Consumer Protection Issues For Single-Family Rental Investors

By Bill Gordon, Katherine Kirkpatrick, Thad Wilson and Yelena Kotlarsky (October 23, 2019)

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Over the last 10 years, more and more Americans have declined to purchase homes and chosen to rent instead.[1] 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 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.

Just last month, Rep. Alexandria Ocasio-Cortez, D-N.Y., released a series of bills aimed at fair housing that, among other things, target "market-controlling landlords."[2]

The Place to Prosper Act would require corporate landlords make disclosures to the secretary of U.S. Department of Housing and Urban Development about items such as median rent charged, the identity of the landlord and the company's largest shareholders. The proposed significant expansion of federal housing policy would also prohibit discrimination against tenants based on source of income, including housing vouchers and Social Security benefits.

When considering such potentially lucrative investments, market-controlling landlords need to understand consumer protection laws to avoid costly litigation and investigations. As Ocasio-Cortez's bill demonstrates, institutional landlords are frequently under particular scrutiny. Below, we discuss some of the most important applicable existing laws and regulations, and suggest best practices for each.

UDAP/UDAAP

Unfair or deceptive acts or practices — or UDAP — and unfair, deceptive or abusive acts or practices — or UDAAP — refer to a series of federal and state statutes that prohibit unfair or deceptive acts or practices[3] 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 or illegal lease terms;[4]
- Failure to maintain a property up to code;[5]
- Unfair debt collection (such as calling a tenant at work to demand payment and threatening to tell their company of the tenant's delinquency;[6]
- Violation of the automatic stay in a consumer bankruptcy case;[7] and
- Negligent management of consumers' personal property (for example, throwing away a tenant's things when taking control of the property).[8]

Generally, allegedly negligent practices tied to conditions in rental homes are ripe for negative press and UDAP or UDAAP actions.

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 discriminatory practices when 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 CoreLogic Rental Property Solutions LLC, a leading consumer reporting agency specializing in tenant screening, for alleged discrimination. There, the plaintiffs alleged that, among other things, CoreLogic's practice of making automatic rental decisions based on the existence of a criminal record or charge vis-a-vis its

algorithm — without holistic assessments per tenant — had an unlawful disparate impact on Latinos and African Americans.[9]

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, they should be sure any effects are not inadvertently violating the law.

Section 8

Section 8 of the Housing Act of 1937 is designed to help lower-income individuals obtain affordable housing, and authorizes Section 8 vouchers to landlords on behalf of tenants.[10] 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 payment. 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. With Ocasio-Cortez's new bill, this type of conduct would be prohibited at the federal level.

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 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.[11] 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.[12] 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 evict the debtor tenant from 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.[13] 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.[14]

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 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 is a federal law designed to safeguard consumer privacy. The TCPA regulates automatic communications like prerecorded marketing calls, robodialed 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.[15]

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.[16] Companies should also ensure that any employees who send mass text messages or prerecorded phone calls receive appropriate training on the TCPA.

SCRA

The Servicemember Civil Relief Act is a federal law that provides certain protections to active duty service members and their dependents.[17] Per the SCRA, service member tenants get two specific protections: (1) Active duty service member tenants and their dependents may terminate their leases early without penalty, and (2) active duty service member 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.

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.

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[1] 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

[2] This is defined as owners with more than 100 properties in a single metropolitan area, 1,000 rental units nationwide or rental units in three states

[3] 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).

[4] 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).

[5] 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).

[6] 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).

[7] Aponte v. Aungst, 82 B.R. 738 (Bankr. E.D. Pa. 1988).

[8] 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 andthe collateral before the time specified in a notice to the tenant and allowing items to be broken and stolen).

[9] Connecticut Fair Hous. Ctr. v. Corelogic Rental Prop. Sols., LLC, 369 F. Supp. 3d 362 (D. Conn. 2019).

[10] 42 U.S.C. § 1437(f).

[11] See 11 U.S.C. § 727(a). See also 11 U.S.C. § 1322.

[12] 11 U.S.C. § 362(a).

[13] 11 U.S.C. § 362(k).

[14] See In re Wagner, 74 B.R. 898 (Bankr. E.D. Pa. 1987).

[15] Telephone Consumer Protection Act of 1991, 47 U.S.C.A. § 227 (b)(1)(A)-(B).

[16] See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 90, Report and Order, 7 FCC Rcd 8752 (1992).

[17] 50 U.S.C. § 3952.