

# COMMERCIAL (GENERAL) LANDLORD-TENANT LAWS

## I. SUBSTANTIVE LAW

### A. Applicable Law

Basic Arizona Landlord tenant statutes appear in Chapter 3, Title 33 of the ARS, entitled “Landlord and Tenant”, ARS §33-301 *et seq.* These laws are sometimes referred to as the “Innkeeper Laws”. This is a misnomer. Only two statutes in Chapter 3 deal with innkeepers. The scope of Chapter 3 goes far beyond innkeepers.

### B. Scope of Chapter 3

ARS §33-381 provides that Chapter 3 applies to all landlord-tenant relationships except for those covered by Arizona Residential Landlord and Tenant Act (ARS §33-1301 *et seq.*) and the Arizona Mobile Home Parks Residential Landlord and Tenant Act (ARS §33-1401 *et seq.*).

1. RV Rental Space Act. When the RV Rental Space Act was created in 2000 and rewritten in 2001, the clear legislative intent was to transfer long term RV space landlord tenant relationships from Chapter 3 to the new RVRSA, ARS §33-2101 *et seq.* It was an oversight that ARS §33-381 was not amended to reflect this.
2. Chapter 3 Residential Relationship Application.
  - (a) Chapter 3 still covers some residential type tenancies despite exclusion of residential act, mobile home parks act, and long term RV space act tenancies. Those transactions excluded by the three residential type acts would thus still be covered by Chapter 3.
  - (b) The Residential Act at ARS §33-1308, excludes certain arrangements which would therefore be covered by Chapter 3:
    - (i) Medical, educational, counseling and religious institution residence tenancies;
    - (ii) Occupancy of a property in by the occupant who is purchasing it, provided occupancy is under a “contract of sale”. Note: The meaning of “contract for sale” has not been interpreted in any reported decision. It seems to refer to a “contract for deed” or similar arrangement which is more akin to a mortgage, not pre-closing

occupancy under a conventional purchase contract. See ARS §33-741 *et seq.*;

(iii) Occupancy by a member of a society in a structure operated for the benefit of the society;

(iv) Transient occupancy in a hotel, motel or recreation lodging;

(v) Occupancy of a landlord provided dwelling by an employee conditioned on his continued employment;

(vi) Occupancy in a co-op by a member of the co-op;

(vii) Certain public housing.

(c) Under the mobile home parks act, only “mobile home parks” are covered (ARS §33-1406). A “mobile home park” is a parcel with four or more mobile home spaces (ARS §33-1409(15)). In a parcel with three or fewer mobile home spaces, Chapter 3 would apply.

(d) The Long Term RV Rental Space Act only applies when a parcel has more than two RV spaces. In a parcel with two or fewer, they are covered by Chapter 3. In addition, when a property is subject to the RVRSA, only rental agreements of more than 180 consecutive days are covered by the RVRSA. Shorter tenancies would also be covered by Chapter 3 (ARS §33-2101).

3. Other Landlord Tenant Relationships. All landlord tenant relationships other than residential are covered. Commercial leases including offices, retail space, industrial space, unimproved land, agricultural land and the like are all covered by Chapter 3.

### C. Philosophy of Chapter 3

The three residential acts are in reality consumer protection laws. To different degrees, each of them creates rights in favor of tenants and restrictions on the ability of landlords to freely deal with their tenants. The Mobile Home Parks Act is the most restrictive on landlords; the Residential Act the least. But all to some degree are designed to create rights in and protect the interests of consumers (tenants).

1. Chapter 3 is not a consumer protection law. It assumes each party has equal bargaining power and that they will negotiate a lease that each is satisfied will protect his interests.
2. Article 1 creates obligations and liabilities of the landlord. This is where the innkeeper statutes appear requiring innkeepers to maintain a safe or be liable for a guest’s valuables, and to post the room rates. It also prohibits discrimination in

the rental of a dwelling (not a hotel room) against children. This statute is largely obsolete having been supplanted by fair housing laws. Beyond these, there are no obligations or liabilities addressed.

3. Article 2 creates obligations and liabilities of the tenant. It requires him to maintain the premises, declares intentional damage to the premises as a misdemeanor, holds the tenant liable for rent, and prohibits the tenant from denying the landlord's title.
4. Article 3 addresses how tenancies are terminated. This will be reviewed in depth below.
5. Article 4 covers remedies of the landlord, essentially creating a right to summarily recover possession of the premises when a tenant is in breach; creating a landlord lien against the tenant's possessions on the premises; and establishing procedures for enforcement of the lien. This too will be reviewed below.

That's it. There is no consumer protection here. To the extent anyone is protected, it is the landlord. The law recognizes that the tenant has possession of a valuable tangible asset of the landlord—the land and building being rented, while the landlord only has an intangible property right—the tenant's promise to pay rent. Thus an important purpose of Chapter 3 is to give the landlord protections against abuse of the landlord's property by the tenant. These interests and vulnerabilities of landlords are largely overlooked in the three residential type acts which are mainly concerned with consumer protection.

#### D. Importance of the Lease

There is no requirement for a written lease (though the Statute of Frauds generally would require leases in excess of a year to be in writing). But the unwritten underlying assumption of Chapter 3 is that the parties will negotiate and execute a written lease detailing the terms of their agreement. In the absence of a lease, the tenant in particular has virtually no protections.

## II. INNKEEPER STATUTES

### A. General

There are only two innkeeper statutes, ARS §33-301 and ARS §33-302.

### B. Posting of Lien Law and Rates

ARS §33-301 requires “every keeper of a hotel, inn, boarding, lodging or apartment house or auto camp” to post in each bedroom and in a public room a printed copy of ARS §§33-951 and 952 (relating to liens) along with a statement of lodging rates.

1. This statute has not been changed since 1939. Since then, the residential act, mobile home parks act, and long-term RV space act have been created and those tenancies have been removed from Chapter 3. Thus the references to apartment house and “auto camp” (an old term for mobile home park) are obsolete. Essentially, this statute now applies only to hotels, motels, short-term boarding houses and other places of transient lodging.
2. The rate chart should list the maximum daily charges for the room. If there are rental plans other than daily (e.g., weekly), the maximum charges for those periods should also be shown.
3. It is unclear what the liability is for non-compliance with these laws except that the innkeeper’s lien on the resident’s belongings is likely lost.

#### C. Fireproof Safe; Liability for Loss of Guest Property

ARS §33-302 immunizes an innkeeper who maintains a fireproof safe and posts notices in the office or the room that valuables may be deposited there, from liability for negligence for loss or damage to valuables not placed there.

1. ARS §33-302(A) makes it clear that he is not immunized for loss or damage which he causes. That would seem to include loss or damage caused by the innkeeper’s employees (i.e., the hotel could be responsible for negligent damage caused by a maid to the guest’s valuables).
2. Under ARS §33-302(B), the innkeeper can refuse articles worth more than \$500 for safekeeping, and it only liable for no more than \$500 if the items are then lost or damaged. \$500 was a lot more money in 1939 when this statute was last updated than it is now.
3. The notice posted by the innkeeper concerning availability of safe must strictly comply with the terms of the statute to effectively relieve the innkeeper of common law liability. *Terry v. Linscott Hotel Corp.*, 126 Ariz. 548, 617 P.2d 56 (App., 1980).

### III. CREATION OF TENANCIES

#### A. General

No particular formalities are required to create a tenancy. Generally, when one (the tenant) receives possession of real property from another (the landlord) in return for the payment of some valuable consideration (rent), there is a lease. There is no requirement that the agreement relating to the transaction be in writing so long as an agreement for a tenancy can be determined from the facts and circumstances leading up to and surrounding the transaction. *E-Z Livin’ Mobile Home Sales, Inc. v. Van Zanen*, 26 Ariz. App. 363, 548 P.2d 1175 (1976). All of the material terms must be agreed to and not left to some future

negotiation. *Cypert v. Holmes*, 81 Ariz. 64, 299 P.2d 650 (1956). Material terms usually include identity of property, parties, amount of rent, and duration of term.

### B. Duration

The statute of frauds requires leases in excess of one year to be in writing. If the term of a lease can be reasonably construed for a term certain rather than an indefinite term, it will be. *Tucker v. Byler*, 27 Ariz. App. 704, 558 P.2d 732 (1976). But where it really is for an indefinite period at a monthly rent, it will be construed as a month-to-month tenancy. *Tyler v. Fred Harvey, Inc.*, 20 Ariz. App. 515, 514 P.2d 268 (1973).

### C. Options to Renew

Nothing prohibits a lease from containing, as one of its terms, an option to renew. An option giving the tenant the right to extend or renew the lease constitutes an offer by which the landlord binds itself in advance to make the contract if the tenant accepts on the terms designated. *University Realty & Development Co. v. Omid-Gaf, Inc.*, 19 Ariz. App. 488, 508 P.2d 747 (1973). But the parties will be held to a strict standard of compliance with the condition in the option in order for it to be effective. *Id.* The option will inure to the benefit of a successor in interest to the tenant if the lease is assigned in compliance with its terms. *Pouquette v. Double L-W Ranch, Inc.*, 11 Ariz. App. 279, 464 P.2d 350 (1970).

## IV. TERMINATION OF TENANCIES

### A. Expiration

ARS §33-342 provides that when a tenant holds over and retains possession after expiration of the term of the lease without an express agreement with the landlord, the holdover does not renew the lease, but instead creates a month-to-month tenancy. Even when the lease itself provides that it will automatically renew for a longer term (here year-to-year), it has been held that absent an express contract for a renewal term the holdover creates a month-to-month tenancy. *Pima County v. Testin*, 173 Ariz. 117, 840 P.2d 293 (App., 1992). In that case, however, the renewal provision stated it would renew year-to-year at a rent to be mutually agreed to at the time of renewal. Since renewal rent had not been agreed to at the expiration, and since rent is a material term of any agreement to lease, the automatic renewal could not be effective. The court also ruled that rent during the month-to-month tenancy would be the reasonable rental value of the property. *Id.* Other terms of the lease apply to the conditions of the month-to-month tenancy insofar as applicable to a monthly letting. *Alabam Freight Lines v. Stewart*, 70 Ariz. 140, 217 P.2d 586 (1950).

### B. Premises Rendered Untenable (Constructive Eviction)

ARS §33-321 obligates the tenant to maintain the premises in as good condition as when he took possession, ordinary wear and tear excepted. ARS §33-343 provides that when the leased property is a building, and when it is damaged such that it becomes unfit for

occupancy, the tenant is not liable for rent unless the lease otherwise provides, and the tenant may surrender possession, provided he was not at fault.

1. When the leased building is seriously damaged through no fault of either landlord or tenant, it is important to see if the lease addresses who is responsible for repairs or restoration.
2. If the lease is silent, it seems that ARS §33-342 trumps ARS §33-321 since destruction of the premises without fault of the tenant gives him the right to vacate and surrender possession.
3. When the premises are damaged to such an extent as to deprive the tenant the beneficial use of them as a result of the fault of the landlord, a “constructive eviction” has occurred if the tenant vacates as a result of the damage. *Riggs v. Murdock*, 10 Ariz. App. 248, 458 P.2d 115 (1969).
4. When conditions beyond the parties control make it impossible for the tenant to use the property as contemplated by the lease, all parties may be relieved of their obligations since the lease has become “commercially frustrated”. *Garner v. Ellingson*, 18 Ariz. App. 181, 501 P.2d 22 (1972).

#### C. When Tenancies Can Be Terminated At Expiration

ARS §33-341 specifies when a tenancy can be terminated.

1. A year-to-year tenancy terminates at the end of each year absent written permission to remain a longer period.
2. A month-to-month tenancy can be terminated by the landlord or tenant giving at least ten days notice to the other (ten days prior to the end of a month).
3. A lease for a fixed term expires at the end of the term.
4. Notice is not required to terminate a tenancy under an expiring lease except for month-to-month leases. Even then, notice is not required to terminate a month-to-month lease when rent is not paid.
5. All of this is subject to the terms of the lease.

#### D. Termination of Right to Possession for Tenant Violations

1. Materiality. A lease can be terminated for breach only when the breach is material. A trivial or immaterial breach will not support a termination. *Foundation Development Corp. v. Loehmann's*, 163 Ariz. 438, 788 P.2d 1189 (1990).

2. **Non-Payment of Rent.** Subject to the terms of the lease, when rent becomes five days past due, ARS §33-361 allows the landlord to recover possession of the premises. Notice is not required when a month-to-month tenancy is involved under ARS §33-341(B). Although this terminates the right to possession, the lease itself is not terminated.
3. **Other Lease Violations.** Subject to the terms of the lease, if a tenant materially violates any other term of the lease, the landlord may take action to recover the premises. No demand is necessary. ARS §33-361(A).
4. **Evictions.** Evictions are also called forcible detainers. When cause exists for the landlord to recover possession, it may do so by filing an eviction action. Note that a 2002 amendment to ARS §33-361(B) allows the prevailing party to recover damages, court costs and attorney's fees in these action.
5. **Lockouts.** ARS §33-361(A) gives the landlord an alternative remedy to court action. The landlord may "reenter and take possession". This is typically done by way of a lockout where the landlord, following a default, changes the locks and posts conspicuous notices on the premises that it has taken possession due to a tenant default.
  - (a) Lockouts are dangerous. If it later turns out the landlord was mistaken and did not have the right to take possession, it could be held liable for substantial damages for wrongful eviction and possibly for conversion of tenant property on the premises.
  - (b) If there is the slightest doubt of the landlord's right to possession, it is much safer to file an eviction action and let the issue be decided by a court.
  - (c) The drawback, of course, is that this gives the tenant an opportunity to remove property from the premises subject to the landlord's lien and to defeat the lien.

## V. THE LANDLORD'S LIEN

### A. Creation of the Lien

ARS §33-361(D) provides that when a tenant refuses or fails to pay rent, the landlord shall have a lien upon his personal property located on the premises which is non-exempt to secure payment of the rent.

1. It is important to note that this lien does not apply to the tenant's household goods and possessions in residential tenancies.

- (a) The Residential Act at ARS §33-1372(A) abolishes it with respect to tenant “household goods” on the premises.
  - (b) The Mobile Home Parks Act at ARS §33-1480(A) also abolishes it with respect to tenant “household goods” on the premises.
  - (c) The RV Space Act does not abolish it.
  - (d) Even in the Residential and Mobile Home Parks Acts, it is only abolished as to “household goods”. Other property such as tenant owned motor vehicles, watercraft, RV’s and in a mobile home park, the mobile home itself would still be subject to the lien.
2. The lien applies to personal property on the premises. Once the property leaves the premises, the lien disappears. It is only a possessory lien.
  3. The lien does not apply to “exempt property”. See ARS §33-1121 *et seq.* for a listing of personal property exemptions.
  4. The possessory landlord’s lien secures only the payment of rent and nothing else. *Mason Dry Goods Co. v. Ackel*, 30 Ariz. 7, 243 P.2d 606 (1926).
  5. In order for the landlord’s lien to exist, there must be a clear landlord-tenant relationship. *Capson v. Superior Court*, 139 Ariz. 113, 677 P.2d 276 (1984). *Capson* held the lien did not apply to cars removed by a towing company to its storage area since there was no intent by the company and vehicle owner to create a lease of the space where the car was stored.
  6. Property on the premises must be owned by the tenant for the lien to apply. Property owned by third parties on the premises is not subject to it. *Western States Securities Co. v. Mosher*, 28 Ariz. 420, 237 P.192 (1925). See also, ARS §33-362(B).
  7. The lien attaches at the commencement of the tenancy or when property is first brought on the premises. *Ex-Cell-O Corp. v. Lincor Properties of Arizona*, 158 Ariz. 307, 762 P.2d. 594 (App., 1988).
  8. When there are other security interests in the property, figuring out which has priority can get complicated. Generally, the first lien perfected has priority. *U. S. v. Globe Corp.*, 113 Ariz. 44, 546 P.2d 11 (1976). Thus if property is purchased but financed and the security interest is perfected with appropriate UCC-1 filings before the property is brought on the premises, the seller’s security interest will have priority over the landlords possessory lien. *Ex-Cell-O Corp. v. Lincor Properties of Arizona*, 158 Ariz. 307, 762 P.2d 594 (App., 1988).

## B. Bankruptcy; Death of Tenant

ARS §33-362(A) restates the landlord lien, but also provides that it does not secure payment of rent accruing after the death or bankruptcy of the tenant.

1. With respect to death, it appears that rent accruing prior to death is covered by the lien, but rent coming due after death is not. Since title to a decedent's property vests in his estate/personal representative, it is suggested that a new rental agreement be entered into with the estate to create a new landlord lien.
2. Under bankruptcy law, post petition rent is ordinarily not affected by the bankruptcy filing, though the lease itself could be altered or terminated during the course of the bankruptcy proceeding. But the statute says the lien "shall not secure the payment of rent accruing after the death or bankruptcy of the lessee". The plain wording of the statute seems to terminate the lien for post petition rent.

## C. Enforcement of the Lien

ARS §33-362(B) states that the tenant's personal property on the premises may be seized for rent. This is the main reason landlords use lockout procedures when rent is past due. By locking the tenant out, the landlord is also able to seize the property on the premises and prevent the tenant from removing it thereby defeating the landlord's lien. The statute goes on to say that the landlord may hold or sell the property for the payment of rent. ARS §33-361(D) provides that if rent is not paid within 60 days after seizure, the personal property may be sold as provided in ARS §33-1023.

1. The landlord must hold the property for at least 60 days after seizure. It is important that the seizure be in accord with both the law and the lease. The property may only be seized when rent is due. The lien does not apply to other indebtedness the tenant may have to the landlord. In addition, if the lease provides for grace periods or for notices to the tenant before he is considered in default or before the lease is terminated, they must be complied with. Be certain all procedures are completely complied with before seizing the property. An improper seizure could open the landlord to liability for damages for conversion.
2. Once the property has been seized and held for 60 days, a notice should be sent to the tenant demanding payment of all rent then due. Send it by certified mail. The tenant has 10 days after mailing to pay the charges. ARS §33-1023(A).
3. If he fails to pay, the property may be sold at public auction.
4. At the time the 10-day notice is sent to the tenant, a notice of sale of the items should be published in a newspaper of general circulation in the County where the property is located. ARS §33-1023(B) indicates publication is not necessary if the owner can be found and informed of the sale. But it is always advisable to publish a notice of sale. The notice should describe the property, the amount of

the landlord's lien, and the time, date and location of the sale. A copy of the notice of sale can be enclosed with the 10-day notice sent to the tenant.

5. If the tenant pays before the sale, it should be cancelled. Otherwise it should proceed.
6. At the sale, the landlord can, if it wishes, "bid in" all or a portion of the rent charges. It can, if it wishes, bid more than this. If others show up, they can bid. At the conclusion of the sale, the high bidder upon payment of the amount of the bid can be given a bill of sale for the goods. Note that if motor vehicles or water craft are sold, the Game & Fish Department and MVD have regulations pertaining to landlord liens which must be complied with in order for titles to be transferred. Contact those agencies for information. Also, check with the UCC section of the Secretary of State's office to see if there are other perfected security interests (i.e., UCC-1's) against any of the property being sold.
7. The sale proceeds are applied to the amounts due to the landlord for the rent. If there are excess proceeds, they get paid to the tenant. If he cannot be located, the excess gets paid to the Arizona Department of Revenue. See, generally, ARS §33-1023.

## VI. LIABILITY UNDER LEASE AFTER TENANT BREACH

### A. General

Ordinarily, when a tenant vacates the premises prior to the end of the lease term, he remains liable for rent accruing subject to the landlord's duty to mitigate damages.

### B. Abandonment

A landlord has the right to hold the tenant liable for rent due for the balance of the lease term subject to the duty to mitigate damages. *Camelback Land & Investment Co. v. Phoenix Entertainment Corp.*, 2 Ariz. App. 250, 401 P.2d 791 (1965). But be careful not to accept the abandonment as a surrender or to take any action constituting a termination of the lease. That could jeopardize the landlord's ability to hold the tenant liable for rent accruing thereafter.

### C. Surrender

If the tenant offers to surrender the premises and the landlord accepts the surrender, the landlord is only entitled to rent due prior to the effective date. The lease is terminated at that point. *Roosen v. Schaffer*, 127 Ariz. 346, 621 P.2d 33 (App., 1980).

### D. Eviction

If the tenant is evicted for breach of the lease, the landlord can hold him liable for rents due for the balance of the lease term subject to the duty to mitigate damages. *Concannon v. Yewell*, 16 Ariz. App. 320, 493 P.2d 122 (1972). But if the filing of the eviction action is construed as a lease termination, then the lease will terminate the date the forcible detainer is filed and no further rent will be due after that. *Wingate v. Gin*, 148 Ariz. 289, 714 P.2d 459 (App., 1985). Read the lease carefully before filing to evict to determine whether it constitutes termination. Also be careful in the wording of notices to tenants. If they have the effect of terminating the lease, future rents may well be lost. Note that even in cases of termination, the tenant may be liable for damages for breach of the lease, subject to the duty to mitigate.

#### E. Duty to Mitigate

When a tenant vacates before the end of the lease terms, the landlord has a duty to make reasonable efforts to rent it at a fair value for the credit of the tenant. *Dushoff v. Phoenix Company*, 23 Ariz. App. 238, 532 P.2d 180 (1975). But the efforts need only to be reasonable, not heroic. *Wingate v. Gin*, 148 Ariz. 289, 714 P.2d 459 (App., 1985). A failure to mitigate bars the landlord from recovering rents after the premises is vacated.