

## TIP OF THE MONTH:

### Surrender and Possession of Your Rental Property

By Jim Straub, Oregon Rental Housing Association Legislative Director

We recently spent 20 minutes on the telephone with a collection agency who refused to pursue a past tenant for unpaid rent. The collection agent misunderstood the tenant's "surrender" of the rental property. It is a common misunderstanding and, therefore, our topic this month. According to the misinformed collection agent, the tenant's obligation to pay rent ended when he "surrendered" the property to the landlord. While this is sometimes true, it was not the case in the situation at hand and is not the case in many landlord-tenant situations.

Let's take the most common example. Your tenant gives you a 30 day notice that they intend to vacate the unit. Under landlord-tenant law, your tenant owes rent for the full 30 days of the notice period. If the tenant vacates early and gives you the keys, you have a good-faith obligation to make reasonable efforts to re-rent the unit within that 30 day period. That means you do what you would normally do when you have a vacancy: clean the unit, advertise it in the manner you normally would, and show it to prospective tenants. If you are able to re-rent the unit within the 30 day period, then the tenant will only owe rent *until you re-rent the unit*. In other words, when a tenant gives a 30 day notice and voluntarily leaves before the notice is up, the tenant owes rent for 30 days or until you re-rent the unit, whichever comes first.

The key here is that the tenant gave you possession voluntarily and you were simply helping them mitigate their loss. In order to do this and preserve your right to charge rent for the 30 days or until you re-rent it (whichever comes first), you must not change the locks. You should wait until you re-rent the unit or until the 30 days are up.

Now, things become more complicated if the tenant leaves involuntarily, say because of a with-cause or a non-payment of rent notice. In these cases you've given tenants a choice: pay or leave the unit. Or, in the case of a with-cause notice (let's use noise as an example): stop making so much noise or leave. In these cases, if you are enforcing the notice, then you usually want the tenant to leave. You don't want to run the risk of them reoccupying the unit, and so you generally want to change the locks. If you change the locks, then you are denying the tenant access and can't continue to charge rent. What if you don't change the locks, though? Can you still charge rent for the full 30 days? According to local experts and attorneys, the answer isn't clearly spelled out in landlord-tenant or case law, and judges have come down on both sides in court cases. There are two main legal theories on this.

First, there is the legal concept that when a tenant leaves following a with-cause and/or non-payment of rent notice, he has actually *complied* with the notice and the tenancy has terminated. The landlord gave the tenant two options to comply with the notice: pay or leave. They chose to leave, which is still a way to comply with the notice. In doing so, the rental agreement ended and, with it, the obligation of the tenant to pay. In this case, the landlord stops charging the tenant rent on the day they vacated the unit (and nothing would prevent the landlord from changing the locks).

The second legal concept involves the question of damages. ORS 90.401(2), which follows the citations on with-cause and non-payment of rent notices, provides “...a landlord may *recover damages* and obtain injunctive relief for any noncompliance by the tenant with the rental agreement...” This legal theory posits that a landlord *may* continue to charge a full 30 days rent after a with-cause and/or non-payment of rent notice because in doing so, the landlord is recovering his damages created by the tenant vacating the unit. In this theory, the tenant leaves, the landlord makes reasonable efforts to re-rent the unit within the 30 days but, if he is unable, is able to show that the unpaid rent is damages that he should be able to recover.

This approach sounds good, but there are practical implications, and so the ROA advises against charging tenants rent after they vacate following a with-cause and/or non-payment of rent notice. Here’s why:

In order to be able to charge the rent in that scenario, the landlord must not change the locks. In cases of the enforcement of a with-cause and/or non-payment of rent notice, the unauthorized reoccupation by the vacating tenant is a possibility. You’ve made them leave involuntarily, but they still have keys to the place. Some tenants simply might move right back in.

There are additional risks as well. “Squatters”, especially by friends or family to whom the tenant has given keys, may move into a unit where the locks haven’t been changed, possibly necessitating an eviction process. Furthermore, tenants who vacate unwillingly often leave personal property behind that requires a landlord to serve an ORHA form #25, “*Abandoned Property*” notice. During the notice period, the landlord is responsible for safe-guarding the property that has been left behind. Most landlords leave this property at the rental unit. If the landlord doesn’t change the locks and the tenant’s property disappears during the abandoned property notice period, the landlord could be held responsible for that lost property and could ultimately have to repay the tenant for the loss.

Given those risks and the ambiguity behind whether Lane County judges would uphold a landlord’s right to charge rent when tenants vacate following a with-cause and/or non-payment of rent notice, we recommend against it.

As in many areas of landlord-tenant law, this is a gray area. I suggest yet another approach when tenants give up possession of the unit voluntarily. He believes that you should always change the locks immediately when a tenant gives you possession by relinquishing the keys to you. He believes that when a tenant voluntarily hands in the keys, there is an expectation on the tenant’s part that the locks will be changed. If you are in a 30-day notice period when rent is still owed, the tenant technically still has the right to access the unit. However, if the tenant wants access (because they forgot something, they want to clean the unit further, etc.), they can simply contact you, and you can let them in. You are not in any way precluding them from accessing the unit. In this way, the landlord is protected if the tenant leaves property behind during an abandoned property notice period, and there is no risk of squatters coming in and damaging the property.

So, in sum, experienced landlords have differences of opinion about possession and surrender and, as always, complications can arise.