

MEMORANDUM

TO: Interested NMHC/ASHA/NAA Members

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RE: Criminal Background Checks and Sex Offender Registries

DATE: February 5, 1999

Please understand that the information discussed in this Memorandum is general in nature and is not intended to be legal advice. It is intended to assist owners and managers in understanding this issue area, but it may not apply to the specific fact circumstances or business situations of all owners and managers. For specific legal advice, consult your attorney.

TOPICS DISCUSSED

- I. Criminal Background Checks
- II. Sex Offender Criminal History Information
- III. Sex Offender Registry Listings

OVERVIEW

Megan's Law? Criminal background checks? Sex offender registries? These issues have all been "hot" topics for the apartment industry. What does your rental application say about prior convictions? Should owners or managers use criminal background checks on prospective residents? Should owners or managers screen new and renewing residents under the state sex offender registries, if available? This memorandum surveys the business and legal landscape in order to help you make a more informed business decision.

SUMMARY OF ANALYSIS

Criminal background information, though not necessarily always fully comprehensive, has become more accessible. Some researchers and courts have concluded that past criminal convictions are reasonable indicators of a propensity to commit further criminal acts. As such, criminal history information can help owners identify prospective residents that may pose a risk to the property or to other persons, residents and employees.

Federal fair housing laws do not preclude owners from choosing not to rent to prospective residents because of their criminal history.¹ However, cases decided under the Fair Housing Act limit the types of criminal history that may disqualify a resident applicant. When using criminal history as a resident screening tool, owners should ensure that any distinctions among prospective residents are made based on objective and established policies or procedures.

Sexual crime history information should be given particular attention. As a result of Megan's Law, information regarding convicted sex offenders is becoming more accessible and tends to be more widely available than information about other violent criminals. Registries have been established pursuant to federal law in almost every state to better inform the public to potential danger from the release of sex offenders. Registry information can be a useful resident screening tool because sex offenders have been found to have high rates of recidivism and as such may pose a risk to the residents and employees of multifamily housing communities.

Finally, owners occasionally learn that current residents are listed as registered sex offenders. Such information poses unique questions. First, owners should consult relevant state statutory and case law to determine what, if any, disclosure obligations they may have to their residents and resident applicants. In most states, such obligations do not exist in state statutory or case law. Second, owners must assess whether to terminate the resident's lease. This decision should be based on the then-existing resident screening policies, the lease application, and the lease. If the owner cannot, or chooses not to, terminate the lease, the owner must determine whether and how to disclose the presence of the sex offender to other residents and employees. The owner must also determine what, if any, other precautions should be taken.

DISCUSSION

¹ 42 U.S.C. 3604 (f)(9) states "[N]othing in this subsection requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others."

I. Criminal Background Checks (CBCs)

Many owners are including criminal background checks (CBCs) in their resident and employee screening protocols because studies of recidivism rates demonstrate that criminal history can be an accurate predictor of future behavior. Thus, a prospective resident's criminal history can be a useful resident screening tool: it may yield information indicating whether that individual will be a responsible resident.

Statistics indicate that certain types of criminals and crimes pose a risk to residents and property. A 1997 special report by the U.S. Department of Justice (DOJ) estimates that 63 percent of 108,580 criminals released from prison in one year were subsequently rearrested and charged with more than 326,000 new felonies and serious misdemeanors. Approximately 50,000 of the subsequent crimes were violent offenses (such as homicides, rapes, robberies, and assaults), more than 141,000 were crimes against property (such as burglary, motor vehicle theft, or arson), and 46,000 crimes were drug offenses.²

The report concluded that recidivism rates for these prisoners were highest in the first year after release, and that the chance of recidivism was higher the more extensive a prisoner's prior arrest record. Furthermore, released prisoners tended to be rearrested for the same type of crime for which they served time in prison. More importantly, DOJ found that those individuals who committed property offenses had higher recidivism rates than criminals convicted of violent or drug offenses. An estimated 68.1 percent of convicted property offenders released in 1983 were rearrested for a new property offense within three years, and were rearrested more than other types of criminals.³

These statistics distinguish certain types of criminals and crimes as posing a higher risk to residents and to property than others. This data also indicates that certain types of criminal offenses have a substantial likelihood of reoccurrence. Since this creates the possibility that some criminals or crimes pose a heightened risk to residents and to property, owners should, at a minimum, ask about criminal convictions on the leasing application. In addition, by conducting a CBC, owners may gain a partial picture of the criminal background of a prospective resident or employee, subject to the scope and reliability of the information available in the CBC. This information, combined with knowledge that recidivism rates are higher for certain criminals and offenses, may help owners evaluate whether a prospective resident poses a risk to other persons or to property.

² Allen J. Beck, Ph.D. & Bernard E. Shipley, Recidivism of Prisoners Released in 1983, U.S. Department of Justice 1 (rev. 1997).

³ *Id.* at 2

A. What is Involved with a CBC?

Because the availability and cost of obtaining criminal background information on a prospective resident or employee varies widely, industry practices vary widely in their use of such information. Generally, a CBC can involve the review of federal, state, and local court records to identify prior misdemeanor and felony arrests and convictions by resident and employee applicants.

Some owners choose not to undertake CBCs for a variety of reasons. It is important to note, however, that a prospective resident's criminal history typically will not be included in a consumer credit report. For this and other reasons many owners do choose to conduct CBCs. Among owners that check applicants' criminal histories, some owners conduct CBCs through their own staff while others purchase these services from a reporting agency. A company that provides such tenant screening data will have a staff of public record researchers who will obtain this vital information directly from public record archives.⁴ Bulk purchasing of criminal history data makes it possible in states like Texas⁵ for companies and trade associations to establish proprietary criminal history information databases for in-house or members-only use.⁶ Criminal history screening programs have also been undertaken as part of larger marketing and security efforts to promote "crime-free" communities.⁷

There is a wide range of commercially available criminal history information. Some reporting agencies provide a full range of resident screening information including a prospective resident's rental, credit, and criminal history. Companies will typically develop a fee structure customized to meet the needs of the owner, taking into

⁴ Gary W. Lindquist, *Public Records and the Tenant Screening Process*, 15 (Copy on file with NMHC.)

⁵ Effective September 1, 1997, Texas criminal conviction records were accessible, without prior permission, by anyone for any purpose upon payment of appropriate fees. See generally "RE: Enactments," "Abode," August 1997, 17-18. (Copy on file with NMHC.)

⁶ For example, Resident Credit Reporting, an initiative of the Houston Apartment Association, provides members with felony conviction information obtained from the Harris County clerk's office. Management employees attend training programs on how to use criminal history data before participating in the program.

⁷ Like many other apartment associations, the Arizona Multihousing Association has worked with local law enforcement to introduce a crime-free community program that encourages residents to learn crime prevention tactics. The program includes a sample Crime-Free Lease Addendum that details which illegal activities are grounds for immediate termination.

account the search costs necessary to access available information. Often, companies will add value to the information product they offer by providing tips to management and owners about the appropriate use and interpretation of the criminal history information provided.

Other companies specialize in conducting only CBCs. Such companies may charge \$10 to \$15 per CBC where information is readily available. Importantly, however, criminal history information is only available on a county-by-county basis in many states. In these states, per-resident criminal history search costs can be significantly higher.

Whatever the type of reporting agency preferred, it is important for an owner to screen them well before making a final selection. Asking questions and determining what methods a reporting agency uses to obtain information will assist an owner in making a wise choice.⁸

In addition, the cost of conducting CBCs may vary based on the needs of the apartment community. Some owners may choose to conduct CBCs more frequently than others: one owner may decide to conduct CBCs with new resident applicants; another may choose to conduct CBCs before entering into the lease and at lease renewal. Factors that may influence such a decision may include such considerations as the resident turnover rate, the size of the company portfolio, local crime rates, or community standards of the surrounding area.⁹ Finally, whether or not owners decide to conduct CBCs, they may wish to include a question on the rental application asking whether prospective residents have been convicted of a felony or other specified crimes.

Owners implementing a policy of criminal history screening should consider the geographic scope and time span of the criminal history of the resident or employee applicant they are investigating. Owners undertaking CBCs may find that a prospective resident is from the surrounding area and that a search of local county court records is sufficient. Other owners may find that a prospective resident comes from a broader geographic range and may require state, interstate, or federal court record searches. Once a CBC policy is established, it should be applied evenly to all applicants.

⁸ Lindquist, *Public Records and the Tenant Screening Process*, 15.

⁹ If a company decides to use CBCs to screen residents at only some of its properties, care should be taken to select properties based on a race-neutral factor, such as the prevalence of crime in the area of the property selected. Screening for criminal behavior whose implementation or effect is not race-neutral may be subject to challenge under the Fair Housing Act.

The broader the search, the longer it takes. Generally, a local county court record search can take days, while a statewide search, interstate, or federal search can take months. Owners must balance their informational needs and resource constraints against the market demand for rental housing in their area. A lengthy resident review process can also result in the loss of desirable residents.

Owners should be mindful that criminal history information may contain some inaccuracies and may not be fully up-to-date. Indeed, the reliability of criminal records is a major concern today. In many jurisdictions, state and federal court records are updated with information that is voluntarily submitted by local entities, and there may be lag time in the submission of such data. In addition, two individuals with the same name may be confused as the same person, which demonstrates the need to obtain other personal identification, such as drivers license or social security numbers when seeking criminal history information.¹⁰

Congress made two important changes in 1998 that impact the availability of criminal history information used in the apartment context. First, the federal Fair Credit Reporting Act (FCRA) no longer imposes a maximum time limit of seven prior years for reported criminal history of a person's convictions. Effective immediately, criminal conviction records from more than seven years before the date of the consumer report request may be included in the report.¹¹ Second, 1998 changes to federal housing law set new procedures governing the use of criminal history information in reviewing resident applications for project-based section 8 housing:¹² (1) the housing must be located within the jurisdiction of a public housing agency; (2) the owner of the housing must request that this agency with jurisdiction obtain the criminal records for tenant screening; (3) the agency must obtain the information on behalf of the owner; and (4) the agency must not make the information available to the owner, but must perform determinations for the owner based on criteria supplied by the owner. This statutory

¹⁰ The Texas Redbook, for example, recommends that owners ask for the Drivers License and/or Social Security numbers of prospective residents which will increase the likelihood of obtaining accurate data. In addition, the Redbook provides a supplemental criminal history questionnaire which enables owners to obtain additional background information regarding the circumstances surrounding a conviction. In this manner, owners can make a fully informed decision when deciding whether a prospective resident with criminal history poses a risk to other residents or to property. Larry Niemann, *Should Rental Housing Owners Use Resident Criminal History Reports?*, Texas Apartment Association Redbook, p. 475, (1998-1999 Revision).

¹¹ Consumer Reporting Employment Clarification Act of 1998, Pub. L. No. 105-347

¹² VA-HUD Appropriations Bill for Fiscal Year 1999, Pub. L. No. 105-276

change does not delineate guidelines regarding the substantive selection criteria an owner may use. Thus, the owner must continue to adhere to limits provided in the Fair Housing Act.

B. Procedures to Follow if Adopting CBCs

If an owner decides to utilize CBCs as a resident screening tool, they should establish clear procedures for the use of such data and consistently adhere to them. Owners should work with their legal counsel to develop these procedures. Taking into account applicable case law, owners and their counsel should identify those convictions that indicate that a prospective resident may pose a risk to the property or to other residents.¹³ These decisions should be documented and included in a written resident screening policy. Once such a policy is in place, owners should ensure that their rental agents are conversant with the policy and apply it consistently.¹⁴ If such policies are not applied consistently, owners run the risk that a prospective resident who is denied a rental will bring a fair housing lawsuit alleging that the decision not to rent to that person was actually a pretext for discrimination.¹⁵ Owners should also obtain the prospect's written consent before undertaking a background check and, if adverse action is warranted, tell prospects why they were rejected.¹⁶

Where a CBC meets the definition of a "consumer report" under the federal Fair Credit Reporting Act (FCRA), additional disclosures may be required of the apartment company requesting the report. FCRA requirements do apply where the information contained in a CBC constitutes a *consumer report* which is defined as "any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (a) credit or insurance to be used primarily for personal, family, or household purposes; (b) employment purposes; or (c)

¹³ Talley v. Lane, 13 F.3d 1031 (7th Cir. 1994).

¹⁴ See Ryan v. Ramsey, 936 F. Supp. 417 (S.D. Tex. 1996) (determining that landlords can show the non-discriminatory selection of residents through the use of formulas, rules, criteria, and policies that are impartially and uniformly applied to all applicants). See also Comer v. Cisneros, 37 F.3d 775 (2d Cir. 1994).

¹⁵ See Mabry v. Village Management, No. 85-C-6093, 1986 WL 5743, at *3 (N.D. Ill. 1986) (validating class action suit alleging resident-selection policies that resulted in race and age discrimination.)

¹⁶ Fair Housing Coach (pp. 2-4, December 1998)

any other purpose authorized under section 604.”¹⁷ As the FTC emphasized in a recent settlement, combined criminal and other history reports which meet the FCRA’s definition of consumer report are subject to FCRA requirements.¹⁸ The Federal Trade Commission, however, issued an opinion that a company requesting criminal conviction information directly from a state highway patrol or other state agency that provides information generally available to the public need not follow FCRA obligations.¹⁹

An apartment professional using a consumer report in the resident or employee screening process has the following obligations under FCRA:²⁰

- ◆ Users must have a permissible purpose²¹ to obtain a report;
- ◆ Users must provide certifications to the consumer reporting agency (CRA) of the permissible purpose(s) for which a report is obtained;
- ◆ Users must certify to the CRA that the report will not be used for any purpose other than the permissible purpose(s); and
- ◆ Users must notify consumers when adverse actions are taken.²²

¹⁷ Fair Credit Reporting Act, Section 603(d)(1).

¹⁸ “In the Matter of First American Real Estate Solutions, LLC.”, Federal Trade Commission File Number 952-3267 (October 28, 1998).

¹⁹ Federal Trade Commission Letter to Gail Goeke (June 9, 1998).

²⁰ 15 USC section 1681 et seq.

²¹ 15 USC section 1681b defines *permissible purposes* for obtaining consumer reports as use of “the information in connection with a credit transaction involving the consumer on whom the information is to be furnished; for employment purposes; ... or for a legitimate business need ...” A *legitimate business need* includes consideration of an application a consumer has submitted to a “landlord”. 16 C.F.R. Part 601, Appendix A - “Prescribed Summary of Consumer Rights”

²² Additional requirements are imposed on apartment professionals if they are using an *investigative* consumer report, or they are using a consumer report for employment purposes. An investigative consumer report (ICR) is defined as “a consumer report or portion thereof in which information on a consumer’s character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge concerning any such items of information ...” 15 USC 1681a (e).

C. Legal Constraints on the Use of Criminal History to Disqualify Resident Applicants

The federal Fair Housing Act prohibits discrimination in the sale or rental of housing on the basis of race, color, religion, sex, familial status, national origin, or handicap.²³ For example, the Act prohibits owners from making pre-occupancy inquiries into the nature or extent of a prospective resident's handicap. While drug addiction or alcoholism may be considered a handicap in such instances, it is permissible for an owner to ask whether an applicant is a *current* illegal user or addict of a controlled substance.²⁴ He or she may also ask whether the applicant has been convicted of the illegal manufacture or distribution of a controlled substance.²⁵

The Fair Housing Act does not prohibit, however, owners from choosing not to rent to individuals for non-discriminatory reasons.²⁶ Indeed, the Act explicitly recognizes that owners cannot be required to rent an apartment to a prospective resident who constitutes "a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others."²⁷

Federal circuit courts have applied this standard in reviewing decisions by apartment management to refuse to admit resident applicants with criminal histories. In Talley v. Lane, the Seventh Circuit Court of Appeals (whose opinion is binding precedent in Illinois, Indiana and Wisconsin in the absence of a Supreme Court opinion to the contrary, and is an instructive interpretation to guide courts in other jurisdictions) upheld the use of criminal history as legitimate screening criteria.²⁸ In reaching its decision, the court reasoned that it is a permissible use of owner discretion to find that individuals with a history of convictions for property and assaultive crimes would be a direct threat to other residents and to deny their applications.²⁹ One leading fair

²³ 42 U.S.C. §§ 3601-3620 (1988).

²⁴ 42 USC 3602(h)(3)

²⁵ 42 USC 3607(b)(4)

²⁶ Prior to establishing any rental policy, owners should also evaluate state fair housing laws to make sure more restrictive state and local standards do not apply.

²⁷ 42 U.S.C. § 3604(f)(9).

²⁸ 13 F.3d 1031 (7th Cir. 1994); Forehand v. IRS, 879 F.Supp. 592 (M.D.Ala. 1996).

²⁹ Id. at 1034.

housing publication, Fair Housing Coach, has reported that a history of one or more of these crimes is sufficient grounds to deny a resident's application.³⁰

Other federal circuit courts have recognized apartment management's right to use its experience and discretion when evaluating prospective residents.³¹ In Hill v. Group Three Housing Development Corporation, the federal court for the Eighth Circuit (comprising Missouri, Arkansas, Iowa, Minnesota, North Dakota, South Dakota and Nebraska) note²⁸d that the resident selection process involves appraisals of prospective residents by owners "based upon their experience with the difficult and sensitive task of evaluating the responsibility of [resident] applicants."²⁹ The Hill court went on to note that "absent invidious discrimination[,] the actual selection of individual residents from among the class of otherwise eligible applicants is left exclusively to the owner's business judgment and discretion."

Courts have also upheld resident screening decisions made for legitimate business reasons.³⁰ In Boyd v. Lefrak Organization, the United States Court of Appeals for the Second Circuit (covering New York, Vermont and Connecticut) held that a landlord may rent to a potential resident of his choosing as long as he does not discriminate on the basis of race, color, religion, sex, familial status, national origin or

³⁰ The Fair Housing Coach, p. 3 (December 1998), also suggests arson, armed burglary, rape, child molestation, spousal abuse, murder, and drug dealing.

³¹ See also Eidson v. Pierce, 745 F.2d 453 (7th Cir. 1984) (class action protesting resident selection procedures. Court recognized that the resident selection process involves other less tangible factors besides mere eligibility for participation in a statutorily created housing program); Overton v. John Knox Retirement Tower, Inc., 720 F. Supp. 934 (M.D. Ala. 1989) (court acknowledged that owners have certain managerial functions and rejected argument of applicant that denied managers of a federally funded apartment complex discretion in resident selection).

²⁹ 799 F.2d 385, 393 (8th Cir. 1986) (*quoting* Greenholtz v. Inmates of Neb. Penal and Correctional Complex, 442 U.S. 1, 99 S. Ct. 2100, 60 L. Ed. 2d 668 (1979)).

³⁰ Similarly, in Ressler v. Landrieu, 502 F. Supp. 324, 328 (D. Alaska 1980), the court found that an owner may decline to rent a unit to an "otherwise eligible applicant who would be likely to diminish other residents' enjoyment of premises by adversely affecting their health, safety or welfare or by adversely affecting [the] physical environment or financial stability" of the development.

handicap.³¹ Generally, federal courts have viewed the evaluation of whether a prospective resident will be a responsible resident or pose a risk to other tenants or to the property as a business decision within the discretion of the owner, as long as decisions are made in a consistent manner.

Important provisions should be included in rental application and lease documents to give an owner sufficient flexibility. If an owner rents to an applicant and later discovers the applicant failed to disclose a prior felony conviction on the rental application, he or she may terminate the resident's right of possession. This is most likely the case, however, only if the rental document warns the prospective resident that misrepresentations on their applications will result in termination of their tenancy.³² In addition, some apartment professionals counsel that language should be included in the lease or rental agreement that clearly asserts a right to evict if either the resident or any of the resident's occupants or guests commits a crime during the lease term. One leading apartment professional has suggested including the following model language in rental agreements and leases: "You will be in default if you or any guest or occupant violates criminal laws, regardless of whether arrest or conviction occurs."³³

D. Apartment Owner Premises Liability under State Law

As a result of a strong plaintiff's bar, creative lawyering, and a liberalization of state landlord/resident law, multifamily owners have been found responsible for an ever-increasing range of resident claims that occur on and near their apartment premises. For example, housing providers have faced liability for a resident murdered by a security guard on the apartment property³⁴ and for a criminal attack on the property despite the

³¹ 509 F.2d 1110, 1114 (2d Cir. 1975); See also Johnson v. Albritton, 424 F. Supp. 456 (M.D. La. 1977) (noting that the civil rights statutes make it clear that one who sells or leases real estate has a right to refuse approval on any honest basis unrelated to the race of the prospective residents).

³² Janet Portman, *Megan's Law: It's Not a Simple Fix* (visited December 22, 1998), www.nolo.com/chunklt/megans_law.html.

³³ Larry Niemann, *Red Flags, Rental Criteria and Practical Resident Screening*, Texas Apartment Association (May 9, 1997). On file with the National Multi Housing Council.

³⁴ Rockwell v. Sun Harbor Budget Suites, 925 P.2d 1175 (Nev. 1996) (guard hired by owner to provide security at apartment complex could be considered owner's employee in wrongful death suit accusing owner of negligence in hiring and supervision of guard).

owner's lack of knowledge of prior crimes occurring there.³⁵ As such, owners should be cognizant of potential new causes of action that creative plaintiffs' attorneys might bring.

To successfully maintain such a lawsuit, an injured resident typically has to prove the three basic elements of a common law negligence claim: (1) that the owner owed the resident a legal duty, (2) that the owner breached that legal duty to the resident, and (3) that the resident was harmed by the owner's breach of that duty.³⁶ Negligence claims are typically matters of state statutory and case law.

It is well settled that owners owe a duty of care to their residents to exercise reasonable care regarding the condition of the premises they own.³⁷ This duty has been found to include responsibility for discovering dangerous conditions on the premises and eliminating them on behalf of residents.³⁸ This duty of care has also been extended from the physical conditions of the property to dangerous activities that occur on the property.³⁹ Courts have held that the owner's duty to exercise reasonable care in certain instances includes protection against criminal activity. In Kline v. 1500 Massachusetts Ave. Apartment Corporation, the court held that an apartment owner has a duty to protect residents against predictable criminal acts.⁴⁰ The court reasoned that the owner was aware of conditions that created a likelihood of attack, and that it was not burdensome to expect a landlord to take steps to "minimize . . . predictable risk to his

³⁵ McKinney-Vareschi v. Paley, 680 N.E.2d 116 (Mass. App. Ct. 1997) (court reasoned that a property owner has a duty to exercise reasonable care in preventing injury to a lawful visitor caused by the reasonably foreseeable acts of another, regardless of whether those acts were accidental, negligent, or intentional).

³⁶ Prosser & Keeton on Torts §§ 29-30 (5th ed. 1984 & Supp.).

³⁷ Restatement (Second) of Torts § 360 (1964).

³⁸ See Dikeman v. Carla Properties, 871 P.2d 474, 480 (Or. App. 1994) (action brought by resident to recover from injuries sustained on premises of apartment complex. The court held that owners have a duty of care to maintain the premises which includes the discovery and repair of dangerous conditions).

³⁹ Martinez v. Woodmar IV Condominiums Homeowners Ass'n, 941 P.2d 218 (Ariz. 1997) (guest of resident who was shot in dark condominium parking lot sued condominium association. Court found that condominium association owed a duty to exercise reasonable care regarding the safety and condition of the premises to residents).

⁴⁰ 439 F.2d 477 (D.C. Cir. 1970).

residents.”⁴¹ Courts have consistently held that owners have a duty to protect residents from reasonably foreseeable criminal conduct. Thus, in evaluating whether to implement CBCs - and if so, how - management should look closely to what local courts have considered to be reasonably foreseeable criminal conduct.⁴²

Owners owe a duty of care to protect their residents from foreseeable harm. Failure to do so could constitute a breach of that duty. Owners have been found liable for not taking steps to minimize a risk that they had knowledge of through prior similar conduct.⁴³ In recent years, some jurisdictions have expanded the concept of “prior similar conduct” to encompass owners’ knowledge of the existence of general criminal activity that poses a risk of harm to residents.⁴⁴ Owners have also been found liable for not taking reasonable security precautions that would protect residents against the risk

⁴¹ Id. at 481. See also O’Hara v. Western Seven Trees Corp., 75 Cal. App. 3d 798, 142 Cal. Rptr. 487 (1977) (finding that the owners could be held liable for negligence if it could be proven that they failed to warn the plaintiff of the series of attacks, failed to provide adequate security to prevent the attacks, and misrepresented the safety of the complex to induce the plaintiff to rent there. In this case, not only did the owners have prior knowledge of the attacks, but police provided a composite sketch and description of method of assault. However, the owners did not warn the plaintiff of this danger, and neglected to take steps to increase security. Since the owners failed to take appropriate action, the court reasoned that they increased the likelihood of the plaintiff’s attack).

⁴² See Graham v. M & J Corp., 424 A.2d 103 (D.C. Cir. 1980) (residents sued owner because of injuries suffered from fire deliberately ignited in foyer of complex. Court determined that owner could be negligent for failing to take reasonable security precautions because danger of criminal assault was sufficiently probable where owner knew of previous crime); Rosenbaum v. Security Pac. Corp., 43 Cal. App. 2d, 50 Cal. Rptr. 2d 917 (1996).

⁴³ Kline, 439 F.2d at 481; Walker v. Sturbridge Partners, 470 S.E.2d 738 (Ga. 1996); aff’d 482 S.E.2d 339 (Ga. 1997). But see Kazanoff v. United States, 945 F.2d 32 (2d Cir. 1991) (owners and manager of building not negligent in connection with tenant’s death where there was little evidence of criminal activity prior to incident that would have made murder foreseeable to owners and manager).

⁴⁴ See Walls v. Oxford Management, 633 A.2d 103 (N.H. 1993) (sexually assaulted resident sued management company of complex with history of thefts but no history of prior sexual assaults by claiming that owners had a duty to warn residents of lack of security and about the criminal activity which had taken place on the premises. Court held that owner generally had no duty to protect residents from criminal attacks but may be liable if owner created or was responsible for a known defective condition on the premises that foreseeably enhanced the risk of criminal attack to residents).

of harm.⁴⁵

In a major 1998 opinion, the Texas Supreme Court adopted a five-factor analysis to determine the extent of the duty of apartment owners and managers to take reasonable precautions against on- and near-premises liability. In Timberwalk Apartments, the court stated the following should be considered in analyzing whether criminal conduct on an owner's property was foreseeable: (1) proximity of prior criminal conduct to the property; (2) how recently such conduct occurred; (3) the frequency of the conduct; (4) the similarity of the conduct to the conduct on the property; and (5) the publicity level given the prior conduct. In dicta, the court found that property owners and managers did not have a duty to inspect local police reports regularly for evidence of criminal activity. Also, the absence of crime or the occurrence of a few, isolated incidents over a long period makes the risk of a particular crime unforeseeable as a matter of law.⁴⁶

Where criminal behavior of apartment employees is at issue in a premises liability case, courts have split over whether the owner/management team's duty to exercise reasonable care extends to undertaking employee background checks. Some courts have found a heightened duty to inspect an employee's criminal background where the employee will have authority to enter the apartment unit. Owners and management should use reasonable care in the hiring of an employee who may pose a threat of injury to residents.⁴⁷ The scope of this duty is determined by the type of work

⁴⁵ See Kuzmicz v. Ivy Hill Park Apartments, 660 A.2d 1208 (N.J. 1995) (residents stabbed on pathway across adjacent lot that owners knew residents used. Court held that owner had a duty to take reasonable steps to protect residents from criminal activity on vacant lot by warning of the crime risk or by closing a gap in a fence on owners' property that residents used to access the pathway); Bach v. Florida R/S, Inc., 838 F. Supp. 559 (M.D. Fla. 1993); Larochelle v. Water & Way Ltd., 589 So. 2d 976 (Fla. Dist. Ct. App. 1991) (owner potentially liable for sexual battery committed on resident in her apartment where resident claimed owner was aware of certain unsavory but nonviolent conduct that occurred in apartment of another resident). *But see* Feld v. Merriam, 485 A.2d 742 (Pa. 1984) (residents sued owners for injuries incurred during attacks on premises of complex. Court noted that owners cannot be insurers of residents' safety).

⁴⁶ Timberwalk Apartments and Sovereign National Management Co. v. Cain, 972 S.W. 2d 749 (1998)

⁴⁷ See Ponticas v. K.M.S. Inv., 331 N.W.2d 907 (Minn. 1983) (resident raped by manager of apartment complex sued owner and operator of complex for negligence in hiring manager with a criminal record. The court held that owner had duty to exercise reasonable care in hiring individuals who, because of nature of employment, may pose a threat of injury to members of the public whom employee may

and the degree of risk to the public.⁴⁸ Owners have been found liable for not thoroughly reviewing the backgrounds of individuals who would have access to the interior of apartment homes.⁴⁹

Some courts have found an owner/manager's duty of ordinary care does not require management to make inquiries into the criminal history of employees or prospective employees. In Ernst v. Parkshore Club Apartments,⁵⁰ an apartment resident attacked by a maintenance employee sued the building owner for negligence. The court held that the owners did not have a duty to investigate maintenance employee's arrest record before hiring him, and that even if the owners had such a duty, the failure to investigate employee's arrest record was not a proximate cause of the resident's injuries. Here, reasonable care in the selection and retention of employees did not extend to an obligation to investigate the employee's criminal history.

What constitutes a reasonable inquiry typically depends on the circumstances of the case. In Evans v. Morsell, the Court of Appeals of Maryland held that there was no legal duty requiring a bar-owner employer to specifically inquire about a bartender employee's criminal record.⁵¹ The court, citing the difficulty at that time of obtaining criminal records, reasoned that the owner's mere inquiry regarding the employee's experience was sufficient to evaluate the employee's fitness. Criminal record history, however, is more readily available today, and is slowly becoming more reliable. A court conducting a similar fact-based inquiry one day soon might find the employer has a duty to inquire into the employee's criminal history.

come in contact by reason of employment).

⁴⁸ Ponticas, 331 N.W.2d at 911. See also Kendall v. Gore Properties, 236 F.2d 673 (D.D.C. 1956) (holding that an owner could be negligent if the owner hired an employee to do painting in an apartment building who would have access to residents' apartments without any investigation whatsoever as to qualifications or character of that employee).

⁴⁹ Williams v. Feather Sound, 386 So. 2d 1238 (Fla. Dist. Ct. App. 1980) (action against developer for injuries received from attack by developer's employee. The court found that developer was responsible for obtaining information regarding the employee's background that could have been obtained upon reasonable inquiry since employee would be permitted to have access to resident's homes).

⁵⁰ 863 F. Supp. 651, 656 (N.D.Ill. 1994).

⁵¹ 284 Md. 160, 395 A.2d 480 (Md. 1978). See also Hipp v. Hospital Auth. of Marietta, 121 S.E.2d 273 (1961) (holding that hospital could be liable for allegations of negligence in hiring employee with criminal record without an investigation into the employee's background); Estate of Arrington v. Fields, 578 S.W.2d 173 (Tex. 1979).

As criminal history information becomes easier to obtain and adequately reliable, courts may begin to impose a duty to inquire into criminal history with greater frequency than they now do. Owners should consider what role CBCs should play in their screening procedure to help ascertain whether a prospective resident or employee may pose a risk to other residents or to the property.

II. Sex Offender Criminal History Information

In the wake of increasing public concern about the presence of sexual offenders, Congress enacted three significant federal statutes since 1994 that have facilitated the dissemination of sex offender information. The first, the Jacob Wetterling Crimes Against Children & Sexually Violent Offender Registration Act,⁵² mandates that states receiving certain federal funds establish registration systems for convicted child molesters, sexually violent offenders, and sexual predators. Under the Wetterling Act, states must require such persons to register with the state; update such registries regularly and maintain these records in a central location; distribute this information to law enforcement personnel; and allow the disclosure of this information to the community for public safety reasons.

In 1996, Congress passed the federal version of “Megan’s Law”,⁵³ which strengthened the community notification component of the Wetterling Act. Currently, this law contains a mandatory community notification provision which requires the release of registry information to the public when a state determines it is necessary to protect the public. All 50 states now have their own Megan’s Law-type statutes and have established state registries requiring that sex offenders within their jurisdictions register with them.⁵⁴ It is important to note, however, “[T]he various Megan’s Law databases across the country are not the reliable trove of information they’re often touted to be. The data may be incomplete or incorrect, depending on the rigor with which states enforce their sex-offender registration requirements.”⁵⁵

⁵² 42 U.S.C. § 14071 (1994).

⁵³ Megan’s Law, Pub.L. 104-145, 110 Stat.1345 (1996).

⁵⁴ In addition, in accordance with the Pam Lychner Sexual Offender Tracking and Identification Act, Pub. L. 104-236, 110 Stat. 3093 (1996), the Federal Bureau of Investigation (“FBI”) established its own database listing sexual predators. The FBI registry provides a nationwide tracking and identification system of sexual offenders. This information is currently not released publicly. It is used only for law enforcement purposes.

⁵⁵ Janet Portman, *Megan’s Law: It’s Not a Simple Fix* (visited December 22, 1998), http://www.nolo.com/chunklt/megans_law.html.

The Pam Lychner Sexual Offender Tracking and Identification Act of 1996⁵⁶ directs the FBI to establish a national database of registered sex offenders and to register offenders in states that have not established a “minimally sufficient sexual offender registration program”⁵⁷. It also tightens state registration procedures. Moreover, in 1997, the Justice Department issued final guidelines for the implementation of the Wetterling Act⁵⁸ as well as Megan’s Law. In 1998, DOJ published proposed guidelines clarifying state compliance procedures under all three acts.⁵⁹ It also published final guidelines to implement the Wetterling Act as amended by Megan’s Law and the Pam Lychner Act.⁶⁰

A. Accessibility of Sexual Offender Criminal Histories

The rationale for these laws is that certain types of sex offenders have been found to have a high rate of recidivism. In essence, community notification laws are based on the theory that residents of communities should be made aware of the presence of sexual offenders due to the likelihood that the sexual offender will continue to commit sexual offenses.⁶¹

Statistics also indicate that sex offenders are likely to be repeat offenders than

⁵⁶ 42 U.S.C. § 14072 (1996).

⁵⁷ The Pam Lychner Sexual Offender Tracking and Identification Act defines the term “minimally sufficient sexual offender registration program” as one that (A) requires the registration of each offender who is convicted of a covered offense; (B) requires that all information gathered under such program be transmitted to the FBI in accordance with the act; (C) meets the act’s verification requirements; and (D) requires that each person who is required to register shall do so for a period of not less than 10 years beginning on the date that such person was released from prison or placed on parole, supervised release, or probation.

⁵⁸ 62 Fed. Reg. 39009 (1997)

⁵⁹ 63 Fed. Reg. 33696 (1998)

⁶⁰ 63 Fed. Reg. 69652 (1998)

⁶¹ See Paul P. v. Verniero, 982 F. Supp. 961 (D.N.J. 1997) (registered sex offenders brought class action challenging constitutionality of New Jersey’s Megan’s Law. In dismissing claim, the court discussed the state’s compelling interest in protecting the public from the danger of recidivism).

are other types of violent criminals.⁶² For example, a study conducted by DOJ concluded that individuals convicted of sexual assault were 7.5 times more likely to be rearrested for a new sexual assault than those convicted of other violent crimes. Rapists released from prison were found to be 10.5 times as likely as non-rapists to be rearrested for rape.⁶³ Moreover, sex offenders are also more likely to be arrested for a subsequent violent sex offense than are other violent offenders.⁶⁴

Because sexual offenders have higher documented rates of recidivism, they pose a significantly higher risk of harm to residents. As such, owners could consider reviewing sex offender registries as part of their overall resident and employee screening procedures to ascertain whether a prospective resident poses such a risk to other residents. Owners are permitted to use their discretion in evaluating prospective residents as long as they do not do so in a discriminatory manner. By asking potential residents if they are listed in these registries and by reviewing registries, owners can screen out individuals who are listed on registries and eliminate the risk of harm that they may pose to residents and employees.

Among the states, levels of disclosure of sex offender registry information vary.⁶⁵ Ten states provide Internet access to the sex offenders registered in their states.⁶⁶ For example, Florida classifies individuals as either lower-risk “sexual offenders” or as the

⁶² See “Symposium: The Treatment of Sex Offenders: Approaches to Sexual Predators: Community Notification and Civil Commitment”, 23 New Eng. J. on Crim. & Civ. Confinement 405 (1997).

⁶³ Lawrence A. Greenfield, Sex Offenses and Offenders: An Analysis of Data on Rape and Sexual Assault, U.S. Department of Justice 25 (1997).

⁶⁴ Id. at 26; See generally Eric S. Janus & Paul E. Meehl, Assessing the Legal Standard for Predictions of Dangerousness in Sex Offender Commitment Proceedings, 3 Psych. Pub. Pol’y. and L. 33 (1997).

⁶⁵ The Appendix provides summaries and a list of citations to state laws that govern the disclosure of sex offender criminal history information, prepared by the Washington State Institute for Public Policy. For additional information, see www.wa.gov/wsipp.

⁶⁶ The states are Alaska - www.dps.state.ak.us, California - www.sexoffenders.net, Florida - www.fdle.state.fl.us/sexual_predators/index.asp, Indiana - www.ai.org/cji/html/sexoffender.html, Iowa - www.state.ia.us, Kansas - www.ink.org/public/kbi/kbisexpage.html, Louisiana - www.scarletweb.com, South Carolina - www.scattorneygeneral.com/public/registry.html, Utah - www.cr.ex.state.ut.us/soreg/info_soreg.htm, and Virginia - www.vsp.state.va.us.

higher-risk “sexual predators”, depending on the severity of the crime committed. Both predators and offenders must register in person with the Florida Department of Law Enforcement (“FDLE”) or the local sheriff’s office. Sexual predators also must provide genetic material for identification purposes. The FDLE or the local sheriff must notify the community of the presence of sexual predators in any manner deemed appropriate. Information regarding the status of both classes of registrants is provided by the FDLE on the Internet. In addition, the FDLE maintains a toll-free hotline available at all times from which citizens can obtain information about registered individuals.

By contrast, the New Jersey community notification law limits accessibility to information regarding sexual predators. New Jersey was the first state to enact a community notification statute, and the law was subjected to a series of constitutional challenges attacking its validity.⁶⁷ Presently, only offenders deemed to pose a moderate to high risk to the community are listed on the state registry. State judges must approve individuals who may receive registry information. These individuals are restricted from relaying registry information to non-approved persons.

The plethora of legislation surrounding sex offender registration and community notification illustrates the increased accessibility to this information. More importantly, it may diminish past difficulties associated with obtaining registry data. Previously, there may have been lag time when updating records between various jurisdictions. In addition, there may have been various fees or costs involved with seeking background information about individuals. Although concerns about the reliability of sex offender registry information remain, the enhanced reporting requirements implemented by the states pursuant to federal statutes may eventually increase the accuracy and reliability of registry information.

States are also addressing sex offender information disclosure obligations and liability protection for real estate professionals. In September 1998, California enacted a measure which requires written leases and rental agreements for residential real property and contracts for sale of residential real property entered into on or after July 1, 1999 to contain a specified notice regarding the state database which contains the locations of registered sex offenders. Upon distribution of the notice, lessors, sellers, or brokers need not provide additional information regarding the proximity of registered sex offenders. Also, registered sex offenders can not bring a cause of action against the party distributing sex offender database information.⁶⁸

⁶⁷ See Doe v. Poritz, 142 N.J. 1, 667 A.2d 367 (N.J. 1995) (suit challenging the constitutionality of New Jersey’s Megan’s Law); Artway v. Attorney Gen., 876 F. Supp. 666 (D.N.J. 1995).

⁶⁸ Act of September 21, 1998, ch. 645, 1998 Cal. Laws (regarding real property disclosure of registered sex offenders).

North Carolina recently enacted a law clarifying that housing providers do not have a duty to obtain or disclose sex offender information, but must answer truthfully if asked while possessing knowledge of such facts.⁶⁹ As this memorandum went to print, a bill passed by the Michigan legislature was awaiting the Governor's signature. If enacted, the law would prohibit a legal action against a real estate broker, an associate broker, or a real estate salesperson for failure to disclose any information from the compilation provided or made available to the public under the Sex Offenders Registration Act.⁷⁰

Overall, federal legislation and technological advances have increased access to information regarding registered sex offenders. Owners should become conversant with the state sexual predator statutes in those states in which they operate. Doing so will inform them about available information, its ease of access, and any obligations related to the use and/or distribution of data included therein. This information will also influence an owner's decision about accessing such databases.

Because of the increasing availability of sex offender information, owners may consider whether it is appropriate to include the review of sex offender registries during the resident screening process, lease renewal, or both. If owners decide to access registry data, they should establish written procedures to govern its use. Accordingly, owners should collaborate with their legal counsel to establish procedures to govern the use of registry data and ensure that such policies are applied consistently to all prospective residents. Owners should ensure that registry information is applied in an evenhanded fashion to avoid claims that such information was used as a pretext for discrimination. In the course of reviewing a registry, an owner may discover that a prospective resident is a convicted sex offender. In that instance, an owner will have to determine whether to rent to that individual.

B. Liability Issues Concerning the Review of Sex Offender Registries.

To date, no owner has been found negligent for failing to access a sex offender registry. As discussed above, however, the increased ease of access to registry information in some states may cause courts to determine that such review of public information is within the reasonable scope of inquiry when screening potential residents. Under the theory of negligent hiring, in determining whether the employer exercised reasonable care, the "[l]iability of an employer is not to be predicated solely on failure to investigate the criminal history of an applicant, but rather on the totality of the circumstances surrounding the hiring."⁷¹ Thus, it is unlikely that an owner will be

⁶⁹ N.C. Gen. Stat. section 42-14.2 (1998)

⁷⁰ H.B. 5938

⁷¹ Ponticas v. K.M.S. Inv., 331 N.W.2d 907 (Minn. 1983)

deemed negligent solely for not reviewing a registry; owners, however, should consider reviewing registries to demonstrate they used reasonable care in the evaluation of prospective employees and residents for their rental communities.

III. Sex Offender Registry Listings

Occasionally, owners discover that current residents are listed on a registry of sex offenders. Such circumstances pose a unique set of problems that require owners to work with counsel to develop an appropriate response. First, owners should evaluate the state sexual predator statute to determine whether they face disclosure obligations.

Second, owners should evaluate their resident screening policies to determine whether they would have rented to such an individual had the information been available at the time of the application. If the owner would not have rented to the resident, then the owner should evaluate his eviction options. The most obvious eviction options would be a lease application violation such as where an applicant falsely denied on the application that he or she was convicted of a sexual offense.

If no basis for eviction exists, then owners must decide whether to disclose the status of the registered offender to other residents as well as determine whether any other actions should be taken. Making such decisions will require an analysis of the relevant facts and risk with the advice of counsel. Some owners may choose to hire special personnel to monitor the activities of the offender for the protection of other residents. Some owners may choose to notify other residents; doing so will allow residents to take adequate steps to protect themselves, their friends and families from any threat posed by the sex offender's presence. Moreover, doing so will limit the likelihood that the owner would be found to have breached any duty of reasonable care that he had to other residents. For example, in O'Hara, the court found that owners of an apartment complex who possessed specific information regarding a series of physical attacks that had occurred in the vicinity had a duty to warn residents of the attacks.⁷² The court reasoned that since the plaintiff in O'Hara, a new resident in the complex, had no warning of the attacks, she was unable to take adequate steps to protect herself. As such, the owners were found to have increased the likelihood of the resident's attack.

CONCLUSION

⁷² O'Hara v. Western Seven Trees Corp., 75 Cal. App. 3d 798, 142 Cal. Rptr. 487 (1977). See also Scott v. Watson, 359 A.2d 548 (Md. 1976) (court held that landlord owed duty to use reasonable care to keep premises safe, including protecting residents against injuries resulting from criminal conduct committed by others. The court reasoned that if the landlord knew or should have known of criminal activity against persons in common areas, he has a duty to take reasonable measures to eliminate dangerous conditions); Penner v. Falk, 200 Cal. Rptr. 661 (1984).

Owners should seriously consider including a clear statement on the lease or rental application that lying on an application or lease is ground for eviction. Owners may also want to consider asking about criminal convictions on the resident application or conducting CBCs because they provide useful information regarding prospective residents. In addition, posing such questions in a rental application provides the basis for an eviction if a criminal history is not divulged on the form but is later discovered.

Federal fair housing laws permit owners to consider resident applicants' criminal history during the resident screening process. Residents, however, may not be rejected indiscriminately - there must be a threat to person or property. Interestingly, statistics show that certain types of criminals and crimes have high rates of recidivism and do pose such risks to residents and property.

If owners decide to conduct CBCs, clear, written procedures governing their use should be established and consistently applied. We are not aware of a case where an owner has been found liable for negligence for not conducting a CBC in the *resident*-screening process. As criminal history information becomes more reliable and accessible, however, it is possible that not obtaining publicly available criminal background information about potential *employees* could come to be considered a breach of a property owner's duty to protect residents from foreseeable harm.

The enactment of state community notification laws has increased accessibility to information regarding convicted sex offenders in some states. The review of registries can be a useful screening tool because sex offenders have high recidivism rates and thus pose a heightened risk of harm to other residents, especially children. Owners should consider reviewing sex offender registries to determine whether a prospective resident is a convicted sex offender thereby posing a risk to other residents. If owners decide to review registries, they should establish clear procedures for the use of registry information and consistently apply them. However, to date neither statute nor case law requires owners to review sex offender registries.

Owners should monitor developments in their state laws to determine what disclosure procedures they should implement during the leasing process. For example, in California disclosure of the availability of state sex offender registry information will protect against some subsequent lawsuits or inquiries. In North Carolina, however, housing providers do not have a duty to disclose sex offender information, but must respond truthfully to inquiries.

Finally, owners may learn that current residents are sex offenders. Owners should determine whether state statutory or case law mandates any particular actions, upon discovery, including disclosure obligations to other residents or the general public. Owners should also review resident screening policies to determine whether they would have rented to the registered resident in the first place, and determine whether any options to terminate the lease exist (e.g., misrepresentation on the lease application).

APPENDIX

Summary of State Laws Governing Sex Offender Information Disclosure
from "Megan's Law: A Review of State and Federal Legislation
Prepared by the Washington State Institute for Public Policy*

*This report was released in October of 1997. As some states have since made changes to their legislation, it is advisable to contact relevant state governments to determine what, if any, updates have occurred.