Landlording & the Law

An Essential Guidebook for Property Managers and Landlords in Indiana

Landlord-Tenant statutes in Indiana are increasingly complex with nuances that can easily lead to expensive mistakes for the ill-informed. This e-Book addresses some of the essential but oft-misunderstood concepts governing the landlord-tenant relationship in Indiana. This e-Book is written for landlords, real estate investors and property management companies operating residential rental businesses.

An e-Book by Attorney Matthew A. Griffith

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CHAPTER 1
Evictions

A. When should I file an eviction?

When a tenant stops paying rent or otherwise breaches a lease agreement and refuses to vacate, the only lawful mechanism a landlord or property manager has to get the tenant out of the property is to file for an eviction. Indiana prohibits "self-help," or "taking the front door off until the tenant moves out." In order to *legally* regain possession of the property, a landlord must use the judicial process.

The attorneys at Griffith Law Group almost always advise our landlord and property management clients to file for eviction on the first available date after the tenant breaches the lease agreement. For example, if rent is due on the 1st of the month, and the tenant does not pay on the 1st, file the eviction on the 2nd. This may sound harsh, but it is often the only way to "train" your tenant to pay on time. Typically, giving your tenant a "grace period" only trains the tenant that rent is not really due until the end of the grace period. You must be disciplined to treat your rental properties like a business, because after all, it is a business. You can always settle on the courthouse steps.

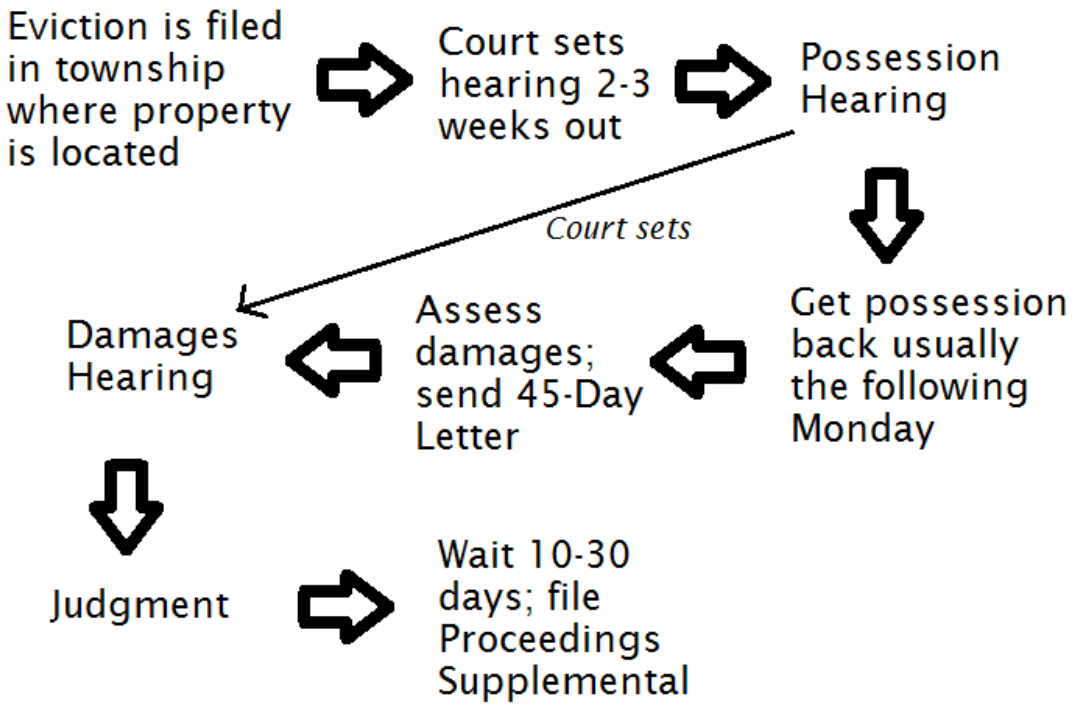
Under only very rare circumstances should you allow your tenant to fall more than one month behind in rent. When a tenant does not pay rent, it is unlikely that the tenant is saving the rent money to pay it later. More often than not, that money—your rental income—is gone. Consequently, it is much more likely that a tenant will be able to come current, when the tenant is just one month behind in rent, as opposed to two or three months behind.

B. Where do I file an eviction?

Evictions in most Indiana counties are handled by that particular county's Circuit or Superior Court. Each county has a court with Small Claims Court jurisdiction. Marion County has its own unique system of handling evictions through the Township Small Claims Courts. An eviction must be filed in the County or Township where the property is located. Many courts have filing information and forms available online.

C. How long does the eviction process take?

In almost every county in Indiana, evictions are a two-step process. At the first hearing, the court will only determine who is entitled to possession of the property. Also at this hearing, the court will schedule another hearing at a later date to determine what damages are owed. Here is a flowchart of a typical eviction in Marion County:



At the damages hearing, the Court determines whether the landlord is entitled to a monetary judgment for unpaid rent and damages. After a judgment is entered, the landlord may initiate what is called Proceedings Supplemental. This is the process by which we garnish the tenant's wages, seize assets, etc., in order to pay for the judgment.

D. How much does an eviction cost?

The filing fee varies county by county, and typically ranges from $86.00 to $158.00. A Writ of Assistance (purchased at the Possession Hearing) costs $13.00 in most counties. Attorneys' fees will vary depending on the attorney you hire. Some attorneys charge a flat fee for evictions, while others charge an hourly fee. Because of the high volume of eviction work we do, Griffith Law Group is able to provide a discounted flat fee structure that passes savings on to our clients in many cases.

E. Can I recover my attorneys' fees and court costs?

Whether or not you can recover your attorneys' fees and court costs all depends on the terms of your lease agreement. We will cover this topic in depth in Chapter 5.

F. Once I file an eviction, what happens if the tenant tries to pay?

Unfortunately, once an eviction is filed, if the landlord accepts *any payment* from the tenant—whether $1 or $1,000—the court deems this to be *waiver* and the landlord must dismiss the case and file again later. Although we respectfully disagree with this application of the law, it is the practical rule in Indiana. Therefore, the best practice for a landlord is this: once an eviction is filed, only accept payment-in-full (or very close to it).

G. What is the $6,000 Small Claims cap*?*

The Indiana Small Claims Court damages cap is $6,000. Marion County is the only county in Indiana where you can recover your attorneys' fees and court costs *in addition to* the $6,000 cap. These caps are rising. In fact, the cap in Marion County is now $8,000.

H. What is the $1,500 Rule?

The **$1,500 Rule** is this: if you are a limited liability entity (LLC or corporation) and your claim is for more than $1,500, *you must be represented by an attorney*. So, a landlord or property manager using a limited liability entity has two options: (1) send a representative from the company and limit your claim to $1,500; or (2) hire an attorney and go for the full amount.

There are disadvantages to "going at it alone" and not using an attorney. For example, let's say the tenant owes $1,000 in unpaid rent, so the landlord files for eviction and damages on their own (capped at $1,500). Then, after the landlord retakes possession of the property, the landlord realizes there is an additional $3,000 in physical damages to the property that the tenant caused. Guess what? The landlord is stuck at the $1,500 cap. Furthermore, even if you file for eviction on your own and then hire an attorney just for the Damages Hearing, you are still capped at $1,500, and you cannot recover your attorneys' fees. The lesson is simple: hire a knowledgeable attorney and read Chapter 5 of this book to ensure your lease agreement provides for the recovery of attorneys' fees and costs.

CHAPTER 2
Abandonment

A. What is abandonment?

The Indiana Code states that *"a tenant's personal property is considered abandoned if a reasonable person would conclude that the tenant has vacated the premises and has surrendered possession of the personal property."* Courts will look at many factors to determine abandonment, but the biggest factors are: beds, clothing, and food. If these items are missing from the property, a court is more likely to determine that the property has been abandoned.

B. What if the tenant abandons the property in the middle of the lease agreement or before the Possession Hearing?

If the "reasonable person" standard described above is met, you are safe to re-enter and re-take possession of the property in order to secure and protect your property.

C. What do I do with all of the tenant's stuff*?*

The Indiana Code states that if a tenant abandons his/her personal property and the landlord is awarded possession of the property, the landlord may seek a Court Order approving the removal of the tenant's personal property. The landlord must store the property in a Court-approved warehouseman or storage facility and give the tenant notice and a reasonable amount of time to recover the personal property. A landlord is entitled to be reimbursed by the tenant for moving and storage costs.

The best practice for a landlord when a tenant's personal property is abandoned is to take an inventory of what was abandoned. Take photos and make a list of items (e.g., 1 box of men's clothing; 1 box of kitchen utensils; etc.). What you are trying to guard against is having a tenant accuse you of throwing away his/her grandfather's gold watch or another item of significant value.

D. What if the tenant never claims the abandoned personal property?

The Indiana Code states that *"if a tenant does not claim the tenant's property within ninety (90) days after receiving notice…a warehouseman or storage facility may sell the property received…"* In other words, after you have complied with the requirements of the statutes, you are free to discard or keep the personal property.

CHAPTER 3
Tenants & Bankruptcy

A. What happens if my tenant files for bankruptcy <u>before</u> I file for eviction or <u>during</u> an eviction?

Call your attorney immediately. The Bankruptcy Code is complicated and if you violate the provisions as a creditor, you could face some harsh penalties and fines. Furthermore, if you wait to exercise your rights, you could potentially cost yourself *thousands* of dollars in unpaid rent and legal fees. The sooner you call your attorney, the more you can mitigate your damages.

When a tenant files bankruptcy, a legal concept known as the **automatic stay** goes into effect, and all collection efforts must stop. This means a landlord cannot make demands for rent payments until the Bankruptcy Court says so—even if the tenant-debtor is still living in the property. If the tenant-debtor wishes to stay in the property, the tenant-debtor must complete a section of the bankruptcy petition called *Executory Contracts and Unexpired Leases*.

In re [redacted] Case No. [redacted]
Debtor

SCHEDULE G - EXECUTORY CONTRACTS AND UNEXPIRED LEASES

Describe all executory contracts of any nature and all unexpired leases of real or personal property. Include any timeshare interests. State nature of debtor's interest in contract, i.e., "Purchaser", "Agent", etc. State whether debtor is the lessor or lessee of a lease. Provide the names and complete mailing addresses of all other parties to each lease or contract described. If a minor child is a party to one of the leases or contracts, state the child's initials and the name and address of the child's parent or guardian, such as "A.B., a minor child, by John Doe, guardian." Do not disclose the child's name. See, 11 U.S.C. §112 and Fed. R. Bankr. P. 1007(m).

☐ Check this box if debtor has no executory contracts or unexpired leases.

Name and Mailing Address, Including Zip Code, of Other Parties to Lease or Contract	Description of Contract or Lease and Nature of Debtor's Interest. State whether lease is for nonresidential real property. State contract number of any government contract.
[redacted] Properties, LLC	Rental Contract Expires 3/2012

The tenant-debtor must: (1) identify the lease agreement; (2) cure all outstanding arrearage; and (3) provide the Bankruptcy Court and the landlord with adequate assurance of future performance under the lease agreement.

If a tenant-debtor properly identifies the lease agreement in his/her bankruptcy petition, but then fails to cure and/or provide adequate assurances, the landlord must petition the Bankruptcy Court for relief from the automatic stay. Once relief is granted, the landlord must then file for eviction in the proper venue, or continue with an ongoing eviction. As you can

probably see, any delay in exercising your rights can cost you months of time and, in most cases, lost rent. Call your attorney.

B. What happens if my tenant files for bankruptcy after the eviction process but before I send the 45-Day Letter?

Indiana's 45-Day Letter Rule states that within 45 days of getting possession of the rental property back from the tenant (for any reason), a landlord must return any portion of the security deposit owed to the tenant along with an itemized list of damages that reduced the amount of the deposit returned to the tenant. If a landlord fails to honor this rule, the landlord must return the entire security deposit to the tenant, pay the tenant's attorneys' fees (if any), and the landlord is barred from recovering any damages from the tenant, except for unpaid rent.

How does a tenant's bankruptcy petition affect the rule? Sending a 45-Day Letter is considered by Indiana courts to be a "collection effort," because the landlord is often times demanding payment from the tenant. If you remember from above, once a bankruptcy petition is filed, the *automatic stay* goes into place and all collection efforts must stop. The landlord is now stuck. The landlord cannot make any collection efforts because of the automatic stay, but if the landlord fails to send a 45-Day Letter, he/she will have to return all of the security deposit and forfeit some of his/her recovery rights against the tenant. So what should the landlord do?

After consulting with several knowledgeable bankruptcy attorneys, the attorneys at Griffith Law Group have developed a standard, form letter that complies with both Indiana's 45-Day Letter Rule and the provisions of the automatic stay in bankruptcy. If your tenant ever files for bankruptcy, call your attorney.

CHAPTER 4
The Fair Debt Collection Practices Act

The Fair Debt Collection Practices Act (FDCPA) is a federal law that Congress added to the Consumer Credit Protection Act. It was originally passed in 1978 but has been significantly amended and interpreted by courts since then. The purposes of the FDCPA are to eliminate abusive practices in the collection of consumer debts, to promote fair debt collections, and to provide consumers with an avenue for disputing and obtaining validation of debt information in order to ensure the information's accuracy. The FDCPA is best understood in two parts: (1) prohibitions on certain debt collection techniques, and (2) a set of affirmative duties imposed on debt collectors. The other significant section of the FDCPA lists penalties that could be imposed on a debt collector for violating the FDCPA.

A. Property Managers are Debt Collectors

The FDCPA applies to all *"debt collectors,"* defined as *"any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another."* Consequently, nearly all residential property managers who collect back rent or damages from residential tenants will be considered debt collectors, subject to the FDCPA.

Similarly, residential tenants are "consumers" and unpaid rent and damages owed under a residential lease are "debt" under the FDCPA. By contrast, debts owed by a business (or by individuals for business purposes) are not subject to the FDCPA.

B. Things You <u>Must Not</u> Do

The FDCPA prohibits certain types of "abusive and deceptive" conduct by a debt collector when attempting to collect debts. Here are the basic rules governing such prohibited activities:

- **Hours for Phoning a Debtor.** Only call a debtor by telephone between 8:00 A.M. & 9:00 P.M. local time.
- **Stop Means Stop!** Generally, when a debtor requests the debt collector to stop contacting the debtor, all communications must stop. The debt collector can advise that

collection efforts are being terminated or that the debt collector intends to file a lawsuit or pursue other lawful remedies.

- **Do Not Annoy the Debtor.** A debt collector must avoid all conduct that is intended to annoy, abuse, or harass a debtor.
- **Do Not Call the Workplace.** If a debtor asks a debt collector to refrain from contacting the debtor at his/her place of employment, the debt collector must comply.
- **Call the Attorney.** If the debtor gets an attorney, talk only with the attorney.
- **Do Not Talk to Strangers.** A debt collector cannot talk with anyone about a debt, except the debtor and his/her attorney. The debt details and the debtor's identity must be kept confidential.
- **Do Not Try Tricks.** Misrepresentations and deceit are strictly prohibited by the FDCPA.
- **Do Not Threaten.** A debt collector can explain that a collection lawsuit will result because of the debtor's failure to pay the bad debt, but avoid all other threats or forms of intimidation.
- **Keep it Clean.** Abusive or profane language is prohibited.

This is not an exhaustive list of prohibited activities, and every debt collector should develop or adopt a Compliance Manual or a set of Standard Operating Procedures that every employee is required to read and agree to follow. Those SOP's should be detailed and ordinarily must be modified to fit the particular business operations of each property management company.

C. Things You Must Do

The FDCPA requires a debt collector to do these things:

- **Mini-Miranda Warning.** In every communication, the debt collector must state that the communication is from a debt collector (identifying the debt collector by name), and in the initial communication, that any information obtained will be used to effect collection of the debt. This is referred to as the Mini-Miranda Warning, and the attorneys at Griffith Law Group recommend that the warning be given in every communication with the debtor, both verbal and written.
- **Validation Notice.** A Validation Notice, also called a Dunning Letter, must be sent to the debtor within five (5) days of the initial attempt to collect the debt. Indiana is situated in the Seventh Circuit, where the Federal Court of Appeals has detailed what the FDCPA requires of each Validation Notice. The attorneys at Griffith Law Group recommend that debt collectors carefully craft Validation Notices to comply with the Seventh Circuit Court of Appeal's suggested Dunning Letter language.

D. Enforcement of the FDCPA

You could be sued by the Federal Trade Commission for violating the FDCPA, but that is unlikely. Rather, it is far more likely that a tenant will hire a private attorney who utilizes the FDCPA as a means of avoiding the tenant's obligations under the lease. Debtors can file a counterclaim in an eviction lawsuit in state court or even a separate lawsuit in a state or federal court to collect damages (actual and statutory damages, attorneys' fees, and court costs) from a debt collector. The FDCPA imposes strict liability on debt collectors, which means that a debtor need not prove actual damages in order to claim statutory damages of up to $1,000, plus reasonable attorneys' fees.

E. Training & Compliance Efforts

Every debt collector should have a Compliance Manual and should regularly train staff members on FDCPA compliance matters and office SOP's. Not only do such measures significantly reduce the likelihood of a violation, but a debt collector in violation of the FDCPA may escape penalty if it can show that the violation was unintentional and the result of a "bona fide error" that occurred despite procedures designed to avoid the error at issue. However, the lack of regular training, Compliance Manuals and SOP's virtually eliminate the chance of escaping penalties for an unintended violation.

F. How We Can Help

The attorneys at Griffith Law Group have developed a Compliance Manual and training program for property managers and other debt collectors. We routinely train property management staff on FDCPA compliance matters and assist clients in developing SOP's that balance compliance concerns, and business and operational needs. If we can assist you in learning more about the FDCPA and its impact to your operations, please contact us.

CHAPTER 5
Important Lease Provisions

A. How can I recover my attorneys' fees and court costs when I file an eviction?

In Indiana, when it comes to attorneys' fees and court costs, we follow what is called the **American Rule**. The rule is that each party pays his/her/its own fees and costs, unless: (1) there is a statute that provides for recovery; or (2) the parties have a contract that specifically provides for recovery.

A landlord can ensure his/her ability to recover attorneys' fees and court costs by drafting specific language in the lease agreement. However, this is easier said than done. Many landlords will attempt this by including language such as "all costs associated with eviction" or "landlord's court fees." While these phrases are broad in scope, the Indiana Court of Appeals has consistently held that "*fees are fees* and *costs are costs*." This means that a contract that provides for recovery must specifically state "attorneys' fees" and "court costs" or the landlord could inadvertently limit his/her recovery.

Even worse, some landlords will limit their recovery and even extend their own liability by adding language that awards attorneys' fees and court costs to the "prevailing party." This means that if the tenant were to prevail at trial, the landlord would have to pay the tenant's fees and costs!

A landlord should always consult a knowledgeable attorney when drafting a lease agreement. The minimal cost of having a professional review your contracts could potentially save you thousands of dollars in litigation expenses and headaches in the future.

B. What is a "Savings Clause" and do I need one in my lease agreement?

There is an important rule of landlord-tenant law that essentially says this: *A landlord can (1) evict a tenant; or (2) sue a tenant for unpaid rent; but not both*.

For example, let's say a tenant signed a one-year lease agreement starting January 1st. The tenant then failed to pay March rent. The landlord could either (1) evict the tenant and get the property back; or (2) sue the tenant for the entire balance of the lease agreement (the rest of the year), but the tenant would be allowed to stay in the property.

There is an important exception to this rule of law: the **Savings Clause**. A Savings Clause is specific language in a lease that allows a landlord to sue for back rent, future rent, and possession. In order to be enforceable, very clear language is required in a written lease signed by the tenant. Unfortunately, even with a Savings Clause, a landlord will typically only be allowed to recover unpaid rent up until a new tenant is found and begins paying rent. However, a Savings Clause at least allows the landlord to *recover some unpaid rent **and** get the property back*.

Whether a Savings Clause will be enforced by an Indiana court rests on how the lease has been written. If you are a landlord or property manager and are unsure whether the lease agreement form you use contains a properly drafted Savings Clause, you should contact a knowledgeable attorney.

C. How should I address mold and environmental conditions?

Tenants often will assert an environmental problem as a way of escaping their obligation to pay rent. Thus, every residential lease agreement should contain provisions that address accusations by a tenant that the tenant is suffering from an environmental condition at the rental property. A good lease agreement will address these issues in part by allowing the landlord to terminate the lease before the term has expired. The lease should also lay out the tenant's notice requirements in the event of an environmental hazard.

D. Rules

A landlord cannot change the terms of a lease agreement after the lease has been signed. However, a good lease can lawfully permit a landlord to change "rules" after the lease has been signed. Generally, "rules" address common areas, such as hallways, parking lots, laundry facilities, etc. Rules also address and can prohibit certain types of tenant behavior, such as smoking, painting, remodeling, etc.

E. Other common drafting errors

Because so many property managers and landlords purchase form lease agreements online or piece together different lease provisions from different lease agreements over time, it is common for property managers and landlords to have trouble enforcing their leases because of poor drafting.

For example, property managers often name themselves as the landlord on the lease agreement when, in fact, the property manager does not own the property and is merely an agent of the property owner. This can become a big problem when a property owner changes property management companies before the end of the lease term. This problem gets worse in litigation, because the property manager is named as a party to the lawsuit, but should not be a party to the lease agreement. In these cases, the property manager might have obligations, but no rights, under the lease agreement.

Another common mistake made by landlords and property managers is in the signature portion of the lease agreement. Many landlords and property managers form limited liability entities (LLC or Corp.) to hold or manage their properties, which is a great form of asset protection. However, these entities can actually be quite vulnerable when signatories are ignorant of the law. There are three things that should always be present when signing on behalf of an LLC or corporation: (1) the name of the entity; (2) the name of the signatory; and (3) the signatory's title with the entity. If these three things are not present in the signature portion, the signatory could potentially subject him/herself to *personal liability* under the lease agreement.

About the Author

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Matt is the founder and Senior Attorney at Griffith Law Group LLC, an Indianapolis law firm. He focuses his practice on business, real estate and estate planner matters. Matt's practice emphasizes practical solutions that are preventative in nature and that serve to maximize his clients' opportunities, while minimizing risks.

He represents business owners, solopreneurs, executives and professionals in a wide variety of planning, growth, transactional and corporate matters. His real estate clients include residential and commercial investors, developers, builders, contractors, brokers, property managers and building trades.

Matt routinely counsels clients in real estate matters, business formations, financing, risk assessment and minimization, business transactions, employment agreements, buy-sell and confidentiality agreements, business succession plans, dispute resolution, and product sales and distribution arrangements.

Matt is an entrepreneur, investor and business owner himself. Those experiences enable him with a unique perspective to identify and serve the needs of his business and real estate clients. Matt provides executive coaching services as well as general business counsel to a wide range of business owners and their companies.

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