

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

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Prepared By: Judiciary Committee

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BILL: SB 636

INTRODUCER: Senator Clary

SUBJECT: Residential Tenancies

DATE: March 14, 2006

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cibula	Maclure	JU	<b>Pre-meeting</b>
2.	_____	_____	_____	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

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## I. Summary:

This bill permits residential lease agreements to impose an early termination fee on tenants who terminate their leases before the expiration of a lease. The amount of the fee is equal to the lesser of two-months' rent or the remaining balance of rent due under a rental agreement. This fee is in addition to rental payments and other unspecified charges under a lease agreement until a tenant surrenders possession of the rental unit. Under existing law, a landlord's remedy for a tenant's early termination is the landlord's actual damages.

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

## II. Present Situation:

### Landlord Tenant Law

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

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<sup>1</sup> Part II of ch. 83, F.S., 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, F.S.

<sup>2</sup> Section 83.46, F.S.

<sup>3</sup> *Id.*

<sup>4</sup> Section 83.49, F.S.

<sup>5</sup> Sections 83.51 and 83.52, F.S.

<sup>6</sup> Section 83.56, F.S.

damages for failure to provide notice before vacating,<sup>7</sup> penalty for holding over,<sup>8</sup> and a landlord's remedies for the breach of a lease.<sup>9</sup>

### ***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.<sup>10</sup> 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. A month-to-month tenant may be required to pay an additional one month's rent for failing to give at least 15-days' notice of vacating the premises.

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

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.<sup>11</sup> 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.<sup>12</sup>

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.

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<sup>7</sup> Section 83.58, F.S.

<sup>8</sup> Section 83.575

<sup>9</sup> Section 83.595, F.S.

<sup>10</sup> Section 83.575, F.S.

<sup>11</sup> See *Hudson Pest Control, Inc., v. Westford Asset Mgmt., Inc.*, 622 So. 2d 546 (Fla. 5th DCA 1993).

<sup>12</sup> *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)).

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.<sup>13</sup> 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.<sup>14</sup>

In *Yates v. Equity Residential Properties Trust*, a trial court found that s. 83.595, F.S., provides a landlord's only remedies.<sup>15</sup> The facts in *Yates* involved rental agreements that imposed early termination fees, fees for failing to notify of lease termination,<sup>16</sup> 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*, a court determined whether liquidated damages in a lease agreement are an unenforceable penalty.<sup>17</sup> 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.<sup>18</sup>

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.

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<sup>13</sup> *Quintero-Chadid Corp., v. Gersten*, 582 So. 2d 685, 689 (Fla. 3d DCA 1991).

<sup>14</sup> *Id.*

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

<sup>16</sup> Some of the fees imposed for failure to give advance notice of lease termination were imposed before they were expressly authorized by statute.

<sup>17</sup> *Olen Residential Realty Corp. v. Romine*, 2004 WL 3322327 (Fla. 15th Cir. Ct. May 27, 2004).

<sup>18</sup> *Id.* at \*2.

### ***Prohibited Provisions in Rental Agreements***

The conclusion that a landlord is limited to the remedies in s. 83.595, F.S., is supported by s. 83.47(1), F.S.<sup>19</sup> That section states in part:

- A provision in a rental agreement is void and unenforceable to the extent that it:
- (a) Purports to waive or preclude the rights, remedies, or requirements set forth in this part.
  - (b) Purports to limit or preclude any liability of the landlord to the tenant or of the tenant to the landlord, arising under law.

Additionally, s. 83.47, F.S., appears to prohibit lease agreements from allowing a tenant to pay less than the damages specified in s. 83.595, F.S., for early termination of a lease.

### **Liquidated Damages**

Liquidated damages are damages specified in a contract to be paid in the event of a breach.<sup>20</sup> Accordingly, an early termination fee specified in a lease 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 from a breach as to show that the parties could have intended only to induce full performance, rather than to liquidate their damages.<sup>21</sup>

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.<sup>22</sup>

### **III. Effect of Proposed Changes:**

This bill permits residential lease agreements to impose an early termination fee on tenants who terminate their leases before the expiration of a lease. The amount of the early termination fee is equal to the lesser of two-months rents or the remaining balance of rent due under a rental agreement. This penalty is in addition to rental payments and “*any charges due under the lease agreement*” until the tenant surrenders possession of the rental unit. The bill does not clearly

<sup>19</sup> See also *Bell v. Kornblatt*, 705 So. 2d 113 (Fla. 4th DCA 1998) (noting that a lease agreement may not waive a tenant's statutory right to a 3-day notice before a landlord terminates a rental agreement for nonpayment of rent).

<sup>20</sup> *Lefemine, v. Baron*, 573 So. 2d 326, 328 (Fla. 1991).

<sup>21</sup> *Id.*

<sup>22</sup> 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 . . . .

indicate whether these charges relate to other fees based on the premature termination of a lease. Under existing law, a landlord's remedy for a tenant's early termination is the landlord's actual damages. Nothing in the bill suggests that a landlord must credit a tenant for what a landlord recovers for reletting the rental property. As such, a landlord may be able to double his or her income from a rental unit when a lease is terminated prematurely.

The early termination fees authorized in the bill function as liquidated damages. Further, these fees/liquidated damages allow a landlord's remedies for a tenant's early termination to exceed the landlord's actual damages. As such, under existing law, the early termination fees would likely be unenforceable penalties. Additionally, the bill gives a landlord the option to impose an early termination fee or collect the rents due under the lease. If a landlord's rental properties have a high occupancy rate, a landlord will likely opt to maximize his income and collect the early termination fee. If the properties have a low occupancy rate, a landlord will likely opt to collect the rents due under the lease. Under existing law, an option in a contract for liquidated damages or actual damages would not be valid.

Lastly, the provisions of the bill permit early termination fees to apply to a tenant who "*surrenders possession*" of a rental unit. By negative implication, the bill appears to prohibit the imposition of early termination fees on tenants who are evicted.

The 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. None. Economic Impact and Fiscal Note:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill authorizes landlords to collect more income from tenants who prematurely terminate their leases than from tenants who complete their leases.

C. Government Sector Impact:

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

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

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## **VIII. Summary of Amendments:**

None.

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