

**OPINION
78-105**

June 1, 1978 (OPINION)

The Honorable Wayne K. Stenehjem
State Representative
District 42
3712 Berkeley Drive, No. 6
Grand Forks, ND 58201

Dear Representative Stenehjem:

This is to acknowledge receipt of your letter in which you set forth the following:

This letter is a request for an opinion from your office regarding Section 47-16-13.1 of the North Dakota Century Code. As you know, that Section is the new statute enacted by the 1977 Session of the North Dakota Legislative dealing with the disposition of moneys tenants are frequently required to deposit with prospective landlords to indemnify landlords in the event of subsequent damages to the property caused through the fault of the tenant.

Part of that Section requires landlords receiving such deposits to place them in a separate account at passbook interest rates.

Although the statute prescribes civil damages to the landlord who wrongfully withholds the tenant's moneys from him at the termination, there is no provision in the Section for a civil or criminal penalty for the landlord who refuses to place the money in a separate account.

Nonetheless, it is apparent that the policy of the legislature is that such moneys are the property of the tenant, which the landlord is merely holding for him.

Therefore, it would seem that although no criminal penalty was specifically enacted with this Section, other Sections of North Dakota law dealing with treatment of entrusted funds might apply here.

I have learned that some landlords within North Dakota have failed to heed the requirement of the law, treating the language of this Section, in the absence of a penalty provisions, as merely advisory rather than mandatory.

Your opinion on this matter is respectfully requested.

In our letter of February 27, 1978, to the Secretary-Treasurer of the North Dakota Real Estate Commission, we set forth our opinion on many issues relating to the new security deposit law which has been codified as Section 47-16-07.1 of the North Dakota Century Code. A copy of that letter is enclosed. In that letter we indicate our opinion that a lessor is a fiduciary as to a security deposit. We noted that our opinion is based both in the language of the law and

the minutes of the Senate Judiciary Committee, January 25, 1977, in which Senator Freed, the sponsor of the legislation, indicated his opposition and intent that the security deposit, during the period in which it is held, is the lessee's money.

We note that North Dakota Century Code, Section 12.1-23-07, provides:

MISAPPLICATION OF ENTRUSTED PROPERTY. Any person is guilty of a class A misdemeanor if he disposes of, or uses, or transfers any interest in property that has been entrusted to him as a fiduciary, or in his capacity as a public servant or an officer, director, agent, employee of, or a person controlling a financial institution, in a manner that he knows is not authorized and that he knows to involve a risk of loss or detriment to the owner of the property or to the government or other person for whose benefit the property was entrusted.

We believe that the above quoted section is applicable to the fiduciary relationship involving a security deposit entrusted to a lessor by a lessee.

We further believe that under the appropriate facts and circumstances there are aspects of the consolidated theft of property statute, Section 12.1-23-02 of the North Dakota Century Code, as well as the consumer fraud law, Chapter 51-15 of the North Dakota Century Code, that may be applicable by virtue of the element of deception being present should the lessor fail to disclose that he is not going to handle the money as required by law.

Therefore, we conclude that there are civil and criminal sanctions available for violating North Dakota's new security deposit law. We further note the apparent availability of injunctive relief, under North Dakota Century Code Section 32-06-02, to compel compliance with the law.

We trust this is sufficient for your purposes.

Sincerely,

ALLEN I. OLSON

Attorney General