

SEPTEMBER 5, 2019

For more information,  
contact:

Bill Gordon  
+1 713 276 7373  
[bgordon@kslaw.com](mailto:bgordon@kslaw.com)

Katherine Kirkpatrick  
+1 312 764 6918  
[kkirkpatrick@kslaw.com](mailto:kkirkpatrick@kslaw.com)

Thad Wilson  
+1 404 572 4842  
[thadwilson@kslaw.com](mailto:thadwilson@kslaw.com)

Yelena Kotlarsky  
+1 212 556 2207  
[ykotlarsky@kslaw.com](mailto:ykotlarsky@kslaw.com)

## King & Spalding

Houston  
1100 Louisiana Street  
Suite 4000  
Houston, Texas 77002-5213  
Tel: +1 713 751 3200

Chicago  
353 N Clark Street  
12<sup>th</sup> Floor  
Chicago, Illinois 60654  
Tel: +1 312 995 6333

Atlanta  
1180 Peachtree Street, NE  
Suite 1600  
Atlanta, Georgia 30309-3521  
Tel: +1 404 572 4600

## Institutional Investors Embrace Single-Family Rentals: Consumer Protection Considerations

Over the last 10 years, more and more Americans have declined to purchase homes and chosen to rent instead.<sup>1</sup> The demand for single-family rental homes first surged after the housing crisis and has not waned, with many viewing renting as a way to get the house that they want while retaining some flexibility in their budgets.

Historically, single-family rental homes were owned by landlords responsible for one or a few properties. With rental demand growing and with certain incentives from the federal government, institutional investors have become increasingly focused on this asset class. Many private equity firms and other investors have founded or purchased companies that exclusively focus on this industry and own thousands of properties. As landlords, however, institutional investors are increasingly confronted with an evolving and sometimes onerous consumer protection legal infrastructure.

When considering such potentially lucrative investments, these laws should be top of mind to avoid costly litigation and investigations. Below, we discuss some of the most important applicable laws and regulations and suggest best practices for complying with each.

### UDAP / UDAAP

Unfair, Deceptive or Abusive Acts (“UDAP”) and Unfair, Deceptive or Abusive Acts or Practices (“UDAAP”) refer to a series of federal and state statutes that prohibit “unfair or deceptive acts or practices”<sup>2</sup> in or affecting commerce. Not exclusive to the housing industry, an unfair or deceptive practice often involves hidden fees or costs that are not immediately apparent to consumers who are using a particular product or service. UDAP or UDAAP violations can also involve engaging in abusive or harassing conduct toward consumers to facilitate a provider’s business.



In the context of landlord-tenant relationships, the following actions could be considered unfair or deceptive:

- Misleading, unclear, illegal lease terms;<sup>3</sup>
- Failure to maintain a property up to code;<sup>4</sup>
- Unfair debt collection (calling the tenant at work to demand payment and threatening to tell the his or her employer about the tenant's delinquency);<sup>5</sup>
- Violation of the automatic stay in a consumer bankruptcy case;<sup>6</sup> and
- Negligent management of consumers' personal property (for example, throwing away a tenant's things when the landlord takes control of the property).<sup>7</sup>

Just last year, one major housing provider was hit with a class action lawsuit over excessive late fees and was the target of a Reuters investigation that detailed various allegedly negligent practices regarding the condition of its rental homes.<sup>8</sup>

Companies should aim for transparency and regularly review the disclosures and information provided to their tenants. This will help ensure that the information is accurate and complete so that a reasonable tenant can be expected to understand the information and not feel misled or deceived. When an act or practice is identified internally or alleged by a tenant and implicates potential unfair, deceptive or abusive practice concerns, it is imperative to act diligently and fully investigate the matter, including its scope and potential impact on other tenants.

## ANTI-DISCRIMINATION

Tenants and prospective tenants are protected from discrimination by multiple federal and state laws, including the Fair Housing Act and Americans with Disabilities Act. These laws guarantee equal treatment of individuals in protected classes and ban discrimination and targeting relating to housing rentals (including leasing, advertising, maintenance, and customer service). Classes protected by federal law include: race, color, religion, sex, sexual orientation, gender identity, disability, age, familial status (families with children 18 years of age or under), and national origin.

To address potential discrimination issues, companies should have clear policies and procedures in place and ensure that such policies and procedures are applied consistently and documented accordingly. Decisions like whether to rent to a particular tenant or which tenant's repairs will be handled first all have the potential to implicate anti-discrimination laws. Even when a company's employees have not intentionally engaged in any discriminatory practices while interacting with tenants, the use of third-party tenant screening or advertising companies may be unlawful due to disparate impact.

Last year, a group of plaintiffs sued a leading consumer reporting agency specializing in tenant screening, for alleged discrimination. There, the Plaintiffs alleged that, among other things, the agency's practice of making automatic rental decisions based on the existence of a criminal record or charge vis a vis their algorithm—without holistic assessments per tenant—had an unlawful disparate impact on Latinos and African Americans.

In considering whether a particular practice is discriminatory, companies must consider whether the practice is motivated or driven by the individual tenant. And, if contemplating implementing new technology, particularly technology using algorithms, seek advice of counsel to be sure any effects are not inadvertently violating the law.

## SECTION 8

Section 8 of the Housing Act of 1937 ("Section 8") is designed to help lower-income individuals obtain affordable housing and authorizes Section 8 vouchers to landlords on behalf of tenants.<sup>9</sup> Local housing authorities are responsible for approving applications and determining "reasonable" rent. Landlords are prohibited from charging tenants more



than reasonable rent and must not accept any form of “side payments.” Some jurisdictions—including certain cities and municipalities—also prohibit Section 8 landlords from refusing to rent to a tenant solely because he or she needs to pay with Section 8 vouchers on the basis of income discrimination.

Section 8 issues are complicated, and the rules can vary significantly from city to city (or local housing authority office), so it is vital that companies seek the advice of counsel and provide appropriate training and guidance to individuals who manage single-family properties. The same advice applies to other city, state, or locality-based laws and regulations; especially with housing, certain jurisdictions will be bound by rules enacted by municipalities, villages, or homeowner’s associations. Proactive compliance will ensure that the business is not hampered by a series of fines, delays, or complaints.

### BANKRUPTCY STATUTES

The U.S. Bankruptcy Code provides certain legal protections for individual creditors who file for bankruptcy under Chapters 7 and 13.<sup>10</sup> For landlord-tenant relationships, the most important protection is the automatic stay – a prohibition that bars creditors from exercising collection efforts against individuals who have filed for bankruptcy.<sup>11</sup> The stay applies to any action by a landlord to collect past-due rent from a debtor-tenant, and to any action by a landlord to recover possession of, or to oust the debtor-tenant from (i.e., evict), the leased property.

Continuing collection activities when there has been a bankruptcy filing may result in a landlord being sanctioned by the court overseeing the tenant’s bankruptcy proceeding. A debtor who can prove injury due to a “willful” violation of the automatic stay can recover damages, including costs and attorneys’ fees and, potentially, punitive damages.<sup>12</sup> Intent to violate the stay is not required to prove a willful violation; an employee’s knowledge of a tenant’s bankruptcy case may be sufficient.<sup>13</sup>

Bankruptcy courts take automatic stay violations seriously. Entities have faced substantial fines for violating the automatic stay by, among other things, foreclosing on a home, sending agents to knock on doors and windows, and removing appliances from homes. Companies should thus closely monitor interactions between their employees and tenants who are in bankruptcy. A landlord’s relationship with those tenants should be guided by members of legal and compliance to ensure that the company does not violate the automatic stay through what otherwise would be a routine communication.

### PII AND DATA SECURITY

Various federal and state laws protect individuals’ personal information from public disclosure. Personally, identifiable information includes names, social security numbers, dates of birth, and driver’s license numbers. Financial information like credit card and banking information, as well as medical information, are also protected. Landlords often collect such personal information from tenants through the lease application and rent payment processes and must ensure that they take reasonable steps to safeguard this data.

For example, companies should ensure that employees have access to this information only on a “need to know basis” to be able to perform their job responsibilities. Tenant records should be password protected or available only through a secure portal and should be kept locked if available in hard copy. Companies should also keep up to date with data security measures to prevent any data breaches. If a breach occurs, companies should have clear escalation and remediation protocols and procedures in place, as laws and regulations often mandate immediate disclosure to regulators. Employees should be trained to immediately elevate the issues to the company’s legal and compliance personnel.



## TCPA

The Telephone Consumer Protection Act (TCPA) is a federal law designed to safeguard consumer privacy. The TCPA regulates “automatic” communications like pre-recorded marketing calls, robo-dialed calls, and bulk text messaging. The statute prohibits making telephone calls or sending texts using these tactics without the prior express consent of the recipient (subject to some exceptions).<sup>14</sup>

For the single-family home rental industry, robocalls and automated text messages to residents are effective and efficient ways to provide residents with important information about their homes (as well as advertise services). But this kind of contact—be it to tenants or prospective tenants—must comply with the TCPA. As a conservative approach, companies may want to ask all tenants to provide written consent for all communications, regardless of type, as part of their lease agreements.<sup>15</sup> Companies should also ensure that any employees who send mass text messages or pre-recorded phone calls receive appropriate training on the TCPA.

## SCRA

The Servicemember Civil Relief Act (SCRA) is a federal law that provides certain protections to active duty servicemembers and their dependents.<sup>16</sup> Per the SCRA, servicemember tenants get two specific protections: (1) active duty servicemember tenants and their dependents may terminate their lease early without penalty; and (2) active duty servicemember tenants and their dependents may not be evicted without a court order. It is important to note that the SCRA only applies to a tenant who is on active military duty. Veterans do not get the benefit of this laws unless they are in the reserves and called to active duty.

## CONCLUSION

With the significant expansion of single-family home rentals, many investors see an opportunity to invest in a potentially profitable new asset class. At the same time, investor landlords unfamiliar with various complex federal and state consumer protection laws, as well as countless other local regulations and municipality rules, face new legal risks. Without proper guidance, institutional investors can run afoul of these laws, potentially diminishing returns on investment through unanticipated, sizable fines and penalties. To protect anticipated returns, single-family rental home investors should have robust policies and procedures in place to address interactions with tenants and should seek the advice of counsel to help navigate the many risks associated with the landlord-tenant relationship.



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This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice. In some jurisdictions, this may be considered "Attorney Advertising."

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<sup>1</sup> As of 2017, over 46 million individuals lived in rented single family homes. See Jennifer Rudden, *American Single Family Homes - Statistics & Facts* (Feb 12, 2019), <https://www.statista.com/topics/5144/single-family-homes-in-the-us/>; see also Freddie Mac Multifamily, *Spotlight on Underserved Markets: Single-Family Rental, An Evolving Market*, <https://mf.freddiemac.com/docs/single-family-rental-markets.pdf>

<sup>2</sup> See Wheeler-Lea Act of 1938, Pub. L. No. 75-447, §3, 52 Stat. 111 (1938) (codified as amended at 15 U.S.C. §§ 41-58 (2006)) (amending the FTC Act of 1914). The 1914 Act originally prohibited "unfair methods of competition in commerce." Federal Trade Commission Act of 1914, Pub. L. No. 63-203, § 5, 38 Stat. 717 (1914).

<sup>3</sup> *People v. McKale*, 602 P.2d 731 (Cal. 1979); *Leardi v. Brown*, 474 N.E.2d 1094 (Mass. 1985); *316 49 St. Assocs. Ltd. v. Galvez*, 635 A.2d 1013 (N.J. Super. Ct. App. Div. 1994) (inclusion of inapplicable, misleading disclosure, and use of phony lease-purchase option to evade rent control ordinance may be UDAP violations).

<sup>4</sup> *49 Prospect Street Tenants Association v. Sheva Gardens, Inc.*, 227 N.J. Super. 449, 547 A.2d (App. Div. 1988) (holding that the UDAP provisions could be used by tenants against a landlord who failed to maintain rental property in a habitable condition, even though the landlord-tenant relationship in that state was regulated by at least seven other statutes that explicitly recognized tenant rights and provided remedies for violations).

<sup>5</sup> *In re Clarkson*, 105 B.R. 266, 271 (Bankr. E.D. Pa. 1971) (state UDAP applies to unfair debt collection practices in a landlord-tenant context).

<sup>6</sup> *Aponte v. Aungst*, 82 B.R. 738 (Bankr. E.D. Pa. 1988).

<sup>7</sup> *Nelson v. Schanzer*, 788 S.W.2d 81 (Tex. App. 1990) (a moving and storage company engaged in UDAP violations where it negligently held a tenant's property after a sheriff contracted with the moving and storage company to move the contents of the tenant's apartment and the collateral before the time specified in a notice to the tenant and allowing items to be broken and stolen).

<sup>8</sup> Reuters Investigates, *Spiders, sewage and a flurry of fees – the other side of renting a house from Wall Street* (Jul. 27, 2018), <https://www.reuters.com/investigates/special-report/usa-housing-invitation/>

<sup>9</sup> 42 U.S.C. § 1437(f).

<sup>10</sup> See 11 U.S.C. § 727(a). See also 11 U.S.C. § 1322.

<sup>11</sup> 11 U.S.C. § 362(a).

<sup>12</sup> 11 U.S.C. § 362(k).

<sup>13</sup> See *In re Wagner*, 74 B.R. 898 (Bankr. E.D. Pa. 1987).

<sup>14</sup> Telephone Consumer Protection Act of 1991, 47 U.S.C.A. § 227 (b)(1)(A)-(B)

<sup>15</sup> See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 90, Report and Order, 7 FCC Rcd 8752 (1992).

<sup>16</sup> 50 U.S.C. § 3952