

## **HB 1489: FAA's Early Lease Termination Bill Enacted Into Law June 10**

### **Background**

For over 20 years, many lease agreements had clauses which imposed a penalty in the form of a flat amount in the event the tenant skipped. This flat amount was variously known as an early termination fee, re-let fee, or liquidated damages charge. The purpose of these charges was to help compensate the landlord for damages, including the additional turnover costs.

A Circuit Court's decision in the *Yates vs. Equity* case in Palm Beach County brought these charges into question. The Circuit Court held that, when a tenant broke the lease, only the specific remedies provided in Florida Statutes 83.595 could be used by the landlord against the tenant. These remedies included holding the tenant responsible for rent until the unit was re-rented, but did not include charging a flat amount. The court's decision was based upon the market conditions at that time. Vacancy was extremely low and units were rented as fast as they became available. The court failed to take into account the non-rent damages incurred by the landlord. The court felt that, if the unit was re-rented quickly, the liquidated damages or termination fee was a "double rent" windfall. We know this is not true, but when a court has spoken, we must abide by the decision.

Since the *Equity* decision and the many lawsuits that followed, landlords have stopped charging a flat amount. Landlords simply hold the tenant liable for rent until the unit is re-rented. The unit may be re-rented quickly and the tenant is responsible for only a small amount of lost rent. The unit could stay vacant for a long period and the tenant is responsible for a significant amount of lost rent.

### **The Florida Apartment Association Jumps Into Action**

In response to the needs and wishes of its members, in 2005, the Florida Apartment Association began advocating for a change in the Landlord/Tenant act which would approve this common industry practice. The change would allow the landlord and the tenant to agree to a flat amount in the form of "liquidated damages" or a "termination fee". This flat amount could be charged to the tenant if he skipped ("liquidated damages") or if he honored the lease, gave the required notice and paid a fee ("termination fee"). The goal was two-fold. First, to permit the tenant the early termination of his lease if he gave the required notice and paid the required termination fee. Second, to permit the landlord to recover, as liquidated damages, some of the many costs incurred if the tenant skips, even if the landlord was able to quickly re-rent the unit. Even if a unit was quickly re-rented in a very strong market, the non-rent expenses such as marketing, apartment prep, and administration were still being incurred by the landlord.

In 2007, the Florida legislature passed a bill which would have accomplished the apartment industry's goals, but the bill was vetoed by Governor Crist. The FAA persevered and reintroduced the bill in 2008. By necessity, the bill underwent some changes and compromises in order to gain the support of the Governor's office. The result? House Bill 1489 was passed unanimously in both legislative chambers. Governor Crist signed the bill into law on June 10.

Now, the landlord can use a separate addendum at lease signing that will give the tenant a choice: either pay liquidated damages or a termination fee amount of up to two months' rent in

the event of a skip or tenant early termination OR pay rent until re-rent and gamble that the unit will be re-rented quickly. The tenant must make the choice. **The landlord does not have to use such an addendum.** It is an optional new remedy available to a landlord if he wishes to take advantage of the new law.

### **How does this affect leasing practices?**

If the landlord does not wish to make the liquidated damages or termination fee option available to the tenant, the landlord may simply choose not to offer this addendum to the tenant. If the tenant vacates prior to lease end, the landlord can continue to charge the tenant rent until the unit is re-rented, as the landlord did under prior law.

If the landlord wishes to charge liquidated damages or a termination fee, the landlord **MUST** use the addendum and present this to the tenant at the time of lease signing. The tenant will then have to **CHOOSE** the liquidated damages or termination fee option.

The following wording must be placed in a separate addendum and must be in substantially the following form, with the tenant signing the addendum and checking or initialing the choice that is made.

### **Sample wording:**

\_\_\_\_\_ **I agree, as provided in the rental agreement, to pay \$ \_\_\_\_\_ (an amount that does not exceed 2 months' rent) as liquidated damages or an early termination fee, if I elect to terminate the rental agreement, and the landlord waives the right to seek additional rent beyond the month in which the landlord retakes possession.**

\_\_\_\_\_ **I do not agree to liquidated damages or an early termination fee, and I acknowledge that the landlord may seek damages as provided by law.**

The optional lease addendum will soon be available for anyone using the FAA Blue Moon lease.

### **What did the law change accomplish?**

The law change allows the landlord to give the tenant an option of 1) limiting his damages if he skips (liquidated damages) or giving the required notice and paying a fee to terminate early (termination fee) OR 2) paying rent until the unit is re-rented or the end of the lease, whichever occurs first. The landlord benefits because if the tenant skips, the landlord can charge the liquidated damages. The tenant benefits because, if he gives the required notice and pays the termination fee, he can leave without breaching the lease.

**If I offer this addendum to the tenant and the tenant chooses the liquidated damages or termination fee option ...**

### **What can I charge?**

You can charge:

- a) the liquidated damages or the termination fee,
- b) any rent through the end of the month when you retake possession, and

- c) any accrued charges through the end of the month when you retake possession, for example, any utilities through the end of the month.

**Can I require notice from the tenant?**

You may require the tenant to give you up to 60 days' notice in cases where the tenant wishes to early terminate the lease and pay the early termination fee. Your lease or addendum must clearly state this notice requirement. If the tenant gives you notice but fails to remain on the premises and pay the rent through the notice period, the tenant is in breach of the lease and you can charge the tenant the liquidated damages amount.

**Can I charge a penalty for failure to give notice if the tenant leaves BEFORE THE END OF THE LEASE?**

You cannot charge a penalty for any failure to give notice if the tenant leaves before the end of the lease. Liquidated damages are the total damages that have been set for the breach of the lease. You cannot charge any other additional penalties.

**Can I charge a penalty for failure to give notice if the tenant doesn't give the required notice AT THE END OF THE LEASE?**

Failing to give the required notice at the end of the lease is covered by a separate Florida Statute (FS §83.575).

**What about damage to the property at the time the landlord retakes possession?**

The tenant will still owe these amounts regardless of the law change.

**Action Plan:**

If you wish to take advantage of the law change, you MUST place the "choice" language (see **Sample wording:** above) in an addendum and present it to the tenant upon lease signing. When explaining the choice to the tenant, you can tell the tenant about market conditions if you wish. This will better allow the tenant to make an educated decision as to whether he should choose the liquidated damages or early termination option.