

MOVE-OUT STATEMENTS - ISSUES & ANSWERS

Consistently calculating move-out fees pose challenges for most landlords. What can you charge a tenant on a move-out statement (MOS) is one of the most frequent questions clients ask. We are not surprised given the many different types of move-out fees and special rules for even the same kind of move-out fee. Because move-out fees (MOFs) can depend on lease language and legal interpretations, MOFs can be a confusing topic. Generally, MOFs fall into two classifications. MOFs associated with the tenant breaking a lease, and everything else. Because most MOF confusion is directly related to lease break events, this month we will discuss MOFs that are related to lease break events, and will also examine other common MOFs that can be problematic.

Over the years, MOFs have significantly increased in amount and frequency. Specifically, fees charged when a tenant breaks his lease have increased significantly over the last decade. The proliferation of lease break related charges has been accompanied by increased confusion among onsite teams. The problem is that many, if not most, onsite teams are confused about calculating and applying lease break related charges. We see the confusion manifest itself in inconsistent MOSs between properties, but also inconsistent MOSs at the same site. In other words, we see different MOS calculation results being made by the same onsite team for individual tenants with identical leases.

MOF confusion and inconsistency have three causes. Onsite teams cannot generate consistent MOSs if they have been poorly or inadequately trained. Similarly, onsite teams cannot consistently charge lease break related charges if a MOS SOP is poorly drafted or incomplete. Finally, poor or incomplete lease language contributes to MOS confusion. If your lease language does not clearly articulate what a tenant owes when they break your lease, no amount of training will get your onsite teams to accurately and consistently generate MOSs. The same could be said about a poorly worded MOS SOP. Specifically, onsite team members will never be consistent if they are basing charges on a poorly written or confusing MOS SOP.

Landlords should care about MOS accuracy for a host of significant reasons. Tenants are much more likely to dispute a confusing or perceived inflated MOS because they think the total is unfair. Thus, inaccurate, inconsistent, or confusing MOSs can result in security deposit lawsuits, and even claims of fair housing discrimination. Poor MOS policy and execution can potentially inflate write-offs, negatively impact collections, and raises the specter of FDCPA liability. Perceived inflated MOSs negatively impact collections because tenants are much more likely to pay MOS totals they deem to be reasonable and fair. Under the Fair Debt Collections Practices Act (the FDCPA), a landlord potentially can be held liable if charges on a MOS are not legally supportable (misstatement of the nature or amount of a debt).

The biggest MOS problem by far is MOFs charged by a landlord when a tenant breaks the lease. MOFs are only triggered when a tenant wrongfully moves out and doesn't complete the lease term. Lease break MOFs are classified as actual damages (future rent) or liquidated damages (lease break fee). Future rent damages are the actual damages (lost rent) suffered by the landlord because the tenant broke the lease. Lease break damages are a flat amount stated in the lease (a liquidated amount that the landlord and tenant agreed that the tenant would pay if the

tenant broke the lease). Landlords cannot charge both actual damages and estimated damages when a tenant breaks a lease.

The biggest mistake landlords make when charging actual damages is failing to credit the tenant (amend the MOS) upon re-rental. Under Colorado law, a landlord has a duty to mitigate its damages. Landlords mitigate future rent damages by taking reasonable measures to re-rent the unit after a tenant breaches a lease. If the landlord successfully re-rents the unit prior to the end of the breaching tenant's term, the landlord must amend the MOS by crediting the defaulting tenant with the amount of rent being paid by the new tenant. However, we rarely see these credits. Rather, the landlord frequently sends the original amount owed off to collections, and never amends the MOS upon re-rental. As a result, a collection agency is often attempting to collect rent that is now being paid by a new tenant. This is one reason why many landlords prefer liquidated damages.

In theory, calculating liquidated damages should be easy. The amount is stated in the lease. However, we see a number of mistakes made in calculating liquidated damage amounts. Landlords fail to credit the tenant for the current month's rent (the rent for the month that the tenant defaulted). Lease break fees are imposed in lieu of actual damages, not on top of them. If your lease break fee is set at two months, and you don't credit the rent for the month that the tenant defaults, you are in effect charging three months. Some would argue that you are effectively charging double rent for the month of default, which is impermissible.

Some landlord's calculation methods for determining lease break MOFs could arguably be considered piling on because the lease break related MOFs on the MOS arguably are not reasonably related to the landlord's actual damages. For example, some landlords charge both a two-month lease break fee, and two months of rent for failing to give a 60-day notice. When a tenant breaks a lease, and the landlord re-rents the unit a week later, no court is going to give you the equivalent of four months of rent. If you charge lease break fees and notice fees, you should not charge both. If a tenant breaks, charge the lease break fee. The notice fee should only be charged if the tenant does not break the lease, but fails to give notice. Similarly, for the stated reasons, we advise against charging both a lease break fee and a reletting fee.

Sometimes lease break fees often are either not supported by the lease at all or do not support the amount being charged. Poorly drafted liquidated damage clauses (lease break clauses) are subject to legal challenge, and at some point, will not be enforced if a court determines that they do not meet the well-defined legal criteria. One of the key requirements for a liquidated damage clause to pass legal muster is that the agreed upon estimated damages must be reasonably related to the actual damages suffered. Thus, the greater the charges that are associated with a lease break event, the less likely a court will be to enforce them. A good rule of thumb is to set the estimated damages no higher than two-months' worth of rent. Most courts seem to be OK with this amount. However, remember that every situation is different, and that no matter what the amount, courts have great leeway in enforcing or not enforcing estimated damages (lease break clauses).

Concession charge backs, late fees, and non-sufficient funds (NSF) fees are three common MOFs that can be problematic. Concessions are discounts that a landlord gives a tenant

on rent, either as a one-time discount or a monthly discount. Most leases require a tenant to repay these concessions if the tenant breaks the lease or fails to give proper notice. Charging back concessions on a MOS is OK, if your lease specifically and clearly supports the charge. We see too many attempts to charge back concessions on MOSs when the lease doesn't clearly support the charge.

Late fees are fees charged because rent was not paid on time. We see several problems with late fee charges that appear on MOSs. Similar to lease break fees, late fees are estimated damages and must be reasonable (bear some resemblance to your actual damages). Courts regularly strike down unreasonable late fees. Based on our experience, late fees in excess of \$75 are subject to challenge. You can only charge late fees for the month the tenant breaks. Thus, you can't go back and add late fees to a MOS for the six times the tenant paid late over the last year. Courts will rule that you waived these late fees when you kept taking the tenants rent. Finally, if you charge a lease break fee, we recommend not charging any late fees. Arguably, the lease break fee and the late fee are estimated damages for the same event.

NSF fees result when a tenant's payment is not honored (bounces). NSF fees are charged to the landlord by the landlord's bank, and may be passed on to the tenant. In Colorado, NSF fees are strictly controlled by statute. Colorado law states that a landlord can charge either \$20 or the actual fee charged by the bank. These are the only two options. Thus, any NSF charge imposed on a tenant in excess of \$20 or what the bank actually charges you is subject to challenge.

Failure to accurately and reasonably charge a tenant for MOFs can result in a loss of income for the landlord and possibly expensive litigation. Ultimately, courts and tenants do not necessarily care what landlords call MOFs. It's not the name of the fee that matters, but rather the amount. MOFs based on estimated damages that are supported by clear lease language and appear to be a good faith reasonable estimate of a landlord's actual damages are much more likely to be enforced in court, and much less likely to be challenged by tenants.

Ensuring that onsite teams are properly trained is critical to get accurate and consistent MOS results. But even the best-trained team will struggle if your MOS SOP isn't clear. Your MOS SOP can be objectively and quickly evaluated. Simply ask your onsite teams if they struggle in calculating MOF charges when preparing MOSs. You can also quickly determine whether you have a problem by auditing a sample of MOSs from an asset, or from across your portfolio.

MOS auditing is a significant reason to be on the THS Combo Program. THS's Combo Program attempts to get money judgments in eviction cases. As a Combo Program client, THS is regularly reviewing and evaluating your MOSs, and will bring any MOS related issues to your attention. Many clients have already benefited from THS's review of their MOSs. When your MOSs are consistently accurate and appear reasonable, you are in the absolute strongest position to collect your money with the least amount of legal exposure.