Security Deposits in Minnesota
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I. Security Deposit Definition

A. Residential Leases under Minn. Stat. § 504B.178

Security deposits are regulated by Minn. Stat. § 504B.178 (formerly § 504.20). The provisions of the statute may not be waived and any waiver of the statute shall be void and unenforceable. Minn. Stat. § 504B.178 (formerly § 504.20), subd. 8.

A security deposit is "[A]ny deposit of money, the function of which is to secure the performance of a residential rental agreement or any part of such an agreement other than a deposit which is *exclusively* an advance payment of rent." § 504B.178 (formerly § 504.20), subd. 1 (emphasis added). The name given to the deposit is irrelevant.

The issue of whether a security deposit is a bailment was raised in *National Corp. for Housing Partnership v. Liberty State Bank*, 836 F.2d 433 (8th Cir. 1988). The district court concluded that the statute's provision that security deposits "shall be *held* by the landlord *for the tenant*" created a bailment. *Id*. at 436 (district court's emphasis). The district court also concluded that the security deposits at issue were bailments because the contracts governing the deposits required segregation of the deposits in a separate trust account and prohibited transfer of the deposits without prior written approval. *Id*. at 436. On appeal, the court held that in absence of Minnesota authority on point and in light of its deference to the district court on undecided questions of state law, a district court did not error in determining that the security deposits were bailments in this case. *Id*. at 436-37.

B. Commercial Leases under Common Law

Minn. Stat. § 504B.178 and its predecessor are limited to residential leases and does not apply to commercial leases. *Id*.; *State v. Larson*, 605 N.W.2d 706, 711 (Minn. 2000) (interpreting Minn. Stat. § 504.20). In *State v. Larson*, the Court reviewed the alternative views on the commercial deposit relationship, including debtor-creditor, pledgor-pledgee, settlor-trustee. The Court concluded:

> We join the majority of states in defining the lessor-lessee security deposit relationship as one of debtor to creditor. Absent more specific legislative regulation, and given the weight of common law and scholarly comment, a lessee maintains only an expectation that his security deposit is a debt that will be repaid. "A debt is not a trust and involves no fiduciary relationship or duty" between the parties involved.

605 N.W.2d at 712 (citation omitted). The Court noted that "The lessor owes the lessee a debt in the amount of the security deposit at the termination of the lease. The security deposit is described as held for the benefit of the lessor because it protects the lessor's vulnerability under the lease." The Court did not discuss a time frame for return of the deposit or standards for withholding it. *Id*.

II. Interest: Minn. Stat. § 504B.178, subd. 2

The deposit shall bear interest at 1.0 percent per annum noncompounded beginning August 1, 2003. Previous interest rates have been:

5.0 percent before October 1, 1984,
5.5 percent beginning October 1, 1984,
4.0 percent beginning May 1, 1992, and
3.0 percent beginning March 22, 1996, through July 31, 2003.

It is computed as follows:

A. From the first day of the next month following full payment of the deposit.

B. To the earlier of the date on which:

1. The last day of the month in which the landlord, in good faith, complies with Minn. Stat. § 504B.178 (formerly § 504.20), subd. 3, or

2. Judgment is entered in any civil action involving the landlord's liability for the deposit. *See Wahl v. Chester*, No. AC-87-4464, Memorandum at 3. (Minn. Dist. Ct. 4th Dist. June 2, 1987) (Appendix 3).

In *Dahlberg, v. Dube*, 2002 WL 1163553 at *2 (Minn. Ct. App. June 4, 2002) (unpublished), the court reversed the trial court's calculation of interest where the trial court calculated the interest per month rather than per annum, and for the appropriate period of time.

III. Deposit Liability of Original and Successor Landlords: § 504B.178, subds. 5-6

The landlord remains responsible for return of the deposit plus interest. The exception is that if, within 60 days following voluntary or involuntary termination of the landlord's interest in the premises, the landlord or landlord's agent:

A. Transfers the deposit plus interest, or remainder after lawful deductions, to the landlord's successor in interest, and notifies the tenant of the transfer and the transferee's name and address, or

B. Returns the deposit plus interest or remainder after lawful deductions to the tenant.

The landlord's successor in interest is responsible for return of the deposit plus interest, if the old landlord did not return the deposit or remainder after deductions, regardless of whether the old landlord transferred the deposit to the successor, since "the landlords successor and interest shall have all of the rights and obligations of the landlord with respect to such deposit. . . ." § 504B.178 (formerly § 504.20), subd. 6. *See Praschad v. Maciosek*, No. AC-89-13447, Order at 2 (Minn. Dist.

Ct. 4th Dist. Nov. 8, 1989) (contract for deed vendor liable for deposits received by a bankrupt vendee) (Appendix 5); *Schadweiler v. Kallenbach*, No. AC-88-14279, Order at 1, 4-5 (Minn. Dist. Ct. 4th Dist. Feb. 17, 1989) (Appendix 6); *Neadeau v. Meldahl*, No. 758638, Memorandum at 1, 2 (Minn. Dist. Ct. 4th Dist. Dec. 13, 1979) (three judge appellate panel), No. 41395, Order at 2 (Henn. Cty. Mun. Ct. Mar. 3, 1969) (Appendix 7). However, the successor could seek reimbursement from the prior landlord. The exception is that if the tenant does not object to the amount of the deposit being transferred within twenty (20) days after notice of transfer, the landlord's successor in interest remains responsible for return of only the amount of the deposit contained in the notice, plus interest accruing after the transfer. Minn. Stat. § 504B.178 (formerly § 504.20), subd. 6.

Landlords argue that the successor landlord should be able to avoid liability for a deposit that the successor landlord did not receive, by sending a notice to the tenants within 20 days of the transfer of property advising the tenants that the successor landlord did not receive the deposit from the predecessor landlord, and that the tenant should pursue the deposit from the predecessor landlord. Tenants argue that § 504B.178 (formerly § 504.20) does not provide for such a limitation on the successor landlord's liability.

IV. Withholding Rent by the Tenant For The Last Month: § 504B.178, subd. 8

No tenant may withhold payment of all or part of rent for the last payment period on the grounds that the deposit should cover the withheld rent, *id*. Withholding all or part of rent for the last payment period creates a rebuttable presumption that the tenant intended that the deposit cover the withheld rent.

A. Exceptions

1. Under an oral or written month to month residential rental agreement concerning which neither the tenant nor landlord has served a notice to quit;

2. for the last month of a contract for deed cancellation period under Minn. Stat. § 559.21 or a mortgage foreclosure redemption period under Minn. Stat. § Chs. 580, 581, or 582; or

3. where deposit was exclusively an advance payment of rent, *see* Minn. Stat. § 504B.178 (formerly § 504.20), subd. 1.

B. Penalty

Any tenant who continues to withhold such rent after receiving the landlord's written demand and notice of the provisions of Subdivision 8 shall be liable for "damages in an amount equal to the portion of the deposit which the landlord is entitled to withhold . . . other than to remedy the tenant's default in the payment of rent, plus interest on the deposit . . ., as a penalty, in addition to the amount of rent withheld by the tenant in violation of this subdivision."

Two interpretations of the penalty are possible, depending on what language is modified by the words "as a penalty."

One is that the penalty is equal to the portion of the deposit the landlord is entitled to withhold other than to remedy the tenant's default in the payment of rent, plus interest on the deposit.

> Example: when the tenant moved out the deposit and interest equaled $500.00. The tenant withheld the last month's rent of $400.00. Repair of damage to the apartment beyond normal wear and tear cost the landlord $200.00. The landlord may sue for $100 ($600.00 rent arrearage and repairs minus $500.00 deposit and interest) plus $200.00 penalty (penalty equal to amount landlord was entitled to withhold for repairs), for a total of $300.00.

The other is that the penalty is equal to the interest on the deposit.

In light of the double damages the statute give tenants for wrongful withholding of the deposit and interest by the landlord, it appears that the more reasonable interpretation of the penalty is the former interpretation.

V. Obligations Upon Termination Of Tenancy: § 504B.178, subd. 3

Within three (3) weeks after termination of the tenancy or within five days (5) after the tenant leaves the building or dwelling due to legal condemnation for reasons other than the tenant's willful, malicious, or irresponsible conduct, and after receipt of the tenant's mailing address or delivery instructions, the landlord shall return the deposit and interest on the deposit to the tenant, or "furnish to the tenant a written statement showing the specific reason" for withholding all or part of the deposit.

A. When Does the Tenancy Terminate?

When a tenant moves out of an apartment before expiration of the lease or does not move into the apartment in the first place, it may be unclear when the three time period begins for sending the notice. Options include (1) when the tenant moves out or does not occupy the apartment, (2) expiration of the lease, or (3) when the landlord rents to another tenant. The cases support expiration of the lease, unless the landlord rents to another tenant before expiration of the lease.

In *The Gaughan Companies v. Swanson*, No. C3-87-825, 1987 WL 19765 at 2 (Minn. Ct. App. Nov. 17, 1987) (unpublished), the court noted:

> We find no merit in appellant's contention that her tenancy terminated January 20, 1986, when she vacated the apartment, as opposed to January 31, 1986, when her lease period expired. A tenant that vacates and fails to give written notice of termination to the landlord amounts to no more than an abandonment of the premises, which does not automatically terminate a lease:

> A lessee's unilateral action in abandoning leased premises, *unless accepted by his lessor,* does not terminate the lease or forfeit the estate conveyed thereby, nor the lessee's right to use and possess the leased premises and, by the same token, his obligation to pay the rent due therefor. (citations omitted).
>
> *Markoe v. Naiditch & Sons*, 303 Minn. 6, 7, 226 N.W.2d 289, 290 (1975) (quoting *Gruman v. Investors Diversified Services, Inc.*, 247 Minn. 502, 507, 78 N.W.2d 377, 380 (1956)) (emphasis in original).
>
> As a result of the above determination, the statement of charges mailed to appellant on February 14, 1986, having been mailed within three weeks of the tenancy ending, was timely.

In *Oman v. Dunn*, No. CT 02-18797, 2003 WL 23484600 (Minn. Dist. Ct. 4th Dist. Oct. 29, 2003), the landlords has the tenants' new address and the address of their attorney within days of the tenants' notice that they would not be occupying the apartment. The landlords rented to new tenants, but argued lease or the original tenants was still in force for its one year term, so they did not send the security deposit letter until after that year. The landlords argued that the new tenants sub-lessees of the original tenants, but the court that they were tenants. The concluded that when "the new lease went into effect, Defendants retained no rights under their lease to the property, and the lease between Plaintiffs and Defendants was terminated, so the deposit withholding letter was sent too late. *Id.* At *3-4.

B. Tenant's Forwarding Address

Tenants argue that the tenant's mailing address or delivery instructions may be oral. The statute does not state that the address or instructions have to be in writing. Tenants argue that this omission is significant, since the same subdivision of the statue specifically requires the landlord to issue a "written" statement showing the specific reason for withholding the deposit and interest. *See Aguero v. Nordlie*, No. CT 90-4474, Order at 46 (Minn. Dist. Ct. 4th Dist. Aug. 20, 1992) (Appendix 29). Landlords argue that the word "receipt" implies an obligation on the tenant to give the landlord written notice of the tenant's forwarding address, but there are no cases supporting this argument.

Receipt of a court complaint suing for return of the deposit satisfies the notice requirement. *Johnson v. Schoen*, 2004 WL 614857 at *2 (Minn. Ct. App. Mar. 30, 2004) (unpublished).

C. Withholding the Deposit

1. Notice to the Tenant

The landlord has the burden of proving that notice was withholding was given to the tenant. *Johnson v. Schoen*, 2004 WL 614857 at *2 (Minn. Ct. App. Mar. 30, 2004) (unpublished).

Because the statute allows a landlord to retain a security deposit only if the landlord notifies

> the tenant of the reason for withholding the deposit, the burden is clearly on the landlord to show that the required statement was provided. By alleging that the record is silent on this issue, appellant demonstrates his failure to carry his burden, and the district court did not err in concluding that appellant failed to give Johnson the required notice of the reason for withholding the $700 deposit.

Id. See Sandy Hill Apartments v. Kudawoo, No. 05-2327 (PAM/JSM), 2006 WL 2974305 at *4 (D. Minn. Oct. 16, 2006) (unpublished) (landlord proved compliance with the statute).

The landlord's written statement showing the specific reason for withholding all or part of the deposit should contain a calculation of the deposit and interest, and specific deductions from that amount. *Aguero v. Nordlie*, No. CT 90-4474, Order at 46-47 (Appendix 29).

2. Basis for Withholding All of Part of the Deposit

The landlord has the burden of proving, by a fair preponderance of the evidence, the reason for withholding all or part of the deposit. Minn. Stat. § 504B.178, subd. 3; *Shahidullah v. Hart*, No. C9-01-1923, 2002 WL 1163630 at *2 (Minn. Ct. App. June 4, 2002) (unpublished) (affirmed district court conclusion that improperly withheld respondents' security deposit); *Dahlberg, v. Dube*, 2002 WL 1163553 (Minn. Ct. App. June 4, 2002) (unpublished) (affirmed trial court finding that tenant did not damage the carpet); *Vogt v. Demeules*, No. C0-92-716, 1992 WL 203287 at 2 (Minn. Ct. App. Aug. 25, 1992) (unpublished) (affirmed trial court finding that landlord "failed to establish the security deposit deductions were necessary to restore the premises to their condition at the commencement of the tenancy, ordinary wear and tear excepted"); *The Gaughan Companies v. Swanson*, No. C3-87-825, 1987 WL 19765 at 2 (Minn. Ct. App. Nov. 17, 1987) (unpublished) (affirmed trial court conclusion that tenant caused damage to the apartment beyond normal wear and tear); *Aguero v. Nordlie*, No. CT 90-4474, Order at 47 - 50 (Appendix 29); *Wahl*, Memorandum at 6 (Appendix 3); Minn. Stat. § 504B.178 (formerly § 504.20), subd. 3c. *See Sandy Hill Apartments v. Kudawoo*, No. 05-2327 (PAM/JSM), 2006 WL 2974305 at *4 (D. Minn. Oct. 16, 2006) (unpublished) (landlord proved compliance with the statute).

The landlord may withhold from the deposit only amounts reasonably necessary to remedy tenant defaults in the payment of rent or other funds due to the landlord pursuant to an agreement, and to restore the premises to their condition at the commencement of the tenancy, ordinary wear and tear excepted. Minn. Stat. § 504B.178, subd. 3; *Aguero*, Order at 34-41, 47-50 (Appendix 29).

a. Tenant Defaults in the Payment of Rent or Other Funds

The determination of whether the landlord has proved tenant defaults in the payment of rent or other funds is a finding of fact by the trial court entitled to deference by the appellate courts. *Johnson v. Schoen*, 2004 WL 614857 at *2 (Minn. Ct. App. Mar. 30, 2004) (unpublished) (tenant owed rent); *Dahlberg, v. Dube*, 2002 WL 1163553 (Minn. Ct. App. June 4, 2002) (unpublished) (tenant owed rent); *Perez v. Wilson*, No. C4-94-2182, 1995 WL 265018 at *3 (Minn. Ct. App. May 9, 1995)

(unpublished) (affirmed trial court finding that tenant owed rent); *Sandy Hill Apartments v. Kudawoo*, No. 05-2327 (PAM/JSM), 2006 WL 2974305 at *4 (D. Minn. Oct. 16, 2006) (unpublished) (landlord proved that tenant owed rent); *Oman v. Dunn*, No. CT 02-18797, 2003 WL 23484600 (Minn. Dist. Ct. 4th Dist. Oct. 29, 2003) (tenant owed rent).

(1) Period of Rent Liability

(a) Acceleration Clauses

Currently unpaid rent for present and past months may be withheld from the deposit. Absent an acceleration clause, the landlord may not sue for future unpaid rent under the lease, since there is no debt for rent until the day on which the rent is to be paid. *Ambrozich v. City of Eveleth*, 200 Minn. 473, 483, 274 N.W. 635, 640 (1937); *Eickhof v. Health Dimensions Rehabilitation, Inc.*, No. C4-99-1908, 2000 WL 558154 at *3 (Minn. Ct. App. May 9, 2000) (quoting *Ambrozich v. City of Eveleth*); *Reinke v. Boden*, No. C6-91-1990, 1992 WL 43306 at *2 (Minn. App. Ct. Mar. 10, 1992); *Odens Family Properties, LLC v. Twin Cities Stores, Inc.*, 393 F. Supp. 2d 824, 831 (D. Minn. 2005) (quoting *Ambrozich v. City of Eveleth*).

(b) Length and Termination of Tenancy

An automatic renewal clause in a lease with an original term of two months or more that renews the lease for a specified additional period of two months or more unless the tenant gives a notice to quit is enforceable only if the landlord, or landlord's agent, gives the tenant written notice directing the tenant's attention to the automatic renewal clause in the lease. The notice must be served personally or by certified mail at least 15 days but not more than 30 days before the date on which the tenant is required to furnish notice of an intention to quit. Minn. Stat. § 504B.145 (formerly § 504.21).

A month to month tenancy can be terminated by giving written notice before the last month of the tenancy. Minn. Stat. § 504B.135 (formerly § 504.06); *Johnson v. Theo Hamm Brewing Co.*, 213 Minn. 12, 16, 4 N.W.2d 778, 781 (1942). A 30-day notice is not adequate if there are 31 days in the month. *Johnson v. Schoen*, 2004 WL 614857 at *1 (Minn. Ct. App. Mar. 30, 2004) (unpublished) ("Johnson was obligated to give a one-month (not 30 days) advance notice to effectively terminate her tenancy. The record clearly shows that she did not do this."). Notice must be served (and received) before the first day of the month in which the tenancy is to terminate. *Oesterreicher v. Robertson*, 187 Minn. 497, 501, 245 N.W. 825, 825 (1932). A defective notice is void, and does not become effective at the end of the next month. *See Eastman v. Vetter*, 57 Minn. 164, 166, 58 N.W. 989, 989-90 (1894).

(c) Tenant Abandonment of the Premises

The tenant's unilateral abandonment of the premises does not terminate the lease or terminate the lessee's obligation to pay rent due. The right to reenter the premises on default or abandonment by the lessee is at the option of the lessor, not the lessee. *Gruman v. Investor's Diversified Services*, 247

Minn. 502, 509, 78 N.W.2d 377, 381-82 (1956). Landlords are under no obligation to mitigate damages after a tenant abandons the premises. *Control Data Corp. v. Metro Office Parks Co.*, 296 Minn. 302, 306, 208 N.W.2d 738, 740-41 (1973).

However, the landlord's acceptance of the tenant's abandonment of the premises constitutes acceptance of surrender, which terminates the lease. *Provident Mutual Life Insurance Co. v. Tachtronic Instruments, Inc.*, 394 N.W.2d 161, 164 (Minn. Ct. App. 1986). Acceptance of surrender may occur by operation of law, when it arises "from a condition of fact that is voluntarily assumed and that is incompatible with the existence of a landlord-tenant relationship. When . . . the lease expressly permits reentry by the landlord, there must be unequivocal proof that the landlord intended to forgive the tenant's further obligations under the lease and accepted the tenant's surrender of the premises." *Id*. (citations omitted). Some leases provide that acceptance of a tenant's surrender will not be implied unless the landlord expressly accepts the surrender in writing.

In *Provident Mutual Life Insurance Co.*, the court held that the jury could reasonably find that the parties intended to terminate the lease following an unlawful detainer action, where the landlord requested that the tenant vacate the premises, the landlord took back the keys from the tenant, the landlord charged cleaning and lock changing expenses to itself rather than the tenant, the landlord discontinued sending monthly rental statements to the tenant, and the landlord's records implied that it had closed the tenant's account. *Id.* at 164-65. The court concluded that the evidence indicated that the landlord at least initially accepted the tenant's surrender of the premises, and that such acceptance "later proved unsatisfactory or not as lucrative as [the landlord] first thought does not justify allowing [the landlord] to later allege the lease had *not* been terminated on the theory that it never expressly acquiesced in [the tenant's] surrender of the premises." *Id*. at 165.

A determination of surrender and acceptance must be made on a case-by-case basis, by reference to the facts and the lease. The fact that the landlord's janitor obtained the keys and cleaned up the apartment after the tenant left does not require a finding of acceptance of surrender. *Cottrell v. Shulind*, 186 Minn. 292, 293, 243 N.W. 62, 62 (1932). Where the tenant vacates the premises following the landlord's notice to terminate the tenancy, the landlord may have accepted surrender of the premises. *Galbraith v. Wood*, 124 Minn. 210, 215-16, 144 N.W. 945, 948 (1914). A commercial landlord's temporary occupation of the premises to prepare it for another business supported a finding that the landlord had not accepted surrender of the premises. *Book v. Asselstine*, 295 Minn. 531, ___, 203 N.W.2d 387, 387-88 (1972). On the other hand, the landlord's extensive remodeling and improving of the premises, or use of the premises for storage purposes either by the landlord or a third party with the landlord's permission may support a finding of acceptance of surrender. *See* R. Schoshinski, American Law of Landlord and Tenant, § 10:11 (list of cases).

There is disagreement over the effect of an unlawful detainer action on the continuing obligation of the tenant to pay rent. Landlords argue that where there is a term lease, the tenant remains obligated to pay rent during the entire term, even if the tenant is evicted for nonpayment of rent or other breaches of the lease. The obligation to pay rent is not conditioned on continued occupancy, and an eviction does not represent an election of remedies by the landlord. Landlords also argue that a

tenant should not be rewarded for the tenant's breach of a lease in failing to pay rent that leads to an unlawful detainer action by relief from further lease liability. Landlords also argue that where the written lease provides that rent shall continue to be due after an eviction action for breach of the lease, filing the action is not evidence of acceptance of surrender.

Tenants argue that eviction of the tenant through an unlawful detainer action is evidence of acceptance of the tenant's surrender. *See Provident Mutual Life Insurance Co.*, 394 N.W.2d at 164-65; *Galbraith*, 124 Minn. at 215-16, 144 N.W. at 948. Tenants argue that since the tenant's obligation to pay rent is dependent upon the landlord's delivery of possession to the tenant, the tenant should not be obligated to pay rent for a period in which the tenant is denied possession of the premises.

Where the landlord re-rents the premises to a third party, the landlord may have accepted surrender as of the date of the third party's first rental payment. *Bowman v. Plumb*, 220 Minn. 547, 550-51, 20 N.W.2d 493, 494-95 (1945) (list of cases); *Maze v. Minneapolis Willys-Knight Co.*, 184 Minn. 5, 6-7, 237 N.W. 612, 612-13 (1931). However, in some cases evidence may show that rerenting the premises to a third party for a lesser amount of rent than in the lease with the original tenant is consistent with not accepting surrender.

(2) Unenforceable Charges and Fees

Provisions for the payment of certain funds or forfeiture of the deposit may be challenged as unenforceable. Courts have held that a month-to-month lease that requires a minimum occupancy greater than the term of the lease to obtain return of the deposit lacks mutuality, since the landlord could terminate the lease within the same period without penalty. *Gustafson v. Apartment Management Co., Inc.*, No. AC-87-6066 (Minn. Dist. Ct. 4th Dist. July 29, 1987) (Appendix 8); *Levernier v. Steele*, No. AC-667 (Minn. Dist. Ct. 4th Dist. Nov. 28, 1986) (Appendix 9).

The Minnesota Attorney General has challenged a similar provision as violating the Prevention of Consumer Fraud and Uniform Deceptive Practices Acts. *In re Chinyere Ike Njake*, No. 453070 (Minn. Dist. Ct. 2d Dist. Aug. 25, 1981) (order and assurance of discontinuance of use of clause) (Appendix 10). The Prevention of Consumer Fraud Act prohibits the "act, use, or employment by any person of any fraud, false pretense, false promise, misrepresentation, misleading statement, or deceptive practice, with the intent that others rely thereon in connection with the sale of any merchandise . . ." Minn. Stat. § 325F.69, subd. 1. The Act applies to residential property rental. *Love v. Amsler*, 441 N.W.2d 555, 558-59 (Minn. Ct. App. 1989). The Uniform Deceptive Trade Practices Act prohibits a number of listed deceptive trade practices. Minn. Stat. § 325D.44 (1988). It also includes a catch-all category of prohibited activity:" [engaging] in any other conduct which similarly creates a likelihood of confusion or misunderstanding." *Id.* subd. 1(12).

Late fees may or may not be enforceable depending on the amount, and whether the parties agreed to them. *See* L. McDonough, Residential Unlawful Detainer and Eviction, Ch. VI, §E.10 (12th ed. January 2011) (posted at http://hamlinetpc.homestead.com/ under Reading).

(3) Defenses to Claims of Nonpayment of Rent

There are many defenses to claims of nonpayment of rent, including breach of the statutory covenants of habitability, lack of a rental dwelling licenses, improper notice to increase rent, waiver of notice to increase rent, retaliatory rent increase, tenant payment of landlord utilities, illegal billing for shared utilities, violation of tenant privacy and security, charges under illegal lease provisions, landlord actual or acquiescence in unlawful activities, lack of joint tenant liability under the lease, and landlord failure to notify a prospective tenant in writing that the property is in foreclosure. *See* L. McDonough, Residential Unlawful Detainer and Eviction, Ch. VI, §E (12th ed. January 2011) (posted at http://hamlinetpc.homestead.com/ under Reading).

b. Damage Beyond Ordinary Wear and Tear

Similarly, the determination of whether the landlord has proved damage beyond ordinary wear and tear committed by the tenant is a finding of fact by the trial court entitled to deference by the appellate courts. *Dahlberg, v. Dube*, 2002 WL 1163553 (Minn. Ct. App. June 4, 2002) (unpublished) (affirmed trial court finding that tenant did not damage the carpet); *Vogt v. Demeules*, No. C0-92-716, 1992 WL 203287 at 2 (Minn. Ct. App. Aug. 25, 1992) (unpublished) (affirmed trial court finding that landlord "failed to establish the security deposit deductions were necessary to restore the premises to their condition at the commencement of the tenancy, ordinary wear and tear excepted"); *The Gaughan Companies v. Swanson*, No. C3-87-825, 1987 WL 19765 at 2 (Minn. Ct. App. Nov. 17, 1987) (unpublished) (affirmed trial court conclusion that tenant caused damage to the apartment beyond normal wear and tear); *Aguero v. Nordlie*, No. CT 90-4474, Order at 47 - 50 (Appendix 29); *Wahl*, Memorandum at 6 (Appendix 3); Minn. Stat. § 504B.178 (formerly § 504.20), subd. 3c.

The costs of carpet shampooing, repainting, redecorating, repair and replacement must be borne by the landlord, unless they result from excessive wear and tear. Landlords argue that, for example, if carpet shampooing is required to eliminate stains or pet odors, and painting and wall patching is required due to holes in the walls, or writing on the walls, the landlord should be able to deduct these costs. Tenants argue that the court should look at the use of the property envisioned by the landlord and tenant, such as occupancy by families with children, smokers, and pets, to determine what is ordinary wear and tear for that household.

A useful method of analysis is to determine whether the repairs would have been necessary, regardless of whether this tenant or another tenant occupied the unit. It is important to consider the condition of the apartment both at the beginning and the end of the tenancy in order to determine whether wear and tear was ordinary or excessive. On one hand, it might be inappropriate for a landlord to charge a tenant for carpet shampooing and repainting at the end of a two year tenancy. On the other hand, if a recently redecorated apartment requires carpet shampooing and repainting after a tenancy of less than six months, such expenses might be due to excessive wear and tear.

It also is important to consider a type of occupancy intended by the parties. For example, a

household of four in a two bedroom apartment may result in more ordinary wear and tear than a one person household in a one bedroom apartment.

There is some disagreement over how the cost of repairs should be allocated. Tenants argue that the tenant should be responsible only for the portion of the repair costs attributable to the tenant's conduct. For example, if a type of carpet has a useful life of ten years, and the conduct of the tenant over five years shortened the life of that carpet to eight years, requiring replacement, and the previous tenant's conduct did not affect the life of the carpet, the second tenant may be liable for 20% of the cost of replacing the carpet with carpet of similar quality. Landlords argue that the tenant should be liable for the entire costs of repairs necessitated by the tenant's conduct.

Questions sometimes arise over whether the landlord can determine the value of the landlord's services in making repairs, or whether an expert witness is needed. Generally the value of anything having a market value may be proved by the opinion of anyone acquainted with the market value of such things. It is unnecessary that such a witness be an expert. *See* 7A Dunnell Minn. Digest 2d *Evidence*, § 7.05(a) at 130 (list of cases). A person also may testify on the value of a person's own services. *Id*. § 7.06 at 134. While such testimony may be admissible, the court then must decide what weight should be given to the testimony. *Id*. §§ 7.05-7.06 at 130-35. *See generally* P. Thompson, 11 Minnesota Practice *Evidence*, § 701.01 (1979 and Supp. 1990).

VI. Landlord's Penalty for Failing to Give Withholding Notice: § 504B.178, subd. 4

Any landlord who fails to provide a written statement within three (3) weeks of termination of the tenancy (or five (5) days after condemnation) and receipt of the tenant's oral or written mailing address or delivery instructions, as required in subdivision 3, shall be liable to the tenant for the following damages: a penalty equal to the portion of the deposit withheld by the landlord, plus interest, in addition to the portion of the deposit wrongfully withheld by the landlord, plus interest. *Id; Shahidullah v. Hart*, No. C9-01-1923, 2002 WL 1163630 at *2 (Minn. Ct. App. June 4, 2002) (unpublished) (affirmed district court award of penalty and punitive damages where landlord failed to return deposit or give notice of withholding it, and failed to prove a valid reason for withholding it).

A. Is the penalty mandatory?

There is some disagreement over whether the penalty is mandatory. Landlords argue that the penalty is required only where there is "wrongful withholding" by the landlord. Thus, if a landlord accidentally returns a deposit in full on the 22nd day, the tenant would not be entitled to an automatic penalty.

Tenants argue that the penalty is mandatory based on the specific language in the statute. If the landlord fails to provide the written statement within the three week period, the landlord "shall" be liable for the penalty. If the landlord does not act until the 22nd day, the tenant is entitled to receive the penalty.

Compliance with the landlord's obligation will be strictly construed. *See Neadeau*, Memorandum at 5-6 (Appendix 7); *Aguero*, Order at 45-46 (Appendix 29).

B. Termination of the tenancy

The three week period begins with termination of the tenancy and receipt of the tenants oral or written mailing address or delivery instructions. The five (5) day period begins with the tenant's departure following condemnation and receipt of the tenants or oral or written mailing address or delivery instructions. If termination of the tenancy (or departure after condemnation) and receipt of mailing address or delivery instructions do not occur on the same day, the period would not begin until both events have been completed. In some cases there will be a dispute as to when the tenancy was terminated. For example, where the tenant in a month-to-month tenancy moves out without giving proper notice, or before the end of the month, or where the tenant under a term lease moves out before the end of the term, the tenancy may continue after the tenant moved out. Even if the tenant gave a forwarding address at that time, the three week period would not begin until the tenancy has been terminated. *See* Rent: Period of Liability, *infra*, III.B.4.

C. Withholding all of the deposit where only part has basis

In *Wahl*, the tenant vacated the apartment of July 31. On August 8, the landlord wrote to the tenant at her parents' address, which the landlord obtained from the rental application. The landlord alleged deductions of $150 of the $500 deposit, but did not return the remaining $350 to the tenant. The landlord offered to return the entire deposit plus interest if the tenant would sign a mutual release. Memorandum at 1-2 (Appendix 3).

The court held that the landlord must return the portion of the deposit which the landlord does not give specific reasons for withholding in the written statement. *Id*. at 3. The court noted that in the circumstances of the case the landlord's lack of the tenant's address was irrelevant, since the landlord corresponded with the tenant by writing her parents. *Id*. at 3-4. The court concluded that the landlord was liable for a penalty of $350 (the amount of the deposit withheld without notice of specific reasons) plus interest. *Id*. at 4.

D. Tenants mailing address or delivery instructions

Subdivision 4 requires that the landlord must have received the tenant's mailing address or delivery instructions before the three week period commences. *See Perez v. Wilson*, No. C4-94-2182, 1995 WL 265018 at *2 (Minn. Ct. App. May 9, 1995) (unpublished) (affirmed trial court finding that landlord did not know of tenant’s new address); *Vogt v. Demeules*, No. C0-92-716, 1992 WL 203287 at 2 (Minn. Ct. App. Aug. 25, 1992) (unpublished) (affirmed trial court finding that landlord did know of tenant’s new address).

However, the statute is unclear as to how and when the tenant must provide the mailing address or delivery instructions and in what form.

Landlords argue that the statutory phrase "receipt" of mailing address or delivery instructions implies an obligation on the tenant to give the landlord written notice, or to otherwise make sure that the landlord has the tenant's new address. Tenants argue that the tenant may give written *or oral* notice of the new mailing address or delivery instructions, since the statute does not specifically require a written statement from the tenant, in contrast with the statute's specific requirement for the landlord to give a written statement for withholding the deposit and interest. *See Aguero*, Order at 45-46 (Appendix 29) (*oral* forwarding address complied with statute).

Landlords also argue that the tenant must provide the landlord with a mailing address or delivery instructions around the time that the tenant moves out. Tenants argue that provision of the address of a close friend or relative in the rental application or earlier correspondence with the landlord could suffice as the tenant's mailing address or delivery instructions. In *Wahl*, the court noted that in the circumstances of the case the landlord's lack of the tenant's address was irrelevant, since the landlord corresponded with the tenant by writing her parents. Memorandum at 3-4 (Appendix 3).

Tenants also argue that in lieu of any other instructions, the tenant's mailing address continues to be the apartment, and the landlord should send the statement to the apartment and the post office will forward the mail if the tenant has provided forwarding instructions to the post office. Landlords argue that the language in the statute requiring that the notice be sent "within three weeks after termination of the tenancy and receipt of the tenant's mailing address or delivery instructions" envisions a mailing address or delivery instructions other than the tenant's own apartment.

VII. Punitive Damages: § 504B.178, subd. 7

Any landlord who retains all or part of the deposit plus interest in bad faith and in violation of the statute shall be subject to $500 in punitive damages, in addition to the penalty discussed above. Prior to August 1, 2010, the amount was $200. 2010 Minn. Laws Ch. 315, § 6.

A. Presumption

If the landlord has failed to comply with subdivisions 3 or 5, retention of the deposit shall be presumed to be in bad faith unless the landlord returns the deposit within two (2) weeks after commencement of an action to recover the deposit. The presumption can be rebutted by evidence of lack of bad faith.

It appears that any violation of subdivisions 3 or 5, create the presumption of bad faith. There is disagreement over what action is necessary to remove the presumption, as opposed to rebutting the presumption. Landlords argue that there is no presumption if the alleged violation of subdivision 3 is corrected within two weeks after commencement of an action to recover the deposit.

Tenants argue that it is return of the deposit within two weeks after commencement of the action, rather than correction of the violation, that removes the presumption. Tenants also argue that violations of subdivision 3 that create the presumption include (I) failure to return the deposit plus

interest or properly notify the tenant within three weeks after termination of the tenancy and receipt of the tenant's mailing address or delivery instructions, or (ii) withholding all or part of the deposit for purposes not specified in subdivision 3. This is in contrast with the subdivision 4 penalty, which refers only to the failure to comply with the three week response requirement of subdivision 3.

B. Bad faith

A separate award of punitive damages is available for each security deposit withheld in bad faith. *Shahidullah v. Hart*, No. C9-01-1923, 2002 WL 1163630 at *2 (Minn. Ct. App. June 4, 2002) (unpublished) (affirmed district court award of penalty and punitive damages where landlord failed to return deposit or give notice of withholding it, and failed to prove a valid reason for withholding it). When there is a presumption of bad faith, the burden is on the landlord to rebut that presumption. When there is no presumption of bad faith, the burden is on the tenant to prove bad faith. Where the court finds that the landlord gave a timely written statement of withholding and there was a good faith dispute over whether the amount withheld is proper, punitive damages would not be appropriate. In *Wahl*, the court assessed $200 in punitive damages, where the landlord, who was an attorney, retained a portion of the deposit to which the tenant was legally entitled, and offered to return the deposit only if the tenant agreed to waive any claim she may have against him. Appendix 3, Memorandum at 4; Appendix 4, Memorandum at 2-4 (Jan. 14, 1988) (on motion for an amended order). *See Aguero*, Order at 50-51 (Appendix 29) (Landlord withheld tenants' deposits and interest in bad faith, since landlord did not have proper reason for withholding deposit and interest).

C. Who Receives Punitive Damages?

As tenants are the intended beneficiaries of the protections of the statute, only tenants are entitled to punitive damages for withholding the deposit in bad faith, and not the successor to ownership of the property. *Townridge Apartments v. Silver Crest Partnership*, No. C6-97-1002, 1997 WL 769489 at *2-3 (Minn. Ct. App. Dec. 16, 1997) (unpublished).

VIII. Co-Tenants

If the tenancy has been terminated and neither co-tenant remains in possession of the premises, a co-tenant may sue for the entire deposit and penalties and punitive damages based upon the entire deposit. However, the remaining co-tenant(s) could sue the successful co-tenant for return of an appropriate portion of the deposit, penalties and punitive damages. *Wahl*, Memorandum at 1-2 (Jan. 14, 1988) (Appendix 4).

There is disagreement over whether the landlord must send the deposit or the deposit withholding letter to each of the co-tenants. Landlords argue that if the landlord has complied with the statute as to one co-tenant by either returning the deposit and interest or sending the written statement, the landlord should not be liable to the other co-tenant who leaves a different forwarding address. Landlords also argue that if there is language in the party's rental agreement or security deposit agreement specifying the party's obligations where there are co-tenants, these provisions may control.

Tenants argue that the landlord's obligation is to each co-tenant, and that the landlord must correspond with each co-tenant. It is unclear whether the landlord who is returning the deposit and interest should apportion it between the co-tenant or send it to one co-tenant and notify the other.

IX. Civil Action for Recovery of the Deposit

The action may be brought in the county where the rental property is located, or at the tenant's option, in the county of the landlord's residence. Minn. Stat. § 504B.178 (formerly § 504.20), subd. 9. The landlord has the burden of proving, by a fair preponderance of the evidence, the reason for withholding all or part of the deposit. Minn. Stat. § 504B.178 (formerly § 504.20), subd. 3.

X. Public and Government Subsidized Housing

The security deposit statute applies to public and government subsidized tenancies as well as private tenancies. *See* National Housing Law Project, HUD Housing Programs: Tenants' Rights; F. Fuchs, Introduction To HUD-Public And Subsidized Housing Programs.

XI. Appendices

3. *Wahl v. Chester*, No. AC-87-4464, Memorandum at 3. (Minn. Dist. Ct. 4th Dist. June 2, 1987)

4. *Wahl v. Chester*, No. AC-87-4464, Memorandum at 1-2 (Jan. 14, 1988)

5. *Praschad v. Maciosek*, No. AC-89-13447, Order at 2 (Minn. Dist. Ct. 4th Dist. Nov. 8, 1989)

6. *Schadweiler v. Kallenbach*, No. AC-88-14279, Order at 1, 4-5 (Minn. Dist. Ct. 4th Dist. Feb. 17, 1989)

7. *Neadeau v. Meldahl*, No. 758638, Memorandum at 1, 2 (Minn. Dist. Ct. 4th Dist. Dec. 13, 1979) (three judge appellate panel), No. 41395, Order at 2 (Henn. Cty. Mun. Ct. Mar. 3, 1969)

8. *Gustafson v. Apartment Management Co., Inc.*, No. AC-87-6066 (Minn. Dist. Ct. 4th Dist. July 29, 1987)

9. *Levernier v. Steele*, No. AC-667 (Minn. Dist. Ct. 4th Dist. Nov. 28, 1986)

10. *In re Chinyere Ike Njake*, No. 453070 (Minn. Dist. Ct. 2d Dist. Aug. 25, 1981)

29 *Aguero v. Nordlie*, No. CT 90-4474, Order at 46 (Minn. Dist. Ct. 4th Dist. Aug. 20, 1992)