

EARLY TERMINATION FEES: IS THIS PRACTICE LEGAL IN FLORIDA?

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In 2002, several plaintiffs filed a lawsuit against Equity Residential Properties Trust and some other related business entities (collectively referred to below as “Equity”) in Florida’s Fifteenth Judicial Circuit (Palm Beach County).¹ In that lawsuit, the plaintiffs alleged that Equity wrongfully charged excessive termination fees under various circumstances. For example, if a tenant vacated his or her apartment before the end of the lease term, the tenant was charged an “early termination fee” equal to one month’s rent, plus, if the tenant failed to provide the landlord a written 60-day notice regarding the early termination, the tenant was also charged an additional two months’ rent.

The case went to trial in August of 2004 and the Circuit Court ruled in favor of the plaintiffs/tenants on several issues. First and foremost, the Circuit Court stated that the charging of rent and other related fees by a Florida landlord is controlled by the Florida Residential Landlord and Tenant Act (Chapter 83, Part II, of the Florida Statutes). Further, pursuant to section 83.47, Florida Statutes,² Equity *could not* change the type and/or amount of damages available to a landlord under Chapter 83, Part II when a tenant breaches the lease by abandoning his or her apartment before the end of the lease term.

In 2008, Governor Charlie Crist and the Florida Legislature amended the Florida Statutes so that “termination fees,” under certain circumstances, are now legal. Now, section 83.595, Florida Statutes, allows termination fees *if* certain language is contained in an addendum to a tenant’s lease, which must be signed at the same time the lease is initially signed. The necessary language is as follows:

¹ Yates et al. v. Equity Residential Properties Trust et al., Case No. 502002CA0141-16XXOCAB (Fla. 15th Cir. Dec. 1, 2004).

² Section 83.47, Florida Statutes, which is titled “prohibited provisions in rental agreements,” states in part, “[a] provision in a rental agreement is void and unenforceable to the extent that it: (a) [p]urports to waive or preclude the rights, remedies, or requirements set forth in this part [and/or] (b) [p]urports to limit or preclude any liability of the landlord to the tenant or of the tenant to the landlord, arising under law.”

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Option A: 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.

Option B: 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 the foregoing language is present in an addendum to a lease, a *landlord* has the right to determine the amount of the termination fee, which cannot exceed two months' rent, but the *tenant* has the right to choose whether to be subject to the termination fees in the event he/she vacates her apartment prior to the end of the lease term. If the tenant chooses not to be subject to termination fees and then vacates his/her apartment during the term of the lease, then the tenant remains liable to the landlord for rent until the end of the lease term or until the landlord re-rents the apartment, whichever occurs first.

The new law covers two—and only two—scenarios; the first is the classic “skip” where a tenant vacates before the end of his/her lease term without any notice to the landlord, and the second scenario is where the tenant informs the landlord that he/she is leaving before the end of the lease term.

In the first scenario, *if* the skipping tenant selected Option A, the landlord can charge the pre-set termination fee *plus* rent through the end of the month in which the tenant skipped *plus* any other sums owed to the landlord such as the cost of repairs to the apartment. However, the landlord *cannot* charge for additional unpaid rent. If the skipping tenant selected Option B, then the landlord must wait until the tenant's former apartment is re-rented or until the end of the tenant's lease term to determine how much the tenant owes the landlord for unpaid rent.

In the second scenario, a landlord can require that a tenant give a certain amount of notice (cannot be more than 60 days, but can be less) if the tenant wants to vacate his/her apartment before the end of the lease term. If the tenant gives the

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proper notice, the tenant must (i) pay the rent due through the end of the notice period, *and* (ii) pay the termination fee set forth in Option A. If the tenant does so, then technically the tenant has not breached his/her lease. Please note the following regarding this second scenario:

- If a landlord imposes a “notice period” upon tenants who wish to vacate before the end of their lease term, the length of the notice period must be set forth *elsewhere* in the lease or the addendum and *cannot* be more than 60 days.
- If a tenant has chosen Option A but does not want to wait out the notice period and simply skips, the landlord’s claim against the tenant is unfortunately limited to the amount set forth in Option A (plus rent through the end of the month in which the tenant skipped plus any other sums owed to the landlord such as the cost of repairs to the apartment).

Please note that the new law does not address the circumstance where a tenant skips and the amount of the termination fee under Option A, which the tenant has selected, is *greater* than the amount the tenant would have paid had the tenant stayed through the end of the lease (i.e., the tenant only has a month left on his/her lease but the termination fee is an amount equal to two months’ rent). This particular circumstance may be covered under section 83.575, Florida Statutes, if the lease and the landlord comply with that statute. Otherwise, my recommendation is that the landlord charge the *lesser* amount due (i.e., one month’s rent instead of two under my example, above). However, should the landlord re-rent the skipping tenant’s apartment prior to the end of the skipping tenant’s lease term, my opinion is that the landlord does not have to reduce the charges assessed to the skipping tenant.

In summation, please keep in mind the following points regarding the new law:

- A landlord does not have to offer an early termination option; instead, a landlord may rely on standard Florida law, i.e., holding a skipping tenant responsible for rent until the end of the lease term or until the apartment is re-rented, whichever occurs first.

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- The language set forth above in Option A and Option B, or language that is *substantially similar* (i.e., very few changes), *must* be used, it *must* be on an addendum to the lease (not within the lease itself), and the tenant *must* make his/her choice *at the time the lease is entered into*.

- The new law *only* applies to tenants who skip or otherwise vacate their apartments prior to natural expiration of the lease. If a tenant vacates without notice upon the natural expiration date of his/her lease, then section 83.575 applies.

- Regardless of the applicability of a termination fee, a landlord is still entitled to [i] all rent and other charges due to the landlord through the end of the month in which the landlord retakes possession of the apartment, [ii] charges for any damages to the apartment for which the tenant is liable, and [iii] any other charges owed by the tenant (unpaid water bills, for example).

So, how does the new law benefit a landlord? If the landlord is generally able to re-rent an apartment in less than 60 days, then the new procedure set forth above should be used because the landlord does not have to return any money collected or charged against the early-vacating tenant *even if* such tenant's apartment is re-rented within 60 days. However, if a landlord is generally not able to re-rent a vacant apartment within 60 days, it is the author's opinion that tenants should not be given the new option set forth in section 83.595 and the vacating tenant simply remains liable to the landlord for rent until the tenant's former apartment is re-rented or until the end of the tenant's lease term to determine how much the tenant owes for unpaid rent.

Surely there will be some twists and turns that come up as the new law is implemented. Our firm is ready to help you address such issues to minimize your liability and, hopefully, maximize your income.

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