



Landlord News

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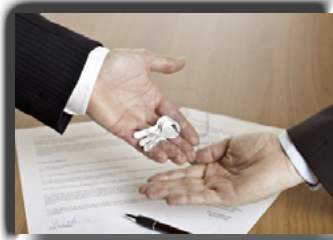
FAX Completed Eviction Forms To: 303.766.1181 or 303.766.1819

FAX Completed Eviction Forms To: 719.227.1181

HAS YOUR RESIDENT FLOWN THE COOP? ABANDONMENT 101

We regularly deal with abandonment situations for clients. Some cases are clear-cut. However, many abandonment scenarios are murky at best. Because the issue of abandonment turns on the facts of each case, abandonment situations can be difficult to analyze. You shouldn't have to evict a resident who has abandoned. But if you make the wrong call, the resident may sue for wrongful eviction. To assist you in evaluating abandonment situations, this month we discuss the law of abandonment, practical considerations, and best practices.

Legally, abandonment is a two-part fact question. Is the resident gone? Does the resident intend to give up his possessory rights in the unit? The answers to these questions are determined on a case-by-case basis. There is no black and white test. However, Colorado law is clear on your rights if a resident has abandoned his unit. You may properly take possession of an abandoned apartment unit without having to go through an eviction.



When Colorado enacted the warranty of habitability law in 2008, the law codified common lease language covering abandonment. Specifically, the law provides that "it shall be unlawful for

a landlord to remove or exclude a tenant from a dwelling unit without resorting to court process, . . . unless the dwelling unit has been abandoned by the tenant as evidenced by the return of keys, the substantial removal of the tenant's personal property, notice by the tenant, or the extended absence of the tenant while rent remains unpaid, any of which would cause a reasonable person to believe the tenant had permanently surrendered possession of the dwelling unit."

Based on the foregoing statute and case law, if the resident has abandoned (voluntarily relinquished possession of the unit), your reentry, even if it constitutes an

CONTINUED ON PAGE 2

A Collection Coach Tip USING A JUDGMENT FOR POSSESSION AS A COLLECTION TOOL

When screening a potential tenant, along with many other factors, landlords consider prior evictions, or judgments for possession, as an indicator of the quality of the potential tenant. Because previous judgments for possession are important to landlords, many tenants who come to court for the initial eviction court date are concerned about having an eviction on their "record" that will prohibit them from renting property in the future. You can use this concern to your advantage to collect the money due from the tenant.



In the THS court stipulation, a tenant agrees that a judgment for possession will enter, and after five (5) days, the sheriff can supervise a physical move-out. The attorneys let the tenant know that they have the option to make arrangements to pay during the five (5) days as well, but that accepting payment or making arrangements is in the landlord's sole discretion. The stipulation also states "both parties specifically reserve all money and damage rights not specifically set forth in this Stipulation" This means that the landlord and tenant are not agreeing to an amount owed, and both the landlord and tenant still have the right to pursue money issues at a later date.

When a tenant asks how the stipulation will affect their "record," the attorney will let them know that a judgment for possession will enter that may show up in screenings by future landlords. However, they have the option to talk to their landlord about vacating the judgment and dismissing the case, which the landlord may consider after they pay all of the money they owe. Even if

CONTINUED ON PAGE 2

HAS YOUR RESIDENT FLOWN THE COOP? ABANDONMENT 101

CONTINUED FROM PAGE 1

eviction, is not wrongful. If the issue goes to court, you will have to prove two elements for the court to find that the resident abandoned the unit. First, you must prove the act of abandonment, i.e. the resident moved out. Second, you must prove that the resident intended to surrender possession of the unit. Evaluating abandonment situations can be problematic because the resident's "intent" must be established, and in many cases, the evidence to prove abandonment, especially intent, is circumstantial (indirect evidence).

If you retake the unit, based on the resident's abandonment and the resident sues, you bear the burden of proving the resident abandoned. In some cases, you will have direct evidence to prove abandonment. Direct evidence of abandonment includes turn over of keys, and written notice of intent to vacate. Verbal statements (I'm moving out) are also direct evidence of abandonment, but can lead to "he said, she said" scenarios, which should be



avoided. Always proceed with caution when relying on a verbal statement of intent to vacate, especially when you walk the unit and it doesn't appear that the resident has moved out.

Lacking direct evidence of abandonment, you can only make an abandonment determination based on indirect evidence (circumstantial evidence). While not a complete list, the following facts, coupled with the resident being gone, are circumstantial evidence of a resident's intent to abandon: rent is unpaid; can't contact resident after repeated attempts over time; no one has seen the resident; the resident's vehicle is gone; utilities and/or phone is disconnected, or has been transferred back to the landlord or community; all food has been removed, or remaining food is spoiling; toiletries removed; most furniture has been removed, especially beds; mail is stacking up, or is forwarded; children have not been seen, or are not in school; storage locker emptied; clothing removed. It is not absolutely necessary to have keys to retake possession, but if you don't have them, you must have other solid facts to support your abandonment assessment.

If the resident is gone and rent is unpaid, this doesn't necessarily equal abandonment. Several of the other critical facts indicating abandonment should also be present before you conclude that the resident abandoned. A Colorado court found that a resident had not abandoned the unit, even though the rent was unpaid for several months and the resident had been gone for a substantial period. The court based its finding on several

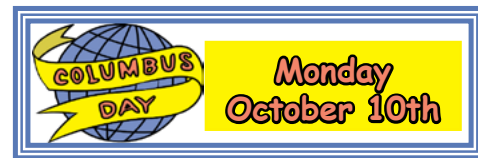
USING A JUDGMENT FOR POSSESSION AS A COLLECTION TOOL

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a tenant never comes to court and a default judgment for possession enters against the tenant on the court date, but the tenant later contacts the landlord later to see if they can remove the eviction from their "record," the landlord can still vacate the judgment and dismiss the case once all amounts are paid by the tenant.



There are tenants who don't care about their credit, eviction history, or a collection action. This tactic won't work for these tenants, but tenants who care about their "record" will be happy to exchange payment of the amount due for vacating and dismissing the possession judgment.



HAS YOUR RESIDENT FLOWN THE COOP? ABANDONMENT 101

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facts. First, all of the resident's property was still in the unit. Second, and most importantly, the resident had a history of paying rent late with the landlord's consent. Because the landlord wrongfully took possession of both the unit and the resident's property, the court found that the landlord had wrongfully evicted the resident, and awarded the resident \$13,000 in damages, plus another \$13,000 in punitive damages.

If the rent is unpaid, the resident's bed, clothes, toiletries, and food are removed or rotting, are strong circumstantial evidence of abandonment. Based on these facts, we would advise the client that the resident has abandoned, even if significant property remains, especially if the remaining property is of little value. Here is an example of a more difficult, and unfortunately, common scenario. The resident is gone, but substantial property remains. The resident may have abandoned, but you can't leap to this conclusion. You must still carefully evaluate the situation. If after evaluating the situation, you determine, based on the type and quality of remaining property, that the resident has abandoned you should follow best practices to insulate against future claims. Always keep in mind that one man's trash is another man's treasure.

Liability and damages must be proven in every lawsuit. Assuming that you made the wrong call and the resident didn't abandon, you can substantially limit

CONTINUED ON PAGE 3

HAS YOUR RESIDENT FLOWN THE COOP? ABANDONMENT 101

CONTINUED FROM PAGE 2

resident damage claims by following best practices. Even if the substantial property remaining is junk, you should always have at least two parties walk the unit, take photographs of all property, and prepare an accompanying inventory list, and have the two team members who walked the unit sign the list. When taking the photos, be sure to include pictures of the entire unit and each room in unit, not just the remaining property. Even if the resident turned in keys, taking photos is still a good idea. While you may think it is a waste of time to photograph and inventory property that you couldn't give away, this practice is critical to reduce and eliminate claims stemming from abandonment disputes, particularly fraudulent claims.

Residents frequently assert these claims months, or even years later. By the time a resident makes a claim, the onsite team may have completely changed. Even if the onsite team hasn't changed, the onsite team will have dealt with dozens, if not hundreds, of trash outs or make-readies. It is unrealistic and bad practice to count on somebody's memory. Without photos and an inventory, the resident now turns the situation into the classic "he said, she said" scenario. The resident's abandoned property now becomes a 400 CD collection, 2 TVs, an Xbox, heirloom jewelry, and a \$5,000 wardrobe. With your inventory and photos, the resident's false claims will get shut down in court. The resident may not even try and go to court once he knows you have photos and an inventory to prove his fraudulent claims.

Based on the number of abandonment situations we have handled for clients, here is some practical advice. Even if countless facts support abandonment, you should never clear an entire unit full of property without a court order for possession. Similarly with respect to garages or storage areas, even if you don't know whose garage or locker it is, or you do know which resident the garage or locker belongs to and that resident hasn't been seen in years, you should proceed cautiously before emptying (trashing) an entire storage locker or garage unit full of property.

You should never discard important documents (visas, passports, birth certificates, or other official documents), or obviously sentimental items (photo albums) without carefully evaluating the situation. Even if the resident has abandoned, discarding these items will likely lead to a time-wasting dispute or lawsuit. Don't assume plastic trash bags are being used for trash. Many residents use them to move their belongings. Always examine the contents. We have dealt with numerous disputes involving trash bags being tossed, only to have the resident claim

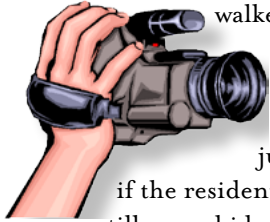
some valuable property was inside, and that they were still in the process of moving out.

Regardless of what your lease says, abandonment issues in any lawsuit will be determined based on the law. However, lease language can and should add an extra layer of protection against potential damage claims. Such language should state that if the resident abandons, the resident irrevocably waives all title and interest resident has to such property and grants you the full authority to immediately dispose of same without notice, court order, or accountability. Your lease should also address the death of a sole resident by stating that a sole resident abandons ten days after death.

In most circumstances it is not advisable to store resident property after abandonment. However, it may be advisable in some circumstances. For example, if a resident has abandoned but left a box full of photo albums, you should carefully evaluate the situation before discarding the box. Even if the resident is long gone, even if the evidence of the resident's intent to abandon is undisputed, and even if your lease gives you the right to dispose, the resident is likely to sue you. Even if you win, you will still incur significant costs to defend it, and your time will be wasted dealing with the lawsuit.

If you store property after a resident abandons, the law imposes duties on you. You must use reasonable care (regardless of what your lease says) in storing and preserving the property. You should contact us for proper advice in dealing with abandoned personal property to eliminate future liability. Most problems in dealing with abandoned personal property can be addressed by proper lease language. Your lease should require the resident to provide both you and the United States Postal Service with a forwarding address. Not all residents will do this, but this lease requirement makes it much easier to eliminate liability associated with abandoned personal property.

We have a simple rule regarding abandonment scenarios. You should always evict if it is a murky situation, a close call, or if there is any doubt regarding the resident's intent to abandon. A lawful court order granting you possession of the unit (an eviction) is an inexpensive insurance policy against a resident's potential future claims that the resident had not abandoned, and you wrongfully threw out the resident's property. Because an eviction provides due process and an opportunity to be heard, a resident's failure to respond and an accompanying court order for possession insulates you against resident claims. You should always err on the side of caution. In unclear cases, it makes no sense to save the small cost of an eviction for the potential of thousands of dollars of future liability.



IMPORTANT THS OCTOBER DATES

- Oct 7th **BOULDER COURT CLOSED**
- Oct 10th **ALL COURTS CLOSED
(Except Denver)
COLUMBUS DAY HOLIDAY**
- Oct 12th **Advanced Fair Housing
THS Lower Conference Center
3600 S. Yosemite Street
Denver, CO
8:30 a.m. - 11:30 a.m.**
- Oct 20th **Colorado Springs Client Lunch
The Ritz Grill - Elbo Room
15 South Tejon St.
Colorado Springs, CO
11:30 a.m. - 1:00 p.m.**
- Oct 21st **South Client Lunch
Dave & Buster's
2000 S. Colorado Blvd.
Denver, CO
11:30 a.m. - 1:00 p.m.**



AAMD Chili Cook-Off

October 15 11:00 a.m - 3:00 p.m.
Redi Carpet Warehouse
14800 E. 35th Place Denver



Don't Miss Out On The Fun!

**Stop By the THS Booth
For Chili And A Lot More**

*Don't judge each day by the
 harvest you reap but
 by the seeds that you plant"*

Robert Louis Stevenson