



## **Some Things You May Not Know About Colorado's Security Deposit Act**

**By Martin D. Beier\***

Colorado's Security Deposit Act<sup>1</sup> was passed to protect tenants from a landlord who wrongfully and willfully withholds the security deposit after the lease has ended or the tenant has surrendered the premises. The Security Deposit Act allows for treble damages against landlords in some circumstances, and contains a one-sided fee shifting provision that allows a tenant who sues and prevails to recover attorneys' fees, while the landlord is not granted a similar remedy should the landlord prevail. Because of the potential risks to landlords for failing to comply with this statute, landlords and their counsel should be well-versed in the statute's provisions and the ways in which the Colorado courts have applied it. This article provides a short list of important things that landlords should know about the Security Deposit Act's requirements.

- **The Landlord Bears the Burden of Proof that Withholding the Security Deposit was Not Wrongful**

In most civil lawsuits, the party that brings the claims (the "plaintiff") usually is also the party that bears the burden of proof at trial. The Security Deposit Act specifically alters this burden, however, by providing that: "[i]n any court action brought by a tenant under this section, the landlord shall bear the burden of proving that his withholding of the security deposit or any portion of it was not wrongful." Thus, the tenant bears the burden of proving that a security deposit was paid, how much that security deposit was, and that the landlord did not return the security deposit within the statutory time. The landlord then bears the burden to establish to the judge or jury that withholding the deposit or any part was not wrongful. This means that if the evidence about the wrongfulness for withholding the deposit is equally balanced (i.e., where the landlord insists the tenant damaged the premises and the tenant disputes doing so, and the judge or jury cannot decide which is true), the judge or jury must rule for the tenant by finding the withholding to be wrongful. A wrongful withholding is a violation of the Security Deposit Act.

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- **The Safe Harbor is Only Partly Safe**

The Security Deposit Act requires that the landlord return to the tenant the full amount of the security deposit within the statutory time (discussed below). If the landlord elects to withhold some or all of the security deposit, the landlord is required to provide the tenant “with a written statement listing the exact reasons for the retention” and at the same time, provide the tenant with “payment of the difference between any sum deposited and the amount retained.”

As previously noted, a tenant may sue the landlord under the Security Deposit Act for willfully retaining some or all of the security deposit and is provided certain remedies such as the prospect of treble damages and fees. Before that can happen, the Security Deposit Act provides a safe harbor to the landlord, by requiring that “the tenant has the obligation to give notice to the landlord of his intention to file legal proceedings a minimum of seven days prior to filing said action.”

The tenant is required to give the landlord seven days’ notice of the intent to file suit under the Security Deposit Act as a second chance for the landlord to return the security deposit to the tenant after not doing so within the statutory time limit allowed. Thus, if the landlord withholds the security deposit, the tenant lets the time for return to pass and then sends a letter to the landlord stating the tenant intends to sue for wrongful withholding after seven more days, the landlord has a second chance – if the landlord returns all of the security deposit within the seven days, the tenant has no claim against the landlord under the Act.

This safe harbor, however, is often misunderstood. It *does not give the landlord a second chance to give the tenant the written statement* explaining the exact reasons for withholding the deposit if the landlord failed to do so before. The only way a landlord avoids liability for violating the Security Deposit Act upon retaining some or all of the security deposit and failing to provide the written statement within the time allowed, is to return *all* of the security deposit within seven days of the tenant’s notice. Failing to provide the written statement to the tenant within the time required is a “forfeiture” of all the landlord’s rights to withhold any part of the security deposit – either with or without valid cause to do so.

- **A Landlord Can, and Should, Extend the Time to Return the Deposit**

Because the deadline to return the security deposit or provide the written statement is a key component to the landlord’s liability as discussed above, from the landlord’s perspective, the more time to comply with the Security Deposit Act, the better. The time to return the deposit begins to run “after the termination of a lease or surrender and acceptance of the premises, whichever occurs last,” and the Security Deposit Act sets a presumptive “one month” timeframe to then return the deposit or provide the written statement. The Act, however, allows for the presumptive time to be extended, but only if it is done so in the lease, and even then, any longer period of time beyond one month may “not exceed sixty days.”

To take advantage of this additional allotted time and give themselves time to comply with the Act, landlords should specify in their leases that the time for the return of the security deposit is agreed between the tenant and the landlord to be within sixty days after termination of the lease or surrender and acceptance of the premises, whichever occurs last. In addition,

because the phrase “acceptance of the premises” is undefined in the statute, and has yet to be interpreted, landlords may want to consider defining in the lease what actions they intend to take upon surrender before the lease expires that constitutes their “acceptance” of the surrender (i.e., taking custody of the keys, changing the locks, re-letting the premises).

- **The Statute of Limitations for a Lawsuit Can Run as Long as Six Years.**

The Security Deposit Act does not contain a statute of limitations. As a result, the Colorado Supreme Court accepted review of a case to decide what general statute of limitations law applies, and ultimately held that the treble damages provision of the Act is a penalty, and thus subject to the shorter, one-year statute of limitations.<sup>2</sup>

The Colorado Supreme Court’s decision that the Security Deposit Act provides for a penalty, and thus falls under the one year statute of limitations of C.R.S. § 13-80-104 for “[a]ll actions and suits for any penalty or forfeiture of any penal statute” is often mistakenly understood to mean that **any** suit brought under the Act is barred after one year – not so. What is often overlooked is that the Court held that there are essentially two types of relief afforded to tenants by the statute: (1) the penalty of treble damages imposed on the landlord for wrongful, willful retention of the security deposit; and (2) a remedial, contract remedy for return of the actual amount of the deposit plus the attorneys’ fees incurred to obtain the return of that amount.

Although it is accurate to state that a tenant cannot sue for treble damages unless the lawsuit is filed within one year after it accrues, the tenant may still sue after the one-year passes if all the tenant seeks is return of the actual amount of the security deposit, and the tenant’s attorneys’ fees. Although often overlooked, the Supreme Court also held that “[t]he recovery of the actual security deposit and the award of attorneys’ fees” is “limited by our six year statute of limitations” in C.R.S. § 13-80-110(1)(d). Thus, **landlords remain subject to suit for wrongfully withholding any part of the security deposit under the Security Deposit Act for a full six years** after doing so, even though they cannot be held liable for treble damages unless the suit is filed within one year.

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<sup>1</sup> C.R.S. § 38-12-13.

<sup>2</sup> *Carlson v. McCoy*, 193 Colo. 391, 566 P.2d 1073 (Colo. 1977).