THE BIG TAKEAWAYS FROM THE 2019 LEGISLATIVE SESSION LANDLORDS NEED TO GET PREPARED

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In the 2019 legislative session, the Colorado General Assembly gave Colorado landlords a historic beating. The only good part of the session was when it ended so that the General Assembly couldn't pass further bills detrimental to landlords. The new laws significantly impact operations and finances. The full impact of the new laws won't be determined for quite some time. Only time will determine how tenants change their behaviors, how landlords react, and how court's rule on many aspects of the new laws that are far from clear. No one size fits all solutions are available. Landlords will need to review existing eviction, application, and maintenance policies and make desired or necessary adjustments. We can't possibly address all aspects of the new laws in this short article. In recent weeks, we have had the pleasure of educating thousands of clients on these issues. The full-length class was nearly three and half hours. Accordingly, much longer and individual conversation will be required. But this month we will address the most important aspects of the four new laws, and our recommendations for moving forward toward compliance.

We will start with HB-1118 (The Right to Cure Bill). This law became effective immediately upon the Governor's signature on May 20, 2019. Since the real goal of proponents was not to postpone or delay evictions but to eliminate them, the bill should have been called the "Delay or Eliminate Eviction Act of 2019". This law increases the rent demand period in Colorado from 3 to 10 days. The law contains a small narrow exemption for certain single family (SF) units by creating a 5-Day Demand for Rent which we will discuss offline with our SF clients. The biggest impact of this law is to further significantly shift the economic risk of non-paying tenants onto landlords. The law accomplishes this by increasing by 233% the amount of time a non-paying tenant can occupy a rental before a landlord can commence eviction.

THS did everything it could to get this bill to be more reasonable. The average rent demand period in the U.S. is 4.89 days. In the end, this bill passed because its proponents lied about the number of evictions in Colorado. "Evictions are way up in Colorado". "Colorado has one of the highest eviction rates in the country". What was amazing was that they were able to get away with this despite clear and undisputed numbers. In reality, evictions are much higher in other parts of the country, and have dropped by over 22% since the high mark in 2007 despite Colorado's population increasing by 18%. The bill's supporters also pushed the narrative that there would be fewer evictions if tenants were given more grace (time to pay). Because most landlords already accept payment up to and even beyond eviction court dates, this narrative is false in most instances as well. As we testified, it's not a lack of grace problem, but rather an inability to pay problem.

What should you be doing in response to HB1118? First, evaluate your current delinquency process. Determine if you can take any practical steps to reduce the number of days or to prevent leakage of further days. For example, if rent is due on the 1st and late if not paid by the 5th, you may want to change your lease, so rent is late if not paid by the 3rd. It seems like a small change, but the

difference is significant. When rent demands are served on the 4th, they expire on the 14th. When rent demands are served on the 6th, they expire on the 16th. This is a 12.5% difference.

Similarly, executing on time (serving rent demands on time with no delays) and paying attention to the calendar can really add up. If you can serve on the 4th but don't, you can lose a couple of days on the front end and a couple of days on the back end because the notices now expire on a weekend. When 2 days turns into 4 days, now its a 25% difference in the amount of time. With a 10-Day Rent demand each and every additional day lost is significant. If after a couple of months 80% of your tenants are paying the rent after the 10th of the month, you may want to consult with us about other strategies. If you want to have that conversation now, please let us know.

The second major bill enacted this session was HB19-1106 (the "Application Fee Bill"). This bill becomes effective on August 2, 2019. The biggest impact of HB1106 is to significantly regulate the application process including how much landlords can charge. Landlords would not think so but limitations on application-related charges could potentially impact financials because of how the law defines application fees. "Rental Application Fee" means any sum of money, however denominated, that is charged or accepted by a landlord from a prospective tenant in connection with the prospective tenant's submission of a rental application or any nonrefundable fee that precedes the onset of tenancy. "Rental Application Fee" does not include a refundable security deposit or any rent that is paid before the onset of tenancy.

What should you be doing in response to the Application Fee law? You should be conducting a detailed review of your current application process. This review should include your current rental criteria, your current application language, preparing a list of all application-related charges (meaning every penny charged up to and including when a tenant signs a lease), and preparing for a conversation with your rental screening provider. You need to also clearly set forth the fees and charges that are collected and imposed if a tenant is approved but doesn't sign a lease. If you don't have written rental criteria, you will need to develop it. Landlords cannot comply with this law without written rental criteria, at least not without significant potential legal exposure. Landlords will also need to review any fee, cost, or charge to the extent that is based on time or labor and not a hard or fixed cost paid to a third party during or in connection with the application process. For each such sum, a landlord must justify the amount as an "actual cost". In short, the goal of this law is to prohibit landlords from making a profit on the application process.

We have been asked a lot of general questions about operational policies and procedures. There are no general answers. This law limits the amount of application fees that can be charged, requires disclosure of those fees, and requires receipts for application fees. Further, the law limits the information that can be considered in evaluating an application, requires specific action when applications are denied, and requires landlords to refund any unused portion of the application fee. Accordingly, we can only review specific operational policies and procedures for compliance with these legal requirements.

The third major bill enacted this session was HB19-1170 (Amendments to the Colorado Warranty of Habitability Law). This law becomes effective August 2, 2019. In greatly expanding the

existing warranty of habitability, the Amended Warranty of Habitability law significantly increases the burden on landlords in dealing with warranty of habitability issues. The new law increases a landlord's burden by requiring specific maintenance-related responses from landlords in specific time frames and requires specific communications from landlords in response to specific tenant communications within specific time frames. Under most circumstances, a landlord must respond to a tenant's initial warranty of habitability communication within twenty-four hours. The General Assembly wrongly assumed that all landlords work on weekends and holidays or have the resources and capability to respond to messages during such hours.

What should you be doing in response to the Warranty of Habitability law? With this bill, the first and most important action is both obvious and critical. All landlords need to designate in their lease where warranty of habitability-related communications are to be sent. The law specifically provides that "a tenant who gives a landlord electronic notice of a condition shall send such notice only to the e-mail address, phone number, or electronic portal specified by the landlord in the rental agreement for communications. In the absence of such a provision in the rental agreement, the tenant shall communicate with the landlord in a manner that the landlord has previously used to communicate with the tenant."

As noted, the warranty of habitability law has very specific communication requirements within specific time frames. If tenants can fire off a warranty of habitability communication via text to the assistant managers mobile, to the maintenance tech's email, or to the community's regular maintenance portal, a landlord has zero chance of complying with the law. Landlords can only successfully comply with this law by having a very focused and exclusive communication channel. If a warranty of habitability issue goes to litigation, you will be required to produce all documentation. If such communications are spread across multiple emails and mobile phones (texts), this will be a daunting and time-consuming task.

We recommended separating the warranty of habitability channel from your regular maintenance communication for two reasons. First, if warranty of habitability claims are sent in the regular maintenance communication channel, you bear the legal responsibility for identifying and fishing them out of what is probably already a busy communication pipe. Second, if you have a separate warranty of habitability channel in addition to your regular maintenance communication pipe, you can't be in breach of the warranty of habitability if the tenant sends a warranty of habitability request via the regular maintenance channel.

The fourth major bill enacted this session was HB19-1328 (Bed Bugs in Residential Premises). This law establishes duties for Colorado landlords and tenants when dealing with bed bugs. The law is likely to significantly impact the rental of units infected by bed bugs because of mandatory disclosures. Specifically, if asked by a prospective tenant, a landlord must disclose whether the unit contained bed bugs within the last eight months. Additionally, if asked by a prospective tenant, a landlord must disclose the last date (if any) that a unit was inspected and found to be free of bed bugs.

What should you be doing in response to the bed bug law? You will need to figure out how to track all treatments so that you can comply with the disclosure requirements. Landlords should make

disclosures in writing for their protection. The bed bug law validates the fraud theory that tenants were already using to sue landlords. Specifically, tenants were alleging fraud when a landlord knew of bed bug issues but failed to disclose prior to leasing. The new law clearly imposes liability for failing to disclose either intentionally (fraudulently) or by omission. Because a tenant could easily allege after the fact that they asked about bed bugs but were told nothing, landlords are going to have to consider making disclosures regardless of whether a tenant asks. Because a disclosure could kill a lease, the disclosures probably are going to need to be made up front.

When you are constantly at the Capitol, speak to countless legislators and lobbyists, and attend countless hearings, you quickly conclude that most legislators are voting to pass laws on subjects they know little to anything about.

Based on our direct involvement this 2019 legislative session, we quickly concluded that many legislators have no idea how business works, and even fewer, if any, know how the rental industry works. If they did, the application bill would have been a couple of sentences requiring landlords to disclose up front their application-related fees. Instead, it is now a complex set of regulations that are likely to encourage unproductive litigation and that interferes with Coloradoans' freedom to contract.

Legislators certainly don't understand that in the end all increased costs are eventually borne by tenants. For example, HB1118 (10-Day Rent Demand) may hurt landlords in the short run, but in the long run landlords will enact counter measures to reduce risk and recover the triple amount of lost rental days now built into the eviction process. Likely reactive measures include tightening credit standards, raising rent and security deposits, and giving less leniency to tenants. We testified that these likely counter measures will likely hurt those tenants already struggling now, i.e. credit challenged tenants. But our pleas fell on deaf ears.

If the status quo appears not to be working, legislators assume that a new law is needed. Legislators do not consider other obvious explanations for why the status quo doesn't work as intended. For example, many legislators supported the drastic changes to the Warranty of Habitability Act because of a single landlord's failure to provide heat by timely getting a boiler fixed. These legislators sincerely but incorrectly believed that the tenants had no legal rights or remedies under current warranty of habitability law. When I asked them to give me one, just one example, of a warranty of habitability situation not covered by current law, they couldn't do it. The legislators appeared completely dumbfounded when I told them that any one of the attorneys at THS could have recovered significant damages for the tenants using current warranty of habitability law. In other words, it wasn't a lack of legal protections but rather a lack of an attorney.

The warranty of habitability bill also illustrates another huge problem with the legislative session and the process as a whole. To a large extent, legislators are unwilling to meet in good faith and discuss the issues with those who know the most about the subject and therefore could provide the most valuable input. The original warranty of habitability bill took a year to draft, with all sides participating in countless hours of mediated meetings. This is why it has been such a good law. Having a single meeting and telling your opponents that your wish list is not negotiable is not acting in good

faith nor in the best interests of Coloradans. Similarly, neither the House nor Senate sponsor of the 10-Day Rent Demand would meet with us.

Unbelievably but not surprisingly, the legislators who said they are “pro-tenant” refused to listen to proposals that clearly would benefit all tenants. Specifically, sponsors and supporters of the 10-Day Rent Demand refused to give tenants who had been evicted a clean slate if they settled the eviction with their landlord. They refused to listen to this proposal because it revealed their true intentions to eventually prohibit the eviction of non-paying tenants. They also didn’t want to hear it because it runs directly contrary to their false narrative that THS is “pro-poverty” and “anti-fair housing”. For the record, THS is not pro-poverty and is pro-fair housing. No one educates more landlords on their legal responsibilities to not discriminate and to comply with fair housing laws than THS. I’m very proud to unabashedly say that THS is the number one fair housing educator in Colorado.

These same legislators also will not listen to common sense advice about where to spend critical resources. Anyone that knows anything about the rental industry here in Colorado, knows that less than one percent of bad landlords are responsible for literally ninety-nine percent of the problems.

Making legal resources available to those tenants dealing with these unethical and unscrupulous landlords would go a long way to solving the problem without the need for one new law. As discussed above, the tenants in the failed boiler case haven’t been compensated so far due to a lack of legal representation. Not due to a lack of legal protections and remedies. However, instead of using critical and limited dollars to help tenants in cases like the failed boiler, local and state elected officials would rather continue to waste millions of dollars by providing every tenant an attorney in routine non-payment eviction cases where there is almost always no defense.

The industry could do itself a big favor by doing a much better job of self-policing. Action should be and needs to be taken against the miniscule number of landlords that engage in the practices that result in onerous knee jerk legislation. Their selfish actions significantly impact all legitimate landlords.

Finally, unless all landlords get a lot smarter politically, a lot more united politically, a lot more willing to contribute to more moderate political candidates, and a lot more politically engaged, the industry is likely to see more of the same in the years to come.