INTRODUCTION

Security deposits paid by commercial tenants are governed by common law, primarily contract law. In contrast, deposits paid by residential tenants are largely governed by Minn. Stat. § 504B.178. *State v. Larson,* 605 N.W.2d 706, 712-13 (Minn.2000). This essay is only about residential tenancies.

Minn. Stat. § 504B.178 was originally enacted in 1973 as 1973 Minn. Laws. c 561. It has been amended over time but its basic structure remains intact. Copies of the original law and of each amending law are available on HOME Line's website.[1] Until 1999, it was codified as Minn. Stat. § 504.20.

This essay discusses Minn. Stat. § 504B.178 in detail. For the most part the essay discusses the subdivisions in the same order as in the statute. The end of the essay discusses some related issues.

SUBDIVISION-BY-SUBDIVISION DISCUSSION

Subdivisions 1 and 10

Subdivision 1 is essentially a definition of "security deposit". It reads in its entirety:

> Subdivision 1. **Applicability.** Any deposit of money, the function of which is to secure the performance of a residential rental agreement or any part of such an agreement, other than a deposit which is exclusively an advance payment of rent, shall be governed by the provisions of this section.

Subdivision 10 says that any "Any attempted waiver of this section by a landlord and tenant, by contract or otherwise, shall be void and unenforceable." Putting these provisions together, along with the extensive nature of the statute, regardless of the residential landlord's or tenant's desires the statute will provide the rule of law for a "security deposit" in virtually all situations.[2]

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[1] Available at http://homelinemn.org/wp-content/uploads/Sec-Dep-Laws%20(1971-2014).pdf This webpage also displays the prior law, Minn. Stat. § 504.19 (1971), which governed residential security deposits from 1971 until the 1973 law repealed and replaced it.

[2] In theory, there might be a few exceptions. Subdivision 11 of the statute makes it applicable "only to tenancies commencing or renewed on or after July 1, 1973. For the purposes of this section, estates at will shall be deemed to be renewed at the commencement of each rental

Subdivision 1 does not define "residential rental agreement" but with one fairly common exception, it should be obvious whether a lease is a "residential rental agreement". The exception is owners of manufactured homes who live in their homes but park their homes on a lot, a lot which they rent. If the lot is in a manufactured-home park, then section 504B.178 applies because Minn. Stat. §327C.03, subd. 4 specifically states, "The provisions of section 504B.178 shall apply to any security deposit required by a park owner under this subdivision." It is an open question whether section 504B.178 governs deposits paid by owners of manufactured homes who live in their homes but park their homes on a rented lot that is not in a manufactured-home park.

Subdivision 1 does require the deposit be "money". "Money" means "lawful money of the United States". Minn. Stat. § 645.45(15).[3] There is little dispute that this includes not only paper and coin currency but also checks and money orders payable in U.S. dollars as well as wire transfers of dollars, all of which were common methods of payment in 1973. Modern electronic payments in dollars via PayPal, Venmo and the like should be similarly covered. Since the payment must be in U.S. money, payment in foreign currency or cryptocurrencies like Bitcoin, unless it is accepted as dollars (just as a PayPal payment is not really dollars but it is accepted and credited as such), would not be covered.

There is one case construing Minn. Stat. § 645.45, *Rathbun v. W.T. Grant Co.*, 300 Minn. 223, 219 N.W.2d 641 (1974). *Rathbun* was a usury case, which did influence the court, but the gravamen of its holding was that W.T. Grant coupons were "money". These coupons were denominated in dollars but good only at the W.T. Grant department stores. E.g. if a sweater cost $15, the buyer could pay for it with $15 in cash, with a $15 check, or with a $15 W.T. Grant coupon. This helps confirm the idea that a deposit payable with an instrument accepted and held as U.S. dollars is governed by Minn. Stat. § 504B.178 but otherwise is not so governed (and is more akin to currency speculation.)

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period." Perhaps in all of Minnesota there are still a handful of very long, term residential leases executed before July 1973.

[3] That definition has been in place since 1941. 1941 Minn. Laws c 492 s 45; 1973 Minn Laws c 725 s 83.

Whether so-called "security deposit bonds" are governed by Minn. Stat. § 504B.178 is an open question, which I will discuss in a separate essay on my blog.

Subdivision 2

Per subdivision 3, once the tenancy is over the landlord owes the tenant interest on the deposit. Subdivision 2 states the interest rate and how it is calculated.

Since August 1, 2003 the interest rate has been 1% per year, not compounded (simple interest). With one exception, interest is calculated by the full month so it is better to say that interest is 1/12th of 1% per month. The month the deposit is made does not count at all. The month after the payment is made counts as a full month. The month the landlord properly pays or accounts for the deposit counts as full month even if this occurs mid-month (as it usually does).

The exception is that if the landlord never properly pays or accounts and the tenant gets a judgment based on liability for the deposit, then interest is calculated to the day of entry of judgment.

If the interest would have been under $1, no interest is owed.

The interest rate has not always been 1% per year. It has changed four times. In each case, the change has been prospective only; the relevant session laws have always used the phrase "the deposit … shall bear … interest at the rate of X%" and then state an effective date for the law. This is both fair (otherwise, an interest rate that changed retrospectively would in a single day be a sudden bonus for either the tenant or landlord and screw the other party) and constitutional (a sudden change would be an unconstitutional Taking without compensation to the loser of the exchange). For the few deposits made prior to August 2003, Endnote 1 is a calculation worksheet for calculating the interest and also provides citations to the applicable session laws.[4]

[4] 2024 Minn. Laws ch. 85, s. 105 deleted the reference to 3% interest before August 1, 2003. However, as discussed in the text above, since the session law that changed the interest rate from 3% to 1% used the phrase "shall bear", the amendment did not change the interest earned prior to 8/1/2003. Indeed, this 2024 amendment was part of the Revisor's bill, which is not designed to make material changes to statutes. As the bill's introduction itself states, it is an "act relating to legislative enactments; making miscellaneous technical corrections to laws and statutes; correcting erroneous, obsolete, and omitted text and references; removing redundant, conflicting, and superseded provisions." *See* *City of New Hope v. Catholic Cemeteries*, 467 N.W.2d 336,339 (Minn Ct. App. 1991) ("revisor's bill which by its title purported to remove redundant and

The first clause of subdivision 2 ("Any deposit … 82.55, subdivision 26") is discussed near the end of this essay.

Subdivision 3(a) – when to return or account for the deposit

The landlord normally has "three weeks" to either return the deposit with interest or to account for the reasons he is keeping all or part of it. The three-week clock is reduced to five days if the tenant was forced out due to the legal condemnation of the tenant's dwelling unless the tenant's own willful, malicious, or irresponsible conduct caused the condemnation.

In *Gallaher v. Titler,* 812 N.W.2d 897 (Minn. App. 2012), *review denied* (Minn. July 17, 2012), the court of appeals construed "six weeks" to mean exactly 42 days with the actor having until 11:59 p.m. on day 42 to act. By analogy, "three weeks" means 21 days with the landlord having until 11:59 p.m. on day 21 to return or account for the deposit.

If day 21 is a Saturday, Sunday or holiday, then the landlord has until the next business day to return or account for the deposit. Minn. Stat. § 645.15. Holidays are listed in Minn. Stat. § 645.44, subd. 5.[5]

If the landlord returns less than the full deposit plus interest, his reasons for withholding must be stated specifically (so there is no "I'm working on it" excuse) and in writing.

"Writing" has a broad meaning under Minn. Stat. § 645.44, subd. 14 and in most cases will include emails and even texts.[6]

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obsolete language, to simplify grammar and syntax, and to improve language style without causing changes in meaning")

[5] Under Minn. Stat. § 645.44, subd. 5 it is not clear whether Columbus Day or the day after Thanksgiving would count as a holiday for the landlord. Following the reasoning of *Commandeur LLC v. Howard Hartry, Inc.,* 724 N.W.2d 508 (Minn. 2006) probably both days would count as holidays. However, the conservative landlord should assume neither would count if she is in a position to meet the deadline without either being a "holiday".

[6] Pages 13-16 of *Babler v. Penn*, Minn. Dist. Ct. File No. 62-CV-13-1539 (Ramsey Cty. Aug. 6, 2013) include an excellent discussion of this issue.

In *Williams v. Diallo*, No. A23-0426 (Minn. Ct. App. Jan. 29, 2024) (nonprecedential), the tenant argued that a statement sent by text was not a "written statement" because it was not sent by US mail. The court rejected the argument on the grounds that section 504B.178 only requires the

If the landlord chooses to mail the deposit or the accounting to the tenant, then she can meet the deadline by mailing it by First Class U.S. Mail with a return address and per the tenant's delivery instructions (his stated address) by the deadline day.[7]

The 21-day or 5-day clock starts when the tenancy is terminated and the tenant has given delivery instructions for return of the deposit.

The tenancy does not end merely by the tenant's skipping out early before the end of the lease. *Gaughan Co. v. Swanson,* Minn. Ct. App. File No. C3-87-825, 1987 WL 19765 (Nov. 17, 1987) (nonprecedential), citing *Markoe v. Naiditch & Sons*, 303 Minn. 6,7, 226 N.W.2d 289,290 (1975). Termination occurs when the lease ends (including termination by proper notice on a tenancy at will like a month's notice on month-to-month lease). Termination also occurs (if earlier) on the first day of a new tenant's lease for the unit. *Oman v. Dunn*, Minn. Dist. Ct. No. CT-02-18797, 2003 WL 23484600 (Henn. Cty. Oct. 29, 2003) (Conclusions of Law ¶¶ 5-10).

There is a nonprecedential case, *Mungall v. Garry*, Minn. Ct. App. File No. A18-2020 (June 17, 2019), holding that the clock starts when the tenancy is terminated even if delivery instructions are given days later. I'm convinced that this holding misconstrued the statute. I've written a long blog post on the subject.[8]

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statement to be "furnished" but not necessarily furnished by US mail. The tenant did not argue that the text was not written nor that texting had not been a method for her to communicate with her landlord. When the written-statement language was enacted in 1973, the legislature obviously meant "furnish" to mean something other than texts or emails; probably it had in mind writing on paper – including a paper-delivered telegram – but I suppose an electronic message that appeared on the tenant's TV or stock-monitor would have been a thought. Therefore, *Williams v. Diallo* does not directly decide if a text meets the requirement of a "written statement" and the discussion in *Babler* is still an important read.

[7] This mailbox rule is in the first sentence of part (b) of subdivision 3.

[8] Available on this same blog. The direct URL is https://birnberglegalwebsite.net/2019/07/22/mungall-v-garry-the-court-of-appeals-misconstrues-the-21-day-clock-in-minn-stat-%c2%a7-504b-178-2/

Subdivision 3(a) – who gets paid

This subdivision says that the "landlord shall … return the deposit to the *tenant* [emphasis added]." Therefore, even if a third-party benefactor (e.g. a parent for a son in college) pays the deposit, it is returnable and accountable to the tenant.

Similarly, if the original tenant assigns his lease to a new person – transfers his entire tenancy and not just part of the remaining time – then the new person (the assignee) is due the deposit and accounting. *Davidson v. Minn. Loan & Trust*, 158 Minn. 411,416, 197 N.W. 833,833-834 (1924) (Assignment by original renter puts new renter into privity of estate with landlord.) The original tenant (the assignor) can protect himself by having the assignee pay him for this claim on the deposit as part of the assignment.[9]

With multiple tenants (roommates) – "tenants in common" – the payment should probably go to all of them (e.g. by one joint check) since they each have an undivided interest in the whole. *Chapman Place Ass'n v. Prokasky*, 507 N.W.2d 858, 863 (Minn. Ct. App. 1993) ("when property is held in tenancy in common, there is unity of possession whereby each owner has an undivided interest and cannot claim any specific portion of the property until partition").

What is the rule from the tenants' point of view if they want to sue the landlord for not returning the deposit? Common law holds that tenants in common must join in an action against a stranger for an injury to the common property, but a single tenant in common may maintain such an action if his cotenants refuse to join or are nonresidents or are out of the state. *Rowland v. McLaughlin Bros*, 110 Minn. 398, 125 N.W. 1019 (1910); *Peck v. McLean*, 36 Minn. 228, 30 N.W. 759 (1886). This suggests that all the ex-cotenants (ex-roommates) must sue as a group unless one or more ex-roommate is out of state or refuses to join the suit.[10]

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[9] Of course, the amount of payment will depend on any number of factors, such as which party is more desperate to do the assignment. All other things being equal, a fair payment for the assignment is the amount of the deposit plus accrued interest. Other switching-roommate issues are discussed here: http://homelinemn.org/wp-content/uploads/Tenants%20in%20Common%20-%20security%20deposit%20return.3.pdf

[10] There is a nonprecedential case allowing three of four roommates to sue for the deposit. *Vogt v. Demeules*, No. C0-92-716, 1992 WL 203287 (Minn. Ct. App. Aug. 25, 1992) The opinion does not state whether the fourth roommate cooperated nor whether any of them lived out of state, and it did not discuss the rule from *Rowland* or *Peck*.

Subdivision 3(b) – allowable deductions

The landlord may deduct from the deposit + interest for three kinds of claims -- two types of financial damage and physical damage.

Physical damage claims – subdivision 3(b)(2)

The landlord may deduct "to restore the premises to their condition at the commencement of the tenancy, ordinary wear and tear excepted."

"Ordinary wear and tear" is not defined in Minn. Stat. § 504B.178. At least some district courts have adopted the definition stated in an insurance case, *Sentinel Management Co. v. New Hampshire Ins. Co.*, 563 N.W.2d 296, 301 (Minn. Ct. App. 1997) ("Ordinary wear and tear is the process of ordinary and natural deterioration which an object experiences by its expected contacts between its component parts and outside objects during the period of its natural life expectancy.") A common-sense definition would be that or something close to it.

One issue that comes up is whether it matters what the lease did or did not allow for uses. No Minnesota appellate case has dealt with that precise issue. Other states' courts have held the anticipated use matters. One example is *Mongeon Bay Props., LLC v. Mallets Bay Homeowner's Ass'n*, 2016 VT 64, ¶ 34 (2016) ("'Ordinary wear and tear' is … based upon the *reasonable* use for which the rental unit is intended" [emphasis in original]). At least one Minnesota trial court has agreed, holding that wall stains from cigarette use were ordinary wear and tear since the lease allowed smoking. *Graven v. AHMC Properties*, Minn. Conc. Ct. File No. 43-CO-15-96 (McLeod Cty. Nov. 5, 2015) at 2-3.

What about nail holes? These seem like intentional damage, albeit not evil, but courts in some other states have determined them to be ordinary wear and tear. E.g. see *Tobin v. McClure*, 144 Ill.App.3d 33, 98 Ill. Dec. 194, 493 N.E.2d 1215 (1986). Also both the Minnesota Housing Finance Agency and more surprisingly the Minnesota landlords' main trade group, the Minnesota Multihousing Association, have published electronic pamphlets saying nail holes, or at least a few holes, are ordinary wear and tear.[11] This does not give the tenant carte blanche to wreck the walls. See e.g. *Gaughan Co. v. Swanson, supra* ($107.77 deduction

[11] Available, respectively, at http://www.mnhousing.gov/get/MHFA_006416 and https://www.mmha.com/FAQ .

allowed for "walls had crayon marks, 119 nail holes, grease, dirt and food spills on them").

When the tenant damages something that otherwise would have required replacement in the foreseeable future then depreciation matters. Otherwise, the landlord would make an unfair profit. E.g. if the tenant wrecks carpeting that was five years old and normally would have lasted only six years, the landlord will have to replace the carpeting sooner than expected. However, that carpeting was hardly worth the same as new carpet, so awarding the landlord new-carpeting cost would be wrong. Most courts apply straight-line depreciation to determine what would have been the carpeting's value on the day the tenant left had the tenant not wrecked it. E.g. see this case, applying the rule and also doing an excellent job of legal analysis of the issue, *Babler v. Penn*, Minn. Dist. Ct. File No. 62-CV-13-1539 (Ramsey Cty. Aug. 6, 2013) at 16-19.

Financial damage claims – subdivision 3(b)(1)

The landlord may also deduct "to remedy tenant defaults [i] in the payment of rent or [ii] of other funds due to the landlord pursuant to an agreement".

Claims for non payment of rent

This category of deduction seems straightforward.

Claims for non payment of other funds due to the landlord pursuant to an agreement

The agreement in question should involve something other than rent or restoring the premises to their condition at the commencement of the tenancy, ordinary wear and tear excepted, since those are separated listed in the subdivision.[12]

[12]Jack Horner, the now-retired, long-term main lobbyist for the Minnesota Multihousing Association (the landlords' trade group), wrote a CLE about security deposits in 1980. Mr. Horner was at the committee hearings in 1977 when the legislature considered changing the "other funds" language but declined to do so; he had not yet started his lobbying job when the original law was written in 1973. In his CLE, he wrote that the other-funds provision was meant to cover things other than either rent or physical damage. He gave two examples, writing:

> There are many kinds of damages that a landlord may suffer due to a tenant's breach which are not defaults in rent or physical damage exceeding ordinary war and tear. Such damages include damages incidental to the breach of a lease such as a landlord's need to

These "other funds due" would obviously have to be lawfully due (e.g. not include usurious interest). Obvious examples are unpaid property taxes under a double-net lease, unpaid late fees lawful under Minn. Stat. § 504B.177, and unpaid charges for use of the party room. Also available as a deduction would be unpaid costs and disbursements charged (and probably also chargeable) in an eviction action or other landlord-tenant case the landlord won as well as lawful attorney fees. Claimed losses for breach of the lease where the lease identifies the claim are likely also covered; an example would be an agreement to pay the landlord for costs of re-rental when the tenants prematurely skips out on his lease.[13]

The landlord should not be allowed to get around the ordinary-wear-and-tear provision by charging a flat fee for carpet cleaning. This is one of the points made by Jack Horner (footnotes 12-13) and also the holding of the Iowa Supreme Court in construing an Iowa statute identical to Minn. Stat. § 504B.178, subd. 3(b). *Walton v. Gaffey,* 895 N.W.2d 422,427-428 (Iowa 2017) (lease clause stating "Landlord shall have all carpeting professionally shampooed, paid out of tenants' security deposit" is not enforceable, in contrast to a clause that established a benchmark for Day One condition of the carpet from which ordinary wear and tear could be measured but was not an automatic deduction).

Minn. Stat. § 504B.178 does not define or limit "an agreement" so it could include any contract claim, such as the tenant reneging on an agreement to pay the landlord

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> advertise the vacant apartment or pay a commission to a firm which secures a new tenant. A tenant's obligation to pay for utilities should be spelled out in the lease as appropriate.

"Additional Remedies and Other Concerns in the Landlord and Tenant Relationship" by John G. Horner, in *Residential Landlord and Tenant Law – 1980*, Sponsored by Advanced Legal Education, Hamline University School of Law (1980) at 150-151

He then went on to write:

> It seems to me that a tenant should leave the premises in a condition befitting an ordinary good housekeeper. On the other hand, I believe a landlord would have difficulty enforcing the withholding of a deposit for a tenant's failure to perform major house cleaning tasks such as shampooing carpets, scrubbing walls or waxing floors that every once in a while a landlord will attempt to demand of a tenant upon vacating the premises. However, a tenant probably could be held responsible if there were extraordinary soiling of the walls or floors, such as crayon marks etc.

Id. at 151.

[13]See footnote 12.

for fixing the tenant's snowmobile. However, in a retaliation-defense case, *Cloverdale Foods of Minnesota, Inc. v. Pioneer Snacks,* 580 N.W.2d 46 (Minn. App. 1998), the Court of Appeals construed the phrase "a lease or contract, oral or written" from another part of Minn. Chap. 504B as only covering contracts related to the landlord-tenant arena and not a separate business contract. Thus, it is an open question whether a residential landlord could deduct a non-housing-related claim from the deposit.

No "forfeiting" the deposit

Because Minn. Stat. § 504B.178, subdivision 3, only lists three bases to deduct, it is not lawful for the landlord to simply forfeit out the deposit, even if the lease says that upon doing X the deposit is forfeited. Deductions are allowed only for the three reasons discussed above. *Kaeding v. Auleciems,* 886 N.W.2d 658,664-665 (Minn. App. 2016).

Subdivision 3(c) – burden of proof

Even if the tenant is the plaintiff, in a lawsuit concerning the deposit, the burden of proof for the reason/s for withholding all or any portion of the deposit is on the landlord.

Therefore, if the dispute is over physical damage the landlord will have to prove the condition of the part of the unit sustaining damage on both the first and last days of the tenancy (i.e. before-and-after condition, not just after).[14]

Subdivision 4(1)-(3) – penalty for delay

If the statute has no penalty other than extra interest when a landlord fails to meet the three-week or five-day deadline for return of the deposit, an unscrupulous landlord will wait indefinitely before returning or accounting for the deposit. If even one in ten tenants simply gives up, the unfairly retained deposit becomes a significant profit even after paying the diligent tenants a bit more interest. Therefore, nearly all states' security-deposit laws include one or more penalty clauses for missing the return deadline.

[14] When the damage is to something like carpeting that requires depreciation analysis (see above), the expected lifetime of the (old) damaged carpeting has to be determined. Carpet dealers and repairers have this sort of evidence. For carpeting in use in many apartments, the landlord likely has records of how often it has needed to replace carpeting in other units where the only damage was ordinary wear and tear.

Subdivision 4 lays out the Minnesota penalty as follows: The landlord who misses the deadline "is liable to the tenant for damages in an amount equal to the portion of the deposit withheld by the landlord and interest thereon as provided in subdivision 2, as a penalty, in addition to the portion of the deposit wrongfully withheld by the landlord and interest thereon [emphasis added]." The use of the word "is" indicates that the court has no discretion. If the landlord misses the deadline, the penalty must be imposed.

The rest of this provision is not a model of clarity. The most likely reading, and one that most practitioners follow, is that when the deadline is completely missed the deposit + interest effectively doubles. If the deadline is only partly missed because the landlord returns some the deposit by the deadline, then the deposit + interest effectively doubles minus the amount paid. E.g. if the deposit + interest is $1000, the landlord pays $400 within the three-week period but doesn't account properly until after the deadline, the deposit + interest effectively becomes $1600 (twice $1000 minus $400). In addition to a number of district-court cases, two nonprecedential Court of Appeals cases affirmed a doubling penalty. *Mungall v. Garry*, *supra*; *Shahidullah v. Hart*, No. C9-01-1923 (Minn. Ct. App. June 4, 2002).

The penalty is not just a forfeiture of the right to deduct from the deposit. While that might seem like a significant penalty, it isn't. Missing the deadline does not prevent the landlord from making a damage claim or counterclaim. E.g. suppose the tenant's deposit + interest is $700, the landlord misses the deadline, but the tenant broke a $700 window and then sues for the deposit. The tenant wins that lawsuit but the landlord wins his $700 claim for the broken window, the same result as if the landlord deducted $700 from the deposit. See e.g. *H-L Apartments v. Al-Qawiyy,* 440 N.W.2d 371 (Iowa 1989) applying this principle under Iowa law.[15]

[15] There is an odd nonprecedential case, *Johnson v. Schoen*, No. A03-887, 2004 WL 614857 (Minn. Ct. App. Mar. 30, 2004), affirming a forfeiture of the landlord's right to withhold the $700 deposit even though the tenant owed a month's worth of rent, which was $700/month . The case is odd in several ways. The tenant did not sue for the doubling penalty but the landlord made no counterclaim for the rent nor did the landlord ever account for the deposit, even after months of litigation. The net result was nearly the same as if the tenant sued for the doubling penalty and the landlord counterclaimed for the one month of unpaid rent. (The rental amount is not in the appellate decision but is stated in the underlying trial court order as Finding #1.)

Very likely this exact concern motivated the 1977 legislature to amend the statute. The original (1973) version of the statute's penalty was forfeiture of the right to deduct. Minn. Stat. § 504.20 (1973). The amendment, 1977 Minn. Laws c 280 s 3, changed this to the current language, the doubling penalty.

Subdivision 4(4) – penalty for denial of joint inspections

The 2023 legislature added a requirement that the landlord allow the tenant a joint move-in inspection during the opening 14 days of the tenancy. Minn. Stat. § 504B.182, 2023 Minn. Laws ch. 52, art. 19, s. 86. The purpose of the inspection is to identify existing damages so the tenant is not held liable at the end of the tenancy for problems she did not cause. *Id.* If the tenant agrees, instead of an inspection "a landlord may provide written acknowledgment to the tenant of photos or videos of a rental unit and agree to the condition of the rental unit at the start or end of the tenancy." *Id.* Furthermore, during the ending 5 days of the tenancy the landlord must allow the tenant a joint move-out inspection to identify deficiencies; the tenant is then allowed to correct those deficiencies to avoid deductions from the deposit. *Id.*

If the landlord does not correctly allow either of these two inspections, the landlord is subject to the same penalty that is imposed for delayed return of the deposit. Minn. Stat. § 504B.178, subd. 4(4) (2023), 2023 Minn. Laws ch. 52, art. 19, s. 85.

Subdivision 7 – bad faith withholding

The unscrupulous landlord might well make sure to make his deadline to account for the deposit but then make up false or exaggerated damage claims in his "accounting" and keep all the deposit. The legislature thought of this as well and enacted subdivision 7 which says, "The bad faith retention by a landlord of a deposit, the interest thereon, or any portion thereof, in violation of this section shall subject the landlord to punitive damages not to exceed $500 for each deposit…."

Note the "each deposit" language. If there are two deposits, the landlord is on the hook for up to $1,000 (twice $500), exactly happened in *Kaeding v. Auleciems, supra*.

Also note the "not to exceed $500" language. Unlike the doubling penalty, the bad faith penalty is discretionary (although maybe the court would have to award at least 1¢ if it finds bad faith).

"Bad faith" is not defined in Minn. Stat. § 504B.178. The leading case defining the term is *Lassen v. First Bank Eden Prairie*, 514 N.W.2d 831,837 (Minn. Ct. App. 1994) which stated:

> "Bad faith" generally means a refusal to fulfill some duty or contractual obligation not prompted by an honest mistake as to one's rights or duties, but rather by some ulterior motive.

Another case stated, "bad-faith … [is] the commission of a malicious, willful wrong." *Mjolsness v. Riley,* 524 N.W.2d 528, 530 (Minn. App. 1994). Subsequent cases generally cite one or both of these two cases. While the Court of Appeals decision in *Kaeding v. Auleciems, supra* did not define "bad faith" it did affirm the trial court order, which cited the *Lassen* definition. Most trial courts use the *Lassen* definition or something like it.

If the landlord misses the deadline and then still does not return the deposit within two weeks of being sued for the deposit, bad faith is presumed (on top of the doubling penalty).

The $500 bad-faith claim is probably the only punitive damages claim available to the tenant. *Barr/Nelson, Inc. v. Tonto's, Inc.,* 336 N.W.2d 46 (Minn.1983) (Minn. Stat. §549.20 does not apply to a contract claim without independent tort).

The $500 bad-faith claim is not available to a successor landlord, just the tenant. *Townridge Apartments v. Silver Crest Partnership*, Minn. Ct. App. File No. A03-887 (Dec. 16, 1997) (nonprecedential).

Subdivisions 5 and 6 – sales and other transfers

These subdivisions govern transfers from one landlord to another, either voluntary (by sale) or involuntary (by mortgage foreclosure, contract for deed cancellation, etc). No distinction is made between the two types of transfer.

The predecessor landlord (seller in a sale) is on the hook for the deposit + interest unless within 60 days of transfer she [i] returns or accounts for the deposit + interest to the tenant; or [ii] accounts for the deposit + interest, sends the money to the successor (buyer in a sale), and notifies the tenant, who has 20 days to object to the successor that the stated amount is incorrect. Notice must include a stamped envelope addressed to the successor.

The successor (buyer in a sale) is on the hook for the deposit + interest, limited only by the un-objected-to transferred amount. Two cases illustrate the rule being

applied to voluntary-transfer situations: *Schadweiler v. Kallenbach*, No. AC-88-14279 (Minn. Dist. Ct. 4th Dist. Feb. 17, 1989) (apparently a sale); *Neadeau v. Meldahl*, Nos. DC- 758638 & MC-41395 (Minn. Dist. Ct. 4th Dist. Dec. 13, 1979) (three judge appellate panel[16]; apparently a series of sales). Two other cases illustrate that even if the transfer is involuntary, the successor remains on the hook: *Reed v. Rooms Plus LLC*, Minn. Ct. App. File No. A05-141 (Oct. 4, 2005) (nonprecedential; change of management companies); *Praschad v. Maciosek*, No. AC-89-13447 (Minn. Dist. Ct. 4th Dist. Nov. 8, 1989) (contract for deed cancellation).

Subdivision 8 – last month's rent

The tenant cannot unilaterally "pay" his last month of rent with the deposit, unless the landlord is in the last month of cancellation or foreclosure.

The landlord has two recourses in addition to just suing for the unpaid rent. [i] He can file an eviction action for nonpayment. [ii] He can demand the rent and give the tenant notice of subdivision 8. If the tenant still doesn't pay, effectively this doubles any physical damage claim the landlord has and the tenant loses the accrued interest on the deposit. The legislative history of the subdivision 8[17] shows the legislature really did mean not to double the tenant's rent debt.

Subdivision 9 – where to sue

The tenant can sue for his deposit, interest, and available penalties in either district or conciliation court. If he wishes to sue in conciliation court, he can sue either in the county where the rental property is located or in the county of the landlord's residence.

Minn. Stat. § 491A.01, subd. 9 provides for the same rights. It also allows the landlord to sue the tenant in a case arising out of the landlord-tenant relationship or

[16] At the time there was no Court of Appeals and the original trial court in this case was Municipal Court. Appeal could be had to the Supreme Court or (first) to a three-judge panel made up of judges from the District Court in the district. That is what happened in this case, which was appealed no further.

[17] Available at https://birnberglegalwebsite.files.wordpress.com/2021/04/security-deposit-legislative-history-of-504b-subd-8-penalty.pdf .

chapter 504B either in the county where the rental property is located or in the county of the tenant's residence (and vice-versa).

Is there a cap on the amount of the deposit?

Minn. Stat. § 504B.178 does not cap the deposit.

Deposits on rentals of lots in a manufactured-home park are subject to a 2-months-of-rent cap. Minn. Stat. §327C.03, subd. 4

At least two city ordinances limit the deposit to one month of rent but with some exceptions. Minneapolis Ordinance § 244.2040 and St. Paul Ordinance § 193.03 (enacted as Ordinance 20-14)

Many federally subsidized housing programs limit the deposit. E.g. see 24 C.F.R §§ 880.608, 882.414, 884.115, 886.116, 886.315, 886.116, 891.435, 891.635, 891.775, 966.4(e)(8), 982.313, 983.259; 7 C.F.R. § 3560.629.[18]

OTHER SECURITY-DEPOSIT ISSUES

When to sue

The general statute of limitations for civil suits is six years. Minn. Stat. § 541.05. However, a suit for the statutory penalties for delay, lack of move-in-out inspection or bad faith is only two years. Minn. Stat. § 541.07(2).

What happens if the landlord goes bankrupt?

The landlord goes bankrupt before the tenant has reduced his claim to judgment

There is no Eighth Circuit case on point but there is one that is very close, *Nat'l Corp. for Housing Partnership v. Liberty State Bank,* 836 F.2d 433 (8th Cir. 1988). The landlord of a huge complex had deposited about $335,000 of pooled deposits in Liberty State Bank. His business failed and National Corporation for Housing Partnership was appointed as receiver for the complex. Both the receiver and the bank claimed the deposits. The bank's theory was that the deposits had been the landlord's money with the landlord then being in debt to each tenant for the deposit made by that tenant; since the landlord owed a large sum to the bank and the banking agreement allowed the bank a right of setoff, its setoff claim had priority

[18] Available by searching for "security deposit" at https://www.law.cornell.edu. This is probably an incomplete list.

over the landlord's debts to the tenants. The receiver's theory was that there was no debt to the tenants. Instead, the landlord was a bailee of the deposits and was simply holding onto the deposits owned by the tenants; the receiver thus now was holding onto the deposits for distribution to each tenant when she moved out.

The district court found for the receiver[19] and the Eighth Circuit affirmed. They held that since subdivision 2 of Minn. Stat. § 504.20 (now 504B.178) provided that the "deposit … shall be held by the landlord for the tenant" the deposits were not the landlord's and the landlord owed no debt to the tenants since the money was simply the tenants' money.

Based on this reasoning, when a landlord goes bankrupt, the bankruptcy does not discharge the deposit as a debt because it wasn't a debt. It is still the tenant's money (bailed to the landlord).

> The landlord goes bankrupt after the tenant has reduced his claim to judgment

There is no Eighth Circuit case on point but there is one approving of the doctrine of defalcation and citing *In re McGee,* 353 F.3d 537 (7th Cir.2003) for that doctrine. *In re Nail,* 680 F.3d 1036, 1039 (8th Cir. 2012).

McGee dealt with a tenant who had sued for his deposit against a Chicago landlord, won the case, and had obtained a judgment against the landlord as a result. The Chicago rental code included this language:

> A security deposit and interest due thereon shall continue to be the property of the tenant making such deposit, shall not be commingled with the assets of the landlord, and shall not be subject to the claims of any creditor of the landlord or of the landlord's successors in interest, including a foreclosing mortgagee or trustee in bankruptcy.

The *McGee* court held that the city code could not determine bankruptcy rights; that is up to the federal courts hearing bankruptcy cases. Similarly, the federal courts determine whether someone is a "fiduciary" under bankruptcy law. That word means different things under state law and bankruptcy law. Based primarily on the ordinance's rule that the deposit remains the tenant's property while on

[19] The district court's order is available here: https://birnberglegalwebsite.files.wordpress.com/2021/02/national-corporation-for-housing-vs-liberty-state-bank-504.20-district-court-order.pdf

deposit, and to a lesser extent that the money must be deposited in an insured account in a financial institution and not be commingled with other assets, the *McGee* court held that the landlord was a "fiduciary" within the meaning of bankruptcy law. As a result under the defalcation doctrine, the landlord could not discharge the judgment in bankruptcy.

The Chicago ordinance and subdivision 2 of Minn. Stat. § 504B.178 have the same key requirement that the deposit be held for the tenant. It should follow that the defalcation doctrine protects a Minnesota tenant's judgment for his deposit.

Whether the part of the judgment based on the doubling penalty in subdivision 4 is probably an open question. The part of the judgment based on subdivision 7 (bad faith) should survive the bankruptcy. 11 U.S.C. § 523(a)(4),(6) *(*respectively, no discharge for "fraud or defalcation while acting in a fiduciary capacity" or for "willful and malicious injury by the debtor [landlord] to another entity [tenant]").

Minn. Stat. § 504B.178, subdivision 2 and bankruptcy

The first clause of Minn. Stat. § 504B.178, subdivision 2 – "Any deposit of money shall not be considered received in a fiduciary capacity within the meaning of section 82.55, subdivision 26 – does not change this analysis. First, as discussed above, under bankruptcy law "fiduciary" has a meaning closer to a bailment than what it means under general state law so whether the landlord is or is not a "fiduciary" under state law doesn't matter.

Second and perhaps more important, note that what this clause says is not that the deposit isn't held in a general sense in a fiduciary capacity but only that it is not held in a fiduciary capacity within the meaning of section 82.55, subdivision 26. That provision ultimately requires a specific set of persons involved in the licensed real-estate business – brokers, salespersons, and closing agents – to hold certain funds in a special trust account that pays an amount of interest (0% in 1973, now the highest current passbook rate) rather than the 1% (5% in 1973) required under Minn. Stat. § 504B.178.

The legislative history of the 1973 law accounts for this clause. The original bill as introduced did not include the clause. Realtors were concerned that they would have to simultaneously put funds into different accounts and simultaneously owe different amounts of interest. They wrote to Robert Tennessen, the chief author in the State Senate, asking for a fix. He did not adopt their precise fix but did introduce what is now the quoted clause in committee and his proposal was

adopted and incorporated into the session law (the exact citation to chapter 82 has changed over time due to recodification of that chapter).[20]

Suggestions for collecting against insolvent landlords or landlords who hide their assets

Realtor landlords

If landlord is a holder of a realtor's license and the tenant wins a judgment against the licensee "on grounds of fraudulent, deceptive, or dishonest practices, or conversion of trust funds arising directly out of any transaction when the judgment debtor was licensed and performed acts for which a license is required", the tenant can make a claim under the Department of Commerce Recovery Fund. *In Re Dziuk*, Minn. Ct. App. File No. A14-0686 (Jan. 12, 2015) (nonprecedential). These situations are unusual but when they occur, the Fund pays valid claims and then seeks reimbursement from the licensee, whose license is suspended until the fund is reimbursed. This both collects money (surely the tenant's goal) and puts "the hurt" on the landlord (possibly a goal of the tenant).

Discharge the debt

Although counterintuitive, sometimes it makes sense for the tenant to write off the debt, telling the landlord that the debt is discharged as uncollectable, or to allow the debt to lapse by expiration of the statute of limitations. At that point, the uncollectable deposit (not the interest or penalties) becomes deductible as a short-term capital loss on the tenant's next tax return. *Stahl v. United States,* 441 F.2d 999 (D.C. Cir.1970) (non-returned bailment deductible as bad debt under 26 U.S.C. § 166(d)). The tenant need not itemize to claim this deduction. *IRS Publication 453*. The tenant/taxpayer uses IRS Schedule D via Form 8949.[21] For a

[20] The full legislative history of the 1973 law, including the original bill and the amendment, are available at detailed legislative history of 1973 session law. The letter to Senator Tennessen is among his papers on file with the Gale Family Library at the Minnesota History Museum in Box 147.C.7.6.F.

[21] If the tenant is also interested in "putting the hurt" on the landlord, she can file with the IRS and serve on the landlord a Form 1099-MISC, resulting in him owing taxes on the discharged debt since it is now "income". IRS Service Center Advice, SSA 998-020 ("there is no specific prohibition in the Internal Revenue Code or the Income Tax Regulations that forbids the reporting of discharges of indebtedness by entities not required to report. Such reporting may encourage voluntary tax compliance"); *Cavato v. Hayes,* File No. 08-C-6957 (N.D. Ill. Eastern

middle-income tenant (and moreso so for an upper-income tenant), the tax benefits are significant.[22]

Repeat offender landlords

When the landlord screws not just one tenant but a series of tenants out of their deposit, three extra avenues suggest themselves:

- Bring a consumer fraud case, which affords attorney fees and other relief as well as the usual relief. *Love v. Amsler,* 441 N.W.2d 555 (Minn. Ct. App. 1989) (fn. 1)
- Refer the dispute to the Minnesota Attorney General, who might bring a similar case but on behalf of both the tenants and the State. E.g. see *State of Minnesota by Hatch v. Alden*, Chisago County District Court File No. 13-C5-04-000819 (complaint 5/19/2004). The case eventually settled and deposits + interest were returned to the tenants.
- For really bad faith, the local criminal prosecutor might prosecute the landlord. Punishment can include both prison and restitution, the latter putting money into the tenants' pockets. *US v. Miell*, 744 F. Supp. 2d 904 (ND Iowa 2010) (comparing Miell to landlord in Little Dorrit by Dickens).

Tax rights and responsibilities

Interest on deposit

The landlord will certainly deduct interest she paid as a business expense, probably on line 13 of Schedule E on the federal return.

Anecdotal evidence indicates that few tenants report the interest they earned on deposits.[23] However there is little doubt they should.[24] It might be enough that the

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Div. Oct. 9, 2009), affirmed along with a July 2010 order in *Cavoto v. Hayes,* 634 F.3d 921 (7th Cir. 2011).

[22] For a single (unmarried) taxpayer, combined Minnesota and marginal tax brackets are currently12% at $9,876, 17.36% at $12,400, 18.8% at $26,960, and 28.8% at $40,126.

[23] The place to report would be line 1 of Schedule B on the federal return.

[24] If no Minnesota tenants report their interest income, Minnesota is losing out on about $350,000 - $500,000 per year in income tax revenue, estimated as follows. Data from the 2019 census indicates there were about 703,681 leases in the state and the median monthly rent was $1,019. If the deposits average one month of rent, annual interest would be $10.19 for each lease or a total

landlord credited the interest against claims for damage. Helvering v. Midland Mut. Life Ins. Co., 300 U. S. 216 (1937) (interest is income, even if received only as a credit). Certainly if the interest is paid and received it is reportable income. *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955) (income includes all "accessions to wealth, clearly realized, and over which the taxpayers have complete dominion"). The *Glenshaw Glass* court cited *Helvering*, *id.* at 429.

Bad-faith and doubling-penalty damages

Money collected as "punitive damages", which is the phrase used in the bad-faith subdivision of Minn. Stat. § 504B.178, are taxable. 26 C.F.R. 1.61-14. They are reportable on line 21 of Form 1040 as "Other Income". IRS Publication 4345 at 2. Money collected for the doubling penalty under subdivision 4 is presumably a form of "exemplary" damages and is taxable as well. 26 C.F.R. 1.61-14. The money representing the returned deposit is not income as it is not an "accession to wealth" but just a return of capital.

OTHER READING THAT MIGHT BE OF INTEREST

- **Security Deposits in Minnesota (January 2015) by Lawrence R. McDonough**, available at http://povertylaw.homestead.com/files/Reading/Security_Deposit.htm
- **Security Deposits and Roommates by Paul Birnberg,** link about halfway down webpage at https://homelinemn.org/publications/other-publications/
- **Detailed legislative history of 1973 session law,** available at https://birnberglegalwebsite.files.wordpress.com/2020/05/security-deposit-leg-hist-1973-minn-laws-ch-561-by-adam-van-alstyne-.pdf
- **Detailed legislative history of 1977 session law,** available at https://birnberglegalwebsite.files.wordpress.com/2020/05/security-deposit-leg-hist-1977-minn-laws-ch-280-by-adam-van-alstyne-.pdf
- ***Residential Landlord and Tenant Law – 1980*, Sponsored by Advanced Legal Education, Hamline University School of Law (1980)**, Library of Congress # KF209.Z9955.H36

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of $7,170.517 interest income/yr. With Minnesota tenants typically being in the 5.35% or 6.80% tax brackets, the lost state taxes would have been $383,622 to $487,595. The same tenants would likely have been in the 10-22% federal tax brackets, so the lost federal taxes would have been $717,051 to $1,577,513 just from this state.

Endnote 1 - Security Deposit Interest Worksheet[1]

Instructions

1. Multiply the amount of security deposit by the interest rate at the time one lived there
2. Divide the number of months lived in apartment by 12
3. Multiply the total of step 1 by the total of step 2

or in mathematical terms

((security deposit) x (interest rate)) x ((number of months) ÷ 12) = _____
that is:

(_____ x . 05[2]) x ((# of months prior to October 1984 and > June 30,1973) ÷ 12) = _____
(_____ x . 055[3]) x ((# of months between October 1, 1984 and April 30, 1992) ÷ 12) = _____
(_____ x . 04[4]) x ((# of months between May 1, 1992 and March 1, 1996) ÷ 12) = _____
(_____ x . 04[4]) x ((# of days between March 1, 1996 and March 21, 1996) ÷ 365) = _____
(_____ x . 03[5]) x ((# of days between March 22, 1996 and March 31, 1996) ÷ 365) = _____
(_____ x . 03[5]) x ((# of months between April 1, 1996 and July 31, 2003) ÷ 12) = _____
(_____ x . 01[6]) x ((# of months between August 1, 2003 and now) ÷ 12) = _____

Total (add the column above) = _____

Example: The following example is for a tenant who paid a $275 security deposit on 27 July 1985, lived in his apartment from 1 August 1985 to 29 July 2019, and got the deposit returned 21 August 2019 (remember don't count partial initial month but do count partial final month).

(275 x .05) x (0÷ 12) = $0	# of months prior to Oct. 1984 = 0
(275 x .055) x (81 ÷ 12) = $102.09	# of months between Oct. 1, 1984 and April 30, 1992 = 81
(275 x .04) x (46 ÷ 12) = $42.17	# of months between May 1, 1992 and Mar. 1, 1996 = 46
(275 x .04) x (21 ÷ 365) = $0.63	# of days between Mar. 1, 1996 and Mar. 21, 1996 = 21
(275 x .03) x (10 ÷ 365) = $0.23	# of days between Mar. 22, 1996 and Mar. 31, 1996 = 10
(275 x .03) x (88 ÷ 12) = $60.50	# of months between April 1, 1996 and July 31, 2003 = 88
(275 x .01) x (193 ÷ 12) = $44.23	# of months between Aug. 1, 2003 and Aug. 31, 2019 = 193

Total = $249.84

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[1]Adopted from http://homelinemn.org/wp-content/uploads/security-deposit-interest1.pdf

[2]See 1973 Minn Laws ch. 561, s. 1

[3]See 1984 Minn Laws ch. 565, s. 1-2

[4]See 1992 Minn Laws ch. 555, art. 2, s. 1,3

[5]See 1996 Minn Laws ch. 357, s. 1,4

[6]See 2003 Minn Laws ch. 52, s. 2