AVOID EVICTION ISSUES BY UNDERSTANDING SUBSTANTIAL VIOLATIONS

Most landlords know that a substantial violation is the appropriate eviction notice when tenants engage in criminal conduct. However, we still see a lot of confusion surrounding substantial violations. Many landlords do not know there is both a statutory substantial violation and a contractual substantial violation. We also see several recurring issues related to substantial violations. Problems include trying to move forward with substantial violations for compliance-based behavior, and proof-related issues. To avoid problems, all landlords should understand the key aspects of substantial violations.

The first key, to understanding eviction notices, is to know the difference between an eviction compliance notice and an eviction notice to quit. A compliance notice gives the tenant the right to cure, i.e. do this within X number of days OR get out. In Colorado, the two compliance eviction notices are a Demand for Rent or Possession and a Demand for Compliance or Possession. On the other hand, a notice to quit does not give the tenant the right to cure, i.e. get out within X number of days (your right to possession is being terminated). A substantial violation is a notice to quit, and thus is frequently referred to as "Notice to Quit for Substantial Violation."

The term "substantial violation" originated in the mid-1990s when the Colorado General Assembly created the statutory substantial violation by amending the eviction statute. The Colorado General Assembly created the statutory substantial violation in 1994 to address violent and antisocial criminal acts committed by tenants in rental properties. Because landlords cannot always be aware of the dangerous nature of certain tenants, until after they take possession of a property as a tenant, the Colorado General Assembly gave landlords the ability to immediately terminate a tenant's right of possession with no right to cure if the tenant engaged in dangerous criminal behavior. The General Assembly wanted landlords to have a strong hand to evict criminals, who often resisted eviction for as long as possible on technicalities, while the criminals were infringing on or otherwise violating the rights of neighbors or co-tenants. In Colorado, every tenant lease prohibits (it is an implied covenant of every lease) a tenant from committing a statutory substantial violation as defined by Colorado Revised Statute § 13-40-107.5.

A statutory substantial violation must pass a two-part test. First, the egregious behavior by the tenant, guest, or invitee of the tenant must occur on or near the property. Second, the conduct must fall into at least one of four categories. The first three categories are simply stated but can be subject to dispute. The conduct must endanger a person; willfully and substantially endanger the property of the landlord or anyone living on or near the premises, or constitutes a violent or drug-related felony.

The fourth category is more complicated. Specifically, the conduct must be a criminal act that carries a potential sentence of incarceration of 180 days or more and has been declared a public nuisance under state or local ordinance. Few evictions are based on category four for two reasons. One, the criminal act at issue doesn't provide for a six-month jail sentence. Two, even if

the criminal act does carry a six-month or longer jail sentence, the crime at issue may not have been "declared a public nuisance."

Statutory substantial violations fail for several common reasons. The number one reason is that the conduct did not occur on or near the property. Even if the tenant robbed a bank or committed murder, if the conduct didn't take place on the property or near it, the conduct cannot meet the statutory test. A good example is the SWAT scenario. The police issue an arrest warrant for a tenant or occupant. The police or a SWAT team show up to arrest the person and make a big public display in front of your other tenants. Unless the crimes that are the basis for the arrest warrant happened on the property, this is not a statutory substantial violation.

The most common scenarios that do not meet the statutory test are tenant verbal threats, annoying, or otherwise intimidating behavior. A tenant's conduct may be aggressive, hostile, rude, outrageous, intimidating, threatening, or uncivilized, but the conduct does not automatically support evicting the tenant for a substantial violation. Thus, common threats such as "I'm going to sue the property into the ground, I'm going to get you fired, or I'm going to get you or make you pay", without additional factors, are probably not statutory substantial violations.

Even threats of bodily injury may not constitute a statutory substantial violation. Threats of bodily injury can constitute a crime (assault) if the person threatened believes the individual has the present ability to carry out the threat, and that the individual making the threat is serious. The prime indicator of perceived threat is whether the police are contacted and whether the police act. Thus, if an onsite team member is threatened, but the threat does not warrant contacting the police, or the police are called but do not feel the threat could be considered an assault, the individual probably should not be served with a substantial violation notice.

In most of the "verbal threat" cases we review, the better route is to serve a three-day Demand for Compliance or Possession (DCP) demanding that the behavior cease. If a threat is not a crime, the DCP is a stronger strategy in a verbal threat scenario. The tenant has one strike against him based on the initial threat. When the tenant causes another disturbance or makes another threat, which is likely, you can then serve him with a Notice to Quit for Repeat Violation. Generally, demand for compliance cases are easier to prove than substantial violations.

If the conduct at issue doesn't meet the statutory substantial violation test, you can't evict the tenant unless the tenant's conduct is a breach of a lease covenant that gives the landlord the right to terminate the tenant's possession without a right to cure. A landlord's rights to terminate a tenant's possession rights (serve a notice to quit) are referred to as a contractual or lease substantial violation. The right to terminate isn't based on Colorado statute, but rather on the lease contract. These rights are most frequently contained in an addendum usually called a "Drug & Crime Free Addendum". The goal of the contractual substantial is to close the statutory substantial violation loopholes. In response to tenants winning statutory substantial violation cases based on technicalities, THS pioneered such language several years after the enactment of the substantial violation statute.

One of the biggest issues with contractual substantial violations is that the lease language (the Drug-Free & Crime-Free Addendum) expands the list of crimes, but fails to address the major limitation of the statutory substantial. Specifically, substantial violation conduct is still limited to occurring on or near the property. Since landlords want to be able to evict a tenant if they rob a bank, even if that bank is across town, your lease language must make criminal conduct (no matter where it takes place) a substantial violation.

Similarly, many leases do not expand the right to terminate the tenant's possession rights without right to cure beyond traditional criminal conduct. Under Colorado law, landlords have the right to terminate a tenant's possession even for conduct that may not be criminal. As discussed, threats generally do not meet the statutory substantial violation test. However, they can be addressed in your lease. For example, your lease could state "that criminal activity means any conduct set forth as criminal in this Addendum and specifically includes, but is not limited to any discrimination against, intimidation, or harassment of any person."

The problem with pursuing a contractual substantial violation eviction is inconsistent court results. The law is clear in our opinion. Landlords and tenants have the right and freedom to agree that a landlord may terminate the tenant's right of possession with no right to cure if the parties agree to this in the lease. However, some courts may still apply the statutory requirements to the facts. This means despite lease language, the court may decline to evict if the conduct does not qualify as a statutory substantial violation, especially if the lease language is not clear, or does not clearly apply to the situation. This is another reason why you should always have THS review and evaluate substantial violation scenarios.

Regardless of whether you are trying to evict on a statutory substantial violation or a contractual substantial violation, you face similar challenges in both types of cases. Since any type of substantial violation is almost always based on criminal conduct, courts can be reluctant to evict unless somebody was arrested or charged with a crime. Thus, any substantial violation case that does not involve an arrest or criminal charges should be thoroughly evaluated before a notice is served. In one case, a tenant emptied two ten-round ammunition magazines into another tenant's dog, but the court found no crime because the tenant wasn't charged.

As with any non-monetary based eviction, proof is always a key issue in any type of substantial violation case. Frequently, landlords may serve substantial violation notices based on police involvement thinking that the police report will contain the necessary proof to evict. Then the report either doesn't contain the proof the landlord thought would be there, or the landlord can't obtain the police report. If you are going to rely on a police report, you should know what is in the report before proceeding.

In addition to the police report, you must know whether the police will testify. The police must testify if the case is contested. You can't just rely on the police report to prove the case because the police report is hearsay. Similarly, if other witnesses (other tenants) are needed to prove the case, you must know in advance what they are going to say, but more importantly, that they are willing to testify. You can't just assume, since they witnessed the substantial violation, that they will be helpful or that they are willing to testify.

If the tenant's conduct isn't a substantial violation, you should always serve a demand for compliance. If you serve a substantial violation when you should have served the tenant with a demand for compliance or possession, you are only making it more difficult to evict the tenant. The most common scenario (verbal threats) illustrates why serving a demand for compliance is the better option.

The tenant threatens the manager ("I'm going to get you"). A substantial violation is served, but the police are not contacted, the tenant is not arrested, and the tenant is not charged. The case can't be won, and thus goes nowhere. Two weeks later, the tenant is at it again and makes more verbal threats. At this point, the only option is to serve the tenant with a demand for compliance or possession. However, the tenant now gets an opportunity to comply, and if the tenant complies, the tenant cannot be evicted. When the tenant originally threatened the manager, if the manager served a demand for compliance (rather than a substantial violation notice), the manager could have served the tenant with a Notice to Quit for a Repeat Violation the second time the tenant threatened the manager.

We get it. Tenants do outrageous things. Tenants can make you mad, upset, and drive out other good tenants. Emotions frequently run high in substantial violation scenarios because the onsite team legitimately feels threatened or intimidated, and the Regional wants to back their team. Given the problems the tenant is causing, you just want the tenant out. Because the tenant has no right to cure, out of sheer frustration, you may erroneously deploy the nuclear option by serving a substantial violation notice. However, it does not serve your purpose to launch a nuke that is a dud. The best route may be to serve a demand for compliance. Stat.

The best part in dealing with frustrating substantial violation scenarios is that you do not have to go it alone. We are always here for you. We will help you evaluate every substantial violation scenario. Just call or send an email to Situations@THSLAWFIRM.COM with your substantial violation situation before you serve any notices. To better assist you, THS has developed an online Substantial Violation Evaluation Form. The form is designed to quickly compile and evaluate the information necessary for us to determine whether the best strategic move is to serve a substantial violation notice or a demand for compliance or possession.