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Banning the use of exclusivity contracts means competition for marketing rights to MDUs

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A recent Appeals Court decision upholding a 2007 Federal Communications Commission order banning the use of exclusivity contracts among cable providers means competition for marketing rights to multi-dwelling units (MDUs) should continue, as firms vie for a competitive edge in an increasingly difficult economic market. That means there remains the opportunity for communities to receive a much needed cash infusion in exchange for granting marketing rights to cable companies. However, the terms for which providers are willing to pay for those rights have gotten somewhat more constrictive recently as cable providers feel the effects of weak consumer spending.

The decision, designed to remove barriers to competition among providers, was handed down in May by the Appeals Court in the case of National Cable & Telecommunications Association v. Federal Communications Commission, and upholds both the exclusivity ban, as well as the FCC's decision to apply the ban to existing contracts retroactively. Since the original 2007 FCC order, and in light of the recent decision, cable providers continue to look for other avenues beyond exclusive access to gain market share. Providing an upfront unit or door fee in exchange for the right to exclusively market services at a given property has grown to be an important part of all major cable providers' sales strategy. For communities struggling to meet budget constraints the potential opportunity to receive thousands of dollars, for relatively little effort, can be an extremely welcoming prospect.

While most of the marketing activities remain relatively passive and noninvasive for both condominium and apartment projects, there has been a recent push from the providers to get more for their marketing dollars. Verizon for instance is insisting that marketing rights be granted for ten years (as opposed to the five years they formerly accepted) in order to obtain premium rates, and some providers are now insisting that the right to conduct door-to-door sales be included as part of the allowed marketing activities. At the same time, Comcast, which had been taking a less aggressive position in seeking marketing rights, appears to be stepping up its commission structure, and has been willing to enter into agreements for less than ten years.

Typically, marketing agreements provide for a one-time per door or unit fee (usually ranging from \$50 to \$200 depending on the type, size, and location of the property) and in return the "owner" of the property agrees to perform or allow certain marketing activities to be conducted. Such activities include placing moderate advertising in high traffic areas and allowing the provider to hold live demonstrations of the services onsite. In apartment communities there may also be requirements that the marketing material for the provider's services be placed in welcome packages for each new or renewing resident. Everything is negotiable and it is important to make sure the specific agreement is tailored to the individual property.

As the competition heats up among the cable providers it is essential to protect the rights of the

property. As with any contract, attention to detail is crucial. Marketing agreements (like many other agreements with cable providers) tend to be lengthy, and somewhat technical, which makes it even more important to review the fine print. When negotiating the contract, specific language should be included that grants the property owner (or condominium board) the ultimate say with regard to placement and size of all advertisements at the property and should specifically include the right to veto any advertisement based on aesthetic reasons alone. Likewise, if door-to-door marketing is allowed, the time and manner in which these activities can take place should be clearly defined. For example, some properties have limited the door-to-door sales to a two-week period at the start of the contracting.

The FCC has indicated that it may begin regulating exclusive marketing agreements but has yet to take any formal action. So for the time being at least, marketing agreements can be mutually beneficial to the property and the cable provider, but care should be taken in reviewing and negotiating the specific contract.

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