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## Wyoming's Residential Rental Property Act-A Critical Review

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WYOMING'S RESIDENTIAL RENTAL  
PROPERTY ACT – A CRITICAL REVIEW

*Arthur R. Gaudio*\*

I. INTRODUCTION AND HISTORY

*Introduction*

Landlord tenant law in Wyoming has received very little attention by the legislature and even by the courts during the last century. Most of the legislation prior to 1999 merely accepted, or provided only slight modifications to, the common law structure existing when Wyoming became a state. The relatively few reported court decisions have dealt, for the most part, with agricultural<sup>1</sup> or commercial leases,<sup>2</sup> options to purchase contained in leases,<sup>3</sup> or the landlord's liability to third parties who are injured on the leased premises.<sup>4</sup> Residential leases have been more or less an orphan child

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1. See, e.g., *McClellan v. Britain*, 826 P.2d 245, 246 (Wyo. 1992); *Bowen v. Korell*, 587 P.2d 653, 654 (Wyo. 1978).

2. See, e.g., *Sheridan Commercial Park, Inc. v. Briggs*, 848 P.2d 811, 813 (Wyo. 1993).

3. See, e.g., *J Bar H, Inc. v. Martin*, 872 P.2d 1174, 1175 (Wyo. 1994); *Svalina v. Split Rock Land & Cattle Co.*, 816 P.2d 878, 879 (Wyo. 1991).

4. See, e.g., *Taylor v. Schukei Family Trust*, 996 P.2d 13 (Wyo. 2000); *Roberts v. Klinkosh*, 986 P.2d 153, 154 (Wyo. 1999); *Krier v. Safeway Stores 46, Inc.*, 943 P.2d 405, 406 (Wyo. 1997); *Ortega v. Flaim*, 902 P.2d 199, 200 (Wyo. 1995).

in the Wyoming legal structure, perhaps with understandable social and economic reason.

Wyoming is not a populous state with many large cities; even in its larger cities the population density would not be described as high. In many states more populous than Wyoming, particularly those with large cities, the lack of physical real estate space has tended to drive up the cost of housing ownership. With the initial investment cost for home ownership being high, the logical alternative is the no-front-end cost of a rented residence. As a very rural state the pressures and costs of residential ownership in Wyoming have not been as pressing. Home ownership, whether in the State's relatively small cities or on the ranch or farm, was not only financially possible but culturally was the thing to do.

Nevertheless, even in Wyoming, cities have grown and real estate space in them is often at a premium. Residential rental properties have become a housing alternative for many people. For some it may be a temporary place to live while in school and before moving on to a more permanent home. For others, often those with jobs and life situations that cannot provide the initial investment needed for home ownership, the rented home has become a permanent home.

With such a small body of landlord tenant law based primarily on outdated common law principles, the protections that a tenant can expect are quite limited. The common law concept of a landlord tenant relationship is based on the premise that a tenant receives a conveyance of a leasehold estate from the landlord that lasts for a term. During the term, the tenant has a duty to pay the rent and perform the other obligations contained in the lease. However, the landlord's primary duties are to assure the tenant that he has the legal right to possess the residential unit and to perform only such other obligations as the tenant can negotiate. If the landlord should breach any of those duties, the tenant has a right to obtain damages from the landlord. The tenant might even terminate the lease if the premises are in substantial violation of the nineteenth century implied covenant of quiet enjoyment. However, the possibilities of staying in place and demanding that the landlord make the premises habitable have been non-existent. With one possible and limited exception, none of the Wyoming cities, where most of the residential units are located, have adopted housing codes to require that landlords provide safe, sanitary housing that is fit for human habitation. Wyoming law has been so devoid of tenant protections that law students often speak of the law in this area rather pejoratively as "landlord law" rather than "landlord tenant law."

With the new millennium about to begin, the Wyoming legislature took a significant first step in an attempt to deal with some of the more pressing issues presented by residential leases. In its 1999 session, it adopted, and

the governor signed, an act entitled "Residential Rental Property."<sup>5</sup> The Act was previously considered at the committee level in 1997, but was defeated before ever reaching the floor of either the House or the Senate.<sup>6</sup> It was revived in the 1999 legislative session and was enacted after considerable debate and many amendments. The Act is now codified as Article 12 (Residential Rental Property), Chapter 21 (Justices of the Peace – Procedure and Actions), Title 1 (Code of Civil Procedure) of the Wyoming Statutes.

The Act obligates landlords to provide tenants in residential rental properties with units that are "in a safe and sanitary condition fit for human habitation,"<sup>7</sup> requires that tenants participate in the maintenance of their rental units,<sup>8</sup> and provides tenants with remedies if their landlords breach their obligations under the Act.<sup>9</sup> The Act also creates certain duties and procedures for landlords in refunding deposits or applying those deposits to the payment of damages caused by tenants.<sup>10</sup> Finally, the Act creates a procedure for removing personal property left in the units by tenants and returning it or, in the alternative, disposing of it without liability for conversion.<sup>11</sup>

#### *A Brief History of Landlord Tenant Law*<sup>12</sup>

To appreciate the objectives of this new legislation, a brief history of landlord tenant law is useful. In reviewing that history, I will focus on the development of the law regarding a cohesively paired set of issues—landlords' duties and tenants' remedies.<sup>13</sup> The end product of this development, in most U.S. jurisdictions, is that landlords have a duty to provide tenants with habitable housing and that landlords are subject to a variety of remedies for the enforcement of that duty.

The law of landlord and tenant began to develop during the latter Middle Ages at a time when the English economy started to move its focus from the manor to the town. Although only in increments, land was beginning to lose its place as a status symbol and a means of power and authority. It was gradually coming to be viewed as a commodity to be traded in the market-

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5. WYO. STAT. ANN. §§ 1-21-1201 to -1211 (LEXIS 1999).

6. Interview with State Senator Phillip Nicholas (Jan. 19, 2000).

7. WYO. STAT. ANN. § 1-21-1202(a) (LEXIS 1999).

8. WYO. STAT. ANN. §§ 1-21-1204 & 1205 (LEXIS 1999).

9. WYO. STAT. ANN. §§ 1-21-1203(b) & 1206(b) - (d) (LEXIS 1999).

10. WYO. STAT. ANN. §§ 1-21-1207 to -1209, -1211(b) (LEXIS 1999).

11. WYO. STAT. ANN. §§ 1-21-1210 & -1211(a) (LEXIS 1999).

12. See generally Krista L. Noonan & Frederick M. Preator, Comment, *Implied Warranty of Habitability: It Is Time to Bury the Beast Known as Caveat Emptor*, 33 Land & Water L. Rev. 329 (1998).

13. While my objective of this brief history will be to focus on landlords' duties and tenants' remedies, the complementary pair, i.e., tenants' duties and landlords' remedies, is also important. In many cases, tenants do not perform their duties and there is a need to consider the remedies available to the landlord. In fact, the Wyoming Residential Rental Property Act does consider this pairing, and I will discuss it later in this article.

place. That trend has continued and grown to such an extent that today, it is no surprise to see residential and commercial property, and even ranches and farms, bought and sold with not much more attention than the sale of stocks or bonds of an equivalent value.

One of the initial uses of the leasehold estate was as a financing device for persons in need of funds. A person owning a freehold estate might want to borrow money, but according to laws then existing in England, the charging of any interest on a loan was usury. However, a lease of the borrower's real property to the lender was available as an alternative. The lender-tenant could lend money to the borrower-landlord with the expectation that the rents or profits from the land would more than provide a satisfactory return, albeit not in a form labeled "interest." Another initial use of the leasehold estate, more in keeping with our present day concept of leasing, involved a prospective entrepreneur needing a shop to sell his merchandise. Not having the current funds needed to purchase the shop, since he would need that money to buy his inventory or the raw materials, he might lease the shop for a term of years. It made no difference to him since he had a place in which to establish his store and sell his merchandise.<sup>14</sup>

Throughout its development, the leasehold estate was a stepchild of the law and the courts did not know quite where to place it. The subject matter of a lease certainly was land, but it was not an estate in land that was befitting a freeholder.<sup>15</sup> Thus, the leasehold came to be known as a non-freehold estate. In fact, so lowly was its caste that the English common law courts did not provide tenants the same remedies available to holders of freehold estates. Tenants did not have access to the real actions for recovery of possession. They could only sue for damages, although eventually other remedies were developed.<sup>16</sup> Since tenants did not have the same remedies as owners of real property, the courts considered the leasehold estate to be personal property. However, the courts could not completely avert the idea that leasehold estates had something to do with real property. Thus, we find the rather curious use of the term "chattels real" to describe leasehold estates in land.<sup>17</sup>

Because leasehold estates were such lowly forms of ownership, it is easy to understand why the courts did not desire to expand landlords' duties to tenants beyond those stated in the leases themselves. Similarly, since landlords owned the more prestigious freehold estates in the lands they

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14. See generally THOMAS F. BERGIN & PAUL G. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 38-42 (2d ed. 1984).

15. A gentleman of the day would only own estates in fee simple, fee tail or for life, i.e., the freehold estates.

16. In due course, the tenant was granted the remedy of ejectment.

17. See generally CORNELIUS J. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 56-58 (2d ed. 1988).

leased, it is easy to understand why the courts did not provide tenants much in terms of remedies against those landlords.<sup>18</sup>

While the economy was changing, it was still basically agrarian in nature. Tenants, like all good farmers, basically had to provide for all their needs. They were considered jacks-of-all-trades and able to master whatever difficulties they encountered with their leased premises. The landlord had no duty to repair or even to provide amenities such as heat or water.<sup>19</sup> If the tenant wanted the landlord to provide a particular amenity or service for the premises, he had to negotiate and include it in the lease agreement.<sup>20</sup>

If the lease did contain a covenant to provide certain services, virtually the sole remedy available to the tenant was a suit for damages. In that era, the courts adhered to the concept that all covenants in the lease were independent of each other. Each promise by a party to the lease was a solemn bond and the failure by one party to perform his obligation did not excuse the other party from performing his own covenant. Thus, the tenant could not refuse to pay his rent because the landlord had failed to abide by his covenant. The tenant had to continue to pay his rent and seek relief in the courts via damages for breach of the landlord's covenant.<sup>21</sup>

Not to be ignored in this stage of the development of landlord tenant law was the fact that the basic remedy available to the landlords was also damages. In the lease, the landlord had conveyed a leasehold estate to the tenant for a stated term. In that lease, the tenant also promised to pay the rent, but the tenant's covenant was also independent of the landlord's covenant to provide the leasehold estate. As a result, the landlord could not terminate the lease for nonpayment of rent, just as the tenant could not cease to pay rent because of the landlord's failure to provide a specified service.<sup>22</sup>

As previously noted, land was changing from a status symbol and becoming a commodity to be traded in the economy. As with any economy, the law of supply and demand played an important part in determining lease

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18. See generally *id.* at 71-76. One noteworthy exception was the concept that a tenant who was evicted from the premises by the landlord had suffered a destruction of his leasehold estate. As a result, the tenant did not have to pay the rent or perform the other duties prescribed in the lease. *Id.* at 74-75. This was an early application of the yet-to-be developed contract doctrine of consideration. The landlord had failed to deliver his consideration (possession of the leasehold estate), and thus the tenant was not obliged to deliver his consideration (the rent prescribed to purchase the leasehold estate). However, for centuries yet to come this was as far as the courts were willing to go.

19. After all, the well was nearby and the fireplace provided the heat. These amenities were both in the easy reach of the tenant.

20. See generally, *supra* note 17, at 71-73.

21. See generally *Boston Housing Auth. v. Hemingway*, 293 N.E.2d 831, 840 (Mass. 1973).

22. One would be quite correct to notice that, the situation in which landlords and tenants found themselves was not at all like contract law as we know it today. At that period in the development of landlord tenant law, the law of contract was not yet formed. Consideration and the concept of quid pro quo were not a part of the law. See generally ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 20, at 30-31 (1 Vol. ed. 1952).

prices and terms. With growing populations and entrepreneurial needs, demands for land, a scarce and limited resource, were growing. Not only was the amount of land scarce, but the owners of that resource were even fewer. The availability of the land resource was controlled by an oligopoly. If landlords were few, it was not necessary for them actually to unite in an agreement in restraint of trade for the purpose of setting prices and terms—the structure of the economy could and did take care of that for them.

Not surprisingly, landlords, seeking to obtain speedier relief than was provided in an action for damages, inserted conditions into their leases. These conditions were essentially all the same. They provided that in the event a tenant should fail to perform a covenant, the landlord could terminate the lease. Such conditions gave landlords more immediate relief, by terminating the lease rather than waiting to collect damages from the tenant.

This new remedy was not inconsequential for the tenant. If a tenant should refuse to pay the rent because the landlord failed to perform his covenants, the tenant had still breached his covenant to pay rent. Consequently, the landlord could terminate the lease, despite his own malfeasance. The tenant would never get a chance to litigate the question of whether the landlord had breached his duties as promised in the lease. The best remedy for the tenant remained paying the rent and then suing the landlord for damages. As one might imagine, the transaction costs of that remedy were too high for most tenants—the damages seldom provided sufficient remuneration to pay for attorney's fees and other litigation costs. As a result, tenants seldom sought relief.<sup>23</sup>

At this point in the development of landlord tenant law, the status of the landlord's duties and the tenant's remedies were as follows: The landlord had a duty to provide the tenant with the leasehold estate and only such maintenance or services as specifically agreed upon in the lease. Practically speaking, the only remedy available to the tenant was to sue for damages.<sup>24</sup>

The next stage in the development of landlord tenant law did not occur until the industrial revolution was changing the previously agrarian landscape of America. By the early nineteenth century, the availability of jobs in cities began to bring about a significant expansion of their population. People leaving the farm and immigrants entering the country flocked to the cities. However scarce land in the cities was before that time, that scarcity began to pale by comparison. In terms of supply and demand, the demand for housing was growing at a rate far exceeding the available supply. Resi-

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23. As a further disincentive to seek damages, when the date for lease renewal arrived the landlord could refuse to renew the lease or, if the lease were a month to month tenancy, he could terminate it at the end of the next period. The issues of retaliatory eviction are still with us today.

24. See also Paula C. Murray, Note, *The Evolution of Implied Warranties in Commercial Real Estate Leases*, 28 U. Rich. L. Rev. 145, 145-46 (1994).

dential leaseholds in cities no longer were one family homes. Instead, tenements began to rise and filled in much of the available landscape.<sup>25</sup>

The conditions in tenements were often deplorable. Heat, running water, and other services were frequently not available. Vermin and rodents not only ran the alleys and sewers, but occupied hallways and bedrooms. Under the law as it existed up to that time, a tenant's refusal to pay his rent because of these conditions was followed by the landlord's termination of the lease. There were always new prospective tenants in the wings.

It was in this atmosphere that the first steps of reform began.<sup>26</sup> The courts resurrected the quaint and honorable covenant of quiet enjoyment and put it to work for the tenant. If a lease did not contain an expressed covenant of quiet enjoyment, the courts eventually implied one. In interpreting the covenant, the courts held that if the tenant's quiet enjoyment was so substantially impaired by the landlord as to be tantamount to an eviction, the court would find that there had been a constructive eviction.<sup>27</sup>

This was the beginning of the intervention of contract law into property law. In contract terms, if the landlord's consideration had so materially failed as to make quiet enjoyment impossible, the tenant had the right to terminate the lease. In later decisions, courts found that violations of other expressed or implied covenants might also provide the basis for the remedy of constructive eviction.<sup>28</sup>

As a result of the covenant of quiet enjoyment and the doctrine of constructive eviction, both the landlord's duties and the tenant's remedies were increased in residential lease situations. The landlord's duties expanded to include an obligation to supply the tenant with premises that were at least in good enough condition that the tenant would not be considered constructively evicted. The traditional examples of conditions that amounted to constructive eviction involved infestations by vermin and rodents, the lack of any water, hot water, and heat, and eventually the lack of electricity and elevator service in a relatively high-rise apartment.<sup>29</sup> In order to take advantage of the remedy, the tenant had to inform the landlord of the defect and give the landlord an opportunity to repair the condition.<sup>30</sup> If the condition was not repaired within a reasonable time, the tenant had to vacate the

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25. See generally Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. Rev. 503, 510-11 (1982).

26. See, e.g., *Dyett v. Pendleton*, 8 Cow. 727 (N.Y. 1826).

27. See generally ROGER A. CUNNINGHAM, *THE LAW OF PROPERTY* § 6.33, at 286-88 (2d ed. 1993).

28. See *id.* at 286.

29. See *id.* at 286-87.

30. See 1 AMERICAN LAW OF REAL PROPERTY § 5.04 at 5-48 (Arthur R. Gaudio, ed., 1994).



premises promptly in order to demonstrate that he and his family had been evicted.<sup>31</sup>

Unfortunately for tenants, this last requirement proved to be a limiting factor in the desirability of the remedy. First of all, many tenants had no real desire to move; they only wanted their landlords to supply the necessary amenities for habitable dwellings. Many tenants would much rather remain in their current dwellings and withhold an appropriate amount of the rent to provide incentives to their landlords to repair the defects or to provide the services. In some cases, tenants might even prefer to repair the defects or provide the services themselves and deduct the cost from the rent. However, that was not an option. Their lease still contained a condition, unmodified by the doctrine of constructive eviction, which provided that upon failure to pay the rent the landlord could terminate the lease.

The doctrine of constructive eviction provided a further problem for tenants. Even if they did want to move to other premises, they often found that they could not find new living accommodations in the short time they were given under the doctrine; they were required to vacate the premises promptly.<sup>32</sup> Although that requirement still exists, over the years some courts have adapted to the reality that it takes time to find a new dwelling and move out.<sup>33</sup>

Finally, the tenant was faced with still another dilemma—the definition of a breach of the covenant of quiet enjoyment was sufficiently unclear that he really didn't know whether a court or jury would agree that he had, in fact, been constructively evicted. If he was convinced of the correctness of his position and willing to take a chance, he could enter into a new lease for another dwelling unit. However, the landlord could still bring suit against him claiming a continuing obligation to pay the rent and denying a constructive eviction.<sup>34</sup> If the tenant was correct, he would win and only have to face the costs of litigation. If he was wrong he would, in addition, have the burden of the prior lease added to the burden of the new lease.<sup>35</sup>

Thus, during this period of legal history there were duties that the courts were willing to impose on landlords in addition to those contained in the lease itself. These might be found in implied covenants such as quiet enjoyment. Furthermore, the additional remedy of constructive eviction

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31. *See id.*

32. *See, e.g., Dell'Armi Builders, Inc. v. Johnston*, 526 N.E.2d 409, 412 (Ill. App. 1988).

33. *See, e.g., Reste Realty Corp. v. Cooper*, 251 A.2d 268, 277 (N.J. 1969); *cf. Dell'Armi Builders, Inc. v. Johnston*, 526 N.E.2d 409, 412 (Ill. App. 1988).

34. *See* 1 AMERICAN LAW OF REAL PROPERTY, *supra* note 30 § 5.04 at 5-48 to -49.

35. During this period of legal history, the common law rule that the landlord had no obligation to mitigate his damages prevailed. In recent years, this too has been ameliorated in some courts by holding that the contract obligation to mitigate damages should apply in leases too. *See, e.g., Sommer v. Kridel*, 378 A.2d 767, 773-74 (N.J. 1977).

was available to the tenant. Now the tenant had the right to terminate the lease in addition to the right to seek damages for the breach of an express or implied covenant contained in the lease. However impractical the remedy of constructive eviction might have been, or however uncertain the landlord's duties under the covenant of quiet enjoyment might have been, the tenant nevertheless had an increase to both sides of the duty-remedy pair.

The next step in the development of landlord tenant law in the United States brings us essentially to the present era. During the last thirty to forty years, many courts and some legislatures have begun to look at the lease in a new light. A lease has aspects of two different legal concepts—a property law aspect and a contract law aspect. Because a lease conveys a leasehold estate from the landlord to the tenant, it has a conveyance or property law aspect. Many of the principles established during the early development of landlord tenant law, especially the doctrine of independence of covenants, are viewed as part of the property law aspect of leases. However, because the lease also contains contractual obligations—covenants—made by the landlord and the tenant, a lease also has a contract law aspect.

As we have seen, throughout most of the history of landlord tenant law the courts have chosen to emphasize the property law aspect of the lease and have generally minimized or ignored the contract law aspect. In our recent era, however, many courts and legislatures have chosen to give a better look at the contract law side of the lease. This has brought about another round of much needed reforms. After all, they reason, the real and obvious intent of the residential tenant<sup>36</sup> is to acquire a package of residential goods and services amounting to habitable premises and not merely the conveyance of a leasehold estate in which she might have to make repairs in order to reside there.<sup>37</sup> Thus, they hold, in every residential lease there should be an implied warranty of habitability.<sup>38</sup> This warranty is a contractual obligation and its breach makes available to the tenant a variety of contract remedies.<sup>39</sup> As a product of this new perspective, there has been the development of an additional set of landlords' duties and tenants' remedies.

However, the fundamental policy reasons supporting the adoption of an implied warranty of habitability are considerably more expansive than the inferred intent of the parties. Unlike her agrarian ancestor, the residential tenant of today is not a jack-of-all-trades. She usually is raised in an urban environment, not an agrarian one, and she has not developed the skills needed to make many of the repairs that a house or apartment needs. There

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36. Under this approach, the landlord acknowledges the tenant's intent by agreeing to the residential dwelling lease.

37. See, e.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1074-78 (D.C. Cir. 1970).

38. See, e.g., *id.* at 1080-83; *Wade v. Jobe*, 818 P.2d 1006, 1009-11 (Utah 1991); *Hilder v. St. Peter*, 478 A.2d 202, 208-10 (Vt. 1984).

39. See, e.g., *Javins*, 428 F.2d at 1080-83; *Hilder*, 478 A.2d at 208-10.

is an added reality to the tenant's inability to make these repairs when one realizes that so many aspects of a residential dwelling today are technologically quite sophisticated. Beyond that, multiple housing units are interrelated and interconnected. To correct a defect in one tenant's unit may require access to other units or to areas reserved to the landlord's control. For example, the cause of a lack of heat may lie in a defect in the central heating system, which is located in a central location legally accessible only by the landlord. Furthermore, the tenant probably does not have the ability to finance the repairs that must be made, such as in the central heating system.<sup>40</sup>

To these policy considerations must be added the fact that residential tenants today are, for the most part, in even poorer bargaining positions vis-à-vis their landlords than were their ancestors. The supply side of the residential rental economy is even more oligopolistic than it was in the past. Each real estate management company represents multiple landlords who own multiple properties. Their presence in the residential rental marketplace further reduces the number of supply-side negotiators. They work from prepared lease forms, which are drafted by, and given the blessing of, their legal counsel. Variation from the wording of these documents is unusual and limited. The need to take steps to adjust these bargaining inequalities is a primary reason why courts and legislatures have intervened.<sup>41</sup> If the marketplace makes it too difficult or impossible for a residential tenant to obtain her landlord's promise that her housing will be habitable, then a promise will be implied.

Courts have taken two somewhat different methods in determining what the landlords' duties should be under an implied warranty of habitability. Under one approach, the landlord must substantially comply with the housing code applicable in the venue where the leased residential unit is located. In other words, rather than attempt to make up a separate set of rules for residential landlords, the courts have looked to the local or state legislatures to set the standard. While housing codes have their own enforcement methods, usually through a local housing inspector, the courts have also given tenants the right to use the judicial system to enforce the codes.<sup>42</sup>

Under the second approach, there is a recognition that not all areas of the state<sup>43</sup> may be governed by a housing code. Looking only to housing codes for the answer would give protection to tenants in some areas, but not to tenants located elsewhere. Furthermore, these courts have also recognized that housing codes may contain provisions, the breach of which

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40. See, e.g., *Javins*, 428 F.2d at 1074-78; *Wade*, 818 P.2d at 1009-11.

41. See, e.g., *Javins*, 428 F.2d at 1074-78.

42. See, e.g., *Javins*, 428 F.2d at 1081-82.

43. In some states, there may be no part of the state governed by a housing code, e.g. Wyoming.

should not result in a breach of the implied warranty of habitability. Under this second approach, the duty of the landlord is to provide a tenant with premises that are in fact safe, sanitary and fit for human habitation, a standard of habitability in fact. Housing codes, if applicable, are excellent evidence of the meaning of habitability, but they are not conclusive. Furthermore, the lack of a housing code does not mean that the landlord has no obligation to supply habitable housing. Of necessity, the standard of habitability in fact is a general guide for defining habitability even though a landlord's duties might not be as clear as they would be under a housing code. Nevertheless, the duty of the landlord is still to provide habitable housing.<sup>44</sup>

On the remedy side of the issue, the normal contract remedies are meant to apply. Two contract remedies have been available to tenants for some time; damages for breach of contract (covenant), and rescission or termination (constructive eviction) because of a substantial failure of consideration on the part of the landlord. The new remedies usually available under the doctrine of implied warranty of habitability may be considered as derived from either specific performance or reformation.

The first of these remedies is rent abatement.<sup>45</sup> The tenant's right to abate the rent is based on the view that if the landlord has failed to provide the consideration he promised in the lease, the tenant can seek specific performance of the lease but with a proportional abatement in the tenant's consideration (the rent) in order to reflect the true value of the leasehold premises. From the reformation perspective, the tenant may ask the court to reform the lease to reflect a reduced rent measured by the true value of the leasehold premises.<sup>46</sup>

The second new remedy is rent application,<sup>47</sup> sometimes known as repair and offset.<sup>48</sup> If the landlord's failure is in performing a repair that the tenant can perform, then the tenant may do so and deduct the cost of the repair from the rents next due. This remedy also might be viewed as a failure of consideration by the landlord, allowing the tenant to seek specific performance of the lease with a reduction of the tenant's consideration by a similar amount. However, the entire amount is deducted from the next rents due, not just an amount reflecting the reduction in value. From the refor-

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44. See, e.g., *Mease v. Fox*, 200 N.W.2d 791, 796-97 (1973); *Hilder*, 478 A.2d at 209.

45. See, e.g., *Wade*, 818 P.2d at 1011; *Hilder*, 478 A.2d at 210. See generally RESTATEMENT (SECOND) OF PROPERTY § 11.1 (1986).

46. A variation of this remedy is for the tenant to deposit her rent with the clerk of court and ask the court to determine who is entitled to it. To the extent that the landlord has breached his duty to provide habitable housing, the court should refund all or a portion of it to the tenant. The Restatement refers to this remedy as rent withholding. *Id.* at § 11.3.

47. See generally RESTATEMENT (SECOND) OF PROPERTY § 11.2 (1986).

48. See, e.g., *Marini v. Ireland*, 265 A.2d 526, 534-35 (N.J. 1970).

mation perspective, the tenant may ask the court to reform the lease to reduce the tenant's consideration by the cost of the repair.<sup>49</sup>

Thus, in adding up all of the landlord's duties and the tenant's remedies in most U.S. jurisdictions today, we have the following: The landlord has a duty to comply with his obligations set forth in the lease, to supply the tenant with premises that were not so totally deplorable that the tenant would be considered evicted by their condition (covenant of quiet enjoyment), and to comply with the duties imposed by the implied warranty of habitability. The tenant may seek relief in several ways. She may seek damages for breach of any of the landlord's duties, terminate the lease if she is constructively evicted, abate the rent to reflect the true value of the premises, or repair the defect and offset its cost from the next rents due.

As of the 1999 legislative session, no cases had been decided by the Wyoming Supreme Court creating an implied warranty of habitability in residential leases.<sup>50</sup> In that session, the legislature stepped in to fill the void by enacting the Residential Rental Property Act.<sup>51</sup> As will be discussed below, the Act clearly creates an implied warranty of habitability. The purpose of this article is to discuss how the implied warranty created by the Act compares with the implied warranty of habitability, as described in the above historical development. I will discuss the nature of the landlord's duties as established by the Act and other sources that may supplement or more fully describe those duties. I will also review the tenant's remedies set out in the Act and will consider alternative remedies not specified in the Act. Further, I will review the tenant's duties set out in the Act and the remedies it provides the landlord for enforcement of those duties. Finally, I will consider the implications that might be derived from the Act regarding a landlord's tort liabilities to a tenant or her third party guests.

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49. The reformation approach may be more fitting than the specific performance approach in analyzing the repair and offset remedy. The tenant is generally not allowed to offset against her consideration an amount greater than one month's rent. *See id.* The policy reason for this limitation is that the remedy should not allow a tenant to finance substantial repairs out of the landlord's current revenues, which may be needed for other purposes such as provision of other services and payment of real estate taxes. Under the reformation approach, the court, in the exercise of its equitable powers, can limit the size of the reduction.

50. However, the Wyoming Supreme Court has determined that there is an implied warranty of habitability in the sale of residential premises by a builder of housing. *Moxley v. Laramie Builders, Inc.*, 600 P.2d 733, 735-36 (Wyo. 1979). In *Ortega v. Flaim*, 902 P.2d 199 (Wyo. 1995) the Supreme Court decided that without "relevant data and analysis which supports the legal, social and/or economic theories behind abrogating the common law," it would not extend the implied warranty of habitability to rental premises under the facts of the case. *Id.* at 204.

51. WYO. STAT. ANN. §§ 1-21-1201 to -1211 (LEXIS 1999).

## II. WYOMING LAW

### *Law Prior to the Residential Rental Property Act*

As was previously stated,<sup>52</sup> courts have traditionally allowed the tenant the right to recover damages from the landlord for the breach of a covenant specifically contained in the lease. Although the cases are not many, there is no disagreement with that position in the Wyoming decisions.

For example, in *Wolin v. Walker*<sup>53</sup> the landlord rendered the premises temporarily untenable because he was removing underground gasoline storage tanks. The Wyoming Supreme Court held that the tenant was entitled to recover damages as provided in the liquidated damages clause of the lease.<sup>54</sup> In *Skeoch v. Electri-Center*,<sup>55</sup> the lease contained a rent escalator clause that provided for rent increases in accordance with increases in a specified cost of living index. In violation of the lease agreement, the landlord increased rent based on a different index. The court affirmed the lower court's determination that the tenant had been damaged under the terms of the lease. The damages were an amount measured by the excess rent charged.<sup>56</sup> In *Bowen v. Korell*,<sup>57</sup> the Wyoming Supreme Court granted damages against a landlord for breach of an agricultural lease. The landlord had failed to supply irrigation water in a timely fashion as provided in the lease.<sup>58</sup> Thus, the basic tenant remedy—damages—has been sustained by the Wyoming courts. If the tenant is injured by the landlord's breach of a covenant as stated in the lease, she may bring an action to recover damages.

Although the Wyoming cases on point are very few, the Wyoming Supreme Court has adopted the doctrine of constructive eviction.<sup>59</sup> In the earliest Wyoming decision<sup>60</sup> involving the doctrine, the court quoted at length from several cases decided in other jurisdictions about the requirements of

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52. See *supra* text accompanying notes 21-24.

53. 830 P.2d 429 (Wyo. 1992). The court further stated that the tenant could not withhold rent for the period during which the landlord was in breach of the lease. Since the tenant had withheld rent for several months, the landlord was allowed to offset that amount against the tenant's damages. *Id.* at 433-34. The court did not actually hold that the lease could be terminated for failure to pay rent. It merely recognized that the landlord had served the tenant with a notice to quit for failure to pay rent, and the tenant voluntarily complied therewith. *Id.* at 431.

54. *Id.* at 433.

55. 778 P.2d 104 (Wyo. 1989).

56. *Id.* at 105.

57. 587 P.2d 653 (Wyo. 1978).

58. *Id.* at 655. There was some ambiguity about whether the lease actually contained a covenant to supply irrigation water for the field in question. Based on the wording of the lease and the testimony presented at trial the court held that the trial court was not in error as a matter of law when it held that the covenant requires the landlord to supply water to the particular field. *Id.*

59. In only three cases was the doctrine presented in a landlord tenant situation. *Goodwin v. Upper Crust of Wyoming, Inc.*, 624 P.2d 1192 (Wyo. 1981); *Scott v. Prazma*, 555 P.2d 571 (Wyo. 1976); *Mileski v. Kerby*, 113 P.2d 950 (Wyo. 1941). In one other case, the doctrine was presented in the context of a deed conveying a fee simple. *Patel v. Khan*, 970 P.2d 836 (Wyo. 1998).

60. *Mileski v. Kerby*, 113 P.2d 950 (Wyo. 1941).

the doctrine. The court decided that in order to breach the covenant there must be a substantial deprivation of beneficial enjoyment of the premises.<sup>61</sup> In that case, and others, the court expanded the doctrine. The deprivation must be substantial both in terms of the severity of the breach as well as in its length or continuity.<sup>62</sup> If the covenant has been breached, the tenant must do two things before the lease may be terminated. First, she must notify the landlord of the defect arising from the breach and give the landlord a reasonable period of time to correct the defect.<sup>63</sup> Second, in order to prove that there was an eviction, albeit constructive, the tenant must vacate the premises.<sup>64</sup>

It is interesting to note that none of the Wyoming landlord tenant cases involving the doctrine of constructive eviction dealt with the condition of residential premises. In *Scott v. Prazma*,<sup>65</sup> the tenant occupied an old, dilapidated building for use as an auto body shop. The court held that the landlord had breached an implied covenant to repair and, as a consequence, the tenant had been constructively evicted. In *Mileski v. Kerby*,<sup>66</sup> the tenant had rented premises for use as a movie theater. The court found that the acts of the landlord "did not materially interfere"<sup>67</sup> with the tenant's use of the premises and "were insufficient to constitute an eviction" of the tenant.<sup>68</sup>

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61. *Id.* at 952-53.

62. See *Scott*, 555 P.2d at 579. "Grounds must amount to a substantial interference with possession of enjoyment." See also *Mileski*, 113 P.2d at 952, where the court quoted from *Parke v. Proby*, 130 Ill. App. 571, 1906 WL 2374, at 1 (1906): "Actions of the landlord which will sustain a constructive eviction must be of a grave and permanent character. . . ." In *Mileski*, 113 P.2d at 952, the court also noted that a tenant was not constructively evicted "where the interference with the . . . [tenant's] rights was brief and insignificant" citing *Kelley v. Long*, 122 P. 832 (Cal. App. 1912). The court in *Mileski*, 113 P.2d at 953 also quoted from *Meeker v. Spalsbury*, 48 A. 1026, 1027 (N.J.L. 1901): The breach or eviction must be "an act of a permanent character done by the landlord in order to deprive, and which had the effect of depriving, the tenant of the use of the thing demised, or a part of it."

63. In only one of the three landlord tenant cases involving constructive eviction did the court find that the landlord had breached a covenant. In only that case was the court presented with an opportunity to consider the tenant's duties before being able to claim the benefit of the doctrine. The court held that there had been a substantial breach of a covenant to repair implied from the wording of the lease. Furthermore, the landlord had been notified by the City of Casper Building Inspector of various serious defects and of an imminent order to evacuate the building. The landlord and tenant had also met several times to discuss the duty to make repairs. These events took place over a period of almost ten months. The landlord was thus given notice of the defect and allowed an opportunity to repair it. However, the landlord continuously maintained that he would not make the repairs and that the tenant should do so. *Scott*, 555 P.2d at 572-75. The court did not specifically discuss the need for the tenant to notify the landlord and to give him an opportunity to repair. However, the landlord had received the required notice and had refused to correct the defect. *Id.* at 579-80.

See generally *Kaplan v. McCabe*, 532 So. 2d 1354 (Fla. Dist. Ct. App. 1988); *Dell'Armi Builders, Inc. v. Johnston*, 526 N.E.2d 409 (Ill. App. Ct. 1988); *Downtown Realty, Inc. v. 509 Tremont Bldg., Inc.*, 748 S.W.2d 309 (Tex. Ct. App. 1988).

64. "Constructive eviction involves the surrender of possession by the lessee on justifiable grounds rather than a deprivation of actual occupancy by direct action of the landlord." *Scott*, 555 P.2d at 579.

65. 555 P.2d 571 (Wyo. 1976).

66. 113 P.2d 950 (Wyo. 1941).

67. *Id.* at 953.

68. *Id.* The court also appeared to suggest that there was no constructive eviction because the offending actions were not performed by the landlord or anyone with superior title. They were performed by the landlord's son. *Id.*

In *Goodwin v. Upper Crust of Wyoming, Inc.*,<sup>69</sup> the tenant subleased commercial space in a mini-mall. The head lease prohibited a sublease without the consent of the landlord, and the sublease was conditioned upon receiving that consent. Although the consent was slow in arriving, the court held that the subtenant had not been effectively deprived of the use of the premises.<sup>70</sup>

Another possible and inexpensive remedy for a residential tenant is to seek the help of the housing inspector, who would have to act under the authority of a city, county or state housing code. If the apartment was not in compliance with the housing code the housing inspector could order the landlord to make the repair or be subject to the enforcement provisions of the housing code. In many cities nationally this avenue is a very common and inexpensive approach to take. However, in Wyoming neither the state nor any city or county has a currently enacted housing code.<sup>71</sup> As a result, the residential tenant in Wyoming does not have access to this less costly form of relief. As of the 1999 legislative session, this was the status of the law for the Wyoming residential tenant.

### *Wyoming Residential Rental Property Act*

#### A. Introduction

The major part of the Wyoming Residential Property Act is derived from two Utah statutes<sup>72</sup>—the Utah Fit Premises Act<sup>73</sup> and the Residential Renters' Deposits Act.<sup>74</sup> The Act was originally introduced in the 1997 legislative session<sup>75</sup> and reintroduced in a modified form in the 1999 legislative session.<sup>76</sup> After additional amendments and changes, it was passed and became law as the Wyoming Residential Rental Property Act. In its final form, the Wyoming enactment departs substantially from the Utah statutes. As originally proposed in 1997, sections 1-21-1201 to -1206 were substantially identical to the provisions of the Utah Fit Premises Act and sections 1-21-1207 to -1209 were substantially identical to the provisions of

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69. 624 P.2d 1192 (Wyo. 1981).

70. *Id.* at 1196.

71. Apparently, the City of Casper formerly had a housing code but it has since rescinded it. However, the City has adopted the Uniform Fire Code and enforces that code against buildings, whether new or previously existing. Telephone Interview by Debora A. Person with David Barrett, City of Casper (Jan. 27, 2000). While this might give the tenant some recourse against violations of the Fire Code, many health and safety issues (e.g. broken windows, nonworking toilet facilities, and lack of hot and cold running water) are not contained in the Fire Code.

72. I will refer to the Utah statutes in passing when discussing some of the provisions of the Wyoming statute.

73. UTAH CODE ANN. §§ 57-22-1 to -6 (1999). *See also* N.C. GEN. STAT. §§ 42-38 through 46 (1999); some of these provisions are similar to the Utah and Wyoming statutes. It may have been an original source of the later two enactments.

74. UTAH CODE ANN. §§ 57-17-1 to -5 (1999). *See also infra* note 77 and accompanying text.

75. Wyo. Senate File No. SF0046 (1997).

76. Wyo. House Bill No. HB 0044 (1999).



the Utah Residential Renters' Deposits Act. Section 1-21-1210, dealing with personal property left in the dwelling unit by the tenant, is derived from the Montana Residential Landlord and Tenant Act of 1977 provision dealing with "Disposition of personal property abandoned by tenant after termination."<sup>77</sup> However, as enacted it departs substantially therefrom.

### B. Applicability

The Act only applies to residential rental units; it does not apply to other types of leases such as commercial leases, agricultural leases, or grazing leases. A residential rental unit is defined as the "renter's principal place of residence. . . ."<sup>78</sup> The word "residence" is capable of several meanings. A traditional interpretation would define it as the premises in which the tenant is currently living regardless of having a more permanent abode.<sup>79</sup> However, in appropriate circumstances, the word might take on connotations of the word "domicile" and require that the premises be the person's permanent place of abode and the one to which she intends to return after a temporary absence.<sup>80</sup> If the traditional interpretation of residence is meant to apply, then a tenant who is living in an apartment while waiting for more permanent premises to become available has the protection of the Act. However, if the concept of domicile is applied, then a student living in an apartment in Laramie for nine months of the year but returning to his parents' home in Sheridan for summers and holidays is not protected; she does not occupy the unit on a permanent basis with the intent to remain there.<sup>81</sup>

If the term "place of residence" were unmodified, a determination of the meaning might be relatively easy since there would be nothing in the Act to suggest that a concept like domicile was involved. However, the Act uses the word "principal" to modify the term "place of residence," thereby possibly invoking connotations of something beyond the idea of mere "residence."

While the word "principal" does not necessarily involve the concept of permanence and an intent to return, it does suggest that the premises be the primary residence versus any other residence occupied by the tenant. For example, it presents a question about whether a person owning a home in Cheyenne and renting a summer home in Jackson has his principal place of

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77. MONT. CODE ANN. § 70-24-430 (1999).

78. WYO. STAT. ANN. § 1-21-1201(a)(iv) (LEXIS 1999). The definition provides that a residential rental unit also includes "the appurtenances, grounds, common areas and facilities held out for the occupancy of the residential renter generally and any other area or facility provided to the renter in the rental agreement. . . ." *Id.*

79. Wyoming Ins. Guar. Ass'n. v. Woods, 888 P.2d 192, 197 (Wyo. 1994).

80. McDougall v. McDougall, 961 P.2d 382, 384 (Wyo. 1998).

81. Nor would the previously stated temporary resident waiting for a more permanent abode be considered a resident.

residence in Cheyenne or Jackson. An analysis based on the primary nature of the residence would suggest that the summer home is not protected by the Act. However, one must ask: Why should a tenant who rents an expensive home in Jackson not be entitled to heat, electricity, plumbing and hot and cold running water?<sup>82</sup> Similarly, the analysis based on the primacy of the residence presents a question about the previously mentioned student living in an apartment in Laramie. Does she have her principal place of residence in Laramie when she spends nine months of the year living there? An analysis based on primacy would suggest an affirmative answer.

In attempting to resolve the meaning of the term “principal place of residence,” the term should be construed “in light of the context of its use and with consideration for the purposes of the Act.”<sup>83</sup> The purpose of an Act creating an implied warranty of habitability is to require that residential rental units be safe and sanitary. Any emphasis on the permanency or length of the tenancy sidesteps those objectives. If the unit is unsafe and unsanitary, a temporary resident is no less deserving of protection than a permanent or long term resident.

Nonetheless, one can not ignore the context of the use of the term “principal place of residence.” It suggests an analysis based on the primacy of the unit as the place of residence versus any other place of residence of the tenant. Since that analysis conflicts with the normal purpose of providing habitable housing for all residents of the State, it must be assumed that the Wyoming Act must have a more limited purpose. If so, the Cheyenne homeowner who rents a summer home does not occupy it as his “principal place of residence” and will not receive the protection of the Act.<sup>84</sup> However, the student spending most of her time living in Laramie rather than in Sheridan probably will have her principal place of residence in Laramie.<sup>85</sup>

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82. Two exceptions expressly stated in the Act might have some application to this situation. WYO. STAT. ANN. § 1-21-1201(a)(iv) (LEXIS 1999) excludes “recreational property rented on an occasional basis” from the definition of a “residential rental unit.” WYO. STAT. ANN. § 1-21-1202(a) (LEXIS 1999) provides that the listing of these amenities in the Act “shall not prevent the rental of seasonal rental units such as summer cabins which are not intended to have such amenities.” Whether a summer home in Jackson is a recreational property rented on an occasional basis is not clear. However, it is doubtful that an expensive summer rental in Jackson is a “summer cabin” not intended to have such amenities.

83. Wyoming Ins. Guar. Ass’n, 888 P.2d at 198.

84. However incongruous it seems, a person living in the Jackson home the other eight months of the year and living elsewhere in the summer would be considered to occupy it as a principal place of residence and would be able to use the Act to require the landlord to correct unsafe or unsanitary conditions. The legislature should reconsider this conundrum, especially since the Act resolves the issue of summer cabins and recreational property elsewhere. See *supra* note 82.

85. A college student has usually begun her move to a life independent of her parents and the fact that her permanent place of abode used to be with her parents should no longer form part of the analysis. Compare *State ex rel. School Dist. No. 1, Niobrara Co. v. School Dist. No. 12, Niobrara Co.*, 18 P.2d 1010, 1013 (Wyo. 1933) where the statutory requirement of residency was given a meaning equivalent to domicile in the case of high school students.

Students living in college dormitories do not seem to be protected by the Act. The usual interpretation of a dormitory arrangement is that it is a license under which the college merely gives the student a right to use a room but does not give the student exclusive possession of it. The college gener-

The status of the person living in the apartment awaiting a more permanent home is unclear.<sup>86</sup>

### C. Landlord's Duties

#### 1. Habitability

The Wyoming Residential Property Act, in plain terms, states that every residential lease in Wyoming contains an implied warranty of habitability. "Each owner and his agent renting or leasing a residential rental unit shall maintain that unit in a safe and sanitary condition fit for human habitation."<sup>87</sup>

The basic obligation the Act imposes on a landlord is that he provide premises that are "in a safe and sanitary condition fit for human habitation."<sup>88</sup> This statement is quite general and needs explanation if the parties are to have a clear idea about the landlord's obligations. As was observed earlier,<sup>89</sup> courts tend to ascertain the specific obligations imposed by the warranty through either of two approaches—either by reference to housing codes or by application of a general standard of habitability in fact. Since Wyoming does not have a statewide housing code, nor have any cities or counties enacted housing codes, reliance on housing codes would provide little help in fleshing out the meaning of the term.<sup>90</sup>

The legislature could have left the meaning of "safe and sanitary condition fit for human habitation" to be developed by the courts on a case by case basis. Instead, the legislature chose to prescribe the minimal elements of the warranty itself. To that end, the Act requires that "[e]ach residential rental unit shall have operational electrical, heating and plumbing, with hot and cold running water. . . ."<sup>91</sup>

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ally reserves the right to reassign the student to another room and to require that the student leave the dormitory during holidays or term breaks. See *Cook v. University Plaza*, 427 N.E.2d 405 (Ill. App. 1981). The Act provides that it applies to a person who is a "renter, lessee, tenant or other person entitled under a rental agreement to occupy a residential rental unit to the exclusion of others." WYO. STAT. ANN. § 1-21-1201(a)(iii) (LEXIS 1999). Since the occupancy must be to the exclusion of others, the usual license arrangement in a dormitory may not qualify as a residential rental agreement under the Act.

86. In terms of policy, however, one is still left wondering why the right to a safe and sanitary premises should depend on how long one waits to find permanent living quarters?

87. WYO. STAT. ANN. § 1-21-1202(a) (LEXIS 1999).

88. *Id.*

89. See *supra* notes 42-44 and accompanying text.

90. Of course, the legislature could have adopted a statewide housing code at the same time that it enacted the Residential Rental Property Act. It is quite understandable, however, that in a state such as Wyoming with a great diversity of environments, ranging from moderately urban to extremely rural, no single standard would fairly and adequately apply across the state. An alternative might have been for the legislature to require cities and/or counties, with populations over a certain size, to adopt housing codes based on a certain model(s).

91. WYO. STAT. ANN. § 1-21-1202(a) (LEXIS 1999). The provision of the Utah Act from which the Wyoming provision was derived is premised, in large part, on the assumption that local governments

Habitable housing in the twenty-first century is different from frontier housing or even housing of sixty or seventy years ago. Even in the most rural settings, tenants are entitled to expect hot and cold running water inside their unit. Similarly, they can expect that indoor plumbing will allow for waste disposal in a sanitary fashion. Each residential unit should also be warmed by some form of heating facility<sup>92</sup> that is safe and adequate to heat the living space. Finally, it is unimaginable that in today's world any structure claimed by the owner to be habitable would not have an electrical wiring system. Most of today's common household amenities, including lighting, refrigeration, some cooking facilities, and radios and televisions, operate on electrical power.<sup>93</sup>

Another section of the Act provides further clarification of the landlord's duties. It states:

To protect the physical health and safety of the renter, each owner shall:

- (i) Not rent the residential rental unit unless it is reasonably safe, sanitary and fit for human occupancy;
- (ii) Maintain common areas of the residential rental unit in a sanitary and reasonably safe condition;
- (iii) Maintain electrical systems, plumbing, heating and hot and cold water; and
- (iv) Maintain other appliances and facilities as specifically contracted in the rental agreement.<sup>94</sup>

Clause (i) is a restatement of the basic characteristics of the implied warranty of habitability. Clause (iii) restates the minimal elements of that warranty. Clause (ii) expands the warranty beyond the physical premises rented by the tenant into the "common areas of the residential unit." Were it not for the definition of a residential rental unit provided elsewhere in the Act,<sup>95</sup> this would be an interesting, if not a confusing term. How can a common area be an actual part of the residential unit? It is normally conceived as an area outside the residential unit itself and serving or providing

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have adopted housing codes. Thus, it provides that the premises must be "in accordance with local ordinances and the rules of the board of health having jurisdiction in the area in which the residential rental unit is located." Each residential rental unit shall have electrical systems, heating, plumbing, and hot and cold water." UTAH CODE ANN. § 57-22-3(1) (1999).

92. Usually a modern heating unit is powered by gas or electric, but other methods might be reasonable as long as the living space is adequately and safely heated.

93. The Act does not state who is expected to supply the electric power itself. It seems probable, however, that such was not intended as an obligation of the landlord. It appears that a word, such as "systems" was inadvertently dropped after the word "electrical." That word is contained in the Utah Act. UTAH CODE ANN. § 57-22-3(1) (1999). In fact, in a subsequent section of the Act the word "systems" is used in the same general context, albeit with a slightly different order of words. WYO. STAT. ANN. § 1-21-1203(a)(iii) (LEXIS 1999).

94. WYO. STAT. ANN. § 1-21-1203(a) (LEXIS 1999).

95. WYO. STAT. ANN. § 1-21-1201(a)(iv) (LEXIS 1999).

common access to multiple residential units. However, the definition of a residential rental unit states that common areas are treated as part of the rental unit itself.<sup>96</sup> Thus, for example, the landlord must provide safe and sanitary hallways, stairs, elevators, and parking lots in order to comply with the warranty. Finally, clause (iv) provides that any additional appliances or facilities included as part of the leased premises must be maintained by the landlord. Usually the lease of an apartment, and sometimes a home, will include a refrigerator, a stove and/or an oven, all as part of the rented premises. If so, those items also must be maintained by the landlord.

Any meaning of habitability beyond these explicit provisions is left to be developed by the courts. It is easy to see that the basic characteristics of a safe and sanitary unit might require that development. For example, broken windows, rotted floor joists, and the presence of rats and other vermin do not conform with safe and sanitary housing. Since they do not seem to be included within the wording of the Act itself, the courts will have to provide that interpretation. How far such development of the meaning of habitability will extend must be left to the courts on a case by case basis.<sup>97</sup>

The Act contains a materiality test, which requires that an alleged breach of the implied warranty must be material before the tenant is entitled to any remedies. More specifically, it provides that the Act "does not apply to breakage, malfunctions or other conditions which do not materially affect the physical health or safety of the ordinary renter."<sup>98</sup> The purpose of this provision is to state that there must be more than a passing malfunction in order for an actionable breach of the implied warranty to arise. It recognizes that everyone experiences, on a more or less regular basis, problems with their living quarters that do not have a material affect on the tenant's physical health and safety. For example, a heating unit on a stove or oven may malfunction. If the malfunction is temporary, it is not likely to have any material affect on the physical health and safety of the premises. A more significant problem might involve a loss of heat in the dwelling unit. Again, it is not uncommon that a starter unit on a gas furnace will malfunction and cause a loss of heat for a short time. As long as a repairperson is promptly summoned and is able to fix the unit, there is no breach of the implied warranty. However, if the landlord delays too long in summoning the repairperson or if the unit can not be fixed, and the short time runs into a

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96. WYO. STAT. ANN. § 1-21-1201(a)(iv) (LEXIS 1999) defines the residential rental unit as including "the appurtenances, grounds, common areas and facilities held out for the occupancy of the residential renter generally and any other area or facility provided to the renter in the rental agreement . . . ."

97. Although the number of Wyoming cases interpreting the doctrine of constructive eviction is very small, the courts should treat the protections provided by that doctrine as the beginning point for the development of protection under the implied warranty of habitability. Indeed, some of the traditional examples of the breach of the covenant quiet enjoyment involved lack of heat, hot and cold running water, and adequate plumbing; these are also listed in the Act.

98. WYO. STAT. ANN. § 1-21-1202(c) (LEXIS 1999).

longer time, the otherwise minor and nonmaterial malfunction can become a material one that will breach the implied warranty.

The Act provides another understandable limitation of the landlord's duties. "The owner shall not be required to correct or remedy any condition caused by the renter, the renter's family, or the renter's guests or invitees by inappropriate use or misuse of the property during the rental term or any extension of it."<sup>99</sup> For example, if the tenant, his family, or guests cause damage to the plumbing facilities or inappropriately disposes of garbage, the landlord need not fix the condition. However, landlords who want to maintain the value of their property will perform the repair even though not required to do so. The damage caused by the tenant may be grounds for terminating the lease under the Forcible Entry and Detainer Act.<sup>100</sup> In any event, the Act provides that the landlord may apply any deposit to the payment of "damages to the residential rental unit . . . [and] the cost to clean the unit. . . ."<sup>101</sup> If the deposit is insufficient to cover the damages, the "owner may take any legal action available to recover damages caused to the unit by the renter."<sup>102</sup>

## 2. Waiver/disclaimer.

Although setting out a clear duty for the landlord to supply habitable housing, the Act also allows the landlord to reduce the duties it imposes. In two separate provisions, the Act allows the parties to the rental agreement to modify or shift the obligations imposed on the landlord. The first provision—a continuation of the sentence listing the minimal elements of habitability—allows the parties to agree to change the landlord's duties as follows: "Each residential rental unit shall have operational electrical, heating and plumbing, with hot and cold running water *unless otherwise agreed upon in writing by both parties*."<sup>103</sup> The second provision states that "[a]ny duty or obligation in this article may be assigned to a different party or modified by *explicit written agreement signed by the parties*."<sup>104</sup> It is not clear why both provisions are needed or even appropriate. The second provision, although worded somewhat differently and applying more broadly, seems to provide adequate authority for the parties to modify landlord's obligations. The Utah Fit Premises Act, from which the Wyoming Act was derived, does not contain the first provision.<sup>105</sup> It apparently was added in the legislative process without consideration that the second provision al-

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99. WYO. STAT. ANN. § 1-21-1203(c) (LEXIS 1999).

100. WYO. STAT. ANN. § 1-21-1002(a)(vi) (LEXIS 1999).

101. WYO. STAT. ANN. § 1-21-1208(a) (LEXIS 1999). To the same effect, see WYO. STAT. ANN. § 1-21-211(b) (LEXIS 1999).

102. *Id.*

103. WYO. STAT. ANN. § 1-21-1202(a) (LEXIS 1999) (emphasis added).

104. WYO. STAT. ANN. § 1-21-1202(d) (LEXIS 1999) (emphasis added).

105. UTAH CODE ANN. § 57-22-3(1) (1999). It does, however, contain the second waiver provision. UTAH CODE ANN. § 57-22-3(4) (1999).

ready existed in the bill and without forethought of the confusion it would engender. Nevertheless, the wording is different and both need to be considered.

Before analyzing the two provisions, it will be helpful to discuss the two alternative conceptual premises upon which implied warranties are built. That discussion will provide some insight into when warranties may be waived by the parties. Warranties can either be implied in fact or implied in law. When a warranty is implied in fact, the court is seeking to determine the actual intent of the parties to the agreement. If the parties were not sufficiently clear as to whether a warranty was intended, the court will review the words employed, read the four corners of the document for evidence of their true intent, allow parole evidence to explain an ambiguity, and ultimately make a decision on their actual intent. If a warranty is implied in fact, it is the result of what the parties actually intended and not the result of any policy expression by the court. In a future agreement on the same subject, the parties may avoid the court's interpretation simply by drafting language that clearly negates the warranty the court found in the case.

By comparison, when a warranty is implied in law the court is actually making a policy statement. In effect it is stating that, under a particular set of circumstances and with certain policy considerations in mind, the actual expression of intent of the parties is not controlling. Public policy demands that the agreement be interpreted as containing an implied promise by one of the parties.<sup>106</sup> For example, as stated previously,<sup>107</sup> courts will imply a covenant of quiet enjoyment in a lease. That covenant will be implied regardless of an attempt by the landlord to state that such a covenant is excluded. In order to protect a tenant from premises that are so substantially impaired as to amount to an eviction, the covenant is implied as a matter of policy. Since the court has made its decision as a matter of public policy, the parties in any future agreement may not alter the interpretation by specifically absolving a party from performing that duty. Such a disclaimer would be contrary to the policy considerations that led the court to adopt the warranty implied in law. Expressed differently, why would the court have gone to the effort of establishing the policy in the first place if it could be overruled merely by one party inserting a term negating the protection?

However, if the foundational policy assumptions upon which the court based its adoption of a warranty implied in law in the first place are changed, then the prior decision implying a warranty no longer applies and the parties should be free to negotiate a waiver. For example, if an exami-

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106. In this sense, the use of the term "implied warranty" may be a misnomer. Instead, it could be referred to as a policy based obligation of one of the parties.

107. See *supra* notes 26-35 and accompanying text.

nation of the bargaining positions of the landlord and the tenant demonstrates that the tenant is in a superior position to the landlord, there is no reason why the tenant should not be able to negotiate a waiver of the warranty.

When the issue has arisen, most courts have treated the implied warranty of habitability as a warranty implied in law.<sup>108</sup> It is a policy of the court that the tenant should have the basic protections provided by the warranty. Since one of the policy considerations for adopting the implied warranty in the first place was a lack of equal bargaining posture between a landlord and a tenant, a landlord should not be allowed to abuse that inequality by disclaiming the warranty in his next rental agreement.

Provisions in the Wyoming Act raise a question about whether the Act establishes the warranty as implied in law or only as implied in fact. On its face, the Act appears to provide that the parties may waive or shift the landlord's duties in whatever fashion the written lease explicitly provides. However, as will be discussed, the ability to disclaim the duties under the Act may be limited and it may not be possible for the landlord to modify or shift his duties quite so easily. A reasonable interpretation of the waiver provisions may allow the landlord to disclaim the warranty only when the fundamental policy considerations that led to the adoption of an implied warranty originally are not present. If the provisions are interpreted in that fashion the warranty created by the Act will still be considered as implied in law.<sup>109</sup> If the warranty is freely and easily disclaimable, then it must be considered as implied in fact.

For example, if the landlord and tenant are actually in a relatively equal bargaining position and the landlord gives genuine consideration for the waiver, there may be no reason to apply the warranty in the first place. The landlord and tenant are each able to protect their interests and should be allowed to negotiate to the ends that best fit their needs.<sup>110</sup> However, given the general inequality in bargaining positions of residential tenants and their landlords, that is not a common situation and proof of the equality should be required.

The more general of the two provisions in the Act allowing for a waiver of landlord's duties provides that "[a]ny duty or obligation in this article may be assigned to a different party or modified by explicit written

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108. *Javins*, 428 F.2d at 1081-82; *Hilder*, 478 A.2d at 208.

109. But see *Haddad v. Gonzalez*, 576 N.E.2d 658, 668 (Mass. 1991), where the court stated that the landlord cannot nullify an implied warranty by giving the tenant a discount in the rent.

110. See, e.g., *Johnson v. Scandia Ass'n., Inc.*, 717 N.E.2d 24, 30-31 (Ind. 1994). Even when bargaining has occurred, if the waiver actually creates a dangerous situation for the tenant or third parties, then other fundamental policy considerations may be involved, and the tenant may not be allowed to waive the warranty. See *Haddad*, 576 N.E.2d at 668 (Mass. 1991); *Foisy v. Wyman*, 515 P.2d 160, 164-65 (Wash. 1973).



agreement signed by the parties."<sup>111</sup> How should the word "explicit" be interpreted? Does "explicit" simply mean "written?" If so, all that the lease agreement would need to contain is a written provision stating that the warranty was waived. For example, a simple boilerplate provision stating that the tenant takes the premises "as is" or that the "tenant hereby waives all warranties" can negate the warranty. However, that interpretation seems doubtful and inappropriate for several reasons.

First, if the word "explicit" merely meant "written," there would have been no need for the legislature to state that the waiver must be "explicit." The provision already states that the waiver must be written. All the provision would mean is the waiver must be by "written agreement." Obviously, that was not intended. Therefore, the word "explicit" must mean something more demanding.

Second, the language of the section gives some idea of what the legislature was intending. Not only does the provision deal with modification of the landlord's duties, but also deals with assigning them to a different party. The only other party to whom the landlord's duties could be assigned is the tenant. This brings to mind situations in which the tenant, in consideration for a reduction in rent or some other benefit, is willing to accept that obligation and waive his rights under the Act. To be fair to basic contract concepts, however, that assignment should not be presumed unless the tenant knowingly accepts the assignment. As if to emphasize that fact, the provision requires the assignment or modification be made by "explicit" language. Any failure of the lease explicitly to identify the obligation being modified or assigned is not in compliance. Thus, any language of general disclaimer, acceptance of the premises "as is," or language that does not draw the attention of the tenant to the "explicit" defect involved is insufficient to meet the requirements of the statute.

Justice Thomas, of the Wyoming Supreme Court, dissenting in a recent case, called attention to the same issue regarding a tort disclaimer in a real estate contract:

As a matter of public policy, disclaimers in contracts will not be honored unless the disclaimer is specific with respect to the tort disclaimed, and it is apparent that an express bargain was struck to forgo the possibility of tort recovery in exchange for negotiated alternative economic damages. . . . The waiver of tort liability by the purchaser in such a contract is permitted, but only with knowledge and if bargained for in the exchange.<sup>112</sup>

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111. WYO. STAT. ANN. § 1-21-1202(d) (LEXIS 1999).

112. *Richey v. Patrick*, 904 P.2d 798, 810 (Wyo. 1995).

Finally, given the fact that the legislature went to the effort of adopting an implied warranty, why would it allow a landlord to negate it so easily? Since we now have a statute imposing an implied warranty on the landlord, we no longer have a "bare table" on which there are no presumptions.<sup>113</sup> There is now a presumption of an implied warranty. A waiver should be permitted only if the policy reasons for adopting the warranty in the first place have not occurred in the particular landlord tenant situation.

Perhaps the most significant policy reason for treating residential leases differently than other leases and implying a warranty is that residential tenants usually are not in an equal bargaining position with their landlord and the implied warranty tends to even out the bargaining field. Thus, it would be appropriate to inquire whether the landlord and tenant were in a position of actual even-handed negotiations over the exclusion of the warranty. Was the tenant aware of the defect for which the landlord is disclaiming responsibility? Does the wording of the waiver draw the attention of the tenant to a specific defect, or is the defect a latent one? Was there consideration for the waiver? If the response to these questions is in the negative, it seems inappropriate to allow the landlord to disclaim his statutorily imposed duties.

This approach supports the basic purposes behind the adoption of the implied warranty. If landlords must disclose the precise defect that is being waived, the stock of habitable housing in the state will be enhanced.<sup>114</sup> If they have the choice, tenants will generally choose not to rent a defective apartment. Explicit disclosure should encourage the landlord to make the repair and, as a result, will improve the stock of habitable housing. In other words, the economics of the marketplace should encourage the maintenance and improvement to the stock of habitable dwellings in the state.

The other provision regarding waivers is less clear regarding the need for specific language. It provides that "[e]ach residential unit shall have electrical, heating and plumbing, with hot and cold running water *unless otherwise agreed upon in writing by both parties.*"<sup>115</sup>

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113. The Wyoming Supreme Court has enforced general waivers or "as is" clauses in other situations. However, those clauses usually arose in contracts that were not the subject of legislation creating any assumptions, i.e., there truly was a "bare table" on which the parties could act. For example, parties to a real estate contract are often viewed as being in equal bargaining positions and may waive their rights as they see fit. *Richey*, 904 P.2d at 803; *Schepps v. Howe*, 665 P.2d 504, 509 (Wyo. 1983). However, when the contract of sale is between a builder/developer and a buyer, the court has found an implied warranty of habitability. *Moxley v. Laramie Builders, Inc.*, 600 P.2d 733, 735-36 (Wyo. 1979); *Tavares v. Horstman*, 542 P.2d 1275, 1282 (Wyo. 1975). Since there is now a presumption of an implied warranty, the table is no longer bare. Presumably, the court will not allow the implied warranty of the builder/developer to be waived lightly by general disclaimers.

114. Enhancement of the stock of habitable housing is also a policy reason for adopting the implied warranty of habitability.

115. WYO. STAT. ANN. § 1-21-1202(a) (LEXIS 1999) (emphasis added).

The sentence begins by requiring certain amenities but allows one or more of them to be waived by an agreement in writing. Nevertheless, it does not allow a general waiver of the warranty itself; it only allows the waiver of specific amenities, if agreed to in writing. To be in compliance with the requirements of this section, the lease agreement must at least mention that the disclaimer involves electrical, heating, plumbing and/or hot and cold running water. If it purports to affect more than those specific amenities, it attempts to do more than the Act allows. Furthermore, this section does not allow general disclaimers or "as is" clauses. An "as is" clause affects, or potentially affects, more than the listed amenities.

Unlike the previously discussed provision, this section would appear to allow waiver of the listed types of amenities without specifying the explicit defect involved. For example, although this provision does not allow a waiver of all warranties, it may allow a waiver of "all warranties concerning heating of the leased premises." That disclaimer is not as explicit as is required by the prior provision. As so interpreted, it would allow landlords to insert boilerplate disclaimers mentioning the listed amenities. Landlords would be able to obviate most of the significant provisions of the Act simply by including such boilerplate disclaimers.

It is also interesting to note that such a loose interpretation of this provision would allow a disclaimer of the most central habitability elements by general language, while other habitability issues<sup>116</sup> which may not be so central, would need the explicit language required by the more general provision.<sup>117</sup> The courts could avoid this incongruity. They could interpret the requirements of the more demanding provision as controlling, since it is more specific.

Some examination of lease language as interpreted under both of these provisions might be helpful. Consider the following examples:

(1) "The tenant accepts the premises as is" or "the tenant waives all implied warranties as created by law." This language is not sufficiently specific to qualify for an explicit disclaimer, nor does it mention the specific amenities and, thus, does not qualify for the more general disclaimer. Furthermore, in neither case is the tenant's attention drawn to the defect involved. If the defect currently exists and is known to the landlord, he should not be allowed to absolve himself by failing to disclosing the defect. He would be laying a trap for a legally unsophisticated tenant.

(2) "The tenant waives all implied warranties to provide heat to the premises." In this case, there is a mention of the specific type of amenity

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116. Such as broken windows, rotted floor joists, and infestations by rodents or vermin.

117. WYO. STAT. ANN. § 1-21-1202(d) (LEXIS 1999).

being disclaimed and it is one of those listed in the statute, but there is no indication that the tenant was advised as to an “explicit” defect and allowed to evaluate it.<sup>118</sup> Nor is there any indication that the tenant was given any consideration for the waiver.<sup>119</sup> This example does not qualify under the provision requiring explicit language in the waiver. However, it might qualify under the more general provision since it does mention the specific type of amenity being disclaimed.

(3) “The tenant hereby recognizes that the furnace in the house does not operate and in consideration for a reduction in the rent agrees to fix the furnace and supply her own heat.” This reassignment of duties is explicit. It mentions not only the fact that it involves heat, but also clearly identifies the explicit defect. The tenant is given information that she can evaluate and upon which she can make a decision. She is also given consideration for accepting the assignment of the duties that would otherwise be placed on the landlord; thus, it qualifies under either provision.

#### D. Tenant’s Remedies

As noted previously,<sup>120</sup> the Wyoming courts have recognized two traditional remedies that have been historically available to tenants—damages and termination (constructive eviction). Normally when courts or legislatures have established an implied warranty of habitability they have added either or both of two additional remedies—rent abatement and repair and offset. The interesting thing about the Wyoming statute is that it makes no particular reference to either of these remedies. In addition, it makes almost no reference to the tenant’s right to terminate for a substantial breach of the landlord’s duties.<sup>121</sup> It does, however, set forth an extended procedure that the tenant must follow in order to recover damages from the landlord.<sup>122</sup> After discussing the tenant’s ability to recover damages under this provision, I will consider the continuing availability of the remedy of termination (constructive eviction), and the possible availability of other remedies in the absence of specific authority in the statute.

The procedures specified in the Act for a tenant to recover damages are long and arduous. Because they are, for the most part, unnecessary, they

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118. The tenant should be allowed to evaluate whether the lack of heat will be occasional or continual, whether it affects the entire premises or only an unimportant or unused portion of the unit, and whether it is a current defect or only a potential one for the future. Of course, if it currently exists and that fact is not disclosed, such failure to disclose could be considered a misrepresentation.

119. Of course, the actual rent paid and other benefits received under the lease agreement should be examined to make this determination.

120. See *supra* notes 53-70 and accompanying text.

121. The Act does refer to termination as one of the remedies a court may grant as a result of litigation. WYO. STAT. ANN. § 1-21-1206(c) (LEXIS 1999). However, it does not refer to the right of a tenant to assert that a constructive eviction has occurred resulting in the termination of the lease without a prior court order.

122. The court may also grant affirmative relief as a consequence of the action. *Id.*

actually appear to be designed to discourage a tenant from suing her landlord.<sup>123</sup> The process involves three separate steps, with two written notices to the landlord occurring over an extended period of time. The ability to recover damages has never been a speedy one, but under the Act, simply getting into the courtroom can be a lengthy and precarious process.<sup>124</sup>

*Step 1.* As a prerequisite even to requesting that the landlord perform his duties under the lease, the tenant must be "current on all payments required by the rental agreement."<sup>125</sup> In effect, this language states that the tenant does not even have a right to begin the remedial process by asking that the landlord correct a defective condition if the tenant is not then current in her rent payments. What harm could result from a delinquent tenant making such a request? Why should a landlord be allowed to jeopardize the health and safety of the tenant and her family just because the tenant is not current in her rental payments? Indeed, the reason for the nonpayment may very well be the fact that the landlord has refused to repair the condition. If the tenant, in breach of the lease, has truly defaulted in her rent payments, the landlord's proper remedy is to evict the tenant under the proper statutory procedures, not to perpetuate his own default by refusing to correct the unsafe or unsanitary condition.

The second prerequisite in order for the tenant to request that the landlord correct a defect is that the tenant must have "reasonable cause supported by evidence to believe the residential rental unit does not comply with the standards for health and safety required under this article. . . ."<sup>126</sup> Certainly if the tenant wants to be successful in obtaining relief, it makes sense that she have reasonable cause to believe there is a defect before she requests the landlord to correct it; but there is no reason to make it a prerequisite for seeking relief. If there is no reasonable cause, the landlord can simply dispute the tenant's claim. The Act specifically provides a procedure by which the landlord may interpose that dispute.<sup>127</sup> By making reasonable cause a specific prerequisite the legislature may have created more problems than it solved. May a landlord refuse to make a repair that is needed because, at the time the tenant made the request she could not demonstrate reasonable cause? The language is even more confusing by the fact

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123. The notice and remedy procedures under the Utah Fit Premises Act are, in most respects, the same as those in the Wyoming Residential Rental Property Act. UTAH CODE ANN. §§ 57-22-4(2); -6(2); (6)(3) (1999).

124. Since jurisdiction is given to the county courts and the justice of the peace courts, the normal dilatory process of discovery can be avoided. WYO. STAT. ANN. § 1-21-1206(c) (LEXIS 1999). In that sense, the remedy may be quicker. However, if the tenant is seeking damages that exceed the jurisdictional amount of those courts, she will have to bring suit in the District Court, apparently after following the same notice procedures. *Id.*

125. WYO. STAT. ANN. § 1-21-1203(b) (LEXIS 1999). This requirement is not part of the Utah Fit Premises Act. UTAH CODE ANN. § 57-22-4(2) (1999).

126. WYO. STAT. ANN. § 1-21-1203(b) (LEXIS 1999).

127. *Id.*

that the reasonable cause must be supported by evidence. What kind of evidence is required? Is it sufficient that there is no heat in fact? Does the tenant have to produce evidence about the defect itself, such as a defective burner in the heating unit? Since the heating unit may be in an area to which only the landlord has access, it may be impossible for the tenant to obtain further evidence. The only reasonable interpretation of this language is that the lack of heat is sufficient evidence by itself of the landlord's failure to comply with the Act, which enables the tenant to lodge the complaint.<sup>128</sup>

After satisfying the prerequisites, the tenant's first step is to "advise the owner in writing of the condition and specify the remedial action the renter requests be taken by the owner."<sup>129</sup> The subsection further provides that "notices required by this subsection shall be served by certified mail or in the manner specified by W.S. 1-21-1003."<sup>130</sup> The referenced section of the Wyoming statutes provides, in pertinent part, that a notice may be served "by leaving a written copy with the defendant or at his usual place of abode or business if he cannot be found."<sup>131</sup> Thus, the notice must state what condition is in violation of the implied warranty and specify the remedial action the tenant requests. For the reasons stated in the prior paragraph, the specificity of the remedial action should not be beyond the tenant's abilities. A tenant, who is not likely to have technical knowledge about the precise remedial action needed to cure the defect, should be allowed to specify that the landlord remedy the consequences of the breach rather than the specific defect itself. For example, if there is no heat in the premises, the tenant may not know whether the defect is in the furnace, the heat ducts or pipes, or in some other part of the unit. It should be sufficient that the tenant specify the remedial action needed is to "restore the heat."

Most tenants, especially at this stage of the matter, have not visited an attorney and may not realize that they must deliver the notice in writing, by either certified mail or personal delivery. One may question whether a landlord should be able to deny any obligation to fix a substantial defect simply because the tenant notified him personally. Good faith should require that even if the landlord received the notice orally, he should nonetheless respond to and fix the defect.

After receiving the notice, the landlord has a reasonable time to respond. His response may take either of two approaches. "Within a reasonable time after the receipt of this notice, the owner shall either commence

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128. If the lack of heat is not the result of a violation of the landlord's duty to provide safe and sanitary premises, the landlord should have the burden to come forward with evidence to demonstrate that fact.

129. *Id.*

130. *Id.*

131. WYO. STAT. ANN. § 1-21-1003 (LEXIS 1999).

action to correct the condition of the residential unit or notify the renter in writing that the owner disputes the owner's claim."<sup>132</sup> The landlord's notice of dispute also must be delivered either by certified mail or by personal service on the tenant at her place of abode or business. Understandably, there is no definition of "reasonable time" for the landlord's response. The amount of time that is reasonable will vary depending on the severity of the defect. For example, a reasonable time to correct a lack of heat in the summer will be considerably longer than in the winter. Similarly, a reasonable time to fix a broken window pane may be longer than the time needed to fix a broken water pipe.

*Step 2.* If the landlord does not respond within a reasonable time by correcting the defect, the tenant must move to the second step in enforcing the warranty.<sup>133</sup> However, there is again a prerequisite, this time to enforcing the warranty—the tenant must be "in compliance with the provisions"<sup>134</sup> of the Act regarding her duties<sup>135</sup> and prohibitions.<sup>136</sup> For example, she must "be current on all payments required by the rental agreement"<sup>137</sup> and she may not "intentionally or negligently destroy, deface, damage, impair or remove any part of the . . . unit. . . ."<sup>138</sup>

Once again, this provision appears to place unnecessary impediments on achieving the benefits of the implied warranty created by the Act. If the premises are, in fact, unsafe or unsanitary and not fit for human habitation, the fact that the tenant has failed to pay her rent has little or no bearing on whether the landlord should comply with the warranty. Indeed, the very reason why she has not paid the rent may be because the landlord has breached the warranty. The tenant should be allowed to obtain relief and, if any rent is yet due to the landlord, the amount can be set off from the tenant's recovery.

Similarly, the mere fact that the tenant may have caused some injury to the premises does not mean the tenant should be denied relief, at least if the damage is immaterial and unrelated to the breach. Otherwise an ordinary and inconsequential scratch on a countertop might be argued to be grounds

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132. WYO. STAT. ANN. § 1-21-1203(b) (LEXIS 1999).

133. If the landlord disputes tenant's claim, the tenant may move directly to the third step and commence legal action. WYO. STAT. ANN. § 1-21-1206(c) (LEXIS 1999).

134. WYO. STAT. ANN. § 1-21-1206(a) (LEXIS 1999).

135. WYO. STAT. ANN. § 1-21-1204 (LEXIS 1999). For a more complete discussion, *see infra* notes 201-18 and accompanying text.

136. WYO. STAT. ANN. § 1-21-1205 (LEXIS 1999). For a more complete discussion, *see infra* notes 219-28 and accompanying text.

137. WYO. STAT. ANN. § 1-21-1204(a)(i) (LEXIS 1999).

138. WYO. STAT. ANN. § 1-21-1205(a)(i) (LEXIS 1999).

for denying relief. If there is some damage to the premises, the cost of repairing it can be offset from any recovery the tenant will receive.<sup>139</sup>

Prior to commencing a legal proceeding the tenant must, once again, notify the landlord of the defect and demand that it be repaired. That notice must again be delivered by certified mail or personal service. It must also contain an enumeration of the prior demands and defects that have not been corrected.

If a reasonable time has elapsed after the renter has served written notice on the owner under W.S. 1-21-1203 and the owner has failed to respond or to correct the condition described in the notice, the renter may cause a “notice to repair or correct condition” to be prepared and served on the owner by certified mail or in the manner specified by W.S. 1-21-1003. This notice shall:

- (i) Recite the previous notice served under W.S. 1-21-1203(b);
- (ii) State the number of days that have elapsed since the notice was served and that under the circumstances the period of time constitutes the reasonable time allowed under W.S. 1-21-1203(b);
- (iii) State the conditions included in the previous notice which have not been corrected;
- (iv) Demand that the uncorrected conditions be corrected; and
- (v) State that if the owner fails to commence reasonable corrective action within three (3) days he will seek redress in the courts.

Most of the elements of this notice seem unnecessarily burdensome and a trap for the normal legally unsophisticated residential tenant. The landlord has already received a notice of the defects under *Step 1* of this process. The first four listed items in the second notice are a repeat of the information the landlord received in the first notice or deal with information about which the landlord must be already aware—that the first notice was served, that a reasonable time has elapsed since the prior notice was served, that the condition has not been corrected, and that the tenant is demanding that it be corrected. Since the landlord has received the first notice, he already knows that he has received it and the length of time that has transpired. A statement that a reasonable time has elapsed since the date of service is self-serving on the part of the tenant. The severity of the defect will be apparent to the landlord and he should know that a reasonable time has transpired. If the landlord has not corrected the defects requested in the first notice, he also is, or should be, aware of that fact. Even the final item should be obvi-

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139. See *Wolin v. Walker*, 830 P.2d 429, 433-34 (Wyo. 1992).



ous to the landlord—that the tenant will commence an action to seek redress.<sup>140</sup>

However, there is one advantage of a second notice, although there is no reason for the notice to be so cumbersome and dilatory. The landlord may believe that he has, in fact, corrected the defect, and the tenant may believe to the contrary. If so, it would be helpful if the landlord discovered that fact. Nonetheless, an additional written notice seems an unnecessary formality, especially if there has been no attempt at correction by the landlord. The landlord can easily check with the tenant upon completion of the repair, or shortly thereafter, to ascertain the tenant's views.

The requirement that the notice be served by certified mail or by personal service also seems to be a trap for the legally unsophisticated tenant. If a tenant delivers the notice to the landlord by ordinary mail and it is actually received, it should not matter how the notice was received. For that matter, if the tenant can prove that the landlord has received oral notice of the defect, the landlord should not be able to complain that he was not given an opportunity to correct the defect.

Most implied warranties have been created through the judicial process. In creating those warranties, courts have also required the landlord be given notice of the defect and have an opportunity to cure it. However, they seldom have provided any rigidity about the content of the notice or the method of its delivery. If the landlord had actual notice of the defect and failed to cure it, then the tenant may seek appropriate remedies. Perhaps more importantly, these courts do not require that the tenant give the landlord essentially the same notice twice.<sup>141</sup>

*Step 3.* If, after giving the “notice to repair or correct condition” and waiting the mandatory three days, the landlord “has not corrected or used due diligence to correct the conditions, . . . or if the owner has notified the renter that the claim is disputed, . . .”<sup>142</sup> the tenant may commence an action against the landlord in the county or justice of the peace court. The action will then be tried within a period of three to twenty days after the service of the summons.<sup>143</sup>

If the landlord has been unreasonable in refusing to correct the condition or has not used due diligence to perform the correction, “the renter may

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140. To require that the tenant give the landlord three additional days to correct in all circumstances is also unnecessarily rigid. Some defects pose such a danger or so significantly breach the warranty that imposing a three day wait for any relief is unreasonable. One can imagine many such situations: A gas leak in the furnace, a break in the water pipes, or even the lack of heat in the winter.

141. See generally *Marini v. Ireland*, 265 A.2d 526, 535 (N.J. 1970); *Hilder*, 478 A.2d at 210.

142. WYO. STAT. ANN. § 1-21-1206(c) (LEXIS 1999).

143. *Id.*

be awarded costs, damages, and affirmative relief as determined by the court.”<sup>144</sup> It should be noted that the damages available to the tenant do not include attorney’s fees. The original version of the bill introduced in the legislature in the 1999 session allowed reasonable attorney’s fees to be collected as part of the damages.<sup>145</sup> The availability of attorney’s fees was, in the view of some, a balancing provision.<sup>146</sup> Without the ability to recover reasonable attorney’s fees, the expectation of compensation may be so low that most tenants will find the cost of prosecuting the suit to be prohibitive. Unless the tenant has sufficient personal resources to afford an attorney and pursue the case on principle, or unless an attorney is willing to accept the case on a *pro bono* basis, the tenant will have to prosecute the case *pro se*. More likely, the inability to recover attorney’s fees from the offending landlord will simply have the effect of squelching relief in many cases. Unfortunately, these cases may include some of the most serious breaches of the implied warranty.

The damages to be awarded to the tenant “may include rent improperly retained or collected” by the landlord.<sup>147</sup> During the period in which the premises are not habitable, the landlord fails to provide the tenant with some or all of the consideration that he promised she would receive—habitable housing. Since the obligations of the parties are mutually dependent, the failure of the landlord to supply his consideration means that he has improperly retained or collected some of the rent.<sup>148</sup> To the extent that the premises have been devalued by the breach of the implied warranty, the landlord has failed to supply his consideration. As a consequence, the landlord has received rent from the tenant that is improperly retained or collected.

There have been several approaches to computing damages in implied warranty of habitability cases. The traditional method of determining compensatory damages is to compute the difference between the fair rental value of the premises in their warranted condition and the fair rental value of the premises in their actual condition.<sup>149</sup> This method, as traditionally stated, requires some evidence of the value of the premises in both states.<sup>150</sup>

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144. *Id.*

145. Wyo. House Bill No. HB 0044 (1999).

146. Interview with State Senator Phillip Nicholas (Jan. 19, 2000).

147. WYO. STAT. ANN. § 1-21-1206(c) (LEXIS 1999).

148. *See Berzito v. Gambino*, 308 A.2d 17, 22 (N.J. 1973).

149. *Mease v. Fox*, 200 N.W.2d 791, 797 (Iowa 1972); *Boston Housing Authority v. Hemingway*, 293 N.E.2d 831, 845 (Mass. 1973); *Von Pettis Realty, Inc. v. McKoy*, 519 S.E.2d 546, 549 (N.C. App. 1999); *Hilder*, 478 A.2d at 209. If the tenant vacates the premises and terminates the lease, the tenant is no longer injured by the continuing condition of the premises. As a consequence, courts have limited the relief after termination to the difference between the promised rent and the fair market value as promised. This amount is likely to be very small in residential leases and will occur only if the tenant has an advantageous lease. *Mease*, 200 N.W.2d at 797; *King v. Moorehead*, 495 S.W.2d 65, 76 (Mo. App. 1973).

150. *See, e.g., Kekllas v. Saddy*, 389 N.Y.S.2d 756, 759 (N.Y. Misc. 1976).

Since the cost of prosecuting a case of this kind is likely to be high for most residential tenants, the need to introduce expert testimony about the value of the property may prove even more prohibitive. To assist in the determination of damages, some courts have found it valuable to engage in some basic valuation assumptions.<sup>151</sup>

In most cases, it is reasonable to assume that the rent promised in the lease is the rental value of the premises as promised. Most residential leases are relatively short term—sufficiently short so that the rental value is not likely to have time to change much, if at all. Thus, it should be permissible to accept the rent promised by the tenant in the lease as the best evidence of the fair rental value of the premises.<sup>152</sup> If either the tenant or the landlord should have proof that the value is otherwise, they may introduce that evidence.<sup>153</sup> In the absence thereof, the fair rental value of the premises in their warranted condition may be assumed to be the promised rent.<sup>154</sup> Thus, in most residential leases, the damages a tenant incurs when she remains in the defective unit is the difference between the rent she promised to pay in the lease and the fair rental value of the premises in their actual condition.<sup>155</sup>

However, simplifying the proof of the fair rental value of the premises in their actual condition may not be as easy. Unless the unit is in such terribly poor condition that it can fairly be assumed to have a fair rental value of zero, some evidence will have to be introduced to determine its fair rental value in its devalued condition.<sup>156</sup> There does not appear to be any readily available assumptions that will simplify this process. Presumably, there are few, if any, residential units in a similar defective condition with which to compare the tenant's unit. There is not a "blue book" of values for residential units in various states of disrepair. An appraiser might be able to determine a value for the unit but, without comparables, it is not clear that this appraisal would be much better of an estimate than the tenant's would be.<sup>157</sup> Given the difficulties involved, a number of cases have accepted reasonable approximations. "We agree with plaintiff that expert testimony is not required . . . and an approximation as to the amount of abatement is allowable

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151. "[I]n residential lease disputes involving a breach of the implied warranty of habitability, public policy militates against requiring expert testimony' concerning the value of the defect." *Hilder*, 478 A.2d at 209 (quoting from *Birkenhead v. Coombs*, 465 A.2d 244, 247 (Vt. 1983)).

152. See, e.g., *Breezewood Management Co. v. Maltbie*, 411 N.E.2d 670, 675 (Ind. App. 1980); *Stone v. Gordon*, 621 N.Y.S.2d 220, 221 (N.Y. App. Div. 1995); *Hilder*, 478 A.2d at 209.

153. Of course it should go without saying that the landlord may not assert that the rental value of the premises has decreased because of the defective condition that is the basis for the breach of the warranty. The change in the rental value must arise because of the effect of independent market forces upon the value of the residential unit.

154. Because there is so little time for the rental value to fluctuate during a short term residential lease, some courts have stated that the fair rental value of the premises in their warranted condition is, as a matter of law, the rent promised in the lease. See *Kline v. Burns*, 276 A.2d 248, 252 (N.H. 1971).

155. RESTATEMENT (SECOND) OF PROPERTY: LANDLORD & TENANT §§ 5.5; 10.2 (1977).

156. See, e.g., *Goldner v. Doknovitch*, 388 N.Y.S.2d 504, 507 (N.Y. Sup. App. Term 1976).

157. See *Birkenhead v. Coombs*, 465 A.2d 244, 247 (Vt. 1983).

if a precise determination is not possible.”<sup>158</sup> Thus, the landlord and the tenant should be allowed to introduce evidence from whatever sources are available to them.<sup>159</sup> The finder of fact must then evaluate the evidence and come to a reasonable determination of damages.<sup>160</sup>

The calculation of the tenant’s injury should also include consequential and incidental damages.<sup>161</sup> For example, additional items such as the tenant’s expenses to live in alternative housing (e.g., a motel) during the period of the defect and her damages due to physical injury or sickness resulting from the unsafe or unsanitary condition should be included as part of her damages.<sup>162</sup> However, the Act explicitly states that the landlord “is not liable under this article for claims for mental suffering or anguish.”<sup>163</sup>

Finally, the section defines the additional affirmative relief that the court may prescribe. “Affirmative relief may include a declaration terminating the rental agreement, or an order directing the owner to make reasonable repairs.”<sup>164</sup> Specific performance, although not often employed in a breach of an implied warranty action, is an appropriate remedy. As long as the court is able to fashion the order properly, specific performance would accomplish the ultimate objective of the implied warranty—assurance that the residential housing unit is safe, sanitary, and fit for human habitation. It

158. *Bedel v. Los Zapatistas, Inc.*, 805 P.2d 1198, 1200 (Colo. App. 1991); *see also* *Young v. Patukonis*, 506 N.E.2d 1164, 1168 (Mass. App. Ct. 1987) (“an approximate dollar amount is permissible; damages in rent abatement cases generally are not capable of precise measurement.”) *Id.*; *Teller v. McCoy*, 253 S.E.2d 114, 128 (W. Va. 1978); RESTATEMENT (SECOND) OF PROPERTY: LANDLORD AND TENANT, § 11.1 cmt. d (1977).

159. *See Birkenhead*, 465 A.2d at 247; *cf.*, *Leris Realty Corp. v. Robbins*, 408 N.Y.S.2d 166, 167 (N.Y. Civ. Ct. 1978).

160. *See Breezewood Management Co. v. Maltbie*, 411 N.E.2d 670, 675 (Ind. App. 1980). Another possible means of calculating damages would be to base it on the proportional diminution in the value of the rental unit. *See, e.g.*, *Vanlandingham v. Ivanow*, 615 N.E.2d 1361, 1369 (Ill. App. 1993); *McKenna v. Begin*, 362 N.E.2d 548, 552-53 (Mass. App. Ct. 1977). One application of this approach generally assumes that each square foot of the residential unit has equal value and the court will calculate the reduction in value in a proportionate fashion. In other words, if the defect renders forty percent of the premises uninhabitable the value of the premises has also been reduced by forty percent. However, this approach would seem to work best if the defect affects a discrete part of the premises. It would be more difficult to apply it to defects that more generally affect the entire premises. *See Teller*, 253 S.E.2d at 128, stating that the difference in value approach is more widely accepted than the percentage reduction in use approach, but in such circumstances, it might be an appropriate method of measuring damages.

161. *Mease v. Fox*, 200 N.W.2d 791, 797 (Iowa 1972); *Creekside Apartments v. Poteat*, 446 S.E.2d 826, 831 (N.C. App. 1994).

162. *See Hilder v. St. Peter*, 478 A.2d 202, 209 (Vt. 1984). *But see Johnson v. Scandia Assoc., Inc.*, 717 N.E.2d 24, 32 (Ind. 1999), where the court held that consequential damages were not permitted if the warranty is implied in fact.

163. WYO. STAT. ANN. § 1-21-1203(e) (LEXIS 1999). *Contra* *Simon v. Solomon*, 431 N.E.2d 556, 570-71 (Mass. 1982). As will be discussed below, the defective condition of the residential unit may give rise to a tort liability for failure to repair as promised in the lease, or due to some other exception to the landlord’s common law immunity from tort liability. In addition, the breach of the implied warranty of habitability may create the foundation for tort liability for the landlord. It would appear that a tort recovery in such a situation would not be for a liability “under this article” since this article does not deal directly with tort liability. *See infra* notes 286-95 and accompanying text.

164. WYO. STAT. ANN. § 1-21-1206(c) (LEXIS 1999).

should not be too difficult for a court to craft an order directing the landlord to repair most of the common defective conditions found in a residential unit. They are usually discrete and achievable repairs, which are easily measured and enforced. As will be discussed below, if repairing the defect is impossible or unreasonably expensive in relation to the nature of the property or the rent charged, the landlord can terminate the lease.<sup>165</sup> Had the landlord believed the repairs were unachievable, presumably he would have elected to terminate the lease upon receipt of the tenant's initial complaint. In the absence of a prior election to terminate, the landlord should not be able to claim the repairs are impossible to perform or too difficult to measure or enforce.

The court's decree may also terminate the lease. If the lease is terminated, the tenant will be required to "vacate the rental unit no sooner than ten (10) days nor later than twenty (20) days after the termination of the rental agreement by the court."<sup>166</sup> If the court does terminate the lease, the tenant is entitled to a refund of the balance of the rent already paid and a return of her deposit within thirty days after the effective termination of the lease.<sup>167</sup>

The maximum period of time within which the tenant must vacate seems to be very short; it may not allow her sufficient time to find a new place to live and then move out of the existing one. This provision might be especially difficult for tenants in rural areas where nearby housing is minimal and often not readily available for rent or lease. The maximum period of time could rightly have been left to the court to determine in its discretion, since only it is in the position to determine a just and equitable termination process under the facts of a particular case.

In authorizing the termination of the lease, the Act makes no specific reference to the doctrine of constructive eviction. As discussed above,<sup>168</sup> if the tenant is constructively evicted from a leasehold estate she may terminate the lease, and she may do so without prior court intervention. If the landlord should thereafter attempt to recover rent from her, she may use the doctrine of constructive eviction as a defense.<sup>169</sup> There does not appear to be any reason of logic or convenience to suggest that a specific provision allowing judicial termination of a lease, as additional affirmative relief in a lawsuit, was intended to repeal the doctrine of constructive eviction. A doctrine so established in our common law as constructive eviction should

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165. WYO. STAT. ANN. § 1-21-1203(d) (LEXIS 1999). See *infra* notes 171-80 and accompanying text for a further discussion of this provision.

166. *Id.*

167. *Id.*

168. See *supra* notes 25-35 and accompanying text.

169. At that time, she will be called upon to prove the correctness of her conclusion that she had been constructively evicted.

not be repealed by anything less than precise and clear language. That language is not present here. The Act is supplemental to existing law and should not be interpreted to repeal current doctrines without specific reference. Furthermore, to do so would deny residential tenants the benefits of the doctrine while still allowing the doctrine to be used by commercial and agricultural tenants.<sup>170</sup>

*Termination by landlord due to economic reasons.* Some repairs to leased premises may be extremely expensive and not economically sound for a particular property. Because of that potential, the landlord is given an opportunity to evaluate the costs of the repairs needed to bring the residential unit into compliance with the implied warranty of habitability. If the costs are out of proportion to the rents or the value of the property, the Act gives the landlord the opportunity to choose not to make the repair and instead to terminate the lease. "The owner may refuse to correct the condition of the residential rental unit and terminate the rental agreement if the costs of repairs exceeds an amount which would be reasonable in light of the rent charged, the nature of the rental property or rental agreement."<sup>171</sup>

Clearly, the legislature did not desire to precisely specify the relationship that would allow the landlord to terminate the lease. Instead, it chose a standard of reasonableness—"reasonable in light of the rent charged, the nature of the rental property or rental agreement."<sup>172</sup> However, that standard does not give the landlord totally free reign to decide whether to make the repair or not. The decision must be reasonable within the parameters stated. Although the Act does not set out any procedure to test whether the landlord is making a reasonable choice, that choice is subject to inspection in any subsequent litigation.

The Act appears to invoke a concept of economic impossibility or unreasonableness. Just because the repair might be expensive is not justification for the landlord to terminate the lease. One factor to consider is the relationship of the cost of repair to the rents charged. Usually, only small repairs are actually paid out of current rents, larger ones are financed, either through purchases on credit or through loans. The Act should not be interpreted to mean the landlord may terminate the lease if he cannot pay for the repair out of current rents. If the rents are sufficient to pay the debt service

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170. As a practical matter, the judicial authority provided in the Act to terminate a lease may have the same practical effect as the doctrine of constructive eviction. A residential tenant, upon encountering premises so deficient in the normal amenities of habitable housing as to bring her to a conclusion that she has been constructively evicted, could still vacate the premises. If the landlord should later attempt to collect rent from her by legal process, she could then ask the court, as a defense to the landlord's action, to exercise its authority to terminate the lease, effective as of the date she vacated the premises. Her remedies under the Act should not depend on who initiates the action. The fact that the Act authorizes her to initiate the action is permissive and not mandatory.

171. WYO. STAT. ANN. § 1-21-1203(d) (LEXIS 1999).

172. *Id.*

on the credit purchase or loan needed to make the repair, the cost of repair is reasonable.

A second factor provided for comparison is the nature of the rental property. The most likely meaning of this term is the value of the property. If the repair is extensive and the cost is excessive when compared to the low value of the property, the landlord might consider the repair to be "throwing good money after bad."<sup>173</sup> However, the comparison should be made not to the value of the property prior to the repair, but rather to the value after the repair is completed. If the landlord has adequate rents to pay for the repairs and the repairs will return the property to its prior market value, the landlord should be required to comply with his lease obligations.

The final comparator is the rental agreement. It is not clear what the legislature might have meant by this term. One possibility might be the remaining length of the lease term. If only a few weeks are remaining in the lease term and the landlord has intentions not to relet the premises and to raze the structure, it may be unreasonable to spend large amounts to repair the premises. In combination, this provision should not be interpreted to allow the landlord to ease out of his lease obligations. He has made an economic decision that has predictable consequences. He should be allowed to terminate only when the obligations are unreasonably excessive and unexpected in relation to the rents charged, the value of the property, and the rental agreement.

Assuring that the landlord has made his decision based on a reasonable standard is important not only to prevent the landlord from easing out the lease when he should be repairing the premises, but also to prevent the provision from being used as a means to disguise the landlord's retaliatory eviction of a tenant who complains about the condition of the premises.<sup>174</sup> One means of assuring that such does not occur would be for the court to require that if the landlord chooses to terminate the lease, he must remove the rental unit from the rental market.<sup>175</sup> If he has intentions to relet the

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173. Of course, it would be appropriate to ask why the landlord would have considered renting property in such condition in the first place.

174. Although Wyoming currently does not have any decision dealing with retaliatory eviction, the doctrine is an equitable one and within the discretion of the court to adopt. The Utah Supreme Court determined that the Utah Fit Premises Act required that it apply the doctrine of retaliatory eviction to prevent the landlord from evicting the tenant after the tenant had filed a complaint. *Building Monitoring Systems, Inc. v. Paxton*, 905 P.2d 1215, 1218-19 (Utah 1995). The Utah Act is similar to, and the basis of, the Wyoming Act.

175. It must be recognized that economic conditions do change. If it should subsequently occur that the landlord is financially able to make the repairs he could not make earlier, he should be able to re-let the premises. However, the change of circumstances should not be a sham. If called to task on this issue he should have to show that there truly was a change in his economic situation. Perhaps a rule of thumb might help; for example, it might be presumed that if the landlord does not keep the premises off the market for at least one year, there was insufficient time for a true change in economic circumstances to occur.

rental unit, he would have to make the repairs; and if he intends to make the repairs, he should make the repairs for the current tenant. To place the premises on the rental market again would mean that the costs of the repairs were not unreasonable in relation to the comparator factors.<sup>176</sup>

In order to implement his decision to terminate the lease, the landlord must notify the tenant in writing and provide the tenant with an opportunity to find substitute housing.

“If the owner refuses to correct the condition and intends to terminate the rental agreement, he shall notify the renter in writing within a reasonable time after receipt of the notice of noncompliance and shall provide the renter with sufficient time to find substitute housing, which shall be no less than ten (10) days nor more than twenty (20) days from the date of notice.”

While the notice must be in writing, there is no provision about how the notice is to be delivered to the tenant. Unlike the requirement in *Step 1*, this notice need not be delivered by certified mail or by personal service. Termination is a significant event for both the tenant and the landlord and should be treated in such a way so that there is no doubt about the nature and clarity of the landlord’s decision. In addition, the date of the notice begins the running of a specific period of days for the tenant to find substitute housing and move out of her current premises. Thus, it would seem to be in the landlord’s best interest to deliver the notice by certified mail or personal service.

The subsection provides that the landlord must give the tenant “sufficient time to find substitute housing.”<sup>177</sup> The subsection provides a minimum, as well as a maximum, period of time for the tenant to find the substitute housing. Again, it is not clear why it was necessary to specify a maximum period of time in the Act. As long as the tenant has an adequate minimum time to find new housing, the parties should be able to determine the maximum period. Perhaps there was concern that the tenant would assert that an excessively long period of time was needed. The legislature may desire to assist the landlord in stemming such a claim by providing a specified period. If so, it seems to have chosen a problematically short period. As previously stated,<sup>178</sup> in some situations the need for a longer period

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176. It is conceivable that a landlord might argue that extensive repairs must be made and that he intends to re-let the premises at an increased rate based on those repairs. However, the increase in rent should not be a minimal one, for if so, then the landlord could have reasonably continued the former tenant under the old lease. The increase should truly be significant to allow the termination. In the end, the landlord should be put to the test. If he re-lets at a rate that is anything less than significantly higher, he is guilty of deceiving his former tenant and perhaps even the court.

177. WYO. STAT. ANN. § 1-21-1203(d) (LEXIS 1999).

178. See *supra* note 166-67 and accompanying text.



may be justified, especially in rural areas where nearby housing is minimal and often not available as rental housing.<sup>179</sup>

Finally, the Act provides that if the lease is terminated, "the rent paid shall be prorated to the date the renter vacates the unit and any balance shall be refunded to the renter with any deposit due in accordance with W.S. 1-21-1208."<sup>180</sup> The tenant is entitled to a refund of rent paid for the period of time that she is not able to remain in possession of the premises. However, the Act fails at this juncture to recognize the full extent of the tenant's position. The landlord has not only decided to terminate the lease and thus not provide her with his promised consideration for the rest of the term, but he has also failed to provide her with his promised consideration during the period that the premises were defective. Since the reason the landlord is terminating the lease is that the premises are not habitable, the tenant has not been receiving the landlord's promised consideration for some time. To do justice to the situation and to comply with contract principles, the subsection should also recognize that the tenant is entitled to a refund of that portion of the rent that exceeds the fair rental value of the premises during the period of the defective condition. She has paid more consideration to the landlord than he provided in return. Just as the tenant is entitled to recover "rent improperly retained or collected" if the landlord does not elect to terminate the lease, she should also be entitled to recover a similar amount for the period of the lease prior to his election to terminate.

*Summary of three-step remedy process.* The remedy provided by the Act is primarily in the form of damages and is inadequate and deliberately attenuated. Except for the possible decree of specific performance, the objective of providing safe and sanitary housing is not facilitated. Whatever relief the court might ultimately decree, it is so prolonged in coming and difficult to achieve that one is left wondering why a tenant would bother to seek it, except on principle. For example, suppose that a tenant should find that she has no heat on January 20<sup>th</sup> because her furnace has ceased to function. What will she have to do to obtain relief?

First, she must give a written notice to her landlord describing the problem and requesting that he fix it. That notice must be delivered by certified mail or personal delivery. She must wait a reasonable period of time for the landlord to either fix it or terminate the lease. How long she must wait is not clear; nor can it be made precise. However, let us assume that it

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179. Although the subsection states that the tenant must be given at least ten days and not more than twenty days to find substitute housing, it does not state that the tenant must vacate the housing unit in that same period. However, that appears to be the probable meaning of the provision.

180. WYO. STAT. ANN. § 1-21-1203(d) (LEXIS 1999). The referenced section (§ 1-21-1208) provides for the return of the deposit to the tenant and specifies the deductions that the landlord may take from the deposit.

is reasonably short<sup>181</sup>—two days.<sup>182</sup> On January 22<sup>nd</sup>, she then must send another notice to the landlord demanding that the furnace be repaired. She must include a list of information that the landlord already possesses, as well as state that if the defect is not corrected within three days she will seek redress in the courts. The “notice to repair or correct condition” must also be delivered by certified mail or personal delivery. If the furnace has not been repaired by January 25<sup>th</sup>, she may commence her legal action. Assuming that no weekend period falls on her proposed date of filing or hearing, the court is sitting on the day she seeks to commence the action, and her summons can be delivered immediately, she can have a hearing on the issue no earlier than January 28<sup>th</sup> and as late as February 14<sup>th</sup>. She must cope with a lack of heat during a Wyoming winter for a minimum of eight days and perhaps as long as twenty-five days. Actually, with the likely intervention of delays such as weekends and delivery delays, it is likely to be longer than the already extended period.

Even if she must only wait a period of eight days, the tenant will either freeze to death, if she remains in the unit, or else she must move to other premises temporarily. During this waiting period, she is not specifically authorized to employ any other means of relieving her situation, such as hiring a heating repair service to correct the problem and withholding the cost thereof from her February rent. Nor is she specifically authorized to abate the February rent by the amount of the reduction in the fair rental value.<sup>183</sup> Both of these remedies have become traditional for the breach of the implied warranty of habitability in other jurisdictions.<sup>184</sup> The object of the warranty should not only be that the landlord provide safe and sanitary housing, but also that the tenant have speedy and effective remedies for the breach of the warranty designed to reinstate the unit to a safe and sanitary condition.

The tenant’s relief is further impaired by the fact that her damages will be limited. Assuming that she or her family did not become ill because of the lack of heat, she will only be able to recover the rent for the eight to twenty-five day period, plus the costs of a motel or other alternative housing. Even if she should seek specific performance, the court order will not issue until the end of the eight to twenty-five day period and will probably take a couple of days longer to accomplish. Her termination (constructive

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181. A lack of heat is a serious defect in the middle of winter. The tenant cannot be expected to wait a lengthy time in that unsafe situation.

182. Actually, a shorter period of time seems appropriate for lack of heat in the middle of winter. This would indicate that certified mail is not a reasonable method for delivering the notice. Assuming instead that the tenant leaves a copy of the notice at the landlord’s abode or place of business, one might allow only a day for the landlord’s response. However, before the tenant can respond thereafter will likely take the second day.

183. In this case, the likely value would be zero since she cannot live in the unit without heat.

184. See, e.g., *Javins v. First Nat’l Realty Corp.*, 428 F.2d 1071, 1083 (D.C. Cir. 1970); *Hilder v. St. Peter*, 478 A.2d 202, 209-10 (Vt. 1984). See also *infra* notes 186-200 and accompanying text.

eviction) remedy, not new under this Act, might give prompt relief, but she has to have affordable and alternative housing available.

In all probability, she also has no specific knowledge of the law and may not have realized that she should have delivered two written notices, one with specific detailed information, by certified mail or personal delivery. If either notice procedure is deficient, she might be required to start all over before she can seek some relief.<sup>185</sup> Overall, perhaps her best chance for relief may be to wait for spring to arrive!

*Alternative remedies.* Although there is no reference in the Act to any relief in the nature of rent abatement<sup>186</sup> or repair and offset,<sup>187</sup> those remedies are not excluded by the Act itself. Since the Act does not purport to override other possible remedies that currently exist for both the landlord and the tenant, or to provide the exclusive remedies for the parties, it should be permissible to consider alternative modes of relief.<sup>188</sup> Nevertheless, steps one and two of the remedy process (notice provisions) might be construed as preconditions to the tenant obtaining alternative relief in any fashion. As previously noted,<sup>189</sup> the difficulty with those steps is not providing the landlord with notice, for it is reasonable that the landlord should have notice about the defect before the tenant seeks any relief. The difficulty is the repetitiveness and lengthiness of the procedure. Nevertheless, after compliance with the two notice provisions, the tenant should be able to seek alternative relief.

Even though not specifically provided in the Act, the tenant should be allowed to avail herself of the remedy of rent abatement or repair and offset. In addition, there exists under current Wyoming law a procedure that parallels the process commonly known as rent escrow.<sup>190</sup>

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185. This would seem unnecessary if the landlord has actually received notice of the defect. The court, in its broad discretionary powers, can determine that the landlord has had sufficient notice and must respond without further delay.

186. Rent abatement refers to a process by which the tenant reduces the rent paid by an amount equal to the reduction of the fair rental value of the premises. It is part of the normal relief available for breach of the implied warranty of habitability. *See, e.g., Hilder*, 478 A.2d at 209-10.

187. Repair and offset refers to a process by which the tenant hires someone to repair the premises after the landlord has failed to do so and then deducts the cost thereof from the next rent due. It is usually limited to one month's rent. It too is often allowed by the courts as a remedy for the breach of the implied warranty of habitability. *See, e.g., Marini v. Ireland*, 265 A.2d 526, 535 (N.J. 1970).

188. The Act itself does not provide the landlord with an eviction process nor with a damage action; that is left to the Forcible Entry and Detainer statute. WYO. STAT. ANN. §§ 1-21-1001-1016 (LEXIS 1999). Nor does the Act provide for termination by the tenant, except by judicial decree. The doctrine of constructive eviction is outside the Act. Even an action for damages that exceeds the jurisdictional limitations of the county or justice of the peace courts is not provided to either party in the Act.

189. *See supra* notes 125-85 and accompanying text.

190. Rent escrow involves the tenant depositing (escrowing) the rents with the court followed by a petition asking the court to determine entitlement to the rents. THE RESTATEMENT (SECOND) OF PROPERTY: LANDLORD & TENANT § 11.3 (1977), refers to this remedy as "rent withholding."

Rent abatement is an effective remedy because it denies the landlord the privilege of collecting, holding and using the tenant's rent money for the period of time during which the premises are not in compliance with the implied warranty of habitability. The burden is placed on the landlord to bring an action to recover the rent rather than requiring the tenant to bring the action to recover the rent she has previously paid to the landlord. Given the usually inadequate relationship between the parties, it is fair not to allow the landlord the privilege of collecting and using the rents and to place the burden on him to commence litigation to recover them.<sup>191</sup> If the tenant can estimate the reduction in the rental value of the premises correctly, she can abate the rent by that amount. If her estimate is incorrect, courts usually give her a brief but reasonable time to pay the shortage. If she then fails to pay the shortage or, in bad faith, has grossly overestimated the reduction in value, the landlord may terminate the lease.<sup>192</sup>

Similarly, with the remedy of repair and offset, if the tenant gives the landlord the required notices, she is allowed to repair the defect and deduct that amount from the rents next due. In fact, this remedy tends to accomplish the purposes of the implied warranty of habitability better than damages or even rent abatement. With either of the latter two remedies, there is no assurance that the repairs will ever be made. They simply deny the landlord the right to obtain or keep the rent, to the extent that it exceeds the fair rental value of the premises. In contrast, the repair and offset remedy is designed to accomplish the actual correction of the defective condition. In the hypothetical described above, the tenant, after waiting the two day period of step one and the three day period of step two, would be able to have the defective condition repaired immediately by a heating contractor. While five days might still be a long period of time during January in Wyoming, it is much faster than having to wait an even longer period for the right to collect damages or abate the rent, and still have no assurance that the condition will ever be repaired.<sup>193</sup>

Perhaps the strongest argument for an alternative relief may lie not in rent abatement or repair and offset, but in the process of rent escrow. In this process, the tenant deposits her rent, as it becomes due, with the clerk of court and, at the same time, commences an action for the court to determine entitlement to the rent. Strategically, this would advance the objectives of the implied warranty of habitability. Before the landlord could recover the

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191. See *Hilder*, 478 A.2d at 209-10.

192. See *Javins*, 428 F.2d at 1083.

193. The repair and offset remedy is usually limited to an amount equal to approximately one month's rent. One reason for this is that larger repairs may need extended financing by the landlord, perhaps by using the real estate itself as security, and also because large repairs often involve more than the tenant's residential unit. Thus, the replacement of the furnace may not be an appropriate item for this remedy since its cost will likely exceed one month's rent. However, the installation of a new thermocouple in the furnace is a minor repair and would usually be covered by one month's rent.

rent—or at least the entire amount thereof—he would have to repair the defect. Until that time, the premises are not habitable and in breach of the warranty; as a result the landlord has not supplied his consideration and the tenant is entitled to a refund of some or all of the rents deposited with the court, the amount thereof depending on the degree to which the unit has been devalued. As a strategy for the tenant, it is often better than rent abatement or repair and offset because it shows her good faith and ability to pay. Since she has deposited the rent with the court, it is clear that she is willing and able to pay it and is not using it for other purposes.

For two independent reasons this remedy has support in current Wyoming law. The first of these arises from the fact that the Residential Rental Property Act currently allows the court to grant “affirmative relief as determined by the court.”<sup>194</sup> The Act further provides that affirmative relief includes “an order directing the owner to make reasonable repairs”<sup>195</sup>—an order of specific performance. In granting specific performance, courts take into consideration the means of enforcing the remedy. One means of assuring that the decree can be enforced is to allow the tenant to escrow her rent with the court. That rent may then become a source of some or all of the funds needed to make the repair, depending on the amount of the escrow to which the landlord is entitled. The court can order that fund paid to the landlord as and when the repair is made.

The second reason why this relief has support in current Wyoming law is that a parallel process is specifically authorized in a different, but related, landlord tenant situation. Currently, a tenant who is taking an appeal from a Forcible Entry and Detainer judgment must deposit the amount of rent specified in the lower court’s decree with the court. She must also deposit future rents with the court as they become due. The rents are retained by the clerk of court pending the determination of the appeal.<sup>196</sup> Although this statutory provision does not specifically authorize tenants to deposit rents with the court incident to an action to determine entitlement to them, the court has sufficiently broad equitable powers to authorize a similar process.

Probably the most significant argument that the landlord may make against the escrow process is that tenant’s failure to pay the rent directly to the landlord violates the lease or even a specific provision of the Residential Rental Property Act.<sup>197</sup> However, escrowing such funds with the court must be an exception to those requirements. Otherwise, depositing the rents on appeal of a Forcible Entry and Detainer action would also be a violation of

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194. WYO. STAT. ANN. § 1-21-1206(c) (LEXIS 1999).

195. *Id.*

196. WYO. STAT. ANN. § 1-21-1015 (LEXIS 1999).

197. WYO. STAT. ANN. § 1-21-1204(a)(vi) (LEXIS 1999) provides that the tenant shall “[b]e current on all payments required by the rental agreement.”

the lease and, of necessity, the appealing tenant could be evicted. Such a result is obviously not intended under the Forcible Entry and Detainer Act. In effect, the depositing of the rents with the court is the payment of the rent to the clerk of court as an escrow agent for the landlord. If the landlord is entitled to them after the appeal is concluded, he will get actual possession of the rents. Until that time, he has constructive possession by the fact that they are in the possession of the escrow agent.

Similarly, with regard to escrowing rents to enforce the implied warranty of habitability, a tenant is invoking a legitimate legal process. The rents can be viewed as deposited with the clerk of court as an escrow agent for the landlord. The payment to the clerk satisfies the requirement that the tenant "be current on all payments required by the rental agreement."<sup>198</sup> If the court subsequently determines that the landlord is entitled to the rents, they will be transferred to his actual possession. If, on the other hand, the landlord is not entitled to some or all of the rents, that amount will not be transferred to the landlord, but instead will be returned to the tenant.

This procedure is not a novel one. It has been used in other jurisdictions and approved by their courts.<sup>199</sup> It is also recognized by the Restatement (Second) of Property and, in fact, is viewed by the drafters of that document as the preferred means of rent abatement and the ultimate relief for the tenant.<sup>200</sup>

#### E. Tenant's Duties

The relationship between the landlord and the tenant is a reciprocal one. Among the landlord's duties are the obligations to comply with all expressed covenants, not to interfere in a substantial way with the tenant's quiet enjoyment of the premises, and to provide the tenant with premises that are safe, sanitary, and fit for human habitation. In a reciprocal fashion, the Act sets forth certain duties the tenant owes to the landlord. These duties are both affirmative and prohibitive.

The list of tenant's duties starts with four interrelated ones: The tenant must maintain the leased premises "in a clean and safe condition and not unreasonably burden any common area."<sup>201</sup> This duty is related to the earlier-stated duty of the landlord—to provide premises that are safe and sanitary. Their similarity does not mean that the provisions are in conflict,

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198. *Id.*

199. *See, e.g.,* *Marini v. Ireland*, 265 A.2d 526, 535 (N.J. 1970).

200. RESTATEMENT (SECOND) OF PROPERTY: LANDLORD & TENANT § 11.3 (1977).

201. WYO. STAT. ANN. § 1-21-1204(a)(i) (LEXIS 1999). This duty extends beyond the residential unit itself to the common areas. That provision probably was unnecessary since WYO. STAT. ANN. § 1-21-1201(a)(iv) (LEXIS 1999) defines the residential rental unit as including common areas, appurtenances, grounds, and facilities.

however. The tenant's duty stated here as an affirmative duty is really an obligation not to engage in conduct that would render the premises unclean and unsafe and thus defeat the landlord's efforts to provide safe and sanitary premises.

The three duties listed immediately thereafter are more akin to examples of this first duty than to separate and distinct obligations. One of them requires the tenant to dispose of garbage in a clean and safe manner, and two of them prohibit the tenant from engaging in conduct that would impair the landlord's efforts to provide operational electrical, heating and plumbing systems, and hot and cold running water. The tenant must:

- (ii) Dispose of all garbage and other waste in a clean and safe manner;
- (iii) Maintain all plumbing fixtures in a condition as sanitary as the fixtures permit;
- (iv) Use all electrical, plumbing, sanitary, heating and other facilities and appliances in a reasonable manner; . . .<sup>202</sup>

Some examples of these duties might include the following: The first duty might require the tenant to collect her own garbage and other waste and dispose of it in the proper receptacles provided by the landlord, whether garbage disposals, incinerators, refuse cans, dumpsters, or other receptacles. In the alternative, the tenant will have to dispose of the garbage off premises.<sup>203</sup> Allowing the waste to accumulate around the housing unit would be a violation of this duty. Similarly, improperly disposing of waste in other than the proper receptacles, whether in common areas or elsewhere on the premises, would be a violation.

The second duty might require the tenant to keep the kitchen and toilet plumbing facilities in as sanitary condition as they permit. Failure to clean them in a reasonable fashion would be a violation. The third duty has many examples. Forcing items into the kitchen or toilet plumbing facilities that should not be placed there might be a violation. Overloading electrical circuits in such a fashion as would cause danger of short circuit, electrical discharge, or overload might be a violation. Improper use of a landlord-supplied stove, oven, or refrigerator might also be a violation. As can be seen, none of the duties reduces the landlord's initial obligation to supply premises that are safe and sanitary. The tenant simply may not engage in

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202. WYO. STAT. ANN. § 1-21-1204(a)(ii)-(iv) (LEXIS 1999).

203. In this regard, the Utah Fit Premises Act § 57-22-4(1)(e) (1999) provides that "for buildings containing more than two residential rental units, [the landlord must] provide and maintain appropriate receptacles for garbage and other waste and arrange for its removal, except to the extent that renters and owners otherwise agree." That provision was deleted from the Wyoming Residential Rental Property Act. In this regard, there is no reciprocal duty on the part of the landlord to provide the facilities in which to place the garbage and waste.

activities that cancel out the landlord's efforts to supply safe and sanitary facilities.

The list of duties continues: The tenant must "[o]ccupy the rental unit in the manner for which it was designed and shall not increase the number of occupants above that specified in the rental agreement without written permission of the owner. . . ." <sup>204</sup> Occupancy in the manner for which the unit was designed is not easily defined. Obviously, a residential unit is designed for residential use. The unit may not be used for commercial or industrial purposes, as those terms are commonly understood. However, depending on the wording of the lease, and applicable land use regulations and restrictive covenants, the tenant may be able to conduct some low intensity business enterprise in the unit as long as it is compatible with the residential use.

The primary issue of occupancy is addressed in the remainder of the sentence—occupancy by a greater number of people than specified in the lease. If this provision is to be enforced, there must be an agreement about the number of occupants in the lease, and the Act so provides. However, oftentimes the number of occupants is not stated in the lease or there may be some lack of clarity in the provision. That does not mean that the tenant can bring in as many occupants as she wishes; it simply means that the number of occupants is not specific and easily determined.

Other common issues regarding the number of occupants involve increases due to the birth or adoption of children, or sometimes merely the existence of children. While the landlord has the general authority to limit the number of occupants in the rental unit, any discrimination based on family status is prohibited under the Federal Fair Housing Act.<sup>205</sup> Similarly, a failure to provide reasonable accommodations for handicapped persons is a violation of both the Federal Fair Housing Act<sup>206</sup> and Wyoming statute.<sup>207</sup>

The Act then obligates the tenant to be "current on all payments required by the rental agreement."<sup>208</sup> This is undoubtedly a repeat of one or more covenants contained in the lease itself. The most obvious payment required of the tenant in the lease is the rent payment. The lease may specify other payments that must be made to the landlord. For example, the lease may require the tenant to pay a portion of the utility bills paid by the landlord, based on some formula or meter readings.

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204. WYO. STAT. ANN. § 1-21-1204(a)(v) (LEXIS 1999).

205. 42 U.S.C. § 3604(a)-(e) (1999). As to occupancy limits and the possible issues that may result therefrom *see generally* Pfaff v. H.U.D., 88 F.3d 739, 745-49 (9th Cir. 1996); Mountain Side Mobile Estates Partnership v. H.U.D., 56 F.3d 1243, 1248-57 (10th Cir. 1995); Glover v. Crestwood Lake Section 1 Holding Corps., 746 F. Supp. 301, 304-10 (S.D.N.Y. 1990).

206. 42 U.S.C. § 3604(f) (1999).

207. WYO. STAT. ANN. §§ 35-13-201 to -204 (LEXIS 1999).

208. WYO. STAT. ANN. § 1-21-1204(a)(vi) (LEXIS 1999).



It is not clear whether the provision was intended to apply to other payments specified in the lease, which are to be made to third parties. The wording of the provision applies to “all payments required” by the lease. The lease may provide that the “tenant shall pay for her own telephone services.” It may be argued that a failure to pay those items would be a violation of the Act. However, that seems to be an unwarranted interpretation. The landlord is not directly benefited by the payment—for example, by avoiding a lien if the telephone bill is not paid. The probable reason why such a provision was inserted in the lease is not to require the tenant to pay her telephone bills on time—that will certainly be required in her agreement with the telephone company—but rather to inform her that the landlord will not supply telephone service as part of the amenities under the lease and that she must do so. Telephone service is a minor example of several other such provisions that may be contained in a lease. Whether a failure to pay these items is encompassed by the duty created by the Act could be important since the tenant is denied the right to serve a complaint to the landlord about a breach of the implied warranty of habitability if she is not “current on all payments required by the rental agreement”<sup>209</sup> and may not file the “notice to repair or correct condition” if she is not “in compliance with all provisions of W.S. 1-21-1204. . . .”<sup>210</sup> Whether the tenant’s bill to the telephone company is paid is irrelevant to the question of whether the tenant should be able to enforce the implied warranty, and the Act should not be interpreted to require such payments in order to seek relief.

The next provision obligates the tenant to perform all the obligations specified in the lease, and it presumably applies to obligations other than the duty to make the payments specified in the prior provision. The tenant shall “[c]omply with all lawful requirements of the rental agreement between the owner and the renter. . . .”<sup>211</sup> Again, this adds nothing to the tenant’s actual obligations since, as a matter of contract law, she would be required to perform all the covenants she has made in the lease. However, if the tenant is not in compliance with this duty she is denied the right to serve a “notice to repair or correct condition” on her landlord.<sup>212</sup> Certainly, a tenant should perform all the lawful duties she has undertaken in the lease. However, it is not clear why the performance of some of those duties should have an effect on her ability to obtain relief under the Act if they have no relevancy to the enforcement of the implied warranty of habitability. Perhaps the courts might interpret this requirement to mean that the tenant must perform only those duties that are relevant to the implied warranty in order to seek relief under the Act.

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209. WYO. STAT. ANN. § 1-21-1203(b) (LEXIS 1999).

210. WYO. STAT. ANN. § 1-21-1206(a) (LEXIS 1999).

211. WYO. STAT. ANN. § 1-21-1204(a)(vii) (LEXIS 1999).

212. WYO. STAT. ANN. § 1-21-1206(a) (LEXIS 1999).

The final affirmative duty placed on the tenant is that she must clean the unit when she terminates the lease. The tenant shall “[r]emove all property and garbage either owned or placed within the residential rental unit by the renter or his guests prior to the termination of the rental agreement and clean the rental unit to the condition at the beginning of the rental agreement.”<sup>213</sup> This provision has a couple ramifications for the tenant at the time she is leaving the premises. First of all, it sets the foundation upon which the landlord will be able to remove and dispose of the tenant’s personal property left in the unit after termination.<sup>214</sup> Second, it requires the tenant to clean the unit prior to leaving. If she fails to do so, the Act allows the landlord to clean the unit and charge the cost of the cleaning against the tenant’s deposit.<sup>215</sup>

It should be noted that although leases usually contain a covenant requiring the tenant to clean the premises before leaving, this provision states that it is a duty of the tenant to do so even if the lease should not contain such a covenant. The extent of the cleaning required by the Act opens another important issue for many tenants. The provision states that the tenant must return the “unit to the condition at the beginning of the rental agreement.”<sup>216</sup> The condition of the premises will naturally deteriorate over a period of time, especially if the lease is renewed several times. For example, during such a period, the walls may receive the usual marks and the floor may get the usual dirt. Unlike another provision dealing with repairs,<sup>217</sup> this section is not limited to cleaning the premises to its condition at the beginning of the lease, reasonable wear and tear excepted. The provision also is unclear about an issue that regularly arises between the landlord and tenant at the termination of the lease. Is it sufficient for the tenant to clean the unit herself or is it necessary that she employ a commercial cleaner, such as for steam cleaning a rug? Landlords often require commercial cleaning of the rug, for example, but the reason why that should be required is not clear if the premises are in “the condition [they were in] at the beginning of the rental agreement.”<sup>218</sup>

The Act sets forth three duties of the tenant in the form of prohibited acts. The first prohibition requires that the tenant not “[i]ntentionally or negligently destroy, deface, damage, impair or remove any part of the residential unit or knowingly permit any person to do so.”<sup>219</sup> This is an under-

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213. WYO. STAT. ANN. § 1-21-1204(a)(viii) (LEXIS 1999).

214. WYO. STAT. ANN. § 1-21-1210 (LEXIS 1999). For further discussion, *see infra* notes 265-85 and accompanying text.

215. WYO. STAT. ANN. § 1-21-1208(a) (LEXIS 1999). For further discussion, *see infra* notes 239-64 and accompanying text.

216. WYO. STAT. ANN. § 1-21-1204(a)(viii) (LEXIS 1999).

217. WYO. STAT. ANN. § 1-21-1208(a) (LEXIS 1999).

218. WYO. STAT. ANN. § 1-21-1204(a)(viii) (LEXIS 1999).

219. WYO. STAT. ANN. § 1-21-1205(a)(i) (LEXIS 1999).

standable and reasonable obligation of the tenant. However, because of its interrelation with two other provisions of the Act, there may be some issue.

Does the prohibition apply to damage that can be characterized as reasonable wear and tear?<sup>220</sup> The answer to this question might be implied elsewhere in the Act. In dealing with allowable deductions from the tenant's deposit, the landlord is allowed to deduct for "damages to the residential rental unit beyond reasonable wear and tear. . . ."<sup>221</sup> It seems unlikely that the legislature intended to impose an obligation on the tenant for which it does not allow the landlord to collect. This is buttressed by the fact that the language of this section speaks in terms that import infliction of gross harm to the unit rather than the gradual accumulation of minor scratches and nicks that are the common nature of ordinary wear and tear.<sup>222</sup>

The interpretation of this section is important to the tenant since she may not serve a "notice to repair or correct condition" unless she is "in compliance with all provisions of W.S. . . . 1-21-1205. . . ."<sup>223</sup> If a minor, negligently-created "scratch" on a countertop will prevent her from seeking redress for a breach of the implied warranty of habitability, she may be denied that right. Relevancy seems to be the important issue here. If the damage is not relevant to the breach of the warranty, there is no reason to interpret the provision as preventing a tenant from seeking a redress. In some situations, the infliction of ordinary wear and tear will not be relevant to the breach being asserted. In others, the ordinary wear and tear may have accumulated and be the cause of the premises being unsafe or unsanitary.

The next prohibition states that the tenant may not "[i]nterfere with another person's peaceful enjoyment of the residential property."<sup>224</sup> The object of this provision is twofold. First, it places a duty on the tenant not to interfere with another person in the use and enjoyment of the other person's leased unit. If she does so, the landlord has the authority to enforce this provision against her. If need be, the landlord may terminate the lease and remove her from the premises.<sup>225</sup>

Second, this provision may give another tenant grounds to assert that the landlord has breached the covenant of quiet enjoyment by not enforcing the prohibition. The covenant of quiet enjoyment provides that neither the

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220. See, e.g., *Scott v. Prazma*, 555 P.2d 571 (Wyo. 1976). "An ordinary covenant to keep the premises in good repair does not include the restoration of a part of a building which has become so run-down that it cannot be repaired. . . . [O]rdinary wear and tear include any usual deterioration from the use of the premises and by the lapse of time." *Id.* at 579.

221. WYO. STAT. ANN. § 1-21-1208(a) (LEXIS 1999).

222. [D]estroy, deface, damage, impair or remove any part of the residential rental unit. . . ." WYO. STAT. ANN. § 1-21-1205(a)(i) (LEXIS 1999).

223. WYO. STAT. ANN. § 1-21-1206(a) (LEXIS 1999).

224. WYO. STAT. ANN. § 1-21-1205(a)(2) (LEXIS 1999).

225. WYO. STAT. ANN. § 1-21-1002(a)(vi) (LEXIS 1999).

landlord nor anyone with superior title will interfere, in a substantial way, with the quiet use and enjoyment of the tenant's premises. Since the noise or other interference caused by one tenant in the building is not the direct action of the landlord nor of anyone with superior title, the traditional response to this problem has been that there is no breach of the covenant of quiet enjoyment.<sup>226</sup> However, courts have held, especially in recent years, that if the landlord has the authority to prevent the offending tenant from continuing the interference and fails to exercise that authority, it is ultimately the landlord's inaction that causes the breach of the covenant. As a result, the offended tenant may assert constructive eviction or seek damages from the landlord for breach of the covenant.<sup>227</sup>

The final prohibition in this section deals with access to the unit for repair, inspection or showing of the unit for sale or rent. The tenant may not "[u]nreasonably deny access to, refuse entry to or withhold consent to enter the residential rental unit to the owner, agent or manager for the purpose of making repairs to or inspecting the unit, and showing the unit for rent or sale."<sup>228</sup> Similar provisions are usually made in the lease itself. The prohibition in the Act is conditioned on the landlord's request for access being reasonable. Reasonableness is a flexible term and will vary with the reason for the access and the circumstances involved. The usual issues are notice and time of access. If the reason for the access is to correct a broken water pipe that is flooding a downstairs apartment, the access should be immediate and without any need for prior notice. Even in that case, however, the landlord must be sensitive to the tenant's personal situation and allow the tenant a "moment" to adjust. By comparison, if the access is to show the apartment for sale or rent, the landlord should give advance notice informing the tenant of the time and date of the visit. The notice usually need not be far in advance but it must be reasonable under the circumstances. Finally, except for extreme emergencies, such as the broken water pipe, the access should be during the normal daytime hours and not during the evening or nighttime hours.

#### F. Landlord's Remedies

*Eviction.* The Residential Rental Property Act itself does not provide two of the more important landlord remedies—an action to terminate the lease and an action to recover damages for failure to pay the rent. They are provided, however, in the Forcible Entry and Detainer statute.<sup>229</sup> Two sepa-

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226. See, e.g., *Thompson v. Harris*, 452 P.2d 122, 126 (Ariz. App. 1969); *Katz v. Duffy*, 158 N.E. 264 (Mass. 1927); *Sciascia v. Riverpark Apts.*, 444 N.E.2d 40, 42 (Ohio App. 1981).

227. See, e.g., *Eskanos & Supperstein v. Irwin*, 637 P.2d 403, 405 (Colo. App. 1981); *Bocchini v. Gorn Management Co.*, 515 A.2d 1179, 1185-86 (Md. App. 1986); *Gottdeiner v. Mailhot*, 431 A.2d 851, 854-55 (N.J. Super. A.D. 1981).

228. WYO. STAT. ANN. § 1-21-1205(a)(iii) (LEXIS 1999).

229. WYO. STAT. ANN. §§ 1-21-1001 through 1016 (LEXIS 1999).

rate provisions of that statute provide for the eviction of a tenant. Forcible entry and detainer proceedings are available:

- (i) Against tenants holding over their terms or after a failure to pay rent for three (3) days after it is due; . . .
- (vi) Against renters in violation of any terms imposed under W.S. 1-21-1204 or 1-21-1205.<sup>230</sup>

The first subsection allows the landlord to evict the tenant if she has failed to pay her rent for a period of three days after it is due. Similarly, under the second subsection, the failure to pay rent is also grounds for eviction since section 1204 of the Act provides that the tenant must be current on all payments required by the lease. There is a small difference between the two provisions, however. Section 1204 does not state that the tenant has a three day grace period after the rent is due, as does the first provision. It is not clear whether the legislature intended that difference and, if so, how that difference should be resolved.<sup>231</sup>

If a court enters a decree under the Forcible Entry and Detainer statute authorizing the eviction of a tenant, the Residential Rental Property Act also authorizes the sheriff to “remove the renter’s possessions and prevent the renter from reentering the premises without further action by the court.”<sup>232</sup> Thus, the sheriff may move promptly to evict the tenant and her personal property. He may also take such action as is necessary to prevent the tenant from reentering.<sup>233</sup> The landlord does not need to obtain additional authority from the court for such action.

*Damages.* The Forcible Entry and Detainer statute allows the landlord to obtain a judgment against the tenant for any rent unpaid at the time the action is filed.<sup>234</sup> The landlord may seek enforcement of that judgment by requesting the sheriff to levy and execute upon the property of the tenant.<sup>235</sup>

230. WYO. STAT. ANN. § 1-21-1002(a)(i), (vi) (LEXIS 1999).

231. One interpretation that would reconcile the two provisions would be to allow a landlord to commence the action to evict residential tenants immediately upon failure to pay rent while requiring that he give all other tenants three days of grace. However, such an interpretation has neither logic nor policy to support it. Why should a commercial tenant have a three day grace period while a residential tenant does not?

232. WYO. STAT. ANN. § 1-21-1211(a) (LEXIS 1999).

233. Such action might include allowing the landlord to change the locks under the supervision of the sheriff.

234. WYO. STAT. ANN. § 1-21-1008(b) (LEXIS 1999). “If the case is one based on failure to pay rent, the justice shall further find the amount of rent due and payable at the time of commencement of the action. . . .” *Id.* If the landlord should seek to recover rent for any term beyond the date when the action was commenced, or if the amount of the rent exceeds the jurisdictional amount of the justice of the peace or county court, the landlord will have to bring a separate action for damages in the district court. See *Hurst v. Davis*, 386 P.2d 943, 950-51 (Wyo. 1963).

235. WYO. STAT. ANN. § 1-21-1013 (LEXIS 1999).

In addition, the landlord may deduct any “accrued rent” from the tenant’s deposit.<sup>236</sup>

If the tenant should cause any damage to the residential unit beyond reasonable wear and tear, or if she should fail to clean the unit to its condition at the commencement of the lease, the landlord may also deduct the costs of repairing or cleaning from the deposit.<sup>237</sup> Should the deposit be insufficient to compensate the landlord for such costs, the landlord may recover that amount, plus ten percent annual interest, by bringing an action for damages.<sup>238</sup>

*Collection and application of deposits.* The Act allows the landlord to collect a deposit from the tenant, which may be applied “to the payment of accrued rent, damages to the residential unit beyond reasonable wear and tear, the cost to clean the unit to the condition at the beginning of the rental agreement and to other costs provided by any contract.”<sup>239</sup> The deposit may also be used to secure the payment of utility charges. However, any part of the deposit that is held to secure the payment of utility charges must be separately identified as such.<sup>240</sup>

The rental agreement must state, “whether any portion of a deposit is nonrefundable and written notice of this fact” must be given to the tenant at the time the deposit is collected from the tenant.<sup>241</sup> The Act is not clear whether the lease provision and notice must be given only if the deposit is absolutely nonrefundable or also if it is conditionally nonrefundable. An absolutely nonrefundable deposit would occur if the tenant makes a deposit, some or all of which is not to be refunded in any circumstance and which is, as a practical matter, prepaid rent. A conditionally nonrefundable deposit would occur in the lease provided that the tenant would forfeit the deposit upon an early termination of the lease.<sup>242</sup>

Since prepaid rent and security deposits are often collected by the landlord at the same time, a tenant might be confused about what portion of the payment is refundable. It seems clear that the landlord must, under a minimal interpretation of this provision, notify the tenant that the prepaid rent will not be refunded. Whether the landlord must notify the tenant that

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236. WYO. STAT. ANN. § 1-21-1208(a) (LEXIS 1999). The Act provides that “[u]pon termination of the rental agreement, . . . money held as a deposit may be applied . . . to the payment of accrued rent. . . .” *Id.* This provision is limited to accrued rent. It does not allow the landlord to deduct for rent accruing in the future.

237. WYO. STAT. ANN. §§ 1-21-1208(a), 1211(a) (LEXIS 1999).

238. WYO. STAT. ANN. § 1-21-1211(a) (LEXIS 1999).

239. WYO. STAT. ANN. § 1-21-1208(a) (LEXIS 1999).

240. WYO. STAT. ANN. § 1-21-1208(b) (LEXIS 1999).

241. WYO. STAT. ANN. § 1-21-1207 (LEXIS 1999).

242. *Cf. Woodhaven Apartments v. Washington*, 942 P.2d 918 (Utah 1997), where the court held that a “termination fee” of one and a half months’ rent was an unenforceable penalty. *Id.* at 922-24.

some of the deposit may not be refunded due to early termination of the lease is not clear. Nevertheless, it might be wise if the landlord did provide in the lease, or separately in a notice to the tenant, the conditions under which the rent will not be refunded.<sup>243</sup> The lease and the written notice might simply state the conditions as listed in the Act.

After the end of the lease term, the landlord must return the deposit, or any balance remaining after permitted deductions, to the tenant. In order to do so, he will need to know the tenant's new mailing address.<sup>244</sup> It would be wise for both the landlord and the tenant if the tenant were to supply her new mailing address to the landlord before she vacates the rental unit. In some situations it might even be possible for the landlord to obtain that information at the beginning of the lease term.<sup>245</sup> In an attempt to assure that the tenant gives her new mailing address information to the landlord, the Act places the burden on the tenant. It provides that "[t]he renter shall within thirty (30) days of termination of the rental agreement, notify the owner or designated agent of the location where the payment and notice may be made or mailed."<sup>246</sup> However, the Act does not specify the consequences of any failure on the part of the tenant to notify the landlord of the new mailing address. Does it mean that the deposit, or any balance thereof, is forfeited?<sup>247</sup> Where should the landlord keep the deposit until the tenant notifies him of a mailing address? Does the unclaimed property act apply and require the landlord to pay it to the state depository?<sup>248</sup>

Unlike security deposit legislation in some states, the tenant is not entitled to interest on the deposit.<sup>249</sup> At the end of the lease, the landlord need only return the deposit, or any balance due thereof, without interest.<sup>250</sup> The Act appears to treat the relationship between the landlord and tenant as one of debtor and creditor and not as one involving a trust or other fiduciary relationship. The consequences of that relationship could reach far beyond the tenant not being entitled to interest on the deposit. For example, since

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243. Both as a precaution under the Act and to establish better landlord tenant relations.

244. As will be discussed below, the landlord will also need to know the tenant's new mailing address for purposes of dealing with any personal property left in the unit by the tenant. *See infra* note 278 and accompanying text.

245. For example, in academic year leases to students at a university or community college, the mailing address at the end of the academic year might be the home address of the tenant's parents. However, there is no universality to this observation since many students do not return to live with their parents during the summer. Furthermore, the home address of the tenant's parents may change after the beginning of the lease term but prior to its ending.

246. WYO. STAT. ANN. § 1-21-1208(a) (LEXIS 1999).

247. That does not seem to be the intent. The landlord must return the deposit to the tenant within the thirty days after termination of the lease, or within fifteen days after the tenant supplies the mailing address, whichever is later. WYO. STAT. ANN. § 1-21-1208(a) (LEXIS 1999). Since the landlord must return the deposit within fifteen days after the tenant supplies the mailing address, even if it is more than thirty days after the termination of the lease, the landlord must not be able to declare a forfeiture.

248. WYO. STAT. ANN. §§ 34-24-101 through 140 (LEXIS 1999).

249. *See, e.g.*, N.Y. Rent & Eviction Regs. § 2105.5 (McKinney 1999).

250. WYO. STAT. ANN. § 1-21-1208(a) (LEXIS 1999).

there is no fiduciary relationship, the landlord may keep any interest on the deposit even if he places it in an interest bearing account in a bank or savings institution. Further, the landlord may commingle the deposit with his other assets or accounts. As a consequence, if the landlord should become bankrupt before the end of the lease term, the tenant may only be entitled to a creditor's share of assets in bankruptcy and would not have a claim against a separate fund held by a trustee.<sup>251</sup>

The Act provides that the balance of the deposit and a written itemization of any deductions therefrom must be delivered or mailed to the tenant within thirty days after the termination of the lease, or within fifteen days after the landlord receives the tenant's mailing address, whichever is later.<sup>252</sup> However, should there be damage to the residential unit the landlord might need more time to perform the repair and to determine the amount of damage to charge the tenant. As a result, the Act provides that when damages occur to the unit the landlord has an additional thirty days, i.e. a total of sixty days, after the termination of the lease to refund, and itemize the deductions from the deposit.<sup>253</sup>

If any portion of the deposit is held as a security deposit for the payment of utility charges, the landlord must refund the deposit within ten days after he receives "a satisfactory showing" that all utility charges incurred by the tenant have been paid. Probably the usual way for a tenant to make such a showing would be to provide the landlord with a final bill from the utility company showing that all utility charges are paid. If the utility company will not send the bill, or a copy, directly to the landlord, the tenant will have to submit her copy to the landlord.

If the utility charges have not been paid within forty-five days after the termination of the lease, the owner "shall"<sup>254</sup> apply the deposit to pay the utility charges within the next fifteen days. If any refund is due to the tenant after the payment of the utility charges, the landlord must refund that amount to the tenant within seven days after the deposit is applied to pay the charges.<sup>255</sup>

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251. See generally COLLIER ON BANKRUPTCY ¶ 541.11 (Lawrence P. King, Ed. 15<sup>th</sup> ed. 1999). "[W]here the recipient of the funds can by agreement use them as the recipient's own and commingle them with the recipient's monies, a debtor-creditor relationship exists, not a trust." *Id.* at 541-59.

252. WYO. STAT. ANN. § 1-21-1208(a) (LEXIS 1999).

253. *Id.* This provision does not specifically provide that the landlord has until fifteen days after the tenant supplies the mailing address, if that is later. However, it would seem to apply since the landlord might not have the tenant's mailing address within the sixty day period.

254. WYO. STAT. ANN. § 1-21-1208(b) (LEXIS 1999). The Act provides, in mandatory terms, that the landlord shall apply the utility deposit to the payment of the utility charges.

255. *Id.* The Act states that the landlord has until fifteen days after the receipt of the tenant's new mailing address if that is later.



The combination of the various periods of time to refund and account for the deposits can be very confusing and cumbersome to both parties, especially to the landlord. He must refund the deposit within thirty days, unless there are damages to the unit or unless some of the deposit is for utility charges; he must refund and account for utility charge deductions within seven days after the expiration of sixty days;<sup>256</sup> and he must refund and account for damage deductions within sixty days. These periods may also be extended because the landlord has not received the tenant's new mailing address. Certainly, each of the periods has an individual justification, but in combination, they result in a very complex matrix, which may help to create unnecessary disputes between the now ex-tenant and ex-landlord.

The Act provides a remedy to the tenant if the landlord "unreasonably fails to comply" with the provisions regarding refund of the deposit.<sup>257</sup> Since the Act provides relief only if the landlord's failure is unreasonable, the circumstances causing the delay must be given some consideration should the landlord fail to meet the specific timelines established in the prior two subsections of the Act. An example of a "reasonable failure" might include a circumstance in which a landlord was late in providing the accounting and/or refund, by a short period, and that lateness was itself caused by an extended time<sup>258</sup> needed to repair damage to the unit caused by the tenant. Nevertheless, if the landlord is unreasonable in his failure to comply, the tenant may recover the full deposit and court costs.

The real teeth of this provision is the loss of the deposit by the landlord, despite the fact that there may be unpaid rent or utility charges or uncompensated damage to the premises. Although the subsection is silent about whether the landlord could turn around and bring a separate action to recover those amounts, if he were able to do so, the "incentive" provided by this subsection might be particularly toothless. If the tenant should bring an action under this provision and the landlord could counterclaim and recover for damages, resulting in an offset against the refund, where is the "incentive?"

The subsection does not allow the tenant to recover attorneys' fees.<sup>259</sup> The tenant's recovery is limited to "the full deposit and court costs."<sup>260</sup> If the tenant should bring an action to recover the deposit and the landlord

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256. This sixty day period is the sum of the forty-five days the landlord must wait for the tenant to provide a showing that she has paid the utility charges and the fifteen days within which he must apply the deposit to pay the charges.

257. WYO. STAT. ANN. § 1-21-1208(c) (LEXIS 1999).

258. Beyond the extra thirty days provided in the Act. WYO. STAT. ANN. § 1-21-1208(a) (LEXIS 1999).

259. However, since the amount of recovery would normally fit within the jurisdictional amount of a small claims action, one might expect some tenants to seek recovery without an attorney. WYO. STAT. ANN. §§ 1-21-201 to 205 (LEXIS 1999).

260. WYO. STAT. ANN. § 1-21-1208(c) (LEXIS 1999).

should prevail, the landlord may recover “court costs in addition to any other relief available”<sup>261</sup> if the tenant “acted unreasonably in bringing the action.”<sup>262</sup>

The Act also provides that the “holder of the interest of the owner or designated agent in the residential unit at the time of the termination of the rental agreement shall be bound by the provisions of Wyo. Stat. Sections 1-21-1207 and 1-21-1208.”<sup>263</sup> The result of this provision is that the person who is the owner or the managing agent at the time of the termination of the lease is bound by the deposit and refund provisions of the Act, even if he was not the owner or managing agent who collected the deposit at the time of the execution of the lease. Thus, the owner or managing agent at the time of the termination of the lease may not defend against the tenant’s demand for a refund of the deposit by asserting that she should obtain a refund from the former owner or managing agent.

Despite the fact that the new owner or managing agent may be liable for the refund of the deposit, the provision does not absolve the former landlord or managing agent from liability. Thus, each has an interest in assuring that the deposit monies are available for refund to the tenant when the lease terminates. A wise seller and purchaser of rented property may arrange for an escrow of the deposits at the time of the sale. The escrow might provide that each tenant’s deposit will be released from the escrow account only after the termination of the tenant’s lease,<sup>264</sup> either to the tenant in satisfaction of the landlord’s refund obligations or to the new landlord in payment for unpaid rent, utility charges, or for damage to the residential unit.

*Personal property left in the unit.* A perennial issue for landlords is the personal property left in the premises after the tenant vacates the residential unit. It is really a two part issue—whether the landlord can dispose of the property without potential for liability to the tenant or anyone else for conversion, and whether the landlord can apply the property to the payment of rent, damages or other obligations that the tenant owes to the landlord. The Act provides the landlord with a process for resolving the issue of conversion. To a limited degree, it also provides some answer to the issue of applying the personal property to the payment of outstanding obligations of the tenant.<sup>265</sup>

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261. *Id.*

262. *Id.*

263. WYO. STAT. ANN. § 1-21-1209 (LEXIS 1999).

264. Particular attention and clarity may be needed to deal with the termination of periodic tenancies or lease renewals.

265. The Act does not deal with the issue of landlord’s liens. This issue was recently presented in *Sheridan Commercial Park, Inc. v. Briggs*, 848 P.2d 811 (Wyo. 1993). The tenant left various tools and equipment in the leased premises when he vacated the real estate. The tools were leased either to the tenant or subject to an Article 9 security interest. The real estate landlord asserted that it had a landlord’s

The Act provides that after the owner regains possession of the leased premises, he "may immediately dispose of any trash or property the owner reasonably believes to be hazardous, perishable or valueless and abandoned."<sup>266</sup> This subsection allows the landlord to dispose of personal property fitting the specified categories without fear of a claim by the tenant or another person that the landlord has committed a conversion in so doing.

The legislature apparently thought that the question of whether the personal property is hazardous or perishable is a factual one and that it should be determined by the landlord based on the nature of the personal property. It did not make any further attempt at defining hazardous or perishable goods. However, it did attempt to give the landlord some assistance in resolving the question of whether personal property is valueless and abandoned. It did so by setting up a process of notice and demand.

First, the Act establishes a presumption that all property left in the unit is valueless and abandoned: "Any property remaining within the rental unit after termination of the rental agreement shall be presumed to be both valueless and abandoned."<sup>267</sup> However, the Act then contains a confusing statement: "Any valuable property may be removed from the residential rental unit" and must be disposed of in a specified manner.<sup>268</sup> The statement is confusing because if "any property remaining in the rental unit"<sup>269</sup> is presumed to be valueless, what property is left to be valuable? Perhaps all that the first sentence was meant to accomplish was to establish a prima facie presumption that property left on the premises is valueless. The landlord may then dispose of such property if he is confident that it is actually valueless and abandoned. If he is not certain that it is valueless (or abandoned), he can convert the prima facie presumption into a conclusive presumption if he follows the notice and demand procedure.<sup>270</sup>

The notice and demand procedure then continues as follows: The owner must give written notice to the tenant. That notice must describe the property claimed to be abandoned and state that it will be disposed of if the tenant does not, within seven days after service of the notice, either take possession of the property or notify the landlord of her intent to take posses-

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lien on the tools left to secure the unpaid rent. It based its claim on a statute allowing a lien for work or services performed on goods or chattels. WYO. STAT. ANN. § 29-7-101(a) (Mitchie 1993). The Wyoming Supreme Court held that the statute made no reference to a lien for rent and, therefore, did not create a landlord's lien to secure the rent owed to the landlord. 848 P.2d at 816-17. The personal property lessee and lender with a perfected security interest prevailed. See also *Slane v. Polar Oil Co.*, 41 P.2d 490 (Wyo. 1935), dealing with the ancient doctrine of distraint.

266. WYO. STAT. ANN. § 1-21-1210(a) (LEXIS 1999).

267. *Id.*

268. *Id.*

269. *Id.*

270. It should be noted that this process applies to "any property remaining in the rental unit." Thus, it purports to apply to property whether it belongs to the tenant or it belongs to a third party guest or invitee.

sion.<sup>271</sup> The notice may be served on the tenant in one of three ways: (i) by certified mail, in which case it is deemed served on the date it is mailed;<sup>272</sup> (ii) by personal service in accordance with Rule 4 of the Wyoming Rules of Civil Procedure, in which case it is deemed served on the date of the service;<sup>273</sup> or (iii) by publication in a newspaper published in the county where the rental unit is located or widely circulated in that county, in which case it is deemed served on the date of publication.<sup>274</sup> If the landlord does not receive a written response from the tenant within seven days after service, “the property shall be conclusively deemed abandoned and the owner may retain or dispose of the property.”<sup>275</sup> If the tenant responds in writing within the seven day period after service indicating that she intends to take possession of the personal property, the landlord must hold the property for an additional seven days after he receives the response.<sup>276</sup> However, if the tenant fails to take possession of the personal property within “the additional fifteen (15) day period, the property shall be conclusively deemed abandoned and the owner may retain or dispose of the property.”<sup>277</sup>

Unless the notice and demand is to be given by publication, it is important that the landlord obtain the tenant’s new mailing address before the tenant leaves the premises. As noted earlier,<sup>278</sup> obtaining the new mailing address is also important for purposes of refunding the deposit. In some circumstances, the landlord might be able to obtain that address from the tenant at the time she enters the lease, but in the usual circumstance that will not be possible. The landlord will have to be diligent in this detail. If he fails, or is unable to obtain it subsequently, he will have to use the publication process.

The periods of time provided in the notice and demand process appear minimal and, in many situations, will not provide enough time for even a diligent tenant to reclaim her property. This might be particularly true if the tenant leaves the state. It is not uncommon for mail to take four or five days to reach some parts of the country from Wyoming. In that case, a diligent response by the tenant is unlikely to arrive by return mail within the seven-

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271. WYO. STAT. ANN. § 1-21-1210(a)(i) (LEXIS 1999).

272. WYO. STAT. ANN. § 1-21-12010(a)(i)(A) (LEXIS 1999).

273. WYO. STAT. ANN. § 1-21-12010(a)(i)(B) (LEXIS 1999).

274. WYO. STAT. ANN. § 1-21-12010(a)(i)(C) (LEXIS 1999).

275. WYO. STAT. ANN. § 1-21-12010(a)(ii) (LEXIS 1999). Perhaps the statement should have provided that it will be conclusively deemed to be “valueless and abandoned” since the earlier stated requirement is that the landlord can dispose of the property if it is “valueless and abandoned.” In the alternative, perhaps the earlier statement should have omitted any reference to “valueless” property.

276. WYO. STAT. ANN. § 1-21-1210(a)(iii) (LEXIS 1999).

277. *Id.* The section is confusing regarding the meaning of “the additional fifteen day period.” No fifteen day period is mentioned in the section. It appears to be a drafting error. The original Senate File No. SF 0046 (1997) provided the tenant with fifteen days to reclaim the property, which was then shortened to seven days in House Bill No. HB 0044 (1999), but this reference to fifteen days was erroneously not concorded. This conflict raises significant confusion and requires corrective legislation.

278. See *supra* notes 244-48 and accompanying text.

day period commencing with the date of initial mailing.<sup>279</sup> It would also be very difficult for a person who moves a considerable distance from the state to return within the seven (or fifteen day) period to reclaim the property.<sup>280</sup>

The Act imposes no obligation on the landlord to use the method of service most likely to apprise the tenant of the fact that the landlord is holding personal property belonging to the tenant. In fact, the landlord may choose to serve by publication without any previous attempt at personal service. Furthermore, the notice need only be published once in a local county newspaper. Such a minimal notice is not designed to reach a tenant who has moved out of the State or even out of the county. If the landlord has the tenant's mailing address, or even good reason to know where the tenant is located, the use of notice by publication is evidence of the landlord's bad faith. In fact, such minimal notice raises serious question of the constitutionality of this particular provision in the Act.<sup>281</sup>

Since the Act applies to all personal property left on the premises, the item of personal property may actually belong to a third party. Sometimes, the personal property may itself provide an indication that it belongs to a third party and not the tenant. For example, it may be a wallet or purse with the name and address of the owner contained inside. Notifying the tenant about property that does not belong to the tenant is not the best way to return it to the true owner. The landlord's good faith should require that he notify the true owner, if possible. Thereafter, the true owner should respond and reclaim the property in the same way and in the same time constraints that apply to the tenant under the Act.<sup>282</sup>

Since the Act provides that if the tenant does not reclaim the property promptly "the property shall be conclusively deemed abandoned and the owner may retain or dispose of the property"<sup>283</sup> the tenant's title to the personal property is terminated. As a result, the landlord may dispose of the property without fear that the tenant may claim that he converted it. Although not specifically stated in the Act, the landlord should also be able to apply the abandoned personal property to the payment of any accrued rent or unpaid damages. If it is abandoned and the landlord may retain it, he should be able to apply it to these obligations.

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279. Original Senate File No. SF0046 (1997) would have allowed fifteen days, which is a much more reasonable period for any tenant who leaves the State after the lease terminates.

280. Since the tenant is required to pay storage costs (WYO. STAT. ANN. § 1-21-1210(b) (LEXIS 1999), if the tenant indicates that she will return within a reasonable time, the landlord should be expected to act in good faith and hold the property for the tenant, despite the times stated in the Act.

281. See *Fuentes v. Shevin*, 407 U.S. 67 (1972).

282. However, as noted, the Act does not provide for notice to the guest or invitee. Similar constitutional issues are relevant here. *Id.*

283. WYO. STAT. ANN. § 1-21-1210(a)(ii) (LEXIS 1999)

The Act provides that the landlord is entitled to reasonable storage costs if he stores the property personally and actual storage costs if he stores it commercially.<sup>284</sup> The Act then provides that “[p]ayment of the storage costs shall be made before the renter removes the property.”<sup>285</sup> This statement, without ever using the word “lien,” gives the landlord a right in the nature of a lien on the personal property. However, that lien is not for payment of any accrued rent or costs of damage repair, but only for payment of storage costs. Since there is no provision giving this “lien” priority over any other lien, another previously perfected lien, such as an Article 9 security interest, will prevail.

### G. Landlord’s Tort Liabilities

As discussed at the beginning of this article,<sup>286</sup> under the common law the primary effect of a lease transaction was to convey a leasehold estate in the premises from the landlord to the tenant. As a result, the owner had no duty to protect the tenant or third parties from injury to person or property. Those duties were on the shoulders of the tenant. In general, those principles continue in the laws of many states, including Wyoming, albeit subject to some exceptions.<sup>287</sup> The exceptions are stated as follows in *Ortega v. Flaim*.<sup>288</sup>

Over time, the courts created exceptions to the rule of landlord nonliability, some of which have been recognized in Wyoming:

1. Undisclosed conditions known to lessor and unknown to the lessee, which were hidden or latently dangerous and caused an injury. . . .
2. The premises were leased for public use and a member of the public was injured.
3. Part of the premises was retained under the lessor’s control, but was open to the use of the lessee. . . .
4. Lessor had contracted to repair the premises. . . .
5. Negligence by the lessor in making repairs. . . .<sup>289</sup>

Despite the variety of exceptions from the common law rule of nonliability, situations have arisen which did not fit within the list. One such circumstance arose in the *Ortega* case, in which a third party invitee of the tenant slipped and fell down stairs in the leased premises. The tenant had

284. WYO. STAT. ANN. § 1-21-1210(b) (LEXIS 1999).

285. *Id.* The Act also provides that “[t]he owner is not responsible for any loss to the renter from storage.” WYO. STAT. ANN. § 1-21-1210(c) (LEXIS 1999).

286. *See supra* notes 22 & 36-28 and accompanying text.

287. *See, e.g.*, Taylor v. Schukei Family Trust, 996 P.2d 13 (Wyo. 2000); Roberts v. Klinkosh, 986 P.2d 153, 154 (Wyo. 1999); Krier v. Safeway Stores 46, Inc., 943 P.2d 405, 406 (Wyo. 1997).

288. 902 P.2d 199 (Wyo. 1995).

289. *Id.* at 202.

previously complained to the landlord about the steepness of the stairs, the narrowness of the treads and the lack of a handrail. Nevertheless, since the situation did not fit within the listed exceptions, the district court granted the landlord's motion for summary judgment. The invitee appealed to the Supreme Court arguing that the court should abandon the common law rule of landlord nonliability. Instead, the invitee argued, the court should apply the general rules of tort liability and impose a duty of reasonable care on the landlord. In the alternative, the invitee argued that the court should adopt an implied warranty of habitability for leased premises. If the court were to do so, the duty of the landlord to provide a safe and habitable premise would extend to both the tenant and her invitee.

The court declined to abandon the common law rule or to adopt an implied warranty of habitability.<sup>290</sup> The court stated: "In our opinion this is a matter for the legislature, and we decline to abrogate the common law in this instance without a proper record and insightful analysis of whether conditions in Wyoming warrant a change regarding residential leases."<sup>291</sup>

The Wyoming legislature has now considered whether the conditions in Wyoming warrant the adoption of an implied warranty of habitability and has adopted the Residential Rental Property Act creating such an implied warranty. It would appear that the logical conclusion to be drawn from the legislative adoption of an implied warranty of habitability is that third parties, in proper circumstances, may recover from the landlord for that breach to the same extent as a tenant.<sup>292</sup>

Nevertheless, many pitfalls still remain in the way of recovery. Since the tenant may waive the implied warranty, the invitee will have to determine whether there has been an effective waiver of the warranty.<sup>293</sup> Even if the tenant has not waived the warranty, the invitee will have to determine

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290. The Wyoming Supreme Court had previously adopted an implied warranty of habitability in the sale of new homes by a builder/developer. *Moxley v. Laramie Builders, Inc.*, 600 P.2d 733, 735-36 (Wyo. 1979); *Tavares v. Horstman*, 542 P.2d 1275, 1282 (Wyo. 1975).

291. *Ortega v. Flaim*, 902 P.2d 199, 204 (Wyo. 1995). This statement was actually made regarding the abandonment of the common law rule of nonliability and the adoption of a standard of reasonable care. However, the court then stated, with regard to the implied warranty of habitability: "For the same reasons discussed above, the rule of an implied warranty of habitability will not be extended to rental premises under these facts." *Id.*

292. The court did not expressly address the question of whether landlords would have liability to third parties if it were to adopt an implied warranty of habitability. However, in resolving the issue as it did by refusing to adopt an implied warranty of habitability and not denying the possibility that an implied warranty of habitability, if adopted, would extend to third parties, it left the impression (as silent dicta) that were it to adopt an implied warranty of habitability, the warranty would be available to invitees as well as the tenant. Furthermore, the court has regularly extended landlord tort liability to third parties if one of the exceptions to the common law rule of landlord nonliability should exist. *See, e.g.*, *Taylor v. Schukei Family Trust*, 996 P.2d 13 (Wyo. 2000). If third parties may recover under that principle, there does not seem to be any reason why they should not be able to recover under an implied warranty of habitability also.

293. *See supra* notes 103-18 and accompanying text.

whether the tenant gave the landlord notice of the defect.<sup>294</sup> Some injuries may involve circumstances where the defect is a breach of the implied warranty but its danger may have been exacerbated by the tenant's acts or failure to act. In that circumstance, the invitee may have to determine whether it was the landlord's breach or the tenant's acts that caused the injury. If both the landlord and the tenant have responsibility, the invitee will have to deal with the issues of comparative fault and several liability.<sup>295</sup>

### III. CONCLUSION

If one were to use a report card to measure how well legislation responds to a societal need, the Residential Rental Property Act would not score very well. It would receive a very low grade for effectively accomplishing the objective it set out to remedy. What it gives with one hand it often takes away with the other. However, the authors of the Act deserve a high grade for recognizing the need to correct an imbalance in the law and beginning the process of correcting it. A Confucian proverb states, "A journey of a thousand miles begins with a single step." This Act most certainly takes that step; what now remains is to complete the journey. Both the legislature and the judiciary have an opportunity to play a significant role in that venture.

In the process of reviewing the Act, I commented on numerous issues—perhaps so many that one's attention is shifted from the main problems with the Act to less important ones. To give focus on what needs to be done to improve the implied warranty of habitability, I would like to return to what I believe are the three primary issues in the Act as it currently exists. These issues deal with assuring tenants that the protection of the implied warranty cannot be denied to them by the simple act of the landlord's disclaimer, and that the remedies provided to them will be prompt and adequate for the purpose of enforcing the warranty.

For societal, economical and technological reasons, today's residential real estate market is not what it was when landlord tenant law had its origins in the common law. Nor is that market the same as it was only a hundred years ago. Today, our economy can support a safe and sanitary home for all of its citizens.<sup>296</sup> Our definition of a habitable residence today is one that has heat, electricity, plumbing, and hot and cold running water. The Residential

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294. See *supra* notes 125-41 and accompanying text. While all that should be necessary is that the landlord have had notice of the defect, there may be an issue about whether the tenant has to go further and give a "notice to repair or correct condition."

295. WYO. STAT. ANN. § 1-1-109 (LEXIS 1999).

296. Unfortunately, this statement is not completely true. There are some people in our society today who cannot afford safe and sanitary housing and even some who have no housing whatsoever. However, this article is not about the plight of the homeless or even about creating affordable housing. Rather, it is about people who can afford housing and assuring them they will receive what they paid for—safe and sanitary housing that is fit for human habitation.



Rental Property Act created an implied warranty stating precisely that. However, it also creates the distinct possibility that those reasonable amenities can be taken away. It allows the landlord to disclaim responsibility for them. Given the oligopolistic nature of the residential rental market, there is usually an imbalance in bargaining postures between a prospective tenant and her landlord, especially in locales where there is a shortage of housing. If the landlord is allowed to force the tenant to waive her implied warranty in order to obtain housing, the implied warranty created by the Act is a myth.

The Act currently has two provisions allowing the landlord to disclaim the implied warranty, one potentially more problematic than the other. The first one allows the landlord to disclaim his responsibilities to provide heat, electricity, plumbing, and hot and cold running water if it is "otherwise agreed upon in writing by both parties."<sup>297</sup> The second provides that "[a]ny duty or obligation in this article may be assigned to a different party or modified by explicit written agreement signed by the parties."<sup>298</sup> The extent to which these provisions allow the landlord to avoid his duties under the implied warranty depends on how the courts interpret the disclaimer provisions. If they allow the landlord to insert general disclaimers without any barter in that regard, the Act will lose viability and there will be no assurance that housing will be habitable. However, if the courts insist that, in order to waive the warranty, the tenant's attention must be drawn to a specific defect, that she will have the opportunity to evaluate that defect, and that there is consideration for the tenant's waiver, the Act will have teeth. Indeed, that seems to be the intent of the second disclaimer provision—the wording of the disclaimer must be "explicit." The legislature can also help to repair this potential hole in the effectiveness of the Act by amending it to clarify the meaning of "explicit" and by removing the first waiver provision, which is really unnecessary given the existence of the second one.

The remedies for breach of the implied warranty raise two issues. The first concerns the promptness of the remedy. As currently written the tenant must go through a three step process in order to obtain relief. The first two steps are duplicative and unnecessarily burdensome. First, the tenant must notify the landlord by certified mail or personal service that there is a defect and request that it be corrected. Then if the landlord has not responded within a reasonable time, she must again notify the landlord by certified mail or personal service stating that she previously notified him, repeating the contents of that prior notice, again demanding that the defect be corrected, and if the defect is not corrected within three days stating that she will commence enforcing her rights through the legal process.

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297. WYO. STAT. ANN. § 1-21-1202(a) (LEXIS 1999).

298. WYO. STAT. ANN. § 1-21-1202(d) (LEXIS 1999).

The second notice is without any meaningful purpose unless it is to delay relief. The landlord certainly is entitled to notice of the defect—otherwise he may not be able to repair it. However, the first notice accomplishes that purpose. There is no reason why it is necessary to tell that landlord the same thing again. Nor is it necessary to tell him that if he does not correct the defect the tenant will begin legal process—he should know that legal rights are meant to be enforced. By the time the tenant is able to obtain relief she may have to suffer for over three weeks without heat, hot or cold running water or other amenities. Then there is still no assurance that the defect will be corrected. The system, as drafted, encourages landlords to be dilatory. The legislature should seriously consider redrafting the notice process. A written notice, not necessarily delivered by certified mail, informing the landlord about the defect and requesting that it be corrected, is all that is necessary. Thereafter, if the tenant waits a reasonable time under the circumstances for the landlord to correct the defect, she should be able to seek immediate relief.

The second remedy issue concerns the availability of an adequate remedy. As the Act is currently written, the only remedies specifically provided are damages, termination, and affirmative relief. If the tenant goes through the two step notice procedure, the primary remedy available to her is damages.<sup>299</sup> The landlord has no incentive from the structure of that remedy itself to perform the repair promptly—he has her rent money and the use of it. Even if he ultimately corrects the defect, the tenant may have suffered unnecessarily and might even leave the premises. The Act does allow the court to grant affirmative relief in the nature of specific performance, but by the time that relief is actually enforced an unnecessarily longer time will have transpired.

Courts in other states have considered the question of appropriate relief and have recognized the need to craft a remedy that will be quick and create an incentive for the landlord to perform the repair. The two most common remedies these courts provide are rent abatement and repair and offset. The first creates an incentive for the landlord to perform the repair since it allows the tenant to withhold rent or a portion of it until the defect is corrected. The second actually allows the tenant to use rent monies to perform the repair. Neither of these two are authorized by the Act. However, being judicially created remedies, there is no reason prohibiting the Wyoming courts from allowing such relief.

An alternative remedy reasonably available under current law is rent escrow. Under this remedy, the tenant deposits the rent with the court and commences legal process to have the parties' rights to the rent determined.

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299. A court may also terminate the lease or grant affirmative relief.

The advantage this remedy provides the tenant over the remedy of damages is that, just like rent abatement, it denies the landlord access to the rent unless and until the repairs are made. When combined with the authority under the Act to grant affirmative relief to the tenant, the court can demand that the landlord correct the repair before receiving the rent, or a portion of it. While the courts should be able to grant this relief based on current law, it would be helpful if the legislature were to amend the Act specifically to allow it.

Clarification and/or correction of the three issues raised above will go a long way in assuring tenants in Wyoming that they genuinely have an implied warranty of habitability. However, the first major step has been taken—Wyoming now has an implied warranty of habitability in residential rental situations. As stated at the beginning of this article, law students have sometimes mockingly referred to landlord tenant law in Wyoming as “landlord law.” It seems fair to say that today Wyoming has “landlord tenant law.” However, now there is a need for the judiciary and the legislature to assure that the “tenant” portion of that statement has real meaning.