



Volume 100 | Issue 2

Article 7

December 1997

West Virginia Landlord and Tenant Law: A Proposal for Legislative Reform

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WEST VIRGINIA LANDLORD AND TENANT LAW: A PROPOSAL FOR LEGISLATIVE REFORM

*Richard L. Costella**
*Christopher S. Morris***

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I. INTRODUCTION

At common law, the landlord-tenant relationship was skewed in favor of the landlord.¹ The landlord had few obligations to his or her tenant, and the tenant had few remedies with which to seek redress against a recalcitrant landlord. Over the last thirty years, however, both judges and legislatures have dramatically restructured the landlord-tenant relationship.² The traditional estate philosophy, which has dominated landlord-tenant law since the sixteenth century, has begun to give way to the realities of the contemporary landlord-tenant relationship.³ In many jurisdictions a landlord now owes certain duties to his or her tenant, and the tenant has remedies available when a landlord does not fulfill those duties.⁴

In West Virginia, the relationship between landlord and tenant has developed similarly. At common law, the landlord was favored by the rules that developed under the traditional estate philosophy, and the tenant was in a position of little power.⁵ However, in the late 1970s, with the enactment of West Virginia Code section 37-6-30⁶ and the West Virginia Supreme Court of Appeals' decision

¹ See ROBERT S. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT § 1.1, at 2 (1980).

² *Id.*

³ *Id.*

⁴ See generally SCHOSHINSKI, *supra* note 1; A. JAMES CASNER & W. BARTON LEACH, CASES AND TEXT ON PROPERTY (3d ed. 1984).

⁵ See *Charlow v. Blakenship*, 92 S.E. 318 (W. Va. 1917); *Clifton v. Montague*, 21 S.E. 858 (W. Va. 1895); *Kline v. McLain*, 10 S.E. 11 (W. Va. 1889).

⁶ West Virginia Code section 37-6-30 (1997) provides:

With respect to residential property:

(a) A landlord shall:

(1) At the commencement of a tenancy, deliver the dwelling unit and surrounding premises in a fit and habitable condition, and shall thereafter maintain the leased property in such condition; and

(2) Maintain the leased property in a condition that meets requirements of applicable health, safety, fire and housing codes, unless the failure to meet those requirements is the fault of the tenant, a member of his family or other person on the premises with his consent; and

(3) In multiple housing units, keep clean, safe and in repair all common areas of the premises remaining under his control that are maintained for the use and benefit of his tenants; and

(4) Make all repairs necessary to keep the premises in a fit and habitable condition, unless said repairs were necessitated primarily by a lack of reasonable care by the tenant, a member of his family or other person on the premises with his

in *Teller v. McCoy*,⁷ the playing field between landlord and tenant has been leveled to some degree.

Although there has been a degree of change in West Virginia's landlord-tenant law as a result of *Teller* and West Virginia Code section 37-6-30, there are both deficiencies in existing law and whole areas of landlord-tenant law that have yet to be addressed by the legislature or the judiciary. The purpose of this Article is to address some of the more significant deficiencies and to propose legislation that effectively balances the competing interests of landlord and tenant. The Article begins with a brief history of the landlord-tenant relationship as it existed at common law. In addition, there is a brief discussion of the major changes that have occurred in landlord-tenant law over the past three decades. The Article also discusses West Virginia landlord-tenant law as exemplified by the common law, *Teller*, and West Virginia Code section 37-6-30. Finally, legislation that addresses ideal landlord duties and tenant remedies is proposed. The proposed legislation does not discuss all areas of landlord-tenant law that currently need reform, but rather it highlights the most pressing issues that need to be addressed by the West Virginia Legislature. The proposal is based on a cross-section of the Uniform Residential Landlord and Tenant Act, current West Virginia law, and landlord-tenant law from other jurisdictions.

consent; and

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

(6) In multiple housing units, provide and maintain appropriate conveniences for the removal of ashes, garbage, rubbish and other waste incidental to the occupancy of the dwelling unit; and

(7) With respect to dwelling units supplied by direct public utility connections, supply running water and reasonable amounts of hot water at all times, and reasonable heat between the first day of October and the last day of April, except where the dwelling unit is so constructed that running water, heat or hot water is generated by an installation within the exclusive control of the tenant.

(b) If a landlord's duty under the rental agreement exceeds a duty imposed by this section, that portion of the rental agreement imposing a greater duty shall control.

(c) None of the provisions of this section shall be deemed to require the landlord to make repairs when the tenant is in arrears in payment of rent.

(d) For the purposes of this section, the term "multiple housing unit" shall mean a dwelling which contains a room or group of rooms located within a building or structure forming more than one habitable unit for occupants for living, sleeping, eating and cooking.

⁷

253 S.E.2d 114 (W. Va. 1978).

II. THE LANDLORD AND TENANT RELATIONSHIP

A. *The Common Law*

At common law, the prevailing rule was *caveat emptor*.⁸ The landlord had few obligations to his or her tenant, and the tenant had little or no recourse against a landlord who did not deliver physical possession of the leased premises or did not deliver a fit and habitable dwelling.⁹ The rule of *caveat emptor* was a holdover from the estate philosophy that developed in sixteenth century England and persisted well into modern times.¹⁰ “At common law, a lease for real estate was considered a conveyance or sale of an estate in land for a term.”¹¹ The landlord merely delivered possession of the premises and did little more.¹² The tenant took possession, paid the rent, and asked little of the landlord.¹³ These common law traditions were the product of an agrarian society where the tenant was more concerned with the land being leased than the building or structures appurtenant to the land.¹⁴ In addition, the tenant at common law was likely to be a handy-man who could make the necessary repairs to any building or fixtures on the leased premises.¹⁵

At common law there were no dependent covenants on the part of the landlord and the tenant.¹⁶ For example, in the Middle Ages “a vassal could not excuse nonperformance of services because of some fault of the lord unless that

⁸ See SCHOSHINSKI, *supra* note 1, at 2; *Charlow*, 92 S.E. at 318, Syl. Pt. 1.

⁹ See SCHOSHINSKI, *supra* note 1, at 2-3; *Teller*, 253 S.E.2d at 114.

¹⁰ SEE SCHOSHINSKI, *supra* note 1, at 2-3; CASNER & LEACH, *supra* note 4, at 355-56.

¹¹ *Teller*, 253 S.E.2d at 117 (citing 2 R. POWELL, THE LAW OF REAL PROPERTY § 221(a) (Rohan ed. 1977)).

¹² *Teller*, 253 S.E.2d at 118 (quoting John L. Zenor, *Judicial Expansion of Tenants' Private Law Rights: Implied Warranties of Habitability and Safety in Residential Urban Leases*, 56 CORNELL L. REV. 489, 490 (1971)).

¹³ *Id.*

¹⁴ See SCHOSHINSKI, *supra* note 1, at 3; *Teller*, 253 S.E.2d at 118; *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970).

¹⁵ See *Teller*, 253 S.E.2d at 118.

¹⁶ See SCHOSHINSKI, *supra* note 1, at 2-3; CASNER & LEACH, *supra* note 4, at 355-56.

default consisted of evicting the vassal from the land."¹⁷ In modern times, this rule meant that a tenant was not relieved of his or her obligation to pay rent even when the landlord failed to deliver actual possession of the premises, failed to deliver fit and tenantable premises, or failed to make repairs to the building or other structures on the premises.¹⁸

1. No Duty to Deliver Physical Possession of the Premises

Assume that you have just leased an apartment and the lease is to begin on January 1. However, when you proceed to occupy the apartment on January 1, you discover that the prior tenant has not vacated the premises. What remedy do you have against the landlord?

At common law, this situation was governed by two competing rules.¹⁹ The American Rule held that the landlord had only a duty to give legal possession of the property or the right to hold the property.²⁰ Under the American Rule, there was no duty on the part of the landlord to turn over physical possession.²¹ The American Rule was premised on the theory that the landlord had transferred the right to possession to the tenant, and the tenant was responsible for removing the holdover or trespasser.²² In addition, the failure on the part of the landlord to deliver physical possession of the premises would not relieve the tenant of his obligation to pay rent.²³

In contrast to the American Rule, the English Rule imposes a duty on the landlord to deliver actual physical possession of the premises at the commencement of the lease.²⁴ Under the English Rule, the tenant can enforce the lease against the

¹⁷ CASNER & LEACH, *supra* note 4, at 355.

¹⁸ See SCHOSHINSKI, *supra* note 1, at 2-3; CASNER & LEACH, *supra* note 4, at 355-56.

¹⁹ See SCHOSHINSKI, *supra* note 1, at 87-88; *Teitelbaum v. Direct Realty Co.*, 13 N.Y.S.2d 886 (N.Y. Sup. Ct. 1939).

²⁰ See SCHOSHINSKI, *supra* note 1, at 87-88. See also *Hannan v. Dusch*, 153 S.E. 824 (Va. 1930); *Teitelbaum*, 13 N.Y.S.2d at 886; *Snider v. Deben*, 144 N.E. 69 (Mass. 1924).

²¹ See SCHOSHINSKI, *supra* note 1, at 87-88.

²² See *id.*

²³ See *id.* at 94. See also *Snider*, 144 N.E. at 69.

²⁴ *Snider*, 144 N.E. 69. See also SCHOSHINSKI, *supra* note 1, at 87; *Teitelbaum*, 13 N.Y.S.2d at 886.

landlord and does not have to take action against the holdover tenant.²⁵ The theory underlying this rule is that a tenant desires physical possession, not just the right to possession, and the landlord is better situated than the tenant to achieve this desire.²⁶

2. No Duty to Deliver the Premises in Tenantable, Fit, or Suitable Condition

Under the common law, the landlord did not imply that the leased dwelling was habitable, safe, or suitable for a particular use.²⁷ In addition, “[t]he covenants in a lease were deemed to be independent, not dependent.”²⁸ Therefore, if the tenant discovered at the commencement of the lease that the dwelling was not fit for human habitation, he or she was not relieved of the duty to pay rent.²⁹ These principles were also remnants of the sixteenth century agrarian society in which the land was the focus of the lease and any building or structure upon the land was incidental.³⁰

However, at common law there were exceptions to the general rule that there is no implied warranty of habitability in a residential lease.³¹ First, the landlord and tenant could agree in the lease that the premises were fit for a particular purpose or in habitable condition.³² In these cases, if the dwelling was not delivered as expressly warranted, the tenant would have recourse against the landlord.

²⁵ See SCHOSHINSKI, *supra* note 1, at 87.

²⁶ See *id.* at 88.

²⁷ See *id.* at 109 (citing cases). See also *Teller v. McCoy*, 253 S.E.2d 114, 118 (W. Va. 1978); *Franklin v. Brown*, 23 N.E. 126 (N.Y. 1889).

²⁸ *Teller*, 253 S.E.2d at 119.

²⁹ See SCHOSHINSKI, *supra* note 1, at 109; *Teller*, 253 S.E.2d at 119.

³⁰ See SCHOSHINSKI, *supra* note 1, at 110; *Teller*, 253 S.E.2d at 118; *Javins v. First Nat’l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970).

³¹ See SCHOSHINSKI, *supra* note 1, at 110-12. See also *Pines v. Persson*, 111 N.W.2d 409 (Wis. 1961); *J.D. Young Corp. v. McClintic*, 26 S.W.2d 460 (Tex. Civ. App. 1930) *rev’d on other grounds*, *McClintic v. J. D. Young Corp.*, 66 S.W.2d 276 (Tex. Comm’n App. 1933); *Young v. Povich*, 116 A. 26 (Me. 1922); *Ingalls v. Hobbs*, 31 N.E. 286 (Mass. 1892).

³² See SCHOSHINSKI, *supra* note 1, at 109. See also *Teller*, 253 S.E.2d at 117 (citing cases).

Second, many courts did imply a warranty of habitability when the lease was a short-term lease for a furnished dwelling.³³ The rationale for implying a warranty of habitability in these situations was that the tenant does not generally have the opportunity to inspect the premises when they have bargained for this type of lease.³⁴ The typical example is the leasing of a vacation rental where the tenant is unable to inspect the premises beforehand. In addition, this situation may arise when an employer leases an apartment for an employee in a town where the employee will soon arrive on temporary assignment.

The third exception occurred when the leased premises were still under construction at the time of the lease agreement.³⁵ The theory here is that if the premises are still under construction at the time the lease is signed, there is nothing for the tenant to inspect to ascertain the condition of the leased premises. The tenant assumes the premises will be adequate and the rule of *caveat emptor* does not apply.

The fourth and final exception arose when the landlord did not disclose latent defects that the tenant would not discover upon reasonable inspection.³⁶ This exception is premised both on the tort theory of fraudulent misrepresentation or non-disclosure³⁷ and on the inability of the tenant to discover these latent defects.

In addition to the general lack of a duty to deliver the premises in a suitable condition, the common law also did not impose a duty on the landlord to repair the premises or provide essential services once the lease had commenced and the tenant was living in the dwelling.³⁸ The no-repair rule was based on “the idea that the tenant has possession and exclusive ‘control’ of the premises.”³⁹

³³ See SCHOSHINSKI, *supra* note 1, at 110; CASNER & LEACH, *supra* note 4, at 501. See also *Ingalls*, 31 N.E. at 286; *Young*, 116 A. at 26; *Pines*, 111 N.W.2d at 409.

³⁴ See SCHOSHINSKI, *supra* note 1, at 110.

³⁵ See *Woolford v. Electric Appliances, Inc.*, 75 P.2d 112 (Cal. Dist. Ct. App. 1938); *J.D. Young*, 26 S.W.2d at 460; *Hardmen Estate v. McNair*, 111 P. 1059 (Wash. 1910).

³⁶ See SCHOSHINSKI, *supra* note 1, at 111 (citing cases).

³⁷ *Id.* at 111-12.

³⁸ *Id.* at 112-13 (citing cases).

³⁹ *Id.* at 112.

3. The Covenant of Quiet Enjoyment

One of the few protections that the tenant enjoyed at common law was that he or she was entitled to “peaceable possession and enjoyment of the premises.”⁴⁰ This protection was known as the “covenant of quiet enjoyment.”⁴¹ At early common law, the tenant could only claim a breach of the covenant of quiet enjoyment when physically “expelled or excluded from possession.”⁴² Over time, however, the physical expulsion requirement was relaxed and the “constructive eviction” of the tenant became a valid reason for claiming breach of the covenant of quiet enjoyment. Constructive eviction meant that the “actions of the landlord which fall short of physical expulsion of the tenant but which are so injurious to the tenant’s enjoyment and use of the premises”⁴³ were equivalent to the actual eviction of the tenant; therefore the tenant was justified in quitting the premises under these circumstances.⁴⁴

Even with the advent of the covenant of quiet enjoyment and the doctrine of constructive eviction, these principles were still limited remedies for the tenant.⁴⁵ First, in order to claim a breach of the implied covenant of quiet enjoyment or constructive eviction, the tenant was required to vacate the dwelling.⁴⁶ Therefore, if the tenant did not have the ability to procure another dwelling, the remedy afforded by constructive eviction was of little value. Second, the covenant of quiet enjoyment generally applied only to actions of the landlord, and the landlord was not responsible for any annoyance caused by other tenants.⁴⁷ Finally, the covenant of quiet enjoyment did not impose a duty to repair the premises, “and thus it is only

⁴⁰ *Id.* at 94. See also *Teller v. McCoy*, 253 S.E.2d 114, 119 (W. Va. 1978); *Milheim v. Baxter*, 103 P. 376 (Colo. 1909); *Edgerton v. Page*, 20 N.Y. 281 (1859).

⁴¹ SCHOSHINSKI, *supra* note 1, at 94.

⁴² *Id.* at 97. See also *Milheim*, 103 P. at 376.

⁴³ SCHOSHINSKI, *supra* note 1, at 97.

⁴⁴ *See id.*

⁴⁵ *See CASNER & LEACH*, *supra* note 4, at 500-01.

⁴⁶ *See id.*

⁴⁷ *See Blackett v. Olanoff*, 358 N.E.2d 817 (Mass. 1977); *A.H. Woods Theatre v. North Am. Union*, 246 Ill. App. 521, 526-527 (Ill. App. Ct. 1927).

where the landlord by conduct, rather than by neglecting to repair, has breached the covenant of quiet enjoyment that constructive eviction is brought into play.”⁴⁸

4. Other Areas Where the Landlord Owed No Duty to the Tenant

In addition to the issues mentioned above, there are numerous other areas of landlord-tenant law where the landlord owed no duty to his or her tenant under the common law. Although these other areas of landlord-tenant law are of lesser consequence when compared with the issues discussed previously, these areas will serve to emphasize the inequity present between the landlord and tenant under the common law. First, at common law there was no obligation on the landlord to keep sidewalks clear of snow and ice.⁴⁹ Therefore, the landlord was not liable to the tenant for any injury sustained as a result of these conditions.

Second, the landlord was under no duty to mitigate his or her damages if the tenant vacated the premises before the expiration of the lease.⁵⁰ If the tenant agreed to a lease with the landlord, then “the tenant [had] become owner of an estate in land for a given term, and during that period the lessor need not concern himself with the lessee’s abandonment of his own property.”⁵¹ In these cases, the tenant was still liable for any unpaid rent due on the balance of the lease at the time of abandonment, and the landlord was not obligated to find a new tenant to lease the vacant premises.

Third, at common law the landlord could terminate or refuse to renew a lease for any reason or no reason at all.⁵² In addition, the landlord could change “the terms of continued occupancy after expiration of the original tenancy”⁵³ without any explanation as to why he or she was doing so.⁵⁴ Thus the landlord was

⁴⁸ CASNER & LEACH, *supra* note 4, at 500.

⁴⁹ See, e.g., *Crago v. Lurie*, 273 S.E.2d 344 (W. Va. 1980); *Barniak v. Grossman*, 93 S.E.2d 49, (W. Va. 1956); *Rich v. Rosenshine*, 45 S.E.2d 499 (W. Va. 1947); *Bixby v. Thurber*, 118 A. 99 (N.H. 1922).

⁵⁰ See, e.g., *Ten Braak v. Waffle Shops, Inc.*, 542 F.2d 919 (4th Cir. 1976); *Lefrak v. Lambert*, 403 N.Y.S.2d 397 (N.Y. App. Term. 1978); *Carpenter v. Riddle*, 527 P.2d 592 (Okla. 1974); *Maida v. Main Bldg. of Houston*, 473 S.W.2d 648 (Tex. Civ. App. 1971).

⁵¹ SCHOSHINSKI, *supra* note 1, at 675.

⁵² *Id.* at 718.

⁵³ *Id.*

⁵⁴ *Id.* at 717.

free to deny renewal of an expired lease, increase a tenant's rent, or evict a tenant for any purpose that the landlord deemed fit, and there was no recourse available to the tenant.⁵⁵

Finally, at common law the landlord was generally allowed to request any amount of security deposit that he or she felt necessary.⁵⁶ In addition, the majority rule did not require the landlord to pay interest on the security deposit.⁵⁷ Moreover, there was no restriction on the use of these deposits, and the landlord was free to commingle any security deposits with his own funds.⁵⁸ The landlord's unregulated discretion surrounding security deposits also created problems at the termination of a lease. The landlord possessed the discretion to withhold any portion of the deposit that he or she felt necessary to compensate for damages caused by the tenant.⁵⁹ Although the tenant could bring suit to recover any security the landlord wrongfully withheld, the tenant was at an economic disadvantage because "[t]he cost of bringing a legal action frequently exceed[ed] the amount of a tenant's potential recovery."⁶⁰

B. *The Last Thirty Years*

Over the last thirty years, landlord-tenant law has been dramatically altered and the playing field has been increasingly leveled between landlord and tenant.⁶¹ The traditional notion of the lease as a conveyance has decreased in importance as the law of contracts has slowly crept into the contemporary thinking of courts and

⁵⁵ *Id.* at 717-18.

⁵⁶ See Billie L. Snyder, *Refunding Residential Tenant Security Deposits: A Legislative Proposal for West Virginia*, 96 W. VA. L. REV. 549, 556-57 (1933) (citing Symposium, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 520 (1984)).

⁵⁷ *Id.* at 557.

⁵⁸ *Id.* See also SCHOSHINSKI, *supra* note 1, at 467-68 (citing cases).

⁵⁹ SNYDER, *supra* note 56, at 550 (citing JEROME G. ROSE, *LANDLORDS AND TENANTS* 2 (1973)).

⁶⁰ *Id.*

⁶¹ SCHOSHINSKI, *supra* note 1, at 1-2.

legislatures.⁶² Many jurisdictions now recognize that the lease is not only a conveyance for a term, but it is also a bilateral contract with mutually dependent promises on the part of landlord and tenant.⁶³ A landlord's failure to perform his or her obligations constitutes a breach, and as a result of the breach the tenant may be relieved of performance under the contract.⁶⁴

Many of the changes in the law surrounding the landlord-tenant relationship occurred contemporaneously with the move toward increased consumer protection.⁶⁵ This increased consumer protection was most evident in the development of the Uniform Commercial Code, local housing regulations, and the increasing number of exceptions to the strict common law landlord-tenant rules.⁶⁶ After centuries under the rule of *caveat emptor*, tenants, as well as consumers in general, began to be afforded increased protection in their dealings with landlords and merchants.

The change in landlord-tenant law is best evidenced by analyzing the numerous judicial decisions and legislative enactments that have sought to abolish the traditional common-law rules. For instance, many jurisdictions now recognize the tenant's right to actual physical possession of the leased premises.⁶⁷ The abolition of the American Rule in numerous jurisdictions reflects the reality that a tenant does not bargain for the legal right to possession, but rather that the tenant desires actual physical possession.⁶⁸ This view is also adopted by the drafters of the Uniform Residential Landlord and Tenant Act⁶⁹ and the authors of the Restatement of Property.⁷⁰ Moreover, in many of the jurisdictions that no longer follow the

⁶² *Id.* See also *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970); *Teller v. McCoy*, 253 S.E.2d 114, 129 (W. Va. 1978).

⁶³ SCHOSHINSKI, *supra* note 1, at 2.

⁶⁴ *Id.*

⁶⁵ See *Javins*, 428 F.2d at 1077.

⁶⁶ *Id.* at 1075-77.

⁶⁷ See SCHOSHINSKI, *supra* note 1, at 87(citing cases); N.Y. [REAL PROP.] LAW § 223-a (McKinney 1989); MD. CODE. ANN. [REAL PROP.] § 8-204(b) (1996).

⁶⁸ See SCHOSHINSKI, *supra* note 1, at 88.

⁶⁹ See UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 2.103, 7B U.L.A. 459 (1985).

⁷⁰ See RESTATEMENT (SECOND) OF PROPERTY: LANDLORD AND TENANT § 6.2 (1977).

American Rule, a tenant is afforded various remedies when the landlord fails to deliver actual possession of the leased premises.⁷¹

A second area of landlord-tenant law where the common law rules have been abolished is the duty of the landlord to deliver the premises in a fit or tenable condition. The majority of states now have statutes that establish an implied warranty of habitability in a lease for residential property and provide remedies when the landlord fails to deliver a livable dwelling.⁷² The implied warranty of habitability usually relates to the landlord's duty to deliver the premises in a suitable condition, as well as the duty of the landlord to maintain the premises in a suitable condition after the commencement of the lease. If the landlord breaches the implied warranty of habitability, the tenant usually has several remedies available. The remedies vary among jurisdictions, but the remedies can include termination of the tenancy,⁷³ the right to withhold rent,⁷⁴ and an action for damages associated with a breach of contract.⁷⁵ One of the major advantages that the implied warranty of habitability affords the tenant is that the tenant does not

⁷¹ See, e.g., N.Y. [REAL PROP.] LAW § 223-a (McKinney 1989); UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 4.102, 7B U.L.A. 481 (1985).

⁷² ALASKA STAT. §§ 34.03.100, .160, .180 (1996); ARIZ. REV. STAT. ANN. §§ 33-1324, 1361 (1996); CAL. [CIV.] CODE §§ 1941, 1941.1, 1942 (Deering 1994); CONN. GEN. STAT. ANN. §§ 47A-7, to -20a (West 1994); DEL. CODE ANN. tit. 25 § 5303-5308 (1989)(as amended); FLA. STAT. ANN. §§ 83.51, 83.56 (WEST 1987); GA. CODE ANN. § 44-7-13 (1991); HAW. REV. STAT. §§ 521-42, 521-61 to -66 (1993); IDAHO CODE § 6-320 (1990); IOWA CODE ANN. §§ 562A.14 to .16, .21 to .26 (West 1992); KAN. STAT. ANN. §§ 58-2540 to -2573 (1994); KY REV. STAT. ANN. §§ 383.595, .625, .635 to .645 (Michie Supp. 1996); LA. CIV. CODE ANN. arts. 2693, 2695, 2700 (West 1996) and LA. REV. STAT. ANN. § 9:3321 (West 1997); MD. CODE ANN., [REAL PROP.] § 8-211 (1996); MASS ANN. LAWS ch. 239 § 8A and ch. 186 § 14 (Law. Co-op. 1986); ME. REV. STAT. ANN. tit. 14 § 6021 (West 1980); MICH. STAT. ANN. §§ 554.139, .633, .636, .637 (1993); MINN. STAT. ANN. § 504.18 (West 1990); MONT. REV. CODE ANN. §§ 42.401 tit. .422 (1997); NEB. REV. STAT. §§ 76-1419, 76-1425 to -1449 (1996); NEV. REV. STAT. § 118A.290, .30 to .380 (1997); N.H. REV. STAT. ANN. §§ 540:13-d, 48-A:14 (1997); N.M. STAT. ANN. § 47-8-1 to -51 (Michie 1995); N.Y. [REAL PROP.] LAW § 235-b (McKinney 1989) (as adopted in ch. 597 [1975] N.Y. Acts. 875); N.C. GEN. STAT. §§ 42-38 to -46 (1990); N.D. CENT. CODE § 47-16-13.1 (1978); OHIO REV. CODE ANN. §§ 5321.04, .07 (Anderson 1989); OKLA. STAT. ANN. tit. 41 §§ 101 to 135 (West 1986); OR. REV. STAT. §§ 91.770, 91.800-.815 (1995); 35 PA. CONS. STAT. ANN. § 1700-1 (West 1993); R. I. GEN. LAWS § 34-18-16 (1995); TENN. CODE ANN. §§ 53-5501 and 66-28-101 to -517 (1993)(amended); TEX. [PROP.] CODE ANN. § 95.052 (West 1995); VT. STAT. ANN. tit. 12 § 4859 (1973); VA. CODE ANN. §§ 55-248.13, .25 (Michie 1995); WASH. REV. CODE ANN. §§ 59.18.060 (West 1990); W. VA. CODE § 37-6-30 (1997); WIS. STAT. ANN. § 704.07 (West 1981).

⁷³ See SCHOSHINSKI, *supra* note 1, at 133-34.

⁷⁴ See *id.* at 136-40.

⁷⁵ See *id.* at 134-36.

have to vacate the premises when there is a breach by the landlord. This situation contrasts with the common law covenant of quiet enjoyment, where a tenant usually had to vacate the premises to assert a constructive eviction resulting from the actions of the landlord.⁷⁶

There is also a recent trend in landlord-tenant law toward imposing a duty on the landlord to mitigate his or her damages when a tenant abandons the premises before the lease terminates.⁷⁷ Imposing this duty on the landlord is consistent with the contract principle that a party must mitigate damages when the other party has breached. Generally, this duty requires the landlord to accept a qualified and suitable substitute for the tenant who has abandoned the premises, as well as to take reasonable steps to find such a substitute.⁷⁸

The fourth area of landlord-tenant law that has seen dramatic change is the area regulating a landlord's conduct in evicting tenants and terminating leases. As stated previously, a landlord at common law was free to take certain actions towards the tenant without question or consequence.⁷⁹ A tenant who was disliked or a troublemaker for the landlord could be evicted, not have the lease renewed, or receive a substantial rent increase at the landlord's whim. However, most jurisdictions now have some form of legislation⁸⁰ that prohibits certain landlord conduct toward a tenant.⁸¹ The activities prohibited vary among jurisdictions, but

⁷⁶ See *supra* Part II.A.3.

⁷⁷ See SCHOSHINSKI, *supra* note 1, at 677-78 (citing cases). See also *Wright v. Bauman*, 398 P.2d 119 (Or. 1965).

⁷⁸ See SCHOSHINSKI, *supra* note 1, at 679. See also UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 4.203, 7B U.L.A. 495-496 (1985).

⁷⁹ See *supra* Part II.A.4.

⁸⁰ West Virginia has no specific legislation prohibiting retaliatory conduct by a landlord. *But see Imperial Colliery Co. v. Fout*, 373 S.E.2d 489 (W. Va. 1988) (construing West Virginia Code section 55-3A-3(g) as prohibiting retaliatory landlord conduct if the conduct grows out of the landlord-tenant relationship).

⁸¹ ALASKA STAT. § 34.03.310 (Michie 1996); ARIZ. REV. STAT. ANN. § 33-1381 (West 1990); CAL. [CIV.] CODE § 1942.5 (Deering 1994); CONN. GEN. STAT. ANN. § 47a-33 (West 1994); DEL. CODE ANN. tit. 25, § 5516 (1989); D.C. CODE ANN. § 45-2552 (1996); FLA. STAT. ANN. § 83.60 (West 1987); HAW. REV. STAT. § 521-74 (1993); IDAHO CODE § 55-2015 (1994); ILL. COMP. STAT. ANN. ch. 765, § 720/1 (West 1993); IOWA CODE ANN. § 562A.36 (West 1992); KAN. STAT. ANN. § 58-2572 (1994); KY. REV. ANN. ch. § 383.705 (Michie Supp. 1996); MD. CODE ANN., [REAL PROP.] § 8-208.1 (1996); MASS. ANN. LAWS ch. 186, § 18, ch. 239, § 2A (Law. Co-op. 1994); ME. REV. STAT. ANN. tit. 14, § 6001 (West 1980); MO. ANN. STAT. § 441.620 (West 1986); MONT. REV. CODE ANN. § 42-442 (Smith 1997); NEB. REV. STAT. § 76-1439 (1996); NEV. REV. STAT. § 118A.510 (1997); N.H. REV. STAT. ANN.

as a general proposition most of these laws proscribe the landlord from evicting the tenant, raising the tenant's rent, or decreasing essential services in retaliation for the tenant's reporting of housing code violations or the tenant's forming of tenant unions.⁸² Many statutes also create a presumption of retaliatory conduct if the landlord takes any of the proscribed actions within one year of a protected tenant activity.⁸³

One of the most active areas of reform in landlord-tenant law has occurred in the regulation of tenant security deposits. Tenant security deposits represent one of the most widely abused areas in residential leasing.⁸⁴ However, the majority of jurisdictions now have legislation limiting the amount of security deposit a landlord may request.⁸⁵ In addition, the typical security deposit legislation generally requires that the landlord return the tenant's deposit within a set number of days, as well as

§§ 540.13-a, -b (1997); N.J. STAT. ANN. §§ 2A:42-10.10 to 2A:42-10.12 (West 1987); N.M. STAT. ANN. § 47-8-39 (Michie 1995); N.Y. [REAL PROP.] LAW § 230 (McKinney 1989); N.Y. [REAL PROP.] LAW § 223-b (McKinney 1989); N.C. GEN. STAT. §§ 42-37.1 to .3 (1990); OHIO REV. CODE ANN. § 5321.02 (Anderson 1989); OR. REV. STAT. § 90-385 (1995); 35 PA. CONS. STAT. ANN., § 1700-1 (West 1993); R.I. GEN. LAWS §§ 34-20-10, 34-20-11 (1995); VT. STAT. ANN. tit. 12 § 4859(c) (1973); TENN. CODE ANN. § 66-28-514 (1993); VA. CODE ANN. § 55-248.39 (Michie 1995); WASH. REV. CODE ANN. §§ 59.18.240, 59.18.250 (West 1990).

⁸² See UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 5.101(a), 7B U.L.A. 503 (1985).

⁸³ *Id.* at § 5.101(b).

⁸⁴ See Snyder, *supra* note 56, at 550.

⁸⁵ ALASKA STAT. § 34.03.070 (Michie 1996); ARIZ. REV. STAT. ANN. §§ 33-1310(13), -1321, -1325 (West 1990); ARK. CODE ANN. §§ 18-16-301 to -306 (Michie 1987); CAL. [CIV.] CODE §§ 1950.5, 1950.7 (Deering 1994); COLO. REV. STAT. ANN. §§ 38-12-101 to -103 (1982); CONN. GEN. STAT. ANN. § 47a-21 (West 1994); DEL. CODE ANN. tit. 25 §§ 5102(10), 5103, 5511 (1989); HOUSING REGULATIONS OF THE DISTRICT OF COLUMBIA, § 2908, art. 290 (1997); FLA. STAT. ANN. §§ 83.43, .47, .49 (West 1987); GA. CODE ANN. §§ 44-7-30 to -37 (Michie 1991); HAW. REV. STAT. §§ 521-31, -44, -45 (1993); IDAHO CODE § 6-321 (1990); IOWA CODE ANN. § 562A.12 (West 1992); KAN. STAT. ANN. § 58-2550 (1994); KY. REV. STAT. ANN. §§ 383.545, .570, .580, .600 (Michie Supp. 1996); LA. REV. STAT. ANN. §§ 9:3251-3254 (West 1997); MD. CODE ANN., [REAL PROP.] §§ 8-203, 8-203(g) (1996); MASS. ANN. LAWS ch. 186 § 15B (Law. Co-op. 1994); ME. REV. STAT. ANN. tit. 14 §§ 6031 to 6038 (West 1980); MICH. STAT. ANN. §§ 26.1138(1) to (16) (Law. Co-op. 1990); MINN. STAT. ANN. §§ 504.20 (West 1990); MO. STAT. ANN. § 535.300 (West 1988); MONT. REV. CODE ANN. §§ 70-25-101 to -206 (1997); NEB. REV. STAT. §§ 76-1415, -1416 (1996); NEV. REV. STAT. §§ 118A.240 to .250 (1997); N.H. REV. STAT. ANN. § 540-A:5 to :6 (1997); N.M. STAT. ANN. § 47-8-18 (Michie 1995); N.Y. [GEN. OBLIG.] LAW §§ 7-103, -105, -107 (McKinney 1989); N.C. GEN. STAT. §§ 42-50 to -56 (1994); N.D. CENT. CODE § 47-19-07.1 (1997); OKLA. STAT. ANN. tit. 41, § 115 (West 1986); R.I. GEN. LAWS § 34-18-19 (1995); S.D. CODIFIED LAWS §§ 43-32-6.1 TO .24 (Michie 1991); TENN. CODE ANN. § 66-28-301 (1993); VA. CODE § 55-248.11 (Michie 1995); WASH. REV. CODE ANN. §§ 59.18.260-280 (West 1990).

- providing for monetary penalties when a landlord violates the statute.⁸⁶ The Uniform Residential Landlord and Tenant Act also provides for the regulation of tenant security deposits.⁸⁷

C. *The Uniform Residential Landlord and Tenant Act*

In 1972, a committee for the National Conference of Commissioners on Uniform State Laws drafted the Uniform Residential Landlord and Tenant Act with the intent to provide a model code for states which desired to reform their existing landlord-tenant law. The act represents a significant modification of traditional landlord-tenant law and is premised on the theory that a residential lease is a contract with interdependent obligations on the part of both the landlord and tenant.⁸⁸ Currently, twenty states have officially adopted the act.⁸⁹ In addition, other states have used specific provisions of the Uniform Residential Landlord and Tenant Act as a basis for their landlord-tenant reform.⁹⁰ It should be noted, however, that the act serves only as a model for landlord-tenant reform and that the jurisdictions that have officially adopted the act generally have done so with significant alteration.⁹¹

⁸⁶ See *supra* note 85.

⁸⁷ UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 2.101, 7B U.L.A. 453 (1985).

⁸⁸ SCHOSHINSKI, *supra* note 1, at 4.

⁸⁹ ALASKA STAT. § 34.03.010 to .380 (Michie 1996); ARIZ. REV. STAT. ANN. §§ 33-1301 to -1381 (West 1990); FLA. STAT. ANN. §§ 83.40 to .63 (WEST 1987); HAW. REV. STAT. §§ 521-1 to 521-78 (1993); IOWA CODE ANN. §§ 562A.12 to .16, .21 to .26 (West 1992); KAN. STAT. ANN. §§ 58-2540 to -2573 (1994); KY. REV. STAT. ANN. §§ 383.500 to .715 (Michie Supp. 1996); MONT. CODE ANN. § 70-24-101 to -442 (1997); NEB. REV. STAT. §§ 76-1401 to -1449 (1996); NEV. REV. STAT. §§ 118A.010 to .530 (1997); N.M. STAT. ANN. § 47-8-1 to -42 (Michie 1995); N.C. GEN. STAT. § 42-38 to -56 (1990); OHIO REV. CODE ANN. §§ 5321.01 to .19 (Anderson 1989); OKLA. STAT. ANN. tit. 41, §§ 101-135 (West 1986); OR. REV. STAT. § 90.100 to .840 (1995); R.I. GEN. LAWS §§ 34-18-1 to -57 (1995); S.C. CODE ANN. §§ 27-40-10 to -940 (West 1991); TENN. CODE ANN. §§ 66-28-101 to -517 (1993); VA. CODE ANN. §§ 55-248.1 to -248.40 (Michie 1995); WASH. REV. CODE ANN. §§ 59.18.010 to .911 (West 1990).

⁹⁰ See, e.g., W. VA. CODE § 37-6-30 (1997).

⁹¹ See SCHOSHINSKI, *supra* note 1, at 4.

III. WEST VIRGINIA'S LANDLORD AND TENANT LAW

A. Background

Due to the rural nature of the state, West Virginia has very little case law that addresses the landlord-tenant relationship. The case law that did exist prior to 1978 was generally consistent with the common law rules discussed above.⁹² However, beginning in the mid-1970s, the state began a move toward the reform of landlord-tenant law. In 1976, a bill that was intended to redefine the state's landlord-tenant law was introduced in the West Virginia House of Delegates. That bill was, however, ultimately rejected.

In 1977, the West Virginia Supreme Court of Appeals docketed the case of *Teller v. McCoy*,⁹³ which involved five certified questions of landlord-tenant law from the Circuit Court of Logan County.⁹⁴ Before the Supreme Court of Appeals could decide *Teller*, however, the legislature passed West Virginia Code section

⁹² See, e.g., *Cowan v. One Hour Valet, Inc.*, 157 S.E.2d 843 (W. Va. 1967); *Lennox v. White*, 54 S.E.2d 8 (W. Va. 1949); *Cherlow v. Blakenship*, 92 S.E. 318 (W. Va. 1917); *Clifton v. Montague*, 21 S.E. 858 (W. Va. 1895).

⁹³ 253 S.E.2d 114 (W. Va. 1978).

⁹⁴ *Id.* The five certified questions were

1. Whether failure of a landlord to maintain rental premises in a habitable condition and otherwise remedy defects to the premises which render the residence uninhabitable is in violation of a landlord's implied warranty of habitability to a tenant? And if so, whether it is subject to waiver?

2. Whether a landlord's warranty of habitability and the tenant's covenant to pay rent are mutually dependent?

3. Whether failure of a landlord to maintain the premises in habitable condition constitutes a failure of consideration and a breach of the rental agreement?

4. Whether a landlord's breach allows to the tenant one or more of the following remedies: (a) a right of action of setoff for the difference between the agreed rent and the fair rental value of the premises in their defective condition; (b) after reasonable notice and opportunity to a landlord to correct the defective conditions, to repair the defects himself and deduct the repair cost from the rent; and (c) vacation of the premises terminating a tenant's obligation to pay rent? (d) what damages, if any, are recoverable by the landlord or tenant in the event of breach of either party?

5. Whether a breach of the implied warranty of habitability is a defense to a landlord's action for rent, damages, or unlawful detainer?

Id. at 117.

37-6-30,⁹⁵ which provided for an implied warranty of habitability in residential leases. The Supreme Court of Appeals decided *Teller* in December 1978, even though the case had, in Justice Neely's view,⁹⁶ become moot with the enactment of West Virginia Code section 37-6-30. Although much of the opinion in *Teller*⁹⁷ can therefore technically be labeled *dicta*, the court gives useful guidance by covering areas not specifically identified by the statute and by providing an interpretive framework for the statute. It should also be noted that portions of the *Teller* opinion directly contradict some provisions of the statute.

B. *Teller v. McCoy*

Teller involved five questions certified to the West Virginia Supreme Court of Appeals from the Circuit Court of Logan County.⁹⁸ The central inquiry of the certified questions concerned the existence of an implied warranty of habitability in West Virginia. The *Teller* opinion began with a brief history of the common law rules of landlord-tenant law and a discussion of how the recent trend in many jurisdictions was to depart from these archaic rules.⁹⁹ The *Teller* court next discussed how any major change in the common law must be brought about by legislation,¹⁰⁰ and the court noted that with the enactment of state fire codes,¹⁰¹ health regulations,¹⁰² housing codes,¹⁰³ and the Housing Cooperation Law,¹⁰⁴ the

⁹⁵ See *supra* note 6.

⁹⁶ See *Teller*, 253 S.E.2d at 131-32 (Neely, J., dissenting).

⁹⁷ *Id.* at 114.

⁹⁸ See *supra* note 94.

⁹⁹ See *Teller*, 253 S.E.2d at 117-20. The court's discussion of this material relies on and closely parallels that provided by the Circuit Court of Appeals for the District of Columbia in *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970).

¹⁰⁰ See *Teller*, 253 S.E.2d at 120. See also W. VA. CONST. art. 8, § 21; *Cunningham v. County Ct.*, 134 S.E.2d 725 (W. Va. 1964).

¹⁰¹ See W. VA. CODE § 29-3-2 to -15 (1992).

¹⁰² See W. VA. CODE § 16-1-7 (1998).

¹⁰³ See W. VA. CODE § 8-12-13 (1998).

¹⁰⁴ See W. VA. CODE § 16-16-2 (1998). See also W. VA. CODE § 31-18-2(a) (1996) (relating to the establishment of the West Virginia Development Fund).

state legislature had manifested the requisite intent to change the common law by providing for improved housing. Armed with the implied consent of the legislature, the *Teller* court proceeded to make significant findings related to the implied warrant of habitability contained in West Virginia Code section 37-6-30.

First, the *Teller* court held that there exists an implied warranty of habitability in a residential lease and that this warranty applies both to the duty to deliver a habitable dwelling at the commencement of the lease and to the duty to maintain the premises in a habitable condition during the tenancy.¹⁰⁵ The court acknowledged the enactment of West Virginia Code section 37-6-30 and added that the implied warranty of habitability adopted in its opinion imposes no “greater burden than that set forth by the Legislature in our new statute.”¹⁰⁶

Second, the court discussed the contract theories underlying a lease for residential property.¹⁰⁷ Here the court held that a lease for residential property constitutes a contract between landlord and tenant, and therefore “the covenant to pay rent and the warranty of habitability are mutually dependent.”¹⁰⁸ Thus, a breach of the warranty of habitability relieves the tenant of his or her obligation to pay rent. The court further provided that the common law contract remedies of damages, reformation, and rescission are available “to the tenant faced with the material breach of warranty.”¹⁰⁹ Therefore, the tenant may abandon the lease without an obligation to continue paying rent.¹¹⁰ Also implied in this portion of the holding is the tenant’s right to specific performance of the lease or the right to have the landlord perform repairs to make the dwelling habitable. This portion of the opinion, however, is in direct conflict with the language of West Virginia Code section 37-6-30(c), which provides that “[n]one of the provisions of this section shall be deemed to require the landlord to make repairs when the tenant is in arrears in payment of rent.” Therefore, under *Teller* the tenant may withhold payment of rent and ask for specific performance by the landlord, but the same statute imposes no duty on the landlord to make repairs once the tenant withholds the rent.¹¹¹ The

¹⁰⁵ *Teller*, 253 S.E.2d at 123.

¹⁰⁶ *Id.* at 123-24.

¹⁰⁷ *Id.* at 124-25.

¹⁰⁸ *Id.* at 125.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 125-26.

¹¹¹ *Id.* at 125-26 n.14.

statute nullifies one of the essential objectives of establishing an implied warranty of habitability: to make safe and suitable housing available to everyone.¹¹² Although the tenant may still seek damages related to the breach of the implied warranty, the denial of specific performance provides no incentive for the landlord to remedy the problem and make suitable housing available to the tenant.¹¹³

Third, the court held that a tenant may raise the breach of the implied warranty of habitability as a defense to the landlord's action for rent or damages.¹¹⁴ The court based this portion of the holding on the theory that when a contract has mutually dependent covenants, "a party who violates the contract cannot recover damages which result from its violation by the other party."¹¹⁵ Therefore, because the tenant's covenant to pay rent is dependent upon the landlord's covenant to provide a habitable dwelling, a breach by the landlord of his or her covenant gives rise to the tenant's defense in an action by the landlord for rent.¹¹⁶ The court also held that a breach of the implied warranty is a defense to an unlawful detainer action by the landlord under West Virginia Code section 55-3-1.¹¹⁷

Fourth, the court denied adoption of the repair and deduct rule, which allows a tenant, after giving notice of a defect, to make repairs and deduct the cost from the rent.¹¹⁸ The court reasoned that the majority of courts do not allow the deduct and repair rule because the "contract remedies available to the tenant are adequate to enforce fulfillment of the implied warranty."¹¹⁹ In his dissent, Justice Miller strongly disagreed with this portion of the holding.¹²⁰ Justice Miller cited

112 *Id.*

113 *Id.*

114 *Id.* at 126.

115 *Id.* (quoting from *Franklin v. Pence*, 36 S.E.2d 505, 508 (W. Va. 1945)).

116 *Id.*

117 *Id.* ("[West Virginia Code section 55-3-1] provides the method for recovering possession or damages from the tenant who 'detains the possession of any land, building, structure, or any part thereof after his right has expired'").

118 *Id.*

119 *Id.*

120 *Id.* at 136-37.

numerous cases¹²¹ where courts “which have adopted the implied warranty of habitability doctrine have sanctioned [the repair and deduct rule].”¹²² Moreover, Justice Miller recognized that at common law when a landlord expressly agreed to repair the leased premises, the tenant was allowed to make the repairs and deduct the cost of the repairs from the rent when the landlord did not perform under the covenant.¹²³ Justice Miller reasoned that if the deduct and repair rule was allowed under an express covenant, there was no reason to disallow the rule under the implied warranty of habitability.¹²⁴ The express covenant and implied warranty impose the same duty on the landlord to keep the premises in repair. It is also important to note that the repair and deduct rule is accepted in West Virginia when a landlord expressly agrees to make needed repairs.¹²⁵

Fifth, the court defined the measure of damages available to a tenant when the landlord breaches the implied warranty. The court adopted the “difference in valuation method,”¹²⁶ whereby the tenant’s damages are the “difference between the fair market value of the premises if they had been as warranted and the fair rental value of the premises as they were during occupancy by the tenant in the unsafe and unsanitary condition.”¹²⁷ The court also stated that the actual rent agreed to by the parties is irrelevant other than “as evidence of the apartment’s fair market value.”¹²⁸

Although the court adopted the difference in valuation method as the primary measure of a tenant’s damages, the court did express that the “percentage reduction of use” method may be appropriate under some circumstances.¹²⁹ Under the percentage reduction of use method, a tenant’s damages are measured by the “relative reduction of use of the leased premises caused by the landlord’s breach.”¹³⁰

¹²¹ *Id.* at 136 n.2.

¹²² *Id.* at 136.

¹²³ *Id.* at 136-37.

¹²⁴ *Id.*

¹²⁵ *Chevront v. Bee*, 28 S.E. 751, 752 (W. Va. 1897).

¹²⁶ *Teller*, 253 S.E.2d at 128.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 127.

Therefore, a trial court must determine what percentage of the dwelling was unavailable for use by the tenant due to the landlord's breach of the implied warranty. That percentage is then applied to the agreed upon rent to ascertain the tenant's damages. In addition to the two damage valuation methods described above, the court also held that the tenant may be able to receive damages for annoyance and inconvenience that result from a breach of the implied warranty.¹³¹ Therefore, when taken together, the court's two holdings on damages make it possible for a tenant to be completely relieved of his or her obligation to pay rent, as well as to receive a payment from the landlord for annoyance and inconvenience.

Justice Miller strongly disagreed with the majority opinion on the issue of damages.¹³² Although Justice Miller did not disagree with the adoption of the difference in valuation method, he did disagree with the majority's use of the fair market value of the premises as promised.¹³³ Justice Miller reasoned that under contract law a party is entitled to damages that compensate the party for the actual loss and do not "bestow a profit on the injured party."¹³⁴ Therefore, based on that reasoning, the measure of the tenant's damages should be the difference between the agreed rent and the value of the premises in the defective condition.¹³⁵ This measure would more closely approximate the tenant's actual damages.

Sixth, the court refused to adopt a general rule mandating that the tenant make future rent payments into escrow pending the outcome of an action by the landlord or tenant.¹³⁶ However, the court did state that under limited circumstances the landlord may request the trial court to establish escrow.¹³⁷ If the landlord shows "an obvious need for such protection,"¹³⁸ the payment into escrow may be allowed. The court then discussed the factors the trial court should consider when deciding if escrow is appropriate.¹³⁹ In addition, the court held that in the limited

¹³¹ *Id.* at 128.

¹³² *Id.* at 137-38.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 138.

¹³⁶ *Id.* at 130.

¹³⁷ *Id.*

¹³⁸ *Id.* (quoting *Bell v. Tsintolas Realty Co.*, 430 F.2d 474 (D.C. Cir. 1970)).

¹³⁹ *Id.*

circumstances in which escrow is established, there is to be no payment from the account “before final judgment without the consent of the parties.”¹⁴⁰

Justice Neely disagreed with the majority opinion on the payment of rent into escrow.¹⁴¹ Justice Neely reasoned that, because the tenant had agreed to pay rent when the dwelling was leased, it was not unfair to the tenant to require that the rental payments be made into escrow.¹⁴² The payment into escrow would not be an added expense to the tenant, and if he or she prevailed in the action, the funds would be returned.¹⁴³ In addition, by not mandating payment into escrow, the court had shifted the burden to the landlord, who would simply pass on the added expense to other tenants.¹⁴⁴

Finally, the court held that the tenant and landlord cannot agree to waive the implied warranty of habitability.¹⁴⁵ To allow the parties to waive the implied warranty would be to allow them to violate the law.¹⁴⁶ In addition, allowing waiver of the implied warranty could force tenants to accept unsuitable housing when other dwellings are not available.¹⁴⁷

Justice Neely also disagreed with this portion of the majority opinion.¹⁴⁸ Justice Neely felt that two parties who bargain at arm’s length “for less than elegant premises”¹⁴⁹ should be allowed to waive the implied warranty of habitability. In addition, Justice Neely stated that courts can easily determine whether the waiver was bargained for at arm’s length or whether the waiver was part of an adhesion contract thrust upon an unwilling tenant.¹⁵⁰

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 131-32 (Neely, J., dissenting).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 130-31.

¹⁴⁶ *Id.* at 129.

¹⁴⁷ *Id.* at 130.

¹⁴⁸ *Id.* at 135-36.

¹⁴⁹ *Id.* at 135.

¹⁵⁰ *Id.*

Justice Neely made other colorful remarks regarding the majority opinion.¹⁵¹ The first of these remarks was that the majority opinion was nothing more than *dicta* because the enactment of West Virginia Code section 37-6-30 meant that there was no case or controversy to be decided.¹⁵² Although the majority does acknowledge the enactment of the statute in its opinion,¹⁵³ the court may have decided to hear the case because of the small number of landlord-tenant cases that occur in West Virginia. The court likely used the opportunity to address an area of state law in dire need of change.

The second point Justice Neely raised is that three sources exist to improve the housing situation in West Virginia:¹⁵⁴ the government, the landlord, and the tenant.¹⁵⁵ According to Justice Neely, the government was not succeeding in improving the conditions of housing, so the onus to provide suitable housing had been thrust on the landlord.¹⁵⁶ In order for the landlord to effect this change, he or she would likely raise rents to the level needed to pay for this change.¹⁵⁷ Thus, while the availability of suitable housing may increase, the corresponding rise in rent could effectively price a great number of tenants out of the market.¹⁵⁸ Although presented in Justice Neely's typical colorful manner, his dissent in *Teller* provides a valid observation of the social and economic realities to be addressed when trying to effect a major reform in landlord-tenant law. The legislature and courts of this state will be well served to keep in the forefront of any decision affecting landlord-tenant reform the notion that the competing interests of the landlord and tenant, as well as the interests of society as a whole, must be properly balanced.

¹⁵¹ *Id.* at 131-36.

¹⁵² *Id.* at 131-32.

¹⁵³ *Id.* at 123

¹⁵⁴ *Id.* at 133.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

IV. PROPOSAL

Although the enactment of West Virginia Code section 37-6-30 and the Supreme Court of Appeals' opinion in *Teller v. McCoy* have both made positive inroads toward abolishing the archaic rules of the common-law landlord-tenant relationship, there are still deficiencies in current West Virginia law. This section of the Article will discuss these deficiencies and submit proposed legislation to remedy them. The proposals contained herein represent an amalgam of the Uniform Residential Landlord Tenant Act, current West Virginia law, and statutes from various other jurisdictions.

A. *Security Deposits*

There is currently no statutory basis for regulating tenant security deposits in West Virginia.¹⁵⁹ This lack of legislation surrounding tenant security deposits puts the tenant in an unfair position when dealing with a landlord who wrongfully withholds the tenant's deposit. As mentioned previously, the tenant is at an economic disadvantage when this situation occurs because the cost of seeking legal redress frequently exceeds the amount of the security deposit.¹⁶⁰ The legislatures in many jurisdictions have recognized this obstacle and as a result have enacted legislation that provides for the protection of tenant security deposits. In fact, an overwhelming majority of jurisdictions have enacted legislation protecting security deposits.¹⁶¹

Legislative protection of tenant security deposits is long overdue in West Virginia. There appears to be no legal or logical rationale for the lack of legislation that would afford protection of a tenant's deposit while preserving the landlord's ability to receive compensation for damage caused by the acts of a tenant. Legislation related to tenant security deposits in West Virginia might read as follows:

Section ____. Security Deposits.

(a) A landlord may not demand or receive security, however denominated, in an amount or value in excess of one month's periodic rent, except that a pet deposit not in excess of one-half of

¹⁵⁹ For a more extended discussion of security deposit legislation, see Snyder, *supra* note 56.

¹⁶⁰ See *supra* Part II.A.4.

¹⁶¹ See *supra* note 85 and accompanying text.

one month's periodic rent may be demanded or received when appropriate.¹⁶²

(b) All landlords of residential property requiring security deposits prior to occupancy shall be required to deposit all tenants' security deposits in an interest bearing account used only for that purpose, in any bank or other lending institution subject to regulation by the state of West Virginia or any agency of the United States government. Any interest earned on the deposit of such security shall be returned to the tenant, or credited to damages, upon termination of the tenancy.

(c) The tenant shall have the right to inspect the premises to ascertain any existing damages prior to taking occupancy. The landlord and tenant shall compile a listing of such damages and each party shall sign the listing, and such signed listing shall be conclusive evidence of the existence of such damages, not to include any latent defects which are not readily ascertainable during the inspection.

(d) At the termination of occupancy, the tenant shall have the right to inspect the premises in the landlord's presence, at which time the parties shall compile a listing of any damages, other than for normal wear and tear, that exists. The landlord and tenant shall sign the listing, and such signed listing shall be conclusive evidence of the existence of such damages. If the tenant shall refuse to sign such listing, he or she shall state specifically in writing the items on the listing to which he or she dissents, and shall sign such statement of dissent.¹⁶³

(e) Upon termination of the tenancy, property or money held by the landlord as security may be applied to the payment of accrued rent and the amount of damages, other than for normal wear and tear, which the landlord has suffered by reason of the tenant's

¹⁶² Subsection (a) was modeled after Nebraska's security deposit legislation which was adopted in part from the Uniform Residential Landlord Tenant Act § 2.101, 7B U.L.A. 453 (1985). *See* NEB. REV. STAT. §§ 76-1415-1416 (1996).

¹⁶³ Subsections (b), (c) and (d) were modeled after Kentucky's security deposit legislation which adopted in part from the Uniform Residential Landlord Tenant Act § 2.101, 7B U.L.A. 453 (1985). *See* KY. REV. STAT. § 383 (Michie 1996).

noncompliance with the rental agreement or any other section of this chapter. The balance, if any, and a written itemization shall be delivered or mailed to the last known address of the tenant within thirty days of the termination of the tenancy and delivery of possession to the landlord.

(f) If the landlord fails to comply with subsections (b) or (e), the tenant may recover the property and money due and reasonable attorney's fees incident to such recovery.¹⁶⁴

This proposed legislation strikes a fair balance between the landlord's need for adequate protection and the tenant's right to receive the security deposit back in a timely manner when appropriate. In addition, imposing the cost of the tenant's attorneys' fees on a landlord who wrongfully withholds the security deposit removes the economic disadvantage to the tenant, while also acting as an incentive to the landlord to deal fairly with the tenant and his or her funds. Moreover, the landlord is not precluded from withholding all or a portion of the tenant's security deposit when appropriate, but under the proposed statute the landlord is required to provide an accounting for the funds withheld and the reason for withholding.

B. *The Duty to Deliver Possession*

Although there is existing case law in West Virginia that imposes a duty on the landlord to deliver physical possession of the leased premises at the commencement of the lease,¹⁶⁵ there is currently no statutory basis for providing this duty.¹⁶⁶ The Uniform Residential Landlord And Tenant Act imposes this duty on the landlord,¹⁶⁷ and with some alteration serves as a model for the following proposed legislation:

¹⁶⁴ Subsections (e) and (f) were modeled after Nebraska's security deposit legislation which was adopted in part from the Uniform Residential Landlord and Tenant Act § 2.101, 7B U.L.A. 453 (1985).

¹⁶⁵ *Huntington Easy Payment Co. v. Parsons*, 57 S.E. 253 (W. Va. 1907).

¹⁶⁶ While one might argue that the existence of a decision which holds that landlords have a duty to deliver physical as opposed to legal possession precludes the need for statutory codification of the principle, the reality of the situation is that statutory provisions produce more consistent application of the law. Fine distinctions in fact patterns can produce differing results under the common law, but a clear statutory provision reduces that possibility. Further, statutes carry the stamp of public approval and public discussion. Finally, the legislation proposed in this section fully sets forth the tenant's remedies when the landlord does not deliver actual possession.

¹⁶⁷ UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 2.103, 7B U.L.A. 459 (1985).

Section _____. Landlord's Duty to Deliver Physical Possession.

(a) At the commencement of the term a landlord shall deliver physical possession to the tenant in compliance with the rental agreement and the warranty of habitability contained in section _____ of this Code.

(b) If the landlord fails to deliver physical possession of the dwelling unit as provided in subsection (a), rent abates until possession is delivered and the tenant may:

(1) terminate the rental agreement upon at least ten days written notice to the landlord and upon termination the landlord shall return all security and prepaid rent; or

(2) demand performance of the rental agreement by the landlord and the landlord shall obtain possession of the dwelling unit from any person wrongfully in possession. This subsection shall not impair any right of the tenant to recover any damages against the party wrongfully in possession.

The proposed legislation protects the tenant's expectation of actual possession of the leased premises, while imposing the duty on the landlord to take action against the person wrongfully in possession. Under the proposed statute, the tenant does not have a cause of action for possession against the wrongdoer, but the tenant does retain the right to seek damages against such person for any annoyance and inconvenience that are a result of the wrongdoer's withholding possession. The duty to remove the wrongdoer is imposed on the landlord because the property belongs to him or her and because the tenant does not bargain for an action to recover possession when the lease is signed. In addition, the landlord is better situated to bring such action and recover possession.

C. *Prohibiting Retaliatory Conduct by the Landlord*

Although there is no specific West Virginia statutory provision preventing a landlord from retaliating against a tenant, in *Imperial Colliery Co. v. Fout* the West Virginia Supreme Court of Appeals construed West Virginia Code section 55-

3A-3(g) as prohibiting retaliatory conduct by a landlord.¹⁶⁸ In so holding, the court recognized that retaliatory conduct by the landlord is a defense to eviction provided that the retaliatory conduct arises out of the landlord-tenant relationship.¹⁶⁹ In *Imperial*, the tenant had been evicted for participating in union activities, and the Supreme Court of Appeals held that the retaliatory conduct defense was not applicable in this situation.¹⁷⁰

In addition, the Supreme Court of Appeals recently held in *Murphy v. Smallridge*¹⁷¹ that a tenant has an affirmative cause of action against his or her landlord when the landlord retaliates against the tenant in response to certain protected activities.¹⁷² As a result of *Murphy*, the tenant is no longer restricted to asserting the doctrine of retaliatory eviction from a defensive posture.¹⁷³ The tenant may now bring suit against the landlord as a result of the retaliatory conduct and is not required to assert retaliatory eviction as a defense to the landlord's suit for unlawful detainer. The *Murphy* court also held that the tenant is not required "to continue living on the leased premises to preserve [the] cause of action for retaliatory eviction."¹⁷⁴

It is submitted that the legislature codify the principles embodied in the *Imperial* and *Murphy* decisions, and provide the tenant a remedy in cases where the landlord's conduct is retaliatory. The Uniform Residential Landlord and Tenant Act provides such a provision.¹⁷⁵ It is further submitted that the legislature adopt, without alteration, the provisions provided for in the Uniform Residential Landlord and Tenant Act sections 5.01¹⁷⁶ and 4.107.¹⁷⁷ These provisions protect the tenant

¹⁶⁸ *Imperial Colliery v. Fout*, 373 S.E.2d 489 (W. Va. 1988).

¹⁶⁹ *See id.*

¹⁷⁰ *See id.* The court noted that Fout's rights not dependant on his status as a tenant, such as his First Amendment rights, could be validated on other grounds. *Id.* at 494.

¹⁷¹ 468 S.E.2d 167 (W. Va. 1996).

¹⁷² *See id.*

¹⁷³ *See id.* at 172.

¹⁷⁴ *Id.*

¹⁷⁵ *See* UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 5.101, 7B U.L.A. 503 (1985).

¹⁷⁶ The Uniform Residential Landlord And Tenant Act section 5.101 provides:
 (a) Except as provided in this section, a landlord may not retaliate by increasing rent or decreasing services or by bringing or threatening to bring an

from retaliatory conduct by imposing harsh penalties on the landlord, but also protect the landlord from vexatious lawsuits by a tenant who has violated the provisions of section 5.101(c).

action for possession after:

(1) the tenant has complained to a governmental agency charged with responsibility for enforcement of a building or housing code of a violation applicable to the premises materially affecting health and safety; or

(2) the tenant has complained to the landlord of a violation under [the warranty of habitability]; or

(3) the tenant has organized or become a member of a tenant's union or similar organization.

(b) If the landlord acts in violation of subsection (a), the tenant is entitled to the remedies provided in Section 4.107 and has a defense in any retaliatory action against him for possession. In an action by or against the tenant, evidence of a complaint within [1] year before the alleged act of retaliation creates a presumption that the landlord's conduct was in retaliation. The presumption does not arise if the tenant made the complaint after notice of a proposed rent increase or diminution of services. "Presumption" means that the trier of fact must find the existence of the fact presumed unless and until evidence is introduced which would support a finding of its nonexistence.

(c) Notwithstanding subsections (a) and (b), a landlord may bring an action for possession if:

(1) the violation of the applicable building or housing code was caused primarily by lack of reasonable care by the tenant, a member of his family, or other person on the premises with his consent; or

(2) the tenant is in default in rent; or

(3) compliance with the applicable building or housing code requires alteration, remodeling, or demolition which would effectively deprive the tenant of use of the dwelling unit.

Id.

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The Uniform Residential Landlord and Tenant Act section 4.107 provides in pertinent part: If a landlord unlawfully removes or excludes the tenant from the premises or willfully diminishes services to the tenant by interrupting or causing the interruption of heat, running water, hot water, electric, gas, or other essential service, the tenant may recover possession or terminate the rental agreement and, in either case, recover an amount not more than [3] months' periodic rent or [threefold] the actual damages sustained by him, whichever is greater, and reasonable attorney's fees. If the rental agreement is terminated the landlord shall return all security recoverable under Section 2.101, and all prepaid rent.

Id.

D. The Landlord's Duty to Mitigate Damages

Consistent with the contract principle of mitigating damages, a landlord should take reasonable steps to lease the dwelling to another party when the tenant prematurely abandons the premises. Again, the Uniform Residential Landlord and Tenant Act provides the framework for a suitable statute imposing this duty on a landlord.¹⁷⁸ With some alteration in the act's provision, the West Virginia statute might read as follows:

Section _____. Landlord's Duty to Mitigate Damages

(a) If the tenant abandons the dwelling unit, the landlord shall make reasonable efforts to rent it at a fair rental price. If the landlord rents the dwelling unit for a term beginning before the expiration of the prior rental agreement, the prior rental agreement terminates as of the date of the new tenancy. If the landlord fails to make reasonable efforts to rent the dwelling unit at a fair rental price or if the landlord accepts the abandonment as a surrender, the prior rental agreement is deemed to be terminated by the landlord as of the date the landlord has notice of the abandonment.

(b) Nothing in this section precludes the landlord from recovering from the prior tenant the difference between the agreed rental of the prior lease and the rental agreed to in, the new lease, provided that the new rental is fair and closely approximates the prior rental.

This proposal is an attempt to balance the landlord's duty to mitigate his or her damages with the landlord's right to any deficiency between the prior rental amount and the new rental amount, provided the landlord makes reasonable efforts to find a new lessee. It will often be the case that the landlord will not be able to relet the premises immediately and at the same rental amount as provided for in the prior lease. The provision allows the landlord to realize his or her bargained-for expectation under the prior lease, while also preventing the landlord from taking no action to relet and holding the prior tenant liable for the full amount of the rental lost. In addition, when the landlord is unable to relet the abandoned dwelling after reasonable efforts, the landlord should be allowed to hold the tenant liable for the full amount of the rent remaining on the lease.

¹⁷⁸

See UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 4.203, 7B U.L.A. 495-96 (1985).

E. *The Implied Warranty of Habitability*

The implied warranty of habitability is the single most critical element in any legislative reform of landlord-tenant law. The implied warranty must balance the competing interests of the landlord and the tenant, while also effectuating the public policy of providing safe and suitable housing. The landlord desires a fair return on his or her investment, and the tenant desires a livable dwelling at a fair rental. In addition, society demands that safe housing be made available to all citizens. Therefore, any legislative action in this area must be undertaken with those interests in mind. The proposal in this section of the Article attempts to balance those interests in providing a minimum level of safeguards that should be contained in a legislative enactment of the implied warranty of habitability. It is the authors' hope that the implied warranty contained in this section will provide the residential tenant with adequate protection while not imposing an undue burden on the landlord that would effectively price many tenants out of the rental market.

The discussion in this section on the implied warranty of habitability will not present a proposed statute in the same form presented in previous sections. Rather the discussion here will focus on certain elements that should be deleted or added to the current implied warranty of habitability contained in West Virginia Code section 37-6-30 and the Supreme Court of Appeals' decision in *Teller v. McCoy*. In the event that the alteration of the existing code provision would be unduly burdensome, this Article advances a legislative provision.

First, West Virginia Code section 37-6-30(c)¹⁷⁹ should be deleted from the implied warranty of habitability. This provision is not common in the statutes of other states that have adopted the warranty of habitability.¹⁸⁰ Further, the majority opinion in *Teller v. McCoy* directly contradicts this provision by holding that the payment of rent is mutually dependent upon habitability.¹⁸¹ Most importantly, section 37-6-30(c) severely reduces the impact of the rest of the statute by stripping the tenant of his rights under the warranty if he fails to continue paying the standard rent for substandard housing. The implied warranty of habitability should provide the tenant with the ability to seek specific performance of the lease and withhold rental payments when the landlord has breached his or her obligations. In addition, if the landlord breaches the implied warranty and the tenant withholds rent as a

¹⁷⁹ This section reads "(c) None of the provisions of this section [37-6-30] shall be deemed to require the landlord to make repairs when the tenant is in arrears in payment of rent." W. VA. CODE § 37-6-30 (1997).

¹⁸⁰ See *supra* notes 72-75 and accompanying text.

¹⁸¹ See *Teller*, 253 S.E.2d at 125.

result, the landlord should not be relieved of the duty to make repairs. To allow the landlord to breach the warranty of habitability and then be relieved of the duty to maintain the premises runs contrary to all notions of fairness and justice. The central purpose for establishing the implied warranty of habitability is to provide fit and tenantable housing. Allowing the landlord to profit from his or her own breach substantially undermines the protections afforded by such a warranty.

Second, the implied warranty of habitability should allow the tenant to use self-help in repairing minor defects in the dwelling. After giving the landlord notice of the defect, the tenant would be allowed to make minor repairs and deduct the cost of the repairs from the rent. The repair and deduct rule should only be allowed when the landlord does not respond to the notice in a timely manner, and only when the repairs amount to less than one hundred dollars.¹⁸² In addition, to prevent abuse of this provision the tenant should be required to perform the repairs in a workman-like manner and furnish the landlord with receipts for all materials as well as a list of the repairs made. A similar repair and deduct rule is provided for in the Uniform Residential Landlord and Tenant Act¹⁸³ and is consistent with Justice Miller's dissent in *Teller v. McCoy*.¹⁸⁴ An adequate repair and deduct rule for West Virginia could read as follows:

Section _____. Repairs by Tenant.

(a) If within a reasonable time after written or oral notice to the landlord or his agent of defects which cause the premises to be untenantable within the meaning of section _____ of this code, the landlord neglects to repair the defects, the tenant may repair the defects himself or herself where the cost of such repairs does not exceed one hundred dollars and deduct the expenses of such repairs from the rent when due.

(b) If the tenant elects to repair and deduct under subsection (a) of this section, the tenant shall provide the landlord with receipts for

¹⁸² The dollar amount provided here is a suggested amount. The one hundred dollar amount frequently appears in other repair and deduct statutes. *See, e.g.*, CAL. CIV. CODE § 1942 (Deering 1994).

¹⁸³ UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 4.103, 7B U.L.A. 481-82 (1985).

¹⁸⁴ *See Teller*, 253 S.E.2d at 136-37. *See also* discussion *supra* Part III.B.

all costs deducted from the rent at the time such deduction is made.¹⁸⁵

Third, when the implied warranty of habitability has been breached by the landlord and the tenant is entitled to damages, these damages should be determined using the “difference in valuation” method.¹⁸⁶ However, in using the difference in valuation method, the tenant’s damages should be measured by the difference in the actual rent agreed to and the value of the premises as delivered in the uninhabitable condition.¹⁸⁷ As was discussed earlier, the majority opinion in *Teller* adopted the difference in valuation method, but held that the damages were measured by the difference between the fair market value of the premises as promised and the fair market value of the premises as delivered.¹⁸⁸ However, the agreed upon rent is the appropriate measure for determining the tenant’s damages because it more closely approximates actual damages and is consistent with the contract principle of only indemnifying the injured party for the loss incurred. Moreover, the use of the actual agreed upon rent promotes judicial efficiency by relieving the trial court of the burden of ascertaining the fair market value of the leased premises. Again, this position is the one Justice Miller took in his *Teller* dissent.¹⁸⁹

Fourth, the implied warranty of habitability should provide for the establishment of an escrow when an action is brought by the landlord or tenant. As Justice Neely stated in his dissent in *Teller*, the tenant has already agreed to pay rent, and it is no injustice to require that he or she continue to pay the rent into escrow.¹⁹⁰ In addition, the payment into escrow protects both parties because upon final adjudication the prevailing party will receive his or her portion of the proceeds. Moreover, the payment into escrow would deter tenants who wrongfully withhold rent and then seek to shield themselves with the implied warranty of habitability.

Finally, the landlord and tenant should not be permitted to waive the implied warranty of habitability. The policy underlying the implied warranty far

¹⁸⁵ This provision is loosely modeled on CAL. CIV. CODE § 1942 (Deering’s 1994).

¹⁸⁶ This approach was advanced by Justice Miller in his *Teller* dissent. See *Teller*, 253 S.E.2d at 137-39 (Miller, J., dissenting).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 128.

¹⁸⁹ *Id.* at 137-38.

¹⁹⁰ *Id.* at 134-35 (Neely, J., dissenting).

outweighs any interest in allowing the parties the right to bargain at arm's length for sub-standard housing. It is further suggested that the incidence of landlord overreaching that this waiver could promote far exceeds any gain that would occur by allowing individuals the freedom to contract for "less than elegant housing."¹⁹¹

V. CONCLUSION

American landlord-tenant law has undergone significant and substantial change in the last three decades. Many of the traditional rules of the common law have been abolished, and new rules, based on the principles of contract law, have begun to replace the sixteenth century estate philosophy that has dominated landlord-tenant law for centuries. West Virginia has made some progress in the area of landlord-tenant reform, but the state still trails many jurisdictions in replacing the traditional common law rules with more equitable and contemporary legislation. West Virginia legislation that accurately reflects the modern landlord and tenant relationship is long overdue.

¹⁹¹*Id.* at 135.