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## ATCP 134: THE 7 DEADLY SINS – 7 PROHIBITED RENTAL PROVISIONS

Did you know that if you have an illegal provision in your rental agreement that the entire agreement may be unenforceable? Unfortunately this is true. In the case of [Baierl v. McTaggart](#) the Wisconsin Supreme Court held that because the landlord's lease contained an illegal provision, the entire lease could be thrown out. This result can occur even if you never tried to enforce the "illegal" provision as was the case with the landlord in the Baierl case.

In my representation of landlords over the past 14 years, the two most frequent situations in which I have found an illegal provision in a rental agreement were because: (1) the landlord decided to draft his/her own rental agreement and didn't know that Wisconsin law prohibited him/her from including certain language,

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and (2) the landlord used a rental agreement that s/he found on the internet that was not drafted by a person knowledgeable about Wisconsin law.

The Wisconsin Administrative Code, [Chapter ATCP 134](#), specifically [ATCP 134.08](#) sets forth the 7 provisions that cannot be included in a Wisconsin residential rental agreement – often referred to as the 7 deadly sins.

You cannot include a provision in your rental agreement that:

1. Authorizes the eviction of a tenant from the property other than by the judicial eviction process set forth in the Wisconsin Statutes.

Essentially this means that if the tenant refuses to vacate at the end of a lease or after committing a breach, the landlord is not able to engage in self-help eviction. You are not allowed to change the locks so that the tenant is locked out. You are not allowed to remove the door to the apartment. You are not allowed to turn off the heat or electricity to the unit. Nor can you remove the tenant's belongings and put them on the curb or in a storage facility.

If a tenant refuses to leave your property, the only legal way to have them removed is to file an eviction action against them, obtain a judgment of eviction, and if necessary involve the Sheriff's Department to physically remove the tenant. Because this is the only legal way to remove a tenant it is illegal to include some other procedure to evict a tenant in your rental agreement.

2. Provides for the acceleration of rent payments if the tenant defaults or breaches the rental agreement.

Some commercial leases include an "acceleration of rents" clause but such clauses are prohibited in Wisconsin residential leases. So if a tenant breaches their rental agreement the landlord cannot require that the tenant immediately pay all future rent through the end of the term. According to sec. 704.29 of the Wisconsin Statutes, the landlord must attempt to mitigate the tenant's damages by trying to re-rent the unit. If the landlord is able to re-rent the unit then the breaching tenant will no longer be responsible for the rent once the new tenant moves in and begins paying rent. If the landlord is unable to re-rent the unit then the breaching tenant may very well be responsible for all of the rent through the end of the term, however since the landlord is unable to determine if that will be the case at the time of the breach, the landlord cannot include language in the agreement that the tenant must pay all future rent immediately upon a breach.

3. Waives the landlord's duty to mitigate damages.

As I mentioned above, landlord's have a duty to mitigate a tenant's damages by trying to re-rent the unit. As such, it is illegal for the landlord to avoid that duty by putting such language in the rental agreement.

4. Requires the tenant to pay the landlord's attorney's fees or costs that are incurred in any legal action or dispute arising under the rental agreement.

This is the illegal provision that I see the most often when reviewing rental agreements. The lease agreements that are sold at OfficeMax and Office Depot contain this prohibited language. This is also the illegal language that was included in the rental agreement at issue in the Baierl case that I reference above.

In a commercial lease it is acceptable to include language that requires a tenant to pay for the landlord's

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attorney's fees and costs however it is not allowed in the residential context. A landlord who prevails in court and has a tenant properly evicted will still be responsible for paying his/her own attorney's fees. If you are interested in learning more about the Wisconsin Supreme Court's reasoning you should read the Baierl case [here](#).

5. Relieves the landlord from liability for property damage or personal injuries caused by the landlord's negligent acts or omissions.

To put it simply, if the landlord causes damage or injury to a tenant then the landlord will be responsible for it. A landlord cannot remove his/her liability by having a tenant sign a rental agreement waiving that responsibility. For example, if a landlord is aware that the railing on his rental property's second floor porch is loose and the landlord has not gotten around to repairing it for several weeks, the landlord will be responsible for the tenant's injuries should he fall off the porch, regardless of what the rental agreement says.

6. Imposes liability on a tenant for injuries or damages which are clearly beyond the tenant's control or any damage caused by natural disasters or by persons other than the tenant or the tenant's guests.

This is very similar to the 5<sup>th</sup> deadly sin mentioned above but is even broader in scope. The landlord can't hold a tenant responsible for someone else's negligence (other than a guest) if the tenant has no control over that person, nor can the landlord hold the tenant responsible for injuries or damage resulting from an act of God. So if the tenant or the tenant's guest was negligent and that negligence caused damage or injury to the tenant or his property then the landlord will not be responsible – the tenant would. But if a massive snowstorm damages the rental property or an electrician hired by the landlord improperly wires the unit causing injuries and damage, the landlord cannot hold the tenant responsible regardless of what the rental agreement says.

7. Waives any other statutory or legal obligation of the landlord to deliver the unit in a fit or habitable condition or maintain the unit during the tenancy.

A landlord has a responsibility to provide the tenant with an apartment that is liveable and safe. A landlord also has the responsibility to repair and maintain the property to insure that it remains safe and liveable. A landlord cannot avoid this responsibility even if the tenant agrees to allow him/her to do so in the rental agreement.

Wisconsin landlords need to make sure their rental agreements do not contain any of these 7 deadly sins. Failure to remove such illegal provisions may result in your rental agreement being declared unenforceable against the tenant and may even expose you to a lawsuit for double damages and attorney's fees by the tenant.

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Tags: [ATCP 134](#)

This entry was posted on Thursday, June 18th, 2009 and is filed under [ATCP 134](#), [Rental Agreements](#). You can follow any responses to this entry through [RSS 2.0](#). You can [leave a response](#), or [trackback](#) from your own site.

## 24 Comments (and one trackback)

*#1 by Admin on June 30th, 2009*



written by David Klinedorf, June 29, 2009

What if previous owner has an agreement with illegal provisions? Does the new owner revert to standard month to month by default or is he stuck with a totally unenforceable lease, not being able to evict tenants or sue for damages etc?

*#2 by Tristan on July 2nd, 2009*



David. You pose a very good question. A tenant's lease travels with the property not the owner. So even if the rental property is sold to a new owner that will never cause an ongoing lease to change to a month to month tenancy. The new owner/landlord will inherit the lease from the prior landlord — flaws and all.

This can often cause problems. I personally have advised landlords who just bought a new property and inherited a lease containing an illegal provision to consider whether or not they want to proceed with an eviction action against a non-paying tenant under the circumstances because there is some risk. Oftentimes the landlord decides to roll the dice and proceed with the eviction and take their chances that the issue won't be brought up by the tenant (or their attorney) or noticed by the ct. comm. or judge. On other occasions, especially if the lease term ends in the near future, the landlord opts to not do anything and then just not renew the tenant once the lease has ended.

*#3 by greg c on September 21st, 2009*



Where do i find the law or statue where it states "tenant cannot use sec deposit for last month's rent?"

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ROOMMATES

#4 by [Tristan R. Pettit, Esq.](#) on September 22nd, 2009



Greg – Great question. Many people assume that the concept behind “you cannot use your security deposit for you lanst month’s rent” is based in statute. Actually it is not. There is no Wisconsin Statute that says this. Nor is there a regulation in ATCP 134 that says this. A friend of mine thinks that there is a court of appeals decision (case law) that says this – but I have not been able to locate that case. If and when I do – I will post it as a comment. But for now the concept that you can’t use your security deposit as last month’s rent is only true if you have it in your rental agreement. It is pure contract law.

#5 by [Pam](#) on September 29th, 2009



Questions: Can a lease required students to pay 12 months rent–by 12 post dated checks and provide to the Landlord prior to moving in?

Questions: Can a lease require students to pay May’s rent in October–year lease beginning June to May.

#6 by [Tristan R. Pettit, Esq.](#) on October 1st, 2009



Any money paid in advance that is greater than 1 month’s rent would be considered to be a security deposit under ATCP 134. So the landlord would need to abide by the security deposit requirements also set forth in ATCP 134 with regard to the 11 months worth of rent if all 12 months of rent were paid at once.

Since these checks are post dated — and I am assuming that they are post dated for the 1st day of each successive month of the lease period — I don’t believe that the rent money has been “paid” to the landlord yet because the checks could not be cashed any earlier than the dates on the checks.

I can’t say that this is a common practice.

#7 by [Deb](#) on December 15th, 2009



Can the landlord charge for routine carpet cleaning or can the landlord only charge carpet cleaning beyond routine wear & tear

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Are there any restrictions for rewriting or re doing a lease midway through the lease period. I am getting someone to take over my lease and would prefer to have the landlord redo the lease instead of sublet it. any legal ramification or problems w/redoing the lease.

#8 by **Deb** on December 15th, 2009



I did use the ATCP 134.06 (6) & 134.09 (6) but it appears to have changed which I believed stated that you can't charge routine carpet cleaning.

Thanks Deb

#9 by **Tristan R. Pettit, Esq.** on December 15th, 2009



Deb – Thanks for your questions. According to The Wisconsin Administrative Code (ATCP 134), specifically the note to ATCP 134.06(3) a landlord cannot deduct money from a tenant's security deposit for routine painting and carpet cleaning, where there is no unusual damage caused by tenant abuse.

Landlords cannot charge tenants for any normal wear and tear. But since there is no definition of normal wear and tear – there can be disagreements on this issue.

If both parties agree to end a lease then it is legal to do so. You can not unilaterally terminate a term rental agreement except if there is a breach of some sort – which usually means eviction time.

#10 by **Deb** on December 21st, 2009



Thanks for your help. Have a Merry Christmas

Deb

#11 by **Valerie** on December 22nd, 2009



What can a tenant do if their lease has one of the illegal provisions?

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#12 by [Tristan R. Pettit, Esq.](#) on December 22nd, 2009

Valerie



Thanks for your question.

I cannot give legal advice through this blog but my generic answer to any tenant that has any issue with their landlord is to communicate with your landlord about the issue and see if it can be resolved informally (i.e. without litigation).

Sometimes a landlord may pull a rental agreement from the internet and not even be aware that it contains a provision that is illegal in Wisconsin. If that is the case, both parties can agree to void the current rental agreement and enter into a new rental agreement that does not contain the illegal provision.

#13 by [David](#) on April 12th, 2010



My lease has a couple of addenda that seem fall under Sins 2 and 3.

One sets out a "Lease Termination Fee" that we are supposed to pay in order to get out of the lease early. The other sets out a "lease concession" wherein the rent amount we agreed to pay isn't our "actual" rent amount. The "actual" amount is \$120 a month more, but the apartment signed a concession saying that they'll give us a \$120 discount as long as we don't violate the lease terms. But if we move, they claim that the entire amount (\$1459.19) is due immediately.

This really seems to go against the rules of "no rent acceleration" and "waives the landlord's duty to mitigate damages".

Thoughts?

#14 by [David](#) on April 12th, 2010



Of course to add to that, my lease contains the very clause that the WI.S.Ct found made the Baierl lease unenforceable. So it looks to me like they've violated three parts of ATCP

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179 Tenant Damage Tristan Pettit

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134.08, at least one of which makes the lease moot.

Where should I look for guidance on how to proceed from here?

*#15 by [Tristan R. Pettit, Esq.](#) on April 14th, 2010*



From the info that you have mentioned I would most likely agree that there may be a violation of ATCP 134. I certainly would advise a landlord client to not include such provisions.

Just a quick point – ATCP 134 and the “7 deadly sins” do NOT apply in commercial rental contexts.

*#16 by [Tristan R. Pettit, Esq.](#) on April 14th, 2010*



You should consult an attorney.

*#17 by [marsha](#) on September 14th, 2011*



I added to my NSRP. None of them I believe violate the atcp. Is there anything you can think of that I should not have in my NSRP? Basically I stated in it they can not install a dish on the house (house is cable ready only) , Also that they can't leave pet unattended in the yard, no outside kennels. . Also need to be quiet after 10 pm. and they must comply with all city codes. And they can not have visitors pets on the property. The property is a 2 unit duplex. Thats why I added rules. I use wi legal blank forms and love them. But I just wanted to know if its ok I add rules and regulations to the NSRP. Thanks for your reply

*#18 by [marsha](#) on September 14th, 2011*



I also have one more question. My new tenants want to pay \$3000 in advance for a \$550 monthly rent. .I understand that anything above the monthly rent is a sec deposit. what they want to to is pay in advance and I will hold the full amount and monthly deduct rent from that. Is that ok? I also told them if things change and they want to leave or what ever then



what ever is left I would then call that amount a sec dep. Would this be ok to do?

*#19 by [Tristan R. Pettit, Esq.](#) on September 15th, 2011*



Marsha — the sole purpose of a NSRP to to list items that might be deducted from a tenant's security deposit. It is allowable to add other items in the documetrn as well — as I have in the NSRP that I drafted and is sold at Wisc. Legal Blank — but that is not the purpose.

Personally, I would put rules and regulations in a documents entitled Rules and Regulations. I have drafted a Rules and Regulatiosn document that is sold at Wisc. Legal Blank also. If you have additional R&R you would just list them and attach them as an addendum to the Wisc. Legal Blank R&R.

*#20 by [Tristan R. Pettit, Esq.](#) on September 15th, 2011*



Marsha – I cannot give specific legal advice via this blog. You are correct however in that anything paid over and above one month's rent is to be considered a security deposit. So if they pay you \$3,000 on October 1st and rent is \$500, then you would have a \$2500 security deposit.

What they are really doing is prepaying rent. Nothing is wrong with that however I am not a big fan of it personally. If they should vacate at the end of October then the \$2500 in the example above would be considered as security deposit.

I prefer nto to hold future rent for tenants, for reasons that are too involved to list in this comment. What is wrong with them holding on to their own money and paying rent when it becomes due? Are they spendthrifts and are afraid they will spend it all????

*Pingback: [Wisconsin's 7 Prohibited Residential Lease Provisions](#)*

*#21 by [Amanda](#) on April 21st, 2013*



Are you saying this clause makes the lease void despite a severability clause?

20. DEFAULT. If Tenant fails to comply with any of the material provisions of this Agreement, other than the covenant to pay rent, or of any present rules and regulations or any that may be hereafter prescribed by Landlord, or materially fails to comply with any

duties imposed on Tenant by statute, within seven (7) days after delivery of written notice by Landlord specifying the non-compliance and indicating the intention of Landlord to terminate the Lease by reason thereof, Landlord may terminate this Agreement. If Tenant fails to pay rent when due and the default continues for seven (7) days thereafter, Landlord may, at Landlord's option, declare the entire balance of rent payable hereunder to be immediately due and payable and may exercise any and all rights and remedies available to Landlord at law or in equity or may immediately terminate this Agreement.

*#22 by [Tristan R. Pettit, Esq.](#) on April 24th, 2013*



The new law as of 3-31-12 states that if your rental agreement includes any of the 8 deadly sins then the lease is void. So it would be void even if you had a severability clause. There is no caselaw re: what clauses or language would be construed as one of the 8 deadly sins except for the atty. fees provision (which was addressed in *Baierl v. McTaggart*).

I cannot provide legal advice via this blog unfortunately and that is what you are asking me to do by applying the law to your specific rental clause.

One thing I can point out is that WI does not allow a "7 day notice" so my guess is that you got your lease from someone in another state in which 7 day notices are allowed. WI has 5, 14, 28, and 30 day notices

*#23 by [Paula Gokey](#) on August 11th, 2014*



Can a new commercial landlord retro-actively increase lease payments and pre-charge for future improvements like the new owner's of Milwaukee's Phoenix Building are doing to their tenants – increasing 2013 rent payments and charging tenants for roof repairs.

*#24 by [Tristan R. Pettit, Esq.](#) on August 25th, 2014*



I cannot give legal advice via this blog. You should consult and retain a lawyer to review your lease and give you legal advice if you feel your landlord is in breach.

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### CONTACT TRISTAN



Email: [tpettit@petriestocking.com](mailto:tpettit@petriestocking.com)

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