HOW YOU CAN REDUCE POTENTIAL DAMAGE CLAIMS FROM AMENITIES

Communities are amenity centric. Many communities offer swimming pools, hot tubs, business centers, fitness centers, bike rentals, and more. Amenities attract residents, but they also create potential liability. A good lease addresses a landlord's liability if someone is injured at or in connection with using an amenity. Liability waivers throughout the lease declare that a landlord is not liable if a resident or guest is injured. While liability waivers have a purpose, most landlords are unaware that their liability, in most cases, is not ultimately determined by their lease but rather by the Colorado Premises Liability Act ("PLA").

At common law, negligence governed a landlord's (landowner's) liability for injuries that occurred on leased property. Whether somebody is liable for negligence depends first on whether a person owes a duty of care to another. For example, a surgeon owes a duty to operate with the standard of care by an ordinary prudent surgeon. Because of contradictory and even confusing court rulings when a landowner owed a duty of care to persons who were injured on land belonging to another, the Colorado General Assembly codified when and under what circumstances landlords owe a duty of care to tenants, guests, and others. Under the PLA, different duties are owed to different classifications of individuals at an apartment community. Thus, what duty a landlord owes an individual depends on whether the person is a tenant, guest, or trespasser.

Under the PLA, individuals entering onto land fall into three categories. The first category is the invitee. Invitees are owed the highest duty of care under the PLA. Tenants and occupants are invitees under the PLA. The duty of care owed by landlords to tenants is to use reasonable care to protect against dangers of which the landlord actually knows or should have known of. For example, if an apartment community keeps their hot tub open year-round, a landlord would likely be liable if a tenant was injured getting in or out of the hot tub because the tenant slipped on snow or ice surrounding the hot tub. While liability certainly would depend on the facts, many factual scenarios would support liability. In particular, if the hot tub was outside in an area exposed to snow or where ice could accumulate, the landlord should know about the possible danger posed by accumulating snow and ice. Note: the landlord doesn't have to be aware of a specific problem. Under the highest level of care, it is enough if the landlord fails to take action against a possible danger that the landlord should have known about.

The second level of care applies to licensees. Tenants' guests are licensees. Landlords are only liable to guests if they actually know about a danger they created but fail to use reasonable care with respect to the danger. This means landlords can only be liable to guests for dangers they actually know about. For example, a landlord would likely be liable to a guest who worked out in the fitness center and was injured on a treadmill that the landlord knew was broken and failed to put an "Out of Order" sign on it.

The third level of care applies to trespassers. Trespassers are uninvited guests (uninvited by the landlord or a tenant) who come onto the apartment community. Despite not being invited, landlords still owe trespassers some duty under the PLA, but only a duty to prevent injury from

dangers deliberately created by the Landlord. For example, if the Landlord is in the process of repairing a water main located under the parking lot, and as a result, there is a giant hole dug in the parking lot, the landlord would be liable to a trespasser if the trespasser fell in since the landlord had failed to take appropriate protective measures.

Most of the calls we get from clients are about injuries that occur in or around swimming pools and fitness centers, likely since they are often the most frequently used amenities. Heavier use increases the wear and tear on the equipment, and the sheer number of people increases the likelihood that an accident can happen. In maintaining these amenities, the landlord should use the most restrictive duty of care, even if some of the people using the amenities are guests of the residents.

Because landlords owe the highest duty of care to tenants under the PLA and tenants use amenities, landlords need to be aware of any potential dangers associated with amenities so that they can take reasonable and timely action to remove dangers. First and foremost, landlords need to routinely inspect every amenity, and test machinery and equipment. To defend in court by demonstrating that you acted with prudence, you should keep logs of inspections with descriptions. Inspections mean both routine as well as the more thorough quarterly, semiannual, or annual inspections. If an amenity is closed for the season (e.g. the pool), it should always undergo a thorough inspection before it re-opens.

When and where appropriate, landlords should post safety signs such as "No Lifeguard on Duty" or Behavioral Rules, such as no running, no diving, no glass, etc. The onsite team should be trained to enforce rules and they should enforce those rules. If you receive a complaint regarding the amenity, address it timely. If you receive notice that the free weight rack is broken, you should fix it as soon as reasonably possible. Until it is fixed, you should post "DO NOT USE" or another appropriate sign. Depending on the situation, you should consider closing the fitness center until the situation is remedied.

Under the PLA, if you do not repair promptly, and someone uses the free weight rack and breaks their toe because the weights fell, you could be held liable. If the required maintenance or a repair makes an amenity dangerous, then close down the amenity immediately until it is repaired. For example, if the pH in your pool is too low, this can cause skin and eye irritation. If you cannot get the pH in your pool balanced correctly quickly, you may need to shut the pool down for a few hours until the pH can be balanced.

The trend is for landlords to offer more and more amenities. Some amenities allow third-party vendors to provide rental bicycles or paddle-boats. These new amenities come with new challenges under the PLA. Many landlords wrongly assume that they are free of liability because the vendor is supplying the equipment. Under the PLA, even if the vendor provides the equipment, the landlord is still potentially responsible if the Tenant gets hurt while using the equipment on the landlord's property. Thus, if the bicycles are not properly maintained by the vendor, the tenant can sue both the vendor and you if the tenant is hurt because the bicycle was not properly maintained. A landlord would also be liable under the PLA if the tenant crashed while riding the bike because your parking lot has a big pothole.

But what about using tenant releases and liability waivers? These will protect the landlord, right? While it is certainly prudent business practice to use releases (liability waivers) in both your lease and in connection with any third-party vendor amenity, the release will not in most cases absolve the landlord or the vendor of liability. Under Colorado law, a tenant can never waive liability if the landlord is at fault.

Despite this fact, because releases serve several purposes, we recommend using releases. The release puts the tenant on notice that they could get injured during the activity and discourage tenants from bringing a lawsuit. The tenant might read the release signed to use the bicycles and conclude he can't sue. If you do allow a vendor to provide equipment or other services in connection with an amenity, we strongly recommend getting an indemnification agreement from the vendor to reduce your potential legal exposure. An indemnity agreement requires the vendor to reimburse you for all damages, costs, expenses, and attorneys' fees if you get sued because a tenant was hurt using an amenity that a vendor provides. To further reduce liability related risks, we also encourage you to make sure the vendor is properly maintaining the equipment, that the vendor is properly insured, and that the vendor has financial strength (isn't a shell company).

In addition to legal liability risks associated with amenities under the PLA, landlord should be aware of the law of attractive nuisance. What is an attractive nuisance? An attractive nuisance is something on the property, such as a pool, that attracts a child's attention, i.e. something that children commonly like to use or explore. Under the law of attractive nuisance, the landowner must take reasonable steps to prevent or protect children from getting hurt by the attractive nuisance. Reasonable steps usually mean prohibiting access by children through fencing or locked entryways. Thus, if you have a pool, to avoid liability, you must make sure access is restricted, either through a fence or a locked entryway. If you provide bicycles for your tenants to rent, make sure the bicycles are locked and not removable without proper access. In addition to providing those barriers, make sure those barriers are maintained. Unlike the PLA, there are no levels of classification. It applies to all children under the age of 14, regardless of whether they are authorized to be on the property. Thus, under the law of attractive nuisance, a landlord would be liable if a trespassing child drowned in the pool because access was not controlled.

So how do landlords protect against these potential risks? The first line of defense is to have good lease language. Indemnification clauses, subrogation waivers, and liability disclaimers are beneficial in curbing some of these unwanted lawsuits. However, just like releases, you can never waive a landlord's duty of care, even if it is in a lease. If someone is hurt at the property due to the landlord's actions or inactions, these lease provisions are not likely to successfully avoid liability. But again, they serve as a powerful first deterrent. Strong lease language discourages many tenants from bringing lawsuits.

The second line of defense is using signage when and where appropriate. Having warning signs up in the fitness room or at the pool, puts tenants on notice of the potential risks of harm when using that particular amenity. Like lease language, signs do not protect you from someone filing a lawsuit, but it does set expectations for the tenants and puts them on notice of the

dangers. Signs like, “Beware Danger”, “Keep Out” or “No Trespassing” are beneficial in protecting yourself from a trespass or attractive nuisance case.

Insurance is a third line of defense. Insurance should be deployed on two fronts. Landlords obviously should carry appropriate insurance. Landlords should also require tenants to have appropriate insurance as well. However, many landlords only require tenants to carry liability insurance which only protects landlords from injury claims caused by the tenant who caused the problem. Even if you have insurance and require tenants to carry insurance, insurance carriers might resist paying by declaring the damage event is not covered. Landlords should be aware of subrogation issues in general, and specifically, require tenants to waive subrogation. This means if the tenant is injured, and the tenant’s insurance company pays out, the tenant’s insurance company can’t turn around and sue the landlord based on an allegation that the tenant was damaged due to landlord’s fault.

Since you cannot count a hundred percent on lease language, signage, and insurance to avoid all liability, you should be vigilant in maintaining and inspecting amenities. Vigilance starts with comprehensive maintenance policies. Essential to any comprehensive maintenance policy is lease language requiring tenants to promptly report any maintenance needs with the property including any amenity. Maintenance policies should include regular maintenance and inspections of the amenities, including regular testing of equipment. If you know that something needs to be repaired, address it quickly. If you cannot fix it, then shut down the amenity until it can be fixed. Following these guidelines should help with preventing resident injuries and the potential lawsuits that follow.