

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Regulated Industries Committee

BILL: SB 2716

INTRODUCER: Senator Aronberg

SUBJECT: Residential Tenancies

DATE: April 8, 2008

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Oxamendi</u>	<u>Imhof</u>	<u>RI</u>	Favorable
2.	_____	_____	<u>JU</u>	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

The bill revises the definition of “rental agreement” and defines the term “early termination fee.”

The bill amends the landlord’s available remedies in s. 83.595, F.S., to permit landlords to recover liquidated damages or early termination fees if they are provided for in the rental agreement. The liquidated damages and early termination fees are charged when the tenant gives notice of the early termination. The bill provides that this remedy is available only, if at the time the rental agreement was made, the tenant indicated his or her acceptance of liquidated damages or early termination fees by placing his or her signature or initials next to the provision in the rental agreement. If acceptance is not indicated, the liquidated damages and early termination fee remedies may not be imposed. It renumbers the current requirement to use good faith efforts to relet the premises.

The bill provides that the landlord is entitled to both the liquidated damages and early termination fee if the total charge does not exceed an amount equal to two-month’s 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.

The bill takes effect upon becoming a law.

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

II. Present Situation:

Part II of chapter 83, F.S., entitled “Florida Residential Landlord and Tenant Act” (act), governs the relationship between landlords and tenants in a residential lease agreement.¹ The provisions of the act specifically address the payment of rent,² duration of leases,³ security deposits,⁴ maintenance of the dwelling and premises,⁵ and termination of rental agreements.⁶

Section 83.43(2), F.S., defines the term “dwelling unit” to mean:

- (a) A structure or part of a structure that is rented for use as a home, residence, or sleeping place by one person or by two or more persons who maintain a common household.
- (b) A mobile home rented by a tenant.
- (c) A structure or part of a structure that is furnished, with or without rent, as an incident of employment for use as a home, residence, or sleeping place by one or more persons.

Section 83.43(7), F.S., defines the term “Rental agreement” to mean “any written agreement, or oral agreement if for less duration than 1 year, providing for use and occupancy of premises.”

Termination of Tenancy with Specific Duration

Section 83.575(1), F.S., provides that a rental agreement with a specific duration may contain a provision requiring the tenant to notify the landlord before vacating the premises at the end of the agreement. The rental agreement may not require more than 60 days notice before vacating the premises.

Section 83.575(2), F.S., provides that the rental agreement with a specific duration may provide that the tenant may be liable for liquidated damages if the tenant fails to give the required notice before vacating the premises at the end of the rental agreement. The liquidated damages are determined as specified in the rental agreement. Landlords may collect liquidated damages from a tenant if the tenant fails to give notice before vacating the premises when notice is required by the rental agreement. The landlord must provide a written notice to the tenant within 15 days before the start of the notification period contained in the lease. The written notice must list all fees, penalties, and other charges applicable to the tenant.

Section 83.575(3), F.S., provides that, if the 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.

¹ This part 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, F.S.

² *See* s. 83.46, F.S.

³ *Id.*

⁴ *See* s. 83.49, F.S.

⁵ *See* ss. 83.51 and 83.52, F.S.

⁶ *See* s. 83.56, F.S.

Landlord's Remedies

Section 83.595, F.S., provides the landlord with choices of remedies for breaches of the rental agreement by the tenant. The remedies in s. 83.595, F.S., 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.

Section 83.595(1), F.S., permits the landlord to:

- (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.

Section 83.595(2), F.S., provides that, 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. The landlord is required to deduct from the balance of rent due from the tenant any rent received by the landlord as a result of reletting the dwelling unit. The term “good faith in attempting to relet the premises” is defined to mean:

that the landlord shall use 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 lease other similar rental units but does not require the landlord to give a preference in leasing the premises over other vacant dwelling units that the landlord owns or has the responsibility to rent.

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.⁷ 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.⁸

⁷ See *Hudson Pest Control, Inc., v. Westford Asset Mgmt., Inc.*, 622 So. 2d 546 (Fla. 5th DCA 1993).

⁸ *Geiger Mutual Agency, Inc., v. Wright*, 233 So. 2d 444, 447 (Fla. 4th DCA 1970) (quoting *Williams v. Aeroland Oil Co.*, 20 So. 2d 346 (Fla. 1944)).

A landlord's remedy for a tenant's breach under the common law and s. 83.595, F.S., appear 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.⁹ 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.¹⁰

In *Yates v. Equity Residential Properties Trust*, a trial court found that s. 83.595, F.S., provides a landlord's only remedies.¹¹ The facts in *Yates* involved rental agreements that imposed early termination fees, fees for failing to notify of lease termination,¹² lease fulfillment fees, and concession payback charges. In effect, these fees were liquidated 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.¹³ 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-month's 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.¹⁴

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. 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.

⁹ *Quintero-Chadid Corp., v. Gersten*, 582 So. 2d 685, 689 (Fla. 3d DCA 1991).

¹⁰ *Id.*

¹¹ *Yates v. Equity Residential Properties Trust*, Finding of Fact and Conclusions of Law at 6 (Fla. 15th Cir. Ct. Dec. 1, 2004).

¹² Some of the fees imposed for failure to give advance notice of lease termination were imposed before they were expressly authorized by statute.

¹³ *Olen Residential Realty Corp. v. Romine*, 2004 WL 3322327 (Fla. 15th Cir. Ct. May 27, 2004).

¹⁴ *Id.* at n. 2.

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.¹⁵

Prohibited Practices

Section 83.45, F.S., prohibits the enforcement of unconscionable rental agreement or provisions, but does not define the term "unconscionable."

Section 83.67, F.S., prohibits certain acts by a landlord in a residential lease. Specifically, the following acts are prohibited:

- Terminating or interrupting any utility service furnished to the tenant;
- Denying a tenant reasonable access to the dwelling, e.g., changing the locks;
- Discriminating against a servicemember¹⁶ in offering the dwelling for rent or in any of the terms in the rental agreement; and
- Removing outside doors, locks, roof, walls, windows, or removing the tenants' personal property unless taken pursuant to surrender, abandonment or a lawful eviction.

A landlord who violates any of these provisions is liable for actual and consequential damages or three months' rent, whichever is greater. The landlord is also liable for costs and attorney's fees.¹⁷

III. Effect of Proposed Changes:

Definitions

The 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 provides a definition for 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 charges for services actually rendered to the tenant, unpaid rent through the end of the month in which the tenant occupied the dwelling unit, and charges for damages to the dwelling unit.

¹⁵ See *Jenkins v. Eckerd Corp.*, 913 So.2d 43, 52 (Fla. 1st DCA 2005). The *Jenkins* court quoted 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

¹⁶ As enacted by s. 4, ch. 2003-72, L.O.F. The enactment of subsection (3) by s. 2, ch. 2003-30, L.O.F. used "member of the United States Armed Forces" instead of "servicemember."

¹⁷ See s. 83.67(5), F.S.

Landlord Remedies

The bill amends the landlord's available remedies in s. 83.595, F.S., to provide that if the landlord retakes possession after the early termination of the rental agreement, the landlord has the duty to exercise good faith¹⁸ 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 effort 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 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.

The bill also permits landlords to recover liquidated damages or early termination fees if they are provided for in the rental agreement. The liquidated damages and early termination fees are charged when the tenant gives notice of the early termination. The bill provides that this remedy is available only, if at the time the rental agreement was made, the tenant indicated his or her acceptance of liquidated damages or early termination fees by placing his or her signature or initials next to the provision in the rental agreement. If acceptance is not indicated, the liquidated damages and early termination fee remedies may not be imposed.

The bill provides that the landlord is entitled to both the liquidated damages and early termination fee if the total charge does not exceed an amount equal to two-month's rent.

In addition to the liquidated damages and early termination fees, s. 83.595(2), F.S., 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.

The bill defines "rental concessions" to mean "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." For example, if the landlord gave the tenant one free month's rent to induce the tenant to enter into the rental agreement, the landlord could collect the rent for the free month.

The 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."

Effective Date

The bill takes effect upon becoming a law.

¹⁸ Section 83.43(8), F.S., defines "good faith" to mean "honesty in fact in the conduct or transaction concerned."

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Tenants who breach a rental agreement by terminating a rental agreement early may be required to pay liquidated damages and/or early termination fees in an amount not to exceed two-month's rent.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The provisions of this bill are substantively similar to the provisions in CS/HB 1277 by the Safety and Security Council, Rep. Patterson, and others (CS/SB's 2730 & 1596 by the Regulated Industries Committee and Senators Joyner and Constantine) which passed both houses during the 2007 Regular Session, but was vetoed by the Governor.

The Governor expressed the concern that the "bill would harm the 4.5 million Floridians who live in rental properties." The veto message noted that the bill would allow landlords to charge an early termination fee or liquidated damages up to two month's rent if a tenant must end a lease early. The veto message stated that "these charges are in addition to any unpaid rent, rental concessions received by the tenant, or other charges due under the rental agreement up to another month's rent."

The Governor's veto message stated that the bill's impact on those Floridian's least able to afford to pay such fees would be too great. The veto message noted that, "with escalating insurance and ad valorem tax costs that are passed on to renters, Florida is experiencing a lack of affordable housing for those workers critical to maintaining the state's robust economy." The Governor's veto message further stated that the bill would add to the housing burden for these Floridians.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

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