A PROPER SODA MAXIMIZES CHANCE OF SUCCESS IN COURT

Everyone is familiar with a security deposit disposition report or a SODA (Statement of Security Deposit Activity). However, the importance of a SODA in landlord collection cases is often overlooked. When a landlord or management company files a collection case, the SODA is the most important document to prove your case for rents and damages. When landlords file collection suits, residents sometimes counter sue for the return of security deposits. Under the Colorado Security Deposit Act (the "Act"), you are required to complete and send a SODA to the resident. Thus, not only is a SODA critical to a collection case, but also it is legally required, and critical to defending against a former resident's security deposit claim.

You have the burden of proof in resident collection and security deposit cases. The Act reverses the burden of proof requiring the landlord to prove that any deposit was not wrongfully withheld even though the resident is asserting the claim. Any failure to accurately and professionally complete a SODA weighs heavily against the landlord in court. The judge reasons that if you can't accurately fill out standard legally required paperwork, how can he trust the underlying charges? To avoid having a judge draw negative conclusions from your SODA, you should follow key guidelines when completing a SODA.

The SODA should always list the critical data regarding the resident's lease, i.e. lease term (beginning and end date), move-in date, and move-out date. The SODA should also include "all" deposits. We regularly review SODAs. All too frequently, a SODA will fail to include pet and other deposits. At a collection trial, the re-rental date can be a critically relevant fact. However, the re-rental date is seldom included on a SODA. If known, you should always include the re-rental date on a SODA. If the unit has not been rented yet, the SODA should indicate "vacant".

SODAs should be legible (typed not handwritten), and easily understandable by the average lay person. A teenager should be easily able to follow the math on a SODA. This point cannot be overemphasized. Total charges (less) total deposits (equals)

balance owed or refunded. The Firm's attorneys have over seven decades of legal experience. However, we frequently can't follow SODAs because the math on the SODA is not clear and simple. If an attorney with twenty years of security deposit experience has trouble deciphering your SODA, the court will too. Have any person read a SODA. If they don't quickly understand it or have questions, then the SODA is not as clear as it needs to be.

Sometimes SODAs are hard to understand because of handwritten notes and cross-outs. Never make any handwritten corrections on a SODA. If corrections need to be made, then issue a new amended SODA sheet and send to the resident. Crossing out the charges and writing in the correct information is not professional and will be confusing years later in court. A resident is much less likely to challenge a highly specific SODA, where the math clearly adds up. In contrast, a resident is very likely to challenge a non-specific SODA or a SODA where the resident cannot easily understand the math.

Pay careful attention to estimates and future credits. If damages are based on estimates, the SODA should note a figure is an estimate, and that an amended SODA will be sent when actual damages are known. Similarly, if the resident is charged for future rent on the SODA and you re-rent the unit, send out an amended SODA with an appropriate credit for the rent being received from the new resident. When your damages are reduced by re-renting and you send an amended SODA, your credibility is enhanced. When you ask for more than you're owed because you didn't credit and send an amended SODA, you lose substantial credibility with the court.

Typically, properties and management companies assign an individual to be responsible for testifying in court collection cases. This person should be responsible for completing SODAs. Normally, this should also be the person who is most likely to be with the property for the longest period. However, because people frequently move around in the rental industry, the reality is that an individual assigned to a property could likely be long gone by the time a collection trial rolls around. For this reason, it is critical that the math on a SODA is simple and adds up. If the math on a SODA doesn't easily add up and the person who created the SODA is gone, you are now at a

significant disadvantage in a collection trial. Now a current employee from the property and the attorney handling the collection case have to figure out and explain to the court the thought process of the person who completed the SODA years ago. This can be difficult at best, and impossible at worst.

SODAs are not summaries of amounts owed. Under Colorado law, SODAs are detailed itemized lists of amounts owed. "In the event that actual cause exists for retaining any portion of the security deposit, the landlord shall provide the tenant with a written statement listing the exact reasons for the retention of any portion of the security deposit." Amounts owed by residents should be placed into two main categories: contractual charges and physical damages.

Contractual charges owed by a resident should be itemized and based on specific lease provisions. Examples of such charges include back rent, lease break fees, re-letting fees, concession charge backs, insufficient notice, and unpaid rents. If known and possible, you should also set forth on the SODA applicable time periods that amounts are owed. For example, $1,500 for unpaid rent for January through March 2009. Under Colorado law, penalties are not enforceable. Therefore, a SODA should never contain the words "penalty" or "lease break penalty". Similarly, a SODA should never list an amount as a contractual charge when the resident is not obligated to pay the charge under the terms of the lease. Sounds simple, but we see this mistake frequently. If you want to charge for an item, make sure that resident is obligated to pay pursuant to your lease.

Charges for physical damages should also be specifically itemized to the greatest extent possible. For examples, the resident's pet has destroyed the carpet in the master bedroom, the kitchen countertop is damaged, and the bathroom door needs to be repaired. The SODA should list carpet replacement master bedroom, repair of kitchen countertop, and repair of bathroom door instead of carpet and repairs. The costs for each line item should be listed separately. All amounts should add up and correspond to invoices, lease provisions, move-in move-out condition report, and other documents that are used in the calculation of the amounts charged on the SODA sheet. If the SODA figures aren't or can't be tied to specific lease provisions and invoices when the

SODA is issued, the probability of figuring it out two years later in a collection suit are remote. When the SODA is issued, the file, including the SODA and backup documentation should be in order as if you were going to court next week.

Don't overreach on damages. You can't charge damages for normal wear and tear. The Colorado Security Deposit Act specifically states that, "no security deposit shall be retained to cover normal wear and tear." Ordinary wear and tear in a lease agreement refers to the gradual deterioration of the condition of the property that results from its appropriate use over time, and to a certain extent to the operation of the elements. You will not prevail on any damage item if a reasonable person would conclude that the condition is caused by usual or expected deterioration from the use of the premises during the lease period. For example, paint fades over time, and thus, absent other factors, is considered normal wear and tear. Similarly, the normal deterioration of carpet over time is normal wear and tear, and the industry rightfully has gone to a prorate standard on carpet.

Cleaning is always an area of dispute. Some cases hold that that the accumulation of dirt does not constitute ordinary wear and tear while others hold that the dirt accumulation does constitute normal wear and tear. Regardless, because the Act allows a landlord to withhold "contracted for cleaning charges" from a security deposit, your lease should obligate the resident to pay for cleaning if the resident fails to clean. If the resident hasn't contracted to pay cleaning charges in the lease, judges have wide discretion on cleaning charges. However, smaller landlords need to be aware that judges usually won't award you damages for time you spending cleaning, especially if your time is billed at premium rates. The judges reason that if you're not contracting it out, or having someone on your payroll perform the cleaning, it's just part of your overhead.

A good lease has a standard charge provision. If the resident fails to clean, or causes damages, or the unit needs replacements, the costs for such items are disclosed up front and the resident agrees to pay them. Standard charge addendums or language are fine and will hold up as long as they are based on actual costs, do not have unreasonable markups, and aren't used as a profit center. Have your maintenance

supervisor and purchase department review your standard charge language. If you buy drip pans at $2.00 per unit, a $20 charge on a SODA is not going to hold up. Plus, if this comes out at a trial, the judge will now doubt all the rest of your charges on the SODA. On the other hand, if your maintenance supervisor has calculated the time and materials for a bathroom door repair at $75, this is very likely to be upheld.

Make sure that your lease gives you the right to deduct any charges and damages from any deposit, including pet deposits. For example, regardless of the purpose of any security deposit, landlord may apply any deposit to any sum owed by resident. Frequently, the right to use pet deposits for non-pet damages is not clearly spelled out in the lease. Without this language in your lease, residents may contend, and have a legal argument, that there is no pet damage, the landlord is applying the pet deposit for general damages, and the lease does not grant this right.

Send the SODA to the right address. The law requires you to send the statement to the resident's last known address. All too frequently, clients call with a security deposit issue because the SODA was sent to the unit, rather than a forwarding address. The address issue can easily be solved with appropriate lease language. "Prior to vacating, Resident shall provide in writing to Landlord and the U.S. Postal Service each Resident(s) individual forwarding or last known address. Resident agrees that any change of forwarding or last known address provided by Resident to Landlord shall only bind Landlord if receipted for by Landlord."

Finally, send the SODA timely. You have to send it within 30 days, or the period specified in your lease not to exceed 60 days. The clock runs from the date that the resident surrenders possession, or the date the lease terminates, whichever occurs last. Because of the wide use of lease break fees, when the clock starts isn't always as clear as it should be. For example, a resident's lease provides for 60 days to refund. The resident's lease is up March 31. However, the resident breaks the lease and moves out early on March 12. Is the SODA deadline May 11 or May 30? The answer turns on the facts and the lease. If you're going to run the SODA clock from the last date of lease (termination date), you will be in a stronger position if your lease specifically covers this

issue. Alternatively, you can never go wrong by playing it safe, and starting the clock on the date the resident moves out.