

# PARK WATCH ® A LEGAL DEVELOPMENTS NEWSLETTER

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**THIS NEWSLETTER CONVEYS GENERAL INFORMATION, NOT LEGAL ADVICE: CONSULT AN ATTORNEY BEFORE RELYING HEREON**

## ● 16 WAYS TO LOSE YOUR NEXT EVICTION CASE; ● RED FLAGS COMPLIANCE

*DLO, Inc.: Creative solutions to keep parks efficient, simple and profitable. Proudly specializing in legal representation of Mobilehome Park Owners since 1978*  
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**Happy Anniversary!**  
*DLO begins its 18<sup>th</sup> year of service to park owners October 1<sup>st</sup>*

By: Terry R. Dowdall, Esq.

● **UPSHOT:** The economy has stopped in its tracks. Holes are appearing in parks once enjoying waiting lists of hopeful buyers. Until that prosperous time returns (and it certainly will), owners are more patient than ever before with defaulting residents. When it is time to terminate a tenancy, *let's make sure to get it right.* How frustrating to receive back an eviction file because a notice is defective! Among other things, when a resident defaults, for example, have your counsel check the notice to ensure it passes legal muster. Do not wait until the 60<sup>th</sup> day!

*Here is a collection of other pitfalls to avoid.*

## 16 WAYS TO LOSE AN EVICTION

By: Terry R. Dowdall, Esq.

*The mistakes most often encountered are notices that cannot stand up in court. Here is a representative sampling of the most frequent mistakes we see.*

### ▲ **SERVING 3 day pay or quit notices BEFORE THE 7TH OF THE MONTH.**

Rent is not delinquent under the MRL until it is late for 5 days. The rent is not late until the second of the month. Therefore 5 full days has not passed until the close of business on the sixth day. Hence the 3 day notice can FIRST be served on the 7<sup>th</sup> of the month for which rent is due.

The late charge can apply on the fifth as often the case; the two dates do not need to be the same. Whether or not you choose to include a late notice is a matter we explore later.

*In this Issue:*

- 10 Ways to Lose Your Next Eviction Case
- Red Flags Compliance

*See us:*

**WMA CONVENTION: October 11-14, 2010**

- Update on New Laws: Oct. 12: 4:15 - 5:15p.m.
- Legal Management Advice: Oct. 13: 9:00 - 11:15 a.m.
- Update on New Laws: Oct. 13: 3:15 - 4:15p.m.
- **ORANGE COUNTY MHET, October 27, 2010**
- Featured Speaker, October 27<sup>th</sup>, 8:00 a.m.

### ▲ **Demanding rents DUE AND OWING for MORE THAN 12 MONTHS.**

The law allows a demand for up to 12 months of past due rent. Your rental agreement may state (as ours do) that the rents received are applied to earliest balance despite conditional or restrictive conditions on acceptance, to help avoid this problem.

### ▲ **Taking money AFTER EXPIRATION of the 3 day notice (add 5 days for "nail and mail")**

Taking payment after the expiration of the 3-day deadline generally waives or "moots" the pay or quit notice, reinstates tenancy and cures the default. Taking money after tenancy is terminated, is an action which reflects you have reinstated and allowed the tenant to continue to reside in the park—else, the tenancy is over and you would be refusing to accept payment.

### ▲ **Taking PART PAYMENTS within the 3 day period after notice is served.**

Again, taking part payment waives the pay or quit notice, reinstates tenancy and cures the default. But if the part payment tendered is substantial, the payment

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may represent the last money you will not otherwise receive (if you rely on your right to full payment and reject the partial amount).

So you can accept the part payment, then serve a new 3 DAY NOTICE for the balance due; or, a written "workout deal" can be signed to preserve the existing notices if there are good prospects for eventual cure by the homeowner.

When preparing the 'balance due' 3 day notice, do not try to figure out the number of days the partial payment covered or the number of days for which rent is still due—rather, state the month (first through the last day of) and note a credit for the part payment).

**▲ REFUSING A LEGAL OWNER'S PAYMENT OF RENT ON BEHALF OF THE TENANT OFFERED WITHIN 30 DAYS AFTER THE 3 DAY NOTICE IS SERVED.**

The legal owner may do so TWICE within a 12 month period to reinstate tenancy.

**▲ Demanding payment of any charges or amounts UNLESS THE CHARGE IS IN WRITING IN THE RENT AGREEMENT or instituted by notice or amendment, or evidenced by past paid, invoices.**

You cannot make up charges due 'out of the air.' all charges set forth in the notice must be tied to a provision of the rental agreement or amendment to the rental agreement. Hence it is important to keep rent increase notices. **Note:** you cannot add new charges for tenancy in the rules and regulations unless expressly and *mutually* agreed. So, keep the promises to pay specific charges in the rental agreement.

**▲ Serving a new 3 day notice AFTER A GOOD NOTICE IS "LOCKED IN" (tenant did not pay within time required).**

You do not need to serve another 3 day notice for the next month during the running of the 60 day notice, after the tenant has failed to pay the amount in the first 3 day notice. The accompanying 60 day notice is now running and the rental charges continue to accrue without further demands for payment of rent. Indeed, if the tenant paid the tenancy would be reinstated. So, once the tenant has failed to pay the 3day notices, that's it! No more notices. On expiration of the 60 day notice, next stop is the courthouse.

**▲ Three strikes you're out: YOU DO NOT NEED (BUT CAN) SERVE ANOTHER 3 DAY NOTICE on the fourth default.**

On the 4<sup>th</sup> default within the 12 month period, just a 60 day notice which IS special—it must describe the 3 preceding defaults and the dates of the earlier 3 day notices served within the past 12 months. Safeguard copies of all the earlier notices, the proofs of service and receipts for certified mail.

**▲ FAILING TO OBTAIN A TITLE SEARCH- everyone on title needs to be served with the 60 day notices.**

Once the 3 day notice to pay or quit is served, you have 10 days to serve the 60 day notice on all owners of record—the

legal owner, junior lienholders and registered owners out of possession. Once the tenant fails to pay within 3 days, run a fresh title search—the tenant may have changed the title information, or the lender may have changed, so do not let the tenant frustrate your notice and remedies.

**▲ Modifying the Rent Agreement by Conduct.**

If the tenant has ALWAYS paid on the fifteenth of the month, do not serve the 3 day notice on the 7th without REINSTATING YOUR RIGHTS (advance notice to tenant that the original time requirements of the lease would again apply). Your CONDUCT arguably ALTERED the time for payment per the rental agreement.

If there has been a history of late rent payments, allowed based on the tenant's receipt of rent assistance on the 15<sup>th</sup> of the month, for example, the court will agree that the terms of payment were modified by agreement or conduct which has misled the tenant. Reinstating your rights is critical in these cases.

**▲ LATE CHARGES: better to exclude them!**

If you must include them, only one late charge per notice, even if more than one month of rent due and check the tenant's rental agreement to make sure the late charge coincides with what's stated in the rental agreement. Some courts allow collection of late charges, some do not. Knowing the local practice is essential and if not known, it is best practice not to include them.

**▲ Failing to complete a proof of service form on each notice that is served; losing proofs of service.**

It is best to staple the return postcards from legal owners to prove certified mail, and proofs of service, to the inside of the resident file. Physically attach them so they are not misplaced !!

**▲ Failing to prepare proofs of service for RENT INCREASE NOTICES and keeping copies of the rent increase notice.**

Courts routinely expect to see proof of service. DO not lose them. Make sure they are filled out completely. Make sure you have made a real effort to have the tenant served personally. It avoids delay, and if there is an excuse or misunderstanding, it can be worked out quickly. If the tenant is dangerous, have your attorneys take care of service of the notice. Endangering yourself or your employees is no part of their job description, may just exacerbate ill will, and worse, can lead to workers' compensation issues.

**▲ Failing to serve the 60 day notice on the legal owner BY CERTIFIED MAIL.**

This failure does not affect your eviction processing under case law, but it does delay the time for the legal owner to decide how to handle the default. This delay may mean lost rents. So be sure to serve timely and to carefully safeguard the receipt of the mailing.

▲ **SERVICE OF NOTICES: Mailing a notice without posting; posting without mailing.**

A post and mail method of service requires both steps! It is not enough to simply post; or to simply mail. Some communications to the tenant may be mailed, by ordinary mail—but not eviction notices. If the tenant cannot be served personally, the ‘nail and mail’ method requires both steps.

▲ **Making VERBAL AGREEMENTS regarding payment with anybody!**

Here is the fundamental legal problem with verbal agreements. People lie! And people take their agreements more seriously when they execute a written agreement. If a verbal agreement to clean up a homesite would appear to be overly formal, send a confirming letter expressing your appreciation for the resident’s cooperation to clean up the space by a certain date. Keep a written record of these agreements and understandings.

▲ **Taking RENT FROM A THIRD PARTY STRANGER – this may make the stranger your new tenant!**

We take money from those with whom we have a contract. If you take money from a stranger for or on behalf of a tenant, documentation of the conditions under which the money is taken is essential. Where a tenant is on vacation, hospitalized, or has deceased, the chance of creating a difficult legal situation are greatly heightened. The stranger will or may claim that taking the money established or was pursuant to the agreement to establish a tenancy. However, if you make a mistake, and act quickly to rectify it, it may not be too late to unwind the action, return the money and maintain your legal position.

● **Novel Options:**

**Offer the resident additional time** to leave the property. Keep the notices in place, do not take any rents, as this may affect the right to evict—but hold off and let them live there for some additional time. This may give them the money they need to move on. And it avoids an unnecessary attorney fee you will likely never collect anyway.

**Offer the resident a payment to go.** Again, this may provide the funds to enable the resident to start over somewhere else. Do not pay the sum to the tenant until that U-Haul is crossing the park entrance on its way out, with power off and keys collected.

● **Do Not Give the Resident Affirmative Defenses To the Eviction Action.**

Do not ignore requests to meet, to take any remedial action management should take for maintenance of the common area improvements, facilities, amenities and especially utilities. When a tenant fails to pay rents or violates rules, the termination of tenancy may be met with affirmative defenses excusing the duty to pay.

If the space is not “*habitable*,” the tenant’s duty to pay may be excused and the tenant and attorney will prevail, leaving management to pay its attorneys and the tenant lawyers as well. “Habitability” goes to the very ability to actually occupy the premises with provision of services such as gas, electricity and water.

Do not “pick out” or select the tenant for *retaliatory* treatment of any kind. Management cannot raise the rent in response to resident complaints, or provide larger increases than other residents, or take any actions which punish the resident for the complaint he has made.

Finally, let’s not *harass* the tenant. Management needs to be professional at all times. Getting into name-calling contests, writing letters with threats or innuendos, raising any personal traits concerning the resident, arguing, turning off the utilities, or in any way stepping down to the level of the resident diminishes the image and authority of the management. It will also affect the respect of other residents toward management. So do not demand the tenant vacate, e.g., knocking on the door constantly, telephoning him, asking or demanding him to vacate. While possible in some circumstances, it is best not to serve any further notices on the tenant whose eviction is pending.

If after service of a three day notice the rent is *timely tendered*, take it! You cannot shut down the office early, make yourself unavailable, or refuse full tender of the monies claimed to be owed. The notice of time and location of rental payments (in every rental agreement) must remain in effect so the tenant can pay. You can reject part payment or third party payment. ▲

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## RED FLAGS COMPLIANCE

Is identity theft an issue for Park Owners to Be Concerned with?

By: *Diane Wilkens Medina, Esq.*

● **UPSHOT:** Examples of mail theft in mobilehome parks are many. Identity theft is ubiquitous. Miscreants, including resident culprits, take mail and steal the identity of the intended recipient. Identity thieves have been known to rent or occupy a home using a stolen identity and then charge goods and services in the victim’s name. Use of falsified information in tenancy applications is common.

*Here are some examples of the problem.*

**Man Charged With Stealing Mail - Suspect Had Been Evicted From Neighborhood<sup>1</sup>, September 23, 2010:**

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<sup>1</sup>Statesville Record and Landmark, September 24, 2010 (North Carolina)

"IREDELL COUNTY, N.C. -- An Iredell County man swiped mail out of several boxes at a mobile home park . . . Redmond said residents at the park called police and detectives said they traced the stolen mail to a former resident, . . . Redmond said federal authorities are also considering charges since stealing mail is a federal crime."

The risk is higher in areas inhabited by criminals and drug users. And the risk is shared by residents and management alike.

**Why meth and ID theft go together:**<sup>2</sup> *"Massey knew where to find meth addicts, and he made them a simple proposal: I'll trade mail for meth. Soon a small army of meth addicts was prowling neighborhoods . . . stealing mail out of hundreds of mailboxes, and raiding the local recycling center for pre-approved credit card applications. . . . A meth user can stay awake for several days at a time, and is often content to perform repetitive tasks -- even having the patience to stitch together shredded documents."*

● Does the "Red Flags" rule apply to property management?

According to one authority<sup>3</sup>, *"Property management companies and residential property owners should have already adopted policies and procedures to deal with applicant address discrepancies. For property owners and managers this means that when reviewing an applicant's credit report, if an address discrepancy is reported, the prospective landlord or management company must have a procedure in place to investigate and resolve the reported discrepancy(s)."*

● Here is what you need to do:

*Simply, in situations in which property management is suspicious that submitted documents are false, the manager can ask for confirmation of the information; and report it to local law enforcement authorities. The Program for the park needs to include the components listed below. In essence, we need to have a procedure which will guide management in*

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<sup>2</sup> Bob Sullivan, The meth connection to identity theft - Drug addiction plays a part in many crime rings, cops say; msnbc.com, March 14, 2004

<sup>3</sup> Merrie Turner Lightner, An Introduction to FACTA: the Fair and Accurate Credit Transactions Act for Property Managers, March 13, 2010, [www.examiner.com](http://www.examiner.com) ("Unfortunately, landlords and property management companies were neither specifically named as examples of covered businesses, nor not named as exempt businesses in the legislation. But I believe it is clear if one uses the plain meaning of words and the language of the legislation, that property management leasing and rental activities are covered by it. Furthermore, the activities of a landlord are specifically called out as high risk for identity theft in an article written by FTC staff entitled: 'The Red Flags Rule: Compliance Tips for Companies Offering Services In and Around the Home'")

*processing new purchasers. Gathering information, assessing the information, acting on suspicious information with requests for confirmation or reporting to authorities, and periodic updating of procedures. Each park property should have such program as part of its management procedure manual.*

● Here is what you will do: *Generally--*

**Write a plan which includes these factors:**

- **Identify the kinds of red flags that are relevant to your business;**

(E.g., applications for tenancy, r.v. storage, persons paying on behalf of tenants in carefully controlled and documented situations, such as family members for incompetent residents, hospitalized residents, recovery houses, dealers)

- **Explain your process for detecting them;**

(E.g., a description of your review process, including tenancy applications, credit reports, comparisons made to the data provided, cross-referencing, telephoning employers, etc., checking credit references, comparing picture identification to the applicant)

- **Describe how you'll respond to red flags to prevent and mitigate identity theft; and**

(E.g., asking for confirmation, clarification, any correction needed, contacting local law enforcement)

- **Spell out how you'll keep your program current.**

(E.g., WMA continuing education, reading trade journals such as the WMA reporter, obtaining updates from your legal advisors, including changes as laws and technology may change)

According to the FTC, indications to watch for may include these factors:

▲ **Alerts, Notifications, and Warnings from a Credit Reporting Company.**

**We have a problem to deal with in these situations:**

- a fraud or active duty alert on a credit report
- a notice of credit freeze in response to a request for a credit report
- a notice of address discrepancy provided by a credit reporting agency
- a credit report indicating a pattern of activity inconsistent with the person's history – for example, a big increase in the volume of inquiries or the use of credit, especially on new accounts; an unusual number of recently established credit relationships; or an account that was closed because of an abuse of account privileges.

▲ **Suspicious Documents.**

**Perhaps Meg Whitman would not be in the current situation with the 'Nikki' fiasco if her agency had focused**

**more attention on these factors:**

- identification that looks altered or forged
- the person presenting the identification doesn't look like the photo or match the physical description
- information on the identification that differs from what the person presenting the identification is telling you or doesn't match with other information, like a signature card or recent check
- an application that looks like it's been altered, forged, or torn up and reassembled

**▲ Suspicious Personal Identifying Information.**

**Persons assuming someone else's identity may use personally identifying information that doesn't ring true. Here are some red flags involving identifying information:**

- inconsistencies with what else you know – for example, an address that doesn't match the credit report, the use of a Social Security number that's listed on the Social Security Administration Death Master File, or a number that hasn't been issued, according to the monthly issuance tables available from the Social Security Administration.
- inconsistencies in the information the customer has given you – say, a date of birth that doesn't correlate to the number range on the Social Security Administration's issuance tables
- an address, phone number, or other personal information that's been used on an account you know to be fraudulent
- a bogus address, an address for a mail drop or prison, a phone number that's invalid, or one that's associated with a pager or answering service
- a Social Security number that's been used by someone else opening an account
- an address or telephone number that's been used by many other people opening accounts
- a person who omits required information on an application and doesn't respond to notices that the application is incomplete
- a person who can't provide authenticating information beyond what's generally available from a wallet or credit report – for example, a person who can't answer a challenge question

**▲ Notice from Other Sources.**

- Sometimes a "red flag" that an account has been opened or used fraudulently can come from someone dealing with the applicant, the victim of identity theft, a law enforcement authority, or someone else.

**▲ New Tenancy.**

**When verifying the identity of the person who is applying for tenancy (referred to as "opening an account"), reasonable procedures may include a good, comprehensive tenancy application.**

- Obtaining such information as name and address is clearly not enough.

(The application should also include in-person verification [management is entitled to require an in park interview], checking a current government-issued identification card like a driver's license or passport.)

- Identification of foreign countries can be checked by inquiring with the local consulate. The tenancy application processing should begin right away. Management has 15 business days to give an answer to the application.
- You may NOT ask questions as to nationality, or whether the applicant is in the country legally under state law. If you know the applicant is not in the country legally, federal law requires that you not rent to the applicant.
- Compare the tenancy application information with the credit report. Also, comparing with a data broker, the Social Security Number Death Master File, or publicly available information is possible.
- Asking challenge questions based on information from other sources can be another way of verifying someone's identity.

**▲ Update the Program**

**The Rule recognizes that new red flags emerge as technology changes or identity thieves change their tactics.**

- Periodic updates to your program are required to ensure that it keeps current with identity theft risks. Factor in your own experience with identity theft; changes in how identity thieves operate; new methods to detect, prevent, and mitigate identity theft.
- As management obtains more experience, more steps and protections may come to light. Changes in technology can be accounted for, together with changes in the law.
- Remember, landlords are subject to the requirement and obligations of this portion of the rule. Landlords are specifically called out for compliance in the Federal Register. Vol. 72, No. 217 / Friday, November 9, 2007 / Rules and Regulations.

**▲ What is the deadline for compliance?**

The FTC has delayed the compliance deadline several times, most recently to **December 31, 2010**, while Congress considers legislation that would affect the scope of entities covered by the Rule.

**● Conclusion**

*Does the Program Need to be Certified or Approved to Ensure Compliance?* No, the FTC does not certify or approve any particular program. So, adopting a procedure can be as simple as working up a procedure and policy based on the foregoing information.

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*Please feel free to contact us for further information.*