HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1489 Residential Tenancies
SPONSOR(S): Patterson
TIED BILLS: **IDEN./SIM. BILLS:** SB 2716

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Committee on Constitution & Civil Law	9 Y, 0 N	Thomas	Birtman
2) Safety & Security Council		Thomas	Havlicak
3)			
4)			
5)			

SUMMARY ANALYSIS

The bill amends the Florida Residential Landlord and Tenant Act to permit residential lease agreements to impose an early termination fee and/or liquidated damages on tenants who terminate their leases before the expiration of a lease. The total liquidated damages and any early termination fee cannot exceed two months' rent and is in addition to any unpaid rent that may be due under the rental agreement. Under existing law, a landlord's remedy for a tenant's early termination is the landlord's actual damages.

The bill does not appear to have a fiscal impact on state or local governments.

The bill takes effect upon becoming a law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Safeguard individual liberty – the bill increases the options of landlords and tenants regarding the conduct of their own affairs.

B. EFFECT OF PROPOSED CHANGES:

Florida Landlord - Tenant Law

The Florida Residential Landlord and Tenant Act, first enacted in 1973, governs the relationship between landlords and tenants in a residential lease agreement.[1] A rental agreement 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.[12] A tenant who fails to give the required notice may be liable for liquidated damages specified in the rental agreement.[13] 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.[14]

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

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;

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[1] Part II of ch. 83, F.S. 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. Section 83.43, F.S.
[2] Section 83.43(7), F.S., provides that: "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 83.58, F.S.
[9] Section 83.575, F.S.
[10] Section 83.595, F.S.
[11] Section 83.575(1), F.S.
[12] *Id.*
[13] Section 83.575(2), F.S.
[14] Section 83.575(3), F.S.

- 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 tenant who prematurely terminates a lease must be given credit for rents received by a landlord after the property is relet.[15] 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.[16]

In *Yates v. Equity Residential Properties Trust,* a trial court found that s. 83.595, F.S., provides a landlord's only remedies.[17] The facts in *Yates* involved rental agreements that imposed early termination fees, fees for failing to notify of lease termination,[18] 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.[19] 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.[20]

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.

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.[21] That section states in part:

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[15] *Quintero-Chadid Corp. v. Gersten*, 582 So.2d 685, 689 (Fla. 3d DCA 1991).
[16] *Id.*
[17] *Yates v. Equity Residential Properties Trust*, Finding of Fact and Conclusions of Law at 6 (Fla. 15th Cir. Ct. Dec. 1, 2004).
[18] Some of the fees imposed for failure to give advance notice of lease termination were imposed before they were expressly authorized by statute.
[19] *Olen Residential Realty Corp. v. Romine*, 2004 WL 3322327 (Fla. 15th Cir. Ct. May 27, 2004).
[20] *Id*.
[21] *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).

> 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.[22] 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.[23]

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.[24]

Effect of Proposed Changes

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 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" but does not include "[u]npaid rent through the end of the month in which the tenant occupied the dwelling unit" and "[c]harges for damages to the dwelling unit."

The bill amends s. 83.595, F.S., to move language presently in s. 83.595(2), F.S., and moves it to what is now s. 83.595(1)(b), F.S. This language relates to the landlord's duty to exercise good faith in reletting the premises and is not being changed substantively.

The bill also amends s. 83.595, F.S., to provide 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 remedy permits residential lease agreements to impose an early termination fee 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-month's rent. Fees and damages collected under this provision are in addition to unpaid rental

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[22] *Lefemine v. Baron*, 573 So.2d 326, 328 (Fla. 1991).
[23] *Id.*
[24] *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 . . . .

payments “due under the rental agreement through the end of the month in which the landlord retakes possession of the dwelling unit.” This remedy is available only if the tenant indicates acceptance at the time the rental agreement was made by placing his or her initials next to the provision in the agreement. The bill provides that the new remedy is not available if the breach of the lease is for failure to give notice as provided in s. 83.575, F.S. (the remedies for such a breach already include liquidated damages as an option – see the discussion above under the heading “Failure to Provide Notice Before Vacating”).

The bill takes effect upon becoming a law.

C. SECTION DIRECTORY:

Section 1 amends s. 83.43, F.S., relating to definitions within the Florida Residential Landlord and Tenant Act.

Section 2 amends s. 83.595, F.S., relating to choice of remedies upon breach of a rental agreement by a tenant.

Section 3 provides an effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The bill does not appear to have any impact on state revenues.

2. Expenditures:

   The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   The bill does not appear to have any impact on local government revenues.

2. Expenditures:

   The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill authorizes additional options and remedies for landlords when tenants prematurely terminate their leases.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to require counties or cities to: spend funds or take action requiring the expenditure of funds; reduce the authority of counties or cities to raises revenues in the aggregate; or reduce the percentage of a state tax shared with counties or cities.

2. Other:

The early termination fees authorized in the bill function as liquidated damages. 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 could be interpreted by a court to be unenforceable penalties. 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 may be held invalid.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

A substantially similar version of this bill was vetoed last year by Governor Crist. In his veto message, the Governor stated:

> While I understand that this would provide another option for landlords who manage rental property, I believe the impact on those Floridians least able to afford to pay such fees would be just too great. With escalating insurance and ad valorem tax cost 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. I cannot allow legislation to become law that would add to the housing burden of these Floridians.[25]

Under the provisions of last year's vetoed version of the bill, the total liquidated damages and any early termination fee available to the landlord could not exceed two months' rent and was in addition to "any unpaid rent **and other charges** that may be due under the rental agreement through the end of the month in which the landlord retakes possession of the dwelling unit, **and any rental concessions that the tenant received."** This year's version of the bill does not include the option of also collecting **"other charges"** and **"any rental concessions that the tenant received."** Otherwise, this year's bill is identical to the vetoed version of last year's bill.

The term "rent concessions" was defined in last year's bill 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."

D. STATEMENT OF THE SPONSOR

No statement submitted.

[25] Veto of Fla. CS for HB 1277, 1st Eng. (2007) (letter from Gov. Crist to Sec'y of State Browning, May 24, 2007) (on file with Sec'y of State, The Capitol, Tallahassee, FL).

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES