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MEMORANDUM

Date: 6/9/2020

To: Tschetter Sulzer Clients

Subject: Waivers for the use of Amenities during The COVID-19 Crisis

OVERVIEW

Many Tschetter Sulzer (TS) clients have requested information regarding the use of waivers of liability for Residents' use of apartment community amenities upon re-opening due to the ongoing COVID-19 crisis. The purpose of this Memorandum is to provide general information about using waivers. If you have specific questions or need customization of a waiver, please reach out to the firm directly for specific advice.

AMENITIES GENERALLY

Amenities need to be routinely monitored, cleaned, and inspected pursuant to the government guidelines. This includes following, monitoring and enforcing that all amenities are used in accordance with all public health orders regarding social distancing, sanitizing and cleaning procedures, maximum occupancy and all other relevant provisions concerning the amenity. To defend in court by demonstrating that you acted with prudence, you should keep logs of inspections and cleaning with descriptions.

The onsite team should be trained to enforce rules put in place for use of amenities, and they should enforce those rules. If you receive a complaint regarding the amenity, address it timely. Depending on the situation, you should consider closing the amenity until the situation is remedied.

Amenities may need to be closed intermittently for daily cleanings.

WAIVERS OF LIABILITY

A waiver of liability is an agreement that attempts to inform a tenant of risks and limit certain risks of liability to the landlord. In the context of apartment community amenity use, owners and/or property managers may seek to have residents sign or execute a waiver of liability before engaging of use of certain amenities within the apartment community to limit the possibility of a tenant claiming that they contracted COVID-19 from use of the amenity.

Waivers of liability may assist in limiting a landlord and management's potential liability associated with COVID-19, however there are limitations to the use and enforcement of such waivers.

While it certainly prudent business practice to use waivers of liability in both your lease and in connection with any amenity, the release will not in most cases completely protect the landlord of liability. In the context of amenity use, the value of the waiver is limited to putting tenants on notice that there is a risk associated with using an amenity due to COVID-19, and trying to discourage anyone from suing if they contract COVID-19 at a community. Waivers of liability do not offer a blanket protection against lawsuits filed by a tenant. Under Colorado law, a tenant can never waive liability if the landlord is at fault. However, by signing a waiver of liability the tenant is put on notice of the risks associated with using amenities at the community related to the spread of COVID-19 and discourages a tenant from bringing a lawsuit. Waivers of liability can also have a deterrent effect. The tenant may read the waiver of liability and decide against using an amenity due to the risks involved or conclude that they cannot sue once they have signed the waiver. Regardless of a waiver of liability having been executed, a property owner or manager cannot waive away liability for an issue if the property is truly at fault. Additionally, the existence of a signed waiver would not eliminate a claim from a tenant that gets ill from blaming the property owner or management for opening or not maintaining a safe amenity.

PRACTICAL CONSIDERATIONS

The other issue with the waiver approach is a practical one. How is a property manager going to enforce the usage of the amenity? Will there be active monitoring of the amenity such as a reservation system, required check-in, and monitoring of social distancing as well as other public health order guidelines? Regardless of whether or not a waiver is signed, this will be management's responsibility. The Landlord is responsible for compliance with all applicable public health orders and this duty cannot be transferred to Residents by requiring Residents to ensure they are compliant with posted rules and regulations or by requiring Residents to engage in cleansing or

sanitization procedures before or after use. You must ensure you can monitor and enforce the cleaning, use restrictions and social distancing requirements. Ultimately, failure to comply with State guidelines, such as public health orders, could result in fines against ownership, management, and employees.

USING A WAIVER

As long as ownership understands that this is at best a notice that there are risks, and not a guaranteed protection from lawsuits, and it may present some operational challenges for management, it is okay to use a waiver of liability regarding Residents' use of amenities.

In addition to using a waiver of liability, at a minimum it is advised to provide notice to all Residents of reopening procedures and protocols, along with appropriate signage to use at their own risk.

Choosing to use a waiver is a business decision for ownership and management. It is not required to reopen an amenity. A waiver is also not a substitute for complying with the public health guidelines regarding reopening an amenity. If you are using a waiver, that should be one part of the procedures your community is putting in place to reopen the community amenities.