

## St. John's Law Review

---

Volume 48  
Number 3 *Volume 48, March 1974, Number 3*

Article 9

---

August 2012

### The Uniform Residential Landlord and Tenant Act: New Hope for the Beleaguered Tenant?

Irene Castaldo

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

---

#### Recommended Citation

Castaldo, Irene (1974) "The Uniform Residential Landlord and Tenant Act: New Hope for the Beleaguered Tenant?," *St. John's Law Review*. Vol. 48 : No. 3 , Article 9.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol48/iss3/9>

This Note is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact [selbyc@stjohns.edu](mailto:selbyc@stjohns.edu).

## NOTES AND COMMENTS

### THE UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT: NEW HOPE FOR THE BELEAGUERED TENANT?

The Uniform Residential Landlord and Tenant Act (URLTA), introduced by the National Conference of Commissioners on Uniform State Laws,<sup>1</sup> is a newly formulated code regulating the landlord-tenant relationship. It attempts to alleviate the major inconsistencies and inequities of the common law leasing agreement, and "to simplify, clarify, modernize, and revise the law governing the rental of dwelling units and the rights and obligations of landlords and tenants."<sup>2</sup> At present, Arizona has adopted the Act,<sup>3</sup> the Hawaii legislature has passed an earlier draft,<sup>4</sup> and several other states have initiated statutory reforms inspired by principles espoused in the code.<sup>5</sup>

The URLTA is the outgrowth of a tentative model code developed, in 1969, by the American Bar Foundation (ABF) under the sponsorship of the Office of Economic Opportunity.<sup>6</sup> The current Act, like the original ABF code, seeks to regulate residential tenancies not "incidental to another primary purpose."<sup>7</sup> Although the URLTA

---

<sup>1</sup> The Uniform Residential Landlord and Tenant Act [hereinafter cited as URLTA] was approved and recommended for enactment by the Commissioners at their annual conference, Aug. 10, 1972, by a vote of 37 to 2, Virginia and West Virginia dissenting. The subsequent request for American Bar Association (ABA) approval was, however, later withdrawn in February of 1973. See Subcommittee on Leases, *Proposed Uniform Residential Landlord and Tenant Act*, 8 REAL PROP. PROBATE & TRUST J. 104 (1973) [hereinafter cited as Subcommittee]. At its August, 1973 conference, the Commission decided to give the Act further consideration before resubmitting it to the ABA.

<sup>2</sup> URLTA § 1.102(b)(1).

<sup>3</sup> ARIZ. REV. STAT. §§ 33-321, -381, -1301 to -1381 (1973).

<sup>4</sup> HAWAII REV. STAT. § 521 (Supp. 1973).

<sup>5</sup> See Tenants Outlook, July, 1973, at 1, 7.

<sup>6</sup> See Gibbons, *Residential Landlord-Tenant Law: A Survey of Modern Problems with Reference to the Proposed Model Code*, 21 HASTINGS L.J. 369 (1970); Levi, *New Landlord-Tenant Legal Relations — The Model Landlord-Tenant Code*, 3 URBAN LAWYER 592 (1971); Pollock & Kokus, *Model Residential Landlord-Tenant Code — Proposed Procedural Reforms*, 25 U. MIAMI L. REV. 317 (1971); Committee on Leases, *Trends in Landlord-Tenant Law Including Model Code*, 6 REAL PROP. PROBATE & TRUST J. 550 (1971) [hereinafter cited as *Trends*]; Note, *Model Landlord-Tenant Code*, 26 RUTGERS L. REV. 647 (1973).

<sup>7</sup> URLTA § 1.202, Comment at 5-6; see AMERICAN BAR FOUNDATION, MODEL RESIDENTIAL LANDLORD-TENANT CODE § 2-101 & Comment (1969) [hereinafter cited as TENTATIVE MODEL CODE]. Exclusions from the URLTA, unless "created to avoid [its] application," include residency at medical, geriatric, educational, or religious institutions or incidental to counseling or other services; occupancy of a unit under contract of sale; occupancy as a member of a fraternal or social organization in a unit benefitting such group; transient hotel or motel occupancy; occupancy conditioned upon employment on the premises; condominium ownership or occupancy under a proprietary lease; occupancy of premises

treats both sides of the lease agreement, its most potent provisions are those which create non-waivable tenant rights.<sup>8</sup> Thus, the lessee is compensated for his classic lack of bargaining power, and protected from victimization by adhesion contracts.<sup>9</sup> Such widesweeping reform merits critical examination in light of the evolution of the landlord-tenant relationship both at common law and in the New York Legislature.

### BACKGROUND

The lease agreement is part contract and part conveyance. Its history is characterized by a shifting balance between the two, the lease originally being viewed as contractual and later primarily as a conveyance of real property.<sup>10</sup> The common law of landlord and tenant in this country springs from the conveyance stage of agrarian English history.<sup>11</sup> This "ancient conveyance . . . [is] based on a forgotten prem-

---

for primarily agricultural purposes. URLTA § 1.202. This section would apparently disallow application of the URLTA to migrant workers and their land owner employers. *Id.* § 1.202(5). The Subcommittee's report criticizes this section for excluding students residing at institutions, tenants in "company towns," sharecroppers, and tenant farmers. The exclusion of occupancy by a condominium owner from the Act's domain is shown to be superfluous and confusing since, in such cases, there is no landlord-tenant relationship. Subcommittee, *supra* note 1, at 105-06.

<sup>8</sup> URLTA § 403(a)(1).

Rental agreements are often executed on forms provided by landlords, and some contain adhesion clauses the use of which is prohibited by this section.

*Id.* Comment. See note 32 *infra*.

<sup>9</sup> See McElhaney, *Retaliatory Eviction: Landlord, Tenant and Land Reform*, 29 MD. L. REV. 193, 195 (1969). An adhesion contract is one in which there is little or no bargaining due to one party's superior position. Standard forms, as those generally used for leases, have become the symbol and tool of the adhesion contract. See notes 31, 32 *infra*.

<sup>10</sup> R. POWELL, REAL PROPERTY ¶ 221 (1968) [hereinafter cited as POWELL]; *Trends, supra* note 6, at 551. See generally Lesar, *The Landlord-Tenant Relation in Perspective: From Status to Contract and Back in 900 Years?*, 9 KAN. L. REV. 369 (1961) [hereinafter cited as *Perspective*].

Tenancies for terms of years, as compared to tenancies in fee for life, were rare before the year 1200. They functioned as "beneficial leases" primarily as collateral for loans or what today would be termed mortgages. 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 110-13 (2d ed. 1898). Husbandry leases, a later development, were used as contracts for labor on the land. POWELL ¶ 221. By Henry II's day, the tenant for years or "termor" had received the benefits of contract although he had no rights in and to the land itself. 2 POLLOCK & MAITLAND, *supra*, at 36; W.S. HOLDSWORTH, *HISTORICAL INTRODUCTION TO THE LAND LAW* 72 (1927) [hereinafter cited as HOLDSWORTH]. A slow transition between the thirteenth and fifteenth centuries resulted in the tenant's acquiring a "fully protected interest in the land." HOLDSWORTH, *supra*, at 73. The lease had become recognized primarily as a conveyance. Its contract aspects were not denied, but were explained away as "merely . . . the aggregate of the covenants into which the parties may have entered in connection with the making of the conveyance by way of lease." 1 TIEFANY, *THE LAW OF REAL PROPERTY* § 39 (2d ed. 1920).

<sup>11</sup> 6 S. WILLISTON, *CONTRACTS* § 890 (3d ed. 1962); *Perspective, supra* note 10, at 371; QUINN & PHILLIPS, *The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future*, 38 FORDHAM L. REV. 225 (1969).

ise that a tenant is primarily interested in the use of the land . . . ."<sup>12</sup> At common law, responsibility for the condition of the dwelling unit, for better or for worse, was vested entirely in the lessee from the time he took possession. However, with the coming of industry and growth in urbanization, the concept of a lease being the conveyance of an estate became unsuitable to the changing needs of the lessee. Unlike his agrarian predecessor, he was not interested in the land per se, nor was it feasible for him to initially make his leased dwelling habitable, keep it that way with major repairs, and provide for the essential services of heat, water, plumbing and electricity.<sup>13</sup> This transition sparked renewed emphasis on the contractual nature of the lease.<sup>14</sup> What the modern lessee wants, and too often does not obtain, is more than a contract for "shelter."<sup>15</sup> The tenant's need has developed into one for a "well-known package of goods and services."<sup>16</sup>

Today, the lessee's true desire is to obtain habitable living quarters which will be maintained for him as such. However, confronted with housing shortages and urban population growth, he discovers that he is virtually without bargaining power.<sup>17</sup> Nor can he confidently rely on basic contract principles since the lease is still heavily tinged by the "conveyance-property" stage of its development.<sup>18</sup> For example, in the common law of a majority of the states the duty of an aggrieved

<sup>12</sup> Friedman, *The Nature of a Lease in New York*, 33 CORNELL L.Q. 165, 166 (1947) [hereinafter cited as Friedman].

<sup>13</sup> *Perspective*, *supra* note 10, at 373; TENANTATIVE MODEL CODE, *supra* note 7, at 6.

<sup>14</sup> POWELL, *supra* note 10, ¶ 221, See generally Friedman, *supra* note 12; *Perspective*, *supra* note 10, at 372-75; Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO. L.J. 519 (1966) [hereinafter cited as Schoshinski]; *Trends*, *supra* note 6, at 565-67.

<sup>15</sup> *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1074 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

<sup>16</sup> *Id.* See Schoshinski, *supra* note 14, at 536-37.

<sup>17</sup> The low vacancy rate greatly diminishes tenant mobility. The U.S. Bureau of the Census reports that the year-round vacancy rate for sound and deteriorating (as opposed to dilapidated) housing units for rent has been as follows:

Year	Vacancy Rate
1965	2.7%
1969	1.7%
1970	1.7%
1971	1.8%
1972 (1st quarter)	1.8%

U.S. STATISTICAL ABSTRACTS No. 1151 at 685 (1972) (Current Housing Reports ser. H-111).

<sup>18</sup> Thus the background of the lease as a conveyance, built solidly by 1500, has a tremendous foreground, evolved largely since 1800, which is purely contractual in character. The modern law is the synthesis of these two historical factors. Sometimes the background peeks through and controls. Sometimes the foreground is alone considered as determinative. The lawyer's problem is to determine which of these two factors is to control in his specific controversy.

POWELL, *supra* note 10, ¶ 221.

party to mitigate damages "has no application to a contract of leasing as the latter is governed by peculiar and entirely different rules."<sup>19</sup> Therefore if a tenant is in breach of the lease agreement, and there has been no covenant to the contrary, the landlord may bring suit for the entire amount of the rent without any attempt to relet the premises. Furthermore, aside from the tenant's duty to pay rent and his right to quiet enjoyment, the covenants in the common law lease are independent.<sup>20</sup> Thus, even if the landlord breaches a specific lease covenant, the tenant must continue to pay full rent.

The courts' response to this latter difficulty was to expand the judicial definition of quiet enjoyment<sup>21</sup> by creating the fiction of "constructive eviction."<sup>22</sup> Reliance on this defense, however, entails high risks for the lessee who must prove that the "substantial breach" which makes the premises uninhabitable is the fault of the landlord or of his agent. He must also vacate the premises immediately to substantiate his allegations.<sup>23</sup> If justified, the tenant receives a total rent abatement; if adjudicated in the wrong, he is liable on the lease.

The tenant's lease contract does not afford him the safeguards enjoyed by parties to public or commercial contracts for goods and services. The reform experienced in the latter group, since widespread adoption of the Uniform Commercial Code (UCC), has largely by-

<sup>19</sup> Gray v. Kaufman Dairy & Ice Cream Co., 9 App. Div. 115, 119, 41 N.Y.S. 73, 75 (2d Dep't 1896), *rev'd on other grounds*, 162 N.Y. 388, 56 N.E. 903 (1900), *cited in* Sancourt Realty Corp. v. Dowling, 220 App. Div. 660, 222 N.Y.S. 288, 289 (1st Dep't 1927); *Fermaglich v. Warshawiak*, 42 Misc. 2d 1077, 1081, 249 N.Y.S.2d 963, 968 (Rockland County Ct. 1964). *Contra*, *Friedman v. Colonial Oil Co.*, 236 Iowa 140, 18 N.W.2d 196 (1945); *Lawson v. Callaway*, 131 Kan. 789, 293 P. 503 (1930). The latter minority rule "seems to be the preferable rule, since it applies to contracts of leasing the business approach applicable generally to other contracts." POWELL, *supra* note 10, at 107 n.97.

<sup>20</sup> *See, e.g.*, *Baldwin v. Cohen*, 132 App. Div. 87, 88, 116 N.Y.S. 510, 511 (2d Dep't 1909) (duty to repair and obligation to pay are independent); *165 West 46th St. Corp. v. Radio-Keith Orpheum Vaudeville Exch., Inc.*, 157 Misc. 816, 817, 285 N.Y.S. 373, 375 (City Ct. New York County 1935) (real estate tax payments and repairs are independent of the duty to pay rent); *Edwards v. Ward Associates, Inc.*, 367 S.W.2d 390, 393 (Tex. Civ. App. 1963) (rent and repairs are independent).

<sup>21</sup> Quiet enjoyment had original reference only to the title of the property and not to its condition. *Cleves v. Willoughby*, 7 Hill 83, 86 (N.Y. 1845); *Rotter v. Goerlitz*, 16 Daly 484, 485, 12 N.Y.S. 210 (C.P. New York County 1891).

<sup>22</sup> In New York, the first case in which a court allowed a plea of constructive eviction was *Dyett v. Pendleton*, 8 Cow. 727 (N.Y. 1826). Noise and disturbance caused by lewd women whom the lessor brought into the building forced the tenant to move out. The court allowed evidence of the "constructive eviction" basing its decision on a comparison with partial actual eviction. 8 Cow. at 731. *See* *Dooley & Goldberg, A Model Tenants' Remedies Act*, 7 HARV. J. LEGIS. 357, 359 (1970); *Trends, supra* note 4, at 552.

<sup>23</sup> POWELL, *supra* note 10, 225(3); *Barash v. Pennsylvania Terminal Real Estate Corp.*, 26 N.Y.2d 77, 256 N.E.2d 707, 308 N.Y.S.2d 649 (1970), *rev'g* 31 App. Div. 2d 342, 298 N.Y.S.2d 153 (1st Dep't 1969); *Zweighaft v. Remington*, 66 Misc. 2d 261, 320 N.Y.S.2d 151 (N.Y.C. Civ. Ct. 1971). *Contra*, *East Haven Associates, Inc. v. Gurian*, 64 Misc. 2d 276, 313 N.Y.S.2d 927 (N.Y.C. Civ. Ct. 1970).

passed landlord-tenant law. The classic example of this disparity is in the area of the implied warranty of fitness for use, which may be likened to "habitability" in lease contracts.<sup>24</sup> In the past, this warranty found no general acceptance in property law<sup>25</sup> except in the sale of new homes<sup>26</sup> and the lease of furnished apartments.<sup>27</sup> In recent years, courts have been increasingly prone to find the warranty implicit in various types of leases.<sup>28</sup> There has also been some scattered legislation to this effect.<sup>29</sup> Yet, there is still lacking a definitive statement of the obligation owed to a tenant by a landlord inherent in a lease agreement.<sup>30</sup>

Freedom of contract, though often touted as integral to the American system of free enterprise and "bargain shopping,"<sup>31</sup> is without meaning for the buyer in a seller's market. The tenant becomes a party to a contract which he had little part in formulating.<sup>32</sup> The in-

<sup>24</sup> See UNIFORM COMMERCIAL CODE § 2-315.

<sup>25</sup> 1 TIFFANY, *THE LAW OF REAL PROPERTY* § 99 (3d ed. 1939). The common law lease is governed by the principle of caveat emptor with no implied warranty of tenantability or fitness for a particular use. See *Richard Paul Inc. v. Union Improvement Co.*, 59 F. Supp. 252 (D. Del. 1945); *Welson v. Neujan Bldg. Corp.*, 264 N.Y. 303, 190 N.E. 648 (1934); *Franklin v. Brown*, 118 N.Y. 110, 23 N.E. 126 (1889). See generally Lesar, *Landlord and Tenant Reform*, 35 N.Y.U.L. Rev. 1279 (1960).

<sup>26</sup> *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 207 A.2d 314 (1965); *Waggoner v. Midwestern Dev., Inc.*, 83 S.D. 57, 154 N.W.2d 803 (1967).

<sup>27</sup> *Pines v. Persson*, 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

<sup>28</sup> *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970); *Brown v. Southall Realty Co.*, 237 A.2d 834 (D.C. App. Ct. 1968) (housing code violations); *Lemle v. Breedon*, 51 Hawaii 426, 462 P.2d 470 (1969) (rat infestation); *Marini v. Ireland*, 56 N.J. 130, 265 A.2d 526 (1970) (faulty plumbing); *Reste Realty Corp. v. Cooper*, 53 N.J. 444, 251 A.2d 268 (1969) (flooding).

<sup>29</sup> See, e.g., CAL. CIV. CODE §§ 1929, 1941 (West 1954); MONT. REV. CODES ANN. § 42-201 (1947); N.D. REV. CODES § 47-16-12 (1952); 41 OKLA. STAT. ANN. § 31 (1951); S.D. COMP. LAWS § 43-32-8 (1967).

In New York the Multiple Dwelling Law (MDL), applicable to cities of 500,000 or more population, requires the landlord to supply gas or electrical lighting, water, plumbing and drainage, heat, wash room facilities, make repairs, and to keep the premises clean. N.Y. MULT. DWELL. LAW §§ 64, 75, 77, 79, 80 (McKinney 1946), as amended (Supp. 1973); *id.* § 76 (McKinney Supp. 1973); *id.* § 78 (McKinney 1946). The Multiple Residence Law (MRL), which applies to cities of less than 500,000 population and to all towns and villages, and the New York City Administrative Code have similar provisions. N.Y. MULT. RES. LAW §§ 170-71 (McKinney 1952), as amended (Supp. 1973); *id.* §§ 172-74 (McKinney 1952); N.Y. CITY ADMIN. CODE §§ D26-10.01, -11.03, -15.01, -16.01, -17.01, -19.01 (1970).

Where there are building code violations, the MDL allows the tenant himself to bring the complaint if the landlord fails to act upon a order to correct them. N.Y. MULT. DWELL. LAW § 309 (1) (f) (McKinney Supp. 1973).

<sup>30</sup> See generally *Prospective*, *supra* note 10; *Trends*, *supra* note 6.

<sup>31</sup> Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 630 (1943); Meyer, *Contracts of Adhesion and the Doctrine of Fundamental Breach*, 50 U. VA. L. REV. 1178, 1181(1964).

<sup>32</sup> Note the usage of standard form leases: Gilsey Form Lease A185; Form of Apartment Lease Approved by the Committee on Real Property of the Association of the Bar of the City of New York 48; Apartment Lease A261; Dwelling House Lease A54.

tent of the URLTA is to protect the lessee from unconscionable practices by re-interpreting "freedom of contract" in light of "the social importance of the type of contract and the degree of monopoly enjoyed by the author of the standardized contract."<sup>33</sup> What the tenant lacks in bargaining power and legal sophistication in the handling of lease forms, the URLTA would compensate by creating inalienable rights issuing from the status of tenancy.

#### PROVISIONS OF THE ACT

##### *Validity of the Lease*

Among the Act's general provisions is the implied obligation of good faith dealing<sup>34</sup> and the duty of an aggrieved party to mitigate damages.<sup>35</sup> The latter feature serves to minimize the tenant's liability, particularly in cases of abandonment, since it is likely that a landlord using "reasonable efforts" will find substitute tenants. More significantly, however, the URLTA further reflects the UCC's influence by vitiating oppressive lease agreements and settlements, thus allowing the courts to separate the wheat from the chaff to avoid "unconscionable results."<sup>36</sup>

This provision is susceptible to the same criticisms directed towards its counterpart in the UCC. Just what is meant by the amorphous term "unconscionable"? How may contract makers know in advance whether they are creating an enforceable agreement?<sup>37</sup> If analogy to the UCC be extended, the answer may lie in the guidelines developed in interpreting commercial unconscionability. Courts should

<sup>33</sup> Kessler, *supra* note 31, at 642.

<sup>34</sup> URLTA § 1.302. This section is applicable to all other sections and intended to be identical to UCC § 1-203. URLTA § 1.302, Comment.

<sup>35</sup> *Id.* §§ 1.105 (a), 4.203 (c).

<sup>36</sup> URLTA § 1.303 derived from UCC § 2-302 is as follows:

(a) If the court, as a matter of law, finds

(1) a rental agreement or any provision thereof was unconscionable when made, the court may refuse to enforce the agreement, enforce the remainder of the agreement without the unconscionable provision, or limit the application of any unconscionable provision to avoid an unconscionable result; or

(2) a settlement in which a party waives or agrees to forego a claim or right under this Act or under a rental agreement was unconscionable when made, the court may refuse to enforce the settlement, enforce the remainder of the settlement without the unconscionable provision, or limit the application of any unconscionable provision to avoid an unconscionable result.

(b) If unconscionability is put into issue by a party or by the court upon its own motion the parties shall be afforded a reasonable opportunity to present evidence as to the setting, purpose, and effect of the rental agreement or settlement to aid the court in making the determination.

<sup>37</sup> W. D. HAWKLAND, A TRANSACTIONAL GUIDE TO THE U.C.C. § 1.1601 (1964); Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 757 (1969); see Meyer, *supra* note 29; Comment, *Unconscionability—the Code, the Court and the Consumer*, 9 B.C. IND. & COM. L. REV. 367 (1968) [hereinafter cited as *Unconscionability*].

inquire into whether or not the lease terms were unreasonably one-sided, whether the parties had a meaningful choice, and whether they had a "reasonable opportunity to understand the contract."<sup>38</sup> Since no Act could be so comprehensive as to address all possible loopholes which might be built into a lease, the provision against unconscionability has the added advantage of proscribing novel as well as pre-existent abuses.

The assault upon adhesion contracts is further supplemented by section 1.403(a). This section specifically prohibits waiver of tenant remedies under the Act, confession of judgment, agreement to pay landlords' attorneys' fees, and exculpation or indemnification of a landlord for any legal liability he may have.

There are comparable provisions in New York law. For example, a lease provision waiving trial by jury is null and void.<sup>39</sup> A lease requiring a defaulting tenant to pay the landlord's attorney's fees and/or expenses impliedly imposes a corresponding duty on the landlord should the tenant initiate the action.<sup>40</sup> Also, agreements exempting a lessor from liability for negligence are void and unenforceable.<sup>41</sup>

URLTA section 1.403(b), providing punitive damages against a landlord who deliberately includes a prohibited provision in the rental agreement, has been criticized by the American Bar Association's Subcommittee of the Committee on Leases.<sup>42</sup> The Subcommittee feels it is unnecessary to add penalties when such provisions would in any case be unenforceable.<sup>43</sup> However, the interest in protecting a tenant deceived, through his ignorance of the law, into compliance with an unenforceable covenant<sup>44</sup> outweighs the abhorrence to penalties in civil matters. Section 1.403(b)'s suggested forfeiture of three months' rent by a landlord employing banned provisions serves a valid purpose in ensuring compliance with this part of the Act. However, since this

<sup>38</sup> *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449-50. (D.C. Cir. 1965). See *Unconscionability*, *supra* note 37, at 368.

<sup>39</sup> N.Y. REAL PROP. LAW § 259-c (McKinney 1968).

<sup>40</sup> *Id.* § 234 (McKinney Supp. 1973).

<sup>41</sup> N.Y. GEN. OBLIG. LAW § 5-321 (McKinney 1964). Other provisions of New York law operate to protect lessees from unconscionable practices, *Compare* N.Y. GEN. OBLIG. LAW § 5-703(2) (McKinney 1964) (a lease for more than one year must be evidenced by a "contract or some note or memorandum thereof, expressing consideration") with URLTA § 1.402 (c). See also N.Y. GEN. OBLIG. LAW § 5-1103 (McKinney 1964) (a written agreement, signed by the party against whom it is to be enforced is necessary to modify or discharge a lease).

<sup>42</sup> Subcommittee, *supra* note 1, at 108.

<sup>43</sup> *Id.*

<sup>44</sup> See *id.* at 108, 109.



section may conflict with others in the Act, it must be clarified to protect the landlord from undue hardship in its enforcement.<sup>45</sup>

### *Maintenance of Premises by Landlord*

The URLTA follows the trend of court decisions finding implied warranties of habitability in lease agreements<sup>46</sup> by imposing duties on a landlord to maintain and repair leased premises.<sup>47</sup> Thus, the Act finally puts to rest the doctrine of caveat emptor as applied to leases<sup>48</sup> and compensates for the tenant's lack of bargaining power by recognizing "standards of habitability" as a matter of "public police power rather than the contract of the parties or special landlord-tenant legislation."<sup>49</sup>

<sup>45</sup> The Subcommittee criticizes this section for its inconsistency with other parts of the Act.

[T]he consequences of punitive damages may well cause more confusion than the use of the prohibited language. For example, in certain cases the Act allows the landlord to collect reasonable attorney's fees [§§ 4.201(c), 4.302(a)]. Inclusions of the exact language of such sections of the Act in the lease does not appear to be objectionable, but to do so would violate the prohibition against the tenant agreeing in advance to pay landlord's attorney's fees, and thus may not only render the provision unenforceable but also subject the landlord to punitive damages.

<sup>46</sup> *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970); *Brown v. Southall Realty Co.*, 237 A.2d 834 (D.C. App. Ct. 1968); *Lemle v. Breedon*, 51 Hawaii 426, 462 P.2d 470 (1969); *Reste Realty Corp. v. Cooper*, 53 N.J. 444, 251 A.2d 268 (1969); *Morbeth Realty Corp. v. Rosenshine*, 67 Misc. 2d 325, 323 N.Y.S.2d 363 (N.Y.C. Civ. Ct. 1971); *Jackson v. Rivera*, 65 Misc. 2d. 468, 318 N.Y.S.2d 7 (N.Y.C. Civ. Ct. 1971).

<sup>47</sup> URLTA § 2.104 (a). The section reads:

(a) A landlord shall

(1) comply with the requirements of applicable building and housing codes materially affecting health and safety;

(2) make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition;

(3) keep all common areas of the premises in a clean and safe condition;

(4) maintain in good and safe working order and condition all electrical, plumbing, sanitary, heating, ventilating, air-conditioning, and other facilities and appliances, including elevators, supplied or required to be supplied by him;

(5) provide and maintain appropriate receptacles and conveniences for the removal of ashes, garbage, rubbish, and other waste incidental to the occupancy of the dwelling unit and arrange for their removal; and

(6) supply running water and reasonable amounts of hot water at all times and reasonable heat between [October 1] and [May 1] except where the building which contains the dwelling unit is not required by law to be equipped for that purpose, or the dwelling unit is so constructed that heat or hot water is generated by an installation within the exclusive control of the tenant and supplied by a direct public utility connection.

<sup>48</sup> *Reste Realty Corp. v. Cooper*, 53 N.J. 444, 251 A.2d 268 (1969).

A prospective lessee . . . cannot be expected to know [such things as whether] the plumbing or wiring systems are adequate or conform to local codes. Nor should he be expected to hire experts to advise him.

<sup>49</sup> 53 N.J. at 452, 251 A.2d at 272. *Contra*, *Fermaglich v. Warshawiack*, 42 Misc. 2d 1077, 249 N.Y.S.2d 963 (Rockland County Ct. 1964).

However, the Act nowhere imposes the initial duty to supply electrical, sewer and drainage or ventilating facilities, but merely requires the landlord to comply with local building and housing codes. URLTA § 2.104(a) (1).

<sup>49</sup> URLTA § 2.104, Comment. The landlord and tenant in a single family residence are rightly allowed more latitude in a good faith, written transfer of certain duties to the

In New York, the Multiple Dwelling Law (MDL), Multiple Residence Law (MRL), and the New York City Administrative Code impose a duty to repair upon the landlord,<sup>50</sup> while holding the tenant liable for violations "caused by his own wilful act, assistance or negligence or that of any member of his family or household or his guests."<sup>51</sup> Similarly, the URLTA does not afford a tenant a remedy against his landlord where the condition complained of is caused by the "deliberate or negligent act or omission of the tenant, a member of his family, or other person on the premises with his consent."<sup>52</sup> Also like the MDL,<sup>53</sup> the URLTA has provisions making the supply of heat and water a landlord's duty.<sup>54</sup>

Regrettably absent from the URLTA's list of basic landlord obligations, are security provisions for tenants' protection in the common area of their buildings. This omission of a need basic to health and safety certainly cannot be justified in urban, high-crime areas nor would minimal requirements burden landlords in more rural settings.<sup>55</sup> In 1970 the Court of Appeals for the District of Columbia Circuit adopted a more progressive philosophy. In *Kline v. 1500 Massachusetts Avenue Apartment Corp.*,<sup>56</sup> following the dictum of *Javins v. First*

tenant. *Id.* (c). Assumption of specified maintenance tasks may be agreed to by tenants of other than a single family dwelling, provided that:

- (1) it is a written transfer of duties made in good faith and with adequate consideration;
- (2) the duties do not entail corrections of building and housing code violations affecting health and safety;
- (3) the landlord's obligation to other tenants in the building remains the same; and
- (4) performance of such duties by the tenant must be independent of the landlord's obligations under the lease.

*Id.* (d), (e).

<sup>50</sup> N.Y. MULT. DWELL. LAW § 78 (McKinney 1946); N.Y. MULT. RES. LAW § 174 (McKinney 1952); N.Y. CITY ADMIN. CODE § D26-10.01 (1970).

<sup>51</sup> N.Y. MULT. DWELL. LAW § 78 (McKinney 1946); N.Y. MULT. RES. LAW § 174 (McKinney 1952); N.Y. CITY ADMIN. CODE § D26-10.03 (1970) (similar language).

<sup>52</sup> URLTA §§ 4.101(a) (3), 4.103(b).

<sup>53</sup> N.Y. MULT. DWELL. LAW § 75 (McKinney 1946) (water); *id.* § 79 (McKinney Supp. 1973) (heat). See note 29 *supra*.

<sup>54</sup> URLTA § 2.104(a) (6), note 47 *supra*.

<sup>55</sup> For example, lock and buzzer systems on outer doors, and window locks on lower floor levels might be required. The New York City Administrative Code requires peepholes in the entrance doors of certain dwelling units. N.Y. CITY ADMIN. CODE § 26-20.01. That Code further requires mirrors in elevators of multiple dwellings. *Id.* § D26-20.03. Also, every class A multiple dwelling unit must be equipped with a latch, dead bolt, and chain door guard. *Id.* § D26-20.05 (Supp. 1972).

<sup>56</sup> 439 F.2d 477 (D.C. Cir. 1970). See *Smith v. ABC Realty Co.*, 71 Misc.2d 384, 336 N.Y.S.2d 104 (App. T. 1st Dep't 1972) (contract liability not considered, but landlord's failure to repair a window was found not to be the "cause" of an attack on a tenant). But see *Hall v. Fraknoi*, 69 Misc.2d 470, 330 N.Y.S.2d 637 (N.Y.C. Civ. Ct. 1972) (court questions whether or not protection from third persons is a duty existing within the landlord-tenant relationship).

*National Realty Corp.*,<sup>57</sup> "secure windows and doors" became an essential feature of the implied warranty of habitability.<sup>58</sup> A related provision for tenant security also ignored by the URLTA concerns the lessee's installation of his own lock on the door of his unit. The Act should provide this right tempered by the added condition that the landlord be provided a duplicate key for emergency access.<sup>59</sup>

The URLTA prohibits avoidance of the landlord's duty to maintain by an assignment of rents.<sup>60</sup> Hence, a financing institution which accepts such an assignment must either assume the risk of the landlord's failure to maintain or be willing to undertake that duty. Although the comment to this section<sup>61</sup> appears to indicate a continuing and primary obligation on the landlord's part, the Act should be more specific as to the nature of the landlord's liability vis-à-vis that of the assignee.

In making receipt of rents conditioned upon maintenance of premises, the Subcommittee fears an added burden is created which will discourage construction and increase interest rates.<sup>62</sup> This criticism appears well-founded in light of present housing shortages and mandates careful study before legislative enactment.<sup>63</sup>

### *Security Deposits*

The URLTA's sections treating security deposits<sup>64</sup> will unnecessarily leave both the landlord and tenant somewhat dissatisfied. While

<sup>57</sup> 428 F.2d 1071 (D.C. Cir. 1970).

<sup>58</sup> 439 F.2d at 481, *citing* *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, (D.C. Cir. 1970). *Contra*, *Hall v. Fraknoi*, 69 Misc. 2d 470, 330 N.Y.S.2d 637 (N.Y.C. Civ. Ct. 1972).

<sup>59</sup> *E.g.*, N.Y. MULT. DWELL. LAW § 51-c (McKinney Supp. 1973). *See* *Lavanant v. Love-lace*, 71 Misc. 2d 974, 337 N.Y.S.2d 962 (1st Dep't 1972). The court in *Lavanant*, interpreting MDL § 51-c, found the tenant's failure to give the landlord a key to be a breach of a substantial obligation of the tenancy. Judge Markowitz, dissenting, felt that the landlord did not have such an unlimited right, and that in either case, the tenant's behavior did not warrant eviction. 71 Misc. 2d at 974-78, 337 N.Y.S.2d at 963-66.

<sup>60</sup> A rental agreement, assignment, conveyance, trust deed, or security instrument may not permit the receipt of rent free from the obligation to comply with Section 2.104(a).

URLTA § 1.404.

<sup>61</sup> The obligation of the landlord to maintain fit premises in accordance with Section 2.104(a) and the rights and remedies of the tenant under Articles II and IV cannot be defeated or thwarted by the assignment of rents.

URLTA § 1.404 Comment.

<sup>62</sup> Subcommittee, *supra* note 1, at 109.

<sup>63</sup> The dual function of this URLTA section is to protect the tenants' rights and remedies in the event of an assignment of rents and to emphasize further the dependency of covenants under the Act. The Subcommittee in its report compares the approach to the provision of the Uniform Consumer Credit Code (§ 2.404), which invalidates notes held on non-usable products or on those which there has been a breach of warranty. *Id.* However, to make section 1.404 of the URLTA operable without dangerous side effects a governmental subsidy or underwriting of loans to builders and landlords may be necessary.

<sup>64</sup> URLTA §§ 2.101, 2.105.

limiting the amount of the deposit, and its use to payment of itemized damages, the Act imposes no obligation that the monies so held be in trust for tenants or in interest bearing accounts with the interest payable to tenants<sup>65</sup> as New York's General Obligations Law (GOL) requires in housing of six or more family dwelling units.<sup>66</sup>

The Subcommittee's report validly criticizes URLTA section 2.105 which holds a landlord liable for security and pre-paid rent after his conveyance of the premises to a bona fide purchaser.<sup>67</sup> The Subcommittee suggests ending liability for such security with its transfer to the purchaser and notice to the tenant.<sup>68</sup> Standard lease forms currently used in New York provide for an end to such liability with conveyance of the property and transfer of the security money to the grantee.<sup>69</sup> Section 7-105 of the GOL offers the best solution by allowing transfer of the security to the purchaser, its return to the lessee, or its retention by the landlord (the first and third options with notice to the tenant).<sup>70</sup> Furthermore, under New York law, upon transfer of the security deposit to a grantee, assignee or purchaser at a foreclosure sale, the landlord's liability for the money ends.<sup>71</sup>

### *Delivery of Possession*

At common law, a tenant was entitled only to the legal right to possess leased premises. New York's Real Property Law changed this by providing that the lessor shall deliver actual possession of the leased premises at the beginning of the term "in the absence of an express provision to the contrary."<sup>72</sup> However, since enactment of the New York statute, standard form leases have been supplying just that provision to the contrary,<sup>73</sup> thus, allowing lessors to continue to escape liability for failure to transfer actual possession to a new lessee. Section 2.103 of the URLTA gives the tenant a non-waivable right to possession of leased premises at the beginning of the term as per the rental agreement. The landlord's duties to maintain the premises also com-

---

<sup>65</sup> Subcommittee, *supra* note 1, at 109; Thomas, *The Uniform Residential Landlord-Tenant Act*, TENANTS OUTLOOK, Dec., 1972, at 4, 6.

<sup>66</sup> N.Y. GEN. OBLIG. LAW §§ 7-103(2) a, b (McKinney Supp. 1973).

<sup>67</sup> Subcommittee, *supra* note 1, at 113.

<sup>68</sup> *Id.* The Subcommittee further suggests that the landlord be required to obtain a receipt for the security deposit from the new owner and forward this, along with an acknowledgement by the new owner that he assumes the landlord's duties, to the tenant. *Id.*

<sup>69</sup> See, e.g., Blumberg Dwelling House Lease A-54, art. 20; Blumberg Apartment Lease A-261, art. 13; Gilsey Form Lease A-185, art. 15.

<sup>70</sup> N.Y. GEN. OBLIG. LAW §§ 7-105(1) (A)-(C) (McKinney Supp. 1973).

<sup>71</sup> *Id.* § 7-105 (2).

<sup>72</sup> N.Y. REAL PROP. LAW § 223-a (McKinney 1968).

<sup>73</sup> E.g., Gilsey Form Lease A-185, art. 27.

mence at that time.<sup>74</sup> In order to protect the landlord from undue hardship, he is given a right of action against a tenant wrongfully holding over. This section would negate the "escape clause" of the New York statute by shifting the burden of suing the wrongful possessor from the new tenant to the landlord who is, in most cases, in a better position to do so. The new tenant is also entitled to a rent abatement until possession is delivered.<sup>75</sup> He may elect to terminate the lease upon five days written notice to the landlord or, in the alternative, bring an action for possession and actual damages against either the landlord or the wrongful possessor.<sup>76</sup> There is no indication whether suit against one bars suit against the other. The Act should clearly state that the landlord's liability does not abate where the holdover is able to prove rightful possession under a lease or through the exercise of an option to renew. In any case a wrongful holdover is subject to suit by both the landlord and the new tenant.<sup>77</sup>

In a suit for possession under the Act, the plaintiff is allowed a rent abatement and may recover actual damages.<sup>78</sup> Furthermore, his rent will abate if the premises are delivered, but are in a condition breaching the landlord's duty to maintain as delineated in section 2.104.<sup>79</sup> These avenues of redress for less than complete delivery are inconsistent with other URLTA remedies in two respects. First, a new tenant about to take possession who finds that his landlord has not met full maintenance requirements is permitted a rent abatement, while a tenant already in possession and claiming an identical noncompliance must either terminate and/or sue for actual damages and injunctive relief.<sup>80</sup> The Arizona adaptation of this section<sup>81</sup> eliminates this anomaly to the landlord's benefit, and does not permit a rent abatement for failure to deliver possession in a habitable condition. However, since the tenant is deprived of full consideration, it is suggested that the better

---

Landlord shall not be liable for failure to give possession of the premises upon commencement date by reason of the fact that premises are not ready for occupancy or because a prior Tenant or any other person is wrongfully holding over or is in wrongful possession, or for any other reason. The rent shall not commence until possession is given or available, but the term herein shall not be extended.

<sup>74</sup> URLTA § 2.104.

<sup>75</sup> *Id.* § 4.102(a).

<sup>76</sup> *Id.* §§ (a) (1), (a) (2).

<sup>77</sup> *Id.* Comment.

<sup>78</sup> A lower New York court has held that RPL § 223-a will not support recovery of money damages. *Atlantic Bank v. Sutton Associates, Inc.*, 36 App. Div. 2d 943, 321, N.Y.S.2d 380 (1st Dep't 1971).

<sup>79</sup> URLTA § 4.102(a).

<sup>80</sup> *Id.* §4.101.

<sup>81</sup> ARIZ. REV. STAT. § 33-1362(2) (B) (approved May 3, 1973).

solution is to allow him an abatement whether he be an established or newly acquiring lessee.

Secondly, the tenant in possession who is faced with a cessation of essential services may recover the cost of substitute housing.<sup>82</sup> The new tenant however, who is forced to seek temporary substitute housing due to absence of vital services or possession by a holdover is given no express right to do so.<sup>83</sup> To provide for these costs a further subsection to section 4.102(a) might be worded as follows:

(3) In addition to the remedy provided by subdivision (a)(2) of this section a tenant maintaining an action for possession may recover the difference between the rent for the premises denied him and that for comparable substitute housing.<sup>84</sup>

In cases where there can be no delivery of possession because there is a prior lease to another tenant for the same term, the lessee would have the normal remedies for breach of a lease agreement.<sup>85</sup>

### *Tenant Remedies*

The URLTA provides the tenant the remedy of termination when there is a material noncompliance with the rental agreement or when the landlord's noncompliance with section 2.104 "materially affect[s] health and safety," provided the landlord is given notice and fails to take remedial action within the statutory period.<sup>86</sup> In addition, the tenant is given a cause of action for actual damages and injunctive relief from any such noncompliance.<sup>87</sup> Also recognized is the right of

<sup>82</sup> URLTA §§ 4.104(a) (3), (b). The section allows the tenant to stop paying rent on the defective housing and in addition recover the "actual and reasonable cost or fair and reasonable value of the substitute housing not in excess of an amount equal to the periodic rent . . ." *Id.* (a) (3). This places an overly severe burden on the landlord who is being doubly penalized. He has to pay the tenant's rent at the new location in addition to not receiving rent from him.

<sup>83</sup> The Subcommittee criticizes the award of indefinite actual damages to a tenant wrongfully denied possession. Its report finds that, "[a]pplication of contract law principles would seem to indicate a rightful claim for costs of substitute housing." Subcommittee, *supra* note 1, at 111 n.38. The provision for recovery of actual damages (URLTA § 4.102 (2)) is too vague. The lessee who is delayed in taking possession should be explicitly allowed damages for the substitute housing he is forced to seek.

<sup>84</sup> It is suggested that damages rising out of the cost of substitute housing be thus limited to the lessee's loss of bargain. This approach should also be taken in §§ 4.104(a) (3), (b). *See* note 82 *supra*.

<sup>85</sup> URLTA § 1.103 provides that principles of law and equity not displaced by the Act are still in effect.

<sup>86</sup> URLTA § 4.101(a). The Act suggests termination thirty days after the landlord receives written notice of his breach, if the situation is not corrected in fourteen days. If substantially the same breach occurs within 6 months, the Act allows termination with only fourteen days' written notice. *Id.* §§ 4.101(a), (a)(2).

<sup>87</sup> *Id.* § (b).

self-help to correct certain defects.<sup>88</sup> If a landlord wilfully or negligently fails to supply heat, water, electricity, gas or other essential services the tenant may (1) procure substitute services at the landlord's expense, (2) recover damages based upon "the diminution in the fair rental value of the dwelling unit," or (3) procure "reasonable substitute housing" and recover its cost.<sup>89</sup>

Although the Act prohibits any covenant in a rental agreement which would explicitly waive the rights and remedies it provides,<sup>90</sup> there is no clear prohibition of an implied waiver by payment of rent after breach by the landlord.<sup>91</sup> Furthermore, the Act fails to protect a tenant from his own good faith error in claiming a breach by the landlord.<sup>92</sup> The remedies provided should entail less risk to the tenant than that attending a defense of constructive eviction. Nor should the landlord be left vulnerable to unsubstantiated allegations.

A possible solution to this apparent clash of interests lies in the creation of municipal landlord-tenant relations boards with bipartisan membership.<sup>93</sup> The local board's approval would be required before a tenant employed the remedies of termination, self-help, or procurement of substitute housing facilities. In the case of termination of the lease, a tenant's action at the instance of such a board would be subject to judicial review to the same extent applicable to decisions of other state administrative agencies. As a minimum, guidelines for defining "material noncompliance" would have to be provided. In all other tenant actions, application to the board and adherence to its recommendations would establish a tenant's good faith and preclude ter-

<sup>88</sup> *Id.* § 4.103.

<sup>89</sup> *Id.* § 4.104(a) (1)(2)(3), (b).

<sup>90</sup> *Id.* § 1.403(a) (1).

<sup>91</sup> Note that the landlord may waive his right to terminate by accepting rent after he has knowledge of the tenant's breach. *Id.* § 4.204.

<sup>92</sup> See, e.g., TENTATIVE MODEL CODE, *supra* note 7, § 3-216. The Model Code allows the tenant to pay all the rent due as of the date of judgment, to stay proceedings against him.

If the tenant, although wrong, argues in good faith over his liability for rent, public policy and justice require that he be allowed to correct his unintended error. This provision is particularly aimed at the tenant's right to repair and charge expenditures to the landlord when it was the landlord's duty to repair a defect in the dwelling unit. Since this provision would be vitiated by the possibility of forfeiture as the result of a good faith error, this redemption is allowed.

*Id.* Comment.

<sup>93</sup> See, e.g., N.Y.S. 2007 (Jan. 30, 1973). This Bill, introduced by Senator Bernstein, is now before the Judiciary Committee. It would create state and municipal landlord-tenant relations boards which would assist in settling disputes, prevent or remedy unfair housing practices, furnish arbitrators, and investigate controversies. The New York City Housing Court which opened October 1, 1973, could provide similar services through its hearing officers. See Note, *The New York City Civil Housing Court: Consolidation of Old and New Remedies*, 47 ST. JOHN'S L. REV. 483 (1973). [hereinafter cited as *Civil Housing Court*].

mination of his lease notwithstanding a subsequent finding that both tenant and board were in error.

Section 4.103 affords a tenant whose landlord has breached their rental agreement a limited right of self-help. The Act suggests a maximum expenditure of the greater of one hundred dollars (\$100.00) or half the rental payment, again provided that sufficient notice of non-compliance is given and no corrective action is forthcoming.<sup>94</sup> A landlord-tenant relations board could, therefore, also serve to prevent a tenant's underestimating the cost of repairs. Until recently, case law in New York did not favor the tenant who made his own repairs and sought to offset their cost against his rent.<sup>95</sup> Absent a covenant, the landlord's duty to repair was owed to the municipality rather than the tenant and, therefore, the lessee could not enforce the obligation by self-help and setoff.<sup>96</sup> However, recent lower court decisions have allowed tenants their expenditures in correcting housing violations or alleviating major threats to habitability.<sup>97</sup>

Although the tenant is permitted to seek substitute housing,<sup>98</sup> when essential services are wilfully or negligently denied, this may be a futile remedy in light of current housing shortages. However, if he is able to implement this remedy, the Act should limit the cost to be recovered for the housing to his loss of bargain.<sup>99</sup> The further URLTA provision allowing an individual tenant to purchase essential services

---

<sup>94</sup> The Subcommittee criticizes section 4.103 because of the possibility of the tenant's miscalculation of the cost of repairs.

Apparently the limitation is placed not only upon what the tenant can deduct from the rent but also upon what he can do on behalf of the landlord. This would appear to be a reasonable result, for landlords would certainly object to allowing tenants, assuming the \$100 limitation, to perform work costing \$500 and then deducting \$100, for the landlord would justifiably prefer to maintain some control over his property. However, suppose the tenant miscalculates in his estimate of the cost which a repair may entail. Suppose he estimates \$100 and, after completion, finds it cost him \$120. Does he forego his entire remedy or may he still deduct \$100?

Subcommittee, *supra* note 1, at 116.

<sup>95</sup> *Davar Housing Inc. v. Cohen*, 255 App. Div. 445, 7 N.Y.S.2d 911 (1st Dep't 1938), *reargument denied*, 256 App. Div. 806, 9 N.Y.S.2d 897, *aff'd* 280 N.Y. 828, 21 N.E.2d 882 (1939) (violations of MDL §§ 78, 80); *Emigrant Indus. Sav. Bank v. 108 W. 49th St. Corp.*, 255 App. Div. 570, 8 N.Y.S.2d 354 (1st Dep't 1938), *aff'd*, 280 N.Y. 791, 21 N.E.2d 620 (1939) (violations of MDL § 78).

<sup>96</sup> 255 App. Div. at 448, 7 N.Y.S.2d at 914; 255 App. Div. at 574-75, 8 N.Y.S.2d at 359.

<sup>97</sup> *Garcia v. Freeland Realty, Inc.*, 63 Misc. 2d 937, 314 N.Y.S.2d 215 (N.Y.C. Civ. Ct. 1970). The judge here qualified the reimbursement on the facts of the case involving a threat to life and health (tenant's children were eating plaster and paint flakes from defective walls). *Accord*, *Jackson v. Rivera*, 65 Misc. 2d 468, 318 N.Y.S.2d 7 (N.Y.C. Civ. Ct. 1971) (tenant repaired broken toilet); *Morbeth Realty Corp. v. Rosenshine*, 67 Misc. 2d 325, 323 N.Y.S.2d 363 (N.Y.C. Civ. Ct. 1971) (leaking toilet, pipes, broken window frames, and roaches).

<sup>98</sup> URLTA § 4.104(a) (3).

<sup>99</sup> See notes 82 & 84 *supra*.



wrongfully denied him and deduct their cost from his rent is often even less effective than that allowing him to seek substitute housing.<sup>100</sup> The URLTA is deficient in failing to provide a vehicle by which tenants may have repairs made or services restored without resorting to self-help or vacating the premises. A device similar to New York's "article 7-A" proceeding<sup>101</sup> would be a welcome feature. The New York statute provides for a petition by the tenants of multiple dwellings<sup>102</sup> in New York City to have their rents deposited into court for use in remedying "conditions dangerous to life, health, or safety."<sup>103</sup> This special proceeding must be initiated by at least one-third of the tenants of a dwelling after such a condition has existed for at least five days.<sup>104</sup> A similar provision added to the URLTA should also encompass conditions *likely to become* dangerous to life, health, or safety<sup>105</sup> and provide for future rebate of rent paid during the continuance of the defect.<sup>106</sup>

### *Affirmative Defense*

MDL section 302-a<sup>107</sup> provides New York State tenants in cities with populations of 400,000 or more with a defense for actions for rent or possession.<sup>108</sup> The tenant relying on this defense must establish that a "rent impairing violation" exists on official records and that six months have elapsed since the landlord received departmental notice of the violation. The tenant must deposit his rent into court. If he is ultimately successful, he receives a complete rent abatement.

A comparable provision of the URLTA<sup>109</sup> allows a tenant to de-

<sup>100</sup> *Id.* (a)(1). For example, in a multiple dwelling unit the only sources of gas, water, and heat are in most cases exclusively under the landlord's control.

<sup>101</sup> N.Y. REAL PROP. ACTIONS & PROC. LAW §§ 769-82 (McKinney Supp. 1973); see TENTATIVE MODEL CODE, *supra* note 5, § 3-301 (similar to "article 7-A" proceeding with receivership provisions); *Civil Housing Court*, *supra* note 93, at 502-03.

<sup>102</sup> N.Y. REAL PROP. ACTIONS & PROC. LAW § 782 (McKinney Supp. 1973) (applicable to dwellings of six or more apartments).

<sup>103</sup> *Id.* § 769.

<sup>104</sup> *Id.* § 770.

<sup>105</sup> *Id.* § 755(1) (a). Section 755 is a defense available to New York City tenants in a proceeding or action for rent. On proof that a municipal department has given the landlord notice of a violation which amounts to a constructive eviction of the tenant, or which "is, or is likely to become, dangerous to life, health, or safety, . . ." a stay will be granted. *Id.* (1) (a).

<sup>106</sup> In considering commencement of an "article 7-A" proceeding the tenant is on the horns of a dilemma. He has to pay full rent into court while living under unsound conditions. Modifying the statute to allow an abatement would only lessen the amount available for the court to draw upon for the remedying of defects. The answer may lie in adapting the statute so as to award the tenants a rebate in the amount of their damages.

<sup>107</sup> See *City Housing Court*, *supra* note 93, at 502-05.

<sup>108</sup> Note the New York City tenant's added defense, *supra* note 105.

<sup>109</sup> URLTA § 4.105.

fend an action for rent or possession based on non-payment of rent with the allegation of the landlord's noncompliance with either the rental agreement or the Act. The court "may" order the tenant to pay the rent into court and divide it between the parties according to their merit. The tenant may also use this section to counterclaim against the landlord in such actions.<sup>110</sup> The section is more liberal than MDL section 302-a in that it does not require a six month term of what amounts to living in uninhabitable premises. Additionally, the URLTA counterclaim may be brought for a broader range of violations,<sup>111</sup> but the successful tenant will not necessarily receive a total rent abatement as he would under New York's MDL. The tenant with a worthy defense or counterclaim under the URLTA is required to pay for the partial consideration he has received, but no more. The New York requirement that rent be paid into court while the violations subsist has been criticized.<sup>112</sup> However, since the lessee under the URLTA is not supported by an official record of a violation in establishing his defense or counterclaim, requiring him to pay the accrued rent into court serves to minimize the number of capricious claims. The URLTA procedure is more flexible and would result in more expeditious resolution of tenant grievances.

### *Retaliatory Eviction*

In order to prevent a landlord's thwarting tenant complaints or their organization into unions, the URLTA provides sanctions for retaliatory conduct.<sup>113</sup> A tenant's allegation that his landlord's action for possession is being brought in retaliation has been judicially recognized as a valid defense.<sup>114</sup> Following the lead of the Court of Ap-

<sup>110</sup> Section 4.105 is consistent with modern procedure reform in permitting the tenant to file a counterclaim or other appropriate pleading in the summary proceeding to the end that all issues between the parties may be disposed of in one proceeding. It is anticipated that upon filing of the counterclaim the court will enter the order deemed appropriate by him concerning the payment of rent in order to protect the interests of the parties.

*Id.* Comment.

<sup>111</sup> A "rent impairing" violation under MDL § 302-a(2)(a) (McKinney Supp. 1973), is one which "in the opinion of the department, constitutes, or if not promptly corrected, will constitute, a fire hazard or serious threat to life, health or safety of the occupants . . ."

<sup>112</sup> *Amanuensis, Ltd. v. Brown*, 65 Misc. 2d 15, 23-24, 318 N.Y.S.2d 11, 21 (N.Y.C. Civ. Ct. 1971). The *Amanuensis* court found that the section 302-a deposit is required of the tenant

(1) without proof that the amount demanded is accurate, (2) without a time limit on the landlord's right to bring his action, and (3) without necessity, since the validity of the defense may be established by the official records showing the rent impairing violation.

<sup>113</sup> URLTA § 5.101.

<sup>114</sup> *Edwards v. Habib*, 397 F.2d 687 (D.C. Cir. 1968), cert. denied, 393 U.S. 1016 (1969); *Dickhut v. Norton*, 45 Wis. 2d 389, 173 N.W.2d 297 (1970).

peals for the District of Columbia Circuit in *Edwards v. Habib*,<sup>115</sup> lower courts in New York State have allowed this defense. Typically, the landlord's action will be considered retaliatory when it is in response to a tenant's participation in a rent strike,<sup>116</sup> a tenant's outspoken membership in a tenant's association,<sup>117</sup> or when, as in *Edwards*, it results from tenant complaints of housing code violations.<sup>118</sup> New York statutes prohibit retaliatory conduct by a landlord when the tenant asserts his rights under rent control legislation.<sup>119</sup> Anti-retaliation provisions of the URLTA may be found to be too narrow as presently structured. The National Tenants Organization (NTO) advocates a stay of eviction in any case where a tenant could, in "good faith," raise the defense of retaliation.<sup>120</sup> URLTA section 5.101 allows the presumption that the landlord is acting vindictively if the alleged retaliatory action is within one year (suggested period) of the following:

- (1) a tenant complaint to an official agency concerning materially unhealthful and hazardous building and housing code violations;
- (2) a tenant complaint to the landlord concerning the landlord's duty to maintain; or
- (3) the tenant's participation in or organization of a tenant's union.

Additionally, URLTA section 5.101(b) disallows the presumption of retaliation if the tenant's complaint comes after notice of a rent increase or diminution in services. The NTO notes that this may discourage a tenant from bringing a complaint about a building's condition at a time when he feels most justified in doing so.<sup>121</sup> The NTO's criticism has substance in that if the complaint is a valid one, it should

<sup>115</sup> 397 F.2d at 699.

<sup>116</sup> *Portnoy v. Hill*, 57 Misc. 2d 1097, 294 N.Y.S.2d 278 (Binghamton City Ct. 1968).

<sup>117</sup> *Church v. Allen Meadows Apartments*, 69 Misc. 2d 254, 329 N.Y.S.2d 148 (Sup Ct. Onondaga County 1972).

<sup>118</sup> *Markese v. Cooper*, 70 Misc. 2d 478, 333 N.Y.S.2d 63 (Monroe County Ct. 1972).

<sup>119</sup> N.Y. UNCONSOL. LAWS § 8590(2) (McKinney 1961); *id.* 8609(b) (McKinney Supp. 1973).

<sup>120</sup> *Thomas, The Uniform Residential Landlord-Tenant Act*, TENANTS OUTLOOK, Dec., 1972, at 4.

<sup>121</sup> *Id.* Senator Bernstein's bill to establish a landlord-tenant relations act, treats the problem of reprisals by landlords. N.Y.S. 2007 § 465 (Jan. 30, 1973). The bill provides for a rebuttable presumption of retaliatory conduct when a landlord brings an action to evict or makes a "substantial alteration in the terms of such tenancy" within 180 days of a tenant's complaint or involvement with a tenant organization. *Id.* at (3). This section is more realistic than the corresponding section of the URLTA in the time period allowed for the presumption. It also expressly provides that the defense is not limited to the time period. *Id.*

give rise to the presumption irrespective of the circumstances under which it was brought.

### *Fire or Casualty Damage*

The URLTA gives a tenant an option to terminate his lease agreement if fire or casualty damage "substantially" impairs "enjoyment of the dwelling unit."<sup>122</sup> However, no definition of the term "substantially impaired" is given. The Act also affords no protection to landlords who find it economically infeasible to repair, yet are faced with tenants who wish to remain in possession.

Present law in New York<sup>123</sup> allows a tenant to surrender premises which have become uninhabitable due to casualty damage unless there is a lease agreement to the contrary. Standard form leases often include a covenant allowing the lease to continue despite an untenable condition if the landlord decides to rebuild.<sup>124</sup> A viable compromise between the URLTA and the situation in New York might be modeled after the fire clause of the Form Office Lease approved by the Real Property Committee of the New York City Bar Association.<sup>125</sup> The landlord would have the option to terminate the lease agreement if the damage sustained equalled or exceeded 30 per cent of the building's pre-casualty replacement value. The tenant could give the landlord notice of his election to terminate if the damage to the building amounted to 50 per cent or more of that value. The landlord would have a duty to restore the building if the damage came to less than 30 per cent of the replacement value, with the tenant to receive an apportioned rent abatement in any case.<sup>126</sup>

### *The Landlord's Outlook*

The landlord, having been the favored party in the common law lease, would apparently receive few new benefits from the URLTA. While certain obligations are imposed upon the tenant, these are limited mainly to keeping the premises as clean and safe as conditions will permit, not deliberately or negligently damaging them, and re-

---

<sup>122</sup> URLTA § 4.106.

<sup>123</sup> N.Y. REAL PROP. LAW § 227 (McKinney 1968).

<sup>124</sup> Blumberg Dwelling House Lease A-54, art 5 (rent ceases until repair is made); Blumberg Form Apartment Lease Approved by Committee on Real Property, Association of the Bar of the City of New York, art. 7 (an apportionment of rent until damage is repaired); Office Lease, Real Estate Board of New York, art. 9 (express waiver of RPL § 227).

<sup>125</sup> Form of Office Lease Approved by the Real Property Committee of The Association of the Bar of the City of New York A254, art. 8.

<sup>126</sup> See generally I P. ROHAN & M. RESKIN, CONDOMINIUM LAW AND PRACTICE § 12.02 [5][a] (1972).

fraining from disturbing neighbors.<sup>127</sup> The provision restricting the lessee to reasonable use of facilities and appliances<sup>128</sup> would be difficult, if not impossible, to enforce except in very extreme situations. The landlord's remedies for a tenant's material noncompliance with the rental agreement or the Act "materially affecting health and safety," and his failure to pay rent<sup>129</sup> are not novel. Previously, the landlord would merely indicate in the lease itself those breaches which would be deemed to be material.

Further sections "grant" the landlord the right to make reasonable rules and regulations concerning use and occupancy<sup>130</sup> and the right of reasonable access to the premises.<sup>131</sup> In general, those provisions favorable to the landlord merely lend an element of balance to the Act in an attempt to make it more palatable to all parties. The primary thrust of the URLTA remains in providing the tenant a right to demand full consideration for rent paid.

#### CONCLUSION

Undergoing a steady reformation in case law, the landlord-tenant relationship is yet in need of modernization with a definitive statutory restatement. Generally, the URLTA attempts to meet this need. It is unlikely however, that the New York State Legislature will hasten to promote its adoption. The MDL and MRL already provide the tenant with guarantees of essential services and facilities. MDL section 302-a allows a wronged New York State tenant a defense to a suit for non-payment of rent while New York City tenants have the additional RPAPL section 755 defense<sup>132</sup> and an affirmative action in the "article 7-A" proceeding to which there is nothing comparable in the URLTA. Furthermore, the Act's sections 2.101 and 2.105 treating security de-

---

<sup>127</sup> URLTA §§ 3.101(1)-(4), (6), (7).

<sup>128</sup> *Id.* (5).

<sup>129</sup> *Id.* §§ 4.201, 4.202.

<sup>130</sup> *Id.* § 3.102. Such right is specifically reserved in Office Form Lease A-254, Approved by the Real Property Committee of the Bar of the City of New York, art. 5 and the Office Lease, Real Estate Board of New York, art 35. The URLTA requires that the tenant have notice of the rules when he takes possession. If they are adopted after he enters, they must not be a substantial modification of his lease and he must be given notice of their enactment. URLTA § 3.102. The Act also provides that such rules be equitably applied. *Id.* (a)(3).

<sup>131</sup> *Id.* § 3.103. Lease form usually reserve the landlord's right of access to show, inspect, and repair the premises. *See, e.g.*, Blumberg Dwelling House Lease Form A-54, art. 17; Blumberg Apartment Lease Form 48, Approved by the Committee on Real Property, Association of the Bar of the City of New York, art. 18.

Under New York State rent control legislation, and the New York City Administrative Code, the tenant's unreasonable refusal of access is a ground for eviction. N.Y. UNCONSOL. LAWS § 8585(1) (f) (McKinney 1961); N.Y. CITY ADMIN. CODE § D26-10.07 (1970).

<sup>132</sup> *See* note 105 *supra*.

posits are actually inferior to GOL sections 7-103 and 7-105. These factors make the Act's reforms less urgent in New York than elsewhere.

Administration of the URLTA could be greatly assisted if it established a landlord-tenant relations board. This board would arbitrate disputes and prevent their eruption by advising landlords and tenants of their respective rights and obligations. It might also serve a policing function by funneling building and housing code complaints to the appropriate departments.

The URLTA, although in need of refining,<sup>133</sup> does bolster the tenant's position by making his rights inalienable, by outlawing unconscionable clauses, and by requiring that an aggrieved party mitigate his damages. The principle of caveat emptor is rejected and the payment of rent does not merely entitle the lessee to "quiet enjoyment," but is made dependent upon the habitable condition of his premises. The Act should be studied by state legislatures with a view toward their state's particular landlord-tenant problems. It will no doubt raise strong landlord opposition<sup>134</sup> and be pejoratively denominated a compromise by tenant groups.<sup>135</sup> However, its propelling concepts make it worthy of serious consideration. It finally gives the lessee basic rights, which for lack of a bargaining position were long denied.

*Irene Castaldo*

#### POSTSCRIPT

At the February, 1974 meeting of the ABA a revised URLTA was approved with the further understanding that alternative sections to the Act would be forthcoming. The revisions which precipitated ABA approval were in the nature of clarifications. For example, "rent" is redefined in section 1.301(10) to include payments made for the *benefit of* as well as *to* the landlord; the comment to section 2.101 on security deposits now notes that this section is not intended to limit prepaid rent.

Tenants' remedies of section 4.101 for landlord noncompliance are expressly not limited to those provided therein. Tenants are reminded, however, that the duty to mitigate damages delineated in sec-

---

<sup>133</sup> See note 1 *supra*.

<sup>134</sup> TENANT'S OUTLOOK, July, 1973, at 1, 7.

<sup>135</sup> *Id.* at 1. See generally Moskowitz, *The Model Landlord Tenant Code*, 3 URBAN LAWYER 597 (1971). Several of these criticisms of the Model Code would apply to the URLTA. For example, neither the Code nor the present Act address the need for more housing or provide for the creation of tenant's organizations. *Id.* at 598.

tion 1.105(a) applies to them as well as their landlord. The revised comment to section 4.102 states that injunctive relief may also be available in cases of a landlord's failure to deliver possession. Furthermore, section 4.104(a)(1) has been modified to allow tenants deprived of essential services to secure them only by "reasonable and appropriate measures." The comment to this section will include the notation that tenants may act collectively to secure such services but in all events must act with the good faith required by section 1.302.