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Robert F. Williams

Phillip B. Phillips Jr.

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## THE FLORIDA RESIDENTIAL LANDLORD AND TENANT ACT

ROBERT F. WILLIAMS\* and PHILIP B. PHILLIPS, JR.\*\*

### I. INTRODUCTION

The Florida Residential Landlord and Tenant Act (FRLTA)<sup>1</sup> is the culmination of several years of effort to accomplish revision of Florida's landlord-tenant law. It is part of a growing nationwide trend, both judicial<sup>2</sup> and legislative,<sup>3</sup> toward reforming outdated principles governing the landlord-tenant relationship.

Under the joint sponsorship of the American Bar Foundation and the Legal Services Program of the Office of Economic Opportunity, the Model Residential Landlord-Tenant Code was drafted in 1969.<sup>4</sup> The main purpose of this recommendation was to stimulate discussion of the reform of landlord-tenant law through the comprehensive revision,

\* Member, Florida Bar. Reporter for the Florida Law Revision Council's landlord-tenant project, 1972-73. B.A., Florida State University, 1967; J.D., University of Florida, 1969; LL.M., New York University, 1971.

\*\* B.S., Florida State University, 1967; M.B.A., University of Miami, 1971.

1. Fla. Laws 1973, ch. 73-330. For a cursory outline of the major provisions of the Florida Residential Landlord-Tenant Act (hereinafter referred to as FRLTA), see Williams, *Governor Signs Landlord-Tenant Act*, 47 FLA. B.J. 462 (1973).

2. *E.g.*, *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); *Buckner v. Azulai*, 59 Cal. Rptr. 806 (Super. Ct. 1967); *Lemle v. Breeden*, 462 P.2d 470 (Hawaii 1969); *Lund v. MacArthur*, 462 P.2d 482 (Hawaii 1969); *Mease v. Fox*, 200 N.W.2d 791 (Iowa 1972); *Kline v. Burns*, 276 A.2d 248 (N.H. 1971); *Reste Realty Corp. v. Cooper*, 251 A.2d 268 (N.J. 1969); *Pines v. Perssion*, 111 N.W.2d 409 (Wis. 1961).

3. *E.g.*, ARIZ. REV. STAT. tit. 33, ch. 3 (1973); HAWAII REV. STAT. ch. 521 (Supp. 1972); see Blumberg, *Analysis of Recently Enacted Arizona and Washington State Landlord-Tenant Bills*, 7 CLEARINGHOUSE REVIEW 134 (1973); Blumberg, *The Ohio Struggle with the Uniform Residential Landlord and Tenant Act*, 7 CLEARINGHOUSE REVIEW 265 (1973). For a complete list of state statutes, see RESTATEMENT (SECOND) OF PROPERTY, Statutory Note § 5 (Discussion Draft 1973). For an overall view of the entire area, both legislative and judicial, see *Developments in Contemporary Landlord-Tenant Law: An Annotated Bibliography*, 26 VAND. L. REV. 689 (1973).

4. MODEL RESIDENTIAL LANDLORD-TENANT CODE (Tent. Draft 1969) [hereinafter referred to as MODEL CODE]; 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); Note, *The Model Residential Landlord-Tenant Code*, 26 RUTGERS L. REV. 647 (1973); Comment, *Model Residential Landlord-Tenant Code—Proposed Procedural Reforms*, 25 U. MIAMI L. REV. 317 (1971).

or code, approach.<sup>5</sup> In 1972 the National Conference of Commissioners on Uniform State Laws promulgated its Uniform Residential Landlord and Tenant Act (URLTA).<sup>6</sup> It was the subject of several years work by the Conference, and some of the persons responsible for the American Bar Foundation Model Code participated in its preparation.

In April 1972 the Florida Law Revision Council<sup>7</sup> commenced its landlord-tenant project. The Council began with one of the preliminary drafts of the URLTA and during the ensuing eleven months considered seven working drafts before completing in March 1973 its recommended Florida Residential Landlord and Tenant Act.<sup>8</sup> The substantive portions of the FRLTA, most of which are codified as Part II of chapter 83, Florida statutes, are patterned after the URLTA.<sup>9</sup>

The Law Revision Council concluded that there were essentially three defects in Florida's landlord-tenant law.<sup>10</sup> First, there was no codification of the substantive legal principles governing the landlord-tenant relationship.<sup>11</sup> Secondly, Florida law did not differentiate between commercial leases and residential leases. Finally, the Council "found it evident that Florida landlord-tenant law, both substantive and procedural, was weighted on the side of the landlord without corresponding protection for the tenant."<sup>12</sup>

Many of the defects the Council perceived existed because the same laws controlled both commercial and residential leases. The failure to differentiate between commercial and residential leases is part of the rationale of such recent Florida decisions as those upholding exculpa-

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5. See MODEL CODE 1.

6. Subcommittee of the Committee on Leases of the Model Landlord-Tenant Act, *Proposed Uniform Residential Landlord and Tenant Act*, 8 REAL PROPERTY, PROBATE & TRUST J. 104 (1973) (copy of the Uniform Act. [hereinafter referred to as URLTA] is reprinted as an appendix to this article); Note, *The Uniform Residential Landlord and Tenant Act: Reconciling Landlord-Tenant Law with Modern Realities*, 6 IND. L. REV. 741 (1973).

7. FLA. STAT. §§ 13.90-.996 (1971). The Law Revision Council is composed of two senators appointed by the President of the Senate, two representatives appointed by the Speaker of the House, and eight lawyers or law professors appointed by the Governor. The landlord-tenant project was one of many carried out by the Council.

8. FLORIDA LAW REVISION COUNCIL, REPORT AND RECOMMENDATION ON FLORIDA LANDLORD-TENANT LAW (March 1973) [hereinafter referred to as COUNCIL REPORT]. This publication contains the FRLTA as it was proposed by the Council, not as it was signed into law.

9. The main differences lie in the early sections of the URLTA, dealing with the purpose of the Act, legislative intent and service of process, which are excluded from the FRLTA, and the remedies portions, which are greatly simplified in the FRLTA. The FRLTA also makes a substantial departure in wording.

10. COUNCIL REPORT 2.

11. The statutory law on the subject was essentially procedural. See FLA. STAT. ch. 83 (1971).

12. COUNCIL REPORT 3.

tory clauses in residential leases<sup>13</sup> and waivers of statutory notice before eviction.<sup>14</sup> A clear understanding of the unequal bargaining position of the parties<sup>15</sup> and a conviction that the law should develop different rules to govern such unequal relationships might have led to different results in these cases.<sup>16</sup> There is an unmistakable trend in the law toward treating consumer transactions by rules different from those governing commercial transactions,<sup>17</sup> and it was this underlying concept that militated in favor of a landlord-tenant act solely for residential tenancies.

The Law Revision Council's completed recommendation was introduced in the Senate as S. 255.<sup>18</sup> A key decision was made to refer the bill to a newly created standing committee, the Senate Consumer Affairs Committee.<sup>19</sup> From there, the bill was reported favorably to the Senate as a committee substitute<sup>20</sup> and was placed on the Senate calendar.

Strong opposition lobbying by the Florida Association of Housing and Redevelopment Officials subjected the bill to an attempt to remove it from the Senate calendar and refer it to the Senate Commerce Committee<sup>21</sup> where its future would have been uncertain. Sponsors overcame this challenge, however, and kept the bill on the calendar.

In the House of Representatives, the Law Revision Council recommendation was submitted to the Judiciary Committee as a proposed

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13. See *Middleton v. Lomaskin*, 266 So. 2d 678 (Fla. 3d Dist. Ct. App. 1972). Judge Pearson's dissent recognized the unequal bargaining position between landlord and tenant. See Mueller, *Residential Tenants and Their Leases: An Empirical Study*, 69 MICH. L. REV. 247, 270-74 (1970).

14. See *Moskos v. Hand*, 247 So. 2d 795 (Fla. 4th Dist. Ct. App. 1971).

15. See generally Mueller, *Residential Tenants and Their Leases: An Empirical Study*, 69 MICH. L. REV. 247 (1970); Note, *The Form 50 Lease: Judicial Treatment of An Adhesion Contract*, 111 U. PA. L. REV. 1197 (1963).

16. See, e.g., *McCutcheon v. United Homes Corp.*, 486 P.2d 1093 (Wash. 1971) (holding an exculpatory clause in a lease to be void as against public policy).

17. Compare *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972) (upholding confession of judgment clause against a corporation), with *Fuentes v. Shevin*, 407 U.S. 67 (1972) (striking down the Florida and Pennsylvania prejudgment replevin laws). Compare *Kuzmiak v. Brookchester, Inc.*, 111 A.2d 425 (N.J. Super. Ct. 1955) (invalidating exculpatory clause in residential lease), with *Midland Carpet Corp. v. Franklin Assoc. Prop.*, 216 A.2d 231 (N.J. Super. Ct. 1966) (upholding exculpatory clause in commercial lease). See also *W.C. James, Inc. v. Phillips Petroleum Co.*, 347 F. Supp. 381 (D. Colo. 1972).

18. FLA. S. JOUR. 48 (1973).

19. *Id.* Other committees that arguably could have had jurisdiction over the bill were the Senate Judiciary Committee and the Senate Commerce Committee. The membership of these two committees indicated that the landlord-tenant bill would not be favorably received.

20. FLA. S. JOUR. 232 (1973). A committee substitute is created when the committee reports out an entirely new bill instead of the old one with numerous amendments.

21. *Id.* at 233. Conventional practice is that a bill receives an assignment to only one substantive committee.

committee bill. This meant that the bill would be subject to committee scrutiny and amendments before being formally introduced in the House. After considerable work, both in the Law Revision Subcommittee and in the full Judiciary Committee,<sup>22</sup> the bill was introduced as H.R. 1423.<sup>23</sup> This bill would become the vehicle by which the FRLTA would be passed by both houses.

Several days after its formal introduction, H.R. 1423 was brought up on the floor of the House for debate,<sup>24</sup> and, after floor action that spanned parts of two days,<sup>25</sup> the bill was passed as amended.<sup>26</sup> At this point, the sponsors made a decision to abandon S. 255, which was on the Senate calendar and could have been taken up by the Senate. It was decided that H.R. 1423 (now in substantially different form from S. 255) should be sent to the Senate after House passage, considered by the Senate Consumer Affairs Committee (which had already passed on S. 255) and then placed on the Senate calendar.

This strategy avoided giving the House, which had passed H.R. 1423 by a fairly close margin, a second opportunity to consider the entire bill as it would have had if the Senate bill had passed the Senate and been sent to the House. Under the procedure adopted (the key to which was the abandonment of S. 255), the House would only have the opportunity to revisit the landlord-tenant bill later in the session to accept or reject any amendments that the Senate placed on the House product, H.R. 1423. The strategy, although ultimately successful, caused delays and resulted in H.R. 1423 being taken up on the Senate floor the day before the end of the regular session<sup>27</sup> and the Senate amendments being approved by the House on the last day of the session.<sup>28</sup>

After passage of H.R. 1423 by the House, it was sent to the Senate and referred to the Senate Consumer Affairs Committee.<sup>29</sup> It was reported favorably and placed on the Senate calendar.<sup>30</sup> Some three weeks later, in the face of a possibility that the bill would die on

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22. Approximately fourteen hours of hearings and working sessions by the four person subcommittee and approximately two hours of full committee time were devoted to the bill.

23. FLA. H.R. JOUR. 298 (1973).

24. *Id.* at 375.

25. *Id.* at 375-77, 381-83.

26. *Id.* at 383.

27. FLA. S. JOUR. 721 (1973).

28. FLA. H.R. JOUR. 1093-98 (1973).

29. FLA. S. JOUR. 323 (1973). Although one might assume this was an automatic decision because the Senate bill had been referred to Consumer Affairs, it was not. Theoretically, the House bill could have been referred to a different committee. See note 19 *supra*.

30. FLA. S. JOUR. 372 (1973).

the calendar as the session ended, H.R. 1423 was taken up by the Senate and passed easily<sup>31</sup> because of compromise amendments that had been worked out between sponsors and opponents.<sup>32</sup> The House concurred in the Senate amendments,<sup>33</sup> and the bill was sent to the Governor, who signed it on June 25, 1973.

## II. SCOPE AND APPLICATION

The FRLTA is not intended to apply to other than residential tenancies. It places previously existing landlord-tenant statutes in Part I, chapter 83, Florida statutes.<sup>34</sup> Section 83.001 is added, which reads: "This part [Part I] applies to nonresidential tenancies, and all tenancies not governed by Part II of this chapter."<sup>35</sup>

The FRLTA apparently presumes that residential landlords have bargaining strength superior to their prospective tenants.<sup>36</sup> The reason for not extending coverage to nonresidential tenants is ostensibly that they, unlike the residential tenant, are able to negotiate for themselves less burdensome leases. This assumption is defensible only when the nonresidential landlord and prospective tenant are not drastically unequal in bargaining strength. Thus those tenants who are nonresidential and whose bargaining strength is less than their landlords' need protection but do not get it. Of course, the FRLTA is designed specially to apply to residences, but there is no reason why the non-

31. *Id.* at 727.

32. The two most important compromises were to delete the prohibition of retaliatory conduct by the landlord (*see* discussion at pp. 577-79 *infra*) and to include a requirement that the tenant pay accrued rent into court whenever he raises any defenses to an eviction based upon nonpayment of rent. (*See* discussion at pp. 585-89 *infra*).

33. FLA. H.R. JOUR. 1098 (1973). The wisdom of the sponsors' strategy not to allow the House another vote on the full bill is illustrated by the wide margin by which the House accepted the Senate amendments, compared with the narrow margin by which the bill itself passed the House initially.

34. Fla. Laws 1973, ch. 73-330, § 2.

35. Fla. Laws 1973, ch. 73-330, § 1. The statutes are numbered such that Part I contains FLA. STAT. §§ 83.001-251 (1971). Part II is contained in Fla. Laws 1973, ch. 73-330, § 2 (§§ 83.40-63). The following statutes have been renumbered as §§ 83.68, 83.69, 83.70 and 83.71, respectively: § 83.255 (proration of mobile home tenants' fees); § 83.271 (restrictions on mobile home evictions); § 83.281 (regulation of mobile home park owners); § 83.291 (restriction on disposition of mobile homes).

36. This presumption is characteristic of much of the contemporary literature and case law on landlord-tenant relations. Its concern is the indigent tenant, the slum where he resides and the nefarious slumlord. While all this attention is not undeserved, it should occasionally be recalled that indigents comprise but a small portion of all tenants. The plight of the more comfortably situated tenant remains mostly undiscovered, so it is difficult to tell whether the FRLTA is his salvation too.

residential provisions should not be revised to offer at least some of the protections afforded in the residential part.<sup>37</sup>

The FRLTA creates Part II of chapter 83, entitled "Landlord and Tenant: Residential." It applies to "rental of a dwelling unit and a mobile home lot."<sup>38</sup> "Dwelling unit" is defined, in part, as "[a] structure or part of a structure that is rented for use as a home, residence, or sleeping place by one person or by two or more persons who maintain a common household . . ."<sup>39</sup> This inclusive language permits Part II to extend not only to multi-unit and to single-unit dwellings,<sup>40</sup> but to hotels and motels and individual rooms in hotels and motels. Of course, there must be a landlord-tenant and not merely an inn-keeper-guest relationship. It is the relationship of the parties rather than the nature of the structure involved that determines the applicability of the FRLTA.

Residential landlord-tenant relationships are governed by the FRLTA, but it does not apply when residence is "incidental" to the provision of services.<sup>41</sup> For example, residency in a bona fide nursing home is incidental to the provision of nursing or geriatric care.<sup>42</sup> These and similar arrangements are usually contractual between the parties and subject to other forms of state regulation. The question raised by this exclusion is the degree of service that must be provided to make residency incidental. A rule of reason should be developed to exclude only those arrangements in which provision of the service is the primary reason the person resides in the particular place.

The FRLTA also excludes "[o]ccupancy under a contract of sale of a dwelling unit or the property of which it is a part . . ."<sup>43</sup> While

37. For example, the landlord's and tenant's obligation to maintain the premises (§§ 83.51, 83.52, respectively), remedies to enforce the obligation (§§ 83.55-56), and prohibition against exculpatory clauses (§ 83.47 (1) (b)), could be extended to nonresidential tenancies, at least in modified form.

38. Fla. Laws 1973, ch. 73-330, § 2 (§ 83.41).

39. Fla. Laws 1973, ch. 73-330, § 2 (§ 83.43(2)).

40. Not all of Part II applies to single-unit dwellings. The landlord's obligation to maintain the premises is not waivable or alterable, except that it may be "altered or modified in writing with respect to a single family home or duplex." Fla. Laws 1973, ch. 73-330, § 2 (§ 83.51(1)(c)). Also, the landlord's maintenance obligations under § 83.51(2) do not apply to single-family homes or duplexes.

41. Fla. Laws 1973, ch. 73-330, § 2 (§ 83.42), provides:

This part does not apply to the following: (1) Residency or detention in a facility, whether public or private, where residence or detention is incidental to the provisions [*sic*] of medical, geriatric, educational, counseling, religious or similar services.

42. In its comment on this exclusion, the Law Revision Council stated: "It is not intended to apply where residence is incidental to another primary purpose such as residence in a prison, hospital, nursing home, or a dormitory owned and operated by a college or school." COUNCIL REPORT 10-11.

43. Fla. Laws 1973, ch. 73-330, § 2 (§ 83.42 (2)).

this language is probably sufficiently broad to encompass occupancy by a condominium owner, the legislature nevertheless expressly excluded such occupancy.<sup>44</sup> Neither exclusion will apply when a condominium owner leases the unit. Occupancy by the holder of a proprietary lease in a cooperative apartment is also excluded.<sup>45</sup>

The most ambiguous exclusion is that of "[t]ransient occupancy in a hotel, condominium, motel, rooming house, or similar public lodging."<sup>46</sup> "Transient occupancy" is defined as "occupancy where it is the intention of the parties that the occupancy will be temporary."<sup>47</sup> Though this definition is circular, it, together with the transiency exclusion, requires an affirmative showing of intent by the party seeking to establish transiency and thus to avoid the FRLTA. A tenancy of indefinite duration, in which the parties did not contemplate a termination date, would not be "transient."

The transient occupancy exclusion is concerned not with the commercial significance of a structure but rather with the intention of the occupant. The distinction is significant. Hotels, motels, rooming houses and "similar public lodging" whose primary business is to provide accommodations for transients will nevertheless be subject to the FRLTA for those occupants who are not transient. The definition of "dwelling unit" includes "part of a structure . . . rented . . . as a . . . home, residence, or sleeping place."<sup>48</sup> Thus, the FRLTA will apply only to rooms occupied by nontransients. Since the intent is to protect rented residences, it is appropriate that protection extend without regard to the type of structure within which the residence is located.

### III. THE LEASE

#### A. Contract or Conveyance?

The common law considered a lease an instrument of conveyance<sup>49</sup> and not a contract. The landlord-tenant relationship, however, is gov-

44. Fla. Laws 1973, ch. 73-330, § 2 (§ 83.42 (5)). The purchaser of a new condominium unit receives protection in the form of an implied warranty of fitness and merchantability running from the builder-seller, *Gable v. Silver*, 258 So. 2d 11 (Fla. 4th Dist. Ct. App.), *petition for cert. discharged*, 264 So.2d 418 (Fla. 1972), as well as the protection of the condominium statutes, FLA. STAT. ch. 711 (1971), *as amended*, (Supp. 1972).

45. Fla. Laws 1973, ch. 73-330, § 2 (§ 83.42 (4)); see 3 FLORIDA REAL PROPERTY PRACTICE § 37.25 (1966); Note, *Legal Characterization of the Individual Interest in a Cooperative Apartment: Realty or Personalty?*, 73 COLUM. L. REV. 250 (1973).

46. Fla. Laws 1973, ch. 73-330, § 2 (§ 83.42 (3)).

47. Fla. Laws 1973, ch. 73-330, § 2 (§ 83.43 (10)).

48. Fla. Laws 1973, ch. 73-330, § 2 (§ 83.43 (2) (a)).

49. 2 W. BLACKSTONE, COMMENTARIES 317 (5th ed. 1773); 1 H. TIFFANY, REAL PROPERTY § 74 (3d ed. 1939).



erned by many common law and statutory concepts that are superimposed on the provisions of the lease/contract between the parties. This results in the courts not actually treating a lease as a contract, though they are often willing to use the terms interchangeably.<sup>50</sup> For example, the Florida Supreme Court, in a case that did not concern a landlord-tenant relationship, stated:<sup>51</sup> "The general right to contract is subject to the limitation that the agreement must not violate the . . . state statutes or ordinances of a city or town. . . ." Under this doctrine, a landlord who rents a dwelling unit with existing housing code violations would be entering an illegal contract/lease. The requirements of the housing codes do not apply while the unit is vacant,<sup>52</sup> so it is the occupancy contemplated by the contract/lease that triggers the violations. Thus, there is a contract for an illegal purpose, which under contract law would be invalid and unenforceable.<sup>53</sup> Failure of consideration is a similar contract law argument that can be applied to landlord-tenant cases in which the premises are substandard.<sup>54</sup> Neither defense, however, has been allowed by the Florida courts in landlord-tenant cases.<sup>55</sup>

The FRLTA does not use either the term "lease" or "contract." It uses the term "rental agreement," defined as follows:<sup>56</sup> "any agreement, written, or oral if for less than the duration of one year, providing for use and occupancy of premises." The provision limiting oral rental agreements to less than one year was to avoid the possible interpreta-

50. *E.g.*, *Meiselman v. Seminole Drug Corp.*, 260 So. 2d 226, 227 (Fla. 1st Dist. Ct. App.), *cert. denied*, 265 So. 2d 51 (Fla. 1972) ("the lease never came into being as a binding contract between the parties"); *National Hotel, Inc. v. Koretzky*, 96 So. 2d 774, 776 (Fla. 1957) ("a lease agreement, like any other contract, must be construed to give effect to the intention of the parties").

51. *Wechsler v. Novak*, 26 So. 2d 884, 887 (Fla. 1946) (contract to illegally influence public officials). *See also* *H.B. Holding Co. v. Girtman*, 96 So. 2d 781, 783 (Fla. 1957).

52. *See, e.g.*, *MIAMI, FLA., CODE* § 17-25 (1966).

53. *See Shephard v. Lerner*, 6 Cal. Rptr. 433 (1960); *Brown v. Southall Realty Co.*, 237 A.2d 834 (D.C. Ct. App. 1968); *Della Corp. v. Diamond*, 210 A.2d 847 (Del. 1965). *See generally* 2 NATIONAL HOUSING & DEVELOPMENT LAW PROJECT, HANDBOOK ON HOUSING LAW II-13 to II-16 (1970) [hereinafter referred to as HANDBOOK ON HOUSING]. A corollary argument is that the landlord performed illegally when there is no evidence of violations at the inception of the lease. *See Saunders v. First Nat'l Realty Corp.*, 245 A.2d 836 (D.C. Ct. App. 1968), *rev'd*, 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

54. 2 HANDBOOK ON HOUSING II-20 to II-32.

55. *See, e.g.*, *Brownlee v. Sussman*, 238 So. 2d 317, 319 (Fla. 3d Dist. Ct. App. 1970) (court upheld lower court's order striking defense of illegal contract and failure of consideration in a suit for possession based on nonpayment of rent).

56. Fla. Laws 1973, ch. 73-330, § 2 (§ 83.43(7)); *see* URLTA § 1.301(11); MODEL CODE § 1-207. The parol evidence rule should still apply. *See Parkleigh House, Inc. v. Wahl*, 97 So. 2d 714 (Fla. 3d Dist. Ct. App. 1957).

tion of repeal by implication of the Statute of Frauds provisions relating to leases.<sup>57</sup>

It is anticipated that the FRLTA will resolve most of the problems caused by the differentiation between leases and contracts, not because of the new term "rental agreement," but because the substantive provisions adequately express respective duties and remedies. These provisions will make it unnecessary to continue the argument of whether a lease is a contract or a conveyance.

One interesting question remaining is the effect to be given "rules and regulations" of the landlord that are included by reference in the lease. The URLTA contains specific provisions governing landlords' rules and regulations,<sup>58</sup> which the Law Revision Council decided to exclude from its final recommendation. It was thought that rules and regulations could be included under the broad definition of "rental agreement" or that they could be included within the provisions of the rental agreement.<sup>59</sup>

#### *B. Tenant's Avoidance of Unfair Rental Agreement Provisions*

The FRLTA imposes an obligation of good faith on the performance or enforcement of the provisions in a rental agreement or of any duty required by Part II of chapter 83, Florida statutes.<sup>60</sup> "Good faith" is defined as "honesty in fact in the conduct or transaction concerned,"<sup>61</sup> the obligation of good faith and its definition being patterned after the provisions of the Uniform Commercial Code (UCC).<sup>62</sup>

It is somewhat unclear how the obligation of good faith fits into the procedural scheme of landlord-tenant law. A violation of the provision could give rise to a cause of action for damages or for equitable relief, though it is difficult to predict whether good faith could be raised by a tenant as a defense to an action for possession. Presumably it could. The one obvious advantage of the good faith requirement is that it applies to acts of the parties whenever they occur and is not limited

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57. FLA. STAT. §§ 689.01, 725.01 (1971).

58. URLTA § 3.102.

59. For a discussion of the general question of landlords' rules and regulations, see Gibbons, *Residential Landlord-Tenant Law: A Survey of Modern Problems with Reference to the Proposed Model Code*, 21 HASTINGS L. REV. 369, 392-93 (1970).

60. Fla. Laws 1973, ch. 73-330, § 2 (§ 83.44).

61. Fla. Laws 1973, ch. 73-330, § 2 (§ 83.43(8)).

62. The substantive provision appears in FLA. STAT. § 671.203(19) (1971), and the definition is in FLA. STAT. § 671.201(19) (1971). See also Murray, *The Consumer and the Code: A Cross-Sectional View*, 23 U. MIAMI L. REV. 11, 13-16 (1968); Summers, "Good Faith" in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195 (1968); UNIFORM COMMERCIAL CODE § 1-203 (1962).

to circumstances at the time the rental agreement is entered into as is the unconscionability provision.

A much stronger mechanism than the good faith requirement for avoiding the consequences of burdensome provisions in the rental agreement is the FRLTA's section on unconscionability.<sup>63</sup> Once again, the section is patterned closely after the UCC provision.<sup>64</sup> Neither the UCC nor the FRLTA has a definition of the term "unconscionable."<sup>65</sup>

The FRLTA provision, like the UCC, requires a finding of unconscionability "as a matter of law," which must exist at the time the rental agreement was made. A detailed discussion of the doctrine of unconscionability is beyond the scope of this article, but its inclusion in the FRLTA is likely to have a significant impact on the decision of future landlord-tenant cases. For example, even though the FRLTA contains no specific limit on the amount of rent or security deposit a landlord may require, could a court reduce the amount on the ground that it was unconscionable and enforce the reduction through its equitable powers?<sup>66</sup> Decisions under the UCC section will probably have an important influence on the interpretation of the FRLTA section.<sup>67</sup>

There were two types of lease clauses that the Law Revision Council decided were so unfair and against public policy that they should be

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63. Fla. Laws 1973, ch. 73-330, § 2 (§ 83.45), provides:

(1) If the court as a matter of law finds a rental agreement or any provision of a rental agreement to have been unconscionable at the time it was made, the court may refuse to enforce the rental agreement, or it may enforce the remainder of the rental agreement without the unconscionable provision, or it may so limit the application of any unconscionable provision as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the rental agreement or any provision thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to meaning, the relationship of the parties, purpose and effect to aid the court in making the determination.

64. FLA. STAT. ANN. § 672.302, Comment (1971).

65. This was the key criticism in Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967); see Spanogle, *Analyzing Unconscionability Problems*, 117 U. PA. L. REV. 931 (1969).

66. Price alone, without other factors such as fraud or deception, is an emerging concept as a ground for a finding of unconscionability. See *Jones v. Star Credit Corp.*, 298 N.Y.S.2d 264 (Sup. Ct. 1969); Zuckman, *Walker-Thomas Strikes Back: Comment on the Pleading and Proof of Price Unconscionability*, 30 FED. B.J. 308 (1971).

67. See 1 UNIFORM LAWS ANNOTATED, UNIFORM COMMERCIAL CODE § 2-302 (1962); Davenport, *Unconscionability and the Uniform Commercial Code*, 22 U. MIAMI L. REV. 121 (1967). For a discussion of the doctrine of unconscionability as it relates to landlord-tenant law, see *Tawn Seabrook v. Commuter Housing Co.*, 2 CCH POVERTY LAW REP. ¶ 17,144 (N.Y. Cir. Ct. 1972); RESTATEMENT (SECOND) OF PROPERTY § 5.5, comment f (Discussion Draft 1973).

specifically prohibited. These were exculpatory clauses and waivers of statutory procedures and protections.<sup>68</sup> These clauses could have been left for challenge under the unconscionability section, but this was considered not sufficiently certain. An exculpatory clause is a provision in which the tenant agrees to waive a cause of action against the landlord, usually for negligence, that would otherwise arise. These provisions are sometimes held invalid as against public policy,<sup>69</sup> but a Florida court recently upheld an exculpatory clause in a residential lease.<sup>70</sup> The FRLTA provision has the effect of overruling this case. In another recent case,<sup>71</sup> a Florida court upheld a lease clause in which the tenant waived his statutory right<sup>72</sup> to receive notice of nonpayment of rent before eviction. The FRLTA renders void and unenforceable those lease provisions that waive "rights, remedies and requirements" of the Act including those that waive notice requirements. This reflects the view that landlords often are in a superior bargaining position and are able to impose onerous terms on the tenant. The terms are especially onerous when they exculpate a landlord from his negligence or deprive a tenant of notice or other procedural protections.<sup>73</sup>

Obligations under the FRLTA cannot be waived except when there is express statutory authorization to do so. The URLTA contains a penalty provision, which applies even in the absence of actual damages, for the deliberate inclusion of prohibited provisions in rental agreements.<sup>74</sup> The Florida Law Revision Council rejected this approach because of its general philosophical opposition to civil penalties. Consequently, the FRLTA authorizes only the recovery of actual damages resulting from the inclusion of prohibited provisions in rental agreements.<sup>75</sup>

If a rental agreement contains a commonly used provision allowing the landlord to recover attorney's fees if he is required to take action against a tenant, the FRLTA provides that the tenant may be

68. Fla. Laws 1973, ch. 73-330, § 2 (§ 83.47); see URLTA § 1.403; MODEL CODE § 2-406.

69. Cf. W. PROSSER, LAW OF TORTS § 68 (4th ed. 1971).

70. *Middleton v. Lomaskin*, 266 So. 2d 678 (Fla. 3d Dist. Ct. App. 1972); accord, *Crowell v. Housing Authority*, 483 S.W.2d 864 (Tex. Civ. App. 1972), *rev'd*, 495 S.W.2d 887 (Tex. 1973); 4 ST. MARY'S L.J. 432 (1972). *Contra*, N.Y. GEN. OBLIG. LAW § 5-321 (McKinney 1964); *McCutcheon v. United Homes Corp.*, 486 P.2d 1093 (Wash. 1971); 7 WILLAMETTE L.J. 516 (1971). See generally Alexander, *Drafting Exculpatory Clauses in a Landlord-Tenant Relationship*, 21 U. MIAMI L. REV. 676 (1967).

71. *Moskos v. Hand*, 247 So. 2d 795, 796 (Fla. 4th Dist. Ct. App. 1971).

72. FLA. STAT. § 83.20(2) (1971). This provision is carried over in Fla. Laws 1973, ch. 73-330, § 2 (§ 83.56(3)).

73. Nonwaiver provisions exist elsewhere in Florida law. *E.g.*, FLA. STAT. §§ 83.261(3), 520.13, 520.40, 520.75 (1971).

74. URLTA § 1.403(b).

75. Fla. Laws 1973, ch. 73-330, § 2 (§ 83.47(2)).

awarded his attorney's fees if he prevails in an action by or against the landlord.<sup>76</sup> This is based on a similar New York statute,<sup>77</sup> which apparently recognizes that the landlord is generally in a position to insert such a provision while the tenant is not. The URLTA prohibits attorney's fee provisions.<sup>78</sup>

A rule of landlord-tenant law that distinguishes it from contract law is the doctrine of independent covenants.<sup>79</sup> It provides that the covenants to a lease are independent of each other and that a breach by one party of his covenant or obligation does not excuse the other party from continued performance of his obligations. Thus, even if the tenant were able to extract from the landlord an express covenant to keep the dwelling unit in repair, a breach by the landlord would not justify abandonment or nonpayment of rent by the tenant.<sup>80</sup> A Florida court has, however, recently held that the lessor's breach of an express agreement to repair a roof prior to the lessee's taking possession prevented the lease from ever taking effect. The court found that performance of the repairs was a condition precedent.<sup>81</sup>

Careful consideration of the doctrine of independent covenants would lead to the conclusion that, if it operated with regard to both parties, the tenant's nonpayment of rent would merely give the landlord a cause of action for the rent as it accrued.<sup>82</sup> This inconvenience to

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76. Fla. Laws 1973, ch. 73-330, § 2 (§ 83.48). The FRLTA also contains a special attorney's fee provision for security deposit litigation. Fla. Laws 1973, ch. 73-330, § 5 (§ 83.49 (3) (c)).

77. N.Y. REAL PROP. LAW § 234 (McKinney 1968).

78. URLTA § 1.403 (a) (3).

79. *Meredith Mechanic Ass'n v. American Twist-Drill Co.*, 39 A. 330, 331 (N.H. 1893); 2 R. BOYER, *FLORIDA REAL ESTATE TRANSACTIONS* § 35.10, at 1271 nn.6 & 7 (1972) [hereinafter referred to as BOYER]. The United States Supreme Court upheld the effects of the doctrine of independent covenants in *Lindsey v. Normet*, 405 U.S. 56 (1972). See Clough, *The Case Against the Doctrine of Independent Covenants: Reform of Oregon's FED Procedure*, 52 ORE. L. REV. 39 (1972); 41 U. CINN. L. REV. 747 (1972).

80. 2 BOYER § 35.10, at 1271 n.6. This is, however, somewhat inconsistent with the remedy authorized by Florida courts of repair by the tenant and deduction of the costs of such repair from the tenant's rent. Cf. *Rosen v. Needelman*, 83 So. 2d 113, 114 (Fla. 1955); *Masser v. London Operating Co.*, 145 So. 79, 84 (Fla. 1932). This remedy was not included in the FRLTA for the reason that it could be subjected to extensive abuse by tenants and that effective controls could not be drawn. Tenants who now have the benefit of the protections of § 83.51, however, requiring the landlord to maintain the premises, could well argue that they have the right to repair and deduct under the old rules regarding express covenants. This would be based on the cases holding that statutes relating to landlord-tenant relationships are read into, and considered part of, all leases. *Baker v. Clifford-Mathew Inv. Co.*, 128 So. 827, 830 (Fla. 1930).

81. *Meiselman v. Seminole Drug Corp.*, 260 So. 2d 226 (Fla. 1st Dist. Ct. App.), cert. denied, 265 So. 2d 51 (Fla. 1972).

82. Quinn & Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future*, 38 FORDHAM L. REV. 225, 228 n.4 (1969) [herein-

landlord interests was quickly overcome by the inclusion of specific lease provisions authorizing termination of the lease for nonpayment of rent<sup>83</sup> and by the passage of statutes authorizing the landlord to regain possession through a summary procedure upon nonpayment.<sup>84</sup> These statutes abrogated the common law doctrine of independent covenants. Thus the adverse effects of the doctrine have not generally been visited upon landlords.

The situation was somewhat different with regard to the landlord's covenant of quiet enjoyment, which was implied, absent express agreement to the contrary, in all leases.<sup>85</sup> A serious breach of the covenant of quiet enjoyment was termed a "constructive eviction," which permitted the tenant to cease paying rent and recover damages<sup>86</sup> provided he abandoned the premises.<sup>87</sup> The doctrine of independent covenants did not vitiate the tenant's rights with regard to constructive eviction, because the landlord's action was treated as if it were an actual eviction in which the landlord renounced the lease. Without possession, there was a total failure of consideration.<sup>88</sup>

The FRLTA greatly expands the tenant's remedies beyond those given him under the constructive eviction doctrine. Termination of the rental agreement for the landlord's breach<sup>89</sup> and limited rent with-

after referred to as *Quinn & Phillips*]; see *Ardell v. Milner*, 166 So. 2d 714, 716 (Fla. 3d Dist. Ct. App. 1964).

83. For such a provision, see 2 *BOYER* § 35.08, at 1237. Acceleration clauses in leases have been upheld in Florida, but the landlord must deduct the income he derives from re-letting the premises. *Jimmy Hall's Morningside, Inc. v. Blackburn & Peck Enterprises, Inc.*, 235 So. 2d 344 (Fla. 2d Dist. Ct. App. 1970).

84. FLA. STAT. §§ 83.05, 83.20 (2) (1971).

85. "[T]he lessee shall have the quiet and peaceable possession and enjoyment of the leased premises during the continuance of the lease." 2 *BOYER* § 35.09[2], at 1258. See also *McClosky v. Martin*, 56 So. 2d 916, 918 (Fla. 1951); *Hankins v. Smith*, 138 So. 494, 496 (Fla. 1931).

86. 2 *BOYER* § 35.09[2], at 1259 n.16; see *Hankins v. Smith*, 138 So. 494, 495 (Fla. 1931) ("A 'constructive eviction' is an act which, although not amounting to an actual eviction, is done with the express or implied intention, and has the effect, of essentially interfering with the tenant's beneficial enjoyment of the leased premises."); *Commentary, Landlord's Lament: New Tenant Remedies in Florida*, 24 U. FLA. L. REV. 769, 773 n.38 (1972). See also *Berwick Corp. v. Kleinginna Inv. Corp.*, 143 So. 2d 684 (Fla. 3d Dist. Ct. App. 1962).

87. See, e.g., *Richards v. Dodge*, 150 So. 2d 477, 481 (Fla. 2d Dist. Ct. App. 1963). But see *Carner v. Shapiro*, 106 So. 2d 87, 89 (Fla. 2d Dist. Ct. App. 1958).

88. *Quinn & Phillips* 229 n.6.

89. Fla. Laws 1973, ch. 73-330, § 2 (§ 83.56 (1)), provides:

If the landlord materially fails to comply with § 83.51 (1) or material provisions of the rental agreement within seven days after delivery of written notice by the tenant specifying the noncompliance and indicating the intention of the tenant to terminate the rental agreement by reason thereof, the tenant may terminate the rental agreement. If the failure to comply with § 83.51 (1) or material provisions of the rental agreement is due to causes beyond the control of the landlord and the

holding<sup>90</sup> give the tenant far broader remedies than the constructive eviction doctrine. Thus, in circumstances far less serious than would be required to establish a common law constructive eviction, the FRLTA gives the tenant realistic remedies.

The doctrine of independent covenants, along with the statutes allowing the landlord to recover possession for nonpayment of rent, resulted in the rule that payment was the only defense to an action for possession based on nonpayment of rent.<sup>91</sup> This rule was upheld recently by the United States Supreme Court in an Oregon case that challenged it as a deprivation of due process of law.<sup>92</sup> Equitable defenses to eviction could be raised by a separate equity action,<sup>93</sup> or by counterclaim. The timing problems,<sup>94</sup> however, along with the other problems associated with multiple litigation in cases involving small monetary amounts, discouraged the use of these remedies.

In the Law Revision Council's initial stages of discussion, some consideration was given to a single statutory statement that all obligations in rental agreements were to be construed as dependent.<sup>95</sup> This was rejected in favor of the specific delineation of remedies, which has the effect of abolishing the doctrine of independent covenants. For example, the FRLTA provides that a material noncompliance by the landlord with his maintenance obligations under section 83.51 (1) will

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landlord has made and continues to make every reasonable effort to correct the failure to comply, the rental agreement may be terminated, or altered by the parties, as follows:

(a) if the landlord's failure to comply renders the dwelling unit untenantable and the tenant vacates, the tenant shall not be liable for rent during the period the dwelling unit remains uninhabitable;

(b) if the landlord's failure to comply does not render the dwelling unit untenantable and the tenant remains in occupancy, the rent for the period of noncompliance shall be reduced by an amount in proportion to the loss of rental value caused by the noncompliance.

90. Fla. Laws 1973, ch. 73-330, § 2 (§ 83.60 (1)).

91. See *Nevins Drug Co. v. Bunch*, 63 So. 2d 329, 332 (Fla. 1953); *Brownlee v. Sussman*, 238 So. 2d 317 (Fla. 3d Dist. Ct. App. 1970). But see *Avvenire College for Women, Inc. v. G.B.D., Inc.*, 240 So. 2d 191 (Fla. 4th Dist. Ct. App. 1970) (decided two months after *Brownlee* but not citing it). Equitable defenses were excluded, even under *Avvenire*, because of the lack of equitable jurisdiction of the court.

92. *Lindsey v. Normet*, 405 U.S. 56 (1972). For a discussion of this case as it relates to Florida law, see 25 U. FLA. L. REV. 220 (1972).

93. *Rader v. Prather*, 130 So. 15 (Fla. 1930); *Knight v. Global Contact Lens, Inc.*, 220 So. 2d 693 (Fla. 3d Dist. Ct. App. 1969).

94. These suits travel under the Florida Rules of Civil Procedure and the normal court calendars, while evictions normally travel under the summary procedure statute, FLA. STAT. ch. 51 (1971).

95. For an example of such a statutory statement, see MODEL CODE § 2-102 (2).

give the tenant a defense to an action for possession based on nonpayment of rent.<sup>96</sup>

The tenant is also authorized to raise any defense, whether legal or equitable, to an action for possession based on nonpayment of rent.<sup>97</sup> Presumably, the tenant could always raise any defense he had to an action for possession based upon termination of a tenancy at will or at sufferance, breach of lease, or existence of a holdover situation.<sup>98</sup> Finally, the tenant is given the right to terminate the rental agreement for a material noncompliance by the landlord with his maintenance obligations under section 83.51(1) or with material provisions of the rental agreement.<sup>99</sup> The effect of authorizing these tenant actions is to treat the landlord's obligations as dependent, allowing the tenant the option to discontinue performance or to sue for redress.

### C. Common Law Tenancies

The FRLTA does not use the terms "tenancy at will," "periodic tenancy" or "tenancy at sufferance,"<sup>100</sup> but in effect continues the rules of law applicable to all three.<sup>101</sup> Under the FRLTA, contrary to prior Florida law, a tenancy for a specific term of less than one year can be created by oral agreement.<sup>102</sup>

The most important result of retaining these rules of law, even though the terminology is changed, is that the termination of tenancies without specific duration and the refusal to renew expired tenancies can be accomplished by the landlord without any requirement of giving justification or reason. This has been one of the critical deficiencies in the URLTA from the tenant's point of view.<sup>103</sup> The allow-

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96. Fla. Laws 1973, ch. 73-330, § 2 (§ 83.60(1)). Noncompliance with § 83.51(2), as opposed to § 83.51(1), is specifically disallowed as a defense to an action for possession based on nonpayment of rent. Fla. Laws 1973, ch. 73-330, § 2 (§ 83.51(2)(b)). *But see* Fla. Laws 1973, ch. 73-330, § 2 (§ 83.51(4)).

97. Fla. Laws 1973, ch. 73-330, § 2 (§ 83.60(1)). This should put to rest the apparent conflict between *Brownlee* and *Avenire*.

98. The available defenses to such actions were quite limited, and still are under the FRLTA.

99. Fla. Laws 1973, ch. 73-330, § 2 (§ 83.56(1)).

100. 4 J. ADKINS, FLORIDA REAL ESTATE LAW AND PROCEDURE §§ 105.03-.04 (1960).

101. Fla. Laws 1973, ch. 73-330, § 2 (§§ 83.46, 83.57, 83.58). It should be noted that a tenant at sufferance or holdover tenant is not entitled to notice as a condition precedent to the landlord's right to file an action for possession, as is a tenant at will or a tenant whose rental agreement is being terminated for cause.

102. Compare Fla. Laws 1973, ch. 73-330, § 2 (§§ 83.43(7), 83.46(2)), with FLA. STAT. § 83.01 (1971).

103. Thomas, *A Uniform Landlord Tenant Relations Act in 1972*, TENANTS OUTLOOK, May 1972, at 2 ("NTO contends that landlords should only be allowed to terminate tenancies for just cause").



ance of eviction without the requirement of good cause makes retaliatory eviction possible.<sup>104</sup> Eviction without good cause is probably the most critical remaining issue in the development of landlord-tenant law in this country.

The FRLTA contains a provision allowing the landlord to recover double rent for the period a tenant holds over without permission.<sup>105</sup> It has been held, under a similar double rent statute,<sup>106</sup> that the penalty was only applicable upon expiration and not upon termination of the lease,<sup>107</sup> and that such damages were not available when continued possession was based upon "a bona fide claim of right based on reasonable grounds."<sup>108</sup> In order to be recovered, double rent must be demanded in the landlord's complaint.<sup>109</sup>

In a case where the landlord did not sustain damages in an amount equal to double the rent, this section could be construed to impose a penalty, in addition to actual damages, that would not be enforced by a court. This would be analogous to the situation in which the landlord claims the total amount of a security deposit as liquidated damages. The courts allow only the amount of actual damages and hold any excess to be a penalty and not recoverable.<sup>110</sup>

#### D. Landlord's Obligation to Maintain Premises

The FRLTA establishes the landlord's obligation to maintain the residential premises.<sup>111</sup> Florida statutes have never dealt with this is-

104. See discussion at pp. 577-79 *infra*. Interestingly, the 1972 Florida Legislature imposed a requirement of an acceptable reason for evictions from mobile home parks, thus changing hundreds of years of common law. FLA. STAT. § 83.271 (1) (Supp. 1972), *as amended*, Fla. Laws 1973, ch. 73-182, § 1.

105. Fla. Laws 1973, ch. 73-330, § 2 (§ 83.58). See also MODEL CODE § 2-310(3). It has been held that a tenant who holds over as to part of the premises holds over as to all of it. *David Properties, Inc. v. Selk*, 151 So. 2d 334, 338 (Fla. 1st Dist. Ct. App. 1963).

106. FLA. STAT. § 83.06 (1) (1971).

107. *Wagner v. Rice*, 97 So. 2d 267 (Fla. 1957).

108. *Central Fla. Oil Co. v. Blue Flame, Inc.*, 87 So. 2d 812, 814 (Fla. 1956), *relying on* *Painter v. Town of Groveland*, 79 So. 2d 765, 767-68 (Fla. 1955).

109. *Id.*; *accord*, *David Properties, Inc. v. Selk*, 151 So. 2d 334, 339 (Fla. 1st Dist. Ct. App. 1963). See generally Gibbons, *Residential Landlord-Tenant Law: A Survey of Modern Problems with Reference to the Proposed Model Code*, 21 HASTINGS L.J. 369, 397-98 (1970); MODEL CODE § 2-310, Commentary.

110. *Stenor, Inc. v. Lester*, 58 So. 2d 673 (Fla. 1951); Anderson, *Negotiating and Drafting Leases for the Landlord*, 25 U. MIAMI L. REV. 360, 369-371 (1971).

111. Fla. Laws 1973, ch. 73-330, § 2 (§ 83.51), provides:

(1) The landlord at all times during the tenancy shall:

(a) Comply with the requirements of applicable building, housing and health codes; or

(b) where there are no applicable building, housing or health codes, maintain the roofs, windows, screens, doors, floors, steps, porches, exterior walls, foundations,

sue, but the common law rule has been that in the absence of an express covenant to repair, the landlord has no duty to repair defects that were present at the time of letting the premises or that developed later.<sup>112</sup> Thus, the rule of *caveat emptor* applied to landlord-tenant transactions. The landlord's duty to repair, often called an "implied warranty of habitability," has been imposed in a number of jurisdictions by judicial decision.<sup>113</sup> Also, various exceptions to the *caveat emptor* doctrine have been carved out by the courts in special circumstances.<sup>114</sup>

In Florida, an attempt judicially to establish an implied warranty of habitability recently failed.<sup>115</sup> A tenant sought to defend an eviction for nonpayment of rent by raising as an affirmative defense approximately twenty-five violations of the Dade County Minimum Housing Code that had been in existence since the tenant's occupancy. The trial court granted a motion to strike the affirmative defenses. On direct appeal to the Supreme Court of Florida, the lower court was affirmed without opinion.<sup>116</sup> Although somewhat clouded by procedural aspects,<sup>117</sup> the case was an indication that the Florida Supreme Court was not willing to impose judicially an implied warranty of habitability.

The common law rule that the landlord had no duty to repair was based upon the concept that a lease was a conveyance of real property for a term.<sup>118</sup> While Florida courts commonly refer to a lease as a contract, they still apply the old common law principles that derived from the view of a lease as a conveyance.<sup>119</sup> Because the land and not the

and all other structural components in good repair and capable of resisting normal forces and loads, and maintain the plumbing in reasonable working condition; provided however, the landlord shall not be required to maintain a mobile home or other structure owned by the tenant.

(c) The landlord's obligations under this subsection may be altered or modified in writing with respect to a single family home or duplex.

See MODEL CODE § 2-203; URLTA § 2.104.

112. See, e.g., *McKenzie v. Atlantic Manor, Inc.*, 181 So. 2d 554, 555 (Fla. 3d Dist. Ct. App. 1965), *cert. denied*, 192 So. 2d 495 (Fla. 1966); *Easton v. Weir*, 125 So. 2d 115 (Fla. 2d Dist. Ct. App.), *cert. denied*, 129 So. 2d 141 (Fla. 1960).

113. See cases cited in note 2 *supra*. See generally *Levine, The Warranty of Habitability*, 2 CONN. L. REV. 61 (1969).

114. E.g., *Young v. Povich*, 116 A. 26 (Me. 1922) (landlord obligated to make repairs on furnished premises leased for short term); *Ingalls v. Hobbs*, 31 N.E. 286 (Mass. 1892); 1 AMERICAN LAW OF PROPERTY § 3.45 (A. Casner ed. 1952).

115. *Barkley v. Keaton*, No. 71-10598 (Dade County Civ. Ct. Rec., Oct. 28, 1971).

116. *Keaton v. Barkley*, 260 So. 2d 193 (Fla. 1972).

117. There was the problem of whether a breach of an implied warranty of habitability, even if the court were to hold that it existed, could be raised as an affirmative defense in an eviction for nonpayment of rent. See note 91 and accompanying text *supra*.

118. 1 H. TIFFANY, REAL PROPERTY § 74 (3d ed. 1939).

119. See note 49 *supra*.

dwelling was the primary object of the lease, and because bargaining strength lay with the mobile tenant, not imposing a duty to repair on the landlord was understandable in its historical context. It has, however, become inappropriate for contemporary times when the dwelling may be of primary importance.<sup>120</sup>

As a standard for the landlord's performance of his maintenance obligations, the FRLTA requires compliance with applicable building, housing and health codes.<sup>121</sup> The codes are defined as "any law, ordinance, or governmental regulation concerning health, safety, sanitation, fitness for habitation, or the construction, maintenance, operation, occupancy, use or appearance of any dwelling unit . . . ."<sup>122</sup> The most important of these are local housing codes,<sup>123</sup> which establish maintenance standards for housing. Also included are local building and health or sanitation codes, state statutes,<sup>124</sup> and state administrative regulations.<sup>125</sup>

The existence of local housing codes<sup>126</sup> has generally been of little help to a tenant faced with a poorly maintained dwelling unit. These codes are penal, giving to the government the right to prosecute the landlord for failure to comply. They do not give the tenant remedies.<sup>127</sup> The FRLTA also provides that when there are no applicable codes, structural components and plumbing must be maintained in good repair.<sup>128</sup>

In an important compromise, section 83.51 (1) (c) was added on the floor of the House. It provides: "The landlord's obligations under this subsection [83.51 (1)] may be altered or modified in writing with respect to a single family home or duplex."<sup>129</sup> This provision is impor-

120. See Quinn & Phillips, *supra* note 82.

121. Fla. Laws 1973, ch. 73-330, § 2 (§ 83.51 (1) (a)).

122. Fla. Laws 1973, ch. 73-330, § 2 (§ 83.43 (1)).

123. See, e.g., TAMPA, FLA., CODE §§ 48-8 to -16 (1971); WEST PALM BEACH, FLA. CODE ch. 27 (1962). Of course, the provisions of the code are subject to judicial scrutiny. See Safer v. City of Jacksonville, 237 So. 2d 8 (Fla. 1st Dist. Ct. App. 1970); 23 U. FLA. L. REV. 195 (1970).

124. E.g., FLA. STAT. §§ 509.211, 509.221 (1971).

125. E.g., FLA. ADMIN. CODE chs. 7c-1 (particularly § 7c-1.03), 7c-2, 10d-9.

126. It appears there is no currently available analysis of the provisions of local codes in Florida, or an evaluation of their enforcement.

127. See Sax & Hiestand, *Slumlordism as a Tort*, 65 MICH. L. REV. 869, 871 (1967). See also 24 U. FLA. L. REV. 769, 770 (1972).

128. Fla. Laws 1973, ch. 73-330, § 2 (§ 83.51 (1) (b)). The limitation of this paragraph to areas "where there are no applicable building, housing or health codes," was not in the original proposal, and was added in an amendment on the Senate floor. FLA. S. JOUR. 726 (1973). This provision was originally intended to serve as a minimum standard regardless of where the premises were located.

129. Fla. Laws 1973, ch. 73-330, § 2 (§ 83.51 (1) (c)). Sponsors agreed to this in the face of an amendment that would have allowed a written waiver of the landlord's main-

tant because it allows the tenant to waive the landlord's obligation to maintain the dwelling unit. These waivers should be strictly construed against the landlord<sup>130</sup> and, in appropriate circumstances, a tenant who has been required to sign a waiver could argue that it is unenforceable because it is unconscionable<sup>131</sup> or because it is not supported by consideration (*e.g.*, a reduced rent).<sup>132</sup> This provision is not intended in any way to affect the primary obligation of the landlord under the housing codes.<sup>133</sup>

The second portion of the landlord's maintenance obligations is contained in section 83.51 (2), which contains a list of duties in addition to those in section 83.51 (1).<sup>134</sup> This provision can also be waived in writing and does not apply to single-family homes or duplexes. In the event that both subsection 83.51 (1) and subsection 83.51 (2) impose a duty upon the landlord, subsection 83.51 (1) governs.<sup>135</sup> Of course, the landlord is not responsible for maintenance problems caused by the tenant.<sup>136</sup>

### *E. Tenant's Obligation to Maintain Dwelling Unit*

It is a familiar common law doctrine that the tenant has a duty to

tenance obligations with regard to any dwelling unit. FLA. H.R. JOUR. 376 (1973). The compromise amendment was worded differently from § 83.51(1)(c) of the final bill, but it had the same effect. *Id.* at 382. The final language was adopted by the Senate Consumer Affairs Committee. FLA. S. JOUR. 722 (1973).

130. RESTATEMENT (SECOND) OF PROPERTY § 5.5, comment *e*, at 214 (Discussion Draft 1973).

131. See Fla. Laws 1973, ch. 73-330, § 2 (§ 83.45). For a discussion of unconscionability and its application to leases in the absence of statute, see RESTATEMENT (SECOND) OF PROPERTY § 5.5, comment *f*, at 215-16 (Discussion Draft 1973).

132. Separate consideration is required under MODEL CODE § 2-203 (2) (b).

133. *Cf. Lester v. City of St. Petersburg*, 183 So. 2d 589, 591 (Fla. 2d Dist. Ct. App.), *appeal dismissed*, 190 So. 2d 307 (Fla. 1966); *Heinlein v. Dade County*, 33 Fla. Supp. 41, 46 (Dade County Cir. Ct. 1969), *aff'd*, 239 So. 2d 635, 637 (Fla. 3d Dist. Ct. App. 1970).

134. Fla. Laws 1973, ch. 73-330, § 2 (§ 83.51 (2)), provides:

(a) Unless otherwise agreed in writing, in addition to the requirements of subsection (1) of this section, the landlord of a dwelling unit other than a single family home or duplex at all times during the tenancy shall make reasonable provisions for:

- (1) The extermination of rats, mice, roaches, ants, and bedbugs;
- (2) Locks and keys;
- (3) The clean and safe condition of common areas;
- (4) Garbage removal and outside receptacles therefor; and
- (5) Heat during winter, running water, and hot water.

(b) Nothing in this part authorizes the tenant to raise a noncompliance by the landlord with this subsection as a defense to an action for possession under §83.59.

(c) This subsection shall not apply to a mobile home owned by a tenant.

135. Fla. Laws 1973, ch. 73-330, § 2 (§ 83.51 (4)).

136. Fla. Laws 1973, ch. 73-330, § 2 (§ 83.51 (5)).

protect the premises from waste.<sup>137</sup> Waste has been defined as "any act or omission of duty by a tenant of land which does a lasting injury to the freehold, tends to the permanent loss of the owner of the fee, or to destroy or lessen the value of an inheritance, or to destroy the identity of the property, or impair the evidence of title."<sup>138</sup> The doctrine imposes a relatively insubstantial duty on a tenant. Its main thrust is to prevent actual destruction of the premises' structural components. Consequently, the tenant's duty is customarily increased through the use of lease provisions. For example, the Model Apartment Lease imposes extensive duties of care on the tenant.<sup>139</sup> But in the absence of an express agreement, the doctrine of waste is the landlord's only protection.

The FRLTA provides for the "[t]enant's obligation to maintain [the] dwelling unit."<sup>140</sup> The enumerated obligations conform to the

137. See, e.g., 1 H. TIFFANY, *THE LAW OF LANDLORD AND TENANT* § 109 (1910). For a thorough discussion of the doctrine of waste, including its historical origin, see Comment, *Periodic Tenant's Repair Obligation in Absence of Covenant*, 41 MARQ. L. REV. 58 (1967). See also Annots., 22 A.L.R.3d 521 (1968); 80 A.L.R.2d 983 (1961); 20 A.L.R.2d 1331 (1951); 10 A.L.R.2d 1012 (1950); 45 A.L.R. 12 (1926).

138. 3A G. THOMPSON, *REAL PROPERTY* § 1270 (repl. 1959). See also 2 BOYER § 35.03[5], at 1216. *Stephenson v. National Bank*, 109 So. 424 (Fla. 1926), remains the Florida authority on waste. There the plaintiff sought to enjoin the defendant from making alterations in the leased building by constructing partitions on the interior and making some large openings in the exterior walls. Applying the common law rule, the court said "any alterations of the buildings on leased premises by a tenant" constitute waste. *Id.* at 426. This was true even if the alteration was beneficial to the premises.

139. See, e.g., *Standard Form of Apartment Lease Approved by the Association of the Bar of the City of New York, Model Apartment Lease*, found in C. BERGER, *LAND OWNERSHIP AND USE* 294 (1968). This provides a set of tenant obligations such as compliance with local codes and landlord rules, and repairing damage caused by the tenant. Terms of the lease imposing a duty upon a tenant will of course vary according to the tenant's bargaining power and the imagination of the landlord's counsel. A landlord may also incorporate by reference in the lease a set of rules designed to supersede the doctrine of waste. See Gibbons, *Residential Landlord-Tenant Law: A Survey of Modern Problems with Reference to the Proposed Model Code*, 21 HASTINGS L.J. 369, 392 (1970); cf. MODEL CODE §§ 2-303, 2-311.

140. Fla. Laws 1973, ch. 73-330, § 2 (§ 83.52), provides:

Tenant's obligation to maintain dwelling unit.

The tenant at all times during the tenancy shall:

- (1) comply with all obligations imposed upon tenants by applicable provisions of building, housing and health codes;
- (2) keep that part of the premises which he occupies and uses clean and sanitary;
- (3) remove from his dwelling unit all garbage in a clean and sanitary manner;
- (4) keep all plumbing fixtures in the dwelling unit or used by the tenant clean and sanitary, and in repair;
- (5) use and operate in a reasonable manner all electrical, plumbing, sanitary, heating, ventilating, air-conditioning and other facilities and appliances, including elevators;
- (6) not destroy, deface, damage, impair or remove any part of the premises or

language of many modern leases and give the landlord more protection than the common law doctrine of waste. Thus the FRLTA specifies a tenant's minimum obligation, which can be increased by the rental agreement. The tenant's maintenance obligations may not be waived.<sup>141</sup>

Tenants are required to "comply with all obligations imposed upon tenants by applicable provisions of building, housing and health codes . . . ."<sup>142</sup> The impact of this provision is diminished by the absence of building and housing codes in many municipalities and counties of the state. A statewide health code could be promulgated to avoid the problems arising from the failure of some local governments to establish health standards.<sup>143</sup> Municipalities could, however, enact local health regulations not inconsistent with the state scheme.<sup>144</sup>

At first glance it may appear that requiring the tenant to comply with building, housing and health codes is a Draconian measure. But landlords and tenants have always been subject to these codes, though strict enforcement has been seldom observed.<sup>145</sup> There has not always been, however, a statutory cause of action by one party against the other for noncompliance with the codes. Enforcement formerly was left to a "building official"<sup>146</sup> or "rehabilitation officer."<sup>147</sup> The FRLTA incorporates these codes into the lease and makes their breach actionable by the parties to the lease.

Another of the tenant's obligations is to "keep all plumbing fixtures in the dwelling unit or used by the tenant clean and sanitary, *and in*

property therein belonging to the landlord, nor permit any person to do so; and (7) conduct himself and require other persons on the premises with his consent to conduct themselves in a manner that does not unreasonably disturb his neighbors or constitute a breach of the peace.

See also MODEL CODE §§ 2-303, 2-304; URLTA §§ 3.101, 4.202.

141. Fla. Laws 1973, ch. 73-330, § 2 (§ 83.47 (1) (a)) (any provision that purports to waive or preclude the rights, remedies or requirements set forth is void).

142. Fla. Laws 1973, ch. 73-330, § 2 (§ 83.52 (1)).

143. See FLA. STAT. § 381.031 (1971) (authorizing the Division of Health of the Department of Health and Rehabilitative Services to promulgate and enforce health regulations).

144. FLA. STAT. § 381.101 (1971).

145. On the general subject of housing codes and their enforcement, see Bross, *Law Reform Man Meets the Slumlord: Interactions of New Remedies and Old Buildings in Housing Code Enforcement*, 3 URBAN LAWYER 609 (1971); Castrataro, *Housing Code Enforcement: A Century of Failure in New York City*, 14 N.Y.L.F. 60 (1968); Grad, *New Sanctions and Remedies in Housing Code Enforcement*, 3 URBAN LAWYER 577 (1971); Gribetz, *Housing Code Enforcement in 1970—An Overview*, 3 URBAN LAWYER 525 (1971); Gribetz & Grad, *Housing Code Enforcement: Sanctions and Remedies*, 66 COLUM. L. REV. 1254 (1966); Note, *Enforcement of Municipal Housing Codes*, 78 HARV. L. REV. 801 (1965); Comment, *The Enforcement of the New Orleans Housing Code—An Analysis of Present Problems and Suggestions for Improvement*, 42 TUL. L. REV. 604 (1968).

146. WEST PALM BEACH, FLA., CODE § 27-16 (1962).

147. TAMPA, FLA., CODE § 48-14 (1971).

*repair.*"<sup>148</sup> The italicized words present a conflict of the tenant's obligations with those of the landlord. The landlord is required to "[c]omply with the requirements of applicable building, housing and health codes."<sup>149</sup> For example, the city of West Palm Beach requires in its housing code that an owner lease no dwelling unless certain minimum standards are met.<sup>150</sup> One of the enumerated standards is that "[e]very supplied plumbing fixture and water and waste pipe shall be properly installed and maintained in sanitary working condition."<sup>151</sup> If an area has no applicable code, the FRLTA supplies the semblance of a minimum housing code for the protection of tenants, at least for structural components. It requires the landlord to "maintain the plumbing in reasonable working condition."<sup>152</sup>

The dilemma is manifest. When the plumbing malfunctions, whose duty is it to make repairs? One possible construction of the statute is that the words "keep all plumbing fixtures . . . in repair" simply require the tenant to give reasonable notice to the landlord of the malfunction, enabling the landlord at his cost to make the actual repair. This interpretation is consistent with the overall scheme of the statute's imposing on the landlord a duty to maintain structural components in good repair. Tenants' duties, on the other hand, require only the reasonable maintenance and operation of facilities. Thus it is unlikely that the legislature intended to impose on the tenant the cost of plumbing repairs. Absent this construction, the three words "and in repair" must be dismissed as a carelessly enacted amendment to H.R. 1423. The bill as drafted by the Law Revision Council and introduced in the House of Representatives did not bear this language.<sup>153</sup> It came as an amendment offered on the Senate floor, adopted by the Senate<sup>154</sup> and concurred in by the House.<sup>155</sup> It now remains for the legislature to strike these unneeded words.

Under the FRLTA, the tenant has an obligation to "conduct himself and require other persons on the premises with his consent to conduct themselves in a manner that does not unreasonably disturb his neighbors or constitute a breach of the peace."<sup>156</sup> Tenants are accorded by the common law an implied covenant of quiet enjoyment that pro-

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148. Fla. Laws 1973, ch. 73-330, § 2 (§ 83.52(4)) (emphasis added).

149. Fla. Laws 1973, ch. 73-330, § 2 (§ 83.51(1)(a)).

150. WEST PALM BEACH, FLA., CODE § 27-4 (1962).

151. WEST PALM BEACH, FLA., CODE § 27-13(7) (1962).

152. Fla. Laws 1973, ch. 73-330, § 2 (§ 83.51(1)(b)).

153. COUNCIL REPORT 18.

154. FLA. S. JOUR. 726 (1973).

155. FLA. H.R. JOUR. 1098 (1973).

156. Fla. Laws 1973, ch. 73-330, § 2 (§ 83.52(7)).

hibits a landlord from unreasonably disturbing them.<sup>157</sup> Although there are exceptions, this covenant is not usually extended to hold the landlord in breach for acts of other tenants or strangers on the premises.<sup>158</sup> A tenant's remedy against noisy fellow tenants is usually limited to the difficult suit for nuisance or to criminal complaint. Landlords typically regulate tenant conduct by the use of rules incorporated by reference into the lease or by provisions in the lease itself.

The FRLTA establishes a statutory duty for each tenant with respect to every other tenant to refrain from unreasonable disturbances. Presumably a breach of this duty would give rise to a cause of action by the disturbed tenant. What constitutes an unreasonable disturbance will be one of those difficult questions of fact with which the law is so accustomed to dealing. Overly sensitive tenants will hopefully be deterred from frivolous complaint by the cost and bother of litigation and by the chance that their offender's conduct has not been an "unreasonable" disturbance. Tenants under the FRLTA owe a duty of reasonable conduct to landlords also. Consequently, section 83.52 (7) will complement apartment rules and supply a statutory minimum code of conduct.

#### *F. Retaliatory Conduct by the Landlord*

The term "retaliatory eviction" was unknown at common law and is only of recent origin in its application to landlord-tenant law. It is the practice by a landlord of evicting—or threatening to evict—a tenant who has reported housing or sanitary code violations to the public authorities or who has engaged in activities thought by the landlord to be inimical to him. The term is new in landlord-tenant law only because in the past such evictions were not challenged.<sup>159</sup>

The Florida Law Revision Council's recommendation contained a strong provision prohibiting retaliatory conduct by the landlord.<sup>160</sup> The provision gave an evidentiary assist to the tenant by providing that a landlord's attempted eviction, decrease in services or increase in rent, within six months of a tenant's complaint of a code violation or certain

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157. The covenant of quiet enjoyment was originally an express covenant of a lease. Courts soon began to hold that in the absence of an express covenant, every lease has an implied covenant of reasonable and quiet enjoyment. *See, e.g., McCloskey v. Martin*, 56 So. 2d 916 (Fla. 1951); *Hankins v. Smith*, 138 So. 494 (Fla. 1931).

158. For a thorough discussion of the common law liability of landlords and tenants for disturbance, see Lloyd, *The Disturbed Tenant—A Phase of Constructive Eviction*, 79 U. PA. L. REV. 707 (1931).

159. 1 CCH POVERTY LAW REP. ¶ 2325, at 3331 (1972).

160. COUNCIL REPORT 27-28. The Law Revision Council's proposal was quite similar to the provisions in URLTA § 5.101 and MODEL CODE § 2-407.



other specified activities, raised a rebuttable presumption of the landlord's retaliatory intent.<sup>161</sup> Without the rebuttable presumption, the tenant would be in the almost impossible position of having to prove the landlord's retaliatory intent. The effect of the presumption was merely to require the landlord to come forward with evidence of some bona fide reason for his action. Without the rebuttable presumption clause, the prohibition of retaliatory conduct by the landlord was practically unenforceable.

The House Judiciary Committee, in its deliberations prior to the formal introduction of H.R. 1423, removed the rebuttable presumption clause.<sup>162</sup> Consequently, the retaliatory conduct section was not debated on the House floor when H.R. 1423 was passed. In the Senate, however, in one of the compromises made by sponsors in the final days of the session, the entire retaliatory conduct section was removed from the bill on the floor of the Senate.<sup>163</sup> Thus the FRLTA as enacted has no provision governing retaliatory conduct by the landlord.

The leading case in the country on retaliatory eviction is *Edwards v. Habib*.<sup>164</sup> There, the United States Court of Appeals for the District of Columbia Circuit held that retaliatory evictions are contrary to the intent of the District of Columbia Housing and Sanitary Codes. Although the court discussed the constitutional issues extensively, it did not find it necessary to render a ruling on constitutional grounds.<sup>165</sup>

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161. COUNCIL REPORT 27-28. Massachusetts has had a similar provision since 1969. MASS. GEN. LAWS ANN. ch. 239, § 2A (Supp. 1973). In *Appelstein v. Quinn*, 281 N.E.2d 228 (Mass. 1972), the court held that the presumption was rebuttable and has effect only until evidence to the contrary appears. *Accord*, *Silberg v. Lipscomb*, 285 A.2d 86 (N.J. Dist. Ct. 1971). See also *Schweiger v. Superior Court*, 476 P.2d 97, 90 Cal. Rptr. 729 (1970); CAL. CIV. CODE § 1942.5 (a) (West Supp. 1973).

162. See Fla. H.R. 1423 § 2 (§ 83.64 (2)) (1973).

163. FLA. S. JOUR. 726 (1973).

164. 397 F.2d 687 (D.C. Cir. 1968), cert. denied, 393 U.S. 1016 (1969). For a list of comments on *Edwards v. Habib*, see Note, *Landlord and Tenant—Burden of Proof Required to Establish Defense of Retaliatory Eviction*, 1971 WIS. L. REV. 939, 943 n.29.

165. 397 F.2d at 699. The constitutional issues involved in retaliatory eviction are the right to petition the government for redress of grievances and the right to speak and associate freely. The latter comes into play when the landlord seeks to retaliate against a tenant for participation in a tenant organization. The original Law Revision Council proposal covered this situation. COUNCIL REPORT 27-28. A discussion of tenant organizations and their role in advancing landlord-tenant law is beyond the scope of this article. For a complete discussion, see 1 CCH POVERTY LAW REP. ¶ 2250 (1972); 2 HANDBOOK ON HOUSING ch. 1; Moskowitz & Honigsberg, *The Tenant Union—Landlord Relations Act: A Proposal*, 58 GEO. L.J. 1013 (1970); Note, *Tenant Unions: Their Law and Operation in the State and Nation*, 23 U. FLA. L. REV. 79 (1970); Note, *Tenant Unions: Collective Bargaining and the Low-Income Tenant*, 77 YALE L.J. 1368 (1968).

The United States District Court for the Southern District of New York declared retaliatory eviction unconstitutional. *Hosey v. Club Van Cortlandt*, 299 F. Supp. 501 (S.D.N.Y. 1969). But see *Aluli v. Trusdell*, 508 P.2d 1217 (Hawaii 1973). The concept has recently been expanded by the District of Columbia Circuit to prohibit termination of

In Florida, it is unclear whether retaliatory eviction will be tolerated. Legislation prohibiting such evictions has been introduced in prior years but none has ever been considered on the floor of either house.<sup>166</sup> The only Florida appellate case to address the issue, *Wilkins v. Tebbetts*,<sup>167</sup> sheds little light on retaliatory eviction in Florida. It affirmed a lower court judgment on the pleadings for the landlord on the ground that the tenant, who had raised retaliatory eviction as a defense, had not pleaded or attached to the answer the provision of the fire code he claimed the landlord had violated. In 1971 the United States District Court for the Southern District of Florida issued a permanent injunction against a landlord who threatened to evict mobile home tenants for reporting sanitary and zoning violations.<sup>168</sup> While there have been some positive indications that proof of the landlord's retaliatory intent would be a good defense to an eviction action, the issue is far from settled.<sup>169</sup>

### G. Security Deposits

The FRLTA significantly amends the existing statutory provisions relating to security deposits.<sup>170</sup> Probably the most significant change is that advanced rent, in addition to security deposits, is now covered by the law.<sup>171</sup> This change imposes the same fiduciary responsibilities on a landlord for advanced rent as had been previously required for security deposits. Another significant change is that now if one of the parties institutes litigation relating to the security deposit and prevails, he is entitled to receive his attorney's fees.<sup>172</sup>

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a tenancy at will when the tenant has made successful exercise of his rent-withholding rights. *Robinson v. Diamond Housing Corp.*, 463 F.2d 853 (D.C. Cir. 1972); see 44 U. COLO. L. REV. 463 (1973). See also *Cooks v. Fowler*, 437 F.2d 669, 673 (D.C. Cir. 1971); *Blanks v. Fowler*, 437 F.2d 677 (D.C. Cir. 1970).

166. Fla. S. 973, Fla. H.R. 4310 (1970) (both died in committee); Fla. S. 598 (1971) (killed in committee); Fla. H.R. 580 (1971) (died in committee); Fla. S. 1388 (1971) (killed in committee); Fla. S. 1046, Fla. H.R. 3933 (1972) (both died in committee).

167. 216 So. 2d 477 (Fla. 3d Dist. Ct. App. 1968). For an analogous case dealing with retaliation against employees for filing unfair labor practice disputes, see *Nash v. Florida Indus. Comm'n*, 389 U.S. 235 (1967) (holding that retaliation frustrates the legislative purpose).

168. *Bowles v. Blue Lake Dev. Corp.*, 1 CCH POVERTY LAW REP. ¶ 2325.51 (S.D. Fla. 1971).

169. For a detailed discussion of the case and statutory law relating to retaliatory conduct, see 1 CCH POVERTY LAW REP. ¶ 2325 (1972); 2 HANDBOOK ON HOUSING ch. 3 (1970); Annot., 40 A.L.R.3d 753 (1971).

170. Fla. Laws 1973, ch. 73-330, § 5 (amends former FLA. STAT. § 83.261 (1971) and renumbers it as § 83.49).

171. Fla. Laws 1973, ch. 73-330, § 5 (§ 83.49(4)) (removed advance rent exemption from FLA. STAT. § 83.261(5) (1971)).

172. Fla. Laws 1973, ch. 73-330, § 5 (§ 83.49(3)(c)). In addition to FLA. STAT. §

Most of the changes in wording in the security deposit sections are meant to clarify existing provisions and to integrate them into the FRLTA. For example, one problem had been that even though interest was required on security deposits held under certain conditions by landlords, tenants were not able to obtain enough information to determine what amount of interest was due. The new provision requires the landlord to give this information to the tenant in writing within thirty days of the time he receives any advance rent or security deposit.<sup>173</sup> Also, a payment or credit of interest to the tenant is required at least once annually.<sup>174</sup>

The FRLTA sets out a statutory form of notice that the landlord is required to mail to the tenant when he intends to impose a claim upon the security deposit.<sup>175</sup> The superfluous requirement that the tenant request the return of his security deposit in writing has been removed.<sup>176</sup> Now the tenant need notify the landlord only if he wishes to object to the landlord's claim.<sup>177</sup>

The case law relating to security deposits as liquidated damages<sup>178</sup> and the distinction between security deposits and advanced rent<sup>179</sup> will still be applicable.

#### IV. REMEDIES

##### *A. Termination of the Rental Agreement*

The common law permitted landlords to terminate the rental agree-

83.261 (2) (1971), requiring the payment of interest while the landlord is holding the security deposit, interest is due from the time the landlord wrongfully fails to return it. *Young v. Cobbs*, 110 So. 2d 651, 653 (Fla. 1959).

173. Fla. Laws 1973, ch. 73-330, § 5 (§ 83.49 (2)).

174. Fla. Laws 1973, ch. 73-330, § 5 (§ 83.49 (2)).

175. Fla. Laws 1973, ch. 73-330, § 5 (§ 83.49 (3) (a)).

176. Fla. Laws 1973, ch. 73-330, § 5 (§ 83.49 (3) (a)).

177. Fla. Laws 1973, ch. 73-339, § 5 (§ 83.49 (3) (b)).

178. *See, e.g., Stenor, Inc. v. Lester*, 58 So. 2d 673 (Fla. 1951) (question of law); *Pappas v. Deringer*, 145 So. 2d 770 (Fla. 3d Dist. Ct. App. 1962); 1 FLORIDA REAL PROPERTY PRACTICE § 16.58 (2d ed. 1971).

179. *See, e.g., Casino Amusement Co. v. Ocean Beach Amusement Co.*, 133 So. 559 (Fla. 1931). The distinction that only as much of the security deposit as needed for actual damages or back rent could be retained, whereas all of the advance rent could be retained, *Housholder v. Black*, 62 So. 2d 50 (Fla. 1952), has been changed by another provision of the FRLTA. Fla. Laws 1973, ch. 73-330, § 2 (§ 83.46 (1)) (rent uniformly apportionable from day to day). Where a lease has been prematurely terminated, the tenant may have to wait until the actual expiration of the lease before he can sue for the return of the security deposit. *Wagman v. Lefcoe*, 167 So. 2d 765 (Fla. 3d. Dist. Ct. App. 1964).

ment by several means: expiration of the agreed term,<sup>180</sup> forfeiture,<sup>181</sup> surrender,<sup>182</sup> and abandonment.<sup>183</sup> Legal literature and judicial opinions abound on the vagaries of these doctrines so no effort is made here to explicate them. Some of them have, however, been altered by or incorporated into the FRLTA.

The FRLTA does not substantially alter the notion that a tenancy expires at the expiration of the agreed term. It does provide, however, that in the absence of agreement otherwise, "the duration is determined by the periods for which the rent is payable."<sup>184</sup> When the parties intend to execute a rental agreement for a specific term, their intentions should be made clear. Otherwise the duration of the rental agreement will be determined by the payment period. Notice requirements may vary substantially with the duration.<sup>185</sup>

Before a landlord can maintain a suit for possession, he must terminate the rental agreement.<sup>186</sup> Termination is permitted when the tenant has materially failed to comply with his obligation to maintain the dwelling unit or has failed to comply with material provisions of the rental agreement.<sup>187</sup> Termination may also be had for the nonpayment of rent.<sup>188</sup> The landlord must give seven days notice of his intention to terminate for material noncompliance and he must specify in the notice the noncompliance that provokes the termination. The notice period for nonpayment of rent is three days and the notice must be accompanied by a demand for rent. Upon termination, the landlord is required either to return the tenant's security deposit or to notify the tenant of his intention to impose a claim on it.<sup>189</sup>

The tenant can himself accomplish termination, allowing the landlord to recover possession without the need for litigation. This is done by surrender or abandonment.<sup>190</sup> The difficulty of establishing that abandonment has occurred can lead to a civil action against the land-

180. See, e.g., *Baker v. Clifford-Mathew Inc. Co.*, 128 So. 827 (Fla. 1930); 1 AMERICAN LAW OF PROPERTY § 3.88 (A. Casner ed. 1952).

181. See, e.g., *Augusta Corp. v. Strawn*, 174 So. 2d 422, 424 (Fla. 3d Dist. Ct. App. 1965); 2 BOYER § 36.10 (3), at 1303-06. See also FLA. STAT. § 796.02 (1971).

182. See, e.g., *Babsdon Co. v. Thrifty Parking Co.*, 149 So. 2d 566 (Fla. 3d Dist. Ct. App. 1963); Boyer & Ross, *Real Property Law*, 18 U. MIAMI L. REV. 799, 850 (1964); 2 BOYER § 36.10, at 1301-06.

183. See, e.g., *Kanter v. Safran*, 68 So. 2d 553 (Fla. 1953).

184. Fla. Laws 1973, ch. 73-330, § 2 (§ 83.46 (2)).

185. Fla. Laws 1973, ch. 73-330, § 2 (§ 83.57).

186. Fla. Laws 1973, ch. 73-330, § 2 (§ 83.59 (1)).

187. Fla. Laws 1973, ch. 73-330, § 2 (§ 83.56 (2)).

188. Fla. Laws 1973, ch. 73-330, § 2 (§ 83.56 (3)).

189. Fla. Laws 1973, ch. 73-330, § 2 (§ 83.56 (6)).

190. Fla. Laws 1973, ch. 73-330, § 2 (§§ 83.59 (3) (b) (surrender), 83.59 (3) (c) (abandonment)).

lord for trespass and wrongful eviction or to criminal complaint. Consequently, the FRLTA presumes abandonment when the tenant is absent for a period of one-half the time for periodic rent payments. For most tenants, fifteen days absence will be sufficient. If, however, the rent is current or the tenant has notified the landlord of an intended absence, the presumption will not apply.

The tenant may also terminate the rental agreement for the landlord's material noncompliance with his obligation to maintain the premises or with material provisions of the rental agreement.<sup>191</sup> When the tenant terminates, he must move from the premises. If he moves, he will not be liable for rent for the terminated portion of the rental agreement. If he does not move, he will be subject to a suit for possession and liable for accrued rent and damages.

A landlord's noncompliance that is due to causes beyond his control gives the tenant the right either to terminate or to alter the rental agreement with the landlord's consent.<sup>192</sup> Though the FRLTA refers to the rental agreement being "altered by the parties," contract doctrine requires that a novation based on consideration be executed. The term "causes beyond the control of the landlord" should be interpreted consistently with the contract doctrine of frustration. It should not be confused with "casualty damage," which is provided for in another section.<sup>193</sup> If serious plumbing malfunction causes the tenant to serve notice of intention to terminate and the landlord or his plumber is unable to secure materials to make the repairs, frustration occurs. If, in the example, the materials are acquired and the malfunction is repaired after expiration of the seven-day notice period, the tenant still is entitled to terminate. Subsequent repair does not reinstate the rental agreement.

Waiver can prevent either party from having a right to terminate.<sup>194</sup> If the landlord accepts rent or other performance from the tenant, with actual knowledge of the tenant's noncompliance, he waives the right to terminate or sue for damages for the noncompliance. Vice versa, the tenant may waive his right to terminate or sue for damages. A written agreement that a party accepting performance with knowledge of a noncompliance does not waive his rights as to the noncompliance is sufficient to avoid waiver. But for the nonwaiver agreement to be effective, the party accepting performance should have actual knowledge

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191. Fla. Laws 1973, ch. 73-330, § 2 (§ 83.56(1)).

192. Fla. Laws 1973, ch. 73-330, § 2 (§ 83.56(1)).

193. Fla. Laws 1973, ch. 73-330, § 2 (§ 83.63).

194. Fla. Laws 1973, ch. 73-330, § 2 (§ 83.56(5)). See, e.g., *Moskos v. Hand*, 247 So. 2d 795 (Fla. 4th Dist. Ct. App. 1971); *Tollius v. Dutch Inns of America, Inc.*, 244 So. 2d 467 (Fla. 3d Dist. Ct. App. 1970); MODEL CODE § 2-313; URLTA § 4.204.

of the noncompliance at the time the agreement is entered into. Otherwise, landlords would include nonwaiver clauses in their rental agreements as a matter of course, making it impossible for them ever to suffer waiver of their rights.

The tenant is permitted to terminate the rental agreement if the premises are "damaged or destroyed other than by the wrongful or negligent acts of the tenant."<sup>195</sup> The enjoyment of the premises must be "substantially impaired," and the tenant must vacate the premises immediately for rent liability to cease. Partial destruction will permit the tenant to vacate the part of the premises destroyed and reduce his rent in proportion to the amount of destruction. This section of the FRLTA is designated "casualty damage" and is designed to provide a remedy for the well-known "acts of God."

The question of when a noncompliance is sufficiently serious to justify termination of the rental agreement must be left for judicial interpretation. The Law Revision Council chose the word "material" with the intent that whatever definitions have already been given it should be given weight in the future.<sup>196</sup> The Council felt that the option of termination of the rental agreement should not lie except for an important or substantial noncompliance. A noncompliance that is not serious enough to be considered material is, however, not without a remedy. The aggrieved party can bring an action in the nature of specific performance or for damages.<sup>197</sup>

It is open to question whether the parties may provide in a rental agreement for termination for any noncompliance whether or not material.<sup>198</sup> The more sound position is that section 83.56 reflects an intention that no termination may take place unless the noncompliance is material. The question of materiality could be brought before the court as a defensive matter by the party against whom the termination was sought to be enforced in an action for possession.

### *B. Suit for Possession*

#### *1. Generally.*—Landlords are entitled to the use of summary pro-

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195. Fla. Laws 1973, ch. 73-330, § 2 (§ 83.63).

196. See generally 4 A. CORBIN, CONTRACTS § 946 (1951); *Reynolds v. Armstead*, 443 P.2d 990, 991 (Colo. 1968); *Transportation Equip. Rentals, Inc. v. Strandberg*, 392 S.W.2d 319, 324 (Mo. 1965).

197. Fla. Laws 1973, ch. 73-330, § 2 (§§ 83.54, 83.55).

198. A provision for termination for immaterial noncompliance could be considered invalid under Fla. Laws 1973, ch. 73-330, § 2 (§ 83.47 (1) (a)), which prohibits the waiver of rights on remedies granted under the FRLTA. It might also be unconscionable under Fla. Laws 1973, ch. 73-330, § 2 (§ 83.45).

cedure<sup>199</sup> in actions for possession. If neither personal nor substituted service can be obtained, service of process by posting on the premises is permitted.<sup>200</sup> Service by posting on the premises differs, of course, from the personal service ordinarily required to support an in personam judgment in a conventional civil action.<sup>201</sup> Accordingly, a landlord who sues for possession using summary procedure and posted service should not be permitted to get a judgment for accrued rent or other money damages in the same action.<sup>202</sup> The landlord should be required to bring a separate suit for the rent or damages using conventional procedure and personal service.<sup>203</sup>

When a judgment for money damages is sought in a summary suit for possession, it should be denied even if personal service of process is obtained. The use of summary procedure is permitted only when "specified by statute or rule."<sup>204</sup> It is permitted in suits for possession under the FRLTA<sup>205</sup> but is not expressly permitted in suits for damages.<sup>206</sup> Consequently, summary procedure to recover a money judgment in the suit for possession should not be permitted absent express statutory authorization.

Though the FRLTA does not permit recovery of both a money

199. Fla. Laws 1973, ch. 73-330, § 2 (§ 83.59 (2)) (permits landlord to use summary procedure provided in FLA. STAT. § 51.011 (1971)).

200. Fla. Laws 1973, ch. 73-330, § 4 (§ 48.183); see discussion at pp. 589-90 *infra*.

201. Service by posting on the premises is permitted because a suit for possession is an action in rem that determines only the issue of possession. Actions that seek a money judgment typically require personal service. Compare FLA. STAT. § 48.031 (1971) (personal service) with FLA. STAT. § 49.011 (1971) (service by publication).

202. See *Sprock v. James*, 278 A.2d 421, 423 (N.J. 1971), in which the court said: "The actions were simply for possession on the ground of nonpayment of rent. Brought as they were under the summary dispossess statute, they were not actions for recovery of the rent." See also *Bell v. Tsintolas Realty Co.*, 430 F.2d 474 (D.C. Cir. 1970); *State ex rel. Dorn v. Morley*, 442 S.W.2d 929 (Mo. 1969). See generally FLA. STAT. ch. 82 (1971), apparently permitting a money judgment in a summary unlawful detainer or forcible entry action, though if obtained without personal or substitute service it would seem to be open to attack on grounds of procedural due process.

203. Suits for damages are maintained under Fla. Laws 1973, ch. 73-330, § 2 (§ 83.55), which provides: "If either the landlord or the tenant fails to comply with the requirements of the rental agreement or this part, the aggrieved party may recover the damages caused by the noncompliance."

204. FLA. STAT. § 51.011 (1971).

205. Fla. Laws 1973, ch. 73-330, § 2 (§ 83.59 (2)).

206. Fla. Laws 1973, ch. 73-330, § 2 (§ 83.55). See also *Paregol v. Smith*, 103 A.2d 576 (D.C. Mun. Ct. App. 1954), where the court permitted recovery of back rent in the suit for possession but only because a statute expressly provided for it. Personal service was of course required to support the money judgment. See also cases cited in note 202 *supra*.

The Florida Law Revision Council considered allowing claims for damages to be litigated using summary procedure, but the idea was rejected. While speed is necessary in the landlord's attempt to regain possession, it is not usually necessary in a suit for money damages.

judgment and possession in a summary suit, the same result can be achieved by use of an unlawful detainer action.<sup>207</sup> The unlawful detainer statutes contain an express authorization for the use of summary procedure<sup>208</sup> and for the recovery of a money judgment.<sup>209</sup> Service of process may be obtained by posting on the premises,<sup>210</sup> but caution requires that personal service be obtained whenever a money judgment is sought. Otherwise the judgment would be open to attack on the ground that it violated procedural due process.<sup>211</sup>

There is an attempt in the FRLTA to repeal unlawful detainer actions "with regard to residential tenancies,"<sup>212</sup> but the attempted repeal is probably unconstitutional. It, in effect, seeks to amend each of the unlawful detainer sections to prohibit their application to residential tenancies. The Florida constitution requires that when a statute is amended it must be "published" in full along with the amendment and not "revised or amended by reference to its title only."<sup>213</sup> The unlawful detainer sections were not "published" in the attempted repeal.

A landlord is entitled to service by publication<sup>214</sup> when personal service cannot be obtained and summary procedure<sup>215</sup> for the enforcement of his lien for rent. Whether enforcement of the lien can be obtained in a suit for possession depends upon whether service in the latter can be in lieu of service in the former. Though the question does not appear to have been decided, if personal service is obtained for the possession suit, it will probably be adequate service for the enforcement of the lien permitting both objectives to be obtained in one summary action. Service by posting on the premises, however, is not sufficient to support enforcement of the lien, since it is not specifically authorized by statute.

2. *Payment into the Registry.*—Under the FRLTA, when a landlord sues a tenant for possession and the tenant interposes any defense other than payment of the rent, the tenant must pay into the registry not only rent that accrues during the pendency of the proceeding but

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207. See generally FLA. STAT. ch. 82 (1971).

208. FLA. STAT. § 82.04 (1971).

209. FLA. STAT. §§ 82.05, 82.081 (2) (1971).

210. FLA. STAT. § 82.061 (1971).

211. See cases cited in note 202 *supra*.

212. Fla. Laws 1973, ch. 73-330, § 13.

213. FLA. CONST. art. III, § 6. See, *eg.*, *Auto Owners Ins. Co. v. Hillsborough County Aviation Authority*, 153 So. 2d 722 (Fla. 1963) (construing FLA. CONST. art. III, § 16 (1885), which is substantially similar to § 6 of the 1968 constitution).

214. FLA. STAT. § 49.011 (1) (1971).

215. Fla. Laws 1973, ch. 73-330, § 9 (§ 85.011 (5) (a)).



also any rent accrued at the time of commencement of the suit.<sup>216</sup> Whether a landlord obtains posted service or personal service, ordinarily only a judgment for possession can be rendered. If enforcement of the statutory lien is sought in the same action, but the amount of the back rent sought is less than the \$1000 personal property exemption from the statutory lien, still only a judgment for possession can be rendered. Therefore, in these and other circumstances in which the landlord can get judgment only for possession, the requirement that the tenant pay accrued rent into the registry is a penalty on the tenant's right to defend because it requires to be paid an amount for which the landlord could not obtain judgment in the suit for possession.

In *Lindsey v. Normet*,<sup>217</sup> the United States Supreme Court found a similar penalty to be a violation of the equal protection clause of the fourteenth amendment. The appellant attacked three provisions of the Oregon statute, which required that: (1) the issue of possession must be tried no later than six days after service of the complaint unless security for accruing rent is provided; (2) the tenant may not defend on the basis of the landlord's breach of a duty to maintain the premises (only the tenant's nonpayment is a triable issue); and (3) the tenant must post a bond of twice the amount of rent expected to accrue during pendency of an appeal, which bond is forfeited if the lower court is affirmed. Both the first and second requirements were upheld.<sup>218</sup> But the Court regarded the third requirement as a penalty and thus an unconstitutional burden on the defendant's statutory right to appeal.<sup>219</sup>

*Lindsey* was concerned only with the equal protection problem of a penalty bond on the right of appeal. But the Court's reasoning can be applied with even greater force to a penalty on the statutory right to raise defenses in the initial trial.<sup>220</sup> Consequently, the legislature should amend section 83.60 (2) to require the tenant to pay into the registry only rent that accrues after commencement of the suit for possession.

There is also a potential due process issue. Payment into the registry is beneficial to the landlord because it assures him that rent will be paid during the pendency of litigation, albeit to the court. The pendency of litigation, even using the summary procedure for possession under the FRLTA, can be protracted. A jury trial can be had for the asking. Material noncompliances with rental agreement or with

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216. Fla. Laws 1973, ch. 73-330, § 2 (§ 83.60(2)).

217. 405 U.S. 56 (1972).

218. *Id.*

219. *Id.* at 74-79. See also *Sanks v. Georgia*, 401 U.S. 144 (1971); *Williams v. Shaffer*, 385 U.S. 1037 (1967) (opinion of Douglas, J., dissenting from denial of certiorari).

220. See *Bell v. Tsintolas Realty Co.*, 430 F.2d 474, 483 (D.C. Cir. 1970).

building, housing or health codes are available defenses. While the litigation continues, the tenant remains in possession and the landlord is without rental income. The landlord may be unable to recover in the suit for possession rent that accrues during the pendency. Thus to assure the landlord that the tenant will pay the accruing rent rightfully due, payment into the registry is necessary.<sup>221</sup> But while payment into the registry is beneficial to the landlord, it is burdensome to the tenant. First, it is uncommon in civil litigation that a plaintiff is accorded the advance assurance of a defendant's solvency.<sup>222</sup> Only prejudgment replevin, attachment and garnishment are possible exceptions, and these are surrounded with strict procedural protections.<sup>223</sup> Secondly, to require that an indigent tenant pay accrued rent into the registry of the court before being entitled to assert as a defense the material noncompliance with the rental agreement or with building, housing or health codes "has the effect of restricting access to and participation in the judicial system."<sup>224</sup> Thirdly, it is anomalous that a tenant who is entitled to proceed *in forma pauperis* should be required to make money payments before being permitted to assert some defenses.<sup>225</sup>

The United States Court of Appeals for the District of Columbia Circuit, in *Bell v. Tsintolas Realty Co.*,<sup>226</sup> was faced with this seemingly implacable conflict between landlord and tenant interests. There, lower courts had adopted under their equity powers the practice of requiring the tenant's payment into the registry. After reviewing the practice and the conflicting interests, the court concluded that "although the court may, in the exercise of its equitable jurisdiction, order that future rent be paid into the registry of the court as it becomes due during the pendency of the litigation, such prepayment

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221. In *Bell v. Tsintolas Realty Co.*, 430 F.2d 474, 483 (D.C. Cir. 1970), the court was concerned with the practice of lower court judges in which the court's equity powers were used to compel payment into the registry in suits for possession. It was found that in view

of the emerging non-summary nature of the suit for possession, the concomitant severe disadvantage in which the landlord has been placed during such litigation, and the potential for dilatory tactics which judicial innovation in this area has bred, we conclude that the prepayment of rent requirement as a method of protecting the landlord may be employed in limited fashion.

*Id.* at 482.

222. *Id.* at 479.

223. See, e.g., *Fuentes v. Shevin*, 407 U.S. 67 (1972) (prejudgment replevin); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969) (prejudgment garnishment); FLA. STAT. §§ 76.04, 76.05 (1971) (prejudgment attachment requiring special circumstances). See also Fla. Laws 1973, ch. 73-20.

224. 430 F.2d at 480.

225. *Id.* at 479.

226. *Id.*

is not favored and should be ordered only in limited circumstances, only on motion of the landlord, and only after notice and opportunity for a hearing on such a motion."<sup>227</sup>

The Florida Legislature would do well to adopt this flexible approach. Payment should be required when a tenant requests a jury trial in addition to when he seeks to defend on the basis of a material noncompliance with the rental agreement or with building, housing or health codes. Either of these events could mean that litigation will be protracted. After motion by the landlord and notice to the tenant, the tenant and landlord should have the opportunity to show circumstances that might affect the court's order requiring payment into the registry.

The *Bell* court said that a tenant should be required to pay into the registry only when "the landlord has demonstrated an obvious need for such protection," even though it appears from other factors that the litigation will be protracted.<sup>228</sup> Circumstances a court should consider in determining whether there is a need are: "the amount of rent alleged to be due, the number of months the landlord has not received even a partial rental payment; the reasonableness of the rent for the premises, . . . whether the tenant has been allowed to proceed *in forma pauperis*, and whether the landlord faces a substantial threat of foreclosure."<sup>229</sup>

Ordinarily, a tenant will be required to pay the reserved rent into the registry. But circumstances may require a court to order a lesser amount paid in. For example, if the tenant's pleadings make a strong showing that the landlord is in material noncompliance with building, housing or health codes or with the rental agreement, the court should order a proportionately reduced amount paid in. If the tenant's indigency seems likely to "preclude litigation of meritorious defenses," the court should order paid in an amount sufficient to cover the landlord's out-of-pocket periodic expenses but less than the reserved rent.<sup>230</sup>

Disbursement of the funds paid into the registry is not explained in the FRLTA, but, again, the guidelines set out by the *Bell* court are helpful. Because a judgment for money damages cannot be had in a suit for possession under the FRLTA, it would be error to apply the funds against rent that accrued prior to commencement of the litigation. But if the court finds an absence of material noncompliances, then the registry funds should be applied against rent that accrued

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227. *Id.*

228. *Id.* at 483-84.

229. *Id.* at 484.

230. *Id.* at 484-85.

during pendency. This assumes that "the condition of the premises during the period at issue continued unchanged throughout the litigation period and that no substantial housing defects have come into existence."<sup>231</sup> If the court finds that material noncompliances by the landlord abate all or a portion of the reserved rent, the funds should be disbursed accordingly.

A tenant who abandons the premises prior to trial should recover all of the registry funds because the landlord will have obtained the possession he sought. A separate suit for a money judgment will be needed if the landlord is to recover rent due during the period it was paid into the registry.

The FRLTA specifies that payment into the registry shall continue "during the pendency of the proceeding."<sup>232</sup> This period extends from commencement to judgment with rent apportioned from day to day.<sup>233</sup> When the tenant appeals from the lower court judgment, the requirement that a supersedeas bond be posted<sup>234</sup> is sufficient to protect the landlord; hence the funds in the registry can be retained by the court pending outcome of the appeal.<sup>235</sup> Since appeal will operate as a "stay or supersedeas upon posting bond,"<sup>236</sup> then the tenant should be left in possession and the landlord should be left with the registry funds intact. Because supersedeas is simply a continuation of the landlord's protection into the appellate stage, a "good and sufficient bond" should be set in the same way as the amount to be paid into the registry.<sup>237</sup> It would be a good practice to allow periodic payments for supersedeas instead of a lump sum so as to accord with the registry scheme of the trial court.

3. *Service of Process.*—Prior to 1945, service of process in actions for possession was carried out in the same way as personal service of process in any civil case.<sup>238</sup> In that year the legislature added a provision allowing the summons and complaint to be attached to the premises involved in the proceeding if the defendant could not be found in the county or if no person above the age of fifteen could be found at the defendant's usual place of abode.<sup>239</sup>

Although this provision required that the defendant could not be found in the county, not until *Knight Manor # One, Inc. v. J.A. Free-*

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231. *Id.* at 485.

232. Fla. Laws 1973, ch. 73-330, § 2 (§ 83.60(2)).

233. Fla. Laws 1973, ch. 73-330, § 2 (§ 83.46(1)).

234. FLA. APP. R. 5.5.

235. *Id.* 5.2.

236. *Id.*

237. FLA. STAT. § 59.13 (1971).

238. FLA. STAT. § 48.031 (1971).

239. Fla. Laws 1945, ch. 22731, § 1. This provision became FLA. STAT. § 83.22 (1971).

*man*<sup>240</sup> was it interpreted to mean what it said. There, the process server went to the defendant's home twice on the same day, a working day. After finding no one at home, he posted the summons and complaint. The court upheld the lower court's order quashing service and dismissing the case. Since this decision, many tenants have prevailed by arguing that the summons and complaint were posted under improper circumstances.

The FRLTA provides that

[i]n an action for possession of residential premises under § 83.59, if neither the tenant nor a person of the tenant's family 18 years of age or older can be found at the usual place of residence of the tenant, summons may be served by attaching a copy to a conspicuous place on the property described in the complaint or summons.<sup>241</sup>

This significantly eases the requirements for giving the court jurisdiction.<sup>242</sup> The Law Revision Council recommended a requirement of "diligent search and inquiry" at the residence of the tenant.<sup>243</sup> This was deleted on the floor of the Senate.<sup>244</sup> The due process rights of the tenant, however, will still require some effort beyond a single knock on the door before posted notice will be adequate. Otherwise this section will be subject to constitutional doubt.<sup>245</sup>

### C. Landlord's Lien

Florida has long had statutory provisions giving the landlord a lien

240. 254 So. 2d 375 (Fla. 3d Dist. Ct. App. 1971). See also *Sussman v. Issac*, 35 Fla. Supp. 50 (Dade County Civ. Ct. Rec. 1971).

241. Fla. Laws 1973, ch. 73-330, § 4 (§ 48.183). This is similar to the service of process section for unlawful detainer in FLA. STAT. § 82.061 (1971).

242. The question of whether an action for possession of rental premises under FLA. STAT. ch. 83 (1971) was an in personam or an in rem action has apparently never been specifically decided.

243. COUNCIL REPORT 31.

244. FLA. S. JOUR. 726 (1973).

245. In *McDonald v. Mabee*, 243 U.S. 90, 92 (1917), the Court stated: "To dispense with personal service the substitute that is most likely to reach the defendant is the least that ought to be required if substantial justice is to be done."

The Court further stated in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950):

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Thus, to the extent that sheriffs, and the courts, do not read at least an equivalent of the "diligent search and inquiry" requirement into this statute, it would probably be unconstitutional as a violation of the due process clause of the fourteenth amendment.

upon the tenant's personal property for unpaid rent.<sup>246</sup> These statutes essentially reflected the common law.<sup>247</sup> The FRLTA contains a newly worded landlord's lien section that applies to residential tenancies.<sup>248</sup> The lien only takes effect for "accrued rent," which is the way the old provision was interpreted.<sup>249</sup> Like the old provision,<sup>250</sup> the landlord's lien is not self-executing but must be enforced through legal process. Landlords' liens are exempt from the provisions of the UCC regarding secured transactions.<sup>251</sup> There has been confusion between innkeeper-guest<sup>252</sup> and landlord-tenant statutes. The problem arises when innkeeper-guest rights and remedies are applied to the landlord-tenant relationship.<sup>253</sup> The FRLTA amends the innkeeper-guest lien and instant ejectment statutes<sup>254</sup> to limit their applicability to "transient" occupancy.<sup>255</sup> Several of these statutes have recently been declared unconstitutional to the extent that they were being applied to landlord-tenant situations.<sup>256</sup>

The new landlord's lien provision is placed under Part II of chap-

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246. FLA. STAT. § 83.08 (1971); see 4 J. ADKINS, *FLORIDA REAL ESTATE LAW AND PROCEDURE* § 106.05 (1960); Anderson, *Negotiating and Drafting Leases for the Landlord*, 25 U. MIAMI L. REV. 361, 363-68 (1971). This statute applies to all property other than agricultural products "usually kept" on the premises. FLA. STAT. § 83.08 (2) (1971). Subsection (3) applies to all other property of the defendant. The new provision for residential leaseholders applies only to property of the tenant "located on the premises." Fla. Laws 1973, ch. 73-330, § 3 (§ 713.691).

247. See, e.g., *Jones v. Fox*, 2 So. 700 (Fla. 1887). See also *City Bldg. Corp. v. Farish*, 292 F.2d 620 (5th Cir. 1961).

248. Fla. Laws 1973, ch. 73-330, § 3 (§ 713.691).

249. *In re J.E. De Belle Co.*, 286 F. 699 (S.D. Fla. 1923). Thus, apparently, any property taken off the premises prior to the accrual of the rent for which the lien is sought will not be subject to the lien. See also FLA. STAT. § 85.011 (5) (b) (1971), as amended, Fla. Laws 1973, ch. 73-330, § 9.

250. *Van Hoose v. Robbins*, 165 So. 2d 209, 212 (Fla. 2d Dist. Ct. App. 1964).

251. FLA. STAT. § 679.104 (2) (1971).

252. The innkeeper-guest relationship is a wholly different relationship from the landlord-tenant one and is surrounded by an entirely different set of rules. See *Goodell v. Morris Landsburgh & Associates*, 77 So. 2d 247 (Fla. 1955). See generally 17 FLA. JUR. *Hotels, Restaurants, and Motels* §§ 22-28 (1958).

253. See discussion at p. 593 *infra*. One commentator has argued that these statutes were in fact intended to cover the landlord-tenant relationship. Barnett, *When the Landlord Resorts to Self-Help: A Plea for Clarification of the Law in Florida*, 19 U. FLA. L. REV. 238, 253 nn.62 & 63 (1966).

254. FLA. STAT. § 509.141 (Supp. 1972), FLA. STAT. § 713.67-69 (1971). Although FLA. STAT. § 713.69 (1971) was not specifically amended, its applicability depends on FLA. STAT. § 713.68 (1971), which was amended.

255. Fla. Laws 1973, ch. 73-330, §§ 6-8.

256. See *Barber v. Rader*, 350 F. Supp. 183 (S.D. Fla. 1972); *MacQueen v. Lambert*, 348 F. Supp. 1334 (M.D. Fla. 1972). There is a good argument that the statutes that create a possessory lien for the innkeeper without a due process hearing for the guest are unconstitutional under *Fuentes v. Shevin*, 407 U.S. 67 (1972). See also *Hall v. Garson*, 468 F.2d 845 (5th Cir. 1972).

ter 713, Florida statutes, thus locating it with all the other statutory liens. These liens are enforceable through the procedure set out in chapter 85, Florida statutes, for enforcement of statutory liens. Thus, the FRLTA provides a new procedure for enforcing the landlord's lien to replace the statutory distress for rent procedure,<sup>257</sup> which has been declared unconstitutional.<sup>258</sup> Section 85.011 (5), Florida statutes, was amended to authorize the use of the summary procedure contained in chapter 51, Florida statutes, for enforcement of landlords' liens.<sup>259</sup> Chapter 85 already includes a provision for injunction and attachment in appropriate circumstances, when the lien has been perfected.<sup>260</sup> The FRLTA states that the remedy of distress for rent is abolished for residential tenancies<sup>261</sup> and codifies the one thousand dollar homestead exemption from the landlord's lien.<sup>262</sup>

A major change in Florida law may now be that the landlord's lien can be enforced in the same proceeding as the action for possession because both are under the summary procedure set forth in chapter 51, Florida statutes.<sup>263</sup> It is arguable, however, that pursuit by the landlord of both an action for possession and an action to enforce the statutory lien are inconsistent<sup>264</sup> and that he must elect one or the other.<sup>265</sup>

#### D. Self-Help Evictions

Self-help evictions by landlords, or evictions without resort to legal process, have been a major problem in Florida landlord-tenant law<sup>266</sup>

257. FLA. STAT. §§ 83.09, 83.11-.19 (1971). An attorney general's opinion has already suggested that the chapter 85 procedure could be used to enforce the landlord's lien. 1971 FLA. ATT'Y GEN. OP. 071-152.

258. *Stroemer v. Shevin*, No. 72-1627 (S.D. Fla., Jan. 29, 1973), based upon *Fuentes v. Shevin*, 407 U.S. 67 (1972). See also *Gross v. Fox*, 349 F. Supp. 1164 (E.D. Pa. 1972).

259. Fla. Laws 1973, ch. 73-330, § 9.

260. FLA. STAT. § 85.031 (1) (1971).

261. Fla. Laws 1973, ch. 73-330, § 3 (§ 713.691 (3)).

262. Fla. Laws 1973, ch. 73-330, § 3 (§ 713.691(2)). See *Schofield v. Lioday*, 16 So. 780 (Fla. 1895); *Hodges v. Cooksey*, 15 So. 549 (Fla. 1894). See also *Van Hoose v. Robbins*, 165 So. 2d 209, 210 n.1 (Fla. 2d Dist. Ct. App. 1964).

263. This would reverse the effect of *Van Hoose v. Robbins*, 165 So. 2d 209 (Fla. 2d Dist. Ct. App. 1964), which pointed out the necessity for a separate distress for rent proceeding to enforce the landlord's lien.

264. See, e.g., *Weeke v. Reeve*, 61 So. 749 (Fla. 1913).

265. A full discussion of this question is beyond the scope of this article. For an analogous situation, see *Voges v. Ward*, 123 So. 785, 793 (Fla. 1929); *National City Truck Rental Co. v. Southern Mill Creek Prods. Co.*, 213 So. 2d 261 (Fla. 2d Dist. Ct. App. 1968) (holding that repossession of trucks under conditional sales contract was an election that precluded an action for back payments). See generally 11 FLA. JUR. *Election of Remedies* §§ 10-12 (1957). But see p. 585 *supra*.

266. Barnett, *supra* note 253, at 238; Boyer & Grable, *Reform of Landlord-Tenant Statutes to Eliminate Self-Help in Evicting Tenants*, 22 U. MIAMI L. REV. 800 (1968).

as well as in other states.<sup>267</sup> Such action by the landlord gives rise to a cause of action for damages.<sup>268</sup> The general rule is:<sup>269</sup> “[A] landlord otherwise entitled to possession must, on the refusal of the tenant to surrender the leased premises, resort to the remedy given by law to secure it; otherwise he would be liable in damages for using force or deception to regain possession.” The problem in Florida has been the difficulty of determining what was the remedy given by law. This stemmed partially from apparent inconsistency in landlord-tenant statutes,<sup>270</sup> and also from ambiguous language in statutes originally intended to give innkeepers the right to lock out or eject guests.<sup>271</sup> The FRLTA makes the statutory landlord remedies clear and exclusive<sup>272</sup> and amends the innkeeper-guest statutes to limit their applicability to transient occupancy.<sup>273</sup>

267. *E.g.*, Comment, *Dispossession of a Tenant Without Judicial Process*, 76 DICK. L. REV. 215 (1972).

268. Whether the eviction is wrongful is a question of fact. *Rogers v. Parker*, 241 So. 2d 428, 429 (Fla. 2d Dist. Ct. App. 1970). *See also Pizzi v. Central Bank & Trust Co.*, 250 So. 2d 895, 897 (Fla. 1971). Punitive damages are recoverable if the eviction is malicious and wanton. *Young v. Cobbs*, 83 So. 2d 417, 420 (Fla. 1955). The Law Revision Council proposal prohibited punitive damages because of a philosophical aversion to such damages in any action. COUNCIL REPORT 20. This prohibition was reversed in the House Judiciary Committee, which specifically authorized punitive damages. After a spirited debate on the floor of the House, the section allowed punitive damages “if applicable.” FLA. H.R. JOUR. 382-83 (1973). All reference to punitive damages was then removed by the Senate Consumer Affairs Committee. FLA. S. JOUR. 723 (1973). Thus, after much debate on the issue, the FRLTA contains no reference to punitive damages, and the law on this subject should remain as it was.

269. Annot., 6 A.L.R.3d 177, 186 (1966).

270. *Compare* FLA. STAT. § 83.05 (1971) *with* FLA. STAT. § 83.20(2) (1971); *see* Barnett, *supra* note 253, at 259-61.

271. *See* FLA. STAT. § 509.141 (1971) (authorizing the removal of intoxicated, immoral or profane guests). The applicability of this section to apartment houses has caused it to be used by landlords as a justification for self-help evictions, thus bypassing the necessity of judicial proceedings under FLA. STAT. ch. 83 (1971). *See* *Kent v. Wood*, 235 So. 2d 60 (Fla. 1st Dist. Ct. App. 1970); 1972 FLA. ATT’Y GEN. OP. 072-134; 1973 FLA. ATT’Y GEN. OP. 073-139; Pensacola News, Mar. 29, 1973, at 4A, col 3.

272. Fla. Laws 1973, ch. 73-330, § 2 (§ 83.59(3)), provides:

The landlord shall not recover possession of a dwelling unit except:

(a) in an action for possession under subsection (2) of this section, or other civil action in which the issue of right of possession is determined;

(b) when the tenant has surrendered possession of the dwelling unit to the landlord; or

(c) when the tenant has abandoned the dwelling unit. In the absence of actual knowledge of abandonment, it shall be presumed that the tenant has abandoned the dwelling unit if he is absent from the premises for a period of time equal to one-half the time for periodic rental payments; provided, however, this presumption shall not apply if the rent is current or the tenant has notified the landlord of an intended absence.

273. Fla. Laws 1973, ch. 73-330, §§ 6-8. FLA. STAT. § 509.141 (1971) was also amended by Fla. Laws 1973, ch. 73-325, § 8, but it is consistent with the limitation to transient



The FRLTA eliminates self-help evictions for two reasons. First, the issue of the right to possession is often in dispute; the tenant's available remedies for unlawful eviction do not make up for the trauma of a lock-out to a tenant and his family. Secondly, the maintenance of the status quo (tenant remaining in possession) pending dispossession of the tenant through judicial proceedings is generally less of a hardship on the landlord than the maintenance of the status quo (tenant remaining out of possession) pending the tenant's regaining the possession of the premises through judicial proceedings.<sup>274</sup>

## V. CONCLUSION

The Florida Residential Landlord and Tenant Act is a sweeping revision of legal principles that have been in effect for hundreds of years. Not only are many of the principles changed, but they are now governed by statutory provisions rather than common law. This article highlights the important changes contained in the FRLTA and describes how these changes will fit into Florida's existing legal framework.<sup>275</sup> With regard to many issues, at this point only questions can

occupancy. See Fla. Laws 1973, ch. 73-325, § 1 (§§ 509.012(9)-(10)), for definitions of transient and transient occupancy.

274. Barnett, *supra* note 253, at 278-79.

275. There are several aspects of the landlord-tenant relationship that are not specifically covered by the FRLTA. For example, the FRLTA does not: (1) provide a statutory form of lease to control when there is no written lease between the parties; (2) address the issue of assignments and subleases; (3) contain a specific provision covering the landlord's termination of utilities or other essential services as a technique of harassing the tenant or forcing him to vacate the premises, see MODEL CODE § 2-207; URLTA §§ 4.104, 4.107; and (4) contain a specific provision governing the situation in which a tenant holds over after the expiration of his term with the permission, actual or implied, of the landlord. See FLA. STAT. § 83.04 (1971).

The FRLTA contains no provision specifically requiring the mitigation of damages upon the tenant's abandonment. It was stated in *Kanter v. Safran*, 68 So. 2d 553, 557-58 (Fla. 1953), that upon the tenant's vacation of the premises prior to the expiration of the lease, the landlord may elect to stand by and do nothing, holding the tenant liable for the rent as it accrues. See also *Diehl v. Gibbs*, 173 So. 2d 719, 720 (Fla. 1st Dist. Ct. App. 1965). Thus, Florida seems to follow the majority rule that the landlord has no duty to mitigate damages upon the tenant's abandonment. For a discussion of the majority rule, see *Gruman v. Investor's Diversified Services, Inc.*, 78 N.W.2d 377, 380-81 (Minn. 1956); 55 MICH. L. REV. 1029 (1957). *Contra*, *Wright v. Baumann*, 398 P.2d 119 (Ore. 1965). Two Florida cases, however, state in dicta that the doctrine of mitigation applies to leases as well as to contracts. *Young v. Cobbs*, 110 So. 2d 651, 653 (Fla. 1959); *Brewer v. Northgate of Orlando, Inc.*, 143 So. 2d 358, 361 (Fla. 2d Dist. Ct. App. 1962). Both cases are perhaps distinguishable: *Brewer* on the grounds that it applied to a contract to deliver possession of leased premises, and *Young* on the grounds that it applied to an action to recover damages for permanent improvements affixed to real property. Also, the two cases involved a lessee's rather than a lessor's duty to mitigate.

Because the general legislative intent of the FRLTA is to abolish the outdated distinctions between contracts and leases, the requirement that a landlord mitigate damages

be raised. It is impossible even to guess at all of the ramifications and possible interpretations of the FRLTA. The courts should look upon the Act as remedial legislation and construe it liberally to effectuate its purposes of modernizing landlord-tenant law and placing the landlord and the tenant on a more nearly equal level.

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upon the tenant's abandonment should be implied in residential landlord-tenant cases. *Accord*, MODEL CODE § 2-308 (4); URLTA § 1.105.

As discussed previously, *see pp. 577-79 supra*, the FRLTA contains no provision governing retaliatory conduct by the landlord. However, pursuant to the Florida deceptive and unfair trade practices act, Fla. Laws 1973, ch. 73-124, the Cabinet recently adopted rules, authorized by Fla. Laws 1973, ch. 73-124, § 1 (§ 50.1205), which specify acts or practices which violate the act. Chapter 2-11 of those rules applies specifically to rental housing and mobile home parks. The most important provision is § 2-11.07, which specifies that retaliatory conduct by the landlord constitutes a violation of the act. Thus a tenant who feels he is being retaliated against can either counterclaim or file an action of his own seeking the remedies available under Fla. Laws 1973, ch. 73-124. A copy of the rules is available from the Office of the Attorney General, The Capitol, Tallahassee, Florida.

In addition, a county court has recently held that retaliatory eviction is a violation of the legislative intent behind local housing codes, and against public policy. *Lifschitz v. Blakely*, No. 73-12166 (Broward Co. Ct., Dec. 21, 1973).

On the other hand, *Fla. Stat.* § 83.271 (1971), discussed in footnote 104 *supra*, is currently under attack in the Florida Supreme Court, as a deprivation of the landlord's property without due process. *Palm Beach Mobile Homes, Inc. v. Strong*, No. 44,179. (filed Aug. 3, 1973).