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February 7, 2020

Re: An open letter to manufactured home community owners about two commonly-seen lease provisions that violate the Manufactured Homes and Manufactured Home Communities Act

Dear Owners of Manufactured Home Communities:

As you are likely aware, one of the duties of the Office of the Manufactured Housing Ombudsperson (“MHO”) is to provide information to both manufactured home owners and manufactured home community owners about their rights and responsibilities under the law. 81 *Del. Laws* ch. 280 § 101 (2018). The MHO has seen multiple cases where manufactured home leases contain provisions that violate the Manufactured Homes and Manufactured Home Communities Act, Chapter 70 of Title 25 of the Delaware Code (“Chapter 70”). The inclusion of these provisions appears to be the result of commonly-held but mistaken interpretations of the relevant sections of Chapter 70. The presence of these provisions could create problems for community owners if there are complaints by home owners. For this reason, the MHO is providing this open letter in the hope that community owners will check their leases and make any required changes before problems arise. The two lease provisions discussed herein are liability waivers and penalties for late rent payments.

The analysis in this letter is the opinion of the Office of the Manufactured Housing Ombudsperson. It is not formal opinion from the Department of Justice and is not binding upon the Department or any division or unit thereof. This letter is provided as a courtesy to inform community owners of some of their rights and responsibilities under the law.

Anyone with questions or concerns regarding the contents of this letter is welcome to contact the MHO at manufactured.housing@delaware.gov. Please be aware that the MHO, as part of the Department of Justice, is unable to provide legal advice to individuals. Within this limitation, we will be happy to answer questions and provide whatever other resources or assistance that we can.

I. Liability Waivers

The MHO has seen multiple manufactured housing lot leases that contain a liability waiver wherein the home owner agrees to be solely responsible for loss or damage that may occur on the rented lot. The exact language varies, but they have the same effect. Such provisions have an exception for “gross negligence” of the community owner and those acting on the community owner’s behalf.

Such waivers are not prohibited per se, but ones that only except “gross negligence” of the community owner are prohibited by Chapter 70 because the exception is too narrow. Chapter 70 prohibits any lot lease from containing:

A provision for a waiver of any cause of action against, or indemnification for the benefit of, the landlord by the tenant for any injury or harm caused to the tenant or to residents, guests, or visitors or to the property of the tenant, residents, guests, or visitors resulting from any negligence of the landlord or of a person acting for the landlord in the performance of the landlord’s obligations under the rental agreement.

25 *Del. C.* § 7008(b)(10) (emphasis added).

Negligence and gross negligence are legal terms of art and have their own distinct definitions. NEGLIGENCE, BLACK’S LAW DICTIONARY (11th ed. 2019). Any action that meets the standard for gross negligence will meet the standard for (ordinary) negligence, but the reverse is not true.¹ *Id.* A liability waiver that only excepts gross negligence is “a waiver of any cause of action . . . for the benefit of [the community owner] . . . resulting from any negligence of the [community owner],” 25 *Del. C.* § 7008(b)(10), because the exception does not cover acts that would constitute negligence but not gross negligence. Such provisions are therefore violations of 25 *Del. C.* § 7008(b)(10) and must be either corrected or removed to bring the lot lease into compliance with Chapter 70.

II. Penalties for Late Rent Payments

Chapter 70 permits community owners to assess penalties for the late payment of rent if the lease includes a provision permitting the community owner to do so. There are limitations to such provisions. The provision cannot permit the imposition of a late “fee in excess of the greater of \$25 or 5% of the monthly rent al payment.” 25 *Del. C.* § 7008(b)(6). In addition, the provision cannot permit the community owner to assess the late fee “without allowing the tenant to remit the monthly rent in full a minimum of 5 days beyond the date that the rent is due.” 25 *Del. C.* § 7008(b)(5).

The MHO has seen multiple cases where a lot lease states: (1) that rent is due on the first of the month; (2) that the home owner has a five day grace period to pay the rent; and (3) the late fee will be assessed on the sixth of the month. If the rent is due on the first day of the month,

¹ I.e., Gross negligence is a subset of negligence (or, if you prefer, the set of things that are negligence includes the set of things that are gross negligence but also contains other things). This can be explained more simply with a simpler example. All beagles are dogs, but not all dogs are beagles. Similarly, all gross negligence is negligence, but not all negligence is gross negligence.

assessing a late fee on the sixth of the month is a violation of Section 7008(b)(5) because it only provides home owners with four additional days to pay their rent.

The lease must allow home owners “a minimum of five days *beyond the date that the rent is due*” to pay the rent without a late fee. *Id.* (emphasis added). If the rent is due on the first of the month, the five days beyond the date that the rent is due are the second through the sixth, and the late fee cannot be assessed until the seventh of the month. Because this can seem counterintuitive, the table below lays out the numbers in more detail:

Table 1: Dates of Grace Period and Date Late Fee Can be Assessed for Different Length Grace Periods (5 days grace period, minimum required by law, highlighted)

Date that Rent is Due (day of month)	Length of Grace Period (Days)	Dates of Grace Period	Date That Late Fee Can Be Assessed
1 st	0	n/a	2 nd
1 st	1	2 nd	3 rd
1 st	2	2 nd , 3 rd	4 th
1 st	3	2 nd , 3 rd , 4 th	5 th
1 st	4	2 nd , 3 rd , 4 th , 5 th	6 th
1 st	5	2 nd , 3 rd , 4 th , 5 th , 6 th	7 th
1 st	6	2 nd , 3 rd , 4 th , 5 th , 6 th , 7 th	8 th

As can be seen from the table, a late fee cannot be assessed before the seventh of the month if the rent is due on the first of the month. Thus, any lease provision stating that the rent is due on the first of the month and stating that the late fee will be assessed on the sixth of the month (or with a similar interval between the due date and the assessment of the late fee) is a violation of Section 7008(b)(5) even if the lease also states that it is providing the full five-day grace period. Such provisions must be corrected to bring the leases into compliance with Chapter 70.

Conclusion

As stated at the beginning, this letter was provided as a courtesy in the hope that community owners who have provisions that violate Chapter 70 in their leases will be able to check their leases and make appropriate changes prior to a conflict arising between the community owner and home owners based on these lease provisions. The MHO is available to address questions or concerns about this letter or other matters by email at manufactured.housing@delaware.gov. Additional information is available on our website at <https://attorneygeneral.delaware.gov/fraud/cpu/manuhousing/>.

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Sincerely,

/s/Brian S. Eng

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Deputy Attorney General
Manufactured Housing Ombudsperson