Residential Tenancies, Lease to Eviction—An Overview of Colorado Law

by Lindsay J. Miller

This article provides an overview of Colorado statutes and case law regarding residential lease agreements, the obligations of the landlord and tenant, and eviction procedure. The article does not discuss mobile home tenancies, which are governed by the Mobile Home Park Act, CRS §§ 38-12-200.1 to -221.

Landlord/tenant law is a complex and quickly changing area of Colorado law, and the clients seeking assistance are growing in number. Recently, Colorado experienced two natural disasters that affected a significant portion of the residential population. Homes were lost, occupants were displaced, and parties to residential lease agreements were at a loss for how to deal with their unfortunate situation. It is out of this experience that this article was written. This article is intended to give attorneys an overview of Colorado landlord/tenant law, in the hope that practitioners will be encouraged to respond to this rapidly expanding client base.

Overview of Leases

Most tenancies start with a written lease agreement between the landlord and tenant. In Colorado, a written lease is required if the length of tenancy is more than one year pursuant to CRS § 38-10-108.[1] Some municipalities, such as the City of Boulder, require written leases regardless of length of tenancy. Attorneys are encouraged to check local laws to ensure compliance.[2]

The "note or memorandum" required to comply with CRS § 38-10-108 must include the following elements: (1) the names of the parties, vendor, and vendee; (2) the terms and condition of the contract; (3) the interest or property affected; and (4) the consideration paid therefor.[3] After this requirement has been met, the parties may include individualized provisions that address their particular situation.

Although parties are generally free to contract in a variety of ways with respect to the rented premises, a written lease may not contain any of the following provisions (in addition to any local restrictions):

1) a provision allowing landlord longer than sixty days to return security deposit;[4]
2) a provision requiring tenant to arbitrate wrongful withholding of security deposit;[5]
3) a provision allowing landlord to terminate lease or impose penalty on residential tenant for calls made by tenant to law enforcement or other emergency assistance in response to domestic violence or abuse situation; a residential tenant may not waive his or her right to contact law enforcement or other emergency assistance in domestic violence situation;[6]
4) with a few exceptions (noted in "Warranty of Habitability" section below), a waiver or modification of the Warranty of Habitability;[7]
5) a waiver of tenant's right to a 3-Day Demand for Compliance or Possession in case of nonpayment;[8] or
6) a waiver of the protections against unlawful detainer in domestic violence situations.[9]

Some additional considerations to note when drafting or reviewing a residential lease include anti-discrimination policies. The Federal Fair Housing Act prohibits discrimination on the basis of race, color, religion, sex, national origin, handicap, and familial status.[10] The protections afforded to residents under state law include the federal protections and add four protected classes (including sexual orientation). In Colorado, it is unlawful to "refuse . . . to rent or lease [to any person] . . . because of disability, race, creed, color, sex, sexual orientation, marital status, familial status, religion, national origin, or ancestry. . . ."[11]

Landlords should also note lead-based paint policies for houses constructed before 1978 and requirements regarding providing pamphlets to tenants.[12] Landlords of applicable properties are

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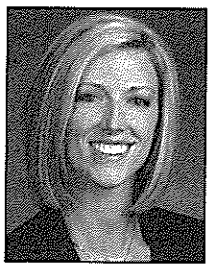

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required to provide a lead-based paint information pamphlet, "Protect Your Family From Lead in Your Home," at the time the lease is signed.[13] This pamphlet can be found in various languages on the HUD website.[14]

With respect to smoking, landlords may permit smoking in a leased residence. However, doing so may expose the landlord to liability for interfering with property rights of neighbors.[15] For this reason, Colorado law clearly permits a landlord to ban smoking on the premises.[16] Additionally, despite current Colorado laws that permit the use of medical marijuana, the Federal Controlled Substances Act categorizes marijuana as an illegal substance and provides that the manufacture, possession, or distribution of said marijuana is a federal crime.[17] HUD has stated that the use of medical marijuana violates federal law.[18] Therefore, federal and state nondiscriminatory laws do not prohibit landlords from refusing to accommodate current or prospective residents who seek to use medical marijuana.[19]

Colorado Amendment 64 permits individuals age 21 and older to consume or possess a limited amount of marijuana for recreational purposes.[20] However, Amendment 64 does not require landlords to permit recreational use or possession of marijuana on leased premises.[21] Practitioners are encouraged to check local laws to verify items that may impact the lease, the obligations of the parties, or the premises.

Obligations of the Parties to Each Other and to Visitors

This section discusses the general duties of the parties to each other under a typical lease agreement and the potential liability to others. Practitioners should pay special attention to the Premises Liability Act when drafting or seeking to enforce a residential lease agreement.

Rent

It is important to note at the outset that even if a tenant is experiencing a problem with the premises (such as a habitability issue, discussed below), the tenant has an ongoing obligation to pay rent.[22] Offsetting the monthly rent with an expense the tenant paid for, unless specifically allowed under the lease, is not advisable, and doing so may expose the tenant to an eviction action.[23]

Typically, a tenant will pay rent to the landlord as outlined and agreed to in the parties' lease agreement. The lease may allow the tenant a grace period for late payments, but it is always important to refer to the lease for proper payment methods and payment addresses to avoid possible eviction or late fees. From a landlord's perspective, it is important to carefully monitor the lease term. If a tenant remains in the premises after the lease has expired, and the landlord continues to accept rent from the tenant or otherwise treats the tenant as a tenant, a "holdover" tenancy has been created.[24] This will be important later if a problem arises and the landlord seeks to evict.

It is also important for the tenant to pay timely rent. Failure to do so and acceptance on the part of the landlord will only cause problems for both parties. The landlord may seek to collect timely rent, while the tenant may assert a waiver/estoppel defense.[25] Tenants should be aware that just because one tenant has paid his or her share of the rent, this does not absolve the tenant of liability if a roommate fails to pay his or her portion of the rent. A default will exist for the full amount of the monthly rent if not submitted timely and in full.[26]

Domestic Violence

In certain situations, such as domestic violence and lack of habitability, the tenant may terminate the lease on written notice to the landlord in accordance with Colorado statute. Once the lease has been terminated, the tenant's obligation to pay rent is limited. For example, in a domestic violence situation, if a tenant has provided statutorily compliant notification[27] to the landlord that he or she is a victim of domestic violence and can provide the landlord "evidence of domestic violence or domestic abuse in the form of a police report written within the prior sixty days or a valid protection order" and the tenant seeks to vacate due to fear of imminent danger to self or children, the tenant may terminate the lease and vacate the premises with limited obligations.[28]

Maintenance and Repair

For maintenance and repair obligations, the parties should refer to their lease. Tenants are cautioned to read this portion carefully, because the landlord may not be responsible for all maintenance items. Additionally, the Warranty of Habitability imposes certain restrictions and duties on tenants with respect to maintenance of property.

Notices

With regard to notices, again, parties should refer to their lease. A smart landlord will include a provision on how and when a party is to receive notification of a maintenance issue, for example, or when a party is late paying rent. If the lease is silent as to notification regarding nonpayment of rent, landlords must serve a "3-Day Demand for Compliance or Possession" in accordance with CRS §§ 13-40-104 *et seq.* (The 3-Day Demand is discussed in further detail below.)

Damages/Normal Wear and Tear

Tenants should be aware of how damages will be paid for, when, and by whom. Normal wear and tear of premises is allowable, and no security deposit deductions will be permitted under Colorado statute.[29] However, tenants are likely to have a much broader definition of this than landlords. "Normal wear and tear" is defined as

> that deterioration which occurs, based upon the use for which the rental unit is intended, without negligence, carelessness, accident or abuse of the premises or equipment or chattels by the tenant or members of his household, or their invitees or guests.[30]

General property repairs and who is the responsible party are typically governed by parties' lease. In situations where the tenant is concerned with habitability, the tenant is again cautioned to avoid doing a rent offset, unless the lease allows. Offsets will lead to confusion and frustration by both parties and may place the tenant in an eviction situation for nonpayment of rent.[31]

Liability to Visitors

The parties should also be aware of their respective liability for visitors to the premises under the Premises Liability Act, codified at CRS § 13-21-115. This Act provides the "exclusive remedy against a landowner for physical injuries sustained on the landlord's

property."[32] Contrary to what a tenant might think, a "landowner" is defined as

> an authorized agent or a person in possession of real property and a person legally responsible for the condition of real property or for the activities conducted or circumstances existing on real property.[33]

Under § 115, a landlord who has transferred control of the premises to a tenant is no longer a "person in possession" of the real property and is not liable for injuries resulting from a danger on the premises unless the landlord had actual knowledge of the danger before the transfer.[34] The point critical in this analysis under *Wilson* is whether the "tenant is entitled to the possession of the leased premises to the exclusion of the landlord."[35] However, it is important to note the holding in *Maes v. Lakeview Associates, Ltd.*, in which tenants have been determined to be invitees under Colorado law for purposes of the Act.[36]

Plaintiffs may no longer bring standard negligence claims against a landowner to recover damages caused on the premises. The Act limits the liability of a landowner to statutorily defined circumstances, in cases brought

> by a person who alleges injury occurring while on the real property of another and by reason of the condition of such property, or activities conducted or circumstances existing on such property.[37]

In contrast, social guests of tenants are licensees with respect to the landlord, with certain few exceptions.[38] Invitees may recover under the Act only "for damages caused by the landowner's unreasonable failure to exercise reasonable care to protect against dangers of which he actually knew or should have known."[39] "Licensees" can recover under the Act

> only for damages caused by the landowner's unreasonable failure to exercise reasonable care with respect to dangers created by the landowner of which the landowner actually knew; or by the landowner's unreasonable failure to warn of dangers not created by the landowner which are not ordinarily present on property of the type involved and of which the landowner actually knew.[40]

Practitioners should always consider these situations on a case-by-case basis to determine liability.

Warranty of Habitability

The Warranty of Habitability became law in Colorado in 2008 and can be found at CRS §§ 38-12-501 to -511. This law has played a very important role in natural disaster situations, such as those experienced by Colorado residents in the last few years. It is simultaneously the source of great confusion among even experienced practitioners. Practitioners who feel that the Warranty may apply to their tenant client's situation must familiarize themselves with the specific notice requirements under the statute.

The Warranty of Habitability provides: "In every rental agreement, the landlord is deemed to warrant that the residential premises is fit for human habitation."[41] Per statute, a residence is deemed "uninhabitable" if it "substantially lacks any of the following characteristics":

1) waterproofing and weather protection of roof and exterior walls maintained in good working order, including unbroken windows and doors;
2) plumbing and gas facilities that conformed to applicable law in effect at the time of installation and that are maintained in good working order;
3) running water and reasonable amounts of hot water at all times furnished to appropriate fixtures and connected to a sewage disposal system approved under applicable law;
4) functioning heating facilities that conformed to applicable law at the time of installation and that are maintained in good working order;
5) electrical lighting, with wiring and electrical equipment that conformed to applicable law at the time of installation, maintained in good working order;
6) common areas and areas under the control of the landlord that are kept reasonably clean, sanitary, and free from all accumulations of debris, filth, rubbish, and garbage and that have appropriate extermination in response to the infestation of rodents or vermin;
7) appropriate extermination in response to the infestation of rodents or vermin throughout the premises;
8) an adequate number of appropriate exterior receptacles for garbage and rubbish in good repair;
9) floors, stairways, and railings maintained in good repair;
10) locks on all exterior doors and locks or security devices on windows designed to be opened that are maintained in good working order; or
11) compliance with all applicable building, housing, and health codes, which, if violated, would constitute a condition that is dangerous or hazardous to the tenant's life, health, or safety.[42]

It is important to note the separate discussion in the statute of "common areas," which will not "render residential premises uninhabitable . . . unless it materially and substantially limits the tenant's use of his or her dwelling unit."[43] It is also very important for landlords in disaster situations to note that unless a landlord has opted the dwelling out of the Warranty of Habitability (only available in certain circumstances, and discussed further in CRS § 38-12-506), "prior to being leased to a tenant, a residential premises must comply with the requirements set forth in C.R.S. § 38-12-503(1), (2)(a) and (2)(b)" (discussed below).[44] In other words, the landlord must bring the property into compliance before the property can be rented again.

Tenant Obligations

The tenant has certain statutory obligations with respect to the Warranty of Habitability, in addition to those imposed by the lease agreement.[45] These include a duty to "use that portion of the premises within the tenant's control in a reasonably clean and safe manner." A tenant has failed in this duty if he or she "substantially fails to":

1) comply with obligations imposed on tenants by applicable provisions of building, health, and housing codes materially affecting health and safety;
2) keep the premises reasonably clean, safe, and sanitary as permitted by the conditions of the unit;
3) dispose of ashes, garbage, rubbish, and other waste from the premises in a clean, safe, sanitary, and legally compliant manner;
4) use in a reasonable manner all electrical, plumbing, sanitary, heating, ventilating, air-conditioning, elevators, and other facilities and appliances in the dwelling unit;
5) conduct himself or herself, and require other persons in the residential premises within the tenant's control to conduct themselves, in a manner that does not disturb the neighbors' peaceful enjoyment of the neighbors' dwelling unit; or
6) promptly notify the landlord if the residential premises is uninhabitable as defined in CRS § 38-12-505 or if there is a condition that could result in the premises becoming uninhabitable if not remedied.[46]

Additionally,

> a tenant shall not knowingly, intentionally, deliberately, or negligently destroy, deface, damage, impair, or remove any part of the residential premises or knowingly permit any person within his or her control to do so.[47]

However, landlords are cautioned that the expressly stated tenants' obligations do not modify the landlord's obligations under the Warranty of Habitability.[48]

Tenant Remedies

A landlord breaches the Warranty of Habitability if three conditions are met: (1) a residential premises is uninhabitable as defined in CRS § 38-12-505 or is otherwise unfit for human habitation; (2) the residential premises is in a condition that is materially dangerous or hazardous to the tenant's life, health, or safety; and (3) the landlord has received written notice of the condition making the premises uninhabitable and dangerous and has failed to cure the problem within a reasonable time.[49]

Prohibited conditions described above caused by "the tenant, a member of the tenant's household, a guest or invitee of the tenant, or a person under the tenant's direction or control" are not covered by the Warranty of Habitability.[50] If there is a breach of the Warranty of Habitability, there are very specific timelines and notifications that need to be complied with for a tenant to have the best chance at effectively terminating the lease agreement.

First, the tenant must provide

> no less than ten and no more than thirty days written notice to the landlord specifying the condition alleged to breach the warranty of habitability and giving the landlord five business days from the receipt of the written notice to remedy the breach.[51]

Note that there are two parts to this demonstration by the tenant: (1) the tenant gave proper written notice; and (2) the landlord failed to remedy the issue.[52] If a landlord fails to remedy the issue, "a tenant may terminate the rental agreement by surrendering possession of the dwelling unit."[53]

However,

> if the breach is remediable by repairs, the payment of damages, or otherwise, and the landlord adequately remedies the breach within five business days of receipt of the notice, the rental agreement shall not terminate by reason of the breach.[54]

It is extremely important to note this distinction. Tenants cannot simply send written notice to the landlord stating that there is a habitability issue and walk away from the lease agreement without consequences.

These notice periods are intended to provide the landlord a chance to remedy the situation, and are not a "get out of your lease free" card for the tenant. Indeed, even after sending the proper written notice and properly terminating the lease agreement due

to failure to remedy the habitability issue, the tenant is still exposed to a suit for unpaid rent.[55]

In action for nonpayment of rent, a tenant may assert defense to possession based on landlord's alleged breach of the Warranty of Habitability. In this instance, the tenant must be prepared to pay into the registry of the court "all or part of the rent accrued after due consideration of expenses already incurred by the tenant based on landlord's breach of the warranty of habitability."[56] A tenant may recover damages directly arising from breach of Warranty of Habitability, including but not limited to any reduction in the fair rental value of the unit.[57]

Landlord Options and Defenses

The first time a landlord will likely become aware of a possible habitability issue is on receipt of the initial notice of uninhabitable condition. When this happens, the landlord need not fear loss of a tenant and may, in his or her discretion, "move a tenant to a comparable unit after paying the reasonable costs, actually incurred, incident to the move."[58] The landlord may terminate the rental agreement at this time and avoid all further liability by either landlord or tenant,[59] which may be a serious consideration in cases of natural disaster or catastrophe.

A landlord who wishes to contest the alleged condition has certain defenses to allegations of breach of the Warranty of Habitability, which may include the following:

1) the tenant's actions or inactions prevent landlord from "curing the condition underlying the breach of warranty of habitability";[60]
2) only authorized parties may assert a claim;[61]
3) a requirement that tenants notify local government of a hazardous material issue;"[62] or
4) improper assertion of breach based on nonmonetary default under the lease agreement or "for an action for possession based upon a notice to quit or vacate."[63]

Prohibition on Retaliation—Unlawful Removal/Exclusion

A landlord is not allowed to retaliate, increase rent, discontinue services, or threaten to or bring an action for possession in response to a good faith complaint of breach of the Warranty of Habitability from the tenant or a governmental agency.[64] Oddly, however, the statute appears to read that a landlord is not liable for retaliation under this section "unless a tenant proves that a landlord breached the warranty of habitability."[65]

Additionally, there is a rebuttable presumption in favor of the landlord under this section for an action for possession of premises and increases in rent.[66] Practitioners are encouraged to carefully read this section if faced with a client who seeks to take action that could be interpreted as retaliatory, and should counsel clients to resist taking this course of action to preserve an underlying eviction action.

Landlords are also cautioned that with certain statutorily authorized exceptions, it is illegal for landlords to remove or exclude a tenant from a dwelling unit without resorting to court process.[67] This "removal" includes: "willful termination of utilities, or willful removal of doors, windows or locks," other than required for maintenance or repair.[68]

Exceptions include:[69] (1) the cleanup of an illegal drug lab; or (2) when the dwelling has been abandoned by the tenant, as evidenced by a return of keys, substantial removal of tenant's personal property, notice from the tenant, or an extended absence without the payment of rent. Any of these exceptions

would cause a reasonable person to believe the tenant had permanently surrendered possession" of the unit. If a landlord violates this section, including willfully and unlawfully causing the cessation of heat, running water, hot water, electricity, gas, or "other essential services," the tenant may seek "any remedy available under the law, including this part 5."[70]

Exceptions to Application

The Warranty of Habitability does not apply to all residential tenant arrangements. See CRS § 38-12-511 for a complete list of exceptions.

Unlawful Detainer

"Unlawful detainer" is defined in CRS § 13-40-104, with the most common scenarios involving holdover tenants,[71] non-paying tenants,[72] tenants who have engaged in a substantial violation,[73] and post-foreclosure homeowners/occupants (with certain exceptions; see the Protecting Tenants at Foreclosure Act (PTFA) discussion below).[74] Here again it is important to note the special statutory protections allowed in domestic violence situations, as detailed in CRS § 13-40-104(4).

When faced with a post-foreclosure situation, practitioners should take the time to analyze whether the PTFA may apply. Although the PTFA is set to expire on December 31, 2014, it is a very relevant consideration in the world of landlord/tenant law, and

may give a tenant client peace of mind in an otherwise frustrating and desperate situation.

Protecting Tenants at Foreclosure Act

Briefly, the PTFA protects "bona fide tenants" with "bona fide leases," by requiring successors-in-interest to foreclosed properties to permit tenants to remain in the property through the term of their lease, unless the property is to be sold to a purchaser who intends to occupy the residence as his or her primary residence. In this case, tenants must be given ninety days' notice to vacate. Tenants who do not have a lease agreement or are month-to-month are entitled to ninety days' notice from the successor-in-interest to vacate.[75]

A *bona fide* tenant with a *bona fide* lease is one in which: (1) the tenant is not the mortgagor, or child, spouse, or parent of the mortgagor; (2) the lease is the result of an arms-length transaction; (3) the lease or tenancy requires receipt of substantially fair market rent (or government subsidy); and (4) the lease was entered into before the date

> complete title to a property has been transferred to a successor entity or person as a result of an order of a court or pursuant to the provisions in a mortgage, deed of trust, or security deed.[76]

In Colorado, this is the date the "post-sale period" expires, or the close of business on the eighth business day following the foreclosure sale.

If contacted by a client who is faced with an eviction notice post-foreclosure, practitioners should check to see whether the PTFA applies. The client may have rights to stay in the property for the duration of the existing lease.

Terminating the Lease Agreement

There seems to be confusion among even seasoned practitioners regarding use of the "Notice to Quit," the "Demand for Compliance," and the "Demand for Possession," all of which can effectively terminate a tenancy. Often, attorneys and *pro se* individuals will use these terms interchangeably. However, each document has a specific purpose, and landlords should seek legal assistance to determine which document is necessary for their situation. Failing to serve the proper document and allow for a proper notice period can be fatal to a later eviction action.

Notice to quit. The "Notice to Quit" is used to terminate a holdover tenancy or to prevent a holdover tenancy. This document instructs the landlord to provide written notice to the tenant "not less than the respective period fixed before the end of the applicable tenancy."[77] Tenancy duration and corresponding notice periods are stated in CRS § 13-40-107(1)(a) to (e). The written requirements are set forth in CRS § 13-40-107(2).

Notice to quit—substantial violation. A special subset of the Notice to Quit is the Notice to Quit for Substantial Violation. It is statutorily implied in every lease agreement in Colorado (residential and commercial) that the tenant shall not commit a "substantial violation,"[78] which is defined at CRS § 13-40-107.5(3).

A substantial violation is as the name suggests: a violation of the lease agreement so egregious that hastened termination of the agreement is warranted, regardless of the length of time the tenant has resided in the property. Substantial violations are statutorily proscribed "violent and antisocial" conduct, such that the tenants have "demonstrated themselves unfit to coexist with neighbors and co-tenants." The statutes recognize that such persons often "resist eviction as long as possible."[79]

> In these circumstances, it becomes
> necessary to curtail the technical, legal right of occupancy of such person in order to protect the equal or greater rights of neighbors and co-tenants [and] the interests of property owners. . . .[80]

Therefore, if a substantial violation of the lease has occurred, "a tenancy may terminated at any time on the basis of a substantial violation. The termination shall be effective three days after service of a written notice to quit."[81] As a caution, the practitioner should note the distinction between a 3-Day Demand for Compliance or Possession (discussed below) and the protections afforded in domestic violence situations under this section of the statute.[82]

Demand for compliance. The Demand for Compliance or Possession (typically referred to as a "3-Day Demand") is used to provide warning to the tenant that a violation of the lease agreement or tenancy has occurred (usually nonpayment of rent), and allows the tenant an opportunity to remedy the problem. This document is often called the 3-Day Demand because this is the length of time under the statutes that a tenant is given before tenant is guilty of an unlawful detainer in situations of nonpayment and other violations of the lease agreement.[83]

Demand for possession. The "Demand for Possession" is frequently used in residential post-foreclosure situations after the "property has been duly sold under any power of sale contained in any mortgage or trust deed . . . and the title under such sale has been duly perfected. . . ."[84] It is also to be used after the "property has been duly sold under the judgment or decree of any Court," when the time for redemption has expired (when allowed by law) and the party to such judgment refuses to vacate.[85]

It can be used during the probate of an estate, when an heir or devisee refuses to vacate after property has been sold or conveyed by the personal representative with authority to sell.[86] Finally, it is to be used when a vendee withholds possession from the rightful vendor (thereby failing to comply with the agreement between vendor and vendee).[87] It is important to note when notice or demands are not required, such as in the following situations where a tenant is statutorily "already guilty" of an unlawful detainer:

1) "[w]hen entry is made, without right or title," into vacant or unoccupied lands or "tenements";[88]
2) wrongful entry on "public lands, tenements, mining claims, or other possessions" that are lawfully claimed by another (occupied land);[89] or
3) holdover tenants or tenants at sufferance (note that the previous discussion of the Notice to Quit was simply to terminate the tenancy),[90] because the holding over itself constitutes an unlawful detention.[91]

Starting the Eviction

Per statute, the Notice to Quit or applicable type of demand discussed above can be delivered to the tenant, other individual occupying the premises, or member of the tenant's family age 15 or older (note the difference between standard service requirements under CRCP 4). If no one is present at the time of service, posting is permissible, as long as the posting is in a "conspicuous place."[92]

Usually, standard unlawful detainer matters will be heard by the county court of a respective county, but county district courts have

concurrent jurisdiction.[93] (Note the jurisdictional limits for recovery of rent—the county court is restricted to entering judgment for rent, damages, or both, in the maximum amount of $15,000, "exclusive of costs and attorney fees."[94]) In certain circumstances (unlawful detainer proceedings under CRS § 13-40-104(1)(f) to (i)), if the answer alleges a monthly rental value in excess of $15,000, the county court shall suspend its proceedings and certify the same to the appropriate district court.[95]

To commence the unlawful detainer matter, the landlord must serve notice or demand, if applicable. As with other civil matters, if there is no response or cure from the tenant, practitioners will proceed to file their complaint. The complaint must be "in writing, describing the property with reasonable certainty, the grounds for recovery thereof, the name of person/persons in possession or occupancy, and a prayer for recovery of possession."[96] The complaint may also request damages, including past-due rent, as well as "present and future damages, costs, and any other relief to which plaintiff is entitled."[97] Practitioners should carefully note the specific additional requirements for eviction of a mobile home tenant in CRS § 13-40-110(2).

The plaintiff landlord is not required to have a detailed listing of all damages owed at the time the suit is commenced. The landlord may not be able to ascertain damages until he or she is able to re-enter the property. For this reason, it is wise to alert the court that a later request for specific damages will be forthcoming (for example, fifteen days after the writ is executed). If personal service cannot be had but the landlord is desperate to obtain possession, a separate civil suit may be commenced later for monetary damages.

It is also important to note that for leases that allow for acceleration of rent on default, landlords are required to mitigate damages and engage in good faith efforts to re-let the property. The damages and rent owed against the former tenant will cease on the leasing of the property to a new tenant.

A summons must accompany the unlawful detainer complaint. This summons must command the occupants to appear at a "return date" (initial court appearance) at least seven and no more than fourteen days from the date the summons is issued.[98] The summons must contain a specific statutory warning to the defendants that failure to appear may result in a judgment for possession and/or damages.[99] If the unlawful detainer action is commenced to recover possession of the property post-foreclosure or after a sale based on a judgment and no answer is filed by any occupant, the court is permitted to "forthwith" enter a judgment for possession, damages, and costs, without the need for the parties to appear.[100]

Service requirements for the unlawful detainer summons and complaints differ from standard civil process. A process server "may" attempt personal service of the summons and complaint; however, if after having made "diligent effort" to personally serve the occupants, a copy of the documents may be posted "in a conspicuous place upon the premises."[101] Personal service is required for complaints that request monetary damages.

Additionally, the plaintiff is required to mail a copy of the documents to the occupants "no later than the next business day" after the complaint is filed.[102] Mailing should be accomplished by prepaid, first-class mail.[103] Service must be made at least seven days before the return date listed in the summons.[104] If the defendant

files an answer to the unlawful detainer complaint, the court will contact the parties to schedule a possession trial. The plaintiff is entitled to trial within five days, per statute. If a delay is requested, the court may require a bond to protect the opposing party in the event the party is damaged by such delay.[105]

An unlawful detainer answer may include the following defenses:

1) there was no default of the lease agreement (for example, rent paid, no other condition violated, or cure has been timely made);[106]
2) waiver and estoppel;[107]
3) defective notice or service;[108]
4) constructive eviction;
5) breach of the covenant of quiet enjoyment;
6) breach of implied Warranty of Habitability;[109] and/or
7) failure to mitigate damages (such as taking steps to attempt to re-let the premises for the balance of the lease term).[110]

Obtaining the judgment for possession is the first step toward recovery of the premises and will be entered if the court is satisfied that the service of summons and complaint is proper and if the court finds that the occupants are guilty of an unlawful detainer.[111] Obtaining the writ of restitution is the second step necessary to recover possession of the premises, unless the occupants vacate voluntarily.

Per statute, the writ may be issued by the court once forty-eight hours have elapsed since entry of the judgment for possession.[112] Although it can be costly and somewhat time-consuming for a landlord to work with the county sheriff to formally execute a writ of restitution, it should always be encouraged to minimize liability (especially with problematic, litigious tenants).

Writs must be executed during daylight hours by a deputy sheriff of the county.[113] Officers who comply with the requirements of CRS § 13-40-122 are immune from civil liability for any damage to a tenant's personal property that is removed from the premises during execution of the writ of restitution (also known as the "lockout").[114]

For all this effort and expense, the reward for the landlord is immunization from liability for the tenant's personal property. Landlords who comply with the lawful directions of the officer executing a writ are exempt from civil and criminal liability for any act or omission related to a tenant's personal property that was removed from the premises.[115] Landlords have no duty to store items removed from the premises during a lockout, no duty to inventory the items, and no duty to determine ownership or condition of the items.[116]

If the landlord does store the items for the occupants, "such storage shall not create an express or implied bailment" and the landlord is immune from liability for any loss or damage that may occur to the property.[117] Landlords who store items may charge occupants "the reasonable costs of storing the personal property."[118] Further details on recovery of costs are found in CRS § 13-40-122(4).

Security Deposits

In a standard landlord/tenant relationship, the return of the security deposit marks the end of the tenancy. However, *pro se* landlords can find themselves in a world of legal trouble if the requirements under the security deposit statute are not met. Wrongful withholding of a tenant's security deposit will expose the landlord to significant liability.

Colorado statutes state that the landlord shall within "one month" of termination of the lease or surrender and acceptance of the leased premises, whichever occurs last, return to the tenant the full security deposit.[119] The lease may provide for a longer period of time to return the deposit, but it shall not exceed sixty days.[120] It is permissible to withhold the deposit for nonpayment of rent, abandonment of the premises, nonpayment of utility charges, repair work, or cleaning contracted for by the tenant.[121]

In this event, the landlord must send the tenant a written statement specifying why portions of the security deposit are being retained, accompanied by a check for the difference, sent to the last known address of the tenant.[122] Landlords cannot withhold funds to cover normal wear and tear.[123] Failure of the landlord to send a written statement as required by CRS § 38-12-103(1) will forfeit the landlord's rights to retain any portion of the security deposit.[124]

Willful retention of the security deposit will expose the landlord to liability for treble damages, "together with reasonable attorneys fees and court costs."[125] A tenant who feels he or she may have a case for wrongful withholding must send a seven-day pre-litigation notice to the landlord before he or she may initiate a suit to recover the security deposit.[126] The seven-day notice provision is intended to give landlords one last week to avoid treble damages.[127] Landlords who purchase property with existing tenants need to be aware of their obligations with respect to the security deposit.

On cessation of the original landlord's interest in the premises (whether by sale, death, assignment, appointment of a receiver, or otherwise), the person in possession of the security deposit, within a "reasonable time" shall:

1) transfer the funds or any remainder after a lawful deduction to the landlord's successor-in-interest and notify the tenant by mail of the transfer and provide the transferee's contact information;[128] or
2) return the funds or any remainder after a lawful deduction to the tenant.[129]

If the original landlord cannot be located, successor landlords should discuss with counsel their liability for the security deposit.

Conclusion

Landlord/tenant law in Colorado is an ever-changing, rapidly expanding arena in need of willing, compassionate, and quick-thinking practitioners. It is an area of law that is ripe for testing and challenging. With the recent onslaught of natural disasters experienced by Colorado residents, clients have been consistently contacting attorneys across the state with unique situations that have not yet been litigated, especially regarding the Warranty of Habitability. It is imperative that practitioners are knowledgeable about leasing requirements, the obligations of the parties, the Warranty of Habitability, eviction procedures, and security deposit retention to meet the growing demands of clientele in this area.

Notes

1. CRS § 38-10-108:
   Every contract for the leasing for a longer period than one year or for the sale of any lands or any interest in lands is void unless the contract or some note or memorandum thereof expressing the consideration is in writing and subscribed by the party by whom the lease or sale is to be made.

2. Section 12-2-3 "Leases to be Provided," Boulder Revised Code 1981, requires a written lease in all situations in which the rental is for thirty days or more. The lease must be signed within thirty days of commencement of the rental, and the landlord must provide each lessee a copy within seven working days after all parties have signed or within fifteen days after the date of signature by any tenant, whichever is sooner. City of Boulder, *Landlord/Tenant Handbook*, bouldercolorado.gov/child-youth-family/landlord-tenant-handbook; Grimm and Boehler, *Landlord and Tenant Guide to Colorado Leases and Evictions* 5 (5th ed., Bradford Publishing, 2012).

3. *Eppich v. Clifford*, 6 Colo. 493 (1883); *Micheli v. Taylor*, 159 P.2d 912 (Colo. 1945); Grimm and Boehler, *supra* note 2 at 5.

4. CRS § 38-12-103(1):
   A landlord shall, within one month after the termination of a lease or surrender and acceptance of the premises, whichever occurs last, return to the tenant the full security deposit deposited with the landlord by the tenant, unless the lease agreement specifies a longer period of time, but not to exceed sixty days. . . .

5. CRS §§ 38-12-101 to -104; *Ingold v. AIMCO/Bluffs, L.L.C. Apartments*, 159 P.3d 116, 122 (Colo. 2007).

6. CRS § 38-12-402:
   A landlord shall not include in a residential rental agreement or lease agreement for housing a provision authorizing the landlord to terminate the agreement or to impose a penalty on a residential tenant for calls made by the residential tenant for peace officer assistance or other emergency assistance in response to a domestic violence or domestic abuse situation. A residential tenant may not waive the residential tenant's right to call for police or other emergency assistance.

7. CRS § 38-12-503(5): "Except as set forth in this part 5, any agreement waiving or modifying the warranty of habitability shall be void as contrary to public policy."

8. CRS § 13-40-104(d).

9. CRS § 13-40-104(4)(c).

10. 42 USC §§ 3601 *et seq.*

11. CRS § 24-34-502(1)(a).

12. Section 1018 of the Residential Lead-Based Paint Hazard Reduction Act of 1992 (or Title X) directed HUD and EPA to require the disclosure of known information on lead-based paint and lead-based paint hazards before the sale or lease of most housing built before 1978. Title X applies to most private housing, public housing, federally owned housing, and housing receiving federal assistance. HUD, "The Lead Disclosure Rule," portal.hud.gov/hudportal/HUD?src=/program_offices/healthy_homes/enforcement/disclosure.

13. Grimm and Boehler, *supra* note 2 at 21.

14. HUD, *supra* note 12.

15. Grimm and Boehler, *supra* note 2 at 22.

16. *Id.* *See* CRS §§ 25-14-206 and -203(16). *See also* www.smokefreecolorado.org for additional information.

17. Grimm and Boehler, *supra* note 2 at 22.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 20.

23. *Id.*

24. *Id.* at 97; *Sinclair Refining Co. v. Shakespeare*, 175 P.2d 389 (Colo. 1946). *See also First Interstate Bank v. Tanktech, Inc.*, 864 P.2d 116 (Colo. 1993); *Blazis v. Orlinski*, 738 P.2d 62 (Colo.App. 1987); *Carder Inc. v. Cash*, 97 P.3d 174 (Colo.App. 2003).

25. Grimm and Boehler, *supra* note 2 at 142.
26. *Id.* at 20.
27. *See* CRS § 38-12-501(2)(a).
28. *See* CRS § 38-12-402(2)(a) and (b).
29. CRS § 38-12-103(1).
30. CRS § 38-12-102(1).
31. Grimm and Boehler, *supra* note 2 at 20.
32. *R.B. v. Shuttleworth*, No. 2007CV1445, 2007 WL 5377384 at *4 (Denver County District Court, Dec. 18, 2007) (citing *Vigil v. Franklin*, 103 P.3d 322, 328 (Colo. 2004)); *Sweeney v. United Artists Theater Circuit, Inc.*, 119 P.3d 538, 540 (Colo.App. 2005).
33. CRS § 13-21-115(1).
34. *Wilson v. Marchiondo*, 124 P.3d 837 (Colo.App. 2005).
35. *Wycoff v. Seventh Day Adventist Ass'n of Colorado*, 251 P.3d 1258, 1259-60 (Colo.App. 2010) (quoting *Wilson*, 124 P.3d at 840).
36. *See Lakeview Assoc. v. Maes*, 907 P.2d 580, 585 (Colo. 1995).
37. *R.B.*, No. 2007CV1445 at *4 (quoting CRS § 13-21-115(2)).
38. *See* CRS § 13-21-115(5)(b); *Wilson*, 124 P.3d at 841.
39. CRS § 13-21-115(3)(c)(I).
40. CRS § 13-21-115(3)(b)(I) and (II).
41. CRS § 38-12-503(1).
42. CRS § 38-12-505(1)(a) to (k).
43. CRS § 38-12-505(2).
44. CRS § 38-12-505(3).
45. CRS § 38-12-504(1).
46. CRS § 38-12-504(1)(a) to (f).
47. CRS § 38-12-504(2).
48. CRS § 38-12-504(3).
49. Grimm and Grimm, "Colorado Implied Warranty of Habitability for Residential Tenancies: An Overview," 38 *The Colorado Lawyer* 59 (May 2009).
50. CRS § 38-12-503(3).
51. CRS § 38-12-507.
52. Grimm and Boehler, *supra* note 2 at 38.
53. CRS § 38-12-507(1)(a).
54. *Id.*
55. CRS § 38-12-503(6)(b):
Nothing in this part 5 shall preclude the landlord from initiating an action for nonpayment of rent, breach of the rental agreement, violation of 38-12-504 (tenant's maintenance of premises) or as provided for under article 40 of title 13, CRS (the FED statutes).
56. CRS § 38-12-507(1)(c).
57. CRS § 38-12-507(1)(d).
58. CRS § 38-12-503(4).
59. CRS § 38-12-503(6)(a).
60. CRS § 38-12-508(1).
61. CRS § 38-12-508(2).
62. CRS § 38-12-508(3).
63. CRS § 38-12-508(4). *See also* CRS § 38-12-508.
64. CRS § 38-12-509(1).
65. CRS § 38-12-509(2).
66. CRS § 38-12-509(3) and (4).
67. CRS § 38-12-510.
68. *Id.*
69. *Id.*
70. *Id.*
71. CRS § 13-40-104(1)(c).
72. CRS § 13-40-104(1)(d).
73. CRS § 13-40-104(1)(d.5).
74. CRS § 13-40-104(1)(f).
75. Pub.L. No. 111-22, §§ 701-04, 123 Stat. 1632, 1660-62.
76. *Id.*; Pub. L. No. 111-203, 124 Stat. 1376, 1484.
77. CRS § 13-40-107.
78. CRS § 13-40-107.5(2).
79. CRS § 13-40-107.5(1)(a) and (c).
80. CRS § 13-40-107.5(1)(d).
81. CRS § 13-40-107.5(4).
82. CRS § 13-40-107.5(5)(c).
83. CRS § 13-40-107(d) and (e).
84. CRS § 13-40-104(1)(f).
85. CRS § 13-40-104(1)(g).
86. CRS § 13-40-104(1)(h).
87. CRS § 13-40-104(1)(i).
88. CRS § 13-40-104(1)(a).
89. CRS § 13-40-104(1)(b).
90. CRS § 13-40-104(1)(c).
91. *Dulmaine v. Reed Bldg. Co.*, 104 P. 1038 (Colo. 1909).
92. CRS § 13-40-108.
93. *See* CRS § 13-40-109.
94. CRS § 13-40-108.
95. *Id.*
96. CRS § 13-40-110(1).
97. *Id.*
98. CRS § 13-40-111(1).
99. *Id.*
100. CRS § 13-40-111(3).
101. CRS § 13-40-112(1) and (2).
102. CRS § 13-40-112(2).
103. *Id.*
104. CRS § 13-40-112(3).
105. CRS § 13-40-114.
106. Grimm and Boehler, *supra* note 2 at 141.
107. *Id.* at 142.
108. *Id.*
109. *Id.* at 145.
110. *Id.*
111. CRS § 13-40-115.
112. CRS § 13-40-122(1).
113. *Id.*
114. CRS § 13-40-122(2).
115. *Id.*
116. *Id.*
117. CRS § 13-40-122(3).
118. CRS § 13-40-122(4).
119. CRS § 38-12-103(1).
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. CRS § 38-12-103(2).
125. CRS § 38-12-103(3)(a).
126. *Id.*
127. *Mishkin v. Young*, 107 P.3d 393 (Colo. 2005).
128. CRS § 38-12-103(4)(a).
129. *Id.* ■