



PROFESSIONAL APARTMENT MANAGEMENT[®]

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Use Lease Addendum to Evict Residents for Criminal Activity

Residents involved in criminal activity can compromise the safety of other residents and your employees. Plus reports of criminal activity at your community can destroy its reputation, causing vacancies. Furthermore, if a resident or employee is the victim of a crime, he may sue you, claiming that you didn't do enough to prevent crime at your community. In fact, these days courts are more likely than they used to be to hold owners and managers responsible for ensuring safety at their properties, says Arizona attorney Denny Dobbins. This is especially true if you knew about the criminal activity but did nothing to try to stop it, he adds.

In many cases, stopping the criminal activity is impossible, though, unless you evict the resident or residents involved. That's why Dobbins suggests that all owners include a lease addendum that gives them the right to evict residents involved in criminal activity on and off their property. With Dobbins' help, we've put together a Model Lease Addendum that you can adapt for use at your community (see pp. 3-4).

How Lease Addendum Helps

Many leases have clauses barring residents from engaging in certain specified criminal activities on or off property. These clauses may also bar residents from engaging in legal but prohibited activities, such as conducting a business from the apartment. The problem with these clauses is that they often lump together different activities and don't give owners the right to evict residents for engaging in these prohibited activities.

One way to handle this is to create a lease addendum that specifically addresses criminal activity (rather than lumping it in with lesser lease violations) and that gives the owner the right to evict if a resident engages in criminal activity, says Dobbins. Such an addendum may also help deter crime. That's because residents usually pay more attention to a lease addendum that they must sign separately, he explains.

Check State Law First

Before you add a lease addendum addressing crime, check your state's law to see if it's necessary. In some states, landlord/tenant law automatically gives the owner the right to evict a resident for certain illegal activities, says New York attorney Lucas A. Ferrara. For example, New York law lets

control whether the boy's conduct was criminal activity banned by the lease. A common sense interpretation of the lease would include delinquent acts by minors that threaten others, so the owner could evict the mother and her son [Stout v. Kokomo Manor Apts.].

7) State that one violation is good cause for lease termination. To convince a court to let you evict a resident for a violation of your addendum, you must show that the resident violated a very important, or "material," part of the lease. Many owners fail to specify in their lease addendum that not committing criminal acts is a material duty under the lease. Like HUD's "one strike and you're out" clause, your lease addendum should give you the power to evict after any instance of criminal activity, and not just after your resident has become a repeat offender [Add., par. 6].

Failure to make this point leaves it up to the courts to decide. Owners who assume that courts will take their side because criminal activity is involved are taking a big—and unnecessary—risk. As our Model Addendum does, be sure to put this statement in capital letters and in boldface type. You want to be sure that residents see it. Highlighting it will make it tough for residents to convince a court that they didn't know about it.

8) Specify that a criminal conviction isn't necessary for eviction. Don't let a resident argue that he or his guest has just been charged with and not convicted of a crime, or that the charges were later dropped. Eviction is a civil proceeding, and the burden of proof in a civil proceeding—called "a preponderance of the evidence"—is much lower than the "beyond a reasonable doubt" requirement for a criminal proceed-

ing. Besides, having to wait for a conviction could mean waiting months, even years, to evict a resident who has committed a criminal activity [Add., par. 6].

9) Say that addendum supersedes lease and will be incorporated in lease. Make sure that your addendum says that it supersedes the lease and will be incorporated in the lease to protect yourself against claims by residents that they didn't violate the lease and so can't be evicted [Add., pars. 7 and 8]. ■

PAM Sources

Denny Dobbins, Esq.: Koglmeier, Dobbins, Smith & Delgado, P.L.C., 715 N. Gilbert Rd., Ste. 5, Mesa, AZ 85203-6656; (480) 962-5353

Lucas A. Ferrara, Esq.: Finkelstein Newman LLP, 225 Broadway, 8th Fl., New York, NY 10007; (212) 619-3090

DEALING WITH CONTRACTORS

Delay Clause Helps Keep Contractors on Schedule

When you hire outside contractors to renovate or repair your apartments, you want them to finish as quickly as possible. The longer they're in an apartment, the more rental income you lose. But what if the work isn't finished by the deadline set in the contract? You'll have a loss of rental income that grows daily until the contractor finally finishes.

You may be able to recoup that loss from the contractor, though, if you include a clause in your contractor agreements that provides for damages for delay. We'll tell you how such a clause can help and give you a Model Clause you can adapt for your own use (see p. 6).

How Delays Cost Money

Every day that an apartment is unoccupied, it doesn't earn rent. In addition to losing rental income, you must pay gas and electric bills for the apartment. That can add up quickly, says John E. Osborn, a New York attorney who specializes in construction law. Also, you may have hired a particular contractor instead of another because it promised to be finished sooner, says Osborn. And if you agreed to pay a higher price for that contractor and he's delayed, you've lost the benefit the higher price bought you, he says.

How Contract Clause Helps

Contractors frequently take on more work than they can handle. They pre-

fer to get as much work as they can and worry later about how to get it all done. If a more profitable project comes their way, they'll take it and may take workers off your project in order to handle it, says Osborn. Putting a clause in your contract requiring the contractor to pay for any delays puts the contractor on notice that you mean business—and takes away the economic advantage for the contractor to delay your project.

When to Use Clause

"We try to put a damages-for-delay clause in our contracts whenever we can," says Terry Schwartz, president of the Village Green Companies in Michigan. If there's a lot of

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DEALING WITH CONTRACTORS

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construction or renovation work in your area, though, it may be hard to do. "If the contractors are busy, they won't agree to it because they don't have to," says Schwartz. In a busy market, contractors have no trouble finding clients that won't hold them to such a promise. Also, if your project is a small one, a contractor likely won't agree to a damages-for-delay clause.

Schwartz includes the clause in contracts for small projects if he can, but it's rare. Small projects usually aren't profitable enough for contractors to risk paying your delay expenses if they don't finish on time. But he insists on them in large construction or renovation projects. "For example, we put a damages-for-delay clause in our fire restoration contracts," he says. That's because fire damage takes apartments off the market unexpectedly. "Every day counts in getting those apartments back into action, and fire restoration contractors know it," he says. So they have little choice but to agree.

The bottom line is that you should put the clause in your contracts when you have a choice of contractors and can send your business elsewhere if a contractor refuses to agree to it. But in a tight construction market, you may not be able to.

What to Say in Clause

To put contractors on notice that they need to finish when promised, and to help compensate you if they fail to do so, add a damages-for-delay clause to your contractor agreements. Your clause, like our Model Clause, should say four things:

1) You're entitled to actual damages if the work is delayed. Say that if the work is delayed, the contractor

must compensate you for your actual damages. What is "actual damages"? "Actual damages is the money you lost because of the contractor's delay," says Osborn. We explain what these damages include below.

2) Actual damages includes out-of-pocket costs. An out-of-pocket cost is money that you spend because of the contractor's delay. For example, say that you're rewiring and repainting an apartment. The electrician is scheduled to finish on Wednesday, and the painter is scheduled to begin on Thursday. If the electrician doesn't finish by Wednesday, the painter won't be able to start work as scheduled and you'll probably have to pay him for waiting around until the electrician finishes. The money you have to pay the painter is an out-of-pocket cost. You wouldn't have had to pay it if the contractor had finished on time.

3) Actual damages includes "consequential damages." "Consequential damages" is a legal term for the money you lose because of the contractor's delay. For example, say you hire a contractor to renovate kitchens in vacant apartments in time for your big summer leasing push.

The contractor doesn't finish on time, and your apartments sit vacant while the rush of summer traffic heads for your competition. You've lost the rent that those apartments would be earning if the contractor had finished on time.

4) Actual damages includes any damages you may be able to prove. You don't want to limit yourself to out-of-pocket and consequential damages, says Osborn. There may be other damages that arise. For example, say that you're the owner of the community and you promised your manager a bonus if occupancy was at a certain level on a certain date. But occupancy can't be at that level on that date because the contractor is still working on the apartments. Your manager comes to you, looking for her bonus. You may be able to recover the bonus you owe her if you can prove that she would have earned it had the contractor finished on time. ■

PAM Sources

John E. Osborn, Esq.: 110 E. 31st St., New York, NY 10016-6809; (212) 576-2670

Terry Schwartz: President and Chief Operating Officer, Village Green Companies, 30833 Northwestern Hwy., 3rd Fl., Farmington Hills, MI 48334

MODEL CONTRACT CLAUSE

Use Contract Clause to Collect Damages for Delay

We drafted this contract clause with the help of New York construction law expert John E. Osborn. The clause says that if the project takes longer to complete than the contractor estimated, the contractor must pay the owner any

damages that the delay causes. These damages will include out-of-pocket costs, consequential damages, and any other damages the owner can prove. Talk to your attorney about adapting this clause for your own use.

DAMAGES FOR DELAY

Owner is entitled to actual damages against Contractor in the event of any delay or delays in the completion of the Work. Such actual damages shall include, but not be limited to, out-of-pocket costs, consequential damages, and such other damages as Owner may prove.