

D17 LEGAL BULLETIN

Advice for Guardians of the Last Frontier



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Living on the Economy Series

Number 1: Lease Reviews

Tenants Paratus: Prepare before you Sign a Lease

Your legal assistance attorney is available to review prospective leases, even if the lease is outside Alaska and even if the lease is with a fellow Coast Guard member, active or retired. Often legal assistance clients have found they could have saved themselves a great deal of misery and money by proactively presenting the lease for review before signing it.

A lease is an agreement for the rental of real property. Its purpose is to establish the rights and obligations of both parties—generally, allowing the tenant’s quiet enjoyment of the property for the term of the lease, subject to the tenant’s obligation to pay monthly rent. Once signed, it is a valid contract, binding both parties for the lifetime of the agreement. As with any contract, the terms of a lease are negotiable. If a landlord objects to your having a lease reviewed by legal before you sign it, you should consider that objection a clue that you do not want to do business with that landlord. Remember, once you have signed the lease, you are bound by its terms for the duration of the contract; waiting to have the lease reviewed before you sign may be too late.

Alaska law does not require that a lease contain any particular elements. In fact, there is no requirement that there be a lease at all. If there is a written lease, it should include, at a minimum, the identity of the premises to be rented; the term of the lease; the amount of monthly rent, including where and when it is to be paid; the amount of security deposit required to take possession and where it is to be held; whether pets will be permitted; and the amount of late fee to be charged, if any. Beyond those essentials, no two leases are likely to be the same, though there are common breaches of Alaska law we see most often.

Of course all this begins with the warning to never sign a lease without actually seeing the property. Yes, property is scarce in much of Alaska. Yes, the house may not be available when you arrive. However, the lease you sign likely will include your affirmation that you have seen the premises and are satisfied with it. Even if you signed the lease from Florida, that “as is” clause will serve as strong evidence that you have, in fact, seen the premises and are satisfied with it in the event you arrive and decide the home is not to your liking. Even with video conferencing capability, you likely see only the aspects of the home the landlord wants you to see. Therefore, if you must sign the lease before seeing the property, it is recommended that the lease also include some sort of “escape” language to allow you to terminate the lease if you arrive and find the home is not what you anticipated. For example, the lease could include a statement that the tenant has ten (or five) days after arrival to view the home for defects and, if necessary, rescind the lease. Keep in mind, though, that there may be a financial penalty involved with that decision.

When you do present a lease for our review, there are five primary issues we consider. This article will examine those five common issues, in light of the member's need to obtain housing in a tight housing market. For example, no portion of any security deposit may be retained by the landlord without documentation of accrued rent or damages. Therefore, we look closely for the characterization of any deposit as "non-refundable" in any lease presented to us for review. By the same token, we look at how the lease treats pets. Often, that treatment is contrary to the provisions of the Alaska Statutes. Additionally, while one measure of damages may be professional carpet cleaning, how that is covered also is important. Attorney fees are relevant, because Alaska law prohibits a lease from requiring the tenant to pay the landlord's attorney fees, and finally, an Alaska lease should refer to Alaska law, and not the law of other states. Those are issues that apply to a lease for a rental home in Alaska, but the legal assistance attorney can also review a non-Alaska lease to consider general contract law and issues of fairness and to interpret terms.

Non-Refundable Deposits

The first thing to look for in any lease is the words "non-refundable" as they relate to any portion of any security deposit. A "non-refundable" deposit is illegal under Alaska law. Non-refundable deposits probably are the one item I target most specifically, because they allow the landlord to collect damages without justification or documentation, often permitting collection of damages when no damages have occurred or double compensation for damages that did occur. If any of your deposit purports to be "non-refundable," you should ask the landlord to strike those words from the lease.

Unquestionably, the application of the tenant's deposit toward damages is the primary landlord-tenant issue we see in the legal assistance office. The application of the security deposit is governed by the Alaska Residential Landlord and Tenant Act in Alaska Statute 34.03.070. AS 34.03.070(b) permits the landlord to withhold the tenant's money deposited with the landlord only for accrued rent and damages that are not the result of normal wear and tear, defined as "deterioration that occurs from the intended use of the rental unit and without negligence, carelessness, accident, misuse, or abuse of the premises or contents by the tenant, members of the household of the tenant, or the invitees or guests of the tenant." AS 34.03.070(i)(1). Retaining a deposit because the landlord has deemed it "non-refundable" violates that law, because it withholds from the tenant's deposit for normal wear and tear.

One can reach that conclusion simply by relying on the definition of a deposit: something of value given as security and held by another for safekeeping or to secure payment on an account. In a landlord-tenant relationship, the tenant deposits her money with the landlord to secure against damages that **might** occur to the premises during the tenancy. In all instances, it remains the depositor's money until the landlord properly has assessed for damages. If it were to be non-refundable without regard to any costs incurred by the landlord, it would cease to be the tenant's money on deposit and would become the landlord's money upon execution of the lease.

That applies to all moneys deposited with the landlord, whether called a "non-refundable deposit" or a "fee." The law limits the amount of money a landlord can demand from a tenant as "prepaid rent or a security deposit, **however denominated.**" AS 34.03.070(a). Attempting to call a deposit a "fee" does not change its character as a deposit, since its intent is to compensate the landlord for cleaning that may be necessitated by the tenancy. Likewise, it does not change its character as refundable if the tenant thoroughly has cleaned the unit so that no cleaning had been necessitated by the tenancy. If the tenant left the unit as clean as the condition of the premises permit, the landlord's "non-refundable cleaning fee" would violate AS 34.03.070. The effect would be to take the tenant's money even though the landlord had not been damaged. More egregiously, it may result in double compensation to the landlord for the same damages--

once with the retention of the “non-refundable” deposit, and again for the itemized damages for which the deposit permissibly may be retained.

Pets

Applying that same analysis, a “non-refundable” pet deposit is illegal under Alaska law, because it takes the tenant’s money for damages that may not have even occurred. However, Alaska law now makes that prohibition even clearer. AS 34.03.070(h) permits a landlord to “demand or receive an additional security deposit [equal to one month’s rent] from a tenant who has a pet on the premises that is not a service animal”, notwithstanding the limitation in AS 34.03.070(a). However, it confirms that the additional money may only be applied to “the amount of damages that are directly related to the pet of the tenant.” The landlord must itemize the damages attributable to the pet and retain only that amount of damages from the deposit. If there are no damages directly related to the pet, the landlord may not withhold from the deposit, regardless of the language in the lease.

If pets are to be allowed, the landlord may collect an additional pet deposit to compensate for the additional damages pets **might** cause. They may not predetermine damages or even assume damages will occur. If the animal is housebroken and does not chew or scratch the home or its furnishings, and if the tenants vacuum the hair (or have a variety that does not shed), then there would be no damage beyond normal wear and tear, and the landlord would be, essentially, stealing the tenant's money. Still, “non-refundable pet deposits” continue to abound throughout Alaska.

Carpets

Whether or not the tenant has pets, landlords’ assessment of damages related to professional carpet cleaning has been an issue in Alaska for many years. Until September 2014, it was definitively an element of normal wear and tear, and the landlord could not require the tenant to professionally clean the carpet or charge a “non-refundable” fee for doing so. Nevertheless, many landlords retained “non-refundable” carpet cleaning fees simply because the lease provided for it, even if the tenant had cleaned the carpets before vacating.

Now, AS 34.03.120(c) permits the landlord to require "professional cleaning the carpets **if the carpets were professionally cleaned immediately before the tenancy began.**" If you are a landlord, it is a good idea to confirm in your lease that you professionally cleaned the carpets immediately before the tenant took possession and that the tenant shall professionally clean the carpets immediately before returning the premises to the landlord. However, the landlord still may not claim a “non-refundable” charge for carpet cleaning at the outset of the lease. For example, the landlord cannot charge the tenant a \$500 carpet cleaning fee if the tenant professionally cleaned the carpets for only \$50. Additionally, if a tenant does not want to pay for professional carpet cleaning (for example, for carpet that clearly is very old to begin with), the tenant should demand the landlord produce a receipt proving the carpet had been cleaned before the tenant took possession. That is the same level of proof the landlord would require of the tenant to prove the tenant had cleaned the carpets.

Attorney Fees

It is common in many of our sister states for leases to contain a provision requiring the tenant to pay the landlord’s attorney fees incurred as a result of any dispute related to the tenancy. AS 34.03.040(a)(4) specifically prohibits that provision. Should a dispute arise, the landlord may obtain an attorney fee award under AS 34.03.350, which requires a court to award attorney fees to the prevailing party in any proceeding

arising out of the Landlord-Tenant Act. Therefore, if the lease is to mention attorney fees, it should confirm that the prevailing party is entitled to the award.

Nevertheless, we still occasionally see attorney fees provisions in some leases. Because of such a clear prohibition in the Alaska Statutes, they raise suspicion whether the landlord will deal fairly with the tenant. Often the landlord will use the attorney fees clause to intimidate the tenant into avoiding taking action to protect the tenant's rights. The landlord's threat that "if you don't do what I'm asking, I'll get my attorney involved, and you'll have to pay for it," indeed can be quite intimidating for the already financially strapped tenant.

If your proposed lease requires the tenant to pay the landlord's attorney fees, ask the landlord to strike that provision, or reconsider whether it is a lease you want to sign.

References to Laws of Other States

One reason Alaska leases sometimes contain illegal provisions such as the requirement that the tenant pay the landlord's attorney fees is because many leases are not written to conform to Alaska law. Seeing a reference to the law of another state is the one other deficiency that causes me look closer at the proposed lease. Believe it or not, it does happen. For example, I have seen leases for Alaska rentals that have referenced the Civil Code (California), RCW (Revised Code of Washington), and Wisconsin Statutes. Others refer simply to "The Act," without indicating to which "Act" it is referring.

The landlord may have found a pattern lease online, or perhaps the landlord is using the same one he used for his property in another state. While that by no means is a reflection on the landlord's integrity, suffice to say those leases at least deserve a closer look.

What if you've already signed the lease?

Usually, if one of these provisions is in the lease you already have signed, the landlord will argue you signed the lease and therefore are bound by its terms, even if those terms are illegal. That is not true. As a consumer protection statute, the protections provided by the Landlord-Tenant Act cannot be waived by contract. That a tenant agreed a deposit is "non-refundable," for example, does not make it so. It is well-settled that a contractual provision that negates a consumer's rights is invalid, regardless of the number of iterations in the contract. The banks, credit card companies, and mortgage servicers—and some landlords—would love for the law to be otherwise, but it is not.

The Alaska Landlord and Tenant Act handbook, a publication of the Alaska Department of Law (Attorney General), provides a summary of Alaska landlord and tenant rights. Page six includes this language: "Illegal provisions in an agreement are not enforceable against the tenant, even if both parties sign." Alaska Court System PUB-30, *Alaska Landlord and Tenant Act* (June 2017), page 6. Landlords cannot simply abrogate the law by superseding it with contractual obligations in a lease.

So even if you've already signed a lease, it never is too late to have legal take a look. It always is better to review the lease before you sign, but if you did not, the second-best alternative is to know your rights before problems arise at the end of the tenancy.

Legal Assistance is a free benefit available to active duty service members and their dependents and retirees and their dependents. It is available by appointment to review leases anywhere in Alaska, generally within the next business day. Call the Legal Assistance office at (907) 487-5474 for an intake to start the process.

Need a D17 Legal Assistance Form? Visit our D17 Website at:

<https://www.pacificarea.uscg.mil/Our-Organization/District-17/Offices/Legal-office/Legal-assistance/>