

A Tenant's Guide To Recovery of Security Deposits West Virginia

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Nothing in this kit is a substitute for retaining an attorney to work on your case. It is recommended that you seek out an attorney rather than trying to perform a lawsuit yourself. However, if you cannot find an attorney to work for you, then the information herein may be of some assistance to you regarding proceeding with such an action and the format for filing a case. The information contained herein can also help you better understand your case so that you can discuss the matter more efficiently and intelligently with your attorney.

Chapter 1

I. Introduction to the Law

A. Two Sources of Law: Common Law and Statutes

There are two sources of law in any state, common law and statutory law. We all know what statutory law is. That is when the legislature gets together and enacts a statute for all residents of the state to obey. But before there is a statute covering a certain area though, there is the common law. Common law refers to court decisions covering that situation. In the absence of statutory guidance, courts tend to follow what other courts have already decided. They do this for reasons of consistency.

Before there was any specific statute in West Virginia covering the subject of landlord tenant law, there were cases which determined the rights of landlords and tenants. The earliest cases were in keeping with the holdings of most other states not having landlord tenant laws. Those holdings determined that the tenant had almost no rights, and the landlord called almost all of the shots. The landlord could impose any conditions he wanted to upon the tenant by way of the lease agreement. If the tenant

signed the lease agreement, then that was that and the tenant had to live with it.

For instance, if the lease contained no duty on the part of the landlord to repair the rented premises, and the furnace went out in January, then the tenant would be liable for repairing or replacing the furnace. There is an old case (not from West Virginia, but it will serve to illustrate the example) where the judge wrote that there “is nothing at common law to prevent a landlord from renting a tumble-down house.” The way the courts used to look at it, nobody was holding a gun to the tenant’s head and forcing him to sign the lease agreement. If the parties intended that the landlord fix things, then they could have written that into the agreement.

Under the common law, if you placed a security deposit with the landlord, and the landlord did not return it, then you would have to sue for breach of contract. This would involve hiring a lawyer, going to court, winning, and then collecting upon the judgment you recovered. If your security deposit was for only \$750.00, you would very likely spend more in attorney’s fees and lost time than you were likely to recover. Landlords knew all about this, and tended to keep security deposits, knowing that few people would sue out of principle.

B. Implied Warranties

But as the law evolved, courts began to realize that many tenants were unsophisticated people. Some folks have trouble just reading, much less reading a contract with its \$64.00 words like “promissory,” “covenant,” and “estoppel.” Many courts also saw it as unfair that a tenant would have to pay to buy a new furnace for a landlord since the law of fixtures dictates that the tenant could not take the furnace with him when he left.

When a court looks at a contract, it construes the contract in accordance with the plain meaning of the terms, in order to get to what the parties to that contract actually meant to agree upon. Courts have a lot of discretionary power when doing this, and courts in West Virginia started to use that discretionary power to imply certain terms into certain contracts, such as residential rental contracts. I use the word “imply” but I should actually say “pretend.”

What the courts will do is pretend that there is a clause in the residential rental agreement whereby the landlord promises that he will put and keep the rented premises in a fit and habitable condition for the tenant. This is called an “implied warranty of habitability.” This gave the tenants the right to claim that the landlord had breached an implied warranty of habitability if he refused to effectively fix a problem around the rented premises.

C. Enactment of the Landlord Tenant Statute

Also in 1978, the West Virginia Legislature enacted the West Virginia Landlord Tenant Act. Many states in the US have adopted laws which cover the return of security deposits. Many, like Ohio Revised Code Section 5321.16, mandate double damages and

attorneys fees if a tenant shows the court that he gave the landlord written notice of his forwarding address and that the landlord failed to return the deposit. Unfortunately for West Virginian tenants, the Legislature enacted no statute dealing directly with security deposits and their return. This leaves the matter to be decided along common law grounds.

In fact, there is so little litigation over security deposits in West Virginia under the current law that I could find only one case even defining the term. In State v. Hayes, a criminal case regarding the passing of a bad check as a security deposit, the West Virginia Supreme Court cited to the Black's Law Dictionary definition, holding: "That term is defined as "money deposited by tenant with landlord as security *for* full and faithful performance by tenant of terms of lease, including damages to premises." Black's Law Dictionary 1357 (6th ed. 1990). State v. Hayes (1991), 185 W. Va. 664 at 669.

The only other legal description of the security deposit I could find was from the West Virginia Supreme Court of Appeals in the case of Russell v. Pineview Realty (1980), 165 W. Va. 822 which held as follows:

A security deposit clause, such as the one involved in the case before us, involves mutually dependent promises and is contractual in its character in that it involves the payment of money by the lessor in exchange for the promise of return of that money by the lessee upon the happening of certain conditions.

Thus at common law, you can still sue a landlord who improperly withholds your security deposit for breach of contract. The trouble with this is that West Virginia follows the same rule as most states which is that each side in a breach of contract case pays its own attorney fees, win or lose, absent a statutory provision to the contrary. Since West Virginia has no statutory provision to the contrary, it is often not worth the time, money, and trouble for a tenant to hire a lawyer to contest the case. Let's look at an example.

You have a security deposit with your landlord in the amount of \$1,000.00. At the end of the tenancy, you send the landlord notice of your forwarding address for the return of your deposit, and you never hear from the landlord. You go to see a lawyer about the matter, and he offers to represent you for \$1,500.00. You hire him, file the case, and win. The court awards you your \$1,000.00 back. You are now \$500.00 poorer for having to hire the attorney, and any amount of time you took off work to contest the case is lost to you as well.

Had you been in a state like Ohio, Colorado, or some other states, upon winning your case, you could have received double or treble damages, plus received a hearing on reasonable attorneys fees, making it worth your time to pursue the matter.

It still may be worth your time to fight for your deposit if you represent yourself in court, or if you can find an attorney from a public assistance group like Legal Aid or

perhaps a law school clinic who will work for you at little or no cost. But it's a tough situation to be in, because landlords know that it will cost you more to recover your deposit than you are likely to receive in victory.

One thing that you will have going for you is that it may cost your landlord a certain amount of money to contest any case you file. To avoid that cost, the landlord might offer you a portion of your deposit back to simply drop the matter.

One line of argument you might try would be to bring the claims for relief not only as a contract action, but under other legal theories as well. You could argue that the landlord's wrongful withholding of your security deposit was a conversion of your property. The West Virginia Supreme Court of Appeals has defined conversion as "the exercise of dominion over the personal property of another by a person who has no legal right to do so." Rodgers v. Rodgers (1990), 184 W. Va. 82 at 95.

The Court in that case also found that the "term "no legal right" is equated to a wrongful exercise of dominion. Bad faith or evil motive is not required." Rodgers at 95. Thus you could argue that the landlord's failure to return the deposit was a conversion of your personal property. Since conversion is an intentional tort, if the judge found in your favor, the judge has the discretion to award attorneys fees and punitive damages. "Discretion" means that the judge does not have to, but that he or she can make such an award. I am aware of no West Virginia case holding that an action for conversion would work here, but it might be worth a try.

Another approach might be to allege a breach of fiduciary duty. You could also argue that the landlord's reasons for keeping the security deposit are frivolous, and that you should be entitled to sanctions for frivolous conduct. Again, I have seen no West Virginia cases where these approaches had either worked or failed, but you might wish to try them or at least speak with your lawyer about asserting them.

If you are going to file a case against your landlord, there is a case which addresses which court has venue (the court which is the proper forum for the case to be heard. In the case of Russell v. Pineview Realty (1980), 165 W. Va. 822, a landlord claimed that the tenant had sued him in a court of improper venue (in plain speaking, the landlord was alleging that he should have been sued in some other court). The West Virginia Supreme Court eventually go the case on appeal and held that venue was proper in the county court in which the rental property was located. The Court reasoned as follows:

Syllabus Point 3 of Wetzel County Savings & Loan v. Stern Bros. Inc. (1973), 156 W.Va 698 provides that the venue for a cause of action involving the breach of an agreement arises in the county where the breach occurs. If the appellee breached its agreement with the appellant, it did it when it failed to return the proper portion of the security deposit. The parties' agreement was that that return was to be made in Kanawha County. Therefore, if the appellee breached its agreement, that breach

occurred in Kanawha County, and venue of the action lies in that county under *Wetzel. Russell* at 824-825.

With these warnings in mind, you can decide whether or not it is worth your time to pursue the deposit. If you choose to pursue the deposit, you will want to read the sections below so that you will be in the best position possible to get the deposit back.