SB24-094 Talking Points

SB24-094 Safe Housing for Residential Tenants

Overview

The bill is 45 pages, thus these talking points are detailed and lengthy.

Everyone Could Support the Bill if it only addressed the sponsors stated purposes - But the Bill Goes Far Beyond the rationale for why it was introduced

- One, the status quo does not require the landlord to ever fix anything
- Two, the notice provisions are too complicated and tenants should be allowed to give verbal notice, or the landlord should be required to fix things, if the landlord has constructive notice of a warranty of habitability issue.
- 45 pages is not a clarification as stated in the Bill summary, if a clarification was needed that could be done in two pages.
- The other 43 pages advances a hard pro tenant agenda making the Bill unpalatable
- If the bill was truly limited to its purported reasons, as set forth by its proponents, the landlords, if given some input, could probably come to some agreement on the commence, continue, and complete concept, as well as maybe revising the notice provisions.
- Other than an amendment to narrow this bill to its original stated reasons (requiring landlords to fix uninhabitable issues and notice), this 45 page bill cannot be fixed.

The Bill Is Long and Complicated and Drafted without Landlord Input

- SB-094 is a total rewrite of the Warranty of Habitability Act.
- A total rewrite should not take place, unless all stakeholders are at the table and given an opportunity for meaningful input over a significant amount of time, like what in occurred in 2008
- Landlords had no input. Not all Realtors are landlords, and do not understand the Bill and do not represent landlords interest.
- Extremely complicated. That is why it is 45 pages.
- Colorado's leading legal experts on the Warranty of Habitability Act find it complicated, convoluted, and difficult to follow after hours of review.
- Judges, tenants, and non-experts will find it incomprehensible.
- Small landlords, which comprise approximately 30% of the rental market (and rapidly shrinking), have a little or no chance of complying with this bill, and face significant

potential legal liability for not complying, even if they are not complying in good faith, or inadvertently

The Bill is Extremely Tenant Biased Because the Drafters Are Biased Tenant Advocates

The complete tenant bias of the drafters is evident throughout the bill. SB094 is primarily or even exclusively authored by the Colorado Poverty Law Center, which is a tenant rights advocacy group. The Bill was most likely drafted with significant input over months of time from other tenant advocate grounds WITH NO LANDLORD INPUT. The Bill reflects the mindset of its tenant advocate drafters, drafted from a tenant defense attorney's perspective, and is so biased that it rewrites existing legal norms to favor tenants.

- This is in stark contrast to the 2008 bill which involved dozens of stakeholders, who met over months, for hours and hours for mediated discussions, and the exchange of countless drafts.
- Only Partisans would give the tenant a right to refuse entry for the landlord to repair what the tenant claims to be an uninhabitable condition, there is no reason for this provision other than to demonstrate the drafter's biased mindset.
- The Bill gives tenants countless rights and protections, gives landlords none, and makes even what should be reciprocal issues (prevailing party gets attorneys fees), into a one sided tenant favored outcome
- If a tenant wins a lawsuit, or an eviction case, based on a warranty of habitability defense, the legislation essentially awards the tenant the kitchen sink.
- Forces courts to draft pro tenant orders even if overall the landlord prevails
- Conditions the landlord's defense of tenant interference on many factors and requirements making the defense problematic or worthless
- If the tenant is preventing (commencing, continuing, and completing repairs), the landlord has a duty to just keep trying (pp 8 and 9, L26)
- The Bill contains numerous "rebuttable presumptions" (tenant's case or tenant's issue is presumed) that the landlord has to rebut through a higher evidentiary standard (clear and convincing).
- Further examples of Bias.
    - Tenants can assert a warranty of habitability defense to an eviction for bad or antisocial behavior. Why? The tenants behavior has nothing to do with the landlord not repairing, and gives bad tenants a license to disturb other tenants
    - Tenants who withhold rent get 45 days to pay the "withhold rent" if the landlord cures within the demand period. Other than tenant bias, there simply is no reason why the tenant needs 45 days to handover rent that the tenant supposedly has but only withheld due to the landlord's failure to repair.
    - If the tenant withholds rent and even if the landlord fixes the issue but doesn't fix within the 3 day notice, the tenant only has to pay 50% of the rent withheld. Why? The drafters of this Bill are always talking about unfair penalties to tenants, this is a penalty to landlords.

- The bill provides for tenants to recover punitive damages. Why? Landlords are limited to actual losses incurred as a result of a breach.
- Tenants may obtain a temporary restraining order without notice to the landlord. This is obviously rife for potential abuse. Especially when it is combined with the fact that the tenant now is not required to give the landlord written notice of an alleged inhabitable condition.
- Tenants can (against existing injunction law) get an injunction:
  - Without having to show irreparable harm
  - Without posting a bond

The Drafters Rewrite Existing Law and Dictate Court Results

- The bill is long because it dictates to the court, what it must order or conclude if it finds in the tenants favor, see pages 31 through 36
- The Status Quo in any lawsuit:
  - Plaintiff files a complaint against the Defendant
  - Defendant answers, asserts defenses, and counterclaims
  - Court determines claims
  - There is a net winner
  - The winner is the “prevailing party”
  - If applicable the prevailing party is entitled to attorneys’ fees and costs
- The status quo applies in tenant landlord suits
  - Landlord evicts for nonpayment of rent
  - Tenant asserts warranty of habitability claims or defense
  - If court determines tenant’s warranty of habitability claim is less than landlord’s rent claim, then landlord is the winner
    - Judgment for possession
    - Attorneys’ fees and costs to the landlord for being the prevailing party
- The Bill Forces the court to enter a pro-tenant order even if overall the landlord is the net winner of the eviction lawsuit
  - Even if tenant doesn’t prevail overall but establishes a warranty of habitability breach that is less than the rent owed to the landlord (Example Landlord is owed $5,000 in rent, tenant is damaged by breach in the amount of $1000)
  - Tenant is the winner even if the tenant still owes landlord rent after taken into account the value of tenant’s warranty of habitability claim
  - No judgment for possession for landlord. Evictions are based on nonpayment of rent, and now the landlord is denied a possession order, even if the court determines that the tenant owed a net amount of rent.
  - No attorneys’ fees and costs
  - In fact the tenant is awarded attorneys’ fees and costs
  - The landlord who was the net winner is now the loser
- Even if Landlord Totally Prevails, Tenants get a favorable order just by asserting a warranty of habitability defense (p35, L16)
  - Tenant fails to prove warranty of habitability claim

    - Landlord proves that they were owed rent, and there was no warranty of habitability breach
    - Tenant gets an additional 14 days to pay the rent.
    - No Judgment for Possession for landlord unless tenant doesn't pay the rent after 14 days
        - Landlord is not entitled to a judgment for possession, even though the landlord won its judgment for possession claim by proving rent owed and the tenant failed to prove their defense.
    - Landlord is denied attorneys' fees and costs even though it is the prevailing party unless the court finds that the tenant filed a frivolous complaint, or counterclaim under the Warranty of Habitability Act.
- Even after losing, and getting its day in Court, the Tenant can sue the Landlord in a future case for breach of the warranty of habitability act!
    - Res Judicata is a fundamental bedrock of American jurisprudence
        - The doctrine simply stands for the proposition that judicial outcomes are final (only subject to appeal)
        - Litigants don't get a second chance to litigate a case they lost
    - So if a litigant loses, they cannot sue again and try to win.
    - SB-094 specifically overturns Res Judicata by allowing tenants to file warranty of habitability claims against landlords even after getting their day in court and losing. Section 4, and page 41, L23
    - So not only is the landlord the loser after winning, the loser (the tenant) gets a second chance to be the winner

The Bill Has Many Drafting Issues

- The Bill has countless (too many to be cited here) flaws as well as confusing and contradictory provisions (some are identified here)
- Nothing in the legislation prevents the tenant from abusing the system, or from asserting a warranty of a habitability claim, except a hollow threat of attorneys' fees and costs being awarded against them which they will never pay
- Section 503 says the landlord is in breach if it's on the 505 list, but the 505 now lists violation of section 503 as a violation.
- CONFLICT between §507(a) termination, and §507(c) right to withhold rent, both allow termination, but §507(c) allows the tenant to get it done quicker (2 three day notices).
- Many (if not all remedies) allow tenants to be relieved of all liability, but what if there is physical damage to the unit?
- Mold. The original statute did not cover mold. Mold was subsequently added but is not clear. The 45 pages bill does not clear up the mold issue.
- The deduct and repair remedy is flawed.
    - The tenant has to give a 10 day notice, but only 48 hours if it's a life health or safety issue.

    - Remember, the tenant advocates have now placed many of the 505 list items that were not formally considered life health and safety issues on a new list §505(4) making them rebuttably presumed to be Life, Health, or Safety issues
    - So is it a ten day notice to deduct or repair or a 48 notice?
    - How will the landlord know, especially if the tenant is not required to give written notice?

Landlord Required To Fix And Liable Without Written Notice And Other Notice Issues

- The bill only requires "constructive notice" (p9. L18)
    - He said she said issues
    - Both verbal notice from the tenant, and from a third-party is going to lead to a lot of he said she said, and disputes about whether the landlord got notice.
- Shorten time frames (to commence, continue, and complete) demand written notice
- Why not have dedicated email address (it used to in the Warranty of Habitability Act but the the same proponents of SB-094 took it out)
- Written notice worked
    - How many people in news stories or who testified took the simple step of notifying the landlord in writing of the need for a repair
    - And if they did, and the landlord didn't fix the problem, notice isn't the issue
- Tenant won't have to give written notice of a serious problem but landlord has to give written notice to enter
- Verbal and or constructive notice is problematic as extensively discussed for hours and hours in 2008, that is why it was excluded.

The Mechanics - Procedures are Flawed

- There is a need for a prompt repair (the condition makes the premises uninhabitable)
- The law requires prompt action (commence, continue, and complete in 14 days (7 for Life, Health, or Safety issues)
- Landlord is willing to act right away
- But tenant can refuse entry
- The potential back and forth allowed by the bill makes no sense given the compacted timeline
- A landlord does not have to give notice for Life, Health, or Safety issues, but the Bill does not make it clear whether the tenant can still refuse entry and require the landlord to reschedule Life, Health, or Safety issues
- The entire Life, Health, or Safety issue has been muddled by creating a rebuttable presumption §505(4) that certain issues are presumed to be Life, Health, or Safety issues, but may not.

Stacks the Deck Against the Landlord with A Series of Rebuttable Presumptions

- A rebuttable presumption means that what the tenant asserts or is claiming to be true is true, and now the landlord must come forth with evidence that it is not.
- Not enough for the landlord to prove NOT TRUE, but the landlord must prove not true by clear and convincing evidence (why is the landlord's evidentiary burden increased beyond the standard burden of proof in civil cases? Biased drafting.)
- Landlord is guilty and has to prove its innocence on key issues
- Presumed to have failed to Commence, continue, and complete repairs (P7)
    - If landlord fails to communicate after notice (but landlord may never have received notice)
    - Why is there a presumption? (drafter Bias)
    - Evidentiary standard is “preponderance of evidence”, so why do landlords have to prove things by the higher standard of “clear and convincing evidence”?
    - Clear and convincing evidentiary burden is much higher burden
- Rebuttable Presumption that condition impacts tenant’s Life, Health, or Safety
    - A condition is rebuttably presumed to impact the tenant’s Life, Health, or Safety if it is on a new list they have created in Section (4) of §505.
    - These issues may or may not impact a tenant’s Life, Health, or Safety but many do not in a lot of cases so it shouldn’t be presumed
- If the court finds a breach, the tenant gets a rebuttable presumption that the value of the premises is zero if it is Life, Health, or Safety issue. Remember, Bill drafters also stacked the on that issue (what is a Life, Health, or Safety issue), and now pursuant to another rebuttable presumption have made almost everything a life health or safety issue.
    - Thus Rebuttable Presumption #1 makes it serious issues, and since it's a serious issue Rebuttable Presumption #2 the value of the premises $0

Comparable Dwelling / Hotel Provisions are Confusing and Unworkable

- Landlord has to provide Comparable Dwelling/Hotel if Life, Health, or Safety Issue
    - Under 505(4) there is now a rebuttable presumption that many previous items on the 505 list now impact a tenant’s Life, Health, or Safety (does a roof leak? - maybe, its presumed now) (P20, L25)
    - So how does the landlord know its CD/hotel obligations
- Issues generally are either Life, Health, or Safety or they are not, presuming many conditions are Life, Health, or Safety issues when they may not be is a big problem with the Bill
- Many hotels do not have refrigerators with a freezer but the Bill requires a hotel to have this (and more) if the tenant is there for 48 hours or longer or the landlord has to pay a per diem for meals (P11, L2).
- Landlord having to inform a tenant that they “may” (because as above it's not always clear) have a right to a hotel will lead to many disputes (p. 13, L8), the tenant either should or shouldn’t be entitled to a hotel

The Bill Imposes Significant Costs and Burden on Landlords

- Landlords have to produce records that tenants request at any time
    - No evidence that landlords are not producing records when a warranty of habitability issue is being raised. Further, if the landlord is not keeping records, how are they going to refute any allegations that they breach the warranty of habitability. Thus, they already have an incentive to keep accurate records.
- Mold Testing will be costly, burdensome, and is inherently unreliable
    - EPA says it is not necessary to in most cases https://www.epa.gov/mold/mold-testing-or-sampling
- Elevators are notoriously time-consuming to repair based on a lack of labor and parts. Accordingly, landlords will have to put disabled individuals up in comparable dwellings, or hotels for months. This is a very difficult issue that needs thorough discussion to resolve, rather than just having the tenants force feed their burdensome solution on landlords.
- Tenants can go out and buy a new appliance based upon a breach with a total of about 20 days notice to a landlord. This will lead to countless disputes (whether the tenant gave the landlord time, the necessity of buying, the cost, and the model).

Air Conditioning is Not a Habitability Issue

- Was debated in 2008 into the ground
- Was kept off the list for countless good reasons
- What justifies its inclusion now?
    - Where are the statistics to justify including AC?
    - How many tenants have died from lack of air conditioning?
    - As homeowners know, getting AC fixed can be a nightmare and take weeks if not longer. Getting AC fixed when it is very hot is even worse if a lot of AC is going down.
    - Will lead to countless complaints and litigation
- Cost of compliance significant to landlords
- Forcing landlords to accept cooling devices, forces landlords to accept undesirable alterations to their properties.
- Having to explain why cooling devices are not allowed is burdensome and will lead to disputes

Absurd Provisions

- Responsibility to disclose nearest public cooling place
- What does the public library having air-conditioning have to do with the habitability of the premises?
- Occupants not even on the lease can bring warranty of habitability claims. Why?
- Allows a court to grant relief to other tenants similarly situated who are not even parties to the action.
    - Generally someone has to be a party to be entitled to relief
    - How is this going to be enforced since the party is not before the court?