



THE BUCKET LIST

By understanding your available bucket list, you can make better decisions with respect to when and to what extent you want to resolve resident delinquencies.

PICTURE THIS: A resident skips out with six months left on the lease. Reletting prospects are dim. You are in the process of itemizing damages for the security deposit statement. How much can you charge the resident?

The term “bucket list” is normally associated with a list of lifelong goals and aspirations, but today I am writing about a different kind of bucket list. There has been a lot of confusion in the apartment industry over what a resident actually owes after a default. I refer you to the “bucket list.” This is a list of four buckets of amounts due under the standard TAA lease when a resident defaults.

Remember: You can only charge a resident what the resident has agreed to pay.

Contrary to popular belief, the TAA lease does not assess the resident for a “termination fee,” “insufficient notice fee,” “early termination fee” or similarly named fees. While these fees may be able to be authorized under an addendum to the lease, they are not incorporated into the standard lease. If the resident hasn’t agreed to pay it, don’t charge it!

I understand that it may be a hassle for you to charge future amounts due only to have to credit the resident’s account when you collect from a subsequent resident. However, even if your practice is not to charge the full amount you can under the lease, it is beneficial to know what your rights are with respect to what you can charge the resident. That way, you know what you are giving up if you decide not to seek recovery of all that you can.

So what is a resident required to pay after a default of the TAA lease?

Let’s take a look at the four buckets....

Bucket 1 - Past Due Rent and Other Damages:

If a resident skips out or is otherwise in default of the lease, the resident would owe all

past due amounts that were due and owing as of the date of the default. Section 40 provides a list of items that the resident is liable for after a default. This includes unpaid rent (due and owing under section 6), unpaid utilities (due and owing under sections 7 and 12 and applicable utility addenda), unreimbursed service charges and repairs or damages to the unit or property.

The first bucket consists of past due rent fees and other charges as of the date of default that the resident has agreed to pay but has not.

Bucket 2 - Reletting Fee:

In section 10.1, the resident agrees to pay a reletting charge if the resident: (i) fails to move in, or fails to give written move-out notice as required by the lease; (ii) moves out without paying rent in full for the entire lease term or renewal period; (iii) moves out at the owner’s demand because of the resident’s default; or (iv) is judicially evicted.

Keep in mind that the reletting charge is not a cancellation fee and does not release the resident from other obligations under the lease. The reletting charge is a liquidated amount covering only part of the owner’s damages for the owner’s time, effort and expense in finding and processing a replacement resident. The reletting fee is not a substitute for the payment of any delinquent or accelerated rent.

In order for the reletting charge to be an obligation of the resident, the blank in section 10.1 must be filled in. As stated in the lease, the amount is not to exceed 85% of the highest monthly rent during the lease term.

Bucket 3 - Accelerated Rent:

Section 32.3 provides that, unless the owner elects not to accelerate rent, all monthly rent for the rest of the lease term or renewal period will

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be accelerated automatically without notice or demand. The total amount accelerated (the future amount of rent due under the lease) will be immediately due and delinquent if, without the owner’s consent, the resident: (i) moves out, removes property in preparing to move out, or gives oral or written notice of intent to move out before the lease term ends and (ii) hasn’t paid all rent for the entire lease term. The remaining rent is also accelerated if the resident is judicially evicted or moves out when the owner demands because of a default.

The alternative to accelerating all rent that is due for the remainder of the lease term is to elect not to accelerate the rent. You have this option under section 32.3. If you decided not to accelerate the rent, the rent would become due and owing by the resident each month as rent becomes due under section 6. In other words, rather than assessing a one-time accelerated rent amount against the resident’s account, you would assess the monthly amount each month as it becomes due. By not accelerating the rent, if you do relet the unit, depending upon when it is relet and how much you are getting for the replacement resident, there may not be a need to credit amounts received to the defaulting resident’s liability.

Bucket 4 - Rent Concession Payback:

Section 32.5 of the lease provides that if the resident defaults, in addition to other sums due,

the resident will pay any amounts stated to be rental discounts or concessions agreed to in writing. If the resident has received any concession, including free rent, the resident would owe those concessions back, in addition to any other amounts due. If you provided a rent concession, there should be a rent concession addendum, which clarifies the amount of the concession and the responsibility of the resident to pay back the concession in the event of a default.

Mitigation of Damages:

Pursuant to section 32.6, the owner agrees to exercise customary diligence to relet the unit and minimize damages. The owner agrees to credit all later rent that the owner actually receives from subsequent residents against the defaulting resident's liability for past due and future rent and other sums due. In other words, after adding up the four buckets and applying any security deposit to those amounts, the resident's liability will not be final until the end of the term of the lease, when you know what amounts you have actually received from subsequent residents throughout the remainder of the defaulting resident's lease term.

This may get a little tricky. If a resident whose lease term expires June 30 skips Jan. 31 (with five months left on the lease), and you relet the unit beginning March 1 for the same amount of rent, you may be inclined to finalize the defaulting resident's account by charging the defaulting resident through the end of February. However, if the new resident defaults after paying one month's rent, the old resident would still owe four months of accelerated rent since you did not actually receive that money from the new resident. Essentially, you would then have two residents who would owe those last four months (the new resident as well as the old resident), even though you would not be able to actually collect this rent from both residents.

Although you may be inclined to have the resident sign a separate addendum changing your obligation to mitigate damages, be careful! Section 91.006 of the Texas Property Code provides a landlord has a duty to mitigate damages if a tenant abandons the leased premises in violation of the lease and that a provision of a lease that purports to waive a right or to exempt a landlord from a liability or duty under this section is void. In other words, the duty to mitigate damages is not only contractual in your TAA

lease, but it is also statutory and the statutory duty cannot be waived by a written agreement.

Can you charge less than the amounts owed?

You can waive your right to charge the amounts due and owing under the lease as long as you do so on a consistent basis under the same or similar circumstances. In other words, you don't want to be accused of a Fair Housing violation by charging less for certain persons and not others. If your company develops a policy of waiving your right to charge all that you can, you may want to consider putting that policy in writing so it can be consistently applied and enforced. Additionally, if you give up charging certain amounts to defaulting residents and the residents agree to pay those amounts, you may want to do an agreed cancellation of the lease where you would incorporate a release and confidentiality agreement. 

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