

Ohio Landlord Tenant Law

A Landlord's Guide

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Introduction

This book concentrates a great deal of its content upon the rights of tenants. It is important for landlords to know what a tenant's rights are, so that the landlord may protect himself from lawsuits by the tenants. Few things, other than unrented property or the housing inspector, can make renting property less profitable than a lawsuit.

It is important to note that very little of this book is concerned with commercial landlord and tenant relationships (defined as persons who run a business out of the rental space rather than those who live there). This work further does not cover rental arrangements outside of the State of Ohio, nor does it cover mini-storage issues where you rent a garage to someone. Lastly, while many of the laws and cases cited herein are analogous to persons who rent mobile homes, there is a different statutory section of the Ohio Revised Code that applies to them, and there are some differences. This book is not addressed to them and should only be used by them as a very general guide to their rights.

This book is organized along the same lines as the chronology of a typical landlord tenant relationship; hunting for tenants, lease signing, move in, problems during the tenancy, move out, eviction, and issues concerning security deposits. This causes a lot of hopping around within the various sections of the Ohio Landlord Tenant Act of 1974 (Ohio Revised Code Section 5321.01-.18), but I decided that it was still the best way for the layman to understand the law.

Chapter I: Bare Bones Summary/Overview

Here's a fast summary of the most frequently arising issues in landlord tenant law. Leases can be written or oral. If you have a written lease, a person's oral promises at or before the lease signing which are not in the lease are not enforceable. Just because your lease says something, that does not mean that a court will enforce it if it is unconscionable (meaning completely unfair), or if it violates the Ohio Landlord Tenant Act of 1974. In most cases, if your one of the tenants runs out on the lease, a landlord will be able to come after the persons on the lease who stayed behind. Absent a clause in the lease to the contrary, getting a job in another city does not allow a tenant to break the lease, nor does crime in the area by unknown persons. Landlord are generally not liable for a tenant's losses due to break ins by unknown third parties.

The tenant is responsible for returning the apartment in the same condition she got it, reasonable wear and tear excepted. It is wise to document the condition of the apartment at move in and move out.

If your tenants have problems during the lease term with at the rented premises, there are ways that they can force repairs. Keep copies of anything your tenants send you or that you send your tenants (it's wise to photocopy rent checks and keep them in a file). If, as a landlord you fail to fix serious problems within 30 days of getting written notices, your may escrow the rent with the Court, and may even have the right to move out. You are not allowed to retaliate against your tenants by evicting them for reporting you to the authorities for violations, nor can you evict a tenant for organizing tenants in your building.

A landlord can only evict a tenant via the statutorily authorized process found in Ohio Revised Code Section 1923 which involves giving the tenant a chance to show up in Court to contest the landlord's allegations. You can't just change the locks while the tenants are away without violating the law. A landlord has the right to enter and inspect the rented premises, but you have to give the tenant reasonable advance notice, usually at least 24 hours.

When your tenants move out, you should document the condition of the premises. You should be very careful about keep any security deposits for damages. If you wrongfully keep the security deposit, you can be sued for double damages (twice the wrongfully withheld amount) plus attorneys fees if your tenants can show they gave you written or actual notice of their forwarding address.

Chapter II: Looking for Tenants

I. Introduction: Mostly Practical Advice

You're not going to see much law in this section. It is mostly just practical advice. But there are some laws regarding discrimination which you do not want to run afoul of. But first, the practical advice.

II. Practical Advice to Landlords

A. The Car Test

One of the best tests you can give any tenant is to take a look inside his or her car. I don't care whether the tenant drives this year's Jaguar or a 1970 VW Beetle with rust all over it. What you are looking for is that the interior of the car is clean and orderly. If the interior of the car is clean and orderly, that is the way that the tenant will likely keep the apartment. But if there are old cans of pop strewn about the floor of the car, clothing and used tissue papers everywhere in the back seat, and a general appearance of disorder and filth, you will want to think very carefully about renting to that tenant.

Naturally, this test does not always work. There are a few exceptions to almost every rule. Further, if you are renting to a group of people, it will be difficult to get a look inside of all of their cars. But for the solo tenant, it's something to keep an eye out for.

B. The Background Check

Failing to look into the backgrounds of your tenants is a very foolish thing. You are entrusting this person with exclusive possession of a very expensive asset, and you need to think long and hard about what type of person you are renting to. You can do this in three ways. First and most simply, you can ask the prospective tenant(s) where they are living now, and, if that is an apartment, you can call that landlord for references. Secondly, a credit check is rather inexpensive and can tell you quite a bit about the person. Thirdly, since so many courts have their cases online these days, you can run that person's name through your local municipal and/or county court to see if he has ever been evicted from rental property.

C. Play It Straight

So many problems with tenants can be avoided by just being fair. If you read this book, you will know about your rights and your tenant's rights. Play it straight and fair and you will save yourself a lot of headaches.

D. Stay Organized

If you are sloppy in your records keeping, you are going to have a hard time making money being a landlord. Not only is good record keeping essential at tax time, it is vital if you are sued. Your insurance company's attorney will love you if you have an organized file of every letter and communication you ever had with the tenants. You will curse the day you rented to a tenant who sues you, but you will count yourself lucky if you have an organized store of documents to show a court when it comes to defending yourself. Tenants usually lose their cases

due to disorganization. Don't give up your big advantage. Stay organized and on top of things and you will likely pull through most lawsuits if you have read this book.

E. Keep A Large Reserve of Cash on Hand

You should always keep about two or three month's rent in a bank account somewhere. The way I do it is that I deposit the rent checks I get and I do not pay any of it to myself until the amount has gone over a certain amount (I use \$5,000.00). That way if something really bad happens (a furnace goes out in January or a roof needs repair), I have the cash on hand to deal with it. It also makes it easier to return a security deposit at the end of the lease term and keep from a lawsuit there.

F. Fix Problems Early

I encourage my tenants to complain to me. That's what I tell them. I give them my home and mobile phone numbers and tell them that the moment something goes wrong, no matter how small, I want to know. It takes up a bit more of my time than I would like now and then, but I have found that if you fix a problem when it is small, you can avoid a much larger cost later. Further, fixing small problems often reveals medium sized problems no one knew about which can be dealt with before they become huge problems.

G. Shop Around

Do not take the first estimate for any repair. Shop around. I once had two bathrooms with leaky faucets. The first plumber quoted me \$597.00 to fix them. The second quoted \$985.00 to fix the problem. The third plumber repaired the problem for \$137.00. No matter how much money the place is making, and no matter how much of a hassle it is, shop around.

H. Form a Relationship With Your Tenants

If your tenants come to know you as a person, they will usually treat you and your place better if they think of you as a person rather than as a role. Send them a bottle of wine at Christmas or a small present for their kid's birthday. Offer to pick up their mail for them if they are out of town. Small things like this cost little, but can make big differences down the road. Often, the balance between a tenant running out on the lease or staying through can be a delicate one, and the little things you do can have a positive effect on this.

I. Don't Be An Ass

I know the lease says that you have the right to evict a tenant if she doesn't pay the rent by the first of the month. But if your tenant has the money in cash on the second, why would you want vacant property? Just because you have the right to something legally does not mean that it is good business to insist upon it.

Many a department store gets repeat business because of a generous return policy. McDonalds gets business all over the world because its standards of cleanliness are much higher than the local laws require. The most profitable way to run rental property is to put a good tenant in there and to keep renting to that person for year after year. Turnover of tenants means cleaning, advertising, vacancies, etc. So don't be an ass, value the long term tenant, and you will do well.

J. You No Longer Have The Right To Possession. Get Over It.

Get over the fact that though the rental property is still titled in your name, you no longer have the right to go there whenever you want to and do anything you want to it. I have met many a landlord who thinks that since they own the place, they can walk in whenever they want and do repairs or tell the tenant to clean the place up or not smoke, etc. These folks have a bad track record in court because they don't understand the fundamental nature of the rental agreement. When you signed the rental agreement with the tenant, you gave up your right to possession of the premises in exchange for money. That was your choice, and a judge is going to hold you to it. No judge is going to do anything but laugh at the argument that you can enter the apartment at any time you want because you own it.

Chapter III: Understanding Rental Applications and Rental Agreements

A. Rental Applications

It is a common practice to have a tenant fill out a rental application wherein he consents to have you look into certain aspects of your background before signing a rental agreement. The three types of check ups that you see done most often are credit checks, eviction/arrest record checks, and rental history checks. It is not uncommon for the landlord to charge a non-refundable application fee for performing these checks. Generally this fee is around Twenty Five or Thirty Five Dollars per person (year 2005 dollars).

1. Hidden Lease Commitments

Just because the rental application recites that the tenant makes a promise to enter into a contract regarding the rental property does not mean that these are enforceable. This is because most of them do not have specified amounts of rent or terms of the agreement's duration. The Eighth District Court of Appeals in the case of White v. Boyd 1993 Ohio App. LEXIS 5660 (November 24, 1993) Montgomery App. No. 13757, unreported, found that these clauses are unconscionable:

Under these circumstances, we agree with the referee's conclusion that there was never a valid, binding, or enforceable lease agreement between the parties, even though the application signed by the Boyds contained their agreement to sign a lease or rental agreement on approval of the application. If no terms of the lease agreement, other than the monthly rental, were discussed with the Boyds, as the referee found upon conflicting evidence, then their open-ended agreement to sign a lease upon approval of the application was not supported by sufficient consideration, was unconscionable, and was, therefore, unenforceable. If we were to hold otherwise, then a landlord receiving such an application could require the applicants to sign a lease having a perpetual term and many onerous undertakings, none of which had been previously disclosed to the tenants. Id. at 7-8

B. The Nature of the Rental Agreement

If you were in law school, some stuffy pompous ass would be teaching you that the landlord tenant relationship is part property law, and part contract law. You would also be drinking a lot of beer and having a great time except during exams. But you are probably not in law school, or you would have been paying a lot more for books that would tell you the same thing as this one, just in a more convoluted way. It is true that a tenancy is a type of estate in land, and it is also true that rental agreements in Ohio are interpreted and enforced by the courts pursuant to the law of contracts.

In Ohio, there are two sources of law which govern the terms of rental agreements (also known as leases). The first source of law is the Ohio Revised Code [this is what the Legislature gets together to vote on from time to time in order to better govern us and enrich themselves. Mark Twain once said that no man's wallet is safe while the legislature is in session], specifically, the Ohio Landlord Tenant Act of 1974 and cases interpreting it.

The second source of law is the rental agreement between the parties. Sometimes the two sources of law conflict. When that happens, the Code and cases interpreting the Code win over the rental agreement's provisions. This only makes sense. If you are stupid enough, you can sign a contract with someone wherein you promise to kill a man for Five Hundred Dollars. But that doesn't mean that the courts will enforce the contractual provisions that are contrary to the laws of the State of Ohio.

Text taken from the Ohio Landlord Tenant Act of 1974 will appear in the chapters that deal with the applicable legal issues. You may not understand the statute perfectly upon first reading (I know I didn't and I'm an attorney), but with luck as you read my explanation of it and see how it relates to your problem, and the big picture will reveal itself to you. But in this section, I will deal with rental agreements, their important provisions, and how they work.

1. Rental Agreements Are Contracts

At their foundation, rental agreements are contracts, and they are interpreted by the courts in the same manner as any other contracts. As the Eighth District Court of Appeals stated in the case of Kacik v. Paris, 1992 Ohio App. LEXIS 11671 (July 22, 1982) Cuyahoga App. No. 44271, unreported:

It is well established that a written lease is both a conveyance of a property interest and a contract, and that the rights and obligations of the parties are determined according to the law of contracts. 3A Corbin, Contracts Sec. 686 (3rd Ed. 1960).

A contract is a promise that Courts will enforce. A court will not enforce a promise to kill a man. Therefore, this is not a contract, despite mafia terminology wherein they put out a contract on the guy. The court will also not enforce a promise from your aunt to pay for your college education standing alone by itself. This will be found to be a gratuitous promise, not a contract.

You are probably wondering then what turns a promise into a contract. Promises become contracts when the three elements of any contract exist. The three elements of a contract are; offer, acceptance, and consideration. Sometimes, there is something called reliance that can be a substitute for consideration. When you present your tenant with a rental agreement for signature, that is an offer. When your tenant signs it, that is an acceptance. When you get a security deposit and the first month's rent, and you give up the keys and possession, that is consideration (also known as the bargained for exchange between the parties, in which each party gives up one thing to get another. In this case, you give up the money and get an apartment, the landlord gives up the apartment and gets the rent). The three elements are present. Congratulations. You have a contract.

Another thing to know about contracts is that they can be either express or implied. An express contract arises when two people spell out their agreement in words, either spoken words (an oral contract) or written words (a written contract). Most of us are familiar with express contracts.

Implied contracts do not arise from an express (spoken or written) agreement between the parties, but rather they arise from the conduct of the parties. An example of this is if you walked into a barbershop, sat down in the chair without a word, and the barber cut your hair for you. At

the end of the haircut, you couldn't just get up and walk away. You wouldn't be able to argue in court that you never had a spoken or written agreement with the barber. The Court would award the barber the fair price of the haircut if the barber sued you. The Court would find that there was an implied contract from your actions. The Court would find that your action of getting into the chair at the barbershop constituted an offer, and the barber cutting your hair constituted an acceptance. The service provided and received would serve as the consideration for the contract. Now you have the three elements of any contract, offer, acceptance and consideration.

An example of an implied contract that arises out of landlord tenant law would likely be found in the context of a holdover tenancy. When a tenant holds over beyond the lease term and pays rent according to the former terms, the law implies a contract on the tenant's part to hold over for an additional term under the same conditions which governed the prior term. Bumiller v. Walker (1917), 95 Ohio St. 344, 348-349, 116 N.E. 797. But we'll deal mostly with express contracts here.

Without a written agreement, the court is going to attempt to determine whether there is an oral contract. In doing this, it will listen to the testimony of both parties to see if there has been an offer, an acceptance, and consideration. The Court will also listen to the testimony of the parties to make findings as to the terms of the contract. Naturally, both parties might have different memories of what the agreed rent was, how much of the building gets to be used, what was promised to be fixed and by whom and when, and so on depending upon the circumstances of each individual case. To avoid these problems, it's nice to have a written document that spells out the promises made by the parties. That is why most rental agreements are in writing.

An oral contract is just as enforceable as a written contract, it's just harder (but not impossible) to prove the terms.

a. Written Rental Agreements and Their Clauses

Most rental agreements are in writing. For any writing to be enforceable, it must be signed by the party against whom it is to be enforced. The nice thing about having your lease in writing is that it is very simple to prove to the Judge what you and the tenant previously agreed. It is a good idea for a landlord to use a lease agreement which has been drafted by an attorney to protect the landlord's rights.

1) Ambiguities

There is one disadvantage to being the party who does drafted the rental agreement. No matter how carefully a sneaky low down good for nothing just-breathing-my-air lawyer writes a contract for someone, there are always unforeseen circumstances or problems. This means that sometimes a contract can be ambiguous in its terms. If the contract states that the landlord will install new carpet in the living room within a reasonable time of the tenant's moving in, how long does he have? Here you have an ambiguity. The tenant thinks that a reasonable time would be about a week (because he has to hold off on moving furniture into his living room until the new carpet is installed). The landlord thinks that a reasonable time is six months because that will give him time to find a good price on carpet, and free up his maintenance people to install it.

In the case of an ambiguity in a contract, the Court will first determine if the term really is ambiguous. If the plain language meaning of the clause leaves it uncertain as to what it means, then the court will find that the clause is ambiguous. The court will then examine each party's

interpretation and see if those interpretations are reasonable or not. If the Court finds that both parties' interpretations of the ambiguous clause are reasonable, the Court will then ask who drafted the contract (meaning, who provided the contract for the other party to sign). Usually, that's the landlord.

Ambiguities in contracts are construed against their drafters. The reason for this is that the person who wrote the contract was in the best position to say what he meant. The court will not punish the person who didn't write the contract just because the person who did draft it didn't take enough time to be clear about things. As the Ohio Supreme Court so eloquently waxed in the case of Smith v. The Eliza Jennings Home (1964) 176 Ohio St. 351:

Under such circumstances, the well-established rule that where there is doubt or ambiguity in the language of a contract it will be construed strictly against the party who prepared it is applicable. 11 Ohio Jurisprudence (2d), 391, Contracts, Section 147; 17A Corpus Juris Secundum, 217, Contracts, Section 324.

The good news for the tenant is that if there is something ambiguous in your contract, and you have taken a reasonable position on the matter, he will likely win the debate in front of a judge.

As another example of this, let's say that your rental agreement allows only blue curtains to be displayed in the front windows. The tenant puts up a dark blue curtain with a lighter blue lightning bolt running down the middle of it. You complain to the tenant that the lease says only blue curtains, and that this means solid blue curtains. The tenant argues that when he signed the lease, he took it to mean that so long as the curtains were blue, he could have any type of colors therein, so long as they were all blue. Here we have an ambiguity. If the Court finds that the tenant's interpretation of the ambiguous clause is reasonable, then his interpretation wins since the landlord was the one who drafted the contract, and he should have taken better care to say what he meant.

C. When Does Your Rental Agreement Become Enforceable?

Once the tenant has signed the rental agreement and returned it to the landlord, it is a legally binding and enforceable contract. The landlord can sue if the tenant fails to perform up to its terms. There is no three day cooling off period wherein one can rescind a rental agreement upon a change of mind. But when is a rental agreement considered assigned? I ask (and answer) this question in the following context.

A tenant is for apartments for next year for herself and a roommate. She finds yours and figures her roommate will like it too. You sign a rental agreement with her, and she takes a copy of it to her roommate to sign as well. In the meantime, her roommate has had a change of heart and wants no further part in any living arrangements with the tenant who signed the lease. In fact, she changes her mind about living with her at all and moves to Bora Bora to study the effects of alcohol ingested while looking out over the evening ocean sunsets. You want to sue you under the signed rental agreement (you kept a copy).

If the rental agreement listed the two roommates as the tenants and only one signed, then the rental agreement will not constitute an enforceable contract without the signature of the second person. In the case of Weizman v. Chapin (1948), 79 N.E.2d 668, a landlord (Weizman) gave a rental agreement for some commercial property to a tenant (Chapin) for Tenant Chapin

and his partner (Longacre) to sign. Tenant Chapin signed it, but Partner Longacre refused. Landlord Weizman tried to sue the Tenant Chapin, relying upon the partially signed rental agreement.

The Eighth District Court of Appeals in Cuyahoga County held that the rental agreement was not enforceable against Tenant Chapin and reasoned as follows:

The lease was prepared in Mr. Glick's [the lawyer's] office and ran to two persons, Chapin and Longacre, as lessees [renters]. Chapin took one of the copies of the lease with him but afterwards returned the lease saying that Longacre would not sign. If at that time the position of the parties had been reversed, that is if Chapin desired to take up the lease alone and Weizman was unwilling to do so on the ground that he had planned a lease with both Chapin and Longacre as lessees [renters] and not with Chapin alone, would any one contend that Weizman would have been bound? Clearly Chapin would have had no right to hold Weizman to the lease upon his failure to produce Longacre's signature. If Weizman was not bound neither was Chapin and until Longacre's signature was secured, neither Weizman as lessor [landlord] nor Chapin as one of the lessees was obligated under the lease. *Id.* at 7-8

But there are cases out there in Ohio law which will enforce the written terms of a lease agreement if the landlord has delivered the lease for signature to the tenant and the tenant takes possession of the apartment, even if the lease was never signed.

D. Individual Clauses In Rental Agreements

1. The Joint And Several Liability Clauses

When tenants agree to be jointly and severally liable in a rental agreement, they allow the landlord the choice to proceed against them all, or to proceed against them individually. Let's break it down with an example. Tim, Deadbeat, and Bum (the Tenants) agree to lease an apartment from Leonard (the Landlord). The rent is \$600.00 per month, and they agree to be jointly and severally liable for all obligations under the rental agreement for one year. With one month left to go on the rental agreement, Deadbeat and Bum decide to move out and they leave the state of Ohio without paying for the last month's rent. Tim cannot afford to pay the entire \$600.00 by himself. It isn't his fault that his roommates ran out on him, but since he agreed to be jointly and severally liable for the actions of his roommates, Leonard the Landlord can sue Poor Tim for the entire amount of the rent. The only right to recovery Tim has is against his former roommates who are long gone and probably without any money to recover anyway. Good luck, Tim. You're going to need it.

The same thing is true if Deadbeat and Bum do a lot of damage to their bedrooms. Perhaps they kicked in their closet doors and broke some windows on the way out. It's too bad, but Poor Tim is on the hook here too. Even if Deadbeat and Bum did the damage intentionally, and even if the damage runs into the thousands of dollars, Poor Tim is out of luck. He will have to pay for the damage if Leonard the Landlord sues him. His only argument would be that contract clauses insuring a person against the intentional torts of another are void as against public policy. That's an argument I just thought up as I wrote this though, and from what research I have done, it has yet to be tested.

So joint liability means that everyone is responsible for the actions of every other, and several liability means that you are only responsible for your own actions. What if your rental agreement does not have joint and several liability language, but does list several tenants? The presumption in Ohio is that if there is more than one tenant on a rental agreement, they will be jointly and severally liable (meaning that landlord can pick which one he wants). A presumption means that the Court will start off with the belief that the rental agreement is joint and several, and it will be the tenant's burden of proof to show that it was not.

The case on this is that of Spicer v. James (1985), 21 Ohio App.3d 222, wherein the Second Appellate District Court in Greene County Ohio held that:

Additionally, each appellant signed the lease agreement separately which established joint and several liability. Generally, an obligation entered into by more than one person is presumed to be joint, and several responsibility will not arise except by words of severance. 17 American Jurisprudence 2d (1964) 716, Contracts, Section 298. Therefore, appellants are liable jointly because no severance language appears in the body of the agreement. See Western Ohio Bank & Trust Co. v. J's Restaurant (Feb. 27, 1985), Miami App. No. 84-CA-22, unreported. Id. at 223.

2. Co-signer Clauses

Many landlords will ask that the rental agreement be guaranteed by someone with sufficient funds to be collectible in the event of breach of the rental agreement. Tenants take umbrage at this because they are on their own and they thought that they no longer needed their parents' permission to do things. Having more defendants to sue who have money is a darned good thing if you are a landlord.

3. Merger and Integration Clauses and the Parol Evidence Rule

Whenever you have a written contract, there is something that comes into play called the Parol Evidence Rule. This rule states that if there is a written contract, a Court will not listen to testimony that contradicts the written provisions of the contract. Example time. If the landlord and the tenant orally agree that the landlord will put in new carpet, but sign a rental agreement saying that the tenant agrees to accept the apartment as is, the Court will not listen to the tenant's testimony regarding the contradictory spoken terms at signing. The Court will not even listen to a tape recording of the conversation wherein the landlord promised the carpet orally.

But if the Court finds that the oral statements cover an area that the rental agreement does not address, and that the situation is ambiguous, then the Court will listen to the testimony of the witnesses regarding what the landlord said. This is because the oral statements of the landlord at the signing do not contradict any provision of the rental agreement. They rather, in this instance, explain an unclear term. This is especially true when the lease does not have one of the as is provisions in it. So if you are trying to get the other party's oral statements in, you need to argue that the statements he made do not contradict the other terms of the lease, or that they merely explain ambiguities in the lease.

The whole point of the Parol Evidence Rule is for the parties to put their agreement in writing rather than into fallible memory. To guard against the argument above that the oral

statement simply explains an ambiguity rather than is a contradiction of the agreement, Merger and Integration clauses come into the rescue. Merger and Integration clauses are both the same thing, they just go by different labels.

These clauses are usually found near the end of the rental agreement, and they state that the writing in the contract comprises the entire agreement between the parties, and that no other promises or representations have been made between the parties or other words to that effect. If this clause is in your rental agreement, it is tough to get in any spoken promises which your landlord may have told you about at the signing or showing regarding new dishwashers or carpet that aren't in the writing. Any oral statements are automatically in direct contradiction with the merger/integration clause. The Parol Evidence Rule will keep them out.

So if the tenant is promising to do something, and you want to make sure that you can hold him to it, write it into the lease agreement. Handwriting on a rental agreement is not only permissible, it's binding. In fact, if the pre-printed words on a rental agreement (often called the boilerplate) conflict with the handwritten words, the handwritten words win out because the Court will see them as a better indication of the intent of the parties than the standard format language that appears in every contract.

When you do handwrite something in or cross something out, all parties to the agreement should initial each addition or deletion. Unless the changes have been made on everyone's copy, don't let the tenant walk off with the only copy of the lease with the changes.

4. Penalty Clauses/Liquidated Damages

Your rental agreement may require that the tenant to pay a pre-defined amount of damages upon a breach of it. For example, the rental agreement states that there are no pets allowed. It further states that if a pet is found in the apartment, then the tenant will pay Two Thousand Dollars to the landlord.

Penalty clauses are unenforceable. Penalty clauses are also referred to sometimes as stipulated damages clauses or liquidated damages clauses. If you are trying to get one of these clauses declared unenforceable by the Court, you want to consistently refer to it as a penalty clause. If you are trying to get the clause to be found enforceable, you want to consistently refer to it as a liquidated damages clause. Penalty clauses are invalid and unenforceable. Liquidated damages clauses are valid and enforceable.

In Lake Ridge Academy v. Carney (1993), 66 Ohio St. 3d 376, 613 N.E.2d 183, the Ohio Supreme Court illustrated the differences between penalty clauses and liquidated damages clauses. The Lake Ridge Academy Court recited the following three part test to determine whether such a provision constitutes an invalid penalty or an enforceable liquidated damages provision:

Where the parties have agreed on the amount of damages, ascertained by estimation and adjustment, and have expressed this agreement in clear and unambiguous terms, the amount so fixed should be treated as liquidated damages and not a penalty, if the damages would be (1) uncertain as to amount and difficult of proof, and if (2) the contract as a whole is not so manifestly unconscionable, unreasonable, and disproportionate in amount as to justify the conclusion that it does not express the true intention of the parties, and if (3) the

contract is consistent with the conclusion that it was the intention of the parties that damages in the amount stated should follow the breach thereof. Id., quoting Samson Sales, Inc. v. Honeywell, Inc. (1984), 12 Ohio St. 3d 27, 465 N.E.2d 392, at paragraph two of the syllabus.

I know. I know. You got halfway through that little treat of wording and the eyes glazed over. So I'll give it to you in straight English. In layman's terms, the above passage says that firstly, the court will look to see if the damages from a breach of this penalty/liquidated damages clause are hard to calculate with exactness. If they are vague and difficult to specifically figure, then the Court will move on to the next part of the test. If they are easy to calculate, then the Court will throw out the clause as a penalty clause and only award the landlord the amount that he was actually damaged.

Under the second prong of the above test, liquidated damages must be "proportionate" (but not exactly equivalent) to the actual damages a party suffers. Lake Ridge Academy, supra, at 383-384. Otherwise, as the Lake Ridge Academy Court explained, a stipulated damages clause will be seen as an invalid penalty and not enforced. Id. at 382. So the damages, even though they are difficult to ascertain, must bear some reasonable relationship to the losses that the landlord actually incurred. In the case of the example we started with, that dog would have to be pretty huge to damage the apartment in the amount of Two Thousand Bucks.

Lastly, under the third prong of the test, a reading of the rental agreement must indicate to the Court that the parties intended to be bound by this damages clause and pay the amounts required. Usually, there has to be some evidence that the landlord and the tenant sat down together and talked about the fact that certain things were prohibited, and that if the tenant did them, it would cost the tenant a certain amount of money. There must be evidence that the tenant understood this and agreed to it. Now if you re-read the above passage from Lake Ridge Academy, it might make a little more sense.

Looking at another particular example from real life, in the case of Berlinger v. Suburban Mgmt., the rental agreement contained a clause that stated as follows:

NO ANIMALS, BIRDS, PETS, MOTORCYCLES, WATER BEDS, TRUCKS, JEEPS OR VANS shall be kept on the premises at any time. . . I agree that if I bring a pet, truck, motorcycle or van onto the property I will be charged by management and pay to it the sum of \$50.00 each time.

When the tenant moved out at the end of the lease, he sent his landlord his forwarding address, and the landlord sent a notice charging him \$300 for having kept a motorcycle on the premises pursuant to the above clause. But the Court of Appeals found that this was a penalty clause.

Let's run it through the test as laid out in the Lake Ridge Academy case above to see if the courts will enforce it. First, the Court looked at whether the damages were difficult to ascertain and determined that they were. This got the landlord past the first of the three hurdles, but the second hurdle proved impassable for the landlord:

However, the sum of \$50 per day (which in a thirty-day month would amount to \$1,500) does not bear a reasonable relationship to any loss which might foreseeably be sustained. A court could take judicial notice that the operation of

a motorcycle might cause great damage to a landlord, because tenants who object to loud noise might move out. However, no evidence was introduced tending to show the amount of damages which might foreseeably result from the mere presence of a motorcycle.

Since the Court found that the landlord did not get past the second prong of the test (requiring that the damages from the contract be at least “proportionate” to the actual damages), it did not have to go further and consider the last prong of the test, whether the landlord and tenant actually agreed that this was the amount that would be paid upon a breach of the lease agreement.

E. The Doctrine of Substantial Performance

If the tenant has complied with the terms of your rental agreement, but the landlord is alleging that breach because the tenant did not perform in exact accordance with the terms of the rental agreement, the tenant can argue that she has substantially performed under the contract. For example, your rental agreement states that the tenant will mow the grass at your apartment every week. At the end of the rental term, the landlord points out that there is a tiny area behind the garage that never got mowed. The area is a small gravel area with one or two weeds poking up near the garage. The tenant can argue that he substantially performed the lawn mowing duties under the rental agreement.

In the case of Burlington Resources Oil & Gas Co. v. Cox (2000), 133 Ohio App.3d 543, the Fourth District Court of Appeals in Jackson County stated that:

A party does not breach a contract when that party substantially performs the terms of the contract. Ohio Farmers' Ins. Co. v. Cochran (1922), 104 Ohio St. 427, 135 N.E. 537, paragraph two of the syllabus. Nominal, trifling, or technical departures from the terms of a contract are not sufficient to breach it. Id. A court should confine the application of the doctrine of substantial performance to cases where the party has made a honest or good faith effort to perform the terms of the contract. Ashley v. Henahan (1897), 56 Ohio St. 559, 47 N.E. 573, paragraph one of the syllabus.

This last bit about an honest and good faith effort means that the breaching party must be seen by the Judge as the good guy who tried his best, but it just wasn't barely enough to be in strict compliance with the terms of the contract. So be conscientious as to your responsibilities if you want to gain the benefit of the doctrine of substantial performance.

F. The Doctrine of Waiver

Even though your rental agreement says something in clear language, if you can prove that after the rental agreement was signed, the parties acted in a way that was different than the express terms of the rental agreement, then there may be an issue of waiver. One most commonly sees this in the context of late fees.

For example, your rental agreement might say that the rent must be paid by the end of the first day of each month, and that failure to pay the rent by the first day of each month will give the landlord the right to start eviction proceedings. On the first month, the landlord accepts the rent four days late. On the second month the landlord accepts the rent eight days late. The third month, the rent is paid on time, but then on the fourth month, the rent is five days late. This

course of conduct continues on for several months. On the eighth month, the rent is two days late, and the landlord starts eviction proceedings.

The tenant will be able to come into court at the eviction hearing and argue that the landlord has no right to evict him for paying the rent late. The landlord will hop up and down like a monkey on a hotplate and read the language of the rental agreement giving him that very right over and over again to the Judge until the landlord is blue in the face.

But the Judge will look at the landlord's actions and find that there was a course of conduct established between the parties that led the tenant to rely upon it. The landlord's actions in constantly failing to insist on strict enforcement of the rental agreement's terms lulled the tenant into a false sense of security in making payments a few days late. Thus the landlord will not have the right to strict enforcement of the rental agreement's terms in this regard.

In the case of Lauch v. Moning (1968) 15 Ohio App. 2d 112, the First Appellate District Court held as follows:

Summarizing defendant's assignments of error, defendant claims that a course of dealing in accepting overdue rent had been established between the parties whereby the plaintiff had waived any right to claim forfeiture for late payment of the rent installments without giving the defendant advance notice of his intention to require strict compliance with the terms of the lease. That is the well settled law of Ohio. See Bates & Springer, Inc., v. Nay, 91 Ohio Law Abs. 425, and Milbourn v. Aska, 81 Ohio App. 79, and authorities in each case cited. The undisputed evidence here establishes that the defendant was entitled to the protection of this rule of law. Id. at 113

How many months does it take to sufficiently establish this course of conduct? That's a crap-shoot. I can't guarantee that any particular period of time will be sufficient. I can only say that the longer the better.

- 1. Two Ways To Defeat Waiver**
 - a. Letter of Strict Compliance**

The landlord can defeat the effects of waiver in two ways. Firstly, she can send a letter of strict compliance. In the letter, she will say something like: Dear tenant, I know that in the past, I have accepted the rent late. Those days are now over, and in the future, I will insist upon prompt payments of all rental amounts as soon as they are due, and if they are late, I will exercise all of my rights under the lease

This puts the tenant on notice that the past course of conduct will no longer be the rule. Once the tenant receives this letter, no Judge is going to allow the tenant to assert the waiver argument on the next late payment. The only exception to this would be where the course of conduct cannot be so simply undone. Paying your rent on time is a matter which can be addressed simply and quickly. Just send the money in earlier. But if the lease calls for no pets, and you have adopted a dog who has lived there with the landlord's knowledge for 9 months, there is a good argument to make that you can't just get rid of the dog like you can your history of late payments. As the tenant, you have likely made an emotional connection with the dog, and you has a moral obligation to the animal to see to its needs. It's not so simple as letting it go in the park one day and waving goodbye. You have an argument at this point that you, as a

landlord, are stuck with this course of conduct until the lease is over or until you have had satisfactory time to make alternate living arrangements for the animal.

b. Anti-Waiver Clauses in Rental Agreement

Landlords also insert anti-waiver clauses in their rental agreements. These clauses say something like: No course of conduct between the parties shall be relied upon if it is in conflict with the provisions of this rental agreement. No course of conduct on the part of either party shall be deemed a waiver by the other of any term or condition of this lease

The problem with these clauses is that they are a restriction upon an individual's freedom to contract. Remember that there are two types of contracts, express contracts (by words, whether written or oral) and implied contracts (by deeds of the parties). The landlord's consistent waiver of an express term of the rental agreement can be seen by the Court as an implied contract. Thus a contractual term which limits your future freedom to contract might not be enforced by the court.

Whether the Court will enforce the anti-waiver provision is dependent upon certain factors. One Ohio Court has addressed the enforceability of anti-waiver provisions, but not in the context of landlord tenant law. However, the wording below is a strong argument against anti-waiver clauses in landlord/tenant law by analogy. The Seventh District Court of Appeals in Belmont County stated in the case of Van Dyne v. Fidelity-Phenix Ins. Co. (1969), 17 Ohio App.2d 116, as follows:

An insurance company cannot, by a nonwaiver provision in its policy, disable itself from subsequently modifying its own contract, or prevent its future conduct from having the force and effect which the law says it shall have. Attempts of parties, including insurers, to tie up by contract their freedom of dealing with each other are futile, and such a nonwaiver provision does not prohibit or limit the company issuing the policy, or its duly authorized agent, from subsequently entering into a valid oral agreement with its insured, modifying the policy's terms. Coletta v. Ohio Casualty Ins. Co. (Court of Appeals, Summit County, 1953), 96 Ohio App. 70 (see paragraphs two and three of the syllabus, and pages 77, 79, 80, 81 in the opinion); Union Mutual Life Ins. Co. v. McMillen, 24 Ohio St. 67; 30 Ohio Jurisprudence 2d 703, 704, Sections 765, 766. Id. at 123-124.

If an insurance company cannot preclude a waiver of its contract by its actions that follow the contract in time, why should a landlord be able to do so? Also, the language above, which says attempts of parties, including insurers speaks to parties to contracts in general as well as insurers in particular, and so further indicates that the rule applies to all.

Chapter IV: Move In

The tenant will be responsible for returning the apartment to the landlord in the same condition that she got it, reasonable wear and tear excepted. It would behoove those of us who wish to have empirical evidence of that move in condition to document such condition when the tenant first takes over possession from the landlord. Why get into an argument over whether a stain on the carpet was there before the tenant came to the place? There are several ways to protect yourself from such persons, and it is not rocket science.

A. Video Your Apartment

You can be forgiven for not videotaping your apartment if the tenant moved into it back in 1981 when video recorders and VCRs were priced out at \$2,000.00 apiece when new. But now that new VCRs go for \$80.00 and camcorders for not much more, if you come to me after reading this without a video tape, you're not going to be getting much sympathy regarding the fact that you can't prove your case.

Before you give up your keys to the tenant on that first day of your lease term, go out and purchase that day's newspaper. Then go get a video camera and a tape. As you approach the door of your apartment, hold up the newspaper so that the headline date can be seen by the video camera. This will show a Court later on what day you took the video. It will also show the Court what kind of shape the apartment was in on the first day of the rental term. If it is possible, get the tenant in the video.

I know what you're saying: my video camera has a time and date stamp on it, I'll just skip the part about the newspaper. That's nice. I also know what your tenant will argue in Court a year later: your Honor, the time and date stamp in the corner of the video can be set like a watch and so we really don't know when the video was taken. Some Judge might believe the tenant. Don't give him this out. Make it as hard on him as possible and as easy on yourself as possible down the road. Get a newspaper.

Walk through the apartment. Be careful to go slowly and note all the conditions with the camera. Make sure that you get all the floors, walls and ceilings. People always forget the ceilings. Replacing ceiling damage can be very expensive, so don't forget to video the ceilings. Do this in a systematized manner and do it the same way for every room. Don't just jump right to the obvious things that are wrong with the apartment. Be organized. Video the damages as you come to them. Don't make editorial comments or jokes while the tape is running. You will sound like a biased fool on the tape. Let the images on the tape speak for themselves.

Be thorough. Get inside the closets, drawers, cabinets, appliances, bathrooms, showers and so on. Show the windows behind the curtains (windows can have cracks and holes in them). Remember that any place that you miss will be the place that your landlord will say the damage you caused was. Function check things like turning the disposal on and off. Slide the closet doors and patio doors back and forth so that you can show that they are on their tracks. When you are finished, review the tape in your VCR machine (you will be surprised how many times you thought the thing was taping but it was not), and if it is acceptable to you, then send it to a safe place for storage.

Don't tell me that you can't get a video camera. If you don't own one, rent or borrow one. Somebody you know has one that they can loan you. If you are stuck with just photographs, well, it's better than nothing, but how do you time stamp a photograph? Perhaps you could put the newspaper in the background of each photo, but that's the best I can think of. If you've ever seen a Judge watch a video when it's one person's word against another and compare that to a Judge looking at a few photographs, give me the video every time.

B. Ameliorative Waste

Remember that you must return the apartment in the same condition in which you got it,