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Non-Payment Form Advisement

Date: April 11, 2024
To: Tschetter Sulzer Clients
From: Tschetter Sulzer
Re: What Amounts To Include On Non-Payment Eviction Notices And Which Form To Use.

Important Introductory Note

Once HB24-1098 is signed by the Governor, the use of one or more of the Eviction Non-Payment Forms discussed in this paper will be mandatory. Once HB24-1098 becomes law, we will not be able to file any eviction nonpayment cases that do not use the Forms discussed.

Overview of the Issues

Tenant Advocate Attorneys (TAAs) have been instrumental in passing complicated landlord-tenant legislation since 2019. The TAAs get complicated and unclear laws passed and they then use these same laws to make nonpayment evictions more complicated, time-consuming, and expensive. The basis of any nonpayment eviction is a demand for payment or possession. TAAs now use new laws to regularly challenge the amounts that can be included in eviction nonpayment demands.

For the most part, the county courts have rejected these attacks and challenges but at least one county court (Boulder County) has erroneously ruled that late fees cannot, under any circumstances, be included on a Rent Demand. More troubling, many other courts appear to be now at least entertaining the TAAs' legal arguments as opposed to immediately rejecting them. Accordingly, landlords should be aware that some eviction notices for nonpayment may be more susceptible to the TAAs' legal arguments and therefore carry a higher risk. TS' new Form Set, is specifically designed to counter the TAA's technicality tactics and offer our clients with risk based options including a very low risk option. Accordingly, TS has created a low risk Form Set

(Just the Rent Form) for Landlords that decide it makes sense to go to a very low-risk and conservative nonpayment eviction strategy.

As always, we know that your time is important. So this paper briefly discusses (in the shortest space possible that the subject can be discussed for you to be able to make a decision) the two big issues, and then our recommendations immediately follow. For those interested and with more time, our recommendations are followed by an extensive discussion of the issues.

Two Areas - Two Arguments

The TAAs attack two areas of nonpayment eviction demands. One, late fees. Two, all other amounts owed by the tenant other than base rent or late fees.

The Late Fee Attack

TAAs argue that late fees cannot be included on Rent Demands based on a section of the [Colorado Late Fee Statute](#). This statute went into effect on October 1, 2021.

While the TAAs have been making this argument for years, until a recent Boulder County Court ruling, courts rejected the TAAs' argument *if a landlord was evicting for nonpayment of rent and late fees were included in the total that the tenant had to pay in order to cure*. The late fee argument was only accepted if the landlord brought an eviction based on late fees alone. Both the Denver District Court and a Federal District Court interpret the statute as only barring evictions that are based solely on late fees. Thus, based on Denver's and the Federal Court's interpretation, late fees should be allowed or be able to be included in a demand for payment or possession.

Attack Against All Other Amounts Due (Other Than Base Rent)

Apart from late fees, based on [a separate statute](#), TAAs argue that no amounts (other than base rent) including late fees, may be included in a demand for payment or possession.

Judges have also routinely rejected the argument that this statute bars landlords from demanding payment (of non base rent amounts) in an eviction by including "other amounts" on a Demand for Rent or Possession. However, the issue is now pending in Boulder County again and continues to be routinely raised by the TAAs. Because more rulings are likely in the near future, TS proactively raises the issue so all of our clients can make informed decisions about their nonpayment (eviction) policies and procedures.

Decisions Landlords Need to Make

What Amounts to Include on a NonPayment Demand

Based on the attacks and court rulings, landlords need to evaluate and determine what amounts they will include on demands for compliance or possession.¹ To begin with there are two amounts or buckets that landlords can consider including on a demand for compliance or possession when a tenant has failed to pay base rent and other amounts.

Bucket A - Monthly base rent only

Bucket B - All other amounts (see discussion: [requiring payment of all other amounts](#))

The Options

Landlords have 3 options when deciding amounts to include on a nonpayment demand (now called a Demand for Compliance or Possession).

1. Demand for Compliance (Payment) Includes Just Rent (JR Form)
2. Demand for Compliance (Payment) Includes Rent and Other Amounts (AB Form)
3. Whether to include late fees in the B Bucket on the AB Form

Remember, two arguments (no late fees and no other amounts).

1. Eliminating Bucket B (using a JR Form), eliminates both arguments.
2. Keeping Bucket B (using an AB Form), but not including late fees eliminates the late fee argument.
3. Keeping Bucket B (using an AB Form) but including late fees into the Bucket B total does not eliminate either argument.

Boulder County - The Decision Has Been Made For You

Boulder County landlords do not need to make any decisions at this point. Based on the erroneous ruling, Boulder County will dismiss all evictions that include any late fees and could easily and foreseeably dismiss any case that includes any other amount. For this reason, Boulder County Landlords need to use Form 01JR (Just the Rent) for now and until the situation in Boulder County normalizes and an appeal of the erroneous order has run its course.

¹ Prior to the legislative activism of the Tenant Attorney Advocates, nonpayment cases were always based on a "Demand for Rent or Possession". However, as discussed further below, for tactical reasons TS will now base nonpayment cases on "Demands for Compliance or Possession". While in some respects in most cases this is a distinction without a difference (other than the title of the Demand), the change is necessary to to squarely rebut and hopefully defeat the TAAs legal arguments.

TS's Advice and Recommendations

Four Eviction Forms (NonPayment Demands) to Choose From

Based on imminent changes to eviction law and these arguments being made by TAAs, TS has changed traditional Rent Demands (Demands for Rent or Possession) to “Demands for Compliance or Possession”.

INTENTIONALLY MADE DESIGN CHANGES

The Name Was Intentionally Changed to Demands for Compliance

Again, please note, by design and intention, all nonpayment demands are now referred to as “Demands for Compliance or Possession” AND NOT *Demands for Rent or Possession*.

A Total Field Was Intentionally Left off of the AB Form

There is no total for Line (A) + Line (B) on any AB Form Series. This is intentional. The reason for this is because the two demanded amounts are two separate and independent amounts for legal purposes. Yes, there is a total amount, if the figures are added together. Yes, the tenant has to pay both amounts or the total amount.² However, the right to statutorily cure only applies to rent amounts owed (Bucket A), and not to other amounts owed (Bucket B). See below for an extended discussion of this issue ([whether a tenant has to pay other amounts owed](#) that are in Bucket B).

The changes are:

1. Nonpayment Forms are now called “Demands for Compliance or Possession”
2. All non-payment demands must now have a specific pay or vacate date.
3. There are 4 versions of the NonPayment Form (2 Regular and 2 Denver Specific).
 - a. 01AB - includes base rent and other amounts (you will still need to decide whether to include late fees in Bucket B).
 - b. 01JR - includes just base rent.
 - c. 02AB - Denver Form that includes base rent and other amounts (you will still need to decide whether to include late fees in Bucket B).
 - d. 02JR - Denver Form that includes just rent.

² Based on the law, if FORM AB is completed correctly, the tenant should have to pay all amounts on the AB Form which include (A) all base rent owed; and (B) all other amounts. The most likely exception to this rule would be if a court accepted the late fee argument and late fees were included in the B Bucket Total. Given the complexity of this subject it is discussed below.

TS Recommendations

1. Boulder County Clients must just Form 01JR.
2. Clients that are risk averse should use Form 01JR (risk averse clients in Denver County should use 02JRD).
3. Non Boulder County clients that are willing to accept more risk can use 01AB. If you are using Form 01AB, remember you can still eliminate the late fee argument by not including late fees in Bucket B on this Form. Denver County clients would use the Denver County version (Form 02AB).

Clients electing to use Form 02AB accept the risk of using the Form. While no county, other than Boulder, has rejected late fees or other amounts that can be included in Bucket B, this could change at any time because the TAAs continue to raise these arguments. Thus, clients using this Form could have a case dismissed based on the use of this Form in general and may be at even greater risk if late fees are included in Bucket B. Accordingly, clients electing to use Form 02AB should pay close attention to developments on whether other counties adopt or reject the Boulder County ruling.

4. While TS completely disagrees with the TAA's arguments and the Boulder County decision, the safest course of action until an appellate court resolves these issues is to immediately start using the 01JR or the 02JRD (Just Rent) Forms without including any late fees or other fees. Demanding that the tenant only pay "just the rent" and removing all other fees eliminates any argument from a tenant or tenant attorney that you have violated the law or that your DRP is invalid.
5. Clients are advised not to change the content of our Eviction Forms for any reason. The landscape is just too technical now. Even slight changes (changes that appear innocuous) can have major repercussions. The Forms are specifically designed taking into consideration many factors, the eviction statute, the arguments being made by the TAAs, how courts are ruling now and how we anticipate them to rule in the future, and the rapidly evolving legal landscape. The Forms are also specifically designed to integrate with our court pleadings to defeat the TAAs' arguments.

Extended Discussion of the Issues

Background of Late Fees Law

Effective October 1, 2021, the Colorado General Assembly passed the law regulating late fees for residential tenants, which among other things, created a statutory maximum for the amount of

late fees that can be charged, restricted when late fees can be charged, and included penalties for landlords who violate the law.

Particularly relevant to this discussion are the following provisions:

C.R.S. § 38-12-105(1)(d) states:

(1) A landlord shall not take any of the following actions or direct any agent to take any of the following actions on the landlord's behalf:

(d) Remove or exclude a tenant from a dwelling or initiate a court process for the removal or exclusion of a tenant from a dwelling *“because the tenant fails to pay one or more late fees to the landlord.”*

C.R.S. § 38-12-105 provides that:

(6) A tenant or homeowner may raise an alleged violation of this section as an affirmative defense in a forcible entry and detainer proceeding.

(7) A late fee is distinct from rent, and a rental agreement may not classify a late fee as rent for the purposes of section 13-40-104(1)(d).

Law Arguably Affecting Other Amounts On Non Payment Notices

During the 2023 General Assembly Session, Representative Steven Woodrow introduced HB23-1095, and the law passed and became effective on August 7, 2023. Since HB23-1095 became law, we have seen a steady increase in challenges to amounts included on Rent Demands.

These challenges rely on C.R.S. § 38-12-801(3)(a)(V) (which was written into law when HB23-1095 passed). This statutory provision provides:

C.R.S. § 38-12-801(3)(a)(V)

A written rental agreement must not include a provision that characterizes any amount or fee set forth in the rental agreement, with the sole exception of the set monthly payment for occupancy of the premises, as “rent” for which all remedies to collect rent, including eviction, are available. Such amounts and fees include any fees for utilities or services and any other charge that is not rent.

The TAA Arguments Attacking Late Fees and Other Amounts

Late Fees

The TAAs argue that requiring a tenant to pay late fees to cure a Demand for Compliance or Possession (for nonpayment of rent) renders the demand for rent void and unenforceable.

Specifically, the premise is that late fees cannot be included on a demand for rent so including them and requiring a tenant to pay them inflates (or overstates) the amount the tenant has to pay to exercise their right to statutorily cure the rent demand. Further, by including late fees and wrongfully inflating the amount, the tenant is now misled regarding the cure amount. Because of the confusion, some tenants who would cure do not cure because while they have the money to cure (pay the base rent), they do not have the extra money to pay the late fees.

TS new nonpayment demand Forms (AB and JR series) are designed to counter this late fee argument. The JR series counters the argument by eliminating late fees on the Demand for Compliance or Possession.

The AB Form series separates the base monthly rent from all other amounts so that it stands on its own. The argument being that the tenant cannot be confused about the base rent owed when the amount is separated (stands alone) in Bucket A. By separating out late fees into the “B” Bucket on the AB Form, and having the rent amount owed separately into Bucket “A”, the courts should rule that the late fee argument does not apply to a separate eviction claim solely based on Bucket A (Just the Rent). While this is the correct ruling in our opinion based on the law, we cannot guarantee or promise how a court will rule. There simply can be no guarantee as to how any court will rule and we won’t know until they start making rulings.

Again, as noted several times, the late fee argument can be entirely eliminated two ways. One, by using the JR Form series. Two, by not including late fees into Bucket B.

While no court other than one Division of the Boulder County Court has agreed with this position (any late fees defeats the eviction), the late fee argument appears to have gained some traction in the sense that it is being made more and more often. Only time will tell, if and to what extent this late fee argument will prevail.

The overall late fee argument is both nuanced and complicated. If and when the opportunity presents itself, TS will attempt to get a Colorado Supreme Court ruling to have the issue decided once and for all. Landlords should note that if the argument (no late fees on rent demands) ultimately becomes the law in Colorado statewide, landlords will not be able to collect late fees through the eviction process (at least not directly) and will have to utilize other methods to enforce late fee payments.

The Argument Attacking Other Amounts Due (Other than Late Fees)

The TAAs argue that Landlords are also prohibited from evicting tenants for nonpayment of utilities or other fees. The argument is based on the following law.

1. Evictions for rent fall under §104(d) of the eviction statute.
2. Pursuant to C.R.S. § 38-12-801(3)(V), any amount owed by a tenant other than base monthly rent is not “rent”, and therefore cannot serve as the basis for a “rent eviction”.

The counter argument begins with the fact that the tenants agreed to pay them and are not paying them. The TAAs’ argument overlooks and fails to address this fact (that nonpayment of other

amounts is in itself a lease breach). Specifically, the tenant agreed to pay rent but also agreed to pay utilities, late fees, and other amounts. The eviction statute gives landlords the specific right to evict a tenant for failure to comply with a lease covenant (a Demand for Compliance or Possession). Finally, when it comes to curing a rent eviction, the right to include other amounts per the right to cure statute (a tenant can only cure by paying “all amounts due according to the notice . . .”) Thus, the right to cure statute differentiates between “rent” and other “amounts due according to the notice”. Thus, a demand for rent that includes both rent and other “amounts due” is not defective

Historically, a demand for rent or possession was used to enforce nonpayment of all amounts. The reason for this was simple. All money amounts were deemed rent before the state legislature enacted HB23-1095 prohibiting this practice. On the other hand, a demand for compliance or possession (as opposed to a demand for rent or possession) was used to enforce non monetary covenants. Now for the reasons that follow, a “Demand for Compliance of Possession” will be used in all nonpayment scenarios (whether base monthly rent or other amounts).

While the state legislature can prohibit landlords from calling other sums due “rent”. The law clearly allows landlords to evict for nonpayment of other amounts. Thus, the clear path forward is to separate “other amounts” from base monthly rent and argue that the TAA’s argument does not apply because the landlord is not evicting claiming these amounts are “rent”, the landlord is evicting because the tenant agreed to pay these amounts and is not paying them (not complying with lease agreements that the tenant agreed to honor).

The AB Form (Demand for Compliance or Possession) was specifically drafted to separate out rent claims from compliance claims. Think of it this way. All lease breaches are noncompliance including a breach of the lease for failure to pay rent. Rent breaches are just a specific form of noncompliance and the most common form of noncompliance. For these reasons, breaches for nonpayment of rent have their own special rules. One of those rules is that tenants have the right to cure a lease breach for nonpayment of rent. Breaches for all other noncompliance with the lease are governed by separate rules.

The AB Form just makes this clear. Rent breaches (rent owed) are separate and is set up to follow the rules for rent breaches (§104(d)). Nonpayment of other amounts (all other amounts owed except for base monthly rent) is set up to follow the rules that govern all other lease breaches (§104(e.5)). Proceeding this way eliminates all of the TAAs technical arguments, except the late fee argument if you include late fees in Bucket B (with your §104(e.5) claim).

Finally, the TAAs may have backed themselves into a corner. The TAAs have forced landlords to make this adjustment (to separate out all other money from base rent). Again, the new AB Demand for Compliance or Possession supports two claims. One, a §104(d) noncompliance with the payment of rent claim. Two, a §105(e.5) noncompliance claim for failure to pay other amounts. A tenant has a right to pay (cure) a §104(d) claim. A tenant does not have a right to cure a §104(e.5) claim after the notice period expires.

Most Commonly Asked Questions

[Check Back from time to time as this Section will be updated after more questions pour in regarding the new requirements]

#1 - Can I Require the Tenant to Pay “Other Amounts” as part of a Cure?

The answer is a bit complicated and the specific answer depends on which Form Series you are using.

When Using the JR Forms

The JR Forms do not have any amounts listed other than rent. Thus, if you serve JR (Just Rent) Forms, you may not require the tenant to pay “other amounts owed” as part of the rent cure amount. Your remedy to collect non base rent amounts owed is to serve a “Demand for Compliance or Possession” for just the “other amounts owed”.

When Using the AB Forms

As discussed above, the current law states that a landlord “shall accept payment of the tenant's full payment of all amounts due according to the notice, as well as any rent that remains due under the rental agreement.” The law definitely requires the tenant to pay the base monthly rent (Line (A) on the AB Form) as part of a cure. Other than the reference to “full payment of all amounts due according to the notice”, there is no other support that the law requires the tenant to pay “other amounts” (Line (B) on the AB Form).

However, the AB Form is designed to support two separate eviction claims. One, a rent claim under §104(d)³. Two, a noncompliance claim under §104(e.5) for failure to comply with covenants of the lease to pay these other amounts. If the tenant cures the rent claim, but doesn't want to pay the other amounts, the argument is that claim two (noncompliance for failure to pay other amounts) is separate and if not cured allows the landlord to still move forward and obtain a possession judgment if the tenant refuses to pay. This hopefully will get the tenants to pay Line (B) (other amounts). However, remember, claim two would still be subject to the late fee argument if Bucket B (Line (B)) includes a late fee amount.

Prior to Boulder ruling and the marked increase of these technical arguments being made, TS position was that all amounts due, according to the notice, must be paid in order to cure the issue of nonpayment. The vast majority of courts are still ruling this way, but we want our clients to be prepared. Thus, our new Forms (whether JR or AB) are designed, based on our substantial

³ Remember, a claim for nonpayment of rent is a noncompliance claim. It is just a specific noncompliance claim with its own statutory rules.

experience, to put our clients in the strongest possible position to defeat these technical arguments.

If there is a substantial probability that the tenant will have to pay Line (B) (other amounts), then why should I consider using the JR (Just the Rent) Form and just not always use Form AB? For the reasons (arguments) set forth above. One, the Boulder ruling. Two, these issues are or could be evolving. Three, there is no clear legal precedent from the Colorado Supreme Court. For all these reasons, there is an ongoing risk of including other amounts due (non rent amounts) on a compliance demand. The risk specifically includes requiring other non-rent amounts to be paid as part of a cure. The AB Form and TS new legal approach is designed to minimize the risk by bringing the rent owed and other amounts owed as separate claims, and set the claims up in a manner to get the court's approval about whether they have to be paid.

Even with this approach, if the Court agrees with the TAA's arguments (either late fees aren't allowed or you can't include other amounts as part of the cure), you could be subject to statutory penalties and/or attorney fees. Additionally, we have seen the class action TAA's already taking interest in this issue and sending demand letters to TS clients. It is clear that the class action TAA's have this issue on their radar. While we think proper use of the AB Form is an acceptable risk (especially if late fees are not included and cure amounts without a court's approval do not include "other amounts owed"), this is not our decision. Only individual clients can decide if it is a risk they want to undertake.

What if Other Amounts Owed Are Not Included or Were Included But Not Paid?

Several strategies are available to landlords to enforce the payment of other amounts owed if the landlord is using Form JR and has made a conscious decision to only seek base rent in an eviction for nonpayment of rent. The risk of strategies vary depending on whether the landlord includes late fees or not.

As discussed, failure to pay all "other amounts," other than base rent, is a lease breach and a landlord may evict for noncompliance. Landlords have the right to notify tenants, outside of serving a compliance demand, that the other amounts are still due and that the tenant is still responsible for paying them. This can be done by serving an informal letter of delinquency stating the outstanding balance, providing an updated ledger to the tenant, or through a simple communication in the manner which the landlord and tenant typically communicate such as email.

If the tenant still refuses to pay, a landlord may pursue an eviction for nonpayment of other non-rent amounts (other than late fees) by serving a Demand for Compliance or Possession for just the other amounts due.

Assuming that it is supported by your lease, you may also deduct the other amounts due from the tenant's security deposit to \$0 the ledger. You may then demand that the tenant restore the security deposit to its original amount. If the tenant fails to restore the security deposit, you could then pursue an eviction for noncompliance with the covenant to restore the security deposit.