THREE PRO TENANT BILLS FLOATED AT STATE CAPITOL -- MORE COMING

"Come, senators, congressmen, please heed the call, don't stand in the doorway, don't block up the hall". When Bob Dylan wrote these famous lyrics, government was viewed as an obstacle preventing what many thought was necessary social change. Unfortunately, many Colorado Senators and Representatives will not need to heed any call this year because they are raring to go. Three major bills that drastically alter Colorado landlord-tenant law have been or will be introduced. With Colorado government firmly in control of the Democrat Party, tenant advocates view this as the golden moment to fulfill their long-awaited dream list of favorable tenant laws and they are pulling out all of the stops to introduce their protenant agenda.

House Bill (HB) 19-1118 (HB-1118) drastically impacts the eviction processing time. Under current Colorado law, landlords can serve a three-day demand (3-Day) for payment of rent or possession. Assuming rent is late if not paid by the fifth, the eviction timeline would be as follows. Landlord serves a 3-Day on the 6th, and if not paid by the 9th, could turn the case over for eviction. Assuming the case is filed on the 10th, the court date is the 17th of the month.

HB-1118 would amend Colorado law so that landlords would be required to serve a fourteen-day demand (14-Day) for payment of rent or possession. Yes, that is not a typo. The proposal is to change the current 3-Day rent demand to a 14-Day rent demand. Assuming again rent is late if not paid by the fifth, the eviction timeline would be as follows. Landlord would serve a 14-Day on the 6th, and if not paid by the 20th, could turn the case over for eviction. Assuming the case is filed immediately, the court date would be the 28th of the month or eleven days later (14-3=11) than under current law. The rationale for this legislation is that fewer tenants will be "evicted" because they have more time to pay. This rationale is advanced without any proof whatsoever and ignores the real world of rent payments, collections, and evictions. First and foremost, landlords don't want to evict tenants. They want tenants to pay their rent. But if tenants don't pay rent, landlords have two options. Evict or let the tenant live in the rental unit for free. Thus, the eviction process is a compulsory collection process designed to reinforce that a person's obligation to pay rent is serious and primary. The current 3-Day rent demand achieves this purpose by creating urgency. A 14-Day rent demand will not only not create urgency, it will undermine it. 14 days is almost 5x the amount of time under the current system.

Under the current system, a landlord is under no obligation to accept a tenant's rent after a 3-Day expires. However, the reality is that most landlords do accept the rent up to the court date, and even after. Because of weekends and delays in serving 3-Days, the bulk of eviction court dates are between the 17th and 25th of the month. Thus, most landlords are already accepting late rent from tenants up to the 25th of the month. Because the current system (3 days before an eviction can be started) is expedited, landlords can and do take chances that the tenant can get caught up.

Because both the urgency and the expedited nature of evictions will vanish under a 14-day system, landlords will not take a chance that a tenant can get caught up. Under a 14-day system, eviction court dates (even if notices are served timely) will be near the end of the month

and many will be into the next month, making an additional month of rent due. When landlords know that eviction court dates are a month out under a 14-Day system, they will not accept rent payments after notices expire like they currently do under the 3-Day system.

This means that even if there are fewer evictions filed (which is questionable), there will be more physical evictions and displaced tenants due to fewer pay and stays. Tenants who can't pay during the notice period will be one default and out. This is but one example of how the Legislature hasn't thought through all of the unintended consequences of an extreme 14-day system (the average rent demand for all 50 states is less than 5 days). Some think that this will give charities and other agencies time to help. However, most, if not all, of these organizations cannot deliver a check within 14 days. When the check is delivered late (after the expiration of the 14-Day), the landlord will decline to accept for the same reasons stated above.

A bill introduced last year, by Senator Angela Williams (18SB-120), was a much more insightful and intelligent piece of legislation. The brilliance of 18SB120 was that it was a great compromise that addressed both landlord and tenant concerns. Senator Williams' bill helped tenants by giving them the right to pay up to the court date (which in many cases is more than the 14 days offered by HB 19-1118, and just made law what almost everyone is already doing). However, 18SB-120 also treated landlords fairly by keeping the 3-Day Notice System and thus allowing landlords to start the eviction process in a timely fashion, which is critical if a tenant intends to pay but doesn't come through. Unfortunately, even though Senator Williams' ground-breaking legislation was supported by the AAMD, the CAA, THS, and literally the entire industry, the bill was killed by parties who lacked knowledge of the eviction process and landlord-tenant matters.

Another landlord-tenant bill, on the cusp of being introduced, is a Warranty of Habitability Bill. Tenant advocates plan to introduce a warranty of habitability bill to re-write current law which was the product of great compromise and effort both by landlords and tenants. Specifically, back in 2007-2008, the Governor appointed a task force to produce a warranty of habitability bill. Tenant's right groups and landlord advocates met many times over months to produce the current law. Both Drew and Mark were instrumental in the drafting of that bill. The flaws with the 2019 draft bill and how it would entirely remake warranty of habitability in Colorado is too extensive to discuss at length here. But two major issues will give you an idea of this bill's potential negative impact.

Similar to the notice bill, the draft warranty of habitability bill is entirely one-sided and aims to drastically alter many long-standing court procedures and Colorado landlord-tenant processes. For example, under current law, tenants can't obtain an injunction against landlords in Small Claims Court or County Court for breach of the warranty of habitability. The proposed law allows tenants to run off to Small Claims Court and seek an injunction over an alleged breach of the warranty of habitability. Thus, Small Claims Court would have jurisdiction to order landlords to make repairs. Small Claims Court severely restricts the participation of attorneys to represent landlords, and also regularly allows hearsay evidence.

This issue was discussed and debated at length in 2008 and was specifically rejected for many reasons. First, this literally could lead to an avalanche of small claims cases by tenants

against landlords. Second, evidentiary standards are relaxed and attorney participation is limited in Small Claims Court. Third, current warranty of habitability law already gives tenants the right to terminate their lease and get money damages, if a landlord is in breach and fails to repair. Historically, injunctive relief is serious business and thus has been almost exclusively reserved for the jurisdiction of the District Court. Under current law, only the District Court (not County Court and certainly not Small Claims Court) has jurisdiction over injunctive matters with the exception of HOA covenant enforcement.

Even more disconcerting, the draft of the proposed warranty of habitability bill gives tenants the right to repair and deduct the cost of those repairs from rent owed. Repair and deduct (R&D) was discussed and debated into the ground back in 2008. Based on our experience, tenants could easily abuse R&D to cloud the issues if they are being evicted for non-payment of rent. Specifically, we are concerned that tenants who don't have the rent would attempt to justify non-payment of rent by alleging payment for dubious repairs. During the 2008 drafting process, we consistently made the point that you can't "deduct" what you "don't have". In other words, if you can't pay the rent because you don't have it, you can't deduct it (shouldn't be allowed to deduct it).

In 2008 both sides compromised, and a great solution was reached resulting in the current law. Tenants are allowed to withhold rent for alleged breaches of the warranty of habitability by landlords. However, if landlord evicts the tenant for non-payment and the tenant asserts a warranty of habitability defense, the tenant must pay the withheld rent into the registry of the court. The court sets a warranty of habitability bond amount after accounting for any expenses the tenant may have incurred due to the breach. This makes sense because if the tenant has the rent and is not paying it because of the breach, they should have no problem paying it to a neutral third party (the court) until the dispute is resolved. What makes no sense is to create a system that allows tenants to assert that they withheld money they never had.

HB 19-1106 (the "Application Fee Bill") has been introduced in the Colorado House of Representatives. While we view the bill as totally unnecessary, this bill is probably the least onerous of the proposals we have seen. We don't think the bill is necessary because most of the issues addressed by the bill are already covered by existing law or already standard industry practice. The purpose of the bill is to address perceived (mainly anecdotal in our opinion) abuses in the application process.

Application Fee Bill (AFB) limits application fees to your actual or average cost. The AFB also requires landlords to disclose application-related costs and to provide any applicant a receipt for application fees paid. The AFB requires landlords to provide tenant prospects with written selection criteria and to specifically list if certain factors are grounds for denial (credit, income, criminal history, lying on the application, etc.). Anyone involved in the rental industry knows that almost all landlords already do this both out of fairness and to avoid disputes.

The AFB then moves into areas already covered by the Federal Fair Credit Reporting Act (FCRA). For example, limiting credit history review to seven years. The proposed AFB duplicates the legal requirements of FCRA by requiring the landlord to provide every applicant with a written notice (adverse action letter in FCRA parlance) stating the reasons why the tenant

was denied. Specifically, FCRA requires everyone who uses reports from consumer credit reporting agencies (CCRA) to advise tenants in writing that the denial was based on a report from a CCRA, to provide the contact of the CCRA, that the tenant prospect may obtain a copy of the report resulting in the denial from the CCRA, and can challenge the accuracy of information contained in the tenant's report with the CCRA.

Based on the misperception that landlords are abusing the application process, the AFB penalizes (yes, the AFB actually uses the word "penalties") landlords who violate the AFB. Specifically, if a landlord violates the AFB, the landlord would be liable to the prospective tenant for two times the application fee, plus reasonable attorneys' fees and court costs. In order to simply encourage landlords to return the application fee (what the tenant advocates say they really want), and to discourage needless lawsuits over small amounts, we have proposed that the tenant applicant should be required to demand the return of the application fee in writing and the landlord be given seven days (just like the security deposit statute) to return the application fee before the tenant could sue. We have been advised that the bill's sponsor and others are receptive to this change.

This year will mark a historic sea change in Colorado landlord-tenant law. It is too early to predict where it will end, but the two bills introduced, and the one draft bill are likely only the beginning. As always, we will do our best to protect the interests of our clients and the industry. There is a lot of room to compromise on these topics as well as additional landlord-tenant legislation that is likely to be introduced. However, at this point, the tenant lobby doesn't seem too interested in compromising, but rather more intent on jamming down their extreme solutions for past perceived wrongs. If they persist and if any extreme measures are passed, we are hoping that the Governor's office will be a voice of reason and not allow legislation that clearly hurts landlords and tenants to become law.