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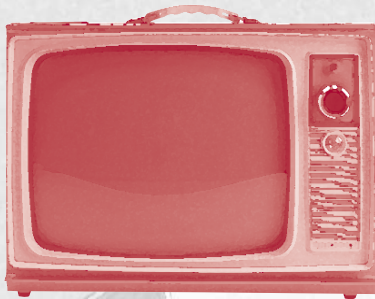
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CURRENT NEWS FOR COMMUNITY ASSOCIATIONS

REGULATION OF SATELLITE ANTENNAS

Groucho Marx once said, "I find television very educating. Every time somebody turns on the set, I go into the other room and read a book."



Every year, we are provided with more and more channels, through which we can surf until our heart's content. In response to that demand, so-called "satellite dishes" have become the rage throughout the nation. As required by the Telecommunications Act of 1996, the Federal Communications Commission ("FCC") has adopted the Over the Air Reception Device ("OTARD") Rule, which generally prohibits community associations, among other types of entities, from placing restrictions upon a person's ability to receive video programming signals.

Specifically, the OTARD Rule prohibits any restriction imposed by a state or local government, deed restrictions, condominium or homeowners' association governing documents, which impairs the installation, maintenance, or use of an antenna one meter or less in diameter, on property within the exclusive use or control of the antenna user, where the user has a direct or indirect ownership or leasehold interest in the property.

According to the Rule, a restriction is said to impair the installation, maintenance, or use of an antenna if it:

- Unreasonably delays or prevents installation, maintenance or use. For example, a rule which outright prohibits the installation of a satellite dish would violate the OTARD rules;
- Unreasonably increases the cost of installation, maintenance, or use, such as requiring payment of a fee to obtain approval for the installation. (However, a requirement that the dish be painted to match the background would probably be acceptable, unless it interferes with the signal quality); or
- Precludes reception or transmission of an acceptable quality signal.

The Rule applies to antennas that are:

- Used to receive direct broadcast satellite service, including direct-to-home satellite service, or to receive or transmit fixed wireless signals via satellite, and is
- One meter or less in diameter (except for Alaska, where larger dishes are permissible).

"Fixed wireless signals" are defined by the Rule to mean any commercial non-broadcast communications signals transmitted via wireless technology to and/or from a fixed customer location.

The Rule also applies to antennas that are:

- Used to receive video programming services via multipoint distribution services, including multichannel multipoint distribution services, instructional television fixed services, and local multipoint distribution services, or that receive or transmit fixed wireless signals other than via satellite, and are
- One meter or less in diameter or diagonal measurement.

The Rule further applies to an antenna that is used to receive television broadcast signals, and to masts which support any of the above-mentioned antennas.

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TIDBITS

Did You Know ???

Pursuant to the Condominium Act, no written contract between a party contracting to provide maintenance or management services and an association which contract provides for operation, maintenance or management of a condominium association or property serving the unit owners of a condominium shall be valid and enforceable unless the contract:

- ✓ Specifies the services, obligations and responsibilities of the parties contracting to provide maintenance or management services to the unit owners.

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Satellite...

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However, the Rule does not apply to signals which transmit AM/FM Radio, Amateur ("HAM") radio, Citizen's Band ("CB") radio, or Digital Audio Radio Services ("DARS").

The Rule applies to areas which are under the "exclusive use" of a unit owner, lot owner, mobile home homeowner, tenant, or other person with an ownership or leasehold interest in property. Areas of "exclusive use" include condominium units (as defined by the declaration of condominium), dwelling units and lots (in the homeowners' association context), balconies, patios, lanais, and areas which may be designated by an association's governing documents as "limited common elements." Key to the analysis of whether the area is one of "exclusive use" in the context of a condominium association, homeowners' association, mobile home homeowners' association, or cooperative association, is an examination of the association's governing documents or lease agreement. First, a determination must be made as to the boundaries of the particular unit, lot, or dwelling. Then, those areas which are under the exclusive use of the owner or tenant must be identified. Finally, those areas which are not subject to the exclusive use of an owner or tenant must be identified.

However, restrictions on the installation of satellite dishes are permitted if the restriction is necessary to accomplish a clearly defined, legitimate safety objective that is stated in the restriction, or the restriction is necessary to preserve a historic site and the restriction is no more burdensome to the antenna user to achieve the safety objective or historic preservation.

An association may also restrict the installation of a satellite dish on common elements or areas, or installations which protrude out into such areas. For example, a condominium unit owner may have the right to install a satellite dish on their limited common element lanai, but the association may validly prohibit any installation which extends the dish beyond the vertical boundaries (planes) of the lanai. This also means that if, for example, a southwest exposure is required to receive satellite signals, and

a unit owner's exclusive use area only provides a northeast exposure, the association is not required to permit the affected unit owner to install his dish on the common elements.

What if an association has a central antenna installed, which provides service to all of the owners? Can an individual be prohibited from installing a satellite dish, even if the dish would be located on an area of exclusive use? The answer, of course, is "sometimes." If the service provided by the central antenna allows the user to receive the same programming and services that they desire, and could receive, with an individual satellite dish, the signal quality provided by the central antenna is as good or better than it would be with an individual antenna, the cost of the central antenna is no greater than it would be with an individual antenna, and the delay involved in utilizing the central antenna is not "unreasonable," then the association may prohibit individual satellite dishes from being installed. This scenario was recently brought home in an association with such a central satellite dish. While the service provided by the association's satellite provider was acceptable for many viewers, a German couple desired to receive television channels from home, and found that the service provider utilized by the association did not offer such channels. Pursuant to the OTARD Rule, the association was required to permit this couple to install an individual dish, despite the fact that there was a central antenna.

Should an association adopt rules preventing the installation of satellite dishes, and seek to enforce same against a home owner, the association must be careful that its rules comply with the mandates of OTARD. The FCC is authorized to hear petitions from persons challenging rules which restrict the user's ability to obtain satellite dish transmissions. If a petition is filed by a user challenging a restriction, the entity seeking to enforce the restriction must suspend all action to enforce the restriction, pending completion of review by the reviewing authority. The party seeking to enforce the restriction cannot assess or collect fines or attorneys' fees while any proceeding is pending.

Even though OTARD permits rules which restrict the installation of satellite dishes on areas other than those within the

TIDBITS

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- ✓ Specifies those costs incurred in the performance of those services, obligations or responsibilities which are to be reimbursed by the association to the party contracting to provide maintenance or management services.
- ✓ Provides an indication of how often each service, obligation or responsibility is to be performed, whether stated for each service, obligation or responsibility or in categories thereof.
- ✓ Specifies the minimum number of personnel to be employed by the party contracting to provide maintenance or management services for the purpose of providing service to the association.
- ✓ Discloses any financial or ownership interest which the developer, if the developer is in control of the association, holds with regard to the party contracting to provide maintenance or management services.

exclusive use of an owner or lessee, associations may determine that it is in the best interests of the community to permit such installations. If an association determines to allow the installation of a satellite dish on the common areas of the property, or allow wiring to be installed through common element walls, it must take precautions to make sure that those common areas will not be damaged by any installation. Such precautions may take the form of requiring the installing owner to sign indemnification or "hold harmless" agreements. This agreement would, among other things, require the installing owner to defend the association against any claims that might be asserted against it by a third party, the installation technician, for example, for injuries arising from the installation. This agreement can also provide that the installing unit would agree to remove the satellite dish upon the transfer of the unit, and require them to return the common elements to their original condition.

PRACTICAL ASPECTS OF ASSOCIATION LITIGATION

As the President of your association, you have just received notice that the association has been sued. This could take the form of a telephone call or letter from the association's attorney or by personal service. The association should immediately inform its insurance carrier in writing of the Complaint against it and should seek to have insurance counsel provided by the insurance carrier. The carrier will then respond in writing, acknowledging the claim and either accepting or rejecting it. Acceptance of the claim may be with a reservation of rights, whereby the insurer provides a defense to the claims raised but reserves the right to refuse to pay any award against the association. This allows the association to have insurance defense counsel provided to it without charge while reserving to the insurance carrier the right to reject the claim if it ultimately turns out that the association violated the law or breached the contract which contains the insurance policy. Generally, the insurance company provides its own counsel. However, it may be advisable for the association to have its general counsel monitor the defense, or it may be necessary to have additional counsel in the event the association has a counterclaim. The insurance carriers' appointed law firm generally will not prosecute a counterclaim under the insurance policy coverage. Every corporation in Florida is required to have a designated, registered agent to accept service of process for that corporation. The Registered Agent must maintain regular business hours as prescribed by statute and must be available at the address shown in the state records for acceptance of service of process. The goal of the statutory requirement is to ensure two things. The first being that every potential Plaintiff can locate some person upon whom to serve a lawsuit in the event the party feels that he or she has been wronged. The second is to ensure that there is a process in place to make the corporation aware that it has been served. Accordingly, the Registered Agent generally gives immediate notice to the corporate board of directors and/or counsel upon being served with the lawsuit. This is important because a default can be entered against the association if it fails to file a responsive pleading within 20 days. Once the 21st day from service has elapsed, the Plaintiff is entitled to obtain a default. A default generally establishes liability for the obligation, but does not establish the exact amount. It is therefore very important to make sure that if you are the Registered Agent for an association you immediately notify the association and its counsel if service is affected upon you in your statutory position. It is highly recommended that this immediately be communicated via telephone or electronic mail and that it be followed up in writing with a copy of the lawsuit via regular mail.

Once the association has been sued it can respond by attempting to "quash" process by asserting that the corporation or its Registered Agent was not properly served; it can move to dismiss the Complaint against it or it can answer the Complaint and raise any affirmative defenses or Counterclaims which are appropriate. In the event that the Complaint does not thoroughly and appropriately spell out the elements needed to support the claim, a Motion to Dismiss would be appropriate. At the hearing on the Motion to Dismiss, the court considers the pleadings and the Complaint on its face alone and considers the allegations true. If all of the elements necessary to state the cause of action are present, the court will generally deny the Motion to Dismiss and require that an Answer be filed. If the elements are not properly pled, the Court is likely to dismiss the Complaint, giving the party who sued the right to revise the Complaint and then file it again by mail within 10-20 additional days. Generally, the Court allows 20 days in which to make the first amendment. Once the pleadings are firm and the allegations of the claim are properly pled, if a claim is supportable on paper, the association will then file an Answer and it will recite in its Answer whether it accepts and admits or whether it denies the allegations of each paragraph of the Complaint. The association's counsel will also respond by raising all Affirmative Defenses which are available. An Affirmative Defense admits some of the claim, but gives a reason why the claim is not valid in spite of having some truth to it. For example, an Affirmative Defense to an accident might be that the victim of the accident was intoxicated or trespassing at the time of the accident. At this point, the association will generally also file any Counterclaims which it has concerning the subject of the lawsuit. (For example, if a vendor was suing for breach of a contract because the association failed to pay, the association might counter sue the vendor alleging that the services rendered or the products were defective or not in compliance with the contracts terms.) Discovery will then ensue.

Discovery takes several different forms. It can be through written Interrogatories or questions directed to individual parties; through oral testimony captured on audio tape or video tape in the form of depositions of witnesses and parties; through the forced turnover of documents, photographs and other tangible items which may support the Plaintiffs or the association's claims, counterclaims, or defenses; or even inspections of property. Generally, the discovery process can last between 6 to 12 months if the case is moderately complex. In some cases, discovery can last for several years, based upon changing circumstances, the complexity of the case and the diligence

of the opposing party in avoiding or delaying the production of important material upon which the claim or defense rests. At some point, the discovery generally concludes and the matter, having been noticed for trial, is set for a trial either before a Judge or a jury. In matters such as breach of contract, the association is entitled to a trial by jury, but generally a jury trial is not available in equitable matters such as injunctive actions or lien foreclosures. Therefore, the type of trial which the association receives may depend upon the claims made, as well as whether either party requests a jury trial. If the jury trial is not requested, it is deemed to be waived, and the trial will be scheduled to be heard before a Judge.

During the trial, which may last several days, the jury is generally picked first, if a jury trial has been scheduled, and then evidence is presented. The Plaintiff goes first attempting to prove all of the elements of its case, including damages and causation of the damages. The Plaintiff then rests. The Defendant is then entitled to present additional witnesses of its own, but may move to dismiss the case at this point claiming that the Plaintiff has not shown by a preponderance of the evidence or by substantial and competent evidence that he or she is entitled to a judgment. If the Court believes that the claim has not been proven by the Plaintiff, it will dismiss the case. If the Court believes that the claim was proven, it will then be the Defendant's turn to defend themselves. The Defendants will call additional witnesses and then the case will be concluded generally through a final summary closing argument made by each party. The Judge or the jury will weigh the evidence, the testimony which they have seen and heard and will come to a decision. Once that decision has been made, a final judgment will be entered.

From the date that the judgment is entered, either party has a period of ten days in which to request a rehearing of the matter. The rehearing is not to reargue the case, but to point out to the Court where one party believes that either evidence was overlooked, allowed to be heard when it should not have been or the law was misapplied to the evidence. Motions for rehearing are not typically granted.

The parties have a period of 30 days from the entry of the Final Judgment in which to file a timely appeal of the matter. If the appeal is not filed within the time allowed by law, the appellate court has absolutely no jurisdiction in which to hear the appeal and, therefore, the trial court's ruling will stand.





CASENOTES

NEGLIGENT SELECTION OF INDEPENDENT CONTRACTOR

The Fourth District Court of Appeal recently held that a landlord was liable to a tenant for injuries resulting from an independent contractor's negligent repairs based upon the theory of "negligent selection." In the case of *Suarez v. Gonzalez*, 2002 WL 460869 (Fla. 4th DCA 2002), the tenant, Gonzalez, was partially paralyzed when a kitchen cabinet fell from the wall of his rental unit and struck him on the head. The landlord, Suarez, disclaimed liability, stating that the cabinet was installed by an independent contractor hired by her daughter-in-law. The daughter-in-law hired the independent contractor when she saw the man passing by on the street with some cabinets in his van. The man was hired to make improvements, including hanging the cabinets in the kitchen of the rental unit. The parties did not sign a contract and she paid the man in cash. Neither Suarez nor her daughter-in-law could remember the name of the man, his business, or whether he was licensed. Further, Suarez did not obtain a permit for the job.

Generally, the employer of an independent contractor is not liable for the negligence of the independent contractor because the employer has no control over the manner in which the work is done. However, there are exceptions to this rule. One such exception occurs where the employer is negligent "in selecting, instructing, or supervising the contractor." In other words, an employer of an independent contractor may be liable to a person who is injured as a result of the contractor's negligence where it is shown that the employer was negligent in selecting a careless or incompetent person with whom to contract.

The Fourth District held that the amount of care, which should be exercised in selecting an independent contractor, is that which a reasonable man would exercise under the circumstances, and varies as the circumstances vary. The Court focused on three factors in fixing the amount of care required: (1) the danger to which others will be exposed if the contractor's work is not properly done; (2) the character of the work to be done – whether the work lies within the competence of the average man or is work that can be properly done only by persons possessing special skill or training; and (3) the existence of a relationship between the parties which imposes upon the one a peculiar duty of protecting the other.

The Court found that since hanging kitchen cabinets is not an inherently dangerous activity, the first factor did

not provide much guidance. Likewise, the second factor, focusing on the extent of the employer's knowledge and experience in the field of work to be performed, provided little guidance since ordinary, non-dangerous activities require an employer to make only minimal inquiry into the qualifications of an independent contractor. It was the third factor, which focuses on the relationship between the parties, that the Court of Appeal found imposed liability on Suarez.

The third factor looks to the relationship between the parties to see if the law imposes a duty on an employer to exercise care to ascertain whether the contractor who is hired is competent to do the work safely. In Florida, the landlord-tenant relationship imposes a non-delegable duty of care upon a landlord who undertakes to make repairs or improvements for the benefit of a tenant. This duty requires a landlord to use reasonable care in selecting a competent independent contractor to make improvements or repairs in the premises occupied by a tenant. The employer is therefore required to choose a contractor who possesses the knowledge, skill, experience and available equipment which a reasonable man would realize that a contractor must have in order to do the work which he is employed to do without creating an unreasonable risk of injury to others.

In this case, Suarez made no inquiry into the contractor's qualifications. She obtained no references. She did not even make the minimal inquiry of whether the contractor operated in the area under a license and a business name. She had no basis for knowing whether the contractor had the knowledge, skill, experience, and available equipment to hang the cabinets. Moreover, since Suarez negligently hired the contractor, she is liable for the contractor's negligence as if she had done the work herself and, therefore, was not entitled to have the "phantom contractor's" name placed on the jury verdict form for purposes of apportioning liability.

This case is of paramount importance to any person or entity that owes a duty of care to others based upon a special relationship. While this holding expressly addresses the landlord-tenant relationship, the opinion is clear that it is not limited to those facts. Accordingly, any entity or person undertaking repairs on behalf of another must ensure that his/her actions comport with the factors outlined in the *Suarez* case. Failure to do so may subject a person or entity to liability for 100% of the contractor's negligence.

CASENOTES