State Bar of Michigan

NEWSLETTER

Consumer Law

V. 20, No. 3 State Bar of Michigan Consumer Law Section August 2016

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Consumer Law Section Annual Meeting Notice

September 22, 2016

2:00 p.m. Business meeting
2:30 p.m. Program —

Investigating the Flint Water Crisis

Speaker: Curt Guyette, Award-Winning Journalist, ACLU of Michigan

2016 Recipient of Frank J. Kelley Consumer Advocacy Award

DeVos Place
303 Monroe Ave NW
Grand Rapids

This event is free, but please register to allow for proper facilities planning. You can register at www.michbar.org/annualmeeting.cfm.

From the Chair

Each year, the SBM Consumer Law Section honors an individual who has demonstrated long-standing dedication and service to consumers and their rights. This year, I am pleased the section will present the Frank J. Kelley Consumer Advocacy Award to Curt Guyette. Curt is an award-winning journalist who is currently employed by the ACLU of Michigan as an investigative reporter. He was named this year's Michigan Journalist of the Year by the Michigan Press Association for his groundbreaking coverage of the Flint water crisis. While researching the emergency manager law and its impact on affected communities, Curt discovered that Flint's water had dangerously high lead levels.

Through his persistence the Flint water crisis became the focus of national attention. We were so impressed with Curt's work that in addition to receiving the Kelley Award, Curt will also speak at our section's annual meeting on Thursday, September 22, 2016 at 2:00 p.m at the State Bar's Annual Meeting in Grand Rapids. I hope to see you there.

At the meeting I will also be leaving leadership of the section in the very capable hands of my successor, Lynn H. Shecter. It has been my great pleasure to serve as the chair of the section and to have the honor and privilege of working with such extremely committed and passionate consumer advocates. Thank you.

Lorray S.C. Brown
Chair, Consumer Law Section

Security Deposits, the Michigan Consumer Protection Act and Statutory Conversion

By Gary Victor

Introduction

The Landlord-Tenant Relationships Act[1] (LTRA) was one of several consumer protection statutes passed during the 1970s.[2] Unfortunately, like many "consumer protection" statutes, the LTRA has a great deal of bark but little bite. Despite many laudable provisions designed to protect tenants' security deposits, the maximum remedy for an aggrieved tenant is twice the amount of security deposit monies retained[3] with no provision for attorney fees. Attorney fees being unavailable under the LTRA, there is virtually no disincentive restraining landlords from retaining their tenants' security deposit funds for one improper reason or another.[4] If a landlord, for example, illegally retains $500 from 10 people and one tenant is lucky enough to litigate getting a judgment for $1,000,[5] the landlord nets $4,000. Functionally, with little downside and a highly profitable upside, a landlord has no reason to stop violating the statute. Unless the LTRA can be combined with one or more other consumer protection statutes authorizing attorney fees, its use to protect tenants' security deposits is all but nonexistent.

Starting in the late '70s, this author decided to litigate cases combining the LTRA with the Michigan Consumer Protection Act[6] (MCPA). The MCPA prohibits a failure to promptly return a deposit as an unfair and deceptive practice.[7] In 1983, three years into what became a 12-year marathon, the Court of Appeals decided *Smolen v Dahlmann Apartments, Ltd.*[8] The *Smolen* Court held that retaining security deposit funds for cleaning violated the LTRA and constituted a violation of the MCPA as well.[9] When the Michigan Supreme Court eviscerated the MCPA in *Smith v Globe Life Insurance Co*[10] and its later companion piece, *Liss v Lewiston-Richards, Inc,*[11] it called into question the use of the MCPA in LTRA cases. This article will examine the continued viability of the MCPA in security deposits cases as well as a potential new and in many ways better theory—statutory conversion.[12]

The LTRA

The LTRA provides that "the security deposit is considered the lawful property of the tenant until the landlord establishes a right to the deposit or portions thereof."[13] It enumerates the specific purposes for which a security deposit may be used.[14] It also establishes requirements the landlord must follow in order to retain any portion of the security deposit for such permitted purposes.[15]

If the tenant provides a written forwarding address within four days of the termination of occupancy,[16] the landlord is required to send the tenant an itemized list of damages for which a security deposit may be used within 30 days of the termination of occupancy.[17] A failure to send the itemized list of damages "constitutes an agreement by the landlord that no damages are due and he shall remit to the tenant immediately the full security deposit."[18] A failure of the landlord to file suit within 45 days of the termination of occupancy to establish a right to the deposit or portions thereof "constitutes a waiver of all claimed damages and makes him liable to the tenant for double the amount of security deposit retained."[19]

Security Deposits and the MCPA

Back in the day, when a client came to this writer with a LTRA violation common to all tenants in an apartment complex, I would usually file a class action under the LTRA and MCPA against both the landlord and the management company. The LTRA defines "landlord" to include "a person authorized to exercise any aspect of the management of the premises."[20] The management company would generally have uniform security deposit practices across multiple apartment complexes. A single representative plaintiff at one complex could represent tenants of all complexes managed by that company. After *Smith* and *Liss*, there was some debate among consumer advocates over the scope of the Court's interpretation of the MCPA as to whether all regulated industries would be exempt from MCPA liability. As far as suits combining the MCPA and LTRA against landlords, it would appear that such suits are still viable. However, suits against the property managers are a different matter.

The *Smith* Court inserted the word "general" into the MCPA's exemption section—MCL § 445.904(1)(a).[21] Under the Court's interpretation, reinforced later by *Liss*,[22] the section reads:

> (1) This act does not apply to. . .:
>
> (a) A *general* transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States. ("*general*" not in the statute but inserted by the Court.)

The Court's interpretation meant that entire industries were exempt if the general conduct of that industry was specifically authorized even if the particular behavior involved violated one or more prohibitions of the MCPA.[23]

Even though the Court's disastrous interpretation of the MCPA exemption section severely limited the scope of the act, the Court should be taken at its word. The exemption only applies to conduct "specifically authorized under laws administered by a regulatory board or officer." It follows that the exemption does not apply to conduct outside those authorized under an actors' license. Case law supports this conclusion.

Both *Smith* and *Liss* rely on *Attorney General v Diamond Mortgage*[24] in reaching their decisions. In *Diamond Mortgage,* the court held that a licensed mortgage broker was not exempt from the MCPA when it engaged in conduct outside the purview of its license.[25] This principle that conduct outside that specifically authorized by an actor's license is not exempt from the MCPA was recently reinforced by the Court of Appeals in *Brownlow v McCall Enterprises, Inc*[26] where builder's license did not protect the defendant when using an ozone generator to remove smoke smell from a house.[27] These cases illustrate that the MCPA exemption does not apply to conduct outside an actor's license—conduct which is not "administered by a regulatory board or officer." It necessarily follows that exemption does not apply where there is no "regulatory board or officer" at all. Landlords do not have to be licensed in Michigan and are therefore subject to MCPA liability.

Although landlords may be subject to MCPA liability regarding their security deposit practices, there are limitations on that liability. The most common connection between the MCPA and security deposit funds withheld in violation of the LTRA is based on MCL § 445.903(1)(u) which prohibits the following conduct:

> Failing, in a consumer transaction that is rescinded, canceled, or otherwise terminated in accordance with the terms of an agreement, advertisement, representation, or provision of law, to promptly restore to the person or persons entitled to it a deposit. . .

In *Hovanesian v Nam,*[28] the tenant left early leaving a written forwarding address.[29] The landlord kept the entire security deposit but violated the LTRA by failing to send an itemized list of damages[30] and failing to sue to establish a right to retain the deposit.[31] The Court of Appeals held that the landlord was liable for twice the security deposit under the LTRA,[32] but not liable under the MCPA because the lease was not "rescinded, canceled or otherwise terminated in accordance with its terms or provisions of law."[33] As long as *Hovenesian* remains good law, it seems clear that the MCPA cannot be used where the tenant leaves early, breaching the lease.[34] A possible exception is where a tenant leaves due to constructive eviction[35] as that would be consistent with a provision of law.

Having examined a landlord's potential MCPA liability for security deposit conduct violating the LTRA, we can now turn to property managers. Generally, property managers must have a real estate broker's license. MCL § 2501(e) of the Occupational Code on Real Estate Brokers and Salespersons defines "proper management" as follows:

> "Property management" means the leasing or renting, or the offering to lease or rent, of real property of others for a fee, commission, compensation, or other valuable consideration pursuant to a property management employment contract.

MCL § 2501(h), goes on to define "real estate broker" as:

> "Real estate broker" means an individual, sole proprietorship, partnership, association, corporation, common law trust, or a combination of those entities who with intent to collect or receive a fee. . .engages in property management as a whole or partial vocation. . .

As the "general" conduct of property management requires a real estate broker's license, property managers possessing such a license and acting within its scope would be exempt under *Smith*. Of course, property managers operating without a license would be subject to MCPA liability and property managers generally would still be liable under the LTRA. We can now turn to the use of statutory conversion in security deposit cases.

Security Deposits And Statutory Conversion

As discussed above, the LTRA provides that the security deposit is the property of the tenant which must be returned to the tenant unless the landlord complies with specific statutory procedures. The question is whether the retention of security deposit funds in a manner inconsistent with the LTRA constitutes statutory conversion under MCL § 600.2919(a). The statute was amended in 2005 to add subsection (1)(a). The section, in pertinent part, reads as follows:

> (1) A person damaged as a result of either or both of the following may recover 3 times the amount of actual damages, plus costs and reasonable attorney fees:
>
> (a) Another person's stealing or embezzling property or converting property to the other person's own use. . . .
>
> (2) The remedy provided by this section is in addition to any other right or remedy the person may have at law or otherwise.

The Michigan Supreme Court recently interpreted section 1(a) in *Aroma Wines and Equipment Inc v Columbian Distribution Services, Inc.*[36] In *Aroma Wines*, a wine distributor sued a warehousing and transportation business for common-law conversion, statutory conversion, and breach of contract. The defendant, in violation of the parties' contract, had removed plaintiff's wines from a controlled environment to an uncontrolled environment. The defendant had not drunk the wine, sold the wine, or kept the wine. The trial court entered judgment on the jury's determination that the defendant had committed common-law conversion but granted defendant's motion for a directed verdict on plaintiff's statutory conversion claim. The Court of Appeals reversed and both parties sought leave which the Court granted. The issue before the Supreme Court was whether statutory conversion is coextensive with the common-law conversion or, if not, "what additional conduct is required to show that a defendant converted property to his, her, or its 'own use.'"[37]

Factually, the plaintiff has argued that the defendant had moved the wine in order to rent the space at a higher rate. Defendant, on the other hand, maintained it had temporarily removed the wine so it could renovate the controlled environment area. Defendant argued that it could not be subject to statutory conversion liability because it had not converted the wine to its own use. In interpreting "person's own use," the Court held that a plaintiff "must show that the defendant employed the converted property for some purpose personal to the defendant's interests, even if that purpose is not the object's ordinarily intended purpose"[38] which could include moving the wine to renovate the controlled area."[39] In essence, under *Aroma Wines* construction, statutory conversion is common-law conversion plus this broadly interpreted "person's own use" element.

Applying this holding to determine whether the improper retention of security deposit funds under the LTRA constitutes statutory conversion, we must look at what constitutes the conversion of money. The *Aroma Wines* Court makes clear the nature of common-law conversion.

> . . .the scope of a common-law conversion is now well-settled in Michigan law as any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein.[40]

The conversion of money has some distinct differences from other property. As stated by the Court of Appeals in *Head v Phillips Camper Sales & Rental Inc:*[41]

> To support an action for conversion of money, the defendant must have an obligation to return the specific money entrusted to his care.[42]

Thus, statutory conversion in an LTRA context requires a showing that defendants put to their own use security deposit money there was an obligation to return in a manner inconsistent with the rights of the tenant. Under this analysis, there are a fairly wide number of circumstances where a landlord may be liable for statutory conversion. Also, while management companies that are licensed are not subject to MCPA liability, they still remain landlords under the LTRA.[43] As such, they would have statutory conversion liability, especially if their contractual responsibilities include the collection, retention and disbursal of security deposit funds. It should also be noted that if the landlord or management company is a corporation or other business entity, the individual owners or managers can be found liable for statutory conversion.[44] Furthermore, since conversion is an intentional tort, good faith is unavailable as a defense[45]

To see an example of how the current statutory conversion approach works, we must revisit *Hovanesian v Nam*[46] where the Court held that statutory conversion did not apply in a security deposit/LTRA violation context.[47] However,

the *Havanesian* Court was interpreting the "now-defunct"[48] older version of the statutory conversion statute which did not contain subsection (1)(a). As stated by the Michigan Supreme Court in *Dept of Agriculture v Appletree Marketing LLC:*[49]

> Before its amendment, MCL 600.2919a applied only to third parties who aided another's act of conversion or embezzlement, and did not apply to the person who directly converted or embezzled, as it does now.[50]

Today, given the amendment to the statute and its interpretation in *Aroma Wines*, the landlord in *Hovanesian* would be liable for statutory conversion.

In that case, after the tenant had provided a written forwarding address,[51] the landlord had failed to send an itemized list of damages to the tenant[52] and retained the tenant's security deposit. As noted above, a failure to send an itemized list of damages "constitutes an agreement by the landlord that no damages are due and he shall remit to the tenant immediately the full security deposit."[53] Instead the landlord retained—put to his own use—security deposit monies—specific money that was the property of the tenant[54]—that he had statutory duty to return—thereby acting in a manner inconsistent with the rights of the tenant. Under these circumstances, it is axiomatic that the landlord would be liable for statutory conversion.

A failure to send an itemized list of damages is just one way landlords and management companies may be liable for statutory conversion. There are a number of other ways. For example, if the itemized list of damages contains claims "for which the security deposit may be used"[55] and other claims which are not permitted, say $50 for cleaning, the landlord would be liable for the statutory conversion of the $50.[56] Another area of potential LTRA/statutory conversion liability is where the landlord has no right to require a security deposit at all such as failing to give the notice required under MCL § 554.603 or failing to deposit the security deposit monies in a regulated financial institution or posting a bond as required under MCL § 554.604.

As we have seen so far, there are three statutes that come into play in security deposit cases: the LTRA, the MCPA, and statutory conversion. The next issue to be examined is whether the remedies in those statutes are individual or can be cumulative. Case law provides the answer that they are cumulative, or at least in theory, can be.

Cumulative Damages Under The LTRA, MCPA, and Statutory Conversion

The LTRA provides for a minimum amount of damages equal to the amount of security deposit improperly retained and a maximum of damages of twice the security deposit.[57] For example, if our landlord above claims $50 for cleaning along with permitted claims on an itemized list of damages, the tenant objects, the landlord sues and loses as to the $50 cleaning claim, there in no provision for damages under the LTRA beyond the $50 improperly retained. On the other hand, if the landlord fails to send an itemized list of damages or sues to retain security deposit funds, the landlord can be liable for twice the security deposit monies retained.[58] Under the MCPA, the landlord retaining the $50 for cleaning is liable for a minimum of $250 plus attorney fees.[59] Under the statutory conversion statute, the landlord would be liable for three times the amount retained, $150 plus attorney fees.[60] The question is whether the damages available under these statutes are cumulative. The answer seems to be "yes" as to the combination of any two.

In *Dept of Agriculture v Appletree Marketing LLC,*[61] the Michigan Supreme Court considered whether the remedies under the statutory conversion statute and the Agricultural Commodities Marketing Act[62] (ACMA) were cumulative. The defendant had failed to remit assessments due under the ACMA. The department sued for violations of the ACMA, common-law conversion and statutory conversion. The trial court found liability under the ACMA but dismissed the conversion claims. The Court of Appeals affirmed and leave was granted.

The Court found that the remedies of the ACMA and the statutory conversion statute were cumulative. The Court stated:

> We next turn to the specific language used in the statutory conversion provision. MCL 600.2919a(2) provides that relief for a claim of statutory conversion "is in addition to any other right or remedy the person may have at law or otherwise." This clear, unambiguous language explicitly indicates the cumulative nature of statutory conversion claims. Furthermore, as noted, the ACMA does not contain an exclusive remedy provision that would explicitly prevent such cumulative claims. The Legislature has used expansive language indicating an intent to provide the broadest possible application, and thus allow cumulative remedies.[63]

The LTRA does not contain any language indicating that the legislature intended the remedies therein to be exclusive. The MCPA states: "This act shall not affect any other cause of action that is available."[64] There is nothing in the three statutes that mediates against cumulative remedies. Theoretically, a landlord could be liable under all three. This poses the question of which remedies to pursue.

Election Of Remedies

Generally, whenever there is a LTRA violation, landlords will be liable under both the LTRA and statutory conversion statute but might not be liable under the MCPA if the lease was breached. Similarly, property managers will be liable for both the LTRA violation and statutory conversion but might not be liable under the MCPA if licensed. When landlords and/or property managers have potential liability under all three statutes, how to proceed will depend on several factors including the amount of security deposit funds retained. For example, the landlord with the $50 cleaning claim would be liable for the $50 under the LTRA, $250 under the MCPA, and $150 for statutory conversion. Under those circumstances, the MCPA coupled with statutory conversion offers $400, whereas the LTRA coupled with statutory conversion offers only $200. If, on the other hand, the amount retained is $500 subject to doubling, the LTRA together with statutory conversion have a potential yield of $2,500, whereas the MCPA and statutory conversion would yield only $2,000.

Where both the MCPA and statutory conversion are available causes of action, another issue that must be considered is that under the statutory conversion statute triple damages (and defendants will argue attorney fees as well) are permissive.[65] On the other hand, under the MCPA the minimum damages of $250 together with reasonable attorney fees are mandatory.[66] Furthermore, the MCPA specifically provides for class actions.[67]

Summary

The LTRA was designed to protect tenants' security deposits. However, it is a toothless tiger unless combined with another statute providing for attorney fees. This article has examined whether the MCPA can still be used in conjunction with the LTRA with regard to the improper retention of security deposit funds. It also examined whether statutory conversion is another theory that can be used to attack illegal security deposit practices. The potential issues regarding both landlords and property managers were considered. A review of the statutes and case law shows that the MCPA can still be used in combination with LTRA with some provisos. Landlords are generally liable under the LTRA but not under the MCPA if the tenant has breached the lease or has not cancelled the lease consistent with a provision of law. Property managers will be liable under the LTRA but not be subject to MCPA liability if they are licensed and are acting within the scope of their licenses.

Statutory conversion may provide another, potentially more powerful approach to security deposit misconduct. It authorizes awards of triple damages together with attorney fees. Generally both landlords and property managers who violate the LTRA will be liable for statutory conversion. Remedies for statutory conversion are cumulative with those under either the LTRA or the MCPA. The possible downside with statutory conversion is that the award of triple damages, and defendants would argue attorney fees as well, is permissive rather than mandatory. It is possible that landlords or property managers could face liability under all three statutes. Under those circumstances, the consumer advocate must examine the best combination of two statutes to elect. Several of the items to consider in making that decision are the amount involved and the permissive nature of statutory conversion.

Endnotes

1 MCL § 554.601, *et seq*.

2 See, eg, The Consumer Protection Act, MCL 445.901, *et seq*. and the Truth in Renting Act, MCL § 554.631, *et seq*.

3 MCL § 554.613.

4 Security deposit funds can only be used for one of four purposes: rent in arrearage, rent due for premature termination, utility bills unpaid and actual damages to the rental unit or any ancillary facility. MCL § 554.607.

5 This outcome is more than just lucky; it would be nearly impossible. With no attorney fees available, the tenant would not be able to secure representation and would usually file a small claim. The landlord would normally have the case removed to the general district court docket. Alone in district court, the tenant's chance of any success would be substantially diminished. Moreover, even with a clear violation having the district court judge award double the the security deposit is problematic at best.

6 MCL § 445.901, *et seq.*

7 MCL § 445.903(1)(u).

8 127 Mich App 108 (1983).

9 *Id.* at 117-118.

10 460 Mich 446 (1999).

11 478 Mich 203 (2007).

12 MCL § 600.2919(a).

13 MCL § 554.605.

14 MCL § 554.607.

15 See, eg, MCL §§ 554.609 and 554.613.

16 MCL § 554.611.

17 MCL § 554.609.

18 MCL § 554.610.

19 MCL § 554.613.

20 MCL § 554.601(c).

21 *Smith* at 465.

22 *Liss* at 210.

23 *Smith* at 445-446.

24 414 Mich 603 (1982). See *Smith* at 463 and *Liss* at 209.

25 *Id.* at 617.

26 ____ Mich App ____ (2016); 2016 WL 1576919. *See also*, Gary M. Victor, *A Tiny Michigan Consumer Protection Act Victory—A Type of Case that Survives Smith*, 17 *Consumer Law Newsletter* 1 (No.2, 2013).

27 *Id.* at ____.

28 213 Mich App 231 (1995).

29 MCL § 554.611.

30 MCL § 554.609.

31 MCL § 554.613.

32 213 Mich App at 236.

33 *Id.* at 237.

34 It should be noted that the facts of *Hovanesian* are unusual. When tenants breach leases they normally leave without providing a written forwarding address. That relieves the landlord from the duty of sending an itemized list of damages "but does not prejudice a tenant's claim for the security deposit." MCL § 554.611. What is discussed in this article comes into play more often where the tenant stays the full term and the landlord violates the LTRA.

35 MCL § 600.2918.

36 497 Mich 337 (2105).

37 *Id.* at 340.

38 *Id.* at 359.

39 *Id.* at 360. In applying this holding the Court stated:

> In arguing that it did not commit *statutory* conversion, Columbian claims that it moved the wine from its temperature-controlled storage area to complete a renovation project at its warehouse. Even considering just this admission, we agree with the Court of Appeals that a jury could consider "the act of moving plaintiff's wine contrary to the contract in order to undertake an expansion project to benefit itself" to be "an act of employing the wine to [Columbian's] own purposes constituting 'use' of the wine." (Emphasis by the Court) *Id.* at 360.

40 *Id.* at 351-352. (citations omitted).

41 234 Mich App 94 (1999).

42 *Id.* at 110 citing *Check Reporting Services, Inc. v Michigan Nat'l Bank–Lansing,* 191 MichApp 614, 626 (1991).

43 MCL § 554.601(c).

44 *See, Dept of Agriculture v Appletree Marketing LLC,* 481 Mich 1, 17-19 (2010). See also, Hayes v Bush, 286 Mich 546 (1938).

45 *See, Trail Clinic, PC v Bloch*, 114 Mich App 700, 705-706 (1982),

46 213 Mich App 231 (1999).

47 *Id.* at 237.

48 497 Mich at 354.

49 481 Mich 1 (2010).

50 *Id.* at fn 16.

51 MCL § 554.611.

52 MCL § 554.609.

53 *Id.*

54 MCL § 554.605.

55 MCL § 554.609.

56 It should be noted that a landlord would not liable for statutory conversion, as is the case with the LTRA, liable if the amount of permitted claims is equal to or exceeds the total amount of the security deposit. See, *Lesatz v Standard Green Meadows*,164 Mich App 122, 130 (1987).

57 MCL §

58 MCL § 554.513. *See also*, *Hovanesian v Nam,* 213 Mich App 231 (1999).

59 MCL § 445.911(2).

60 MCL § 600.2919(1). It should be noted that the language of the statute is permissive rather than mandatory—"may recover 3 times the amount of actual damages, plus costs and reasonable attorney fees." Therefore, awarding triple damages would be up to the discretion of the court.

61 481 Mich 1 (2010).

62 MCL § 290.651, *et seq.*

63 481 Mich at 9-10.

64 MCL § 445.916

65 MCL § 600.2919(a)(1) states that a person "may recover 3 times the amount of actual damages, plus costs and reasonable attorney fees."

66 MCL § 445.911(2).

67 MCL § 445.911(3).

SBM
State Bar of Michigan
Michael Franck Building
306 Townsend Street
Lansing, MI 48933-2012

Consumer Law Section 2016-17 Slate

The following are candidates for positions on the 2016-17 council:

Chair-Elect: Stuart Sandweiss

Secretary: Andrew L. Campbell

Treasurer: Gary M. Victor

Council members (term ending 2019): Daniel O. Myers
Dani K. Liblang
Terry J. Adler

Two positions are automatically filled for the 2016-17 council:

Chair: Lynn H. Shecter

Immediate Past Chair: Lorray S. C. Brown

Elections will be held at the Annual Meeting on September 22, 2016 at 2 p.m.