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## Re: Residential Leases

Dear Delaware Landlord:

The Delaware Department of Justice Fraud and Consumer Protection Division receives thousands of complaints each year, and complaints by tenants against landlords are among the most common. In the course of our investigations, we see a disturbing pattern of residential leases that contain provisions prohibited by the Residential Landlord/Tenant Code.<sup>1</sup> This mostly appears to be the result of landlords being unfamiliar with the requirements of the Residential Landlord/Tenant Code or attempting to use leases across properties in various states without consideration of the specific laws in those states. Regardless, the law is the law. Placing prohibited lease provisions in residential leases is a violation of the Residential Landlord/Tenant Code and may be considered a prohibited trade practice under the Consumer Fraud Act.<sup>2</sup> The purpose of this letter is to serve as a reminder that it is your responsibility to ensure that your leases comply with the law. We strongly encourage you to review each of your leases to ensure that it does not contain any illegal provisions. You should consult with your attorney if you have any questions about the legality of a lease.

Below is a list of the most common prohibited and unenforceable lease provisions that we see in residential leases. Please note that including unenforceable provisions in a standard lease may constitute an unfair practice under the Consumer Fraud Act, especially if it tends to chill action by a tenant to otherwise enforce their rights.

The list below is not intended to be comprehensive, and leases that lack any of the prohibited provisions on this list might run afoul of the law in other ways. As such, you should not assume that your leases comply with the law merely because they do not include any of the provisions below.

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<sup>1</sup> Title 25, Chapters 51-59 of the Delaware Code.

<sup>2</sup> 6 Del. C. § 2511 *et. seq.*

### Most Commonly Seen Prohibited Lease Provisions:

- 1. Attorneys' Fee Provisions.** *25 Del. C. § 5111* states that “No provision in a rental agreement providing for the recovery of attorneys’ fees by either party in any suit, action or proceeding arising from the tenancy shall be enforceable.”
- 2. Overly expansive grounds for lease terminations due to breaches of rules and covenants.** Tenants who breach rules or covenants that are material to the rental agreement can have their leases terminated, but tenants are entitled to notice and an opportunity to cure for most such breaches.<sup>3</sup> *25 Del. C. § 5513(a)*. Immediate (*i.e.*, without notice and opportunity to cure) termination for such breaches is only permitted if the breach “causes or threatens to cause irreparable harm to any person or property, or [if] the tenant is convicted of a class A misdemeanor or felony during the term of the tenancy which caused or threatened to cause irreparable harm to any person or property.” *25 Del. C. § 5513(b)*. Expanding the grounds for immediate lease termination beyond what the statute allows is not permitted as it requires tenants to “waive or forego rights or remedies under [the] Code.” *25 Del. C. § 5301(a)(1)*.
- 3. Waiving the right to a jury trial.** Tenants have a right to a jury trial in summary possession cases. *25 Del. C. § 5713(a)*. A lease cannot require a tenant to waive this right, because a lease cannot require a tenant to “waive or forego rights or remedies under [the] Code.” *25 Del. C. § 5301(a)(1)*.
- 4. Overly expansive liability waivers.** The Code prohibits lease provisions that require a tenant to agree to “the exculpation or limitation of any liability of the landlord arising under law or to indemnify the landlord for that liability or the costs connected therewith.” *25 Del. C. § 5301(a)(3)*. Overly broad liability waivers such as ones that attempt to waive liability for the landlord’s negligence are thus prohibited.
- 5. Late Fees That Trigger Too Early.** Provisions for late fees for unpaid rent are permitted, but any such fee “shall not be imposed within 5 days of the agreed time for payment of rent.” *25 Del. C. § 5501(d)*. We have seen multiple leases wherein rent was due on the first of the month, and the lease stated that the late fee would be assessed on the sixth of the month if the rent is not paid by the fifth. If rent is due on the first of the month, the tenant has until the sixth of the month to pay, and the late fee cannot be assessed until the seventh.

As a final note, we sometimes see prohibited lease provisions with limiting language such as “to the extent permitted by law.” While such language is permissible where appropriate, it cannot be used to create a veneer of enforceability on an otherwise expressly prohibited or unenforceable provision. By way of example, lease provisions purporting to waive a tenant’s right to a jury trial or to allow for attorneys’ fees “to the extent permitted by law” would not be

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<sup>3</sup> If such a breach is not cured, or if the tenant commits a substantially similar breach within one year, the lease can be terminated at that point. *25 Del. C. § 5513(a)(1)*.

acceptable because such provisions are forbidden.<sup>4</sup> Because such provisions are entirely unenforceable regardless of the existence of the limiting language, their presence only serves to discourage tenants from enforcing their rights.

Thank you for your attention to this letter. We hope that it will serve as an impetus for you to review your residential leases to ensure that they comply with the Residential Landlord/Tenant Code and all other applicable laws. It is our hope that such reviews will prevent potential problems for both tenants and landlords in the future.

Respectfully,

A handwritten signature in black ink, appearing to read "Owen Lefkon", is written over a light yellow rectangular background.

Owen Lefkon  
Director  
Fraud and Consumer Protection  
Division

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<sup>4</sup> *I.e.*, there is no “extent” to which such provisions are “permitted by law.”