

Rental Owner

THE VOICE OF THE RENTAL HOUSING INDUSTRY • OCTOBER 2007

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October 2007



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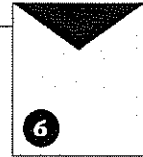
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All Quiet on the Political Front...For Now

A recap by Karen Murphy Gross on what has happened and is happening legislatively around San Diego County. From raising utilities rates to the Mini Dorm issue happening in the City of San Diego, learn more about our efforts on the political front.



Smoking or Non-Smoking?

More and more California cities are trying to "quit" smoking. El Cajon's new rules prohibit smoking at outdoor restaurants, outside the city's courthouse or while walking down public streets. While there is no state law that specifically addresses the rights and responsibilities of property owners, owners should be aware of their responsibilities in ensuring their tenants are not in violation of local laws.

Drug Abuse Fueling Identity Theft

How you can protect your property. Meth abuse at your rental property can have serious negative effects on the entire apartment community. 75 percent of identity theft is fueled by meth addiction.

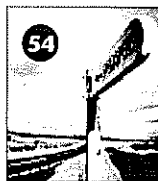


Curb Identity Theft

Are you compliant? Concerned with the growing number of these felony offenses and the serious repercussions for their victims, the United States Postal Service (USPS) implemented a new standard for wall-mounted, centralized mail receptacles known as USPS STD-4C.

Demystifying Criminal Data in Tenant Screening Reports

Should a landlord or management company include a criminal records check as part of a tenant-screening search?



Prosperity's Path

The third installment of successful readings for real estate investors reviews a Random Walk Down Wall Street: The Time Tested Strategy for Successful Investing.

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DEMYSTIFYING CRIMINAL DATA IN TENANT SCREENING REPORTS:



by Michael J. Saltz,
Jacobson, Russell, Saltz & Fingerman, LLP

For as long as I can remember, there has always been bewilderment in the multi-housing industry over the use of criminal records in tenant screening reports. Rumors have persisted as to their availability, their cost and the legality of their use.

As such, this article aims to demystify the use of criminal records to help evaluate a person's credit worthiness with regard to an application for housing and the legal implications for doing so.

1. CAN CRIMINAL INFORMATION BE INCLUDED IN A CONSUMER REPORT FOR EVALUATING A PROSPECTIVE TENANT'S CREDIT WORTHINESS?

"Yes."

There is little doubt that criminal information, such as records of arrest, indictments or convictions, was contemplated by lawmakers to be appropriate material for consumer reports to be used for evaluating a consumer's credit worthiness. We know this because of what lawmakers have stated cannot be contained in a consumer report.

Specifically, the Federal Fair Credit Reporting Act ("FCRA") states in relevant part at 15 USC § 1681c (as recently amended) the following:

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**Disclaimer: The opinions and
information expressed in this
article are those of the author.**

**This article is not intended as
legal advice. Please consult with
your attorney before conducting
criminal screening on your
prospective residents.**

DEMYSTIFYING CRIMINAL DATA...

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"(a) Information excluded from consumer reports. Except as authorized under subsection (b), no consumer reporting agency may make any consumer report containing ...:

(2) Civil suits, civil judgments, and records of arrest

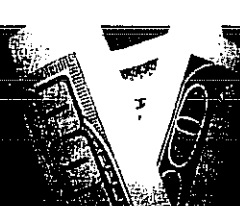
that, from date of entry, antedate the report by more than seven years or until the governing statute of limitations has expired, whichever is the longer period.

(5) Any other adverse item of information, other than records of convictions of crimes which antedates the report by more than seven years.

[15 USC § 1681c (a)(2). Emphasis added].

Thus, by virtue of excluding from consumer reports only those records of arrest that are seven years old,¹ and by expressly excluding records of convictions of crime from any reporting time limitations,² it appears that Congress has expressly allowed for such records to be used in the evaluation process of the credit worthiness or capacity of a consumer.

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The Federal Courts that have had the opportunity to rule upon this issue have agreed that criminal information is proper data to be included in a consumer report. [See *Fite v Retail Credit Co.* (1975, DC Mont) 386 F

Supp 1045, 1048 affd (1976, CA9 Mont) 537 F2d 384.

("A credit reporting agency could lawfully report the record of an arrest or an indictment and a judgment of acquittal.")].

Likewise, California law is generally in accord with the FCRA on this issue. Specifically, California's Consumer Credit

Reporting Agencies Act ("CCRAA") states in relevant part:

"(a) No consumer credit reporting agency shall make any consumer credit report containing ...

(6) Records of arrest, indictment, information, misdemeanor complaint, or conviction of a crime that, from the date of disposition, release, or parole, antedate the report by more than seven years.

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¹ It is important to note that the FCRA at 15 USC 1681c (b) removes any of the restrictions set forth in subsection (a) when there is: (1) a credit transaction involving, or which may reasonably be expected to involve, a principal amount of \$ 150,000 or more; (2) the underwriting of life insurance involving, or which may reasonably be expected to involve, a face amount of \$ 150,000 or more; or (3) the employment of any individual at an annual salary which equals, or which may reasonably be expected to equal \$ 75,000, or more. In such cases, it can be stated that Congress expressly mandated that records of arrest that are over seven years old can be considered in such consumer reports.

² Prior to 1998, records of arrest, indictments and conviction of crime information were all subject to a seven year reporting limitation. However, Congress in 1998 amended the FCRA and expressly excluded records of conviction of crime of any reporting limitation.

³ There is a genuine issue as to whether the CCRAA, to the extent that it differs from the FCRA, is federally preempted. [See 15 USC § 1681i]. However, for our purposes here, the current state of the CCRAA appears to mirror the FCRA in allowing criminal information to be contained in consumer credit reports.

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These items of information shall no longer be reported if at any time it is learned that in the case of a conviction a full pardon has been granted, or in the case of an arrest, indictment, information, or misdemeanor complaint a conviction did not result."

[Civil Code § 1785.13(a)]

Thus, like the FCRA, we know under the CCRAA criminal information is proper data that can be included in a consumer credit report, with the caveat that the subject information is not expressly barred.³

Therefore, it is my opinion that criminal information can be included in a consumer report for evaluating a prospective tenant's credit worthiness.

2. WHAT EFFECT, IF ANY, DOES MEGAN'S LAW HAVE ON THE ABILITY TO USE CRIMINAL INFORMATION IN A CONSUMER REPORT TO REJECT A PROSPECTIVE TENANT'S APPLICATION?

Perhaps one of the biggest issues with regard to criminal information over recent years has been the introduction of the sex offender registry that has been made available to the public by way of what is commonly referred to as "Megan's Law."

In 1996, California enacted "Megan's Law," which provides the public with photographs and descriptive information on serious sex offenders that reside in California. These offenders have been convicted of committing sex crimes and are required to register their whereabouts with local law enforcement. The Department of Justice has made this

database of sex registrant information available for public viewing.

Megan's Law is helpful to the extent that one wants to find out about where a sex offender currently lives. However, Megan's Law expressly prohibits the public from using the information obtained from the Megan's Law website to deny a sex offender credit, housing or services.

Specifically, the information obtained from the Megan's Law website can only be used in the following manner:

"A person is authorized to use information disclosed pursuant to this section only to protect a person at risk."

[Penal Code § 290.4(d)(1)].

The information obtained under Megan's law cannot be used to deny anyone credit or housing. Penal Code § 290.4(d)(2) states in relevant part:

"Except as authorized under paragraph (1) or any other provision of law, use of any information

that is disclosed pursuant to this section for purposes relating to any of the following is prohibited:

- (A) Health insurance.
- (B) Insurance.
- (C) Loans.
- (D) Credit.
- (E) Employment.
- (F) Education, scholarships, or fellowships.
- (G) Housing or accommodations.
- (H) Benefits, privileges, or services provided by any business establishment."

There are exceptions to this restriction (i.e. disclosure to community care facility; employment in health facilities, etc.), but it does not appear that any of the exceptions would apply to private residential tenant screening in the multi-housing industry.

Should landlords not subject to the limited exceptions deny housing to a sex offender

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based upon the information disclosed under Megan's Law, they could be subject to suit, fines, punitive damages and attorneys' fees. Penal Code § 290.4(d)(4)(A) states:

Any use of information disclosed pursuant to this section for purposes other than those provided by paragraph (1) or in violation of paragraph (2) shall make the user liable for the actual damages, and any amount that may be determined by a jury or a court sitting without a jury, not exceeding three times the amount of actual damage, and not less than two hundred fifty dollars (\$ 250), and attorney's fees, exemplary damages, or a civil penalty not exceeding twenty-five thousand dollars (\$ 25,000).

However, Megan's Law appears to be designed to operate in a virtual vacuum. Megan's Law only prevents the information obtained from its operative website from being used to deny a criminal housing or credit, and otherwise does nothing to limit the rejection of a credit or rental application to the extent that the public criminal records are procured from another source. Thus, so long as the public criminal data to be reported in a consumer report was *not* obtained from the Megan's Law website, a potential landlord or creditor may properly rely upon the criminal data in said report to deny a consumer credit or housing.

3. SHOULD A LANDLORD OR MANAGEMENT COMPANY INCLUDE A CRIMINAL RECORDS CHECK AS PART OF A TENANT-SCREENING SEARCH?

Whether to include a criminal records check as part of normal tenant screening procedures is perhaps the multi-million dollar question, because not including such records in your screening process could potentially cost you that much.

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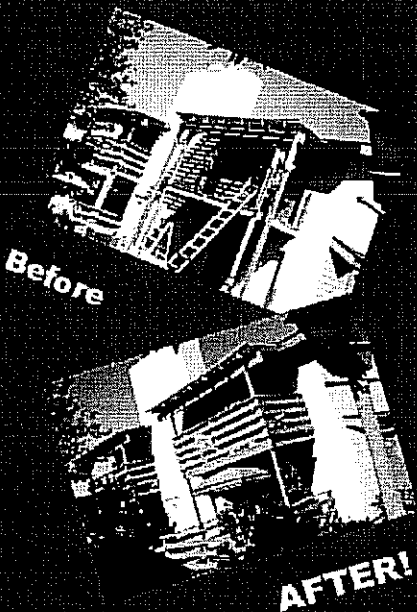
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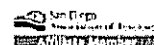
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To the extent criminal records are readily available in your geographic area, and to the extent that a criminal-records search is financially feasible to obtain from a reputable tenant screening company, it would be prudent for a landlord or management company to always include a criminal records search as part of the normal tenant screening process. This is also the recommendation of the International Crime Free Association's Crime Free Multi-Housing Program. [See <http://www.crime-free-association.org/multi-housing.htm>].

Because we live in a litigious society, it is always a wise idea to adopt relatively inexpensive business procedures that could directly limit risk and financial liability in potential litigation. This is especially true when the business involves an activity that carries a heightened duty under the law, such as managing residential property.

Legally, landlords owe a duty to their tenants to protect them from reasonably foreseeable risks, including the risk of criminal conduct by third parties [see, e.g., *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal. 4th 666, 675; *Frances T. v. Village Green Owners Assn.* (1986) 42 Cal. 3d 490, 499-503].

In this regard, one can argue that it is foreseeable that a known criminal may continue to engage in criminal conduct. Specifically, it is a well known fact that persons with prior criminal convictions have a high rate of recidivism.

Additionally, if a criminal lives in a particular apartment community, it is arguably foreseeable that he or she will continue to commit more crime therein. This essentially has the effect of placing other tenants within a foreseeable zone of danger.

Finally, through the inclusion of criminal records in a tenant screening report, a landlord is in a position to fulfill the duty of protecting tenants from criminal activity by preventing certain known criminals from living in their properties. Specifically, it is a proven fact that the inclusion of criminal reports in the tenant screening process to help prevent criminals from moving into a multi-housing community dramatically reduces the amount of police calls at a residential property and the likelihood for crime occurring at that location. [See <http://www.crime-freeassociation.org/testimonials.htm>. ("At Los Angeles County Sheriff's

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Department - San Dimas Station we reduced calls for service and nuisance complaints on average 37% based on our last study in 2002 from our benchmarks." John Gannon, Sergeant Los Angeles Sheriff's Department.))

In the event that a tenant is the victim of a violent crime at the hands of another tenant with a previous criminal history, it is likely that a jury would find the landlord liable, in whole or in part, if the landlord knew or **should have known** that a convicted violent criminal was allowed to live at the subject property. This is especially true if criminal record information on the offending tenant was reasonably available and inexpensive. In contrast, if the landlord had obtained a criminal records search on the subject tenant and the report did not disclose a prior criminal history, it is less likely that a

jury would find the landlord could have prevented the criminal conduct.

In addition to the fact that a landlord can drastically reduce risk and liability by obtaining criminal record information in the tenant screening process, since the advent of Megan's Law, it is also important for a rental property to not be stigmatized as a property that houses sexual offenders.

Because Megan's Law now makes public a criminal's picture and address, a property may develop a negative reputation for being a place where certain criminals live. This could prevent or reduce the number of good tenants from applying and otherwise gives existing good tenants reason to move. By way of example, and not limitation, a brief search on the internet uncovered the following blog rating a particular apartment complex in Walnut Creek California:

RAPIST in Apt 11 - Read Meagan's Law

From: -Anonymous-

Date posted: 4/1/2005

Years at this apartment: 2005-2005

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Was looking at Meagan's Law website (where they list sex related criminals) and there is one in Apt 11. Not sure if they STILL live there, but check out the site before you move in at ANY apartment complex!

[<http://www.apartmentratings.com/rate/CA-Walnut-Creek-Creekside-Garden-Apartments-315802.html>].

Thus, to the extent criminal information is readily available in your geographic area, and to the extent that a criminal-records search is financially feasible to obtain from a reputable entity, a landlord or management company should always include a criminal-records search as part of the normal tenant screening process.

CONCLUSION.

So to re-cap: Criminal data may legally be included in consumer reports under both Federal and California law, and be relied upon in making credit granting decisions; Further, Megan's law does not alter this right – just the source; And, to the extent criminal information is readily available in your geographic area, and to the extent that a criminal-records search is financially feasible to obtain from a reputable entity, a landlord or management company should always include a criminal-records search as part of the normal tenant screening process.



Michael J. Saltz is an attorney in Los Angeles California. He is a partner at the law firm of Jacobson, Russell, Saltz & Fingerman, LLP. Over the past ten years, he has represented several landlords, management companies, and credit bureaus such as The U.D. Registry, Inc. and First Advantage SafeRent, Inc. He is also the Co-Author of The California Landlord-Tenant Litigation Guide, published by Matthew Bender and Lexis-Nexis. If you have any questions or comments about this article, he may be contacted at 310-446-9900.



Smoking or Non-Smoking?

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expensive due to the lower risk present on non-smoking properties. A statewide telephone survey of apartment residents conducted by the American Lung Association indicated that many residents prefer some sort of smoke-free regulations. Considering these results, making a property smoke-free could be a desired amenity and good marketing tool.

Going Smoke-Free

Whether your property is affected by a local no-smoking ordinance or you decide to voluntarily go smoke-free, there are specific steps it is recommended you take. If doing it voluntarily, you should first survey your residents to determine whether they are interested in living in a smoke-free environment. Next, set a time frame for making the changes; some owners "grandfather in" existing tenants, making their units non-smoking after the existing resident has moved out rather than changing the terms of their tenancy.

Regardless of the reasons for going smoke-free, proper noticing is still required for full or partial smoking bans. Thirty days' notice should be given if the tenant is month-to-month, or at the time of renewal if the tenant is on a lease agreement, in the form of a rental/lease agreement addendum. Non-smoking signs also should be posted on the property, and the no-smoking policy advertised as part of the owner's marketing strategy.

The SDCAA has available an Addendum for Smoke Free Areas. You may obtain one by calling the SDCAA Bookstore at (858) 278-8070.

There remain unanswered questions surrounding enforcement of no-smoking policies and the extent of a landlord's culpability for tenants caught smoking. For example, if a tenant is caught violating a community's no-smoking rules, must the landlord observe the law and issue a three-day notice to perform covenant or quit? Then, if the tenant puts out the cigarette...what about the next time he or she is caught smoking? Does the process begin again?

Unfortunately, there is no easy answer. But by taking the steps recommended in this article, you are documenting your efforts to educate residents about, as well as enforce, on-site no-smoking policies. 