NEW WARRANTY OF HABITABILITY LAW CREATES VAST NEW OBLIGATIONS FOR LANDLORD

Another month and another major landlord tenant bill passed at the Capitol. The Colorado General Assembly has passed HB19-1170 (HB1170 or 1170). HB1170 drastically alters the Colorado Warranty of Habitability Act (WHA) initially enacted in 2008. HB1170 is a prime example of how disjointed and broken the legislative process has become. 1170 demonstrates an overall lack of knowledge of the rental industry and creates unrealistic burdens on landlords and the courts. In addition to checking in at 20 pages, HB1170 is poorly drafted (we will mention a few obvious drafting flaws in our discussion that follows). We predict that HB1170 will prove to be unworkable in the long run, and thus will need to be amended in the future. Given the length of the bill, we won't be able to discuss the entire bill in this month's edition of Landlord News. The full analysis of HB1170 can be found at **tinyurl.com/THSWoH.**

Spoiler alert, this subject by nature is highly technical and is not scintillating reading. However, given the law's profound impact on your operations and the increased potential for liability, we highly recommend that you read the entire long form article. This article should be available by Friday.

To begin with, 1170 redefines the concept of habitable. The dictionary definition of habitable is pretty straight forward. Habitable means suitable or good enough to live in. Given this, the original bill which we participated in drafting from start to finish was designed to cover major items and not minor or even some significant maintenance disputes depending on the circumstances. A simple way to view habitability is its impact on a person's ability to live in the unit. Generally, if an issue doesn't affect a tenant's ability to live in the unit, then it by definition it shouldn't be considered a habitability issue. On the other hand, if you would probably consider or need to abandon a rental unit over the issue, i.e. you can't live there, then it is clearly a warranty of habitability issue. In other words, if a landlord is not maintaining what they agreed to maintain and it doesn't make the unit unfit to live in, this is not a warranty of habitability issue. This is called breach of lease for which the law already provides a remedy

For this reason, the original WHA had a set list of violations, e.g. running water, heat, weather proof, etc. A landlord breached the warranty of habitability when he failed to repair an item on the list (the list is set forth C.R.S. §38-12-505 and is referred to as the 505 list) and the condition was materially hazardous to the tenant's life, health, or safety. This was known as the AND TEST. The issue had to be on the 505 list AND had to be materially hazardous or dangerous. Additionally, the current WHA contains a catch all provision beyond the 505 list. Specifically, a premises is deemed uninhabitable even if it is not on the 505 list if it is "otherwise unfit for human habitation" AND is also materially hazardous or dangerous to the tenant's life, health, and safety. Based on the catch all, we challenged the proponents of 1170 to give a single example of a habitability situation that was not covered by current law. They couldn't do it.

The current WHA recognizes that surrounding circumstances should be considered when evaluating habitability situations, was developed from studying the laws of every other jurisdiction in the country and was developed during a deliberate and collaborative process

between stakeholders over a nearly ten-month process. Heat is an excellent example of why surrounding factors need to be considered. Clearly if a tenant's heat is not working in January this is materially hazardous to the tenant's life, health, or safety. On the other hand, a tenant's heat not working in July doesn't make the place uninhabitable.

HB1170 replaced the AND TEST with an OR TEST. Under 1170, any condition that is on the 505 list is a violation OR any condition that makes the premises unfit for human habitation OR any condition that materially interferes with tenant's life, health or safety. Changing AND to OR and lowering the standard from "materially hazardous and dangerous" to "interferes with" tenant's life, health or safety will have profound consequences. For example, under the old WHA, a malfunctioning elevator was not a violation in most instances. A broken elevator is not materially dangerous or hazardous to most tenants. Under the new WHA, a tenant can claim that is a breach because it "materially interferes" with the tenant's life.

This is our first example of poor drafting. Since "interfere" is a much lower standard than "materially hazardous and dangerous" the word "life" should have been eliminated from the expression tenant's life, health or safety. Because the word life was not eliminated, arguably, almost any condition can "interfere" with a tenant's life. While clearly 1170 was meant to lower the bar (from materially hazardous and dangerous to interfere), it wasn't meant to eliminate the bar. However, because the word life was kept, tenants could claim that almost any minor maintenance issue "materially interferes" with the tenant's life and thus is a breach of the warranty of habitability. Hopefully, the courts will not agree with this argument. However, you just can't predict, with any certainty, how a court will interpret a statute. Courts have interpreted the current WHA contrary to what was intended. We know it is contrary because we participated in drafting the current WHA and know that the language was intended to mean the opposite of how some judges have interpreted it.

Similar to current law, under 1170 a tenant must give written notice of an alleged breach of the warranty of habitability. However, 1170 encourages tenants to give notice "electronically". Electronic notice means notice by electronic mail or an electronic portal or management communications system that is available to both a landlord and a tenant. 1170 further 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.

This illustrates two more drafting errors. The definition of "electronic notice" does not include notice via text or mention phone. However, 1170 later says that a tenant shall send such notice to the "phone number" specified in the rental agreement. Further, tenants can give written notice the old-fashioned way (via paper), but 1170 doesn't mention a mailing address "specified in the rental agreement."

Because we anticipate that landlords will receive a literal flood of warranty of habitability related communications in the future, it is critical that you control where those communications go. Thus, it is imperative that you specify in your lease the email address or the web portal URL that tenants are to send such notices. Because if you fail to specify, tenants can communicate with you in a manner that you previously used to communicate with the tenant. Thus, if you have

texted the tenant, they can text you back with written notice of a warranty of habitability breach claim. In order to prove and control these communications, we strongly recommend setting forth in your lease where communications are to be sent, so all such communications are compiled at a single point.

Once a landlord receives a warranty of habitability related communication, landlords are required to respond within 24 hours. 1170 requires landlord's responsive communication contain specific elements. Landlord's communication must indicate the landlord's intentions for remedying the condition, including an estimate of when the remediation will commence and when it will be completed. Since landlords are required to send multiple outgoing communications under 1170 and some of these communications have specific requirements, we recommend setting up communication templates and sending from the same source so that all outgoing communications can be compiled from single send point. With the anticipated volume of warranty of habitability communication, you do not want to have to comb through multiple email accounts to extract relevant communications.

HB1170 also changes the amount of time landlords get to fix an issue. Under the current WHA, a landlord was in breach if the landlord did not fix a violation within a reasonable time. When the original WHA was enacted, stakeholders debated the time that landlords should be given to address or fix an issue for months. At the end of the debate, everyone agreed that specific time frames didn't make sense because facts and circumstances can vary greatly. For example, if the heat is out under normal circumstances a reasonable time is likely a day or two to get fixed. However, if there is six feet of snow and the heat is out, a reasonable time might be weeks.

Under 1170, landlords get 24 to 96 hours from the time they receive electronic notice (or written notice) to "commence remedial action by employing reasonable efforts" depending on the nature of the alleged breach of warranty of habitability. If the alleged breach is on the 505 list or is another issue that "otherwise makes the premises unfit for human habitation", landlords get 96 hours to commence remedial action. One good point is that the tenant's notice must include permission for the landlord to enter the residential premises on 96-hour issues. The bad point is that most tenants will not be aware of this and not include this permission. This will lead to more communication work for landlords and perhaps more misunderstandings.

If the alleged breach materially interferes with the tenant's life, health, or safety, landlords then get 24 hours to commence remedial action. As noted, before, the expression "materially interferes" with a tenant's life is an obvious drafting error but based on this error tenants will demand responsive action to minor issues. For example, it doesn't take a stretch of the imagination to anticipate that all tenants will claim that mold interferes with their "life" or "health" or "safety" and will demand immediate action.

Unfortunately, the more bad news is that HB1170 contains substantial specific mold related provisions. These provisions are too lengthy to discuss in this abbreviated version of the article. Under 1170, mold is both its own specific breach of the warranty of habitability and included on the 505 list. Defining mold as both a separate breach and adding it to the 505 list is another clear drafting error and frankly will be a statutory interpretation nightmare.

In addition to the major changes to the WHA, HB1170 also imposes additional legal requirements on landlords. Landlords are now required to provide tenants with a copy of written lease agreements no later than the seventh day after the tenant has signed the agreement. Landlords may provide the tenant with an electronic copy of the agreement, unless the tenant requests a paper copy, in which case the landlord shall provide the tenant with a paper copy.

HB1170 also requires all written lease agreements to include a statement providing the tenant with the name and address of the person who is the landlord or the landlord's authorized agent. If the landlord or the landlord's authorized agent changes, the new landlord or authorized agent has to provide the tenant with notice of such change the next business day after such change. The landlord or agent may provide each tenant written or electronic notice of the change or post the identity of the new landlord or new authorized agent in a conspicuous place on the premises. Such notices are already common under Real Estate Commission Rules, especially with regard to transfer of security deposits. However, landlords who are brokers should be aware the Real Estate Commission Rules require such notices to be given by First Class U.S. Mail in order to be effective.

As noted at the outset of this Article, HB1170 is twenty pages and contains other significant provisions that are not discussed in this issue of Landlord News. For example, we didn't discuss the specific mold provisions, repair and deduct issues, and the major alteration to the retaliation provisions in the current WHA. Again, the full article can be found at: **tinyurl.com/THSWoH**. THS is currently developing a full education program for all the new laws enacted this year including these significant changes to the warranty of habitability and will be offering classes as soon as May 2019. As always, classes are always free for THS clients.

HB1170 is a major change to existing Colorado landlord tenant law. The new law is likely to make tenants think that minor maintenance issues are warranty of habitability issues. One of the unintended consequences of the law is likely to be more evictions. Tenants already withhold rent for maintenance issues that do not amount to a breach of the existing warranty of habitability. The new law may embolden tenants to withhold rent even more often when such withholding is not legally justified. Obviously, when tenants do not pay the rent, landlords evict for non-payment of rent. Once the eviction is filed, tenants are literally going all in that they are right but as we have learned under the existing WHA every tenant hand is not a winner. The new law requires a lot of communication. Since it will be impossible to determine up front which maintenance issues fall under the purview of the new WHA, we strongly recommend that your communication system document all maintenance issues as though the issue has warranty of habitability implications. In other words, an ounce of prevention is worth a pound of cure. Finally, given the anticipated volume of communication, your system should collect all incoming and outgoing communications from a single point.