



## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

Safeguard individual liberty – This bill increases the ability of landlords and tenants to enter into contract terms that they agree upon.

#### B. EFFECT OF PROPOSED CHANGES:

##### Present situation

The 1973 Florida Residential Landlord and Tenant Act governs residential landlord-tenant law.<sup>1</sup> A rental agreement specifies the terms and conditions of a tenant's occupation in a dwelling unit for a specific period of time. Should a tenant breach a rental agreement by leaving prior to the end of the rental term, a landlord may choose one of three remedies provided in s. 83.595, F.S.:

- Treat the lease as terminated and retake possession for his or her own account, thereby terminating any further liability of the tenant;
- 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 renting to another tenant; or
- Stand by and do nothing, holding the tenant liable for the rent as it comes due.

A clause for liquidated damages is a means for two parties to a contract to agree in advance what the damages are for a future breach of the contract. A liquidated damages clause is incorporated into a contract because it provides the following benefits<sup>2</sup>:

- The establishment of an exact amount of recovery in the event of a breach.
- The simplification or elimination of the need to prove actual damages, thereby leading to a reduction in the costs, time, and inconvenience of litigation.
- The reinforcement of contractual obligations and added deterrence to breach.

Section 83.47(1)(a), F.S., provides that to the extent any provision in a rental agreement purports to waive or preclude the rights, remedies, and requirements set forth in the Florida Residential Landlord and Tenant Act, that provision is void and unenforceable. Section 83.47(1)(b), F.S., also makes void and unenforceable any provision that purports to limit or preclude any liability arising under law between a landlord and a tenant.

In 2004, a circuit court in Palm Beach found that the remedies set forth in s. 83.595, F.S., are exclusive because s. 83.47, F.S., prohibits rental agreement terms that conflict with specific rights in the Florida Residential Landlord and Tenant Act, including those regarding liquidated damages. This class action judgment therefore found a liquidated damages clause in a landlord's standard lease agreement to be invalid.<sup>3</sup>

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

<sup>2</sup> Luepke, Henry F., "How to Draft and Enforce a Liquidated Damages Clause." 61 J. Mo. B. 324

<sup>3</sup> Order dated December 1, 2004, in *Yates v. Equity Residential Properties Trust*, 15<sup>th</sup> Judicial Circuit in and for Palm Beach County, Florida, Case No. 502002CA014116XXOCAB. Equity's standard lease had two separate fees that, in effect, charged a tenant 3 months rent as a penalty for early termination of the lease.

## Effect of proposed changes

This bill amends s. 83.595, F.S., to provide a landlord an additional remedy that a landlord may elect should a tenant breach a rental agreement by leaving prior to the end of the rental term.

This bill creates paragraph (d) to provide that a landlord and a tenant may contract for liquidated damages. A landlord is entitled to both liquidated damages and an early termination fee if specified in the rental agreement and the total amount charged does not exceed an amount equal to two months' rent. If a landlord elects this remedy, the landlord must treat the rental agreement as terminated, and the other remedies provided for in s. 83.595(1)(a)-(c), F.S., are no longer available to the landlord. This remedy does not apply when the breach is a failure to give notice of the end of the rental agreement as provided in s. 83.575, F.S.<sup>4</sup>

This bill also creates subsection (2) to provide that, in addition to the remedies in s. 83.595(1), F.S., a landlord may charge a tenant who breaches a lease for any unpaid rent, other charges that may be due under the rental agreement, and any rental concessions that the tenant received in consideration for entering into the rental agreement. Rental concessions include any amount by which all or part of the base rent, options, services, or any other thing of value are reduced in exchange for entering into the rental agreement.

This bill also provides that the act will take effect upon becoming law and shall apply to any rental agreement containing provisions for such remedies and entered into prior to the effective date. In effect, a liquidated damages clause in a rental agreement entered into prior to or after the effective date of this bill will be valid and enforceable.

### C. SECTION DIRECTORY:

Section 1. Amends s. 83.595, F.S., to allow a landlord and a tenant to contract for liquidated damages and to provide for additional damages a landlord may collect should a tenant breach a rental agreement by early termination.

Section 2. Provides that the act will take effect upon becoming law and apply to any rental agreement providing for such remedies and entered into prior to the effective date.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

None.

#### 2. Expenditures:

None.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

#### 1. Revenues:

None.

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<sup>4</sup> Section 83.575, F.S., allows for a rental agreement provision requiring a tenant to notify a landlord before vacating the premises at the end of a rental term. The provision may not require more than 60 days' notice. A landlord must provide written notice to a tenant specifying the obligations under the notification provision as well as the termination date. If, after written notice, a tenant breaches such a provision, the tenant may be liable for liquidated damages as specified in the rental agreement.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, nor does it reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor does it reduce the percentage of state tax shared with counties or municipalities.

2. Other:

In cases involving statutes, which the Legislature clearly intended to be retroactive in application, the court must determine whether such application is constitutionally permissible.<sup>5</sup> Even if the Legislature expressly states its intent to have a statute applied retroactively, a court will not permit the retroactive application of a statute if doing so would impair vested rights, create new obligations, or impose new penalties.<sup>6</sup>

A vested right is "more than a mere expectation based on an anticipation of the continuance of an existing law; it must have become a title, legal or equitable, to the present or future enforcement of a demand . . ."<sup>7</sup> The right to pursue a cause of action once it has accrued is generally considered a vested right so a statute that subsequently takes effect may not be applied to eliminate or curtail the cause of action.<sup>8</sup> Furthermore, "it is impermissible for a statute to be applied retroactively to prevent the enforcement of a judgment that was obtained before the effective date of the statute."<sup>9</sup>

Where contract rights are involved, the invalidation of the retroactive application of civil legislation may be based on the conclusion that the legislation impairs the obligation of contract . . .<sup>10</sup> [T]here must be a lawful contract . . . in existence which is the subject of impairment.<sup>11</sup>

Article I, Section 10 of the Florida Constitution provides: "[n]o bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed."<sup>12</sup> "A statute contravenes the constitutional prohibition against impairment of contracts when it has the effect of rewriting antecedent contracts, that is, of changing the substantive rights of the parties to existing contracts."<sup>13 14</sup>

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<sup>5</sup> See *Romine v. Fla. Birth Related Neurological Injury Compensation Ass'n*, 842 So.2d 148, 153 (Fla. 5<sup>th</sup> DCA 2003).

<sup>6</sup> See *id.*

<sup>7</sup> *Id.* at 1218.

<sup>8</sup> See *id.* at 1220.

<sup>9</sup> *Id.*

<sup>10</sup> *R.A.M. of S. Fla., Inc. v. WCI Comm., Inc.*, 869 So.2d 1210, 1217 (Fla. 2d DCA 2004).

<sup>11</sup> *Id.* at 1219.

<sup>12</sup> Article 1, Section 10(1) of the U.S. Constitution provides: "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . ."

<sup>13</sup> 10a Fla. Jur. s. 414, Constitutional Law.

This bill amends s. 83.595, F.S., to allow a landlord and a tenant to contract for liquidated damages and to charge certain fees in the event a tenant breaches a rental agreement by early termination. This bill provides that the act will take effect upon becoming law and apply to any rental agreement providing for such remedies and entered into prior to the effective date.

A rental agreement is a contract between a landlord and a tenant. It is possible that courts will interpret a retroactive application of this bill as an impairment of the substantive rights of parties to an existing lawful contract. A retroactive application of this bill to contracts entered into prior to the effective date of this bill and which courts have found to have an invalid and unenforceable liquidated damages clause would, in effect, prevent the enforcement of the judgment obtained. Under current case law, preventing the enforcement of such judgments obtained prior to the effective date of a statute by retroactive application of that statute is unconstitutional.

The same analysis may apply to contracts with such clauses which were entered into prior to the effective date of this bill but which have not undergone litigation. Courts have held that legislation which impairs vested rights, creates new obligations or imposes new penalties is unconstitutional. With a retroactive application of this bill, a court may find that a tenant's vested right is impaired or that a tenant has a newly created obligation under the contract or both.

Under current law, a liquidated damages clause is invalid and unenforceable. Therefore, if a rental agreement provides for liquidated damages, the right to pursue a cause of action against the validity of the provision may be considered a vested right. Applying this bill retroactively would eliminate this cause of action, thereby impairing a vested right, since a liquidated damages clause would, in effect, become valid and enforceable. It may also be seen as creating a new obligation in that it will require the tenant to pay liquidated damages in the event of a breach by early termination.

On the other hand, courts may find that a tenant has no such vested rights in contracts containing a liquidated damages clause or that there are no newly created obligations. A landlord and a tenant are free to agree to the terms of a rental agreement which is a private contract between two or more parties. If liquidated damages were agreed to in a rental agreement entered into prior to the effective date of this bill, the intent to apply this bill retroactively may be seen as being within the bounds of legislative authority.

**B. RULE-MAKING AUTHORITY:**

None.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

**IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES**

On February 22, 2006, the Civil Justice Committee adopted one amendment which modified the bill in the following manner and reported the bill favorably with committee substitute.

- Made the remedy in subsection (2), whereby a landlord may collect any unpaid rent, other charges due, and rental concessions, available to a landlord in addition to the remedies for a breach of a rental agreement by a tenant's early termination, found under subsection (1).
- Provided that the bill will take effect upon becoming law.

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<sup>14</sup> The term impair is defined as "to make worse; to diminish in quantity, value, excellence, or strength; or to lessen in power or weaken." 10a Fla. Jur. s. 414, Constitutional Law.

- Provided that the bill would apply to any rental agreement involving such remedies and entered into prior to the effective date.

On March 16, 2006, the Business Regulation Committee adopted four amendments which modified the bill in the following manner and reported the bill favorably with committee substitute.

- Amends the definition of "rental agreement" to include "amendments" and "addenda."
- Technical - adds a reference to the term "rental agreement."
- Expands the definition of "rental concessions" to include "services or any other thing of value."
- Creates a definition of "early termination fee" to include any assessment against the tenant when a dwelling unit is vacated and it excludes from the definition services actually rendered, first month's unpaid rent, and damage charges.