

# MICHAEL P. MORTON, P.A.

E-Newsletter

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## *“Deflate Gate: Over Inflated Late Notice May Lead to Underinflated Outcomes”*

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The importance of a correct late notice cannot be understated when filing a summary possession action. Such notice will make or break your case and determine whether you will be successful in obtaining possession of a property from a delinquent tenant. However, it is all too

*The importance of a correct late notice is critical to the success of a case.*

tempting to simply carry over the total outstanding balance from the ledger or other accounting without reviewing exactly what that outstanding balance contains. This is particularly true when the notices are automatically generated by management software. This is a critical step as both the Residential Landlord Tenant Code (the “Code”) and the Manufactured Home Owners and Community Owners Act (the “Act”) both put restrictions on what may be contained in the late

notice. See 25 *Del. C.* §§ 5502 and 7010A(b)(3). Specifically only rent, late fees, utilities and Relocation Trust Fund fees (for manufactured housing) may be included in the late notice. Certain charges such as damages and prior court fees may not be included in the notice. Other charges such as “not sufficient fund” fees are more ambiguous, particularly for notices arising from the Act.<sup>1</sup> However, it is a best practice to not include such fees as the consequences for a judge determining a late notice is overinflated far outweigh the nominal fee contained in the notice. Moreover, a landlord will be able to recover such additional fees at the time of trial by simply including them in their breakdown sheet or testifying to the amounts owed. It is imperative that only permitted charges be included in the late notice<sup>2</sup>. A charge that is included in the late notice, but which is not permitted to be included, will result in an overstated notice. An attorney or savvy tenant will immediately bring this overstated amount to the court’s attention. If found to be overstated, even by a cent, the notice will be considered defective on its face. That will result in the dismissal of the possession action that was filed based upon the overstated notice. There is no way to cure this defect at trial! While you may succeed in obtaining a money judgment for the outstanding balance, possession will remain with the tenant.

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<sup>1</sup> Please note that the Act does define “rent” more broadly, specifically, it states rent includes “**other fees and charges**.” While it is clear some fees and charges may be included in a late notice for manufactured housing, exactly what fees and charges may be included is not clear. Because any permissible fee rightfully charged to the tenant can be

recovered at the time of trial, it is best practices to limit the charges included in the late notice to rent, late fees, utilities and Relocation Trust Fund fees to avoid any issue related to an overinflated late notice.

<sup>2</sup> You cannot include the cost of filing your JP Court action on your balance sheet until the Court rules in your favor.

As mentioned above, any additional fee or cost which is either contained in the lease agreement or otherwise rightfully charged to the tenant can be recovered at the time of trial. This is important as not including such fees in the late notice does not waive the right to subsequently seek any such fees. Indeed, it cannot act as a waiver as such fees are not permissible to be included by law. This also alleviates concerns that the landlord may lose out on such fees. To recover such fees, the fee must be referenced in the complaint and included in the

breakdown sheet and evidence of such fees and the tenant's obligation to pay them, (i.e. the lease), must be submitted if trial proceeds.



The failure to include such fees in either the breakdown sheet or enter them into evidence will result in a waiver, so you must take the appropriate steps to ensure such fees and costs are indeed added at that time.

The importance of a correct late notice is critical to the success of a case. While a landlord may be able to "skate" by with a letter which may include additional fees or charges, the risk that the late notice will be deemed overinflated far outweighs the short term benefit. All it takes is one judge to review the letter and note, perhaps for the first time, find that the letter is defective and the case will be over. This all too frequently occurs in a case brought against a tenant the landlord wants to desperately evict. Don't let this happen to you!

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