THE LAW OFFICE of DANIEL J. BERNIER LLC

February 3, 2023

Distinguished Members of the Judiciary Committee

From Daniel J. Bernier, representing the
Central Maine Apartment Owners Association

Re: LD 45 An Act to Prevent Retaliatory Evictions

I represent the Central Maine Apartment Owners Association who is joined by the Rental Housing Alliance of Southern Maine in opposition to LD 45. **LD 45 just takes away the discretion of Judges in handling retaliatory eviction claims.**

When a landlord brings an eviction action, a tenant may assert a retaliatory defense where the tenant claims the reason for the eviction is the tenant asserted the tenant's rights or claims against the landlord. A list of reasons a tenant may claim a retaliatory defense is in statute which trigger a presumption of retaliation thereby shifting the burden of proof to the landlord. The presumption of retaliation already gives the tenant an advantage in these cases.

I have been practicing landlord tenant law for thirty years and have handled thousands of evictions. In that time, I have never seen a tenant win a retaliatory eviction case. First, retaliatory eviction claims are overused with many frivolous claims; this has contributed to these claims being viewed with skepticism. Until we find ways to reduce the number of frivolous retaliatory claims, they will continue to be treated with skepticism. Second, tenants will often assert their right the day of the eviction hearing for the first time. If a landlord started an eviction a month or two before the hearing, but the first time a tenant asserts their rights is the day of the hearing, it is hard to say the landlord started the eviction because of the tenant asserting their rights. Simply put, at the time the landlord started the eviction they did not know of the tenant's complaint so how can the tenant's complaint be the reason for the eviction. Third, the most common retaliatory claim is a habitability claim where the tenant claims the apartment is not habitable; this, however, puts the tenant in the position of arguing that the apartment is so bad no one can live there, but the tenant should be allowed to stay and live there. This begs the question of if the place is so bad, why is the tenant fighting to stay. Another common issue is the tenant complains of the condition of the apartment but then refuses to let the landlord in to fix the problems.

Section 1 of LD 45 regarding rent increases is likely OK with some clarification. If a landlord did not properly increase rent, they are likely to have problems in court on the eviction

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anyway especially if the reason for the eviction is failure to pay rent. Under LD 45 section 1, section 6015 would now be a retaliatory defense. Section 6015 requires a landlord to give a forty-five (45) day notice of rent increase. The wording should also be added to LD 45 to say a landlord may rebut the presumption of retaliation if they can show they complied with section 6015.

Regarding section 2 of the legislation, I am not sure what that is doing. It appears to be repealing the wording that says there is no presumption of retaliation if the reason for the eviction is the tenant caused substantial damage to the premises, the tenant has not paid their rent, the tenant is a perpetrator of domestic violence, or the person is not an authorized occupant. I am extremely concerned about repealing that wording.

We strongly oppose section 3 of the legislation. In eviction cases, tenants will try to assert a retaliatory defense as a last act of desperation. This section would represent a sweeping change in Maine law, by saying the landlord would be **limited to** the reasons in section 6002 (1) to rebut a claim of retaliatory eviction. Section 6002 (1) enumerates the reasons for a seven (7) day notice. Many evictions are done under a thirty (30) day notice. Section 6002 (1) is a short list of reasons where the legislature has stated a landlord can use a seven (7) day notice because the matter is urgent. Only the legislature can create a reason for a seven (7) day notice. Landlords in leases can create reasons for a 30-day notice. The most common rebuttal to a retaliatory claim is the tenant waited until the day of the hearing to tell the landlord about the condition; thus, how could the landlord be retaliating against them if the eviction was started before the tenant ever made the complaint. This would reduce that as a defense and open the door to many frivolous claims. The other issue is if we want tenants to fair better with retaliatory evictions, Pine Tree Legal and others need to stop overusing retaliatory defenses. At a hearing, when things start going bad for tenants, tenant's and their lawyers often just start throwing out any retaliatory claim they can make; this just throwing things out hoping they stick hurts people asserting legitimate claims. The retaliatory claims are usually so poorly constructed and so clearly the act of someone who is desperate to not lose the hearing that they really degrade the defense and the process. We need to work towards eliminating the frivolous claims of retaliatory eviction if we want the serious one's to be taken seriously. This law would encourage the frivolous claims of retaliatory eviction.

Section 3 does go on to say violation of a lease can rebut a retaliatory eviction claim. However, a lot of month-to-month tenancies have very simple leases. I see more tenants coming up with conduct that most of us would have never thought to prohibit in a lease. One eviction I recently handled the tenant's brother pitched a tent in the parking lot for the building and started to live in it. The tenant pointed out that the lease did not have any prohibition on that. Another case, an elderly couple lived on the property and rented a building beside their home to their tenants. Their tenants started cutting all the shrubs around the landlord's home. This was done to harass the landlord, but then the tenants made the point that the lease did not prohibit them from cutting shrubs. In both cases the lease did not permit the conduct, but it did not prohibit it. In both cases, the tenants made retaliatory claims. If this legislation had been in place, we would not have been able to introduce that conduct as part of rebutting the retaliatory claim. Another case, a tenant was making Molotov Cocktails and throwing them in the yard. The lease did not mention Molotov cocktails or anything about explosives. On explosives, to overcome the presumption of retaliation under LD 45, does the tenant have to throw them in the building? Is throwing them in the yard or on the street enough? Is making explosives in

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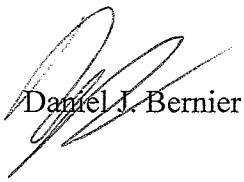
the apartment enough to overcome the presumption of retaliation? **LD 45 takes away the discretion of the Judge to deal with these situations. When a tenant asserts retaliation, a Judge is limited to a short list of reasons in statute and things specifically mentioned in a lease to overcome a presumption of retaliation. If a tenant engages in extreme conduct neither the legislature nor the landlord thought to explicitly prohibit, the Judge's hands are tied.**

The harder you make it to evict tenants the more landlords are going to screen tenants on the application process. Right now, there is a lot of concern about getting landlords to give people who are homeless a chance or give a person with a criminal record a chance with housing. Landlords are more likely to take a chance on someone who has been homeless or has had a criminal record if they know they can evict the tenant if it is not working out. This bill represents a major change to our eviction process in terms of how hard it would be for landlords to rebut retaliatory defenses. Frivolous claims of a retaliatory eviction are so common in the eviction practice this change could be very sweeping.

I would encourage you not to pass section 2 or 3 of this bill. I encourage you to simply clarify section 1.

Thank you for your time and consideration.

Very truly yours,



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Enclosures

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