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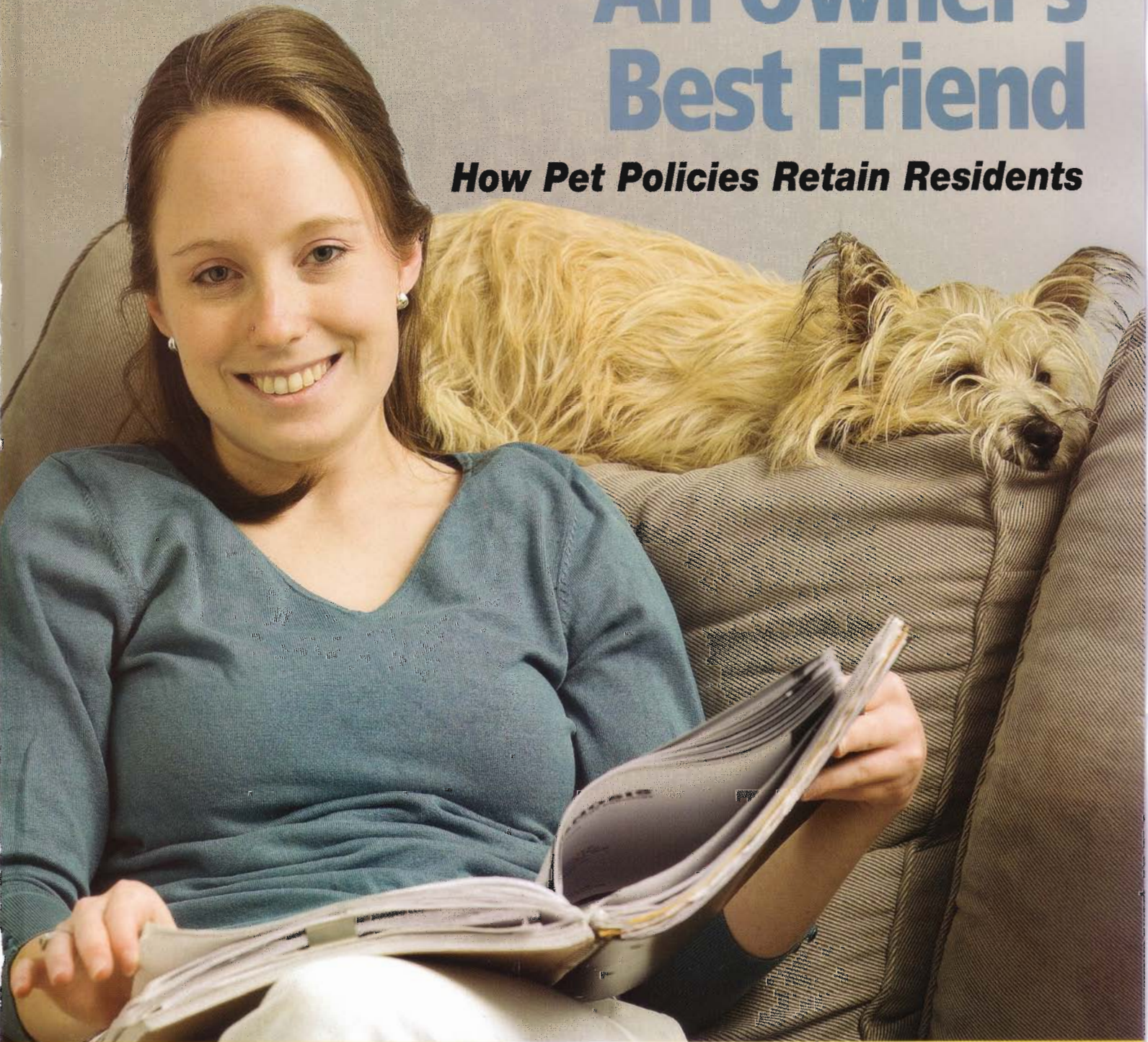
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## An Owner's Best Friend

**How Pet Policies Retain Residents**



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### Screening Brings Security for Owners, Residents

**PRESS REPORTS** of the recent hedge-fund scandal on Wall Street indict the major funds for not performing necessary due diligence before doing business with New York trader Bernard Madoff. The average cost for hedge funds to perform due diligence has been reported at a very cost prohibitive \$50,000 to \$100,000 and can take months to complete.

A vendor compliance check, however, can be completed in a matter of hours and for about the cost to replace a few light bulbs. Imagine the press reports if a community employee or hired contractor committed an unspeakable crime while onsite; or picture the repercussions from residents if property was damaged or stolen by a supplier; or fathom the financial exposure that comes with working with multiple vendors across multiple communities.

A growing number of property management companies are opting to hire vendor compliance firms to mitigate risks arising from mistakes made in performing basic background checks and vendor credentialing. Most apartment managers already understand the importance of screening their employees to protect against hiring workers with criminal records involving crimes of property, sex, drugs or violence. Pre-employment screening is a simple and inexpensive way to mitigate the risk of premises liability.

“Statistics show that the average settlement for a premises liability case is more than \$500,000,” said David Carner, Senior Vice President of LeasingDesk, the risk mitigation division of RealPage Inc. “The average jumps to more than \$1 million if those cases fall into the hands of a jury.”

#### Improving Resident Safety

With the safety of employees, residents and visitors a primary concern, criminal background and sexual predator checks for residents and employees have become a routine part of the screening process for most management companies.

Additionally, the risk of financial liability, concern over negative publicity if an incident occurs and the cost of defending a negligence lawsuit, even if it is successful, also plays an important role in the decision for many management companies to select a screening provider that includes criminal checks.



Requiring the screening of a service provider's employees remains less common but is seen as increasingly important. According to Frank Swingle, Past President of the Independent Insurance Agents of Texas, there is an inherent level of liability risk that can increase greatly if the service provider has access to a resident's apartment.

Although some management companies are demanding that service providers perform background checks on their employees and many of these companies do perform a check, “there aren't universal standards regarding the type of check being performed and what is considered as an acceptable criminal record for their employment,” said Jorge Baldor, President of ResidentCheck.

Simply requiring a service provider to perform a check will not relieve the management company from liability if the check was not performed or incomplete, Baldor said.

Criminal record searches are available in two basic formats: database records and county-level records. Both types have advantages and disadvantages. Database records are fast but not as accurate. These records often are outdated and incomplete because many jurisdictions never report even felonies and sexual offenses, and those that do report often only update records monthly, quarterly or even annually.

Criminal searches from the county level offer up-to-date and accurate records but with many jurisdictions not automated and not likely to report to any database, they require a manual search, which is more costly and time consuming.

Budget and time constraints often dictate database criminal checks for residents but the same standard should not be true for employees. Negligent hiring court rulings have made clear that an employer has a greater responsibility—and liability.

Baldor suggests that “when requiring service provider background checks, the type of check being performed and their employment hiring standards should be made clear and audited.”

Mike McDougal, CAPS, CPA, President, The McDougal Companies, Lubbock, Texas, requires his vendors to perform criminal background checks on any of their employees who might enter his communities and that contractors, such as plumbers and electricians, hold legitimate licensures.

# Service Spotlight

## Employee Screening

Communities that consider resident safety a priority are making the shift to run employees and employees of service providers through the same criminal background screening as residents.

### Owner Liability

Can an apartment community be held liable for the tortious acts of its workers? An owner must first determine if the worker is an employee or an independent contractor. The general rule is that an apartment community or owner is liable for the tortious acts of its employees under the legal theory of agency, but not for the tortious acts of its independent contractors (*Hammerly Oaks, Inc. v. Edwards*, 958 S.W.2d 387).

The legal theory of agency basically states that a principal—the apartment owner—is legally liable for the conduct of its agents—employees—as if committed by the principal itself (*Hammerly Oaks, Inc. v. Edwards*, 958 S.W.2d 387). However, an apartment owner's liability becomes more complicated when dealing with an independent contractor.

As stated above, an apartment owner generally is not liable for the tortious acts of its independent contractors. However, there is an exception to this rule (*Ross v. Texas One Partnership*, 796 S.W.2d 206). An apartment community is liable for the tortious acts of its independent contractors if the apartment community has the right to control the details of the independent contractor's work (*Brentwood Financial Corporation and Chateau Orleans, Ltd. v. Lamprecht*, 736 S.W.2d 836, 1987).

The primary test to determine if a party is an independent contractor is which of the parties possess the right of control over the details of the work (*Ross v. Texas One Partnership*, 796 S.W.2d 206).

Usually, if the owner possesses narrow control over the work to be performed, the worker will be seen as an independent contractor who should be treated as an employee for purposes of agency law (*Ross v. Texas One Partnership*, 796 S.W.2d 206). Factors that can be considered in determining who possesses the control over the details of the work are the nature of the independent contractor's business; which party is obligated to supply the necessary tools, supplies and materials to complete the work; which party controls the progress of the work; how long the independent contractor is employed; and how the independent contractor is paid (*Ross v. Texas One Partnership*, 796 S.W.2d 206). If it is determined that the owner possessed such control over the independent contractor and that the independent contractor should be treated as an employee, the owner will be held liable for the independent contractor's tortious acts (*Ross v. Texas One Partnership*, 796 S.W.2d 206).

An owner cannot only be liable for compensatory damages under the legal theory of agency; he also can be liable for exem-

plary or punitive damages under special circumstances. Some of those circumstances include if an agent or employee was employed in a managerial position and was acting within the scope of his employment or the acts of the agent or employee were authorized or subsequently ratified by the owner (*Hammerly Oaks Inc. v. Edwards*, 958 S.W.2d 387). An apartment owner also can be ordered to pay punitive damages if he hires an employee or independent contractor and the owner was negligent in the hiring (*Hammerly Oaks Inc. v. Edwards*, 958 S.W.2d 387).

### Credit History A Strong Indicator

Mike Britti, Group Vice President, TransUnion, said prospective employers may calculate an applicant's credit history and conduct a background check before making an employment decision.

"Employers' access to this type of information gives them additional insight into how potential job applicants manage other responsibilities in their lives, such as financial ones," Britti said. "This is because they believe the manner in which an individual handles personal affairs reflects his or her ability to manage professional duties. Credit and background checks are especially common if the position involves access to company goods or data and financial information."

Federal law mandates that individuals must agree to the use of their credit reports for employment purposes and that they are notified if their credit reports result in a negative employment decision. Though bankruptcies are public record, it is illegal for an employer to discriminate against an applicant because of a past bankruptcy. ■

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*RealPage, ResidentCheck, First Advantage SafeRent and TransUnion contributed to this article.*

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