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Landlord News

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ESTOPPEL CERTIFICATES - A CONCEPT WHOSE TIME HAS COME

We've seen this scenario play out a thousand times. A resident lives at the community for several years. The resident never had a single issue with management, or the lease. The resident always pays rent on time. However, one month the resident doesn't pay rent and so you evict. When Hopkins Tschetter Sulzer files the eviction, the resident files a ten-page answer. The resident's answer lists a litany of complaints including various unresolved maintenance issues. While this is news to you, the resident alleges that he has been requesting action for months or even years, and you simply ignored him or failed to resolve these serious issues. To defeat a resident's groundless claims, you should use estoppel certificates.



Estoppel certificates are based on the common law doctrine of promissory estoppel. The promissory estoppel doctrine evolved to prevent injustice in cases where there was no written contract. Specifically, if Party A makes oral promises intended to induce Party B into action, and Party B detrimentally relies on Party A's oral promise, Party A is "estopped" to deny or break the promise even though there is no written contract. Similar to the common law doctrine of promissory estoppel, estoppel certificates prevent (estop) a resident from making certain claims or contentions. In layman's terms, an estoppel certificate is simply a piece of paper signed by a resident acknowledging the current state of the landlord tenant relationship.

Estoppel certificates are extremely useful in defeating groundless claims made by residents. Estoppel certificates bar and prevent the resident from later on asserting a fact or a claim that is inconsistent with the facts acknowledged

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A Collection Coach Tip The Importance of Updating Tenant Files

You have the perfect tenants for five years. They paid their rent on time during the entire tenancy, completed their lease, and gave the proper notice prior to vacating. However, because they were such good tenants, other than signing lease renewals, you didn't talk to them much. Unfortunately, once you take back possession of the property you learn that the tenants had a chinchilla farm in the basement to earn a little extra money. Besides the concerns you may have about a run-in with PETA, now you have a property that may be cheaper to demolish than get rid of the smell. This is an obvious violation of the lease and beyond normal wear and tear, not to mention business use. So after applying the security deposit and timely sending your security deposit letter, you send the file to collections because damages far exceeded the funds recouped from the deposit.



First, regular inspection of the property at lease renewals may have lessened the damages caused by the chinchilla farm. Had it been there only a year, instead of five years, the damage may have been significantly less. Also, because applications were not updated during the



tenancy, the collection firm faces locating both the tenants new address, including current bank accounts and employer. Average wage and salary workers stay with a job for an average of four years, so updating employment information during the tenancy will help if there is a collection case

later. It's also important to update bank information, keep copies of personal checks used to pay rent, update emergency contacts, and get copies of tenant driver's licenses.

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and agreed to by the resident in the estoppel certificate. The most critical fact for a resident to acknowledge (admit) in an estoppel certificate is that the landlord is not in default of the lease. Because the resident acknowledges in writing that the landlord is not in default of the lease,



the resident cannot later make up a host of reasons (excuses) to either defend the landlord's money claim or assert a countersuit against landlord. Properly

drafted estoppel certificates can be used to combat many common resident scenarios. For examples, estoppel certificates can be used to address the bogus collection defense; the manufactured default because I'm buying a house gambit; and the you discriminated against me allegation.

The value of an estoppel certificate becomes obvious when a typical industry collection case is reviewed. Resident defaults and moves out. The resident's account is sent to collection. Two years later, when the collection suit goes to trial, the entire property management staff no longer works on the property. In fact, the community is now managed by a different company. The resident defends the case by contending that the landlord was in default and that the former onsite team made all sorts of promises and verbal agreements with the resident. Without an estoppel certificate, this would be a difficult case to win. You may not be able to produce any witnesses (the former onsite team) to deny and refute the resident's allegations. With an estoppel certificate, the resident's case is dead in the water.

In fact, the resident's case is now so weak that the resident might do the right thing and settle the case without a trial. If the resident is represented by counsel, most attorneys would seriously consider whether it was worth going forward. Estoppel certificates have the potential to positively impact resident recovery in a number of ways. First, they cut off groundless claims. Second, they save valuable staff time by decreasing trial length. The collection trial is much shorter because no time is spent dealing with the resident's litany of made-up allegations. Third, estoppel certificates have the potential to increase resident recovery when all of the resident's bogus bargaining chips (leverage to get you to lower your claim) are taken out of

play.

You may think that your lease already covers some of these issues. Specifically, you may think you're protected because most leases contain a non-waiver clause coupled with a merger clause. For example, this lease contains the entire agreement, there are no other agreements, verbal or otherwise, and the lease can only be modified or waived by a written document signed by the parties. While these clauses are important, merger and non-waiver clauses by themselves do not address all problems because of Colorado case law. Colorado courts have clearly held that every lease or lease provision can be modified or waived, even leases with no modification and no waiver clauses. Similarly, an estoppel certificate will not cut off all claims, but will cut off all claims through the date the resident signs it. For example, the resident has lived at the community for five years. The resident signed an estoppel certificate three months ago. The resident can now only raise claims that arose over the last three months, and is "estopped" to raise claims that arose over the previous four years and nine months.

Estoppel certificates also have value when you're turning a property over, taking over a property, refinancing, or assisting the owner in buying or selling a community. When you're leaving a property, the last thing you need is to be continually dragged into problems involving residents on a property you no longer manage. The solution - have all residents sign estoppel certificates before you turn the property over. You can now move on with peace of mind. When you're taking over a property, you may not be well informed regarding resident status. The solution is to have all residents sign estoppel certificates upon renewal. Now, you don't have to worry about what went on before you arrived. Similarly, when all of the residents have signed estoppel certificates, buyers, sellers, and lenders have confidence that they are not dealing with a hidden mine field of resident complaints and lawsuits.



When should you use estoppel certificates? You should require residents to sign an estoppel certificate upon renewal. However, for maximum protection and benefit, your lease should also require every resident to execute and deliver an estoppel certificate within X days of request. If the right to request an estoppel certificate is built into your lease, you may request them when you need them. If a resident refuses to sign, you know that you may have a potential problem. Further, if the right to request an estoppel certificate is a lease obligation, you

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ANOTHER GOVERNMENT REPORTING REQUIREMENT

Once again the Federal Government in its quest to generate even more regulations has enacted legislation that casts a broad net and will now impact even more rental property owners than before. Many of our clients are familiar with the IRS 1099 form, and the administrative burdens behind it. The 1099 form is more typically used by independent contractors to report income that is not wage/salary/tip-based. Owners are required to track



all business completed with their vendors and supply a 1099 form if at least \$600 worth of work was done in the year. Prior to the Federal government's passage of the Small Business

Jobs Act of 2010, these burdens extended only to larger rental property owners. What some of the Firm's clients may not know is that, starting this year, ALL owners of rental property that do more than \$600 worth of business with any suppliers will be required to provide that vendor with a 1099. Under the new law, 1099 requirements are extended to all owners, even for a single property being rented out as part of a family investment fund or retirement plan. There will be a fine levied by the IRS for each act of non-compliance of this expanded requirement.

Exceptions to these requirements exist for certain owners. If the gathering of information and issuing of forms would create a hardship, if you are only temporarily renting your own residence, or if your rental income does not meet minimal requirements, you may be exempted. Unfortunately, what constitutes a hardship has not been defined by the IRS, and minimal income requirements have not been established or published, so these exceptions are uncertain at best. Absent this information, it is important to note that ignorance of what is expected is rarely accepted by the IRS as a defense of non-compliance with regulations

For now, it is just important for owners, who have previously not been subjected to tracking vendors with \$600 or more in payments, to start tracking all vendor work and prepare for some added tax work at the end of the year. If you didn't keep records of this information before, make sure you or your accounting staff are aware of the requirements and have the ability to keep track of all required information going forward.



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can enforce this obligation, through eviction if necessary.

Commercial landlords have been enjoying the tremendous benefits of estoppel certificates for years. The use of estoppel certificates is rare in residential leasing. Because of the many potential benefits, the time has come for residential landlords and property managers to use estoppel certificates to defeat groundless claims and to alert you to serious potential litigation claims. If you are a client with a current client login, example estoppel language is available for immediate download from our website. If you're not a client, you may register to receive future editions of Landlord News at htspc.com, and receive access to our example estoppel language.

IMPORTANT HTS FEBRUARY DATES

February 9th	Basic Evictions HTS Lower Conference Center 3600 S. Yosemite Street Denver, CO 8:30 a.m. - 11:30 a.m.
February 18th	DENVER COURTS CLOSED FURLOUGH DAY
February 18th	South Client Lunch Dave & Busters South Colorado Blvd 11:30 a.m. - 1:00 p.m.
February 21st	ALL COURTS CLOSED PRESIDENTS DAY HOLIDAY

SPECIAL NOTICE

El Paso Court Schedule
Cases Will Be Scheduled
Tuesday February 22nd
Due To Court Closure on 21st



President's Day

February 21st 2011

Wise Sayings on Government

In my many years I have come to a conclusion that one useless man is a shame, two is a law firm, and three or more is a Congress. --

John Adams

If you don't read the newspaper, you are uninformed; if you do read the newspaper, you are misinformed. --

Mark Twain

Suppose you were an idiot. And suppose you were a member of Congress. But then I repeat myself. --

Mark Twain

I contend that for a nation to try to tax itself into prosperity is like a man standing in a bucket and trying to lift himself up by the handle. --

Winston Churchill

A government which robs Peter to pay Paul can always depend on the support of Paul. --

George Bernard Shaw

Democracy must be something more than two wolves and a sheep voting on what to have for dinner. --

James Bovard

Foreign aid might be defined as a transfer of money from poor people in rich countries to rich people in poor countries. --

Douglas Casey

Giving money and power to government is like giving whiskey and car keys to teenage boys. --

P.J. O'Rourke

Government's view of the economy could be summed up in a few short phrases: If it moves, tax it. If it keeps moving, regulate it. And if it stops moving, subsidize it. --

Ronald Reagan

If you think health care is expensive now, wait until you see what it costs when it's free. --

P.J. O'Rourke

In general, the art of government consists of taking as much money as possible from one party of the citizens to give to the other. --

Voltaire

Just because you do not take an interest in politics doesn't mean politics won't take an interest in you. --

Pericles (430 B.C.)

No man's life, liberty, or property is safe while the legislature is in session. --

Mark Twain

Talk is cheap... except when Congress does it. --

Anonymous

"The power of imagination makes us infinite."

John Muir

