MICHAEL P. MORTON, P.A.

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"Let's Do The Time-Warp Again."

Timing Lessons From the Rocky Horror Picture Show

"Time meant nothing, never would again."

By: David Zerbato, Esquire

Don't be fooled. Timing is of the **utmost importance** when dealing with a landlord tenant matter. Getting the timing wrong – having it mean nothing -- whether it is filing too soon or appealing too late can dramatically affect the outcome of your case and often forms the basis for the Court to dismiss your case. Getting the timing correct is critical during all stages of a landlord tenant matter, from charging late fees to requesting the writ of possession. This article will not delve into the specific timing requirements for certain actions as defined by the Residential Landlord Tenant Code (the "Code") or the Manufactured Home Owners and Community Owners Act (the "Act"), but rather will identify and clarify how time must be calculated so as to comply with both the Code, the Act and the rules of Court.

"With a bit of a mind flip you're into the time slip"

Why a "slip in time" can be costly!

Calculating any relevant time period under the Code, Act or rules is fairly straightforward. The first day begins the day **after** the event, act or default occurs, unless an applicable statute, order or rule states otherwise.[1] The overwhelming majority of time computations will fall under this time calculation. So for example, you have a tenant who has an unauthorized pet. You send them a 7 day violation notice providing 7 days to cure the violation. The first day of that 7 day period begins the day **after** the letter is mailed or hand delivered.

[1] See 25 Del. C. §5112

Briefly Speaking

Proof of Mailing

Did you know that the U.S. Proof of Mailing Form 3877 is now available to complete on your computer? Just fill in and print out, the post office accepts this form the same way as if it was completed in the Firm Mailing Book. If you would like a copy, please send us an email and we will provide you with one.

For copies, please email:

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When does the 7 day period end? The last day of the time period is included in the 7 days unless it is a Saturday, Sunday or legal holiday. If the last day falls on a Saturday, Sunday or legal holiday, the time period is extended to the next day which is not a Saturday, Sunday or legal holiday. Simply put, the time period cannot end on a weekend or holiday. It will be extended until the next business day or day which is not a legal holiday. So, getting back to our tenant with the unauthorized pet, the 7 day period expires after the completion of 7 complete days – which is actually the 8th day from the date you mailed[2] or hand delivered the notice. You may be asking, "Why the 8th day, I thought it was a 7 day period?" You are correct, but remember that you must provide 7 **full** days. You cannot terminate for non-compliance on the 7th day, but only after the full 7 day period has run.

Now, suppose the tenant with the unauthorized pet has provided you adequate proof that the pet is gone. Crisis averted, for now. However, assume the tenant was forced to incur expenses to board the dog for several weeks until he can figure out a permanent solution, and, therefore, has not paid you rent when it was due. You send him a 5 day notice requiring him to pay the outstanding balance in full within the 5 day period. You assume from your experience with the 7 day letter, that on the 6th day following the mailing or hand delivery, if he has not paid in full, you can file for possession and the unpaid rent, **or** so you think. The Code and Act add another small wrinkle to the calculation, any period which is **less than 7 days** does not include intermediate Saturdays, Sundays or legal holidays. What does this mean? It means any time period that is less than 7 days must be calculated by counting only business days, or, if a legal holiday falls within the period or falls at the end of the period, the period must be extended to the next business day that is not a legal holiday. So the tenant does not have 5 **calendar** days to pay, but rather 5 **business** days. And if he is fortunate enough to have the 5th day fall on a legal holiday, he will get an extra day to pay and stay.

After sending the 5 day violation notice, you sit back and mark the days off on your calendar as you want to be sure you stay on top of this tenant. You sent the notice on a Tuesday, so you mark off Wednesday as the 1st day, Thursday and Friday as days two and three, you skip the weekend and pick up with the 4th day on Monday and the 5th day on Tuesday. Day 6, the next Wednesday, you can file if not paid in full. You count each calendar day and realize that while the tenant only had a 5 day period to pay, the practical effect is that he is provided 7 full calendar days! You then realize that the 5 day period and 7 day period under the Code are always identical. This is of course true and may help ease the administrative burden of keeping track of when time periods have run, but we recommend that you always run through the steps listed here as it is imperative that you get the timing right. Your case depends on it.

[2] This is assuming the notice is mailing First Class Mail with Certificate of Mailing.

So, you have counted the "5 day period" correctly and the tenant hasn't paid. Assume you file for summary possession and, thereafter, obtain a judgment for possession and the unpaid rent. You wait the statutory 10 days from the date the judgment was entered to file for the writ of possession and file it on the 11th day, nicely done. You are now feeling much more confident about this timing thing and think you've gotten it down. The constable does a lock out and the tenant is now gone. Several months later, much to your surprise, you receive a summons and Complaint in the mail. The tenant has sued you in JP Court for the return of his security deposit as he does not agree with all of the charges you deducted. The summons tells you that you must file an Answer within 15 days of being served the Complaint. You disagree with the allegations in the Complaint, but need to run this by your owner. However, you want to be sure you don't miss the deadline so you mark off 15 days from the date you received the Complaint, knowing that the Answer must be filed on or before the 15th day. But then you realize something, you are no longer dealing with the Code or Act, but rather with a time period found in the rules of the Court. You begin to feel unsure of yourself. Don't! The calculation for a time period found in the rules of Court is the same as found in the Code and Act.[3] The first day begins the day after the act and the last day is included. Just as in the Code and Act, if the last day falls on a weekend or legal holiday, the period is extended until the next business day or which is not a legal holiday. If the period is less than 7 days, you do not count intermediate weekends or legal holidays.

We have recently seen a significant increase in tenants bringing claims and raising defenses arising from late fees which are charged prematurely. This is a significant issue and one which can create potential liability or can result in a lost case. This issue is of course related directly to the calculation of the 5 day grace period provided by the Code and Act. As seen above, the 5 day period begins the day after the rent is due. It does not include weekends or legal-holidays as such time period in the Code is less than 7 days. For example, the rent is due on the 1st of the month, which, which for March, 2015, happens to be a Sunday. The 5 day period begins on Monday and ends on Friday. The first day a landlord can charge the late fee is that Saturday, or **the 7th of the Month.** Any late fee charged prior to the 7th is in violation of the Code and Act. Things get a bit more interesting when you add weekends and holidays into the mix. Change the 1st of the month to a Wednesday, as it is for April, 2015. The first day of the 5 day period beings on Thursday, or the 2nd of April, and due to the weekend, it does not end until the 8th of April, again a Wednesday. Under these circumstances, **you cannot charge a late fee until the 9th of the month!** If there happened to be a legal holiday during that time period, the first day a landlord could charge a late fee would be extended even further.

[3] See Justice of the Peace Civil Rule 6.

What does this mean? The absolute earliest a landlord can charge a late fee is on the 7th day of the month. However, as the day of the 1st day of the month changes from month to month, the date a landlord can charge a late fee will also change. As shown in the example above, if the 1st day of the month falls on a weekday, the date one can charge the late fee will be pushed back dramatically. A landlord must be aware of when it can charge a late fee and ensure its policies and procedures are in line with the Code and Act requirements. **This may require a significant change to a landlord's policies**. However, failing to do so may result in liability for inappropriately charged late fees **and** damages for violating the Code or Act. As a practical matter, don't let this happen to you. Review your late fee and 5 day letter practices now, before you find yourself being severely penalized for simply trying to collect the rent you are due. Make the changes now. You will be thankful you did.

Yes, indeed, now you can see the time warp. "It's astounding; time is fleeting, madness takes its toll…" Let's all do the time-warp again! Let's get the timing right!

Thank you for reading our newsletter.
If you have any topics that you would like to see addressed in future newsletters, please email David Zerbato at dzerbato@michaelpmorton.com

Links in this newsletter: Justice of the Peace Civil Rules
http://courts.delaware.gov/forms/download.aspx?id=39328

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The Last Laugh: