statute and would likely be denied his claim for liquidated damages. Similarly, if the landlord failed to send a reminder notice at all, or if the landlord required a 70 day notice period, his assessment of liquidated damages would likely be denied. Additionally, if the reminder notice failed to mention all fees, penalties and applicable charges, the landlord would likely be denied his claim for liquidated damages.

The same strict compliance applies to charging liquidated damages under §83.595(4). In order to charge liquidated damages for a tenant's breach or early termination, the tenant must be provided with the choice of selecting among liquidated damages or actual damages, at the time the lease agreement is entered into. Additionally, the amount of liquidated damages must be limited to two months rent, regardless of when during the lease term the breach occurs. And, the landlord cannot require the tenant provide more than 60 days notice prior to the tenant's proposed date of early termination if the lease contains an early termination option therein. Moreover, §83.595(4)(b) makes the liquidated damages penalty for breach by early termination inapplicable if the breach is for a tenant's failure to provide timely notice as required in §83.575(2).

Let's assume that a lease terminates on Dec. 31. Some eight months into the lease term, the tenant breaches the lease agreement by vacating early and surrenders possession on Aug. 31. If, at the time the lease was entered into the tenant selected the liquidated damages option, then the landlord could assess up to a two month penalty fee. The landlord would not be able to charge rent for the months of November or December, and would be limited to only two months rent as damages. However, if the tenant vacated and surrendered possession on Sept. 10, then the landlord could charge rent through the end of September, plus the two month liquidated damages fee. But under no circumstances can a landlord assess a 60 day "insufficient notice

fee," plus the two month liquidated damages fees as such assessment would violate the limitations specified in §83.595(4).

Let's assume that a 12 month lease terminates on June 10, and the tenant breaches the lease agreement by vacating and surrendering possession on May 31, and fails to pay the prorated portion of rent due for June. If, at the time the lease was entered into the tenant selected the liquidated damages option, then the landlord could potentially have an argument to assess up to a two month liquidated damages fee, because the statute allows for it. However, the landlord could still face a challenge for imposing a two month penalty for this 10 day breach.

The court will apply a test as to when a liquidated damages provision will be upheld and not stricken as a penalty clause. First, the damages consequent upon a breach must not be readily ascertainable. Second, the sum stipulated to be forfeited must not be so grossly disproportionate to any damages that might reasonably be expected to follow from a breach as to show that the parties could have intended only to induce full performance, rather than to liquidate their damage.[13] In applying this test, the court could find that imposing what amounts to a two month penalty is grossly disproportionate to the actual damage sustained by the landlord. In which case, a landlord could have avoided such a challenge by foregoing the liquidated damages penalty and only assessing the prorated rent as it would have come due through the lease expiration date.

CONCLUSION

In sum, the creation and subsequent amendments to Fla. Stat. §83.575 and §83.595(4) have codified liquidated damages and expanded the remedies available to a landlord for a tenant's breach. And in the instance of early termination, it empowers the tenant to select his or own exposure to damages, whether actual or liquidated, and provides a fixed amount that a tenant can more easily manage. But the unwary landlord could be left with an unenforceable penalty fee if the landlord does not strictly comply with the statutory requirements. ▲

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1 *Lefemine v. Baron*, 573 So. 2d 326, 328 (Fla. 1991).
2 *Olen Properties v. Moss*, 984 So.2d 588, 560 (Fla. 4th DCA 2008).
3 Fla. S. Reg. Indus. Comm., CS for SB 2666 (2004) Staff Analysis (final April 13, 2014).
4 Fla. H.R. Comm. On Const. and Civ. L., HB 1489 (2008) Staff Analysis (final April 9, 2008).
5 *Yates v. Equity Residential Properties Trust* (Fla. 15th Cir. Ct. Dec. 1, 2004).
6 *Olen Residential Realty Corp. v. Romine*, 2004 WL 3322327 (Fla. 15th Cir. Ct. May 27, 2014).
7 *Yates* (Fla. 15th Cir. Ct. Dec. 1, 2004).
8 *Lefemine*, 573 So. 2d at 329-30.
9 *Id.*
10 *Olen Properties v. Moss*, 984 So.2d at 560.
11 Veto of Fla. CS for HB 1277, 1 Eng. (2007) (letter from Gov. Crist to Sec'y of State Browning, May 24, 2007).
12 *Ady v. Am. Honda Fin. Corp.*, 675 So. 2d 577, 581 (Fla. 1996).
13 *Lefemine*, 573 So. 2d at 328 (citing *Hyman v. Cohen*, 73 So.2d 393 (Fla.1954)).

BY JOHNNY KLEMME AND SHAWN MILLER, LOSS & SECURITY EXPERT AND AUTHOR

Rent Check Theft and YOUR REPUTATION

Reports of rent check theft and property management loss continue to make headlines. In January 2014, a depository theft was reported by NBC2 and more than $11,000 was stolen in the form of 13 rent payments from tenants. Investigators report an adhesive substance was found in the deposit box, a common technique, known as phishing that outdated after-hours drop boxes are susceptible to. Affected property owners, managers and tenants are asking: What can be done to deter and prevent these losses?

NBCRightNow.com reports a story in In Pasco, Washington from July 2013 about a property manager who was talking to a tenant on the phone concerning the loss of the month's rent. During the conversation, the property manager noticed that the surveillance camera was showing a man phishing in the drop box for the checks in real time. If surveillance isn't enough, then what is?

An end-to-end approach to security of your facility and the reputation of your property should be taken into consideration at all times. Whether you improve the security measures already in place or add new layers to the approach, property management can accomplish this by taking a closer look at deterrents, focusing attention on the location of rent drop boxes as well as alternatives to your current approach.

Signage: Smile, you're on camera! The simple act of bringing attention to security is a deterrent that is often overlooked. The cost of an all-weather sign is an investment in your facility and the value held in the well-being of tenants. Whether you choose to post large signs or add high visibility stickers, would-be thieves may reconsider theft with this simple step.

Surveillance: Adding or improving the usage of surveillance cameras in the area of your current night or after-hours depository can both capture an attempted burglary and become a major deterrent to the theft itself. Depending on the age of your existing system, it may be worth considering network video recorders, giving you more flexibility for adding more cameras down the road. Consult your security provider and, as always,

inform your tenants of an investment in their security to build trust and improve safety.

High-Security Depository: The after-hours depository box of yesterday may not be enough to prevent theft. As several news stories point out, the technique of phishing continues to make headlines with thefts occurring in many areas of the country. You can take steps today to minimize the risk of loss by upgrading your facility with a better rent vault. Consult with a security professional and do your research on new high-security depositories that are engineered specifically to combat the trend of rent check theft.

Vestibule Doors: Vestibule doors create a small, enclosed area, before one enters the main interior of the building. These areas are easily monitored with security cameras, should be well lit and encourage a feeling of safety and security. In addition to security, vestibules become great locations for advertising and marketing. A vestibule can be a focus area for signage, bulletins for tenants and provides a high traffic area to upsell, cross sell or promote new offerings at your property.

Tenant Communication: Staying in regular contact with tenants via email, text or written notices is a great way to improve reporting of suspicious activity and improve loyalty to your property. Regular and timely notices, improvements and upgrades to your facility help build trust. Alerting your tenants that thefts have been reported in the news can also speed up the time of deposits and encourage more daytime rent drops. When communication is two-way, the likelihood of tenants reporting issues sooner rather than later have been shown to increase.

An end-to-end approach to security of your facility and the reputation of your property should be taken into consideration at all times.

Online Payments: Physical payment methods are often much easier to steal compared to virtual payments. In addition, online payment systems do more than protect you from theft; with our 24/7 culture, adding a convenient way for tenants to pay their rent from a mobile device improves long-term property loyalty with tenants. While there may be added IT infrastructure challenges, properties utilizing online payments reap the benefits of labor cost savings and getting your deposits faster than traditional methods.

Written Policy: Communities that may have experienced rent check theft consider updating the terms and conditions related to the after-hours rent drop box. Consult with legal counsel to determine how to best limit liability.

Consulting with a security professional and legal counsel is always the best approach before making an investment, change

in policy or facility upgrade. With the average dollar loss from burglary in 2011 at $2,185 dollars and a burglary happening every 14.6 seconds in the United States, an investment today can prevent the headache and hassle of loss tomorrow. Getting a fresh perspective on security and safety often leads to plans and strategies that are scalable and may not require large upfront capital investments.

As rent check and money order crimes continue to be reported in several other areas across the nation, it's vital for property owners and management to mitigate these risks. The Online Athens reported on a case in Clarke County, Ga., where several apartment communities in the area had reported a total loss of about $9,000 in checks, money orders and cash. Just as it was in the NBC2 story from Florida, an adhesive substance was found in several of the drop boxes. Less than a week later, law enforcement officials were called to yet another apartment community where 25 people reported the loss of their rent. Police Lt. Mike McKeel was quoted saying, "We're contacting the various apartment communities and trying to get them to take steps to make these drop boxes a little more difficult to get into."

On-going debate for who is responsible for the theft and loss of rent continues to a leading industry topic. Lawyers may argue that because the rent was placed within the lessors building, the landlord is responsible. Others attorneys contend that without proof of payment, the tenant may be held liable. Regardless of where liability falls, apartment associations and property management groups across the country are taking note of the headache these losses cause.

Investing in security may not always be the top priority in your budget. However, thinking through any of the options and scenarios above may lead to improvements that are intangible – reputation and tenant loyalty. The reputation of your property in the local market and loyalty of your tenants in an increasingly competitive market is a top priority, and this month we ask our readership: What are you doing to prevent the loss of rent at your facility? ▲

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