

The Florida Senate
PROFESSIONAL STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: Judiciary Committee

BILL: CS/SB's 2730 & 1596

INTRODUCER: Regulated Industries Committee and Senators Joyner and Constantine

SUBJECT: Residential Tenancies

DATE: April 16, 2007

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Oxamendi	Imhof	RI	Fav/Combined CS
2.	Daniell	Maclure	JU	Favorable
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

This bill permits residential rental agreements to impose an early termination fee or liquidated damages on tenants who terminate their leases before the expiration of a lease, as long as the tenant gives notice. The landlord can collect both liquidated damages and an early termination fee as long as the combined total does not exceed two-months' rent. In addition to the liquidated damages and early termination fees, the bill provides that the landlord may charge the tenant for any unpaid rent and other charges due under the rental agreement through the end of the month in which the landlord takes possession of the dwelling unit, as well as any rental concessions that the tenant has received up to the maximum of one month's rent.

This bill revises the definition of "rental agreement" and defines the term "early termination fee," and further amends the landlord's available remedies in s. 83.595, F.S.

This bill substantially amends sections 83.43 and 83.595, Florida Statutes.

II. Present Situation:

Landlord Tenant Law

The Florida Residential Landlord and Tenant Act (act), first enacted in 1973, governs the relationship between landlords and tenants in a residential lease agreement.¹ A rental agreement

¹ Part II of ch. 83, F.S. This part expressly applies to the rental of a "dwelling unit," which is defined as a structure or part of a structure rented for use as a home, residence, or sleeping place. It also includes mobile homes rented by a tenant. See s. 83.43(2), F.S.

specifies the terms and conditions of a tenant's occupation in a dwelling unit for a specific period of time.² The provisions of the act specifically address the payment of rent,³ duration of leases,⁴ security deposits,⁵ maintenance of the dwelling and premises,⁶ termination of rental agreements,⁷ liquidated damages for failure to provide notice before vacating,⁸ penalty for holding over,⁹ and a landlord's remedies for the breach of a lease.¹⁰

Failure to Provide Notice Before Vacating

A tenant may be required by a rental agreement to notify a landlord that the tenant intends to vacate the rented premises at the end of the rental agreement.¹¹ The rental agreement may require this notice to be provided up to 60 days before the end of the agreement.

A tenant who fails to give the required notice may be liable for liquidated damages specified in the rental agreement.¹² The landlord must provide a written notice to the tenant within 15 days before the start of the notification period contained in the lease, listing all fees, penalties, and other charges applicable to the tenant.

If a tenant remains in the rental unit after the termination of the rental agreement, with the landlord's permission, in a month-to-month tenancy and fails to give 15-days notice before vacating the dwelling unit, the tenant is liable to the landlord for an additional one month's rent.¹³

Landlord's Remedies on Tenant's Breach/Early Termination of Lease

Section 83.595, F.S., provides the landlord with choices of remedies for breaches of the rental agreement by the tenant. These remedies apply to the following situations:

- The tenant has breached the lease for the dwelling unit, and the landlord has obtained a writ of possession;
- The tenant has surrendered possession of the dwelling unit to the landlord; or
- The tenant has abandoned the dwelling unit.

² Section 83.43(7), F.S., provides that a "rental agreement" means "any written agreement, or oral agreement if for less duration than 1 year, providing for use and occupancy of premises."

³ Section 83.46, F.S.

⁴ *Id.*

⁵ Section 83.49, F.S.

⁶ Sections 83.51 and 83.52, F.S.

⁷ Section 83.56, F.S.

⁸ Section 83.575, F.S.

⁹ Section 83.58, F.S.

¹⁰ Section 83.595, F.S.

¹¹ Section 83.575(1), F.S.

¹² Section 83.575(2), F.S.

¹³ Section 83.575(3), F.S.

Section 83.595, F.S., appears to be the codification of the common law remedies available to a landlord for a tenant's premature termination of a lease. These remedies appear to be a landlord's exclusive remedies.¹⁴ The common law remedies were as follows:

First, the landlord may treat the lease as terminated and resume possession of the premises, thereafter using exclusively the premises as his own for his own purposes; second, he may retake possession of the premises for the account of the tenant, holding the tenant in general damages for the difference between the rental stipulated to be paid and what in good faith the landlord is able to recover from a reletting; or third, he may stand by and do nothing and sue the lessee as each installment of rent matures or for the whole when it becomes due.¹⁵

Similarly, s. 83.595, F.S., provides, in part, that a landlord may:

- (a) Treat the lease as terminated and retake possession for his or her own account, thereby terminating any further liability of the tenant; or
 - (b) Retake possession of the dwelling unit for the account of the tenant, holding the tenant liable for the difference between rental stipulated to be paid under the lease agreement and what, in good faith, the landlord is able to recover from a reletting; or
 - (c) Stand by and do nothing, holding the lessee liable for the rent as it comes due.
- (2) If the landlord retakes possession of the dwelling unit for the account of the tenant, the landlord has a duty to exercise good faith in attempting to relet the premises, and any rentals received by the landlord as a result of the reletting shall be deducted from the balance of rent due from the tenant.

As such, a landlord's remedy for a tenant's breach under the common law and s. 83.595, F.S., appears to be limited to actual damages. Accordingly, a tenant who prematurely terminates a lease must be given credit for rents received by a landlord after the property is relet.¹⁶ A judgment for future rent due under a lease must include a provision for an accounting of rents received for reletting through the end of the lease term.¹⁷

In *Yates v. Equity Residential Properties Trust*, case number 502002CA0141, a trial court found that s. 83.595, F.S., provides a landlord's only remedies.¹⁸ The facts in *Yates* involved rental agreements that imposed early termination fees, fees for failing to notify of lease termination,¹⁹ lease fulfillment fees, and concession payback charges. In effect, these fees were liquidated

¹⁴ See *Olen Residential Realty Corp. v. Romine*, 2004 WL 3322327, *5 (Fla. Cir. Ct. 2004) (citing *Hudson Pest Control, Inc. v. Westford Asset Mgmt., Inc.*, 622 So. 2d 546 (Fla. 5th DCA 1993)).

¹⁵ *Geiger Mutual Agency, Inc. v. Wright*, 233 So. 2d 444, 447 (Fla. 4th DCA 1970) (citing *Williams v. Aeroland Oil Co.*, 20 So. 2d 346 (Fla. 1944)).

¹⁶ *Quintero-Chadid Corp. v. Gersten*, 582 So. 2d 685, 689 (Fla. 3d DCA 1991).

¹⁷ *Id.*

¹⁸ *Yates v. Equity Residential Properties Trust*, case no. 502002CA0141, at 6 (Fla. 15th Cir. Ct. Dec. 1, 2004), http://www.equityclassaction.org/order_merits.html (last visited April 13, 2007).

¹⁹ Some of the fees imposed for failure to give advance notice of lease termination were imposed before they were expressly authorized by statute.

damages for early termination of a lease. The fees often amounted to several months' rent. The apartments, however, were typically relet in less than a month. Further, the landlord did not give terminating tenants credit for rents collected from new tenants. The court found that the landlord's practices amounted to the collection of double rent in violation of s. 83.595, F.S.

In *Olen Residential Realty Corp. v. Romine*, the court determined whether liquidated damages in a lease agreement are an unenforceable penalty.²⁰ In that case, a lease agreement gave the landlord an option to choose liquidated damages or to sue for actual damages caused by a tenant's termination of a lease. The landlord sought to enforce the collection of liquidated damages equal to about five-months' rents. The court stated that:

A "liquidated damage" clause must fail if an option is granted to the landlord to either choose liquidated damages or to sue for actual damages because it indicates an intent to penalize the defaulting tenant and negates the intent to liquidate damages in the event of a breach. Thus, the tenant would always be at risk for damages greater than the liquidated sum. On the other hand, if the actual damages are less than the liquidated sum, the tenant would nevertheless be obligated by the "liquidated damages" clause because the landlord would opt to take the liquidated sum as it would represent the greater element of damage. As neither party intends the stipulated sum to be the agreed-upon measure of damages, the provision cannot be a valid liquidated damages clause.²¹

The *Olen* court also cited authority that liquidated damages cannot be an arbitrary sum and that liquidated damages in a contract must reasonably estimate a loss.²² The court concluded that the contract attempted to impose an unenforceable penalty. The court further concluded that the remedies in s. 83.595, F.S., are a landlord's exclusive remedies.

Liquidated Damages

Liquidated damages are damages specified in a contract to be paid in the event of a breach.²³ Accordingly, an early termination fee specified in a rental agreement functions as liquidated damages. The test as to when a liquidated damages provision will be upheld and not stricken as a penalty clause is as follows:

First, the damages consequent upon a breach must not be readily ascertainable. Second, the sum stipulated to be forfeited must not be so grossly disproportionate to any damages that might reasonably be expected to follow

²⁰ *Olen Residential Realty Corp. v. Romine*, 2004 WL 3322327 (Fla. 15th Cir. Ct. May 27, 2004).

²¹ *Id.* at *2.

²² *Id.* at *1 and *2.

²³ *Lefemine v. Baron*, 573 So. 2d 326, 328 (Fla. 1991). Specifically, liquidated damages are "an amount contractually stipulated as a reasonable estimation of actual damages to be recovered by one party if the other party breaches. • If the parties to a contract have properly agreed on liquidated damages, the sum fixed is the measure of damages for a breach, whether it exceeds or falls short of the actual damages." BLACK'S LAW DICTIONARY (8th ed. 2004).

from a breach as to show that the parties could have intended only to induce full performance, rather than to liquidate their damages.²⁴

Additionally, a court's interpretation of a liquidated damages clause may be affected by an inequity in bargaining power between the parties to a contract.²⁵

III. Effect of Proposed Changes:

This bill amends s. 83.43, F.S., to revise the definition of "rental agreement" to provide that the term means any written agreement, including amendments or addenda made to the agreement.

The bill further amends this section to provide a definition of the term "early termination fee" to mean "any charge, fee, or forfeiture that is provided for in a written rental agreement and is assessed to a tenant when a tenant vacates a dwelling unit before the end of the rental agreement." It provides that the term does not include unpaid rent through the end of the month in which the tenant occupied the dwelling unit and charges for damages to the dwelling unit.

This bill amends s. 83.595, F.S., to provide an additional remedy that a landlord may elect should a tenant breach a rental agreement. This remedy permits residential rental agreements to impose an early termination fee, upon the tenant's giving notice, on tenants who terminate their leases before the expiration of a lease. Under this provision, the landlord is entitled to both an early termination fee and liquidated damages provided the combined total does not exceed an amount equal to two-months' rent. Fees and damages collected under this provision are in addition to unpaid rental payments and other charges due under the rental agreement through the end of the month in which the landlord retakes possession of the dwelling unit, and any rent concessions that the tenant has received up to the maximum one month's rent. The term "rent concessions" is defined as "any amount contained in the rental agreement by which all or a portion of the base rent is reduced in consideration for the tenant's entering into the rental agreement." This new remedy is only available if the tenant indicates acceptance at the time the rental agreement was made by signing or initialing next to the provision in the agreement. This remedy is not available if the breach is a failure to give notice as provided in s. 83.575, F.S., discussed under the "Failure to Provide Notice Before Vacating" heading in the "Present Situation" section of this analysis.

The early termination fees authorized in this bill function as liquidated damages. These fees/liquidated damages allow a landlord's remedies for a tenant's early termination to possibly exceed the landlord's actual damages. As such, under existing case law, the early termination fees may be unenforceable penalties.

²⁴ *Lefemine*, 573 So. 2d at 328.

²⁵ See *Jenkins v. Eckerd Corp.*, 913 So. 2d 43, 52 (Fla. 1st DCA 2005). The *Jenkins* court cited Samuel Issacharoff, *Contracting for Employment: The Limited Return of the Common Law*, 74 TEX. L. REV. 1783, 1788 (1996), which states:

[C]haracteristic indicators of impediments to full and equal bargaining [are]: significant disparities in bargaining power between offeror and offeree; contracts of adhesion drafted by the offeror; asymmetries in the ability to breach the contractual guarantee of security; and the inability to seek a market remedy in the event of a breach.

This bill further amends s. 83.595, F.S., to provide that if the landlord retakes possession after a breach of the rental agreement, the landlord has the duty to exercise good faith in attempting to relet the premises. It requires that the landlord deduct from the balance due from the tenant any rent received by the landlord as a result of the reletting. For the purposes of this section, the bill defines “good faith in attempting to relet the premises” to mean “that the landlord uses at least the same efforts to relet the premises as were used in the initial rental or at least the same efforts as the landlord uses in attempting to rent other similar rental units.” It also provides that it “does not require the landlord to give a preference in renting the premises over other vacant dwelling units that the landlord owns or has the responsibility to rent.” This definition is retained from the current s. 83.595(2), F.S., which the bill deletes.

Although the bill provides for the deducting of rent received by the landlord from reletting from the amount owed by the tenant as a liquidated damage or early termination fee, s. 83.595, F.S., provides that the liquidated damages or early termination fees are due upon the tenant giving notice of his or her early termination. If the dwelling unit has not been relet at the time the tenant gives the notice, the tenant would be required to remit the full amount of the liquidated damages and/or early termination fees. The timing of the tenant’s notice and the landlord’s good faith duty to relet the dwelling unit may not afford the tenant with an opportunity to avoid the payment of the liquidated damages or early termination fees. The bill does not require that the landlord refund to the tenant any portion of liquidated damages or early termination fees that he or she has already paid if the landlord relets the dwelling unit after these payments are made.

This bill also amends s. 83.595, F.S., to change the term “lease” to “rental agreement,” and to correct a scrivener’s error by replacing the term “rental” with the term “the rent.”

This bill takes effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Tenants who breach a rental agreement by vacating a dwelling unit before the end of the rental agreement may be required to pay liquidated damages and/or early termination fees in an amount not to exceed two-months' rent.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Summary of Amendments:

None.

This Senate Professional Staff Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
