



Mark N. Tschetter
Victor L. Sulzer
Peter E. Muccio
Lindsay E. Jasper
Karen A. Harvey
Rachel L. Winders
Kory J. Cook

Chris R. Cunningham
Jonathon G. Carlson
June A. Torres
Hannah J. Bevers
Oscar J. Brueckner
Rider A. Daily
Zachary W. Dupuis

3600 S. Yosemite St., Suite 828
Denver, CO 80237
303.699.3484
719.550.8004 (CS)
970.822.7020 (GJ)
TSM.Law

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JURY TRIAL WAIVER ADVISEMENT

Date: November 2024

To: Tschetter Sulzer Muccio Clients

From: Tschetter Sulzer Muccio

Re: Advisement re: Waiver of the Right to Trial by Jury in Eviction Actions

I. Impact of Colorado Supreme Court Jury Trial Ruling in Evictions

On October 21, 2024, the Colorado Supreme Court held that there is a right to a jury trial on any factual disputes in forcible-entry-and-detainer ("eviction") actions. This ruling has significant implications for filing eviction cases. Jury trials are extremely expensive and time consuming. A simple eviction jury trial could drag on for days when a trial to the Court could be completed in hours. Additionally, eviction jury trials will significantly increase costs and potential legal exposure. Jury trials require significantly more attorney time to both prepare and try. Jury verdicts are unpredictable and juries almost certainly will include tenants making judgments on a landlord's conduct. Further, in addition to any monetary award, landlords exposure is also increased by the possibility of Courts awarding tenants attorneys' fees and costs in cases where the landlord does not prevail.

II. A Proper Jury Trial Waiver is Now a Must For Every Landlord

To limit the potential exposure of jury trials, landlords must deploy a proper jury trial waiver in every lease when permissible.

Effective August 7, 2023, HB23-1095 significantly amended Colorado Statute C.R.S. § 38-12-801, and prohibited lease provisions that waive certain rights of the parties including the right to a jury trial in most cases. However, there is a specific exception for a waiver of the right to a jury trial in an eviction possession trial.

Pursuant to C.R.S. § 38-12-801(3)(a)(III), a written rental agreement must not include a waiver of “the right to a jury trial; **except that the parties may agree to a waiver of a jury trial in a hearing to determine possession of a dwelling unit.**” (emphasis added).

There are three possible scenarios regarding the jury trial waiver:

1. The lease does not contain a waiver.
2. The lease contains a broad general waiver.
3. The lease contains a valid limited waiver.

1. Leases Not Containing a Jury Trial Waiver.

Here, the outcome is easy - tenants will be able to request a jury trial on any eviction action. Landlords without a valid jury trial waiver in the lease face heightened stakes in filing eviction cases understanding that there will be little to no defense that can be raised to avoid a jury trial if demanded by a tenant. The same goes for situations in which there is no written lease. If there is no written lease, there can be no jury trial waiver.

Subsidized Properties that utilize the HUD Model Lease do not have the jury waiver. The HUD Model Lease is prohibited from containing a jury waiver. Other Federal programs such as HOME, PHA, or HUD project based programs may also have this restriction.

2. Leases Containing Broad General Waivers May Not Be Enforced

Prior to August 2023, leases could include a jury trial waiver applicable to any action between the landlord and tenant concerning the lease. For example:

“To minimize legal expenses and, to the extent allowed by law, you and we agree that a trial of any lawsuit based on statute, common law, and/or related to this Lease Contract shall be to a judge and not a jury.”

This is a general broad jury fee waiver. This waiver does not specifically apply only to issues of possession. We do not recommend using a broad general waiver. If a broad general waiver is utilized, the Court could rule that the waiver is unenforceable because it violates C.R.S. § 38-12-801(3)(a)(III). Remember, this lease specifically states that a lease may not include a waiver of the right to trial by jury, except for waivers in eviction possession hearings. Any Court ruling would be based on the language of the jury waiver and it is possible that the Court could still enforce the above waiver based on its limiting language (“to the extent allowed by law”). But again, we strongly recommend not leaving it up to the discretion of the court by deploying a complying limited waiver.

3. Leases Containing Valid Limited Complying Waivers.

The only way to ensure that a landlord has maximum protection against a tenant’s jury trial demand is to have an updated jury trial waiver that strictly adheres to § 38-12-801(3)(a)(III). All major lease products including the NAA lease, TSM lease and leases reviewed and approved by TSM will include a jury waiver.

Such a provision looks like this:

“Landlord and Tenant agree that in any action or proceeding in which Landlord is seeking possession of the Premises from Tenant, a trial shall be heard by a court sitting without a jury.”

So long as the lease has a provision that mirrors the above, we should be able to successfully avoid a jury trial in any eviction possession trial. Even if a tenant requests a jury trial in this scenario, we should be able to strike the request by filing a Motion with the Court after verifying the lease has a valid waiver.

III. All Leases Should Contain a Low Attorney Fee Cap

In addition to a jury trial waiver, we strongly recommend for all of our clients to immediately revise their leases to cap the amount of attorneys’ fees and costs that can be recovered in any litigation with a tenant including eviction cases. For example:

“The attorneys’ fees and costs awarded to the prevailing party shall not exceed \$1,000.00.”

As a practical matter, most tenants representing themselves will not be able to try a jury case. This means that almost all tenant jury trials will be tried by attorneys. Attorneys will have limited incentive to try a jury trial if the maximum amount of fees that they can recover is \$1,000. The cap had the additional advantage of discouraging attorneys from taking non-jury cases as well.

What about my attorneys' fees? The greatest and continual need to be reimbursed for attorneys' fees comes from eviction possession hearings. We recommend setting the cap between \$1,000 and \$2,000, but not in excess of \$2,500. This should allow landlords to recover most attorneys fees for possession related litigation. Landlords should also keep in mind two additional points. One, the Tenant Advocate Groups implemented many barriers to recovering possession related attorneys' fees last session, that landlords may not add such fees and costs to a tenant ledger without a court order determining that the landlord was the prevailing party and that landlords' fees and costs were reasonable. Two, in many cases, especially where the attorneys' fees and costs are significant, landlords' chances of actually getting paid those fees is minimal.

IV. Eviction Processing Operational Changes

The Supreme Court's jury waiver ruling has the potential to significantly impact TSM attorney resources and the allocation of those resources. We will likely be required to hire significant additional attorneys and paralegals to continue to provide the highest level of client service in eviction cases. To ensure adequate resources and allocation of those resources, the following changes to eviction processing will be phased in between now and January 1, 2025. These changes will be reflected in the annual TSM Residential Eviction and Sheriff's Fee Agreement you should have received or will receive shortly.

1. Leases or An Example Lease Required to File in the Case.

While many (most) clients already have leases on file, TSM will need to review the most current lease for any rent cases being sent to us for filing. Accordingly, to process cases, in addition to submitting the expired Demand to TSM, clients will also be required to submit a copy of the tenant's Lease. Once the lease requirement is mandatory, we cannot file your case without a lease submission. The failure to timely submit a lease with your demand will delay the processing of your case.

Additionally, having the lease uploaded immediately ensures that we have the necessary information in order to defend a jury demand from a tenant by filing a Motion to Strike the request with the Court. In filing such a motion, we will be required to submit the lease as an exhibit. So, if we do not have the corresponding lease we would not be able to promptly file the Motion to Strike the request for a jury.

- **Multiple Demands**

If you send us multiple compliance demands (rent demands), you are only required to send us a representative lease. For example, if you send us 5 demands and the lease is the same for all 5 demands, you are only required to send us a single representative lease. If the lease is different for all 5 demands, you will need to send us all 5 leases.

- **Leases Will Be Submitted on Client Portal**

Clients are currently required to submit all rent demands on their client portal. Accordingly, you will also need to send (upload) applicable leases on the portal. The lease submission process with instructions is currently being added to the TSM Client Portal.

2. TSM May Require Prepayment of Attorneys' Fees (Retainers)

To ensure adequate staffing levels and for other reasons, TSM *may require an adequate retainer before filing* where we have determined there is no lease, no jury waiver in the lease, or the lease contains a jury waiver of questionable enforceability. The retainer determination will be made in our sole discretion based on numerous facts, i.e. overall relationship with TSM, payment history, etc. A retainer is a sum of money paid to TSM as an advance against anticipated costs and attorneys' fees associated with preparing for and trying a jury trial. TSM will set retainers at our discretion. However, based on based experience with jury trials, retainers likely will be set at a minimum of \$5,000. Any paid retainer amounts not used are refunded.

Key Retainer Points

- Any client with a valid jury fee waiver in their lease (Note - some federally subsidized programs prohibit jury waivers) does not have to pay a retainer. Thus, you can avoid having to pay a retainer by simply having a valid jury waiver
- If you pay a retainer, your fees are not limited to the retainer if a jury trial takes place
- Similarly, if you pay a retainer, it does not mean that all or any of the retainer will be used. If we file your case and the tenant does not contest, the retainer would be refunded in its entirety.