PAY ATTENTION TO NAMES TO AVOID PROBLEMS AND LEGAL NAME REQUIREMENTS

More attention needs to be paid to owner legal entity names and apartment community names. Specifically, the industry needs to pay more attention to ensure compliance with legal requirements for community and owner legal entity names. Legally, names are required to be registered. Failure to comply with legal name requirements can affect court results, makes cases vulnerable to dismissal, and could result in increased attorneys' fees and costs. Name mistakes can usually be addressed in evictions, but not in collections. Name compliance requires entity and trade name registration, and a thoughtful evaluation of who will be bringing eviction and collection lawsuits against tenants.

A legal entity is someone other than an individual. Some of the most common forms of legal entities are corporations, limited partnerships, and limited liability companies. Any legal entity (LE) that regularly does business in Colorado must be registered with the Colorado Secretary of State. LEs must register regardless if a company is a Colorado company or a company organized under the laws of another state. Colorado LEs are created by filing (registering) with the Colorado Secretary of State. Companies formed under the laws of other states, but do business in Colorado, are called foreign companies or foreign LEs. Colorado's legal registration requirements are not unique. Every state requires both domestic and foreign LEs to register for several reasons. A primary reason is that registration fees generate revenue.

Another reason is to identify a registered agent in Colorado for service of process. With the exception of eviction lawsuits, only seeking possession, all lawsuits must be personally served. The handing of lawsuit papers to a person is service of legal process or service of process. If LEs were not required to register and designate an agent located within Colorado for service of process, faceless corporations, especially companies formed in other states, could avoid answering for legal wrongs in Colorado courts. For this reason, if an LE is operating in Colorado but is not registered, Colorado law prevents them from using the Colorado courts. Foreign LEs may also be required to post cost bonds, under some circumstances, to use Colorado courts.

Most apartment communities are owned by LEs. Many Colorado communities are owned by foreign LEs. With the Colorado apartment building boom, this will only increase in the future. Based on our experience, foreign LEs fail to consistently register, either by neglect or because of bad advice. Many communities are fee managed. Even if owner managed, owners typically have a separate management company. In many instances, a foreign LE's only connection to Colorado is the ownership of a single apartment community located in Colorado. These facts erroneously lead some to conclude that the foreign LE is not operating in Colorado, especially when the asset is managed by a third party. However, even if not managing the asset and the foreign LE only owns a single apartment community in Colorado, the foreign LE is still legally doing business in Colorado, and must be registered.

If the ownership LE is registered, this is not the end of potential problems. Another common mistake is failing to register the community's trade name. For strategic or marketing

reasons, many businesses legally operate under a different name. For example, Apple Computer, Inc. was always just known as Apple. Apple was the trade name for Apple Computer, Inc., and was so well known that Apple Computer, Inc. eventually became just Apple, Inc. A trade name is usually a shorter, simpler, and more appealing name for a business to be known to the public.

Almost every community name is a trade name, and not the LE owner name. However, to be legal, the community's name cannot simply be made up in a marketing meeting, and then printed on signs and inserted into leases. To be legally enforceable, the LE owner's trade names must be registered with the Colorado Secretary of State. Because multifamily assets rebrand often, and are being bought and sold regularly, the trade name issue arises frequently. Foreign LEs not registered cannot file trade names. Only properly registered LE owners can file trade names. Property management agreements (PMAs) should identify all owner trade names, and make the owner responsible for registering the LE, filing annual reports for the LE, and filing any applicable trade names.

Even if everything is in order at the secretary of state's office, human error can still cause problems. Specifically, onsite personnel responsible for generating leases may insert the incorrect name into the lease. For example, you manage The Links at Curbside; the Links at Curbside is owned by (the LE name is) Links Master Holding Company IX, LLC. Instead of putting the correct LE name in the lease, an onsite team member lists the Landlord as "The Links" or "Curbside". If the landlord listed in a lease is the name of a LE that doesn't exist, including a trade name that hasn't been registered, the landlord doesn't exist. The landlord is literally a non-existent landlord.

Accordingly, even if the person completing the lease puts in the name of the community ("The Links at Curbside"), this is still a problem unless the owner has registered "The Links at Curbside" as a trade name. If the landlord/ owner identified in the lease is wrong, the tenant won't say anything because it's usually a name the tenant expects. This mistake (wrong or non-existent landlord listed in lease) is common. With the rise of the auto-generated lease, the error of inserting of the wrong landlord into the lease has decreased. However, auto-generated leases only compound the error if the wrong name is programmed, and auto-generated leases don't fix the non-existent landlord problem.

The final name related issue that causes problems is the real party in interest doctrine. Only a party who has a real interest in the matter and outcome must bring every lawsuit. In rental world, only the owner and the management company could have an interest in enforcing the lease against a tenant. The interest of the landlord (owner) is usually apparent. However, the interest of the management company (manager) may not be so clear. As agent for owner, manager only has those rights set forth in the PMA. Most PMAs give manager the right to enforce the lease by bringing suit in manager's name directly against a tenant. Thus, the manger's authority set forth in the PMA makes manager a real party in interest to lawsuits to enforce the lease, and this issue can be addressed in court if the tenant argues that manager is not the real party in interest (the proper plaintiff) to an eviction case.

When you become a client, we ask you who should be the plaintiff in your eviction cases. What is the name of the company that will be evicting the tenant? Because we have represented

many clients for years, the name issue is frequently not given much thought until there is a problem. Managers should evaluate the name issue, and review both the PMA and the lease. Because some owners want to remain anonymous and for other reasons, the PMA may require that all lawsuits be filed in the name of manager. Conversely, if you want to file lawsuits in the name of the owner, the PMA should give you the specific right to bring eviction actions and other litigation as agent for owner and in the name of the owner. Best practices would be for the plaintiff (whose name lawsuits will be filed in) to be addressed in the PMA.

Leases should also be reviewed for consistency with the PMA, and should support the name you use to file eviction cases. For example, if the PMA says all suits will be brought by agent in name of owner, the lease should be consistent (identify the owner as landlord), and thus make the owner the real party in interest to any lawsuit. If the lease names the owner as landlord, manager may experience problems if eviction cases are filed in the management company's name. Because the management company is not the landlord, the tenant may contend in court that the tenant does not have a rental relationship with the management company. Under the real party in interest doctrine, your case is vulnerable to dismissal. Similarly, if the lease lists the management company as landlord and you file your evictions in the name of the owner, your case would also be vulnerable to a motion to dismiss.

If the PMA and lease support your name decision, the name in which you bring lawsuits is primarily a preference decision. Some management clients prefer filing in the owner's name for two reasons. The management company doesn't want to be known for or otherwise get a reputation for filing hundreds, if not thousands, of lawsuits against tenants. Some management companies argue that by filing lawsuits under the name of the owner, it is clear that the owner is responsible for the litigation, including responding to counterclaims, paying legal fees, and paying any damages. The rationale is that an owner can't ignore a lawsuit when it is a named party. Similarly, some managers may be concerned that an owner might take the position that a lawsuit is the management company's problem if the owner is not a named party. However, because most all PMAs require the owner to indemnify manager for all costs associated with litigation absent negligence on manager's part, owners generally cannot ignore litigation issues, even when litigation is in the name of manager.

Overall, most management clients opt to bring litigation in the name of the owner. Filing eviction cases in the name of the owner reinforces the parties' contractual obligations, i.e. lawsuits are the owner's problem absent negligence. However, even if manager files all lawsuits in name of owner, manager won't always be left out of the fray because managers have no control over tenants. Often, even when a manger brings suit in the name of the owner, the tenant will name manager in a counterclaim. After all, the tenant doesn't know the owner; the tenant deals with and knows manager. In some cases, both manager and owner will always be named. Fair housing discrimination charges that don't name both manager and owner are rare.

Regardless of whether it's failure to register a name, failing to file a trade name, using a non-existent name, or not being a real party in interest, name issues can cause problems in evictions, collections, and other lawsuits. When the wrong parties or non-existent landlords are named, the tenant usually has grounds to have the case dismissed. In many instances, but not all, we can fix most name related issues even after an eviction case has been filed. But name issues

may result in delays and even dismissal of an eviction case. Under a worst-case scenario, the landlord may be liable for the tenant's attorneys' fees and costs. The non-existent landlord argument is always fatal to an eviction case. If a tenant argues that company evicting the tenant doesn't exist and it doesn't, you will have to start your eviction over because only real legal entities may bring and maintain legal actions in Colorado courts.

Unlike evictions, name issues in collections are usually incurable and potentially costly. For example, the tenant breaks his lease, damages the unit, and now owes a $5,000 balance. If the lease lists a non-existent landlord, unless the tenant voluntarily pays either before or after being contacted by a collection agency, the landlord will not win in court if the tenant raises the name issue. Collections occur when the lease is over and the tenant is gone. At that point, corrective action is not possible. Name problems that arise during collections also bring into play both the FDCPA (Fair Debt Collection Practices Act) and the FCRA (Fair Credit Reporting Act).

The FDCPA creates liability for misstating the character or nature of a debt. Aggressive tenant attorneys would argue that trying to collect a debt in the name of a non-existent landlord (business) misstates the character of a debt. Under the FDCPA, violators are liable for actual damages or a minimum of $1,000 for each and every violation, plus attorneys' fees and costs. No competent and reputable collection law firm will bring suit to collect a tenant balance if the landlord lists a non-existent landlord because of FDCPA liability concerns. Thus, if a tenant won't pay after being contacted by a collection agency (more and more tenants who owe balances these days won't pay without being sued), you have no ability to collect the debt.

No problem you say, the tenant will pay because the debt is reported on the tenant's credit report. If the lease lists a non-existent landlord, placing the debt on the tenant's credit report now creates potential liability under the FCRA. With both the FDCPA and FCRA, collection of debt based on leases that list non-existent landlords could result in significant exposure even on a single case. If the mistake (listing a non-existent landlord) has been replicated on many leases over time, the possibility of a class action lawsuit comes into play. Thus, the best case in collections is you won't be able to collect if there are name issues, and the tenant raises the issue. The worst case is that you may be looking at significant legal exposure by attempting to collect tenant debt when there are name issues.

Despite the potential for problems, name problems in eviction cases don't come up that often. Name problems don't arise frequently in eviction cases because the tenant must raise (argue) a name related issue. Tenants simply don't raise the issue that often. However, similar to other issues that are being raised by tenants more frequently because of information on the Internet, tenants are playing the name card more frequently than they have in the past. A name issue sometimes can't be fixed, and may result in the community paying attorneys' fees and costs. The most common mistakes we see are a non-existent legal entity is listed as landlord, or the listed landlord is clearly a trade name, and the trade name has not been registered as belonging to the owner legal entity. To avoid all problems regarding proper names in lawsuits, you should review that your lawsuits are being filed under your preferred name, and your management agreement and your lease supports the name you choose.

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