

## Chapter 5



### DEPOSITS

Deposits are a very important part of every rental agreement. The landlord can ask for the first month's rent, the last month's rent, and a number of deposits. Remember, these deposits and prepaid rents are negotiable. Also, the law provides the tenant a number of protections for the return of the deposits.

#### A. Refundable deposits vs. non-refundable fees

A deposit is *money the tenant pays in advance to protect the landlord*. The law is clear that if the property is not damaged, the tenant is entitled to get the deposit back (NMSA § 47-8-18(C)). For example, if the landlord charges a pet deposit, the deposit is to protect the landlord for the additional wear and tear the pet may cause at the apartment. If, however, the pet does not cause any unusual wear and tear, the tenant is entitled to the return of the pet deposit.

If the landlord charges the tenant a *holding deposit*, that deposit is to protect the landlord if the tenant doesn't move in. However, the landlord is not entitled to double rent (NMSA § 47-8-18(B)). So, if the tenant does move in, the tenant is entitled to the return of the deposit or to have it applied to the first month's rent. Similarly, if the landlord is able to rent to someone else right away, the tenant is entitled to the return of the portion of the holding deposit equal to the rent the landlord received from the tenant who did move in.

A *fee*, however, is different. It is a charge for something the landlord does for the tenant or for the tenants generally. A landlord, for example, may charge an application fee when someone applies for

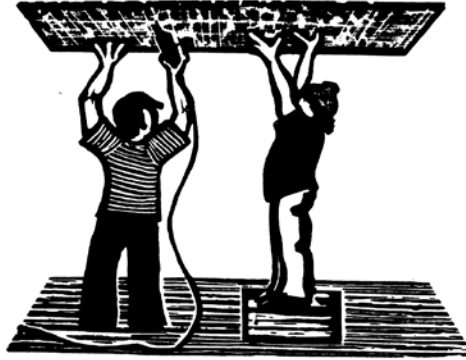
an apartment. This fee is supposed to cover the landlord's costs in doing credit and background checks and other investigations to determine whether the applicant is an acceptable renter. Even if the applicant decides not to take the apartment, he or she will not necessarily be entitled to the return of the fee, unless the applicant can convince a court that the fee is wholly unreasonable given the landlord's actual costs.

Sometimes, landlords will call something a fee that is really a deposit. The most common example is a cleaning fee to cover costs of making the apartment ready for the next renter after the tenant leaves. This is really a deposit, because if the tenant cleans the place before moving out, the landlord will not have performed any service to earn the fee. When the tenant moves out, the tenant should treat the cleaning fee as a damage deposit. If it is not returned to the tenant, follow the guidelines on damage deposits in this chapter.

#### B. The damage deposit

A damage deposit is the money paid to protect the landlord against tenant-caused damage to the rental housing that goes beyond normal wear and tear (NMSA § 47-8-18(C)). Usually the deposit money is turned over to the landlord at the time the rental agreement is finalized, and it is returned or accounted for after the tenant moves out. Although the landlord may also use the damage deposit to cover unpaid rent, damages and advertising costs if the tenant violates the terms of the tenant rental agreement (NMSA § 47-8-35), this deposit is not the same as the last month's prepaid rent required by the landlord (NMSA § 47-8-18(B)). A landlord may not have any obligation to refund the prepaid rent if

the tenant voluntarily moves out before the lease ends or if the tenant is evicted. The landlord must, however, return that portion of the tenant's damage deposit which exceeds the damages the landlord actually suffered.



The most common situation involving damage deposits, however, is where the landlord claims the tenant did real damage to the rental unit. Broken furniture, torn or heavily soiled carpeting, and other problems requiring costly repairs often are claimed by landlords as the basis for keeping damage deposits

rather than returning them. Often, however, the tenant caused nothing more than *normal wear and tear*, which is not chargeable against the deposit (NMSA § 47-8-18(C)).

## 1. What is the most that can be charged for a damage deposit?

A landlord may not charge a tenant more than one month's rent as a damage deposit on any kind of lease with a term of less than one year (NMSA § 47-8-18(A)(2)). Remember, prepaid rent for the last month is not the same as a damage deposit, so the tenant can be charged both prepaid rent *and* a damage deposit, even though the total amount is more than one month's rent. The deposit cannot be treated as the last month's rent unless the landlord and tenant agree to this in writing.

If there is a written lease for a term of a year or more, the landlord may charge any amount as a damage deposit. However, if the landlord charges a deposit that amounts to more than one month's rent, the landlord must pay interest on the full amount of deposit for as long as the landlord keeps it (NMSA § 47-8-18(A)(1)).

## 2. What does the deposit cover?

Many tenants are surprised when the landlord won't give them back their deposit when they move out. Sometimes a landlord will keep it even when the tenant has done no damage. The problem often comes from what is legally considered damage.

The damage deposit covers only those damages the tenant has caused the landlord to actually suffer. These damages may be lost rent, physical damage to the apartment requiring repairs or replacements, or other business-related expenses that the landlord had because the tenant violated terms of the lease (NMSA § 47-8-35). If, for example, the tenant moves out without giving proper notice, and the landlord has trouble getting a new tenant, the landlord may withhold that portion of the deposit covering lost rent and costs involved in getting the place ready to rent to someone else.

## 3. What is normal wear and tear?

Normal wear and tear is damage or deterioration by ordinary and reasonable use of the property. It is the normal loss in value that occurs when something is used. A landlord, for example, should expect to have to repaint walls every few years, especially in the kitchen. Furniture normally gets worn with age. Walls acquire small nail holes, and carpets get worn. (Some rental agreements do, however, prohibit putting nails into the walls. If the rental agreement does prohibit any nail holes, then nail holes would be an item of damage.)

The law requires the landlord to pay to fix ordinary wear and tear. Normal use of the property by the tenant and guests of the tenant is not something the landlord can claim as damages. However, the tenant must pay for accidental damages done to the property. If the landlord can prove that the tenant intentionally damaged the property, the tenant may be charged for the cost of repairs, plus two times the monthly rent as a penalty (NMSA § 47-8-48 (C)). Wear and tear does not include cleaning made necessary by a tenant's failure to clean when moving out or other failure to keep the rental unit clean. A tenant's obligation to clean (NMSA § 47-8-22) generally includes sweeping and washing floors, shampooing carpets, disposing of all trash and making sure that the kitchen, bathroom and all appliances are properly cleaned. The tenant should take pictures when moving in and moving out to show the condition of the rental. Pictures should include the tops and insides of sinks, stoves,

cabinets, refrigerators, and toilets. Having a witness look at the place at move-out time is helpful, too.

#### 4. When should the damage deposit be returned?

Within 30 days after the tenant moves out, the landlord must make an itemized list of all deductions from the deposit that he or she claims were damages caused by the tenant. The landlord must send this list of deductions to the tenant. The landlord must also send any part of the deposit remaining after deducting the cost of the damages listed (NMSA § 47-8-18(C)). If the landlord does not send both the list and any refund within the 30 days, the tenant is entitled to the full deposit and the landlord loses any right to compensation for damages the landlord claims the tenant caused to the property (NMSA § 47-8-18(D)).

Remember, the landlord must mail the list of deductions and the deposit to the tenant's last known address (NMSA § 47-8-1(C)(3)). If the tenant has not provided a new address, the landlord will use the address of the rental unit. If the landlord has any other addresses, such as a work address or emergency contact, the landlord should also send the notice to those places. If the notice of damages only goes to the rental unit after the tenant moves out, the tenant may not receive it. If the tenant is not going to have a permanent address after moving out, it is wise to give the landlord a forwarding address such as the tenant's employer or someone the tenant trusts to receive mail. If the tenant does have a new permanent address, it is important to file a change of address with the post office.

This can be done in person or on line at [www.usps.com](http://www.usps.com). This is a free service. Ignore websites that offer this service for a fee.

If the landlord does not provide a deduction list or return the full deposit, the tenant should demand the full deposit back. If the landlord sends the tenant

a list of deductions claiming damages that the tenant feels are unreasonable or simply the results of normal wear and tear, the tenant should demand the full deposit back. There is a Demand Letter for Return of Security Deposit in the Appendix to this guide which can be used for this purpose.

If the landlord still does not return the tenant's deposit, the tenant may take the landlord to small claims court (Magistrate or Metropolitan) and sue for the deposit (NMSA § 47-8-18(D)). The judge should order the landlord who has not complied with the law to turn over the full deposit and pay the tenant's court costs and attorney fees. In a lawsuit for the return of the tenant's deposit, the landlord who has not complied with the law cannot claim any damages against the tenant in a counterclaim. If the judge finds that the landlord kept all or part of the deposit in bad faith (not just by mistake), the judge must award the tenant an additional \$250 civil penalty (NMSA § 47-8-18(E)).

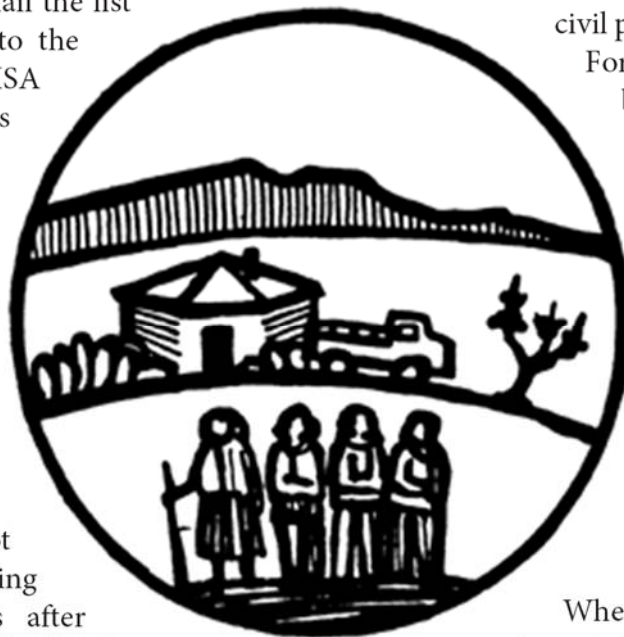
For more information on how to bring a lawsuit for the tenant deposit, see Chapter 16 on "Going to Court."

The landlord can keep the deposit to cover unpaid rent or utilities without having to send the notice regarding deductions.

#### 5. Getting back the full deposit

When the tenant moves in, the tenant should get a *receipt* for each deposit the tenant has paid to the landlord. With a receipt, or at least a canceled check, the tenant will have evidence he or she paid the deposit, and that will make it easier to get the deposit back if the tenant has to go to court to get it.

*Before actually moving in, the tenant should inspect the rental dwelling.* Look for damaged furniture, dents or holes in the walls, broken glass, spots on the floors or carpeting, and generally look the place over for anything that might be looked at as damage to the place. (See the move-in rental unit checklist format in the Appendix to this guide.)



It is a good idea to do this walk-through with the landlord and reach agreement on the checklist. Both the tenant and the landlord should initial the checklist and keep a copy of it. The checklist can be used to negotiate with the landlord to get repairs, but more importantly, the list will give the tenant a record of the condition of the rental dwelling at the time the tenant moved in. If the apartment is furnished, the tenant should also make a list of all the furniture in place at the time the tenant moves in, so that later on the landlord can't claim that something is missing.

If it isn't possible to have the landlord sign off on the checklist, get a couple of witnesses to inspect the rental unit and sign the list. It is also a good idea to take photographs and date them (use the date function on the camera or have the developer do this when the film is processed).

If the tenant discovers more damages after living in the unit for a few weeks, make an additional list. Keep a copy of the new list and send a copy to the landlord.

If the tenant later gets into a dispute with the landlord over the condition of the rental unit on the move-in date, these lists and photographs could be important evidence to use in showing the tenant's side of the story. Keep the checklist, photographs, and the deposit receipts together, so that they can be found easily.

The tenant should get and keep a receipt for every rent payment made, including prepaid rent. Just like with the deposit receipt and checklists the tenant kept when moving in, the tenant should keep all of the rent receipts together in one place. If there is a dispute over rent, these receipts will be extremely important.

The tenant should leave the rental unit clean and in the same condition as it was when the tenant moved in. *The best way to prove the unit is clean is to take photographs at the time the tenant moves out.* Also, take the checklist made when the tenant first moved in and go over it again, making sure everything is in pretty much the same condition. If the landlord and the tenant agree that there are no damages, get the landlord to sign the checklist when the tenant moves out, indicating that the place is in the same condition it was when the tenant moved in.

If the tenant and the landlord agree that something has been damaged while the tenant lived in the place, they can sign a list of the agreed damages (NMSA § 47-8-7). The list should set out the amount of damages the landlord claims. If the tenant disagrees about some of the damages, make a separate list showing which damages the tenant and the landlord disagree on.

It is best to get all disagreements set out before the tenant leaves, so the landlord will not later claim more damages. If the tenant's lease has language stating the landlord's inspection will be made after the tenant vacates, that language should be crossed out and changed to read "at the time the tenant vacates." (Always have landlord initial any change in the lease language.) If this change is not made, the tenant may get stuck with a larger damage estimate made by the landlord.

The suggestions in this section may seem complicated, but they are important. Issues involving damages to a rental dwelling are often difficult and sometimes involve going to court. Disputes over damages usually wind up being the landlord's word against the tenant's word. If the tenant has photographs and written evidence and gets the landlord to agree about damages in before the move-out date, the tenant will have a much better chance of getting back the deposits.

