

**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.)

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Prepared By: The Professional Staff of the Judiciary Committee

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BILL: CS/SB 2716

INTRODUCER: Judiciary Committee and Senator Aronberg

SUBJECT: Residential Tenancies

DATE: April 18, 2008

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

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

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**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 or 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 signing a separate addendum to the rental agreement using substantially similar language to that suggested in the bill. If acceptance is not indicated, the liquidated damages or early termination fee remedies may not be imposed. The liquidated damages or early termination fee must not exceed two-months’ rent, and the tenant must not be required to give more than 60-days’ notice in order for an early termination fee to be charged.

In addition to the liquidated damages or early termination fee, the bill provides that the landlord is entitled to recovery of any unpaid rent and other charges accrued through the end of the month in which the landlord retakes possession, as well as charges for damages to the dwelling unit.

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

## II. Present Situation:

Part II of chapter 83, F.S., titled the “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 unit and premises,<sup>5</sup> and termination of rental agreements.<sup>6</sup>

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 one year, providing for use and occupancy of premises.”

### Termination of Tenancy with Specific Duration

Current law 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.<sup>7</sup> The rental agreement may not require more than 60 days’ notice before vacating the premises.<sup>8</sup>

A 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.<sup>9</sup> 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.

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

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<sup>1</sup> 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.

<sup>2</sup> *See* s. 83.46, F.S.

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

<sup>4</sup> *See* s. 83.49, F.S.

<sup>5</sup> *See* ss. 83.51 and 83.52, F.S.

<sup>6</sup> *See* s. 83.56, F.S.

<sup>7</sup> Section 83.575(1), F.S.

<sup>8</sup> *Id.*

<sup>9</sup> Section 83.575(2), F.S.

vacating the dwelling unit, the tenant is liable to the landlord for an additional one month's rent.<sup>10</sup>

### **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.

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

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>13</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

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<sup>10</sup> Section 83.575(3), F.S.

<sup>11</sup> Section 83.595(2), F.S.

<sup>12</sup> *Id.*

<sup>13</sup> See *Hudson Pest Control, Inc., v. Westford Asset Mgmt., Inc.*, 622 So. 2d 546 (Fla. 5th DCA 1993).

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>14</sup>

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>15</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>16</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>17</sup> The facts in *Yates* involved rental agreements that imposed early termination fees, fees for failing to notify of lease termination,<sup>18</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*, the court determined whether liquidated damages in a lease agreement are an unenforceable penalty.<sup>19</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>20</sup>

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<sup>14</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)).

<sup>15</sup> *Quintero-Chadid Corp., v. Gersten*, 582 So. 2d 685, 689 (Fla. 3d DCA 1991).

<sup>16</sup> *Id.*

<sup>17</sup> *Yates v. Equity Residential Properties Trust*, Case No. 502002CA0141, Findings of Fact and Conclusions of Law at 6 (Fla. 15th Cir. Ct. Dec. 1, 2004).

<sup>18</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>19</sup> *Olen Residential Realty Corp. v. Romine*, 2004 WL 3322327 \*2 (Fla. 15th Cir. Ct. May 27, 2004).

<sup>20</sup> *Id.* at n. 2.

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.

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>21</sup>

### **Prohibited Practices**

Enforcement of unconscionable rental agreements or provisions is prohibited. However, current landlord/tenant law does not define the term "unconscionable."<sup>22</sup>

The following acts by a landlord in a residential lease 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 servicemember 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 tenant's personal property unless taken pursuant to surrender, abandonment, or a lawful eviction.<sup>23</sup>

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.<sup>24</sup>

## **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 elects to terminate the rental agreement, as provided in the agreement, and vacates a dwelling unit before the end of the rental agreement." The definition expressly excludes unpaid

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<sup>21</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 . . . .

<sup>22</sup> Synonyms for the term unconscionable include "shocking to the conscience" and "monstrously harsh." *Garrett v. Janiewski*, 480 So. 2d 1324 (Fla. 4th DCA 1985).

<sup>23</sup> Section 83.67, F.S.

<sup>24</sup> See s. 83.67(6), F.S.

rent through the end of the month and other charges through the end of the month in which the landlord takes possession of the unit, damages to the dwelling unit, and charges associated with a rental agreement settlement, release, buy-out, or accord and satisfaction agreement.

### **Landlord's Remedies**

The bill amends the landlord's available remedies in s. 83.595, F.S., which governs cases in which a tenant terminates a lease early, to provide that if the landlord retakes possession after the early termination of the rental agreement, the landlord has the duty to exercise good faith<sup>25</sup> 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 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 rent other similar units." Under the bill, landlords are not required 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 signing a separate addendum to the rental agreement containing a provision in substantially the following form:

\_\_\_\_\_ I, agree, as provided in the rental agreement, to pay \$ \_\_\_\_\_ (an amount not to 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.

If acceptance is not indicated, the liquidated damages and early termination fee remedies may not be imposed. These remedies also are not available if the breach is due to the failure to give notice as provided in s. 83.575, F.S.<sup>26</sup>

The bill provides that the liquidated damages or early termination fee must not exceed an amount equal to two-months' rent. Additionally, if the tenant is required to give more than 60 days' notice in the rental agreement, the landlord may not charge an early termination fee.

<sup>25</sup> Section 83.43(8), F.S., defines "good faith" to mean "honesty in fact in the conduct or transaction concerned."

<sup>26</sup> Under 83.575, F.S., a tenant must notify the landlord before vacating the premises at the end of the rental agreement. If the tenant fails to give the required notice before vacating the premises, the tenant may be liable for liquidated damages as specified in the rental agreement and under certain other conditions.

In addition to the liquidated damages or early termination fees, the bill provides that the landlord is entitled to rent or other charges accrued through the end of the month in which the landlord retakes possession, and charges for damages to the dwelling unit.

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.

#### **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 the agreement early may be required to pay liquidated damages or an early termination fee in an amount not to exceed two-months’ rent.

C. Government Sector Impact:

None.

#### **VI. Technical Deficiencies:**

None.

## VII. Related Issues:

The provisions of this bill are substantively similar to the legislation that passed both houses during the 2007 Regular Session but was vetoed by the Governor.<sup>27</sup>

The Governor expressed concern that the “bill would harm the 4.5 million Floridians who live in rental properties.”<sup>28</sup> While acknowledging that the bill would provide another option to landlords who manage rental property, 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. Additionally, the Governor reasoned that “[w]ith 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.”

Under the provisions of last year’s legislation, a landlord could recover “any rental concessions that the tenant received” in addition to the total liquidated damages or early termination fee. This year, the bill does not provide for landlords to recover that item.

## VIII. Additional Information:

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

#### **CS by Judiciary on April 16, 2008:**

The committee substitute:

- Revises the definition of “early termination fee” to clarify that “other accrued charges” through the end of the month in which the landlord retakes possession of the dwelling unit are not included in the definition.
- Provides that charges associated with a rental agreement settlement, release, buy-out, or accord and satisfaction agreement are excluded from the definition of “early termination fee.”
- Clarifies that the landlord is entitled to recover liquidated damages *or* an early termination fee, if the amount does not exceed two-months’ rent.
- Provides that if the tenant is required to give more than 60-days’ notice in the rental agreement, the landlord may not charge an early termination fee.
- Requires a tenant to indicate acceptance of liquidated damages or an early termination fee by signing a separate addendum to the rental agreement which is substantially similar to a form prescribed in the bill.
- Allows landlords to recover rent *and other charges* accrued through the end of the month in which the landlord retakes possession of the dwelling unit in addition to liquidated damages or an early termination fee.

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<sup>27</sup> See CS/HB 1277 (2007).

<sup>28</sup> Veto of Fla. CS/HB 1277, 1st Eng. (2007) (correspondence from Gov. Crist to Secretary of State Browning) (May 24, 2007).

B. Amendments:

None.

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

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