

Legality of Upfront Tenant Fees

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A recent Massachusetts federal district court case has placed a significant limitation on the type of upfront fees that landlords may charge tenants. On August 26, 2014, Judge Rya Zobel ruled that Equity Residential, a Chicago-based real estate investment trust, violated the Massachusetts Security Deposit Statute when it charged former tenants Brian and Kim Perry and Cheryl Miller application, amenity, community, and pet fees prior to the tenants occupying their respective units.¹ As part of his decision, Judge Zobel consolidated the case with another action pending before him, which consists of four other lawsuits against Equity involving the same violations of the Security Deposit Statute. Given the commonality of the claims, Judge Zobel also granted the Perrys and Miller class certification in the pending matter.

Under the Massachusetts Security Deposit Statute², residential landlords are limited to four categories of upfront fees that they may charge to prospective tenants. These include the first month's rent, the last month's rent, a security deposit that does not exceed the first month's rent, and the purchase and installation cost for a key and lock. In its case, however, Equity attempted to argue that the statute should be interpreted so as to mean that residential landlords may charge any type of fee upfront that does not exceed the total amount of the above mentioned categories. In other words, Equity argued that application, amenity, and similar fees are valid as long as their combined total is equal to or less than the total amount of the four categories mentioned in the statute. Judge Zobel was not convinced by this argument, relying instead on a recent 2011 case against Archstone Properties³ to find that the fee types are limited to the enumerated list found in the Security Deposit Statute.

The outcome of the class action against Equity is likely to have significant ramifications for Massachusetts residential landlords with respect to the type of upfront fees residential landlords charge tenants. For example, the common practice of charging prospective tenants application fees may expose residential landlords to the same type of liability that Equity is currently facing. Moreover, residential landlords need to be especially cautious about the types of upfront fees that they charge because conduct prohibited by the Security Deposit Statute is subject to penalties under the state's Consumer Protection Act.⁴

¹ Perry v. Equity Residential Mgmt., 1:12-cv-10779-RWZ (D. Mass. Aug. 26, 2014).

² Mass. Gen. L., ch. 186, § 15(B).

³ Hermida v. Archstone, 826 F. Supp. 2d 380 (D. Mass. 2011).

⁴ Mass. Gen. L., ch. 93A, § 2(a); 940 Mass. Code Regs., § 3.17(4).

Pursuant to the Consumer Protection Act, it is an unfair or deceptive practice for a residential landlord to charge a tenant an upfront fee that does not fall into one of the four categories mentioned in the Security Deposit Statute. Consequently, residential landlords who are in violation of the statute may be ordered to pay up to triple damages and attorneys' fees. Depending on the number of tenants, this amount could up being very costly.

Similar to Massachusetts, Rhode Island places a limitation on the amount that a residential landlord can charge for a security deposit. Under the Rhode Island Security Deposit Statute⁵, any upfront fee that qualifies as a security deposit may not exceed the value of one month's rent. The Rhode Island Security Deposit Statute defines a security deposit as a deposit against physical damages to the unit during the tenancy. Unlike Massachusetts, however, the Rhode Island Security Deposit Statute does not provide an enumerated list of fees that landlords may charge upfront. In other words, it is unclear whether charging prepayments such as an application fee is a violation of the statute. A handbook published by the State of Rhode Island in 2007 provides that prepayments that are not considered to be forms of security may be requested from a new tenant, and also notes that these types of fees are not specifically governed by state law.⁶ Therefore, landlords are not expressly prohibited from charging tenants with upfront fees that go beyond a security deposit. It is, however, still prudent for residential landlords to exercise caution and make sure that these prepayments are reasonable because, like Massachusetts, Rhode Island also has a consumer protection law titled the Rhode Island Unfair Trade Practice and Consumer Protection Act⁷. Although the Act is similar to the Massachusetts statute, the Rhode Island courts have yet to apply the Act to landlord-tenant disputes.⁸ There is, however, precedent from the Rhode Island federal district court that raises the argument that the Act could apply to certain facets of residential leases.⁹ Given the similarities in both language and purpose, it is possible that Rhode Island courts in the future would be willing to impose penalties under the Act if upfront fees are found to be unfair or deceptive. If a court were to find that the Unfair Trade Practice and Consumer Protection Act did apply to residential landlords, similar to Massachusetts they may be subject to punitive damages as well as attorneys' fees and costs.

Given the recent lawsuits against Equity and Archstone, residential landlords need to be increasingly conscious of the types of fees that they are charging tenants at the outset. It appears likely that more tenants will be apt to bring claims under the Massachusetts Security Deposit Statute, which could lead to increased exposure to double and triple damages under the Consumer Protection Act. Landlords operating within Rhode Island should also be aware of this development, because court rulings like Judge Zobel's could lead to a change in the types of fees that residential landlords may permissibly charge and that tenants are willing to pay.

The opinions stated within do not constitute legal advice.

⁵ R.I. Gen. Laws § 34-18-19.

⁶ OFFICE OF HOUSING AND COMMUNITY DEVELOPMENT, STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, THE RHODE ISLAND LANDLORD-TENANT NOTEBOOK, 8 (2007).

⁷ R.I. Gen. Laws §§ 6-13.1-1 to 29.

⁸ See Kelley v. Cowesett Hills Assocs., 768 A.2d 425, 431 (R.I. 2001).

⁹ See Whouley v. Shoreham, Inc., C.A. No. 08-411S, U.S. Dist. LEXIS 24162 (D.R.I. Mar. 20, 2009).