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Ohio Landlord-Tenant Reform Revisited


Edward G. Kramer

Marilyn Tobocman

Kenneth J. Kowalski

James Buchanan

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OHIO LANDLORD-TENANT REFORM REVISITED

EDWARD G. KRAMER*
MARILYN TOBOCMAN**
KENNETH J. KOWALSKI***
JAMES BUCHANAN****

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* J.D., Case Western Reserve University; Director, The Housing Advocates, Inc.; Partner, Kramer & Tobocman Co., L.P.A.

** J.D., Cleveland-Marshall College of Law, Cleveland State University; Assistant Director, The Housing Advocates, Inc.; Partner, Kramer & Tobocman Co., L.P.A.

*** J.D., The Ohio State University; General Counsel, The Housing Advocates, Inc.; Partner, Kramer & Tobocman Co., L.P.A.

**** J.D., University of Cincinnati; Staff Attorney, Southwest Ohio Legal Services.

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'Now! Now!' cried the Queen, 'Faster! Faster!' And they went so fast that at last they seemed to skim through the air, hardly touching the ground with their feet, till suddenly, just as Alice was getting quite exhausted, they stopped, and she found herself sitting on the ground, breathless and giddy.

The Queen propped her up against a tree, and said kindly, 'You must rest a little, now.'

Alice looked round her in great surprise. 'Why, I do believe we've been under this tree the whole time! Everything's just as it was!'

'Of course it is,' said the Queen. 'Now, here you see, it takes all the running you can do, to keep in the same place. If you want to get somewhere else, you must run at least twice as fast as that!'

—Lewis Carroll's *Alice in Wonderland*

I. INTRODUCTION

The "gentle readers"—as they were politely addressed in Victorian days—may be surprised by the analogy suggested between the reform of landlord-tenant law and the experience of Alice and the Queen. However, the events surrounding the enactment of Amended Substitute Senate Bill 103¹ were as perplexing as those in Lewis Carroll's story.

Those opposing real reform, principally the real estate industry,² were successful in weakening the proposed legislation. Consequently, the primary goal of the sponsors of landlord-tenant legislation in Ohio, i.e., the true equalization of the relationship between landlords and tenants, was not met by the legislation finally enacted. As this Article will demonstrate, the interpretation of the Act by the courts of Ohio has proven true the claims of some of the proponents of the reform legislation who likened the final enacted bill to the March Hare: a little bit late and somewhat confusing.

The purpose of this Article is to review this legislation and its interpretation by the Ohio courts over the past thirteen years. Like Alice, the gentle reader may conclude that despite all this running, "[e]verything's just as it was." For this reason, the authors will propose legisla-

¹ Amend. Sub. S. B. 103 was passed on July 23, 1974, and became effective on November 4, 1974. The new law, The Landlord and Tenant Reform Act of 1974 [hereinafter the Act], consists of a revision of the existing chapter of the Ohio Revised Code treating forcible entry and detainer, OHIO REV. CODE ANN. ch. 1923 (Anderson Supp. 1986), and an entirely new chapter of the Code treating landlord and tenant relations, OHIO REV. CODE ANN. ch. 5321 (Anderson Supp. 1986).

² Snook, *Real Estate Interests Fight Tough Tenant Bill for Ohio*, The Plain Dealer (Cleveland), Jan. 21, 1974, at A1, col. 4; See also Baillis, *Ohio Landlord-Tenant Act of 1974*, 3 OHIO N.U.L. REV. 122, 127 n.18 (1975)[hereinafter Baillis].

tive amendments to the Act necessary to bring into more equitable balance the landlord-tenant relationship in Ohio.

II. CHANGES IN LANDLORD-TENANT RELATIONSHIP BY THE ACT

The impetus behind the 1974 Act was a realization that the traditional principles of property law that had governed the landlord-tenant relationship, such as "caveat lessee"³ were anachronistic and unworkable in a non-agrarian Ohio.⁴ This "transformation" of landlord-tenant law was in large part a by-product of the civil rights movement in America during the Sixties.⁵ The fundamental change wrought by the Act was the abandonment of some of the outmoded legal constructs of property law that had led to substantial inequities. In exchange, new rules assigned responsibilities to the parties on the realistic basis that only the landlord could rationally be held responsible for maintenance of the property.⁶

Prior to the passage of the Act, tenants had few rights with respect to the property they were renting and fewer remedies.⁷ For instance, under common law, a tenant could be held responsible for maintenance of the premises. However, in an attempt to equalize the relationship, specific obligations for landlords and tenants were created in the Act. Landlords are required to make all reasonable and necessary repairs to maintain the premises in a fit and habitable condition,⁸ while the tenant must keep that part of the premises he occupies and uses in safe and sanitary condition.⁹ These co-extensive and dependent obligations were designed to improve the quality of housing stock in Ohio.¹⁰

Also, under common law, the landlord was free to utilize the ultimate weapon, eviction, against a tenant who complained about the conditions of the property. Neither the Ohio nor federal judiciary would interpose

³ Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 521 (1984) [hereinafter Rabin]. Just as the legal maxim "caveat emptor" meaning "let the buyer beware" operated to deny consumers any redress, until recently many court decisions refused to place any responsibility for repairs and maintenance on landlords based on the premise that because the tenant had the opportunity to inspect the apartment prior to leasing, the tenant took the property "as is". *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1074 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970).

⁴ *Shroades v. Rental Homes, Inc.*, 68 Ohio St. 2d 20, 24-25, 427 N.E.2d 774, 777 (1981); Baillis, *supra* note 2, at 122-33.

⁵ Rabin, *supra* note 3, at 546-49.

⁶ *Campion, The Ohio Landlord and Tenant Reform Act of 1974*, 25 CASE W. RES. 876, 876-77 (1975) [hereinafter *Landlord-Tenant*]. For an excellent discussion of the division of responsibilities, see *id.* at 878-82.

⁷ See, e.g., Note, *Covenant of Habitability and the Ohio Landlord-Tenant Legislation*, 23 CLEV. SR. L. REV. 539, 539-40 (1974) [hereinafter *Covenant of Habitability*].

⁸ OHIO REV. CODE ANN. § 5321.04(A)(1) (Anderson 1981).

⁹ OHIO REV. CODE ANN. § 5321.05(A)(1) (Anderson 1981).

¹⁰ *Landlord-Tenant*, *supra* note 6, at 878-82.

any ameliorating relief even if the eviction was based on unconstitutional motives.¹¹ The Act prohibits retaliatory conduct such as threatening or filing forcible entry and detainer actions when the tenant complains of conditions to either the landlord or an appropriate government authority.¹²

Another ill remedied was the unequal bargaining power between the two parties.¹³ Previously, tenants had little leverage to ensure that their landlord provided quality housing or fair treatment. Too often they faced standardized lease forms and an attitude of take it or leave it. For this reason, the Ohio General Assembly enacted a provision which voids any lease terms which are inconsistent with the Act.¹⁴

These and the other provisions of the Act were to establish a new legal position for landowners and renters. Advocates for tenants' rights were hopeful that a new day for equality was dawning with the passage of the Act. Yet, they were aware that the interpretation of the Act by the courts would determine whether that dawn would come.

III. JUDICIAL INTERPRETATION OF THE LAW SINCE 1974

It is axiomatic that laws are not self-executing. Under our system of government the courts are vested with the power to interpret the intent and scope of statutory rights and duties.¹⁵

Ohio courts are mandated liberally to construe reform statutes in order to effectuate their objectives.¹⁶ The Act should therefore be given broad and liberal construction. Doubts about any provisions should be construed in favor of the persons whom the legislation was enacted to protect, namely tenants.¹⁷

The Ohio Supreme Court recognized these reform-minded underpinnings of the Act in its seminal decision of *Shroades v. Rental Homes, Inc.*¹⁸ Chief Justice Celebrezze, writing for the majority, observed that:

¹¹ *Fallis v. Dunbar*, 386 F. Supp. 1117, 1120 n.3 (N.D. Ohio 1974), *aff'd*, 532 F.2d 1061 (6th Cir. 1976).

¹² OHIO REV. CODE ANN. § 5321.02 (Anderson 1981).

¹³ *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1079 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

¹⁴ OHIO REV. CODE ANN. § 5321.06 (Anderson 1981).

¹⁵ OHIO CONST. art. IV, § 1.

¹⁶ *Rose v. King*, 49 Ohio St. 213, 30 N.E. 267 (1892). OHIO REV. CODE ANN. § 1.11 (Anderson 1980) leaves no question as to this rule: "[r]emedial laws and all proceedings under them shall be liberally construed in order to promote their object and assist the parties in obtaining justice." (emphasis added).

¹⁷ See *Cox v. Roth*, 348 U.S. 207 (1955); *Cosmopolitan Shipping Co. v. McAllister*, 337 U.S. 783, 790 (1948); *Markham v. Cabell*, 326 U.S. 404, 409 (1945).

¹⁸ 68 Ohio St. 2d 20, 427 N.E.2d 774 (1981).

In light of previous common law immunity of landlords, and in recognition of the changed rental conditions and the definite trend to provide tenants with greater rights, the General Assembly enacted R.C. Chapter 5321 in 1974. We agree with the majority in *Thrash, supra*, insofar as the Act was an attempt to balance the competing interests of landlords and tenants. . . .

Thus the new remedies given tenants in R.C. Chapter 5321 are intended to be preventive and supplemental to other remedial measures. . . .

We conclude that the General Assembly intended both to provide tenants with greater rights and to negate the previous tort immunities for landlords.¹⁹

The *Shroades* decision signified a major breakthrough in the interpretation of the Act. By viewing its provisions expansively, the court armed tenants with a remedy theretofore denied them. Unfortunately, the Ohio Supreme Court and the other courts of Ohio have not always interpreted the Act in such a fashion and have often limited the remedies seemingly provided by the Act. The subsequent sections of the Article will explore the extent to which Ohio courts have followed the intent of the drafters of the Act.²⁰

A. Coverage of the Law

The Act contains a definitions section²¹ in which important terms are defined and exclusions from coverage are outlined. Not every type of living arrangement is addressed in the Act. Moreover, the degree to which the common law was abrogated by the new statute was—and remains—a crucial question needing a final determination by the courts.

The extent to which the Act covers various types of residential

¹⁹ *Id.* at 24-25, 427 N.E.2d at 777 (citing *Thrash v. Hill*, 63 Ohio St. 2d 178, 407 N.E.2d 495 (1980)).

²⁰ In determining legislative intent, Ohio courts must follow specific statutory guidelines:

[Court consideration as a legislative intent.]

If a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters:

(A) The object sought to be attained;

(B) The circumstances under which the statute was enacted;

(C) The legislative history;

(D) The common law or former statutory provisions, including laws upon the same or similar subjects;

(E) The consequences of a particular construction;

(F) The administrative construction of the statute.

OHIO REV. CODE ANN. § 1.49 (Anderson 1981).

²¹ OHIO REV. CODE ANN. § 5321.01 (Anderson Supp. 1985).

premises was limited.²² Many of the exclusions are related to residences in which persons rent for a short period, usually one night at a time,²³ while persons in institutional living situations are also excluded.²⁴

However, the listing in section 5321.01 does not specifically cover or exclude several living situations, and the courts have been called upon to resolve disputes. For example, sublessors have been included in the Act's coverage, since they have been determined to have the same rights and duties as an original lessor.²⁵ On the other hand, it has been determined that the Act does not apply to cooperatives.²⁶

Other questions have not been susceptible to such precise answers. For instance, whether an occupant of a hotel, motel, YMCA or other similar facility is covered by the Act will depend on the particular circumstances of each case. Factors to be considered include whether the occupant is entitled to the use and occupancy of the unit to the exclusion of others²⁷ and whether the circumstances indicate transient occupancy.²⁸ In attempting to address the second factor, the courts have generally applied common law criteria.²⁹

²² OHIO REV. CODE ANN. § 5321.01 (Anderson Supp. 1985).

²³ OHIO REV. CODE ANN. § 5321.01(C)(3) (Anderson Supp. 1985) excludes tourist homes, hotels, motels and other similar facilities where circumstances indicate a transient occupancy.

²⁴ OHIO REV. CODE ANN. § 5321.01(C)(4), (5) (Anderson Supp. 1985). These subsections exclude boarding schools when room and board are included as part of the tuition cost, orphanages, and other similar institutions. See also OHIO REV. CODE ANN. § 5321.01(C)(1). This subsection excludes prisons, jails and places of incarceration as well as halfway houses or other residences occupied as part of a probation or parole program.

²⁵ *Colony by the Mall v. Duckro*, No. CA 6169 (Montgomery County, June 29, 1979).

²⁶ *Kohler v. Snow Village*, 16 Ohio App. 3d 350, 475 N.E.2d 1298 (1984). The *Kohler* court found that cooperative occupancy agreements are not rental agreements as defined in OHIO REV. CODE ANN. § 5321.01(D) (Anderson 1981). The key to the court's decision was that, as defined in the Act, a rental agreement requires "parties", i.e., landlord and tenant. In cooperatives the occupancy agreement creates a common sharehold ownership and makes the unit owner both a landlord and tenant. Further, a landlord-tenant arrangement requires the tenant to pay monthly rent while in a cooperative the only monthly payment is the unit holder's proportionate share of the cooperative's maintenance expenses and mortgage. Finally, this monthly payment was not for the use and occupancy of the unit as found in the definition of rental agreement. Yet, if the unit is rented by its owner to a third party unrelated to the condominium or cooperative association, the law may apply. The theory is that the original owner cannot at the same time be both a common part owner, i.e., a landlord, and a tenant. However, once he rents the unit to a third party, the tenancy resembles the traditional landlord-tenant relationship and thus may be covered by the Act. It should be noted that condominium ownership was specifically excluded from the residential landlord-tenant law. OHIO REV. CODE ANN. § 5321.01(C)(8) (Anderson Supp. 1985).

²⁷ OHIO REV. CODE ANN. § 5321.01(A) (Anderson Supp. 1985).

²⁸ OHIO REV. CODE ANN. § 5321.01(C) (Anderson Supp. 1985).

²⁹ In *Baker v. Doubletree, Inc.*, No. 81 CA 38 (Miami County, Feb. 19, 1982) the Court of Appeals for Miami County stated in *dicta* that a motel is merely a structure and persons living in a motel are not necessarily excluded from the coverage of the Act; rather than

Factors which support the finding of a tenancy covered by the Act include: monthly or weekly rental payments rather than daily payments; payment of a security deposit; furniture totally or partially supplied by the tenant; occupancy for a lengthy or specified period of time as opposed to very short, temporary or day-to-day indefinite occupancy; occupant responsibility for cleaning and housekeeping; utilities, such as phone service, paid by occupant rather than being included in the bill; numerous possessions of occupant in the unit;³⁰ and whether or not a sales tax is paid by the occupant.³¹

The Act's definition of the term "landlord" is extremely broad.³² The meaning of the term "landlord" may be different depending on the specific provision of the Act being litigated. For example, the Franklin County Court of Appeals discussed the meaning of this term in the context of a security deposit case.³³ The court found that, for the purpose of security deposit litigation, a landlord is the person who has and retains the tenant's funds.³⁴

examining the application of the law the court should look to the terms of the occupancy agreement and other surrounding circumstances such as the fact that this particular motel rented rooms on both short and long term leases.

³⁰ See, e.g., *Howard v. Shangri-La Inn*, No. 48219 (Cuyahoga County, Nov. 29, 1984)(despite the fact that a hotel resident signed a register and paid hotel taxes, other factors indicated the existence of a factual issue as to whether the plaintiff was a tenant under the Act).

³¹ Each county is empowered to levy a hotel tax on "transient guests." OHIO REV. CODE ANN. § 5739.024 (Anderson 1981). "Transient guests" are defined by the Code as "persons occupying a room for sleeping accommodations for less than thirty consecutive days." OHIO REV. CODE ANN. § 5339.01(B)(2) (Anderson 1981).

³² The Code defines "landlord" as the "owner, lessor or sublessor of residential premises, his agent, or any person authorized by him to manage the premises or to receive rent from a tenant under a rental agreement." OHIO REV. CODE ANN. § 5321.01(B) (Anderson Supp. 1985)

³³ *Ford v. Club S. Inv. Co.*, No. 86AP-559 (Franklin County, Dec. 16, 1986).

³⁴ *Id.* at 4-5. The Court held that:

Although broadly construed the definition of "landlord" set forth in R.C. 5321.01(B) would include anyone connected with the rental of a premises, including a clerk in an office who physically receives rent checks on behalf of his employer, we do not find that R.C. 5321.16 contemplates that every such person will be personally liable for return of the security deposit. Rather, although the word "landlord" may have meanings and applications, it is the apparent intent of R.C. 5321.16 that the landlord for the purposes of that section is the person who has and retains the security deposit.

The result in this case protected the tenant. However, the decision could lead to unfair results if applied generally. What happens to the situation when the property is sold and the former landlord keeps the security deposit of the tenant? The tenant may be faced with a situation where his deposit is not returned but the new landlord is insulated from any litigation over the violation of the Act. As a policy decision, the statute should be amended to place the obligation on the new landlord who is in a better position to secure the deposit

One question the Act seems to answer differently than did common law is the status of the person residing in a dwelling unit pursuant to an employment contract, such as a resident custodian of an apartment building who is provided an apartment in exchange for services. Such an employment contract is arguably a rental agreement under the Act since the contract would establish rules and conditions concerning the use and occupancy of residential premises.³⁵ If so, the employee/tenant would presumably be entitled to the protections of the Act.³⁶

Another question regarding the coverage of Chapter 5321 concerns the status of persons who rent manufactured homes (also commonly termed "mobile homes") in manufactured home parks. Chapter 3733 of the Ohio Revised Code governs the relationship between manufactured home parks and the park residents. That Chapter was originally enacted to provide coverage to manufactured homeowners who rented lots in parks and was modeled after Chapter 5321.³⁷

Persons who reside in a manufactured home park but do not own their homes, renting them either from the park or from other persons, are in a different situation than homeowners who only rent lots for their homes. Persons renting the homes themselves have been covered by Chapter 5321.³⁸ Due to recent amendments to Chapter 3733,³⁹ they may instead, or also, be covered by Chapter 3733.

during the negotiations for the sale of the premises. See *infra* text accompanying notes 386-87.

³⁵ OHIO REV. CODE ANN. § 5321.01(D) (Anderson Supp. 1985).

³⁶ For instance, if the employment contract/rental agreement is being terminated for conduct of the employee tenant which violates both the agreement and the statutory duties of a tenant as set forth in Revised Code section 5321.05, the employee/tenant may be entitled to notice of the violation and an opportunity to cure pursuant to Revised Code section 5321.11 OHIO REV. CODE ANN. §§ 5321.05, 5321.11 (Anderson 1981). Cf. Sandefur Mgmt. Co. v. Wilson, 21 Ohio App. 3d 160, 486 N.E.2d 1267 (1985); Parker v. Fisher, 17 Ohio App. 3d 103, 477 N.E.2d 654 (1984).

³⁷ Kramer, Buchanan & Sobol, *Reforming the Mobile Home Tenant-Landlord Relationship: The Ohio Experience*, 30 CLEV. ST. L. REV. 57, 61 (1981).

³⁸ Schwartz v. McAtee, 22 Ohio St. 3d 14, 19 n.2, 488 N.E.2d 479, 483 n.2 (1986).

³⁹ OHIO REV. CODE ANN. § 3733.01(J), (K), (L) (Anderson Supp. 1987). The new definitions state:

(J) "Tenant" means a person who is entitled under a rental agreement with a manufactured home park operator to occupy a manufactured home park lot and who does not own the manufactured home occupying the lot.

(K) "Owner" means a person who is entitled under a rental agreement with a manufactured home park operator to occupy a manufactured home park lot and who owns the manufactured home occupying the lot.

(L) "Resident" means a person entitled under a rental agreement to the use and occupancy of residential premises to the exclusion of others. It includes both tenants and owners.

Thus, a tenant who does not own the home and also rents the lot, is governed by the provisions of Chapter 3733 as far as his relationship with the park is concerned. However,

The greatest controversy over the coverage of the Act has been whether the common law is still viable in the face of the statute, or whether it was significantly modified and in some cases pre-empted. Several Ohio Supreme Court cases have addressed the issue, beginning with *Thrash v. Hill*,⁴⁰ in which the court determined that the statutory scheme was not the sole source of remedy for tenants for a violation of the landlord's duties. Thus, the court found no landlord tort liability because none was provided under the new law and none had existed at common law.⁴¹ The following year, however, in *Strayer v. Lindeman*⁴² and *Shroadess v. Rental Homes, Inc.*,⁴³ the court reversed *Thrash* and found a landlord and his agents liable for injuries suffered by a tenant. In the latter case a plurality found that section 5321.12 allows recovery under both the Act and the common law for a landlord's negligence resulting in an injury to his tenant.⁴⁴ Where the two schemes of law clash, however, it is clear that the statutory scheme has superseded the common law, and the rights of landlords and tenants are determined by Chapter 5321.⁴⁵

The coverage and definitions of the Act should be so construed by the courts as to effectuate the purpose of the law. As is demonstrated elsewhere in this Article, such construction has not always occurred. Therefore, in order to promote the purpose of the Act, the authors suggest enactment of provisions spelling out legislative findings⁴⁶ as to the purpose and policies of the Act. The authors further suggest codifying the decisions recognizing the continued viability of common law remedies.⁴⁷

B. Landlord Obligations

Perhaps the most important of all the provisions in the Act is section 5321.04, which prescribes certain obligations for landlords. This provision marked a major change from the common law which, except for one notable exception,⁴⁸ imposed virtually no obligations on landlords regarding the leased premises beyond allowing the tenant to occupy it undis-

it would seem that the tenant's relationship with the owner of the home he is renting, whether it be the park or an individual, would still be governed by Chapter 5321 since that person would also qualify as a tenant under OHIO REV. CODE ANN. § 5321.01(A) (Anderson 1981).

⁴⁰ 63 Ohio St. 2d 178, 407 N.E.2d 495 (1980).

⁴¹ See Note, *Torts and Landlord-Tenant Act—Thrash v. Hill*, 50 U. CIN. L. REV. 134 (1981).

⁴² 68 Ohio St. 2d 32, 427 N.E.2d 781 (1981).

⁴³ 68 Ohio St. 2d 20, 427 N.E.2d 774 (1981).

⁴⁴ *Id.* at 25, 427 N.E.2d at 777.

⁴⁵ *Krutsch v. Republic Steel Corp.*, No. 42062 (Cuyahoga County, Oct. 1, 1981).

⁴⁶ MODEL RESIDENTIAL LANDLORD-TENANT CODE § 1-102 (1969) suggests such a finding. See *infra* text setting forth Proposed Amendments to the current statute.

⁴⁷ See, e.g., UNIF. RESIDENTIAL LANDLORD-TENANT ACT § 1-103, 7B U.L.A. 435 (1987).

⁴⁸ *Glyco v. Schultz*, 35 Ohio Misc. 25, 289 N.E.2d 919 (1972).

turbed by the landlord.⁴⁹ No duty to repair was imposed upon the landlord⁵⁰ and no warrant of habitability was implied.⁵¹ In enacting a Landlord-Tenant law which specified a list of obligations for landlords the legislature clearly signaled that this provision should be construed to broaden not only the obligations of landlords but also the rights of tenants.⁵²

The obligations of a landlord under section 5321.04 are described in both general⁵³ and specific terms.⁵⁴ These obligations apply to the entire leased premises and are not restricted to the common areas.⁵⁵ Delegation of a statutory duty will not insulate the landlord from liability for physical harm arising from the negligent performance of these prescribed duties by a third party.⁵⁶ Indeed, a violation of a statutory duty which results in injury to a tenant is negligence per se.⁵⁷

Despite the plain language of the Act, novel defenses for the failure to perform these obligations have been raised. One landlord argued that his obligation to supply an air conditioner in good and safe working order did

⁴⁹ See *Landlord-Tenant*, *supra* note 6, at 878-79.

⁵⁰ *Goodall v. Peters*, 121 Ohio St. 432, 169 N.E.2d 443 (1929).

⁵¹ *Branham v. Fordyce*, 103 Ohio App. 379, 145 N.E.2d 471 (1957).

⁵² See *Covenant of Habitability*, *supra* note 7.

⁵³ General obligations under section 5321.04 include:

(A) A landlord who is party to a rental agreement shall:

- (1) Comply with the requirements of all applicable building, housing, health, and safety codes which materially affect health and safety;
- (2) Make all repairs and do whatever is reasonably necessary to put and keep the premises in a fit and habitable condition;
- (3) Keep all common areas of the premises in a safe and sanitary condition;
- (4) Maintain in good and safe working order and condition all electrical, plumbing, sanitary, heating, ventilating, and air conditioning fixtures and appliances, and elevators, supplied or required to be supplied by him.

OHIO REV. CODE ANN. § 5321.04 (Anderson 1981).

⁵⁴ Specific obligations under section 5321.04 include:

- (5) When he is a party to any rental agreements that cover four or more dwelling units in the same structure, provide and maintain appropriate receptacles for the removal of ashes, garbage, rubbish, and other waste incidental to the occupancy of the dwelling unit, and arrange for their removal;
- (6) Supply running water, reasonable amounts of hot water and reasonable heat at all times, except where the building that includes the dwelling unit is not required by law to be equipped for that purpose, or the dwelling unit is so constructed that heat or hot water is generated by an installation within the exclusive control of the tenant and supplied by a direct public utility connection.

Id.

⁵⁵ *Shroades v. Rental Homes, Inc.*, 68 Ohio St. 2d 20, 26, 427 N.E.2d 774, 778 (1981).

⁵⁶ *Strayer v. Lindeman*, 68 Ohio St. 2d 32, 427 N.E.2d 781 (1981).

⁵⁷ *Anderson v. Ceccardi*, 6 Ohio St. 3d 110, 451 N.E.2d 780 (1983); *Shroades v. Rental Homes, Inc.*, 68 Ohio St. 2d 20, 25, 427 N.E.2d 774, 778 (1981).

not require him to turn it on.⁵⁸ The court, in rejecting this argument, declared that,

[t]he Act would furnish no protection to the tenant if read to merely require the landlord to have a system in working order. An air conditioner which is turned off results in the same uninhabitable conditions as one which is broken. The Act requires the equipment to perform when needed.⁵⁹

Another question concerning landlord obligations that has been litigated is the question of the meaning of the word "supply." This became an issue in one case because in certain circumstances the obligation to supply running water, heat, and hot water, pursuant to section 5321.04(A)(6), could be shifted to the tenant.⁶⁰ In *Griffin v. Hulston*,⁶¹ the unit lacked heat and water, and the landlord cited Ohio Revised Code section 5321.04(A)(6) for the proposition that the tenant had the duty to supply it. The court ruled that the term "supply" should be read to obligate the tenant for payment of utility charges only, and in no way relieved the landlord from the obligation to supply the heating and plumbing fixtures.⁶²

More troublesome is the presence of conflicting provisions on the issue of assigning statutory obligations. Under the Act the landlord may agree to assume any obligations delegated to the tenant by the Act.⁶³ This unambiguous statement should be understood to mean that the right to delegate is in the nature of a one-way street since there exists no comparable right for the landlord to delegate any of his obligations to the tenant. However, another section of the Act imposes responsibility upon the tenant to "maintain in good working order and condition . . ." appliances supplied by the landlord which a rental agreement requires the tenant to maintain.⁶⁴ Because these sections seem to conflict, they should be construed *in pari materia* and, under the rules of construction for a remedial law⁶⁵ should be construed in favor of the tenant. Thus,

⁵⁸ *Howard v. Simon*, 18 Ohio App. 3d 14, 15, 480 N.E.2d 99, 102 (1984).

⁵⁹ *Id.* at 16, 480 N.E.2d at 102.

⁶⁰ OHIO REV. CODE ANN. § 5321.04(A)(6) provides:

(A) A landlord who is a party to a rental agreement shall:

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

⁶¹ No. L-83-261 (Lucas County, Dec. 16, 1983).

⁶² *Id.*

⁶³ OHIO REV. CODE ANN. § 5321.13(F) (Anderson 1981).

⁶⁴ OHIO REV. CODE ANN. § 5321.05(A)(7) (Anderson 1981).

⁶⁵ OHIO REV. CODE ANN. § 1.11 (Anderson 1981).

even despite a lease clause making a tenant responsible for maintenance of appliances, a tenant should not be required to make serious repairs on appliances (e.g. replace a thermostat or heating element on a stove). Instead, the tenant should be held responsible merely for routine cleaning and maintenance (e.g., cleaning an oven, defrosting a refrigerator).

A comparison of the parts of the Act outlining the respective duties and obligations of landlords and tenants, and remedies for breach of those duties, reveals a basic inequity. Under the section of the Act outlining tenant duties, a landlord can sue for damages together with reasonable attorney fees whenever a tenant violates any of the obligations specified.⁶⁶ No comparable provision exists authorizing reasonable attorney fees for successful actions by tenants based on violations by landlords of the obligations specified under Ohio Revised Code section 5321.04. The availability of reasonable attorney fees for legal actions by tenants against landlords for violation of their obligations is limited to landlord abuse of the right of access.⁶⁷ This is an empty gesture in light of the Ohio rule that in the absence of "actual" damages there can be no award of attorney fees.⁶⁸ The act of entering tenant's leasehold without notice is not likely to produce a pecuniary loss. Thus, the tenant who probably cannot afford to hire an attorney to prosecute such an action without the hope of being reimbursed is usually left without an actual remedy for what may be a serious breach of the duty to respect the tenant's privacy.⁶⁹

Moreover, in the event of a violation by the landlord of other obligations, even a tenant who can prove actual damages cannot recover attorney fees incurred. Thus, it will be a rare case in which a tenant will find it economically feasible to retain an attorney to recover such damages, since the damages are likely to be less than the cost of litigation. The inherent inequity in allowing the landlord but not the tenant to recover attorney fees makes little sense, since in most situations a landlord is more able to absorb legal fees than a tenant.

The Ohio Supreme Court has overruled the several appellate and district court cases declaring the Act to be the exclusive remedy of tenants for conduct of landlords.⁷⁰ In *Shroades v. Rental Homes, Inc.*,⁷¹ the court also specifically laid to rest the common law immunities in tort

⁶⁶ OHIO REV. CODE ANN. § 5321.05(C) (Anderson 1981).

⁶⁷ OHIO REV. CODE ANN. § 5321.04(B) (Anderson 1981).

⁶⁸ *Jemo & Assoc. v. Garman*, 70 Ohio St. 2d 267, 272, 436 N.E.2d 1353, 1356 (1982).

⁶⁹ The tenant may be able to claim a breach of the duty of the covenant of quiet enjoyment. *Howard v. Simon*, 18 Ohio App. 3d 14, 16-17, 480 N.E.2d 99, 102 (1984). The court's reliance on the landlord's duty of peaceful and quiet enjoyment is interesting because the statute only references this covenant among tenant obligations. OHIO REV. CODE ANN. § 5321.05(A)(8) (Anderson 1981). However, the tenant may have the same problem in proving damages and, of course, attorneys fees are not available in such an action.

⁷⁰ *Laster v. Bowman*, 52 Ohio App. 2d 379, 370 N.E.2d 767 (1977).

⁷¹ 68 Ohio St. 2d 20, 427 N.E.2d 774 (1981).

by declaring the duties imposed on the landlord by the Act to maintain and repair the premises to be an invocation of a duty to "put and keep the premises in a fit and habitable condition and . . . protect persons using rented residential premises from injuries."⁷²

One example of a common law duty recognized by a post-Act decision is the covenant of quiet enjoyment.⁷³ However, the Ohio courts have generally refused to find a common law duty imposed on landlords to afford protection against intentional criminal acts.⁷⁴ Yet, the trend seems to be to recognize such a duty to provide at least reasonable protection.⁷⁵

Courts are more likely to recognize a statutory duty to provide a safe and secure premises, though claims based on that duty have thus far failed on their facts.⁷⁶ If certain security measures were promised by a landlord and became part of the bargain, a failure to provide such measures could be the basis for breach of contract claims.⁷⁷

The legislature did a fairly thorough job in setting forth the obligations of landlords in light of modern conceptions of rental property. The only changes that are really needed as to obligations and duties are, as indicated above, relatively minor. However, as to remedies, there are several important deficiencies. Legislative changes are needed. The authors suggest that the remedies offered to tenants be expanded to be at least as extensive as those provided to landlords.⁷⁸ The change needed

⁷² *Id.* at 25, 427 N.E.2d at 778.

⁷³ See *Howard*, 18 Ohio App. 3d at 16, 480 N.E.2d at 101-02.

⁷⁴ See *Thomas v. Hart Realty, Inc.*, 17 Ohio App. 3d 83, 477 N.E.2d 668 (1984); *Cherkiss v. Thomas*, No. L-83-416 (Lucas County, Apr. 13, 1984).

⁷⁵ For instance, in *Hart Realty* the court stressed that the case did not involve criminal entry or activity in common areas, thus indicating that a different result might be reached under those circumstances. In *Sciascia v. Riverpark Apartments*, 3 Ohio App. 3d 164, 444 N.E.2d 40 (1981), the court also recognized a duty on an apartment landlord to undertake reasonable measures to provide secure common areas. Furthermore, in *Runge v. Rosewater*, Nos. 47650 and 47651 (Cuyahoga County, June 14, 1984), the court stated that the landlord could be held liable if the criminal activity was reasonably foreseeable and the landlord's failure to adhere to the common law and statutory duties regarding safety proximately caused the tenant's injury. Summary judgment for the landlord was upheld, however, because of the absence of evidence that the proximate cause of the injury was the landlord's failure to provide security. Thus, while a duty to provide at least some measure of security may be recognized, proof of proximate cause is required for liability to ensue.

⁷⁶ See *Cherkiss v. Thomas*, No. L-83-416 (Lucas County, Apr. 13, 1984)(entry through window with defective latch); *Emm v. Shesky*, No. 79AP-632 (Franklin County, Feb. 14, 1980)(entry through back door with defective lock); *Runge v. Rosewater*, Nos. 47650 and 47651 (Cuyahoga County, June 14, 1984)(insufficient evidence on whether entry occurred through door with defective lock).

⁷⁷ *Buncy v. Daniels*, No. CA-6059 (Stark County, June 13, 1983)(summary judgment reversed because, *inter alia*, the issue whether breach of contractual obligation to provide secure windows was proximate cause of entry, should have been presented to the jury).

⁷⁸ Compare OHIO REV. CODE ANN. § 5321.04(B) (Anderson 1981) with OHIO REV. CODE ANN. § 5321.05(C) (Anderson 1981).

would be to permit actual damages and attorney fees for any violation of either the landlord or tenant obligations.⁷⁹ It is noteworthy that mobile home owners who are tenants in mobile home parks enjoy such remedies.⁸⁰ Such equality of duty and remedy is long overdue for apartment tenants and other renters.

C. Impermissible Actions by the Landlord

The Act includes several provisions directed at certain actions that might be taken by a landlord against a tenant that were for the most part permitted under common law, but which are now prohibited due to a combination of the realities of modern living, increased sensibilities as to the rights and needs of tenants, and the desire to have potentially violent confrontations defused in the courts. The particular actions which the General Assembly hoped to prevent were of two categories: (1) self-help remedies such as eviction and distraint; and (2) actions taken against tenants because they have exercised some of their newly provided rights.

The Act lists several specific actions a landlord may not take against a tenant.⁸¹ The most litigated of those actions prohibited by the landlord-tenant law are lockouts and property seizures. A lockout occurs when a landlord excludes a tenant from the premises by changing the locks or otherwise barring the tenant. A property seizure involves the landlord exercising some form of control or dominion over the tenant's property. This control is usually the removal of property and disposal or storage of it. In litigation arising under this section, the legal issues generally concern exactly what acts are proscribed, whether the prohibited actions have occurred, and what damages are available to a tenant who has been subjected to a landlord's violation of this law.

It should be emphasized that whether or not the tenant is behind in rent payments or has breached some other obligation is irrelevant under the Act. The statute is intended to force landlords to seek redress through the various avenues provided by law, be it an action in forcible entry and detainer and/or a claim or action for money damages.⁸²

The earliest reported case in which a lockout was determined illegal under the Act was *Keener v. Ewert*.⁸³ Other courts have reached similar conclusions that lockouts are prohibited and that damages and attorney fees are available to the tenant subjected to a lockout.⁸⁴ The extent of the

⁷⁹ See *supra* text accompanying notes 66-69.

⁸⁰ OHIO REV. CODE ANN. § 3733.10(B) (Anderson 1981).

⁸¹ OHIO REV. CODE ANN. § 5321.15(A) (Anderson 1981) (termination of utilities, exclusion from premises or threat of unlawful act); OHIO REV. CODE ANN. § 5321.15(B) (Anderson 1981) (seizure of property).

⁸² *Teall v. MacKinlay*, No. L-81-313 (Lucas County, May 28, 1982).

⁸³ 67 Ohio App. 2d 17, 425 N.E.2d 914 (1979).

⁸⁴ *Burroughs v. Douglas*, No. 46030 (Cuyahoga County, Dec. 8, 1983); *Melvin v. Bryant*,

protected property boundaries is determined by the rental agreement and, thus, any of the property rented by the tenant is included. For example, even when the lock was changed on a garage which was considered part of the residential premises, an illegal lockout was found.⁸⁵ The limiting factor, however, has been that courts have applied the protections only to tenants, not to third parties present on the premises.⁸⁶

The issue of damages and attorney fees has been partially determined by the statute and partially by judicial interpretation. While the Act provides for "damages" for violations, and for attorney fees, the question left unanswered by the General Assembly was what damages were available.⁸⁷ The extent to which courts have allowed damages ranges from "minimal" damages and attorney fees⁸⁸ to \$8,000 in compensatory damages.⁸⁹

Punitive damages provide a harder determination for the courts, with decisions both allowing and rejecting them. In one reported decision, the court decided that punitive damages were not available under Ohio Revised Code section 5321.15.⁹⁰ While this court remains in the minority, those which do allow punitive damages require a showing of actual malice or aggravating circumstances prior to such an award.⁹¹

The language of the statute which allows a tenant to maintain an action for "all damages"⁹² would seem to permit an award of punitive damages. In this respect, this particular section differs from other sections of the Act providing for damage awards as they simply provide for "actual damages,"⁹³ or, simply, "damages."⁹⁴ Thus, it can be argued

No. 7259 (Montgomery County, Nov. 13, 1981); *Shultz v. Lovejoy*, No. 42408 (Cuyahoga County, Jan. 22, 1981); *Boltz v. McFarland*, No. 2-78-14 (Auglaize County, Dec. 6, 1978).

⁸⁵ *Teal v. MacKinlay*, No. L-81-313 (Lucas County, May 28, 1982).

⁸⁶ *O'Neil v. Walburg*, 70 Ohio App. 2d 30, 433 N.E.2d 1286 (1980). Plaintiff was never a tenant in this case, but his property was stored with that of the tenant. Evidence showed that defendant landlord's employee seized the property but there was no evidence that the plaintiff ever had any relationship with defendant. *Id.* at 32-33, 433 N.E.2d at 1288.

⁸⁷ OHIO REV. CODE ANN. § 5321.15(C) (Anderson 1981).

⁸⁸ *DeGraffenreid v. Torges*, No. 82-B-34 (Belmont County, June 29, 1983).

⁸⁹ *Melvin v. Bryant*, No. 7259 (Montgomery County, Nov. 13, 1981).

⁹⁰ *O'Neil*, 70 Ohio App. 2d at 30. The holding as to the possibility of recovering punitive damages can be read as not controlling, since the Court had first decided that section 5321.15 of the Revised Code did not apply and that in any event, the tenant had not proved the sort of aggravating circumstances that would justify an award of punitive damages. *Id.* Moreover, this case involved a commercial rental which may dilute its applicability to residential premises.

⁹¹ *Burroughs v. Douglas*, No. 46030 (Cuyahoga County, Dec. 8, 1983); *Schultz v. Lovejoy*, No. 42408 (Cuyahoga County, Jan. 22, 1981).

⁹² *Thomas v. Papadelis*, 16 Ohio App. 3d 359, 476 N.E.2d 726 (1984).

⁹³ See OHIO REV. CODE ANN. §§ 5321.02(B)(3), 5321.04(B) and 5321.05(C) (Anderson 1981).

⁹⁴ See OHIO REV. CODE ANN. §§ 5321.09(D), 5321.12 (Anderson 1981).

that the language of the statute providing for a fuller recovery for violation of this particular section than for other violations evinces an intent by the legislature to authorize an award of punitive damages under the proper circumstances. The purpose of this section of the Act was to discourage, among other things, potentially violent self-help evictions,⁹⁵ and to assure the tenant due process of law.⁹⁶ The potential for awards of punitive damages acts as a further deterrent.

Another rationale for the allowance of punitive damages under this section is that the cause of action is really one in tort for which punitive damages are available, and not in contract for which punitives are not recoverable.⁹⁷ For instance, a self-help eviction action is similar to a trespass action or breach of the peace⁹⁸ while an action for seizure of possessions is essentially a claim for conversion.

Similar to a lockout is the unauthorized seizure of a tenant's property by the landlord. This is specifically prohibited by the Act.⁹⁹ When the landlord does seize property, he becomes a bailee and must use reasonable care in the storage and preservation of the property.¹⁰⁰ However, a landlord does not become a constructive bailee nor is he liable for damaged property that is removed from rented premises and placed on the landlord's property by a government official pursuant to a writ of execution of a judgment on a forcible entry and detainer action.¹⁰¹

The damages which may be awarded in regard to an illegal property seizure are the same as in the case of a lockout.¹⁰² Procedurally, the tenant may pursue his claims through an offensive suit for the statutory violation and for conversion or through a counterclaim in an eviction

⁹⁵ *Scott v. Park Central Assoc.*, No. TG-CV-H-7676 (Cleve. Mun. Ct., Mar. 18, 1976).

⁹⁶ See *Landlord-Tenant*, *supra* note 6, at 907-08.

⁹⁷ *Ketcham v. Miller*, 104 Ohio St. 372, 136 N.E. 145 (1922).

⁹⁸ See, e.g., *Edwards v. C.N. Inv. Co.*, 27 Ohio Misc. 57, 272 N.E.2d 652 (1971). The court in *Edwards* carved out an exception to the common law rule permitting self-help evictions. The exception was based on the fact that the landlord, by breaching the peace, violated a public duty.

⁹⁹ OHIO REV. CODE ANN. § 5321.15(B) (Anderson 1981); see also *Keener v. Ewert*, 67 Ohio App. 2d 17, 425 N.E.2d 914 (1979)(prohibits lockout of tenant).

¹⁰⁰ *Kayenda v. Kamenir*, 16 Ohio Misc. 2d 1 (1984). That decision concerned property remaining in leased premises after the premises was closed because of flooding. The court ruled that once the property was closed with the tenant's personal property inside, the landlord became a bailee as to that property. The court held that the taking of possession by the landlord satisfied the essential elements for creation of a bailment. The court further held that absent the tenant's assent the landlord-bailee could not unilaterally exempt himself from liability for negligence by posting a sign disclaiming property "abandoned" if left in the property after a certain date.

¹⁰¹ *Ringler v. Sias*, 68 Ohio App. 2d 230, 428 N.E.2d 869 (1980).

¹⁰² *Melvin v. Bryant*, No. 7259 (Montgomery County, Nov. 13, 1981)(court awarded damages); *Keener v. Ewert*, 67 Ohio App. 2d 17, 425 N.E.2d 914 (1979)(court ordered return of security deposit and rent paid).

action.¹⁰³ Once the claim is filed, a tenant must prove damages by evidence of either a market value at the time of the seizure¹⁰⁴ or the purchase price of the goods seized.¹⁰⁵

Another impermissible act is the landlord's termination of utility service to the residence.¹⁰⁶ A court may also issue a restraining order to enjoin violations of section 5321.15, including termination of utilities.¹⁰⁷

The other type of landlord action to be discussed here is retaliation against a tenant who has engaged in activities protected under the Act.¹⁰⁸ The retaliation section has been the focus of much litigation, some of which has weakened the protections supposedly provided to tenants. For example, in *Cuyahoga Metropolitan Housing Authority v. Watkins*, the Court of Appeals of Cuyahoga County stated that despite the anti-retaliation section of the Act a landlord may bring a forcible entry and detainer action when the tenant is in arrears in rental payments.¹⁰⁹ The Court cited *Karas v. Floyd*¹¹⁰ for that proposition. However, the *Watkins* court overstated the holding of *Karas*, which actually held that once a tenant shows that the challenged action of the landlord was in response to protected activity of the tenant, it becomes the landlord's duty to prove that the challenged action was taken *because* the tenant was in default in payment of rent, the code violation of which the tenant has complained is attributable to the tenant, or repairs to the premises necessary for compliance with applicable codes require the tenant to vacate or the tenant is holding over.¹¹¹ While the statute does provide that "[n]otwithstanding" retaliatory conduct by the landlord, he may still bring an eviction action for one of the four reasons listed above,¹¹² it does not follow that if a landlord proves the existence of circumstances supporting one or more of those reasons, the eviction should automatically be

¹⁰³ *Naumann v. Taylor*, No. L-78-295 (Lucas County, July 6, 1979).

¹⁰⁴ *Woodard v. Walker*, No. 78AP-495, slip op. at 349 (Franklin County, Feb. 27, 1979).

¹⁰⁵ *Russ v. Hill*, No. E-78-26 (Erie County, Oct. 13, 1978). The use of the purchase price is not conclusive as to the issue of damages. Rather, it is only an indication of the value of the goods.

¹⁰⁶ *Fox v. Wilson*, No. CA80-32 (Muskingum County, March 30, 1981)(citing OHIO REV. CODE ANN. § 5321.15 (Anderson 1981)).

¹⁰⁷ *Colquett v. Byrd*, 59 Ohio Misc. 45 (1979). In that case the municipal court determined it had jurisdiction to enjoin a utility shut-off and could do so without setting a bond.

¹⁰⁸ OHIO REV. CODE ANN. § 5321.02 (Anderson 1981). The tenant has a right to complain to the landlord or an appropriate government agency about violations of building, housing, health and safety codes or violations of a landlord's duties under R.C. § 5321.04. Further, the tenant has the right to participate in the activities of a tenant association without threat or action by a landlord in the form of rent increases, decreases in service or eviction actions.

¹⁰⁹ 23 Ohio App. 3d 20, 25, 491 N.E.2d 701 (1984).

¹¹⁰ 2 Ohio App. 3d 4, 440 N.E.2d 563 (1981).

¹¹¹ *Id.* at 6.

¹¹² OHIO REVISED CODE ANN. § 5321.03(A) (Anderson 1981).

granted. The landlord should be able to succeed only if, in the absence of a retaliatory motive, the eviction action would have been filed.

There are a number of possible ways for a tenant to succeed on a retaliation defense to an eviction even though the case fits into one of the exceptions. For instance, if the landlord has caused the tenant to be in violation in retaliation for the tenant's activities, then the landlord should not be able to defeat the retaliation defense. Thus, when a tenant was made a holdover by the landlord's serving a thirty-day notice upon the tenant, evidence that would show that the notice was served after the landlord learned of the tenant's activity in a tenant's association would be relevant to establish a retaliatory motive and could lead to judgment for the tenant.¹¹³ In such cases, the timing of the notice to the landlord of the protected activities in relation to the notice to the tenant to vacate would be a substantial factor.¹¹⁴

Another factor that would demonstrate that retaliation was the actual motive would be if the tenant is being treated differently than other tenants who have not engaged in the protected activity. Thus, a landlord's refusal to accept a late rental payment from a tenant who had complained about conditions when the landlord regularly accepted such

¹¹³ *Voyager Village Ltd. v. Williams*, 3 Ohio App. 3d 288, 444 N.E.2d 1337 (1982). Though that case involved a mobile home park tenancy and, therefore, applied the retaliation sections of Chapter 3733, the court's reasoning on the second assignment of error, dealing with the retaliation defense, is instructive since those sections were modeled after OHIO REV. CODE ANN. §§ 5321.02, 5321.03. The Court of Appeals ruled that the trial court was in error in holding that retaliation was not a valid defense to an eviction based on a tenant holding over this term. The Court framed the issue as not whether a holdover tenant can be evicted, but whether the law will label the tenant a holdover. 3 Ohio App. 3d at 295. If the original 30-day notice issued to the tenant was prompted by the tenant's exercise of protected rights, then the tenant can use the retaliatory action of the park owner-landlord as a defense to the eviction, even though the eviction is premised on the tenant's status as a "holdover." The case was remanded to the trial court for a determination of whether the tenant had sustained his burden of proving retaliation.

¹¹⁴ *Karas*, 2 Ohio App. 3d at 6, 440 N.E.2d at 566. While the *Karas* court recognized the potential importance of the timing factor, indicating that it could play a substantial role in determining the landlord's motive, it also held that evidence of the temporal proximity of the parties' actions does not create a presumption of retaliation. *Accord* *Howard v. Simon*, 18 Ohio App. 3d 14, 480 N.E.2d 99 (1984). Instead, the tenant must prove by a preponderance of the evidence that the landlord's motive is retaliatory. Of course, the timing of the landlord's action may be the most persuasive evidence. If the tenant succeeds in meeting this burden, the burden shifts to the landlord to prove that the action was brought for a different reason. *Karas*, 2 Ohio App. 3d at 6, 440 N.E.2d at 566.

Some other jurisdictions have a statutory presumption of retaliation if the landlord's action is taken within a specified time of the tenant's protected activity. *See, e.g.*, CAL. CIV. CODE § 1942.5 (West 1985). This seems a sounder approach since otherwise the tenant must attempt to show the state of mind of the landlord. *See infra* text setting forth Proposed Amendments to the current statute.

late payments from other tenants was held to demonstrate a retaliatory motive.¹¹⁵

Another question that can arise is whether an eviction action should be granted if retaliation is one of two or more reasons for the eviction. One Ohio court of appeals has rejected the proposed standard that the tenant needs to show by clear and convincing evidence that retaliation was the motive for the landlord's action.¹¹⁶ One unreported Ohio decision has held that even if otherwise legitimate reasons support the landlord's action, if the action is taken in response to protected activity by the tenant, illegal retaliation has occurred.¹¹⁷ Thus, it would seem that Ohio courts should look beyond the mere fact of nonpayment of rent, holdover tenancy, etc., to see whether a retaliatory motive played a part in the landlord's decision.¹¹⁸

To provide recompense for tenant victims of retaliation both damages and attorney fees are allowed under the Act,¹¹⁹ and an injunction may be issued to prohibit the landlord from carrying out threatened retaliation.¹²⁰ Although attorney fees are available to a tenant who prevails on a claim of retaliation, that right was severely limited by the Ohio Supreme Court's decision in *Jemo Assoc., Inc. v. Garman*.¹²¹ In *Garman*, the Court held that in order to recover attorney fees on a counterclaim for retaliatory eviction, a tenant must prove actual damages. This is unfortunate because in many cases, actual damages may be difficult to prove, such as when the tenant has only been threatened with a retaliatory action. Thus, a tenant may find himself able to defeat an eviction action on the grounds that it was brought in retaliation and not

¹¹⁵ *Belvoir Cliffs Apts. v. Bembry*, 56 Ohio Misc. 37, 383 N.E.2d 1170 (1978).

¹¹⁶ *Karas v. Floyd*, 2 Ohio App. 3d 4, 6, 440 N.E.2d 563, 566 (1981).

¹¹⁷ *Gateway Apts. v. Darrah*, Nos. 76-CVG-725, 76-CVG-928 (Lyndhurst Mun. Ct., Aug. 22, 1977). The court relied in part on precedent in the labor law area, in which claims of retaliation for union activity are at issue. Courts have held that in such cases liability could be found if only *one* reason for an employee's discharge was retaliation for union activity. See, e.g., *NLRB v. Whittier Mach. Works*, 204 F.2d 883, 885 (1st Cir. 1953). Similarly, courts in fair housing cases have determined that even if only one of the motives for a challenged action was based on prohibited criteria, illegal discrimination has taken place. See, e.g., *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Smith v. Sol D. Adler Realty Co.*, 436 F.2d 344 (7th Cir. 1970).

¹¹⁸ Other jurisdictions vary greatly in their response to this question. Compare *Silberg v. Lipscomb*, 117 N.J. 491, 285 A.2d 86 (1971) (liability for retaliation found if any part of motive retaliatory) with *Dickhut v. Norman*, 45 Wisc. 389, 173 N.W.2d 297 (1970) (retaliation must be sole motive). It should be noted that the court in *Karas v. Floyd*, 2 Ohio App. 3d 4, 440 N.E.2d 563 (1981), thus far the most thorough consideration of Ohio's anti-retaliation provisions, considered and rejected the standard adopted in *Dickhut* and determined it to be inappropriate under Ohio law.

¹¹⁹ OHIO REV. CODE ANN. § 5321.02(B) (Anderson 1981).

¹²⁰ See, e.g., *Creps v. Brandon*, No. L-82-132 (Lucas County, Nov. 12, 1982).

¹²¹ 70 Ohio St. 2d 267, 436 N.E.2d 1353 (1982).

be able to be reimbursed for the expenses of defending against the landlord's illegal act. Even worse, a tenant who is unable to afford an attorney in such an action may not be able to get representation because there is no certainty that counsel will be paid.¹²² Since the purpose of the landlord-tenant act is to protect tenants, decisions such as this have undercut the law's intended purpose.

While certain of the foregoing decisions have robbed the retaliation provision of some of its effectiveness, it can still provide protection for tenants. It has been successfully argued that an eviction brought against a tenant who did not provide the landlord with a passkey was retaliatory.¹²³ It has also been held that an eviction filed after complaints to the health department was also retaliatory.¹²⁴

Certain changes should be made to the Act to better effectuate the aims of the legislation in protecting tenants against impermissible acts by the landlord, including actions taken in retaliation for protected activities. First, a standard for damages should be established for violations of Ohio Revised Code section 5321.15, so that the confusion as to whether or not punitive damages are available would be eliminated. This has already been provided in Ohio Revised Code section 5321.16, in which a violation of security deposit provisions triggers a recovery of the full or partial deposit plus an amount equal to the amount wrongfully withheld.¹²⁵ A suggested alternative for the harsher actions in the case of lockouts, property seizures, utility termination or retaliation would be the treble damages award and attorney fees like those found in the Ohio Consumer Sales Practices Act.¹²⁶

A presumption of retaliation should be enacted into Ohio Revised Code section 5321.02, so that prohibited actions as listed in the statute could not be taken against a tenant within a specified period of time unless there was another just cause of action. In this way, a cooling-off period would be established to protect a tenant during the period immediately following a complaint when a landlord is often angered at the tenant's action.

¹²² See, e.g., *Howard v. Simon*, 18 Ohio App. 3d 14, 18, 480 N.E.2d 99 (1984)(citing *Karas v. Floyd*, 2 Ohio App. 3d 4, 440 N.E.2d 563 (1981). Because a defense of retaliation necessarily involves a question of motive, such a case is generally not one that a tenant will be able to successfully litigate *per se*. For the same reason, such a case will probably demand more time and effort than most eviction cases making it even more difficult to find an attorney willing to undertake the substantial risk of non-payment.

¹²³ *Spencer v. Blackmon*, 22 Ohio Misc. 2d 52 (1985).

¹²⁴ *Karas v. Floyd*, 2 Ohio App. 3d 4, 440 N.E. 2d 563 (1980).

¹²⁵ *But see infra* text accompanying notes 333-90 which discusses problems with this provision.

¹²⁶ OHIO REV. CODE ANN. § 1345.09 (Anderson 1978).

D. Tenant Duties

The initial duty of any tenant is to pay in a timely fashion the rent agreed upon for his use of the premises. This duty was apparently so clear that the General Assembly did not codify this obligation, although the Act contains a number of references to the duty to pay rent.¹²⁷

Other duties of tenants were not so obvious. Thus, the legislature enumerated seven specific obligations for tenants relating to the protection of the landlord's property.¹²⁸ Many of these obligations complement the responsibilities imposed on the landlord.¹²⁹

While the Act requires the tenant to dispose of rubbish in a safe manner,¹³⁰ keep plumbing fixtures as clean as their condition permits¹³¹ and keep the premises in a safe and sanitary condition,¹³² it does not require tenants to make repairs. In fact, the only parts of the Act using the word "repair" impose this duty on the landlord.¹³³ The other important statutory duty of the tenant is to permit access to the landlord or his agent to the premises upon reasonable notice.¹³⁴ Reasonable notice has been defined by the Act to require the landlord to give a twenty-four hour notice to his tenant of the intention to enter the premises, except for emergencies.¹³⁵

Another obligation of the tenant codifies the established common law duty of a tenant not to commit waste.¹³⁶ The Act expands this obligation to forbid any person who is on the landlord's premises with the permission of the tenant from causing damage to the landlord's property, either intentionally or negligently.¹³⁷ A tenant is not liable for all negligent acts

¹²⁷ See OHIO REV. CODE ANN. §§ 1923.02(B), 5321.02(C), 5321.07(B) (Anderson 1981).

¹²⁸ OHIO REV. CODE ANN. § 5321.05 (A)(1)-(7) (Anderson 1981).

¹²⁹ Compare OHIO REV. CODE ANN. § 5321.05 (Anderson 1981) with OHIO REV. CODE ANN. § 5321.04 (Anderson 1981). See also *Landlord-Tenant*, *supra* note 6, at 897-99; Baillis, *supra* note 2, at 133-34.

¹³⁰ OHIO REV. CODE ANN. § 5321.05(A)(2) (Anderson 1981).

¹³¹ OHIO REV. CODE ANN. § 5321.05(A)(3) (Anderson 1981).

¹³² OHIO REV. CODE ANN. § 5321.05(A)(1) (Anderson 1981).

¹³³ OHIO REV. CODE ANN. §§ 5321.04(A)(2), 5321.05(B)(11) (Anderson 1981). One possible exception to this lack of a duty to repair involves Revised Code section 5321.05(A)(7) which states: "A tenant who is a party to a rental agreement shall: Maintain in good working order and condition any range, refrigerator, washer, dryer, dishwasher, or other appliances supplied by the landlord and required to be maintained by the tenant under the terms and conditions of a written rental agreement." OHIO REV. CODE ANN. § 5321.05(A)(7) (Anderson 1981). The foregoing could conceivably be read to allow a landlord under a lease to require repairs to appliances to be made by the tenant.

¹³⁴ OHIO REV. CODE ANN. § 5321.05(B) (Anderson 1981).

¹³⁵ OHIO REV. CODE ANN. § 5321.04(A)(8) (Anderson 1981). In addition, entry also must be made at reasonable times of the day. This is to prevent a landlord from abusing his right of entry or using it as a means to retaliate against his tenant.

¹³⁶ *Landlord-Tenant*, *supra* note 6, at 898.

¹³⁷ OHIO REV. CODE ANN. § 5321.05(A)(6) (Anderson 1981) provides: "(A) A tenant who is a

of guests which cause damage to the rental premises.¹³⁸ Thus, in a suit brought by a landlord's insurance company exercising subrogation rights against a tenant whose visiting daughter had negligently caused a fire which destroyed the premises, the court found that the Act did not impose a duty upon a tenant actually to prevent negligent acts of third parties.¹³⁹ Only if a tenant was aware of a guest's negligent acts and failed to command the person to discontinue the negligent acts, could the tenant be held to have violated this duty.¹⁴⁰ Thus, the statute does not establish a strict liability standard against tenants for damages caused by the negligence of their guests.¹⁴¹

In recognition of the unequal bargaining position of the parties, the General Assembly prohibited any waiver of the landlord's obligations.¹⁴² However, the Act specifically permits the landlord to undertake any of the tenant's duties based on an agreement of the parties.¹⁴³

However, there has been little opportunity for interpretation of a tenant's obligations under the Act. This is not surprising since the drafters spent considerable time in enumerating the duties of a tenant.¹⁴⁴

There have, however, been several areas of considerable controversy regarding rental payments. The first relates to late payment of rent by the tenant. Under Ohio common law, courts have recognized that when there has been a pattern of rental payments made later than the dates prescribed in the lease, the landlord has waived the right to evict based on receipt of late rent.¹⁴⁵ Courts have permitted the landlord to evict upon

party to a rental agreement shall: (6) Personally refrain, and forbid any other person who is on the premises with his permission, from intentionally or negligently destroying, defacing, damaging, or removing any fixture, appliance, or other part of the premises."

¹³⁸ Ohio Casualty Ins. Co. v. Wills, 29 Ohio App. 3d 219, 504 N.E.2d 1164 (1985).

¹³⁹ *Id.* at 220, 504 N.E.2d at 1167.

¹⁴⁰ *Id.* at 221-22, 504 N.E.2d at 1167-68.

¹⁴¹ *Id.* at 221, 504 N.E.2d at 1168. In its decision, the court first discussed the principles of statutory construction established by the General Assembly. The court concluded that the Act must be construed to achieve a reasonable balance between the legitimate rights of both landlords and tenants.

¹⁴² OHIO REV. CODE ANN. § 5321.13(E) (Anderson 1981).

¹⁴³ OHIO REV. CODE ANN. § 5321.13(F) (Anderson 1981). "The landlord may agree to assume responsibility for fulfilling any duty or obligation imposed on a tenant by § 5321.05 of the Revised Code." *Id.*

¹⁴⁴ These specific enumerations, along with the provisions voiding any landlord-imposed duties inconsistent with the Act, limit the opportunity for misunderstandings about the meaning of the Statute. The appropriate rule of statutory construction in this situation is *expressio unius est exclusio alterius*, literally meaning, the "expression of one thing is the exclusion of another" BLACK'S LAW DICTIONARY 692 (5th ed. 1979). See also OHIO REV. CODE ANN. § 1.51 (Anderson 1981).

¹⁴⁵ Finkbeiner v. Lutz, 44 Ohio App. 2d 223, 337 N.E.2d 655 (1975); Lauch v. Monning, 15 Ohio App. 2d 112, 239 N.E.2d 675 (1968); Bates & Springer, Inc. v. Nay, 91 Ohio L. Abs. 425, 187 N.E.2d 415 (1963).

a showing that advance notice of a discontinuation of the practice of accepting late payments had been given to the tenant.¹⁴⁶

A serious judicial undercutting of the reforms intended by the legislature is found in the treatment by the courts of the Act's statutory set-off provision which exhibits a clear intention by the General Assembly to protect a tenant refusing to pay rent because of a landlord's failure to provide a fit and habitable dwelling. The provision in question, Ohio Revised Code section 1923.061,¹⁴⁷ provides that in an action for eviction, the tenant may counterclaim for any amount due under the rental agreement or the Act. Thus, a counterclaim could be asserted by the tenant for the landlord's failure to fulfill his statutory obligations. If it is shown at trial that the amount owed by the tenant for rent is exceeded by the amount due the tenant as a result of the counterclaim, judgment on the claim for possession should be rendered in favor of the tenant. The commentators on the Act were unanimous in their prediction that this part of the law established a new defense to an eviction action.¹⁴⁸ This defense was based both on the plain meaning of the Act and the common law principle of "mutually dependent covenants."¹⁴⁹ The latter concept recognizes that the duty to pay rent is dependent on the landlord's compliance with his obligations under the Act.¹⁵⁰

¹⁴⁶ The decisions are not uniform on the amount of advance notice required. See, e.g., *Classic Real Estate v. Bowen*, No. M-79-CVG-01404 (Franklin County, Mar. 12, 1979)(Section 5321.17 notice period or time specified in the lease); *Lauch*, 15 Ohio App. 2d at 113 (three days). Arguably, with the passage of the Act the longer period in section 5321.17 should apply rather than the three day period. *Bates & Springer, Inc.*, 91 Ohio L. Abs. at 425. Only the Eighth District has addressed the issue of whether the notice must be in writing. As a general rule, that court requires written notice. *Id.* It has, however, permitted oral notice where the tenant admits to having received it. *Associated Estates Corp. v. Smith*, No. 46054 (Cuyahoga County, Oct. 4, 1984).

¹⁴⁷ OHIO REVISED CODE ANN. § 1923.061(B)(Anderson 1981):

In an action for possession of residential premises based upon nonpayment of the rent or in an action for rent when the tenant is in possession, the tenant may counterclaim for any amount he may recover under the rental agreement or under § 3733. or § 5321. of the Revised Code. In that event the court from time to time may order the tenant to pay into court all or part of the past due rent and rent becoming due during the pendency of the action. After trial and judgment, the party to whom a net judgment is owed shall be paid first from the money paid into court, and any balance shall be satisfied as any other judgment. If no rent remains due after application of this division, judgment shall be entered for the tenant in the action for possession. If the tenant has paid into court an amount greater than that necessary to satisfy a judgment obtained by the landlord, the balance shall be returned by the court to the tenant.

¹⁴⁸ *Landlord-Tenant*, *supra* note 6, at 923-27; Baillis, *supra* note 2, at 140-41.

¹⁴⁹ *Leleme v. Breeden*, 51 Haw. 426, 433, 462 P.2d 470, 474 (1969). See also Note, *Contract Principles and Leases of Realty*, 50 B.U.L. Rev. 24, 25 (1970).

¹⁵⁰ See, e.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); *Boston Hous. Auth. v. Hemingway*, 363 Mass. 184, 293 N.E.2d 831, 842

Unfortunately, the judicial interpretation of this section of the law has substantially defeated the purpose of this provision. The leading case is *Smith v. Wright*,¹⁵¹ where a landlord had brought an eviction action based on nonpayment of rent and the tenant filed counterclaims based on severe pest infestation of the premises. The Cuyahoga County Court of Appeals held that in an action for forcible entry and detainer, the unfit condition of the rented premises "can be in issue only if the tenant is current in rental payments, having paid them either directly to the landlord or having deposited them into court."¹⁵² Thus, the Court of Appeals ruled that the trial court had properly excluded evidence of the unfit condition of the premises in an eviction proceeding where the tenant was admittedly in default in rental payments and had not deposited his rent into court.

The *Smith* decision and others that have followed it¹⁵³ have the practical effect of rendering impotent a part of the Act enacted to protect tenants. These decisions are inconsistent with the plain meaning of section 1923.061(B). Under this precedent, section 1923.061(B) provides the court discretionary authority to order rent paid into court and accords the tenant a set-off defense in the exercise of that discretion. Yet, there is simply no basis in section 1923.061(B), or in any other section of Chapter 1923 or Chapter 5321, or in the theory of implied warranty of habitability, to support such a position.

The authors submit that the *Smith* court misread section 1923.061. The court held that the provision therein mandating that judgment shall be rendered for the tenant if after trial it is determined he owes no rent, only comes into play if the court has ordered rent paid into court.¹⁵⁴ The key sentence is: "if no rent remains due after application of this division, judgment shall be entered for the tenant in the action for possession." The *Smith* court apparently felt that "application of this division" referred to the payment of rent into the court and that if such payment was not made the section had not been applied, and the legislative command that judgment should be rendered for the tenant was inapplicable.

However, this reasoning results from a fundamental misreading of the statute. "Application of this division" should be read to mean that which

(1973); Note, *Landlords and Tenants—Forcible Entry and Detainer-Eviction Action for Nonpayment of Rent-Defenses: Smith v. Wright*, 8 N. Ky. L. Rev. 423, 431-32 (1981).

¹⁵¹ 65 Ohio App. 2d 101; 416 N.E.2d 655 (1979).

¹⁵² *Id.* at 109, 416 N.E.2d at 661.

¹⁵³ *Martins Ferry Jaycee Hous., Inc. v. Pawlaczyk*, 4 Ohio App. 3d 302, 448 N.E.2d 512 (1982). The Belmont County Court of Appeals followed *Smith* and ruled that the section 1923.061(B) set-off defense is available only if the tenant has deposited the unpaid contract rent with the court, either voluntarily pursuant to section 5321.07 or by court order pursuant to section 1923.061(B). See also *Geyer v. Frank*, No. CA84-06-074 (Butler County, Jan. 14, 1986)(dicta).

¹⁵⁴ *Smith*, 65 Ohio App. 2d at 107.

is the primary thrust of the section, namely the assertion of counterclaims by the tenant, not the order by the court for payment of rent into the court. The payment of rent into the court is merely an optional method of guaranteeing the money that could potentially be due the landlord. It is not the major focus of the statute. Whether or not the rental money is paid into court, the court should decide the claims and counterclaims. If the judgment on the counterclaim is for the tenant in an amount that exceeds the amount of the rent owed, the tenant should be granted judgment on the claim for possession.

The *Smith* Court misinterpreted the discretion granted to the court by the Act to order deposit of rent during the pendency of the action. That part of the statute was designed to protect a landlord whose ability to collect rent due after a long pretrial delay might be endangered. The discretion is to be exercised to that end alone. The exercise or non-exercise of that discretion should not be determinative of whether the tenant can prevail in the eviction action if the evidence shows that, because the tenant is owed more on his counterclaims than he owes the landlord for rent, in effect no rent is owed. Whether a tenant can avail himself of such a method of defeating an eviction action cannot be dependent on the discretion of a court.^{154a}

Such was not the intent of the legislature in adopting this key section of the Act. Ohio Revised Code Section 1923.061(B) was taken from the National Conference of Commissioners of Uniform State Laws, *Uniform Residential Landlord and Tenant Act* section 4.105 [hereinafter cited as URLTA].¹⁵⁵ Interestingly, that section of the URLTA is entitled "Land-

^{154a} It should be pointed out that under the interpretation of the *Smith* court, the landlord's right to possession also depends on the discretion of the court as to what is essentially a procedural matter. For instance, in *Sandefur Mgmt. Co. v. Smith*, 21 Ohio App. 3d 145, 486 N.E.2d 1234 (1985), it was held that because the court had exercised its discretion and ordered rent deposited into court and the net judgment for the landlord was less than the amount thus deposited, the tenant was entitled to possession. The tenant in that case recovered on her counterclaim, but in an amount less than the amount of rent owed at the time the action was filed. Thus, though the tenant owed money for rent, the landlord's claim for possession was defeated, since more money was deposited than was owed.

¹⁵⁵ UNIF. RESIDENTIAL LANDLORD-TENANT ACT, *supra* note 47, § 4.105. The explanation about this section from the drafters of the language of section 1923.061 does not indicate that the availability of the habitability defense depends on the discretion of the court:

Article II defines the obligations of the landlord which the tenant may enforce against him (Section 1.105). While *Lindsey v. Normet* (405 U.S. 56) holds no principle of constitutional law requires the admission of the habitability defense in a summary proceeding maintained by the landlord against the tenant, Section 4.105 is consistent with modern procedural reform in permitting the tenant to file a counterclaim or other appropriate pleading in the summary proceeding to the end that all issues between the parties may be disposed of in one proceeding. It is anticipated that upon filing of the counterclaim the court will enter the order deemed appropriate by him concerning the payment of the rent in order to protect the interests of the parties. See cases in comment to Section 2.104(e).

lord's Non-Compliance as Defense to Action for Possession or Rent." It seems clear that the legislature was bringing Ohio into line with modern theories of the landlord-tenant relationship by allowing tenants the right to contest evictions by showing that the landlord has failed to fulfill his obligations.

Additional support for the theory that the legislature made provisions for the availability to the tenant of a defense based on the warranty of habitability is found in Ohio Revised Code section 1923.061(A),¹⁵⁶ which states that a tenant may assert *any defense* in an eviction action, and section 5321.12,¹⁵⁷ which holds that in an action under the Act a party can recover for the breach of contract or other duty imposed by law. Thus, the legislature recognized that a rental agreement is a contract, a breach of which gives rise to remedies. Since, in an ordinary action on a contract, the party sued for non-payment can assert as a defense the non-performance by the other party, it would follow that a tenant sued for non-payment can, in light of section 1923.061(A), raise as a defense the non-performance by the landlord of his statutory duties. It is unthinkable that the availability of the valid affirmative defense of non-performance by one party to the contract would depend totally on the discretion of the court as to whether or not to act as the escrow agent for the landlord. By this reasoning, the tenant can be denied a substantive defense at the option of the court. Not only does this result elevate a matter of court procedure above a matter of substantive law, but it may constitute a denial of due process.¹⁵⁸

The defense of non-habitability has been denied to substantial numbers of tenants by the Ohio courts' narrow interpretation. Unless the Ohio Supreme Court is presented with an opportunity to reverse *Smith* and its progeny, the only other course would be legislative action to overrule this restrictive interpretation. While it seems that the Act as currently worded already provides for the mutuality of obligations defense, in light of the judicial interpretation, even clearer language may be required. The possible solution is the enactment of a specific provision recognizing the mutuality of covenants as was proposed in one model law.¹⁵⁹

¹⁵⁶ OHIO REV. CODE ANN. § 1923.061(A) (Anderson 1981).

¹⁵⁷ OHIO REV. CODE ANN. § 5321.12 (Anderson 1981).

¹⁵⁸ A property interest such as the tenant's leasehold, once created by the state, may not be terminated without due process of law. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982). To deny a tenant the right to present evidence in an eviction action pertaining to the defense of non-performance by the landlord of statutory obligations would be to deny the tenant due process of law since such defense has been permitted both by statute and by the common law of contract.

¹⁵⁹ MODEL RESIDENTIAL LANDLORD-TENANT CODE § 2-102 (Tent. Draft 1969).

E. Landlord Remedies

Any discussion of remedies available to a landlord must begin with his ability to recover the premises through a forcible entry and detainer action commonly referred to as an eviction.¹⁶⁰ If the landlord is successful in the eviction action, a writ of restitution will be issued¹⁶¹ and will be enforced by a sheriff, bailiff, or constable.¹⁶² The enforcement consists of putting the tenant and his or her possessions out of the premises, thus restoring the premises to the landlord. Because of the obviously devastating effect such a procedure can have for a tenant, an eviction should not be granted without a full and fair opportunity for the tenant to be heard.

Three provisions of Ohio Revised Code Chapter 5321 discuss eviction actions.¹⁶³ While other sections of the Act do not specifically refer to

¹⁶⁰ OHIO REV. CODE ANN. §§ 1923.01 to 1923.15 (Anderson 1981)(govern actions for forcible entry and detainer).

¹⁶¹ OHIO REV. CODE ANN. § 1923.13 (Anderson 1981).

¹⁶² OHIO REV. CODE ANN. § 1923.14 (Anderson 1981).

¹⁶³ Section 5321.03 [Actions by landlords authorized.]

(A) Notwithstanding section 5321.02 of the Revised Code, a landlord may bring an action under Chapter 1923 of the Revised Code for possession of the premises if:

- (1) The tenant is in default in the payment of rent;
- (2) The violation of the applicable building, housing, health, or safety code that the tenant complained of was primarily caused by any act or lack of reasonable care by the tenant, or by any other person in the tenant's household, or by anyone on the premises with the consent of the tenant;
- (3) Compliance with the applicable building, housing, health, or safety code would require alteration, remodeling, or demolition of the premises which would effectively deprive the tenant of the use of the dwelling unit;
- (4) A tenant is holding over his term.

(B) The maintenance of an action by the landlord under this section does not prevent the landlord from recovering damages for any violation by the landlord of the rental agreement or of section 5321.04 of the Revised Code.

OHIO REVISED CODE ANN. § 5321.03 (Anderson 1981).

5321.05 [Obligations of tenant]

(C) If the tenant violates any provision of this section, the landlord may recover any actual damages which result from the violation together with reasonable attorneys fees. This remedy is in addition to any right of the landlord to terminate the rental agreement, to maintain an action for the possession of the premises, or injunctive relief to compel access under division (B) of this section.

OHIO REV. CODE ANN. § 5321.05 (Anderson 1981).

§ 5321.15 [Residential premises landlord restrictions.]

(A) No landlord of residential premises shall initiate any act, including termination of utilities or services, exclusion from the premises, or threat of any unlawful act, against a tenant, or a tenant whose right to possession has terminated, for the purpose of recovering possession of residential premises, other than as provided in Chapters 1923, 5303, and 5321 of the Revised Code.

(B) No landlord of residential premises shall seize the furnishings or possessions

actions for possession, some sections do discuss termination of rental agreements. Section 5321.11 sets forth procedures for terminating the rental agreement if the tenant has violated statutory duties imposed by section 5321.05 that materially affect health and safety.¹⁶⁴ The landlord is to serve a notice of the specific violations on the tenant. The tenant then has thirty days to correct the violation.¹⁶⁵ The Act is clear that the tenant may prevent a termination of the rental agreement and thus defeat an action for possession by remedying violations imposed by section 5321.05 within thirty days of a notice.¹⁶⁶

The Act also specifies procedures for terminating periodic tenancies. Either the landlord or the tenant may terminate such a tenancy by giving notice one rental period in advance.¹⁶⁷ If a tenant who has been given such a notice does not vacate upon the specified date, he becomes a holdover tenant subject to eviction.¹⁶⁸

A tenant who has breached the terms of a written rental agreement, but not any statutory obligations that materially affect health and safety,

of a tenant, or of a tenant whose right to possession has terminated, for the purpose of recovering rent payments, other than in accordance with an order issued by a court of competent jurisdiction.

(C) A landlord who violates this section is liable in a civil action for all damages caused to a tenant, or to a tenant whose right to possession has terminated, together with reasonable attorneys fees.

OHIO REV. CODE ANN. § 5321.15 (Anderson 1981).

¹⁶⁴ OHIO REV. CODE ANN. § 5321.11 (Anderson 1981); *See supra* text accompanying notes 127-55.

¹⁶⁵ OHIO REVISED CODE ANN. § 5321.11 (Anderson 1981):

[Noncompliance by tenant terminates agreement.] If the tenant fails to fulfill any obligation imposed upon him by section 5321.05 of the Revised Code that materially affects health and safety, the landlord may deliver a written notice of this fact to the tenant specifying the act and omission that constitutes noncompliance with such provisions and that the rental agreement will terminate upon a date specified therein not less than thirty days after receipt of the notice. If the tenant fails to remedy the condition contained in the notice, the rental agreement shall than terminate as provided in the notice.

¹⁶⁶ Sandefur Mgmt. Co. v. Wilson, 21 Ohio App. 3d 160, 486 N.E.2d 1267 (1985); Parker v. Fisher, 17 Ohio App. 3d 103, 477 N.E.2d 654 (1984); Yutzy v. Huebner, 14 Ohio Op. 3d 440 (1979).

¹⁶⁷ OHIO REV. CODE ANN. § 5321.17 (Anderson 1981):

[Termination of periodic tenancies.] (A) The landlord or the tenant may terminate or fail to renew a week-to-week tenancy by notice given the other at least seven days prior to the termination date specified in the notice. (B) The landlord or the tenant may terminate or fail to renew a month-to-month tenancy by notice given the other at least thirty days prior to the periodic rental date. (C) This section does not apply to a termination based on the breach of a condition of the rental agreement or the breach of a duty and obligation imposed by law.

¹⁶⁸ OHIO REV. CODE ANN. § 1923.02(A)(1) (Anderson 1981). The term "holding over" would also refer to a tenant whose written lease has expired and who has been informed by the landlord that he wishes the tenant to vacate.

would be subject to termination of the rental agreement without the thirty-day opportunity to cure unless the terms of the rental agreement hold otherwise.¹⁶⁹ However, if the breach of the written rental agreement is also a breach of statutory obligations, the landlord must comply with the thirty-day notice-to-cure procedure of Section 5321.11.¹⁷⁰

The notice requirements imposed by the forcible entry and detainer statute¹⁷¹ must be met to confer jurisdiction on the court to hear the action for possession.¹⁷² Even if the required notice has been served, the landlord's acceptance of current or future rents waives the notice and, as such, is a defense to an eviction action.¹⁷³ The waiver will not apply to acceptance of earned rentals¹⁷⁴ or partial payment in the form of federal housing assistance.¹⁷⁵ The courts are split on whether or not the election by the landlord to evict the tenant relieves the tenant of future obligations to pay rent.¹⁷⁶ Where the landlord refuses a rent payment he cannot base an eviction on the lessee's failure to pay rent.¹⁷⁷

The requirement to refuse tender of future rents may cause a landlord some hardship if there is any appreciable delay in hearing the forcible entry and detainer action.¹⁷⁸ The delay may be occasioned by a motion by either side for a continuance. A tenant might seek a continuance in order to exercise the right to raise any defenses he may have to the landlord's

¹⁶⁹ OHIO REV. CODE ANN. § 1923.02(A)(9) (Anderson 1981). *Parker*, 17 Ohio App. 3d 103, 477 N.E.2d 654.

¹⁷⁰ *Sandefur Mgmt. Co.*, 21 Ohio App. 3d 160; *Parker*, 17 Ohio App.3d 103; *Yutzy*, 14 Ohio Op. 3d 440.

¹⁷¹ OHIO REV. CODE ANN. § 1923.04 (Anderson 1981).

¹⁷² *Siegler v. Batdorff*, 63 Ohio App. 2d 76, 408 N.E.2d 1383 (1979); *Yutzy v. Heubner*, 14 Ohio Op. 3d 440 (1979).

¹⁷³ *Andrews School v. Brown*, No. 11-040 (Lake County, March 14, 1986)(court held landlord waived 3-day notice where tenant had no notice that rent received and held was not accepted as timely payment of rent); *Associated Estates Corp. v. Bartell*, 24 Ohio App. 3d 6, 492 N.E.2d 841 (1985)(notice to vacate held waived when landlord's bank cashed rent checks, despite landlord's later tender of money back to tenant); *Graham v. Pavarin*, 9 Ohio App. 3d 89, 458 N.E.2d 421 (1983); *Marchioni v. Wilson*, 20 Ohio Misc. 2d 10, 485 N.E.2d 1073 (1984)(judgment granting writ vacated when, after hearing, landlord received and cashed rent check); *Presidential Park Apts. v. Colston*, 17 Ohio Op. 3d 220 (1980).

¹⁷⁴ *Cubbon v. Locker*, 5 Ohio App. 3d 200, 450 N.E.2d 697 (1982).

¹⁷⁵ *National Corp. for Hous. Partnerships v. Chapman*, 18 Ohio App. 3d 104, 481 N.E.2d 654 (1984).

¹⁷⁶ *Compare Cubbon*, 5 Ohio App. 3d 200 (notice to vacate held to be election by landlord to forfeit lease releasing tenant of any future obligations thereunder) *with Briggs v. McSwain*, 31 Ohio App. 3d 85, 508 N.E.2d 1028 (1986)(notice to vacate does not terminate tenant's obligation to pay rent for remainder of term or until new tenant secured).

¹⁷⁷ *Professional Inv. of Am., Inc. v. Ross*, No. 44540 (Cuyahoga County, Dec. 9, 1982); *Caringi v. 2819 Harvard, Inc.*, No. 42834 (Cuyahoga County, Mar. 12, 1981).

¹⁷⁸ *Presidential Park Apt. v. Colston*, 17 Ohio Op. 3d 220, 221 (1980).

claim as well as any counterclaims.¹⁷⁹ At least one court has held a tenant's claims for damages arising from a tenancy to be compulsory counterclaims to a pending forcible entry and detainer action.¹⁸⁰ A landlord might seek a continuance for, among other reasons, time to respond to a tenant's counterclaims. A delay may also be occasioned by a demand by either party for a trial by jury. If a jury demand is made, the action is to proceed as any other civil case.¹⁸¹ Thus, the proceeding will not be summary in nature.

Because of the possibility of such a delay, the law makes provision for protection of the landlord's ability to collect rent that becomes due during the pendency of the action. A tenant seeking a continuance of more than eight days is required to provide a bond to assure payment of rent that might accrue.¹⁸²

Because the bond required is for the purpose of securing the rent payments until the conclusion of the eviction proceedings, it should be sufficient for the tenant to be ordered to pay rent into the court as it becomes due. This sort of "use-and-occupancy bond" serves the purpose of securing the landlord's right to obtain rent for the months prior to a determination on the forcible entry and detainer claim and does not unfairly deny a tenant the time necessary to present his defenses and counterclaims. Requiring a bond in a large amount will in most cases deny the tenant a continuance that most litigants are granted as a matter of course.¹⁸³ Few tenants will have the sort of resources necessary to obtain a surety bond in a large amount. Thus, setting a bond in an amount greatly exceeding a month's rent is, in effect, a procedural ruling made on the basis of the financial resources of the tenant.

Obviously, the legislature intended that the landlord's position should not be permitted to deteriorate during the pendency of an eviction action. It sought to prevent tenants from using the court system to live rent-free by the use of delaying tactics.¹⁸⁴ However, it is also clear that the

¹⁷⁹ *Jemo Assoc., Inc. v. Garman*, 70 Ohio St. 2d 267, 436 N.E.2d 1353 (1985); OHIO REV. CODE ANN. § 1923.061 (Anderson 1981).

¹⁸⁰ *Maduka v. Parries*, 14 Ohio App. 3d 191, 470 N.E.2d 464 (1984).

¹⁸¹ OHIO REV. CODE ANN. § 1923.10 (Anderson 1981).

¹⁸² OHIO REV. CODE ANN. § 1923.08 (Anderson 1981). As long as the tenant gives the required bond, he may be entitled to the continuance. *Seventh Urban, Inc. v. University Circle Property Dev., Inc.*, 67 Ohio St. 2d 19, 30, 423 N.E.2d 1070 (1981): "In order to secure the continuance . . . appellant need only to have given the required bond."

¹⁸³ *See, e.g., Vesta Suites v. Primes*, No. CV-G-1652 (Clev. Hts. Mun. Ct., Nov. 12, 1986). There the court granted a continuance of a little more than a month but directed the defendant-tenant to give bond in the amount of \$2,000. Since the monthly rent was only \$200, the bond was almost ten times the amount necessary to secure payment of rent likely to accrue.

¹⁸⁴ Thus, it is only when the tenant seeks the continuance that the bond is required. *Talbot v. Resler*, 64 Ohio L. Abs. 461, 113 N.E.2d 21 (1952).

legislature intended that tenants be able to assert whatever defenses and counterclaims they might have.¹⁸⁵ One indication that the legislature considered payment of rent into the court as it becomes due to be adequate protection for the landlord is that it provided for just such a procedure in a section of Chapter 1923 that was part of the Act. When the tenant files a counterclaim in an action for possession based on non-payment of rent or in an action for rent when the tenant is still in possession, the court may from time to time order rent to be paid into court.¹⁸⁶ This sort of use-and-occupancy bond should adequately protect the landlord's interest.

Damages are also available to a landlord for breaches of a tenant's duties under the Act.¹⁸⁷ The statutory damages are limited to actual damages incurred as a foreseeable consequence of the breach.

The landlord must introduce competent evidence of actual damages.¹⁸⁸ Opinions of witnesses are not of themselves sufficient to prove actual damages.¹⁸⁹ Thus, when a landlord's evidence is solely his opinion of the cost to relet an apartment or clean it the law does not permit recovery.¹⁹⁰

Another issue regarding proof of damage is whether a landlord must mitigate any loss incurred as a result of a tenant's breach of obligations. The modern rule recognizes that a landlord must mitigate damages.¹⁹¹

The Act provides an additional remedy when the tenant refuses to give

¹⁸⁵ *Jemo Assoc., Inc. v. Garman*, 70 Ohio St. 2d 267, 436 N.E.2d 1353 (1985).

¹⁸⁶ OHIO REV. CODE ANN. § 1923.061 (Anderson 1981). See *supra* text accompanying notes 147-58.

¹⁸⁷ OHIO REV. CODE ANN. § 5321.05(C) (Anderson 1981). If damages are awarded the Court may award attorney fees to the landlord. *Landlord-Tenant*, *supra* note 12, at 909.

¹⁸⁸ *Groves v. Freedom Oil Works Co.*, 60 Ohio App. 376, 21 N.E.2d 599 (1938).

¹⁸⁹ *Cincinnati Traction Co. v. Stephens*, 75 Ohio St. 171, 79 N.E. 235 (1906); *Mentor Lagoons, Inc. v. Geldart*, No. 6-265 (Lake County, Jan. 29, 1979); *Stern v. Taft*, 49 Ohio App. 2d 405, 361 N.E.2d 279 (1976); *Shaker Building Co. v. Fed. Lime & Stone Co.*, 28 Ohio Misc. 246 (1971).

¹⁹⁰ *Mentor Lagoons, Inc. v. Drizigacker*, No. 8-247, slip op. at 4-5 (Lake County, June 18, 1982).

In the instant cause, appellant, in the form of testimony by Albert C. Nozik, who admitted he was in reality plaintiff, did not set forth facts upon which he based his opinions as to the cost of cleaning up and redecorating the subject apartment. He admitted his figures were estimates. As to a broker's commission or re-rental fee, there was no evidence offered that such a fee has in fact been paid or was owed by appellee and, therefore, appellee had not been damaged in the amount of \$208.50 for the re-rental of said apartment. We conclude appellee failed to offer sufficient evidence as to any damages suffered by it for redecorating, cleaning up the apartment and re-rental fees.

¹⁹¹ *Stern*, 49 Ohio App. 2d 405. While courts may recognize the duty to mitigate, the reasonableness of the landlord's efforts at mitigation is a question of fact. See, e.g., *Mentor Lagoons, Inc. v. Geldart*, Case No. 6-265 (Lake County, Jan. 29, 1979), where the court upheld the trial court's determination that a period of two months to clean the apartment and four months to re-let was not an abuse of discretion.

the landlord reasonable access to the premises. Under the Act the landlord may apply to the courts for an injunction ordering the tenant to comply with his statutory duty.¹⁹²

In light of the strong bargaining position of the landlord the remedies available by the Act are sufficient to protect his interest. However, there are two legislative changes which should be enacted. First, the law should codify the requirement that a landlord must mitigate any damages resulting from a tenant's breach. URLTA has a provision which recognizes this principle.¹⁹³

The other change involves the type of bond required of a tenant to obtain a continuance of a forcible entry and detainer action.¹⁹⁴ The potential for setting an unreasonably high bond exists under the present statute. In order to avoid this possibility but still protect the landlord's interest, the Act should be modified to limit the amount of the bond to the amount of rent claimed to be due and owing as of the filing of the action and to require the tenant to deposit rent with the Court in a timely fashion until the completion of the proceedings.

F. Tenant Remedies

The Landlord-Tenant Act provided tenants with a number of remedies that did not exist under common law. First, the Act provided a means to enforce the right to a fit and habitable dwelling place.¹⁹⁵ In addition, the Act provided a means for the tenant to combat retaliatory and self-help actions by landlords.¹⁹⁶ The statute is not the sole source of remedies for tenants, however, as the Supreme Court of Ohio has decided.¹⁹⁷ Causes of action in tort and contract may also be brought by tenants, as well as claims based on other statutes.¹⁹⁸

1. Remedies Under Chapter 5321

a. Remedy for Illegal Entry

As discussed above, Ohio Revised Code section 5321.04 of the Landlord Tenant Act sets forth the obligations of the landlord concerning maintenance and repairs. With one exception, however, that section of the Act

¹⁹² OHIO REV. CODE ANN. § 5321.05(C) (Anderson 1981).

¹⁹³ UNIF. RESIDENTIAL LANDLORD-TENANT ACT, *supra* note 47, § 4.203(C), at 26. That section requires the landlord to make reasonable efforts to relet the premises. Failure to use reasonable efforts results in termination of the lease as of the date the landlord became aware of the tenant's breach.

¹⁹⁴ OHIO REV. CODE ANN. § 1923.081 (Anderson 1981).

¹⁹⁵ OHIO REV. CODE ANN. § 5321.12 (Anderson 1981).

¹⁹⁶ OHIO REV. CODE ANN. §§ 5321.02, 5321.15 (Anderson 1981).

¹⁹⁷ *Shroades v. Rental Homes, Inc.*, 68 Ohio St. 2d 20, 25, 427 N.E.2d 774, 777 (1981).

¹⁹⁸ *Id.*

does not specify the remedies available to the tenant when the landlord fails to fulfill those statutory obligations. For such remedies the tenant must look to other parts of the Act and to common law remedies.

The one exception concerns landlord abuse of the right of entry.¹⁹⁹ One of the obligations of the landlord is to give reasonable notice of the intent to enter and to enter only at reasonable times.²⁰⁰ Except when special circumstances are shown to exist, twenty-four hours is deemed to be reasonable notice.²⁰¹ If the landlord enters the unit without giving sufficient notice or harasses the tenant by making repeated demands for entry that would, in isolation, be lawful, the statute provides that the landlord can be held liable for actual damages and attorney fees.²⁰² The tenant can also obtain an injunction or can terminate the rental agreement.²⁰³

This particular section of the Act, when read in conjunction with the section admonishing tenants not to unreasonably deny access to a landlord entering for a legitimate purpose, rather specifically delineates the rights and obligations of the parties concerning access of the landlord to the apartment. The landlord has no right to enter except for specific purposes, and then only after providing reasonable notice; only in the case of a bona fide emergency can a landlord demand immediate access. Thus, it has been held that a landlord has no right to a passkey.²⁰⁴

What constitutes a "reasonable notice" and "reasonable times" and "unreasonable manner" of entry is, of course, a matter of interpretation.²⁰⁵ So is the question of whether repeated demands for entry have the effect of harassing the tenant.

As opposed to the section of the Act setting forth the tenant's obligations which provides for recovery by the landlord of actual damages for violation of *any* of the tenants' duties, section 5321.04 does not provide for recovery for any violation by the landlord except that regarding entry.

¹⁹⁹ Pursuant to Revised Code section 5321.05(B) the tenant must allow the landlord entry for specific purposes. OHIO REV. CODE ANN. § 5321.05(B) (Anderson 1981).

²⁰⁰ OHIO REV. CODE ANN. § 5321.04(A)(8) (Anderson 1981).

²⁰¹ *Id.*

²⁰² OHIO REV. CODE ANN. § 5321.04(B) (Anderson 1981).

²⁰³ *Id.*

²⁰⁴ *Spencer v. Blackmon*, 22 Ohio Misc. 2d 52, 490 N.E.2d 943 (1985). In this case it was held that since a landlord had no right to have a passkey, the attempt by the landlord to evict the tenant for failing to provide the landlord a passkey constituted retaliation as a matter of law.

²⁰⁵ For instance, can a landlord demand entry during the hours that a tenant normally works? It may depend on the circumstances of the particular request. If the reason for the entry is to allow a plumber in to do necessary repairs, and the plumber only works during these hours, the demand might be reasonable. If, however, the landlord's purpose is to inspect the premises, since in most cases this could be done at a time more convenient to the tenant, an entry made while the tenant is at work may be unreasonable.

The tenant must look elsewhere for a remedy for violations of the landlord's statutory obligations.

b. Rent Depositing

The Act provides a unique avenue for tenants faced with the refusal of a landlord to fulfill statutory obligations. The statutory scheme permits the tenants to use the threat of temporarily withholding rental payments as a means to secure compliance by the landlord with the statutory obligations.²⁰⁶

The rent deposit remedy is available whenever a landlord has failed to fulfill obligations imposed by the Act or by the rental agreement; or, because of the condition of the premises, the tenant reasonably believes the landlord has so failed to fulfill these obligations, or the landlord has been cited for non-compliance with local building, housing, health or safety codes which apply to conditions materially affecting health and safety.²⁰⁷ Obviously, there will be some overlap in the above. For instance, a citation by the local housing inspector would be evidence of a violation of the landlord's statutory duties since compliance with applicable codes is one of the statutory obligations of the landlord²⁰⁸ and would certainly give the tenant reason to believe that a violation has occurred. It should also be stressed that a violation of the rental agreement alone gives the tenant the right to utilize the rent deposit remedy.

If there has been a breach of obligations by the landlord or a tenant reasonably believes that such a breach has occurred, the tenant may give written notice to the landlord of the acts, omissions, or code violations constituting such breach. The notice is to be sent to the person or place where rent is normally paid.²⁰⁹ This notice is waived, however, if the landlord fails to provide the tenant with the name and address of the owner and the owner's agent in writing, either in the rental agreement or, if the rental agreement is oral, in a separate written notice.²¹⁰ Another notice that the landlord may deliver to the tenant would have the effect of excluding the landlord from the application of this section of the Act. If a landlord does not rent more than three dwelling units and gives notice of such fact to the tenant in a written rental agreement or if the rental agreement is oral, in a written notice at the time of the initial occupancy, the tenant may not utilize the remedies of this section.²¹¹ The

²⁰⁶ OHIO REV. CODE ANN. § 5321.07 (Anderson 1981).

²⁰⁷ OHIO REV. CODE ANN. § 5321.07(A) (Anderson 1981).

²⁰⁸ OHIO REV. CODE ANN. § 5321.04(A) (Anderson 1981).

²⁰⁹ OHIO REV. CODE ANN. § 5321.07(A) (Anderson 1981).

²¹⁰ OHIO REV. CODE ANN. § 5321.18(C) (Anderson 1981).

²¹¹ OHIO REV. CODE ANN. § 5321.07(C) (Anderson 1981). Thus, a landlord who owns and resides in one of the units of a four-unit building and rents the other three, would be

remedies are also not available to residents of private college and university dormitories.²¹²

Once the tenant has given notice of the specific violations by the landlord, the landlord has a certain amount of time to attempt to satisfy the tenant. At this point in the process, the parties have the opportunity to work out the disagreement amongst themselves. Thus, the legislative scheme relies first on the private resolution of disputes.²¹³

The landlord can make the requested repairs or can reach an agreement with the tenant about which repairs do or do not need to be done. If the tenant is thereby satisfied or simply does not want to press the matter further, nothing else will occur. No court or other governmental body need be involved.²¹⁴

If, after a reasonable period of time,²¹⁵ the landlord fails to remedy the condition, the tenant has three options: 1) the tenant can deposit the entire amount of the rent due with the clerk of the court; 2) the tenant can apply to the court for an order that the condition be remedied; 3) the tenant can terminate the rental agreement.²¹⁶ As part of the application to the court for an order that the landlord remedy the condition, the tenant may also ask for a reduction in rent until the repairs are made and/or an order that the monies already deposited be used by the tenant to remedy the condition.²¹⁷

To exercise any of the above remedies the tenant must be current in rental payments.²¹⁸ Thus, in most situations, a tenant will have to make a rental payment at the same time as or after giving the notice of breach of obligations to the landlord.

exempted if he or she did not own other rental property and gave notice of such fact to the tenant.

²¹² *Id.*

²¹³ *Chernin v. Welchans*, 641 F. Supp. 1349, 1356 (N.D. Ohio 1986), *aff'd* _____ F.2d _____ (6th Cir. 1988).

²¹⁴ If, however, the reason for the tenant's notice was a citation by a local housing, building or health department, further proceedings may occur along those lines in the enforcement of the Code. Such proceedings are criminal, or at least quasi-criminal, in nature and would not involve the tenant as a party.

²¹⁵ OHIO REV. CODE ANN. § 5321.07(B)(Anderson 1981). A reasonable period of time will vary according to the severity of the conditions and the amount of time necessary to cure the defect. It may be less than thirty days. *Katzin v. Murad*, No. 46553 (Cuyahoga County, Jan. 5, 1984). For instance, if because of a malfunctioning furnace or a failure by the landlord to pay utility bills, a tenant is without heat during the winter, a more serious situation is present and a few days may be deemed insufficient time for the furnace to be repaired. Unfortunately, this flexibility regarding the notice period is often overlooked and tenants are advised that they cannot deposit rent with the court until at least thirty days after giving the required notice.

²¹⁶ OHIO REV. CODE ANN. § 5321.07(B)(3) (Anderson 1981).

²¹⁷ OHIO REV. CODE ANN. § 5321.07(B)(2) (Anderson 1981).

²¹⁸ *Smith v. Wright*, 65 Ohio App. 2d 101, 105, 416 N.E.2d 655, 659 (1979).

The remedy that is practical for most tenants at this stage is the deposit of rent. Application for a court order for repairs is simply not going to be undertaken by most tenants who, at least at this stage of the process, are without representation. Terminating the rental agreement is a rather drastic measure for most tenants who would not relish the prospect of moving given the problems of finding another suitable dwelling unit, moving expenses and a security deposit for a new unit, and is not likely to be utilized unless the conditions are bad enough to force the tenant out.²¹⁹

If the tenant chooses to deposit rent with the proper court, the clerk of the court has certain duties according to the Act: give written notice to the landlord and to the landlord's agent, if any;²²⁰ place the rent money in an escrow account; keep a separate docket account for each deposit. The statute does *not* direct the clerk to in any way ascertain whether the rent deposit is proper. Nevertheless, some courts require proof that the tenant is current in rental payments and has given proper notice to the landlord.²²¹ Other courts have required the tenant to show that proper grounds exist for the rent deposit at a hearing prior to acceptance of the deposit.²²² While the requirement of a pre-rent deposit hearing has been successfully challenged,²²³ some courts still require the tenant to obtain permission to deposit rent.²²⁴ Such procedural hurdles are not required by

²¹⁹ Such a situation would constitute a constructive eviction. *Keener v. Ewert*, 65 Ohio App. 2d 17, 425 N.E.2d 914 (1979).

²²⁰ This notice requirement is waived by the landlord's failure to provide written notice of the name and address of the owner and owner's agent, if any. OHIO REV. CODE ANN. § 5321.18(C) (Anderson 1981).

²²¹ See, e.g., *Chernin v. Welchans*, 641 F. Supp. 1349, 1355 (N.D. Ohio 1986), *aff'd* _____ F.2d _____ (6th Cir. 1988). The Cleveland Heights Municipal Court requires a tenant who wishes to rent deposit to sign an affidavit swearing that the preconditions have been met. *Id.*

²²² *Morris Inv. v. Kettman*, No. 80-CV-10735 (Franklin County, Mar. 20, 1981); *Rallie v. Pastor*, No. M-76-CVG-46763 (Franklin County, Apr. 11, 1977).

²²³ *State ex rel. Taynor v. Hysell*, 19 Ohio App. 3d 120, 483 N.E.2d 156 (1984). In a mandamus action, the court of appeals directed the clerk of the Franklin County Municipal Court to follow the statute and accept rent deposits without a prior hearing.

²²⁴ For example, in the Cleveland Municipal Court, the tenant who presents rent for deposit at the clerk's office is directed to the Housing Court Specialist for approval. Only after meeting with the specialist and obtaining written permission can the tenant have her rent accepted by the clerk's office. The tenant is then given a date, within fourteen days, for a hearing to determine if the procedural prerequisites for the deposit have been met. At the hearing, the tenant will be required to verify that rent was current and that notice was provided. RULES OF THE HOUS. DIV. OF THE CLEV. MUN. COURT 2.601(A). This hearing is held by the Housing Court Specialist, who makes the determination as to whether the deposit is proper. Keating, *Judicial Approaches to Urban Housing Problems: A Study of the Cleveland Housing Court*, 19 URB. LAW. 345 (1987)[hereinafter Keating]. This decision is not reviewed by any judicial officer. If the specialist decides the deposit was improper, the rent is released

the statute,²²⁵ nor is a hearing prior to a rent deposit necessary to satisfy due process requirements.²²⁶

These court-created procedures have the effect of adding additional steps to the rent deposit procedure and may result in discouraging tenants from availing themselves of this remedy.²²⁷ By involving the court at an earlier time than is contemplated by the statute, the legislative effort to "fashion a process for dealing with landlord-tenant disputes which minimizes governmental participation"²²⁸ is partially undermined. As the statute is designed, the parties may still work out the dispute amongst themselves after rent has been deposited. If the problem can be resolved prior to any court hearing, the landlord can obtain the release of the rent with the tenant's consent.²²⁹ Thus, at this stage in the statutory scheme governmental participation is still minimal.²³⁰

Only if the parties are unable to resolve the dispute themselves should the court become involved in more than an escrow agent capacity. The landlord may file a complaint with the municipal court for the release of the rent on the grounds that: 1) the conditions complained of have been remedied; 2) the tenant was not current in rental payments or did not give the required notice prior to depositing rent; 3) there was no violation of any obligation by the landlord.²³¹ The tenant is to be named as a defendant to any action filed by the landlord²³² and, *as in any other civil case*, has an opportunity to file an answer and counterclaims.²³³ Thus, no hearing on the landlord's application for the release of rent should be had until the tenant has been served with process and has had the opportunity to file a responsive pleading.

The hearing is to be held within sixty days of the filing of the complaint.²³⁴ Although the statute provides that for good cause shown, the hearing may be continued beyond the sixty-day period, a recent federal court decision holds that, while the rest of the rent deposit

to the tenant. Star & Keating, An Evaluation of the Cleveland Housing Court (1986)(unpublished report)[hereinafter Star & Keating].

²²⁵ State ex rel. Taynor v. Hysell, 19 Ohio App. 3d 120, 483 N.E.2d 156 (1984).

²²⁶ Chernin v. Welchans, 641 F. Supp. 1349, 1355 (N.D. Ohio 1986), *aff'd* _____ F.2d _____ (6th Cir. 1988).

²²⁷ See Star & Keating, *supra* note 224, at 76-79.

²²⁸ Chernin, 641 F. Supp. at 1356.

²²⁹ OHIO REV. CODE ANN. § 5321.09(A)(1) (Anderson 1981).

²³⁰ Chernin, 641 F. Supp. at 1356.

²³¹ OHIO REV. CODE ANN. § 5321.09(A) (Anderson 1981).

²³² The statute directs that the tenant is to be named *as a party* to such actions. OHIO REV. CODE ANN. § 5321.09(B) (Anderson 1981)(emphasis added). Perhaps because this language does not specify that the tenant is to be named as the defendant in such actions, some courts allow the tenant to be named as a plaintiff. However, since any such action is filed by the landlord, the landlord is clearly the plaintiff.

²³³ OHIO REV. CODE ANN. § 5321.09(B) (Anderson 1981).

²³⁴ *Id.*

provisions satisfy the due process requirements, the provision allowing for continuance of the hearing must be struck since not holding a hearing until after that time would constitute an unreasonable delay and a denial of due process.²³⁵

The statute further provides the landlord the opportunity for an expedited hearing on a motion for a partial release of rent.²³⁶ If the landlord needs a portion of the rent to make payments for a mortgage, insurance, taxes, utilities, repairs and other customary costs during the pendency of an action filed pursuant to section 5321.09,²³⁷ he may apply for a partial release of the rent to cover such expenses. Since the statute provides that certain factors are to be considered by the court in deciding whether to allow a partial release, it follows that the partial release should not automatically be granted. The tenant is entitled to notice of the hearing on such a motion. The hearing should not be an *ex parte* proceeding²³⁸ or be granted as a matter of course. The landlord should have to make a particularized showing of the need for the partial release.²³⁹ An order for partial release is not a final appealable order, although a series of partial releases resulting in the release of the entire amount deposited might conceivably constitute a final appealable order.²⁴⁰

The statute provides for protection for landlords from bad faith rent deposits.²⁴¹ If, upon the filing of an action for release of rent and a subsequent hearing, the court finds after a hearing that the condition complained of by the tenant was the fault of the tenant or that the tenant intentionally acted in bad faith in depositing rent, the landlord may recover actual damages caused by the rent deposit.²⁴² In addition, if the finding is that the tenant intentionally acted in bad faith, the landlord may recover attorney fees.²⁴³

While the intentional bad faith showing is a high standard that will rarely be met, it should be noted that, once again, the statute inequitably provides for the recovery of attorney fees only by the landlord. A tenant

²³⁵ Chernin v. Welchans, 641 F. Supp. 1349, 1357 (N.D. Ohio 1986), *aff'd* _____ F.2d _____ (6th Cir. 1988).

²³⁶ OHIO REV. CODE ANN. § 5321.10 (Anderson 1981).

²³⁷ The pendency of an action under section 5321.09 is a prerequisite to the partial release of rent under section 5321.10. Blum v. Pennington, No. 42422 (Cuyahoga County, Feb. 5, 1981)(citing OHIO REV. CODE ANN. §§ 5321.09-.10 (Anderson 1981)).

²³⁸ *Id.*

²³⁹ Gill v. Zipkin, No. 78-LLT88 (Clev. Hts. Mun. Ct., Oct. 31, 1978); *Landlord-Tenant*, *supra* note 6, at 916.

²⁴⁰ Pratt v. Dykema, No. 44624 (Cuyahoga County, Dec. 31, 1981).

²⁴¹ Chernin v. Welchans, 641 F. Supp. 1349, 1355 (N.D. Ohio 1986), *aff'd* _____ F.2d _____ (6th Cir. 1988).

²⁴² OHIO REV. CODE ANN. § 5321.09(D) (Anderson 1981).

²⁴³ *Id.*

who deposits rent in an attempt to have conditions remedied and is then faced with a complaint filed by the landlord alleging a bad faith deposit and seeking attorneys fees, must either defend against the complaint pro se or hire an attorney at the tenant's own expense. The tenant has no hope of being reimbursed for attorney fees unless another statutory violation is proven, such as retaliation.²⁴⁴ The prospect of fighting such an action can act as a severe deterrent to a tenant who has deposited rent, even if it is clear that the deposit was in good faith. To alleviate this deterrence and to make the rent deposit provision more equitable, provision should be made for attorney's fees to be recovered by a tenant who is successful in defeating an action for release of rent.

Aside from the deficiency regarding attorney fees, on its face the rent deposit section of the statute seems to be a well-constructed remedy which can be utilized by tenants to pressure landlords to maintain rental units in accordance with state and local standards. Ideally, the process should encourage the parties to work out their differences with minimal involvement of the court.²⁴⁵

However, it does not seem that the availability and use of the remedy is achieving the desired results.²⁴⁶ One cause for this lack of success is that the application of the statutory scheme by the courts has undercut the effectiveness of the remedy. The obstacles encountered by tenants attempting to deposit rent may discourage some tenants from depositing.²⁴⁷ Such obstacles, not included in the statutory scheme, may give tenants the impression that the court is less than enthusiastic about a tenant's exercise of this remedy. Also possibly discouraging to tenants is the apparent ease by which landlords can secure a release of rents in many cases.²⁴⁸ Finally, there is the treatment of motions for rent abatement and counterclaims for the reduced value of the premises raised by tenants in rent deposit cases. Such motions and claims are rarely successful.²⁴⁹ This result may stem from the reluctance of some courts to recognize the contractual nature of the rental agreement.²⁵⁰ A tenant whose rent is not reduced, even prospectively while waiting for repairs to

²⁴⁴ OHIO REV. CODE ANN. § 5321.02 (Anderson 1981).

²⁴⁵ *Chernin*, 641 F. Supp. at 1356.

²⁴⁶ Keating, *supra* note 224, at 350.

²⁴⁷ See *supra* notes 217-23 and accompanying text.

²⁴⁸ For instance, in *Pratt v. Dykema*, No. 44624 (Cuyahoga County, Dec. 31, 1981), the tenant complained on appeal that the landlord had obtained a partial release of the rent despite failing to state any of the statutory reasons for release of the rent and that the tenant did not have sufficient notice of the hearing. The Court of Appeals dismissed the appeal holding that the partial release was not a final appealable order.

²⁴⁹ For example, a review of the 108 rent deposits in the Housing Division of the Cleveland Municipal Court in 1984 shows that in only one case was rent released to a tenant to make repairs. *Star & Keating*, *supra* note 224, at 74.

²⁵⁰ See cases cited *infra* note 265.

be made, is more likely to move than to continue to pay for a sub-standard dwelling. Thus, the landlord who can then obtain a release of the rent escrow has little incentive to make the repairs.

c. Remedy for Retaliation

The prohibition against retaliation is discussed elsewhere in this Article.²⁵¹ For our purposes here, we need only stress that retaliation may be asserted as either a defense or a counterclaim to an eviction action, or both.²⁵² Thus, if the tenant is involved in protected activity such as complaining to the landlord about the conditions of the premises, and the landlord brings or threatens to bring an eviction action against the tenant, the tenant may assert the landlord's retaliatory motive as a defense to the eviction. The tenant may also base a claim for damages on the retaliation.

Once again, while the statute on its face seems to provide adequate protection for tenants, due to its application by the courts it falls somewhat short.²⁵³ Because actual damages are often difficult to prove and because attorney fees are only recoverable upon proof of actual damages, the statute loses much of its deterrent effect. In order to strengthen this section, it needs to be amended to provide for statutory damages.²⁵⁴

d. Remedies for Landlord Self-Help

In the preceding discussion about the Act's prohibition of self-help evictions and lockouts, we argued that the statute would seem to permit recovery of punitive damages both because of the "all damages" languages of section 5321.15 and because these damages should be considered tort damages.²⁵⁵ For the same reasons, tenants should be able to recover tort-style damages for mental anguish, emotional distress, etc. suffered as a result of a violation of section 5321.15.

Once again, while various theories for recovery can be put forth, these types of damages are often difficult to prove and the result may be that the tenant is without a practical remedy. Again, the statute would be stronger with a statutory damages and attorneys fees provision.²⁵⁶

²⁵¹ See *supra* notes 108-24 and accompanying text.

²⁵² *Smith v. Wright*, 65 Ohio App. 2d 101, 106, 416 N.E.2d 655 (1979); OHIO REV. CODE ANN. § 5321.02(B)(Anderson 1981).

²⁵³ See *supra* notes 120-25 and accompanying text.

²⁵⁴ The retaliation provisions of both the MODEL RESIDENTIAL LANDLORD-TENANT CODE, *supra* note 46, § 2-407, and the UNIF. RESIDENTIAL LANDLORD AND TENANT ACT, *supra* note 47, § 5-101 provide for statutory damages of three months rent or three times the actual damages suffered by the tenant, whichever is greater.

²⁵⁵ See *supra* text accompanying notes 90-98.

²⁵⁶ See MODEL RESIDENTIAL LANDLORD-TENANT CODE, *supra* note 46, § 2-408 and UNIF. RESIDEN-

e. Remedies for Illegal Lease Terms

The Act provides that certain types of lease terms will not be enforced. As discussed below, these include the specific terms listed in section 5321.13 and terms that are found unconscionable pursuant to section 5321.14.²⁵⁷ However, these two sections do not provide for any remedy except that the offending provisions shall not be enforced. No damages or attorney fees are provided. While the inclusion of such prohibited provisions may be a violation of the Ohio Consumer Sales Practices Act, as discussed elsewhere in this Article, it would be preferable to directly provide in the Act for statutory damages for the inclusion of prohibited or unconscionable lease terms.²⁵⁸

2. Common Law Remedies

A tenant is not limited to the remedies specifically outlined in the Act. As the Ohio Supreme Court has definitively stated, the remedies provided in the Act are not exclusive; rather, they are cumulative and were meant to supplement other remedies available to tenants.²⁵⁹ The Act specifically provides that either party to the rental agreement may hold the other liable for the breach of *any* duty imposed by the law.²⁶⁰ Not only the duties imposed by the Landlord-Tenant Act are covered; liability may also attach for the breach of duties imposed by other statutes, the contract between the parties or common law duties.

a. Remedies for Breach of Contract

Prior to the Act, some Ohio courts had recognized the contractual nature of the landlord-tenant relationship.²⁶¹ For instance, one decision, recognized as a forerunner to the statute,²⁶² interpreted the lease as a contract and even went so far as to incorporate local building, housing and health codes into the agreement.²⁶³

TIAL LANDLORD AND TENANT ACT, *supra* note 47, § 4-107, both of which provide for statutory damages of three months' rent or three times the actual damages suffered.

²⁵⁷ See *infra* text accompanying notes 314-24.

²⁵⁸ Statutory damages for inclusion of prohibited provisions in rental agreements are provided in the UNIF. RESIDENTIAL LANDLORD AND TENANT ACT, *supra* note 47, § 1-403.

²⁵⁹ *Shroades v. Rental Homes, Inc.*, 68 Ohio St. 2d 20, 25, 427 N.E.2d 774, 777 (1981).

²⁶⁰ "In any action under Chapter 5321 of the Revised Code, any party may recover damages for the breach of contract or the breach of any duty that is imposed by law." OHIO REV. CODE ANN. § 5321.12 (Anderson 1981).

²⁶¹ See *Lauch v. Monning*, 15 Ohio App. 2d 112, 239 N.E.2d 675 (1968), where the court determined that, since the eviction action was based on a contract, a municipal court had jurisdiction to entertain an equitable defense in an eviction action, *i.e.*, that the course of dealing in accepting late rental payments waived the right to claim forfeiture.

²⁶² *Glyco v. Schultz*, 35 Ohio Misc. 25, 289 N.E.2d 919 (1972).

²⁶³ *Id.*

Some post-Act decisions have also recognized the contractual nature of the landlord-tenant relationship and have entertained contractual claims.²⁶⁴ Since section 5321.12 itself states that damages may be recovered by any party for the breach of contract, such claims would seem to be specifically authorized by the statute. Yet, other decisions have inexplicably failed to recognize claims by tenants for breach of contract.²⁶⁵ In light of *Shroades v. Rental Homes, Inc.*,²⁶⁶ these decisions no longer carry any weight.

While *Shroades* concerned only a tort claim, its reasoning implicitly applies to contractual claims as well. In *Shroades*, the court determined that the remedies in the Act are not exclusive.²⁶⁷ Therefore, a tenant may look outside the remedies provided in Chapter 5321 and can rely on traditional theories to remedy a breach of a lease agreement.

The recent decision of the Ohio Supreme Court in *Smith v. Padgett*,²⁶⁸ settled the question of how the tenant's damages for breach of contract are to be measured. There the court adopted the "diminution-in-value" rule as applied by earlier Ohio courts.²⁶⁹ According to this rule, "the measure of damages is the difference between the rental value of the premises in their unrepaired condition and what the rental value would have been had the repairs been made."²⁷⁰

²⁶⁴ See, e.g., *Lobo v. Hoelscher*, 44 Ohio Misc. 46, 48 (1975), one of the first reported cases interpreting the Act, holding that the Act had "changed the tenant-landlord relationship from a simple conveyance of an interest in real estate into a contractual relationship."

²⁶⁵ See *Laster v. Bowman*, 52 Ohio App. 2d 379, 370 N.E.2d 767 (1977), where the court refused to recognize certain claims by the tenant based on breach of contract. In its decision the court discounted *Glyco* on the ground that it was decided prior to the Act. *Id.* at 392, 370 N.E.2d at 775. (Yet the same Court of Appeals, two years later in *The Pagoda Co.* pointed to *Glyco* as a forerunner of the Act). Again in *Krutsch v. Republic Steel Corp.*, No. 43062 (Cuyahoga County, Oct. 1, 1981) the same Court of Appeals held that the Act does not authorize a contract action for damages to personal property caused by a breach of the landlord's obligations.

²⁶⁶ 68 Ohio St. 2d 20, 25, 427 N.E.2d 774, 779 (1981).

²⁶⁷ Thus, *Laster v. Bowman*, 52 Ohio App. 2d 379, 370 N.E.2d 767, (1977), which held that the Act provides the *exclusive* remedies for the landlord's breach, is directly contradicted by *Shroades*. Furthermore, *Krutsch v. Republic Steel*, No. 43062 (Cuyahoga County, Oct. 1, 1981), relied heavily on *Thrash v. Hill*, 63 Ohio St. 2d 178, 407 N.E.2d 495 (1980), the case that was directly overruled by *Shroades*, 68 Ohio St. 2d at 26, 427 N.E.2d at 778.

²⁶⁸ 32 Ohio St. 3d 344, 513 N.E.2d 737 (1987).

²⁶⁹ *Holder v. Farmakis*, 66 Ohio L. Abs. 279, 282, 117 N.E.2d 491, 494 (1951); *Cochran v. Widra*, 35 Ohio L. Abs. 608, 611, 41 N.E.2d 875, 877 (1931).

²⁷⁰ 32 Ohio St. 3d at 347. In adopting the "diminution-in-value" rule, the Court rejected an alternative proposed by The Cleveland Tenants Organization as *amicus curiae*. That organization proposed the "reduction-in-use" measure of damages, in which damages would be based upon the percentage by which the value of the premises was diminished by the landlord's failure to repair. Such an approach has been utilized in other jurisdictions. *E.g.*, *Pugh v. Holmes*, 486 Pa. 272, 405 A.2d 897 (1979); *Green v. Superior Court of San Francisco*, 10 Cal. 3d 616, 111 Cal. Rptr. 704, 517 P.2d 1168 (1974). The Court did indicate,

The court also gave some guidance as to how the two values being weighed—the value of the premises had repairs been made and the value of the premises in the unrepaired condition—can be calculated. First, the court held that the amount of rent agreed upon by the parties is presumptive, though not conclusive, evidence of the value of the premises as repaired.²⁷¹ Second, the court held that a tenant is competent to give opinion testimony as to the rental value of the leased premises even absent a showing of expertise in real estate and rental value.²⁷² Now both owners and lessees of real property are competent to give opinion testimony as to the rental value of the property,²⁷³ and it is not necessary to obtain expert testimony. The weight to be accorded the non-expert testimony of an owner or lessee is a matter to be determined by the trier of fact.²⁷⁴

b. Tort Remedies

In *Thrash v. Hill*,²⁷⁵ the Ohio Supreme Court applied a very restrictive view to the Act, holding that the General Assembly, despite its enactment of comprehensive legislation governing the landlord-tenant relationship, did not abrogate the common law rule that landlords could not be held liable in tort for injuries to tenants sustained as a result of the landlord's failure to make repairs to the premises.²⁷⁶ Despite the fact that the Act clearly imposes a duty upon landlords to keep residential premises in good repair, the *Thrash* court held that a tenant could not hold a landlord liable in tort to remedy such a breach since the Act did not specifically alter the common law tort immunities of landlords. Instead, the Court indicated that a tenant must resort to the remedies created by the Act.²⁷⁷

This restrictive interpretation of the statute did not last long. The court was soon presented with another chance to interpret the Act in *Shroades v. Rental Homes, Inc.*,²⁷⁸ a case that had been decided at the appellate level prior to the litigants' awareness of the decision in *Thrash* and with

however, that such a measure of damages could be appropriate where a tenant shows that the premises are in whole or in part rendered uninhabitable. 32 Ohio St. 3d at 346.

²⁷¹ 32 Ohio St. 3d at 347.

²⁷² *Id.* at 348.

²⁷³ Owners of real property had long been recognized as competent to give such testimony. *See, e.g.*, *Bishop v. East Ohio Gas Co.*, 143 Ohio St. 541, 56 N.E.2d 164 (1944).

²⁷⁴ *Smith v. Padgett*, 32 Ohio St. 3d 344, 348, 513 N.E.2d 737 (1987).

²⁷⁵ 63 Ohio St. 2d 178, 407 N.E.2d 495 (1980).

²⁷⁶ *Id.* at 180-81, 407 N.E.2d at 498.

²⁷⁷ *Id.* The Court quoted *Laster v. Bowman*, 52 Ohio App. 2d 379, 382, 370 N.E.2d 767, 770 (1977) which had held that the Act creates "the exclusive remedies now available to landlords and tenants as to the rights and obligations contained in the Act." (emphasis in original).

²⁷⁸ 68 Ohio St. 2d 20, 427 N.E.2d 774 (1981).

the opposite result. The second time, the court correctly determined that the legislature, in passing the Act, had meant to expand the rights of tenants. The court held that not only were tort remedies available to tenants pursuant to section 5321.12, but that the legislature had negated previous common law tort immunities for landlords.²⁷⁹ Indeed, a failure by a landlord to fulfill the duties imposed by the Act was held to constitute negligence *per se*.

In light of the pronouncement in *Shroades* as to the availability of tort remedies, it would seem that common law tort principles can be applied along with other tort theories. For instance, in a companion case to *Shroades* the court held that a landlord can be held liable for the negligence of a contractor hired by the landlord if such negligence causes injury to the guest of a tenant.²⁸⁰ Other tort claims that could arise from the landlord-tenant relationship include conversion, trespass,²⁸¹ and malicious prosecution.²⁸² However, as of yet, a landlord will not be held liable for the criminal act of a third person.²⁸³ Nor will a landlord be held liable for failure to remove ice and snow from common areas.²⁸⁴

c. Other Statutory Remedies

Since section 5321.12 provides that either party may raise claims based on the breach of *any* obligation under the law, a tenant could logically combine a claim made pursuant to any of the provisions of Chapter 5321 with any *other* statutory claim the tenant might have. A particular statute that could be implicated in many landlord-tenant matters is the Ohio Consumer Sales Practices Act (CSPA).²⁸⁵

The primary question to be answered regarding a claim pursuant to the CSPA is whether the rental of the property constitutes a consumer transaction. Although this question is one of first impression in Ohio, a number of courts in other jurisdictions have held that the leasing of real property is a consumer transaction subjecting a landlord to possible sanctions under consumer protection laws.

The leading case in this area is *Commonwealth v. Monumental Properties, Inc.*,²⁸⁶ in which the Supreme Court of Pennsylvania held that "the leasing of residences falls within the ambit of the Consumer Protection

²⁷⁹ *Id.* at 25, 427 N.E.2d at 777-78.

²⁸⁰ *Strayer v. Lindeman*, 68 Ohio St. 2d 32, 427 N.E.2d 781 (1981).

²⁸¹ *Baker v. Loudermilk*, No. 76 AP 770 (Franklin County, Mar. 29, 1977).

²⁸² *Reenan v. Klein*, 3 Ohio App. 3d 142, 444 N.E.2d 63 (1981).

²⁸³ *Thomas v. Hart Realty, Inc.*, 17 Ohio App. 3d 83, 477 N.E.2d 668 (1984); *See Moore, Landlord's Liability for Injuries Criminally Inflicted by Third Person*, 17 AKRON L. REV. 395 (1984).

²⁸⁴ *LaCourse v. Fleitz*, 28 Ohio St. 3d 209, 503 N.E.2d 159 (1986).

²⁸⁵ OHIO REV. CODE ANN. §§ 1345.01 to 1345.77 (Anderson 1981).

²⁸⁶ 459 Pa. 450, 329 A.2d 812 (1974).

Law.” The court based its holding on several theories: case law involving the modern interpretation of residential leases; traditional common law; legislative intent in solving social problems; and the consequences of holding to the contrary. In following the modern view of the apartment dweller the court held that the leasing of residential property involves the landlord exchanging for periodic payments of money (rent) a bundle of goods and services, rights and obligations. Therefore, held the court, “the modern apartment dweller is a consumer of housing services.”²⁸⁷

The analysis of the court in *Monumental Properties* is particularly instructive when looking at the CSPA. First, the court looked closely at the legislative history of the Pennsylvania Unfair Trade Practices and Consumer Protection Law²⁸⁸ and determined that it was to be liberally construed to effect its purpose of protecting consumers. Similarly, the Ohio Act is intended to protect Ohio consumers from deceptive acts and is a remedial statute.²⁸⁹ As a remedial statute, it should be construed liberally in favor of the persons it is designed to protect, i.e., consumers.²⁹⁰

Also deserving of special attention is the reliance of the Pennsylvania Supreme Court on the Federal Trade Commission Act (FTCA) and the interpretation thereof.²⁹¹ The court analyzed the interpretation of the FTCA in both judicial and administrative proceedings and held that such precedent counseled for the inclusion of the leasing of housing under the protection of the Consumer Protection Law. That analysis is especially instructive in interpreting the Ohio CSPA because it explicitly directs the court to also look to FTCA precedent.²⁹²

A third part of the *Monumental Properties* analysis is the court’s functional view of the economic reality of the modern housing market. This analysis led the court to view an apartment dweller as a consumer of a package of goods and services who is afforded the protection of the consumer laws. In making this determination, the court looked at precedents in other states and cited to an Ohio Supreme Court case,

²⁸⁷ *Id.* at 459, 329 A.2d at 820.

²⁸⁸ PA. STAT. ANN. tit. 73, § 201-1 (Purdon Supp. 1987).

²⁸⁹ *Brown v. Market Dev., Inc.*, 41 Ohio Misc. 57, 322 N.E.2d 367 (1974).

²⁹⁰ “Remedial laws and all proceedings under them shall be liberally construed in order to promote their object and assist the parties in obtaining justice. The rule of the common law that statutes in derogation of the common law must be strictly construed has no application to remedial laws. . . .” OHIO REV. CODE ANN. § 1.11 (Anderson 1981).

²⁹¹ *Commonwealth v. Monumental Props., Inc.*, 459 Pa. 450, 329 A.2d 812, 818-19 (1974).

²⁹² (C) In construing division (A) of this section, the court shall give due consideration and great weight to federal trade commission orders, trade regulation rules and guides, and the federal courts’ interpretations of subsection 45(a)(1) of the “Federal Trade Commission Act,” 38 Stat. 717 (1914), 15 U.S.C. 41, as amended.

OHIO REV. CODE ANN. § 1345.02(C) (Anderson 1981).

Brenner v. Spiegle,²⁹³ where it was held that a lease is really a sale of an interest in property. Thus, there is precedent in Ohio for the functional view of the tenant as a housing consumer.

Other jurisdictions have similarly applied consumer laws to landlord-tenant cases. Of special interest for Ohio courts is the interpretation of the Illinois Consumer Protection Statute.²⁹⁴ In *People v. Hedrich*²⁹⁵ the court liberally construed the statute and, also relying on FTC precedent, held that the rental of real estate, specifically lots in mobile home parks, was a consumer transaction. In *Carter v. Mueller*,²⁹⁶ the court held that the Illinois Consumer and Deceptive Business Practices Act applied to the lease of residential apartments and that the lessee was a "consumer" under the Act.²⁹⁷

One reported decision in which a court has specifically determined that a state's consumer protection legislation does not cover a landlord-tenant transaction is *Chelsea Plaza Homes, Inc. v. Moore*.²⁹⁸ The rationale for the Kansas court's decision, however, does not apply to the Ohio CSPA. The court there did not hold that a landlord-tenant transaction is not a consumer transaction. Instead, the court based its decision on its interpretation of the Kansas Residential Landlord and Tenant Act which, held the court, "controls and preempts the field."²⁹⁹

Examination of Ohio's Landlord-Tenant Act and the Ohio Supreme Court's interpretation thereof reveals that the holding in *Chelsea Plaza* is totally inapplicable in interpreting the Ohio statute. The Ohio Landlord-Tenant Act specifically provides that landlords and tenants are not foreclosed from other causes of action.³⁰⁰ Further, following *Shroades v. Rental Homes, Inc.*,³⁰¹ the remedies provided by Chapter 5321 are not

²⁹³ 116 Ohio St. 631, 632, 157 N.E. 491, 491 (1927).

²⁹⁴ ILL. ANN. STAT. ch. 121, paras. 261-272 (Smith-Hurd Supp. 1987). The Illinois statute, it should be noted, is listed as "Comparative Legislation" to the Ohio Consumer Sales Practices Act. OHIO REV. CODE ANN. ch. 1345 (Anderson 1981).

²⁹⁵ *People ex rel. Fahner v. Hedrich*, 108 Ill. App. 3d 83, 90, 438 N.E.2d 924, 928-29 (1982)(park owner's violations of Mobile Home Parks Act governing relationship between park and tenants can also be prosecuted by Attorney General as acts of unfair competition).

²⁹⁶ 120 Ill. App. 3d 314, 457 N.E.2d 1335 (1983).

²⁹⁷ See *Conaway v. Prestia*, 191 Conn. 484, 464 A.2d 847 (1983)(landlord's violations of landlord-tenant statute constitute violations of Unfair Trade Practices Act); *Goes v. Feldman*, 8 Mass. App. 84, 391 N.E.2d 943 (1979)(claims for violation of Massachusetts Consumer Protection Act stemming from landlord-tenant relationship may be within jurisdiction of Boston Housing Court); *Love v. Pressley*, 34 N.C. App. 503, 239 S.E.2d 574 (1977), cert. denied, 294 N.C. 441, 241 S.E.2d 843 (1978) (landlord who owns 76 units of rental housing falls within the scope of consumer protection statutes); Cf. *People v. McKale*, 25 Cal. 3d 626, 602 P.2d 731, 159 Cal. Rptr. 811 (1979).

²⁹⁸ 226 Kan. 430, 601 P.2d 1100 (1979).

²⁹⁹ *Id.* at 433, 601 P.2d at 1104.

³⁰⁰ OHIO REV. CODE ANN. § 5321.12 (Anderson 1981).

³⁰¹ 68 Ohio St. 2d 20, 25, 427 N.E.2d 774 (1981).

exclusive. Therefore, unlike those in Kansas, tenants and landlords in Ohio may utilize remedies other than those found in the Landlord-Tenant Act, including remedies under the Ohio Consumer Sales Practices Act.

Another case holding a state's consumer protection legislation inapplicable to a landlord-tenant relationship is *State v. Schwab*.³⁰² There, the court determined, from the legislative histories of both the state's Consumer Protection Act³⁰³ and Residential Landlord-Tenant Act,³⁰⁴ that residential landlord-tenant disputes are not covered by the Consumer Protection Act. The Court specifically relied on the fact that a proposed amendment to the Landlord-Tenant Act which would have provided that a violation of the Landlord-Tenant Act should be construed as also a violation of the Consumer Protection Act had been rejected.³⁰⁵ Again, the particular basis for the decision in that case makes it inapplicable to Ohio. Because no such legislative history exists to justify a restrictive interpretation of Ohio's relevant statutes, the CSPA and the Landlord-Tenant Act should be viewed as complementary to each other.

Looking at the definitional section of the CSPA itself also leads to the conclusion that leases of apartments are consumer transactions covered by the CSPA.³⁰⁶

The definition of "consumer transaction" includes the lease of goods, services, and intangibles and would thus include the lease of the whole range of goods and services purchased by the modern apartment dweller. The definition does exclude certain transactions but, significantly, *does not exclude* leases or rental of real property. According to ordinary principles of statutory construction, transactions not specifically excluded would presumably be included in the coverage of the statute. If the rental of residential property is considered a consumer transaction, both rental practices and rental agreements themselves would be subject to the provisions of the CSPA prohibiting unfair and deceptive practices and tenant-consumers could avail themselves of its remedies.³⁰⁷

³⁰² 103 Wash. 2d 542, 693 P.2d 108 (1985).

³⁰³ WASH. REV. CODE § 19.86 (1978).

³⁰⁴ WASH. REV. CODE § 59.18 (Supp. 1987).

³⁰⁵ *Schwab*, 103 Wash. 2d 542, 693 P.2d at 113.

³⁰⁶ As used in sections 1345.01 to 1345.13 of the Revised Code:

(A) "Consumer transaction" means a sale, lease, assignment, award by chance, or other transfer of an item of goods, a service, franchise, or an intangible, except those transactions between persons, defined in sections 4905.03 and 5725.01 of the Revised Code, and their customers, those between attorneys, physicians, or dentists and their clients or patients, or those between veterinarians and their patients that pertain to medical treatment but not ancillary services, to an individual for purposes that are primarily personal, family, or household, or solicitation to supply any of these things.

OHIO REV. CODE ANN. § 1345.01 (Anderson 1981).

³⁰⁷ Such remedies include minimal statutory damages and attorneys fees.

OHIO REV. CODE ANN. § 1345.09 (Anderson 1981).

G. Lease Terms

In order to prevent the erosion of the new rights and remedies being accorded to tenants, provisions governing written leases were included in the statute. The evil sought to be remedied was the use of lease clauses which would nullify the intended equalizing provisions of the Act. No doubt the restrictions on the use of unconscionable practices and adhesion contracts in other areas of the law had some influence on the drafters.³⁰⁸

A rental agreement in Ohio is any agreement between a landlord and a tenant setting forth the terms and conditions of the living arrangement.³⁰⁹ As such, a rental agreement may be oral or written, and the Act does not attempt to differentiate between the mode of establishing the agreement. Thus, since the rights and remedies outlined by the Act become a part of every rental agreement³¹⁰ and the Act does not distinguish between oral and written agreements, all tenants have common rights under the Act and are not without recourse merely because there are no written terms.

Paradoxically, in some situations the tenant may be in an inferior position if he/she is bound by a written lease since, in the absence of the lease, the tenant has all the protections of the law, while a lease may contain terms which would take away some of those rights. The Act, however, contains certain provisions designed to avoid such consequences.

Residential leases are covered by the Act's definition of the term, "rental agreement." In addition, the Act has other sections which prohibit certain terms in leases,³¹¹ provide that terms inconsistent with Chapter 5321 are not to be included in a rental agreement,³¹² and provide that unconscionable terms of rental agreements may be held unenforceable.³¹³

Terms which are prohibited in written residential leases are delineated in the Act.³¹⁴ Included in these terms are prohibitions on confessions of judgment, warrants of attorney, limitations on the landlord's liability, and other oppressive terms which were legal prior to the enactment of

³⁰⁸ Baillis, *supra* note 2, at 125-26. Specific statutes dealing with unconscionability include the Ohio Consumer Sales Practices Act, OHIO REV. CODE ANN. §§ 1345.01 (Anderson 1981); OHIO REV. CODE ANN. § 1302.15 (Anderson 1981); and the Ohio Land Installment Contract Act, OHIO REV. CODE ANN. § 5313.01 to 5313.10 (Anderson 1981).

³⁰⁹ OHIO REV. CODE ANN. § 5321.01(D) (Anderson 1981) defines a rental agreement as "[a]ny agreement or lease, written or oral, which establishes or modifies the terms, conditions, rules, regulations, or any other provisions concerning the use and occupancy of residential premises by one of the parties."

³¹⁰ *Laster v. Bowman*, 52 Ohio App. 2d 379, 382, 370 N.E.2d 767, 770 (1977).

³¹¹ OHIO REV. CODE ANN. § 5321.13 (Anderson 1981).

³¹² OHIO REV. CODE ANN. § 5321.06 (Anderson 1981).

³¹³ OHIO REV. CODE ANN. § 5321.14 (Anderson 1981).

³¹⁴ OHIO REV. CODE ANN. § 5321.13 (Anderson 1981).

Chapter 5321.³¹⁵ In addition, even though not spelled out, other lease terms which are unconscionable in their context or application may be stricken under the Act,³¹⁶ and terms which are inconsistent with other provisions of the statute are prohibited under Chapter 5321.³¹⁷ For example, in one case the lease provision which granted the landlord the right to lock the tenant out of the apartment was held to be inconsistent with the prohibition on lockouts found in Ohio Revised Code section 5321.15 and therefore violative of Ohio Revised Code sections 5321.13 and 5321.14.³¹⁸

Many of the lease terms which have been determined to be unconscionable concern automatic renewals of leases and fees such as liquidated damages clauses.³¹⁹ Many liquidated damages clauses are inconsistent with the security deposit sections of the Act.³²⁰ Such an inconsistent clause would be violative of either section 5321.06, prohibiting lease terms inconsistent with Chapter 5321 or section 5321.14, which renders unconscionable lease agreements or parts thereof unenforceable. Other provisions found to be unconscionable under the Act include a fifty dollar per day charge for the presence of a motorcycle,³²¹ a requirement to report overnight guests,³²² and an attempt to alter the legal notice provisions for eviction purposes.³²³ However, lease terms providing for the waiver of the right to a jury trial have been permitted in rental agreements.³²⁴

³¹⁵ For an excellent discussion of pre-1974 Ohio law see *Landlord-Tenant*, *supra* note 6, at 949-55.

³¹⁶ OHIO REV. CODE ANN. § 5321.14 (Anderson 1981).

³¹⁷ *Landlord-Tenant*, *supra* note 6, at 955-56. Since section 5321.14 is taken almost verbatim from section 2-302 of the Uniform Commercial Code, cases interpreting UCC section 2-302 provide an excellent source of precedent. Baillis, *supra* note 2, at 142-43.

³¹⁸ *Thomas v. Papedelis*, 16 Ohio App. 3d 359, 359-60, 476 N.E.2d 726 (1984).

³¹⁹ See, e.g., *McGowan v. DM Group IX*, 7 Ohio App. 3d 349, 455 N.E.2d 1052 (1982) (re-rental fee).

³²⁰ OHIO REV. CODE ANN. § 5321.16 (Anderson 1981). An example of an inconsistent clause would be a clause which calls for forfeit of the security deposit for any violation of the terms of the rental agreement, one that is quite common in form leases. Such a clause contradicts the duty of the landlord to itemize any deductions from the security deposit.

³²¹ *Berlinger v. Suburban Apt. Mgmt. Co.*, 7 Ohio App. 3d 122, 454 N.E.2d 1367 (1982).

³²² *Heritage Hills v. Smith*, No. 78-CVG-268 (Chillicothe Mun. Ct., May 1, 1978).

³²³ *Valley Home Mut. Hous. v. Williams*, No. C-810923 (Hamilton County, Nov. 3, 1982) (lease provision for ten days grace period in case of rent default was not replaced by the provisions of section 1923.04 but was an addition to it, given by the landlord through the lease); *Landlord-Tenant*, *supra* note 6, at 950.

³²⁴ *Union Commerce Bank v. Kimbo*, 11 Ohio Op. 2d 279 (1959); *Accord Mentor Lagoons, Inc. v. Geldart*, No. 6-265 (Lake County, Jan. 29, 1979); *Mentor Lagoons, Inc. v. Mayor, No. 10-180 (Lake County, Mar. 1, 1985)* (same landlord and lease involved in both cases). *Kimbo* held that a waiver of jury trial in a forcible entry and detainer case was enforceable since it served the valid purpose of preserving the summary character of eviction proceedings. However, in a non-eviction action between a landlord and tenant, such as an action for damages, there would not be the need to expedite the proceedings and a jury waiver may be

Whether or not a rental agreement may be automatically renewed is an issue which has created much litigation in Ohio. Some leases include either renewal options or automatic renewal provisions so that a tenant not acting by a certain date finds that the rental agreement has been either automatically terminated or automatically renewed, depending on the term found in the agreement. In dealing with these issues, the courts have determined that if there is an option, it must be positively stated and exercised to be effective.³²⁵ Furthermore, lease terms providing for successive automatic renewals must satisfy the Statute of Frauds.³²⁶

An automatic renewal clause provides too great an opportunity for abuse, especially if the time period for the required notice of non-renewal is longer than the periodic rental period. A mistake by a tenant is too likely to result in the tenant being bound for an additional year whether or not the tenant at the end of the first year intended to renew the tenancy. While the equitable defenses of accident, fraud, surprise, or mistake³²⁷ may be available, such sophisticated legal theories probably will not be raised by the typical tenant without an attorney. The Act should be amended specifically to prohibit such clauses.³²⁸

unreasonable and unconscionable. This question has not been ruled on by the Ohio Supreme Court. Courts in other jurisdictions, however, have held jury waiver clauses, included in fine-print in form leases, unconscionable. See *National Equip. Rental Ltd. v. Hendrix*, 565 F.2d 255, 258 (2d Cir. 1977); *Koslowski v. Palmieri*, 98 Misc. 2d 885, 414 N.Y.S.2d 599 (1979); *Gaylord Dept. Stores, Inc. v. Stephens*, 404 So. 2d 586, 588 (Ala. 1981). It is arguable that such jury waiver clauses also contradict the mandate of section 5321.06 which prohibits lease terms contrary to law. See OHIO REV. CODE ANN. § 5321.06 (Anderson 1981). Since the right to a trial by jury is guaranteed by both the Ohio and United States Constitution, a waiver of such a right can only be given when circumstances indicate an affirmative, knowing waiver. A waiver embodied in fine print in a form lease can rarely qualify. See *Mall, Inc. v. Robbins*, 412 So. 2d 1197 (Ala. 1982), where the court discussed the factors to be considered in determining whether to enforce a jury waiver provision of a lease: (1) whether the waiver is buried in fine print in a long contract; (2) whether the parties had equal bargaining power; and (3) whether the waiver was knowingly and intelligently made.

Even if a court holds a jury waiver clause contained in a lease to be applicable, a court has the discretion, upon motion by a party, to order a trial by jury pursuant to OHIO R. CIV. P. 39(B). *Moknach v. New York Life Ins. Co.*, 67 Ohio App. 293, 36 N.E.2d 529 (1941); *Kaplan v. Brown*, 17 Ohio L. Abs. 561 (1934); *Hamilton v. Miller*, 22 Ohio L. Abs. 55 (1936).

³²⁵ *Ahmed v. Scott*, 65 Ohio App. 2d 271, 418 N.E.2d 406 (1979).

³²⁶ See Note, *Residential Renewal Leases and the Ohio Statute of Conveyances: Invalidation and Subsequent Treatment*, 27 CLEV. ST. L. REV. 231, 243 (1978).

³²⁷ See *Mentor Lagoons, Inc. v. Velbeck*, No. 10-056 (Lake County, Mar. 23, 1984) (holding that an equitable defense of mistake is available to a tenant who fails to give notice of non-renewal due to confusion over the lease term); *Ward v. Washington Distrib.*, 67 Ohio App. 2d 49, 425 N.E.2d 420 (1980); *Friederich v. Matrka*, No. 37178 (Cuyahoga County, Mar. 23, 1978) (automatic renewal invalid when not properly attested).

³²⁸ The landlord-tenant law for manufactured home parks, mandates the offer of a lease of a term of one year or more. OHIO REV. CODE ANN. § 3733.11(A)(1) (Anderson Supp. 1987). If the initial offer is accepted, the park operator is required to offer a renewal at the end of the first lease term. The difference of course is that the park resident has the option of

Another change recommended by the authors would be to add to section 5321.13's list of prohibited rental terms a prohibition against waivers of the right to a trial by jury. In this way the right to a jury trial would not only be preserved, but the question of whether or not such a clause is inconsistent with Ohio law³²⁹ would be resolved by making such a term unenforceable in a court of law.

It is highly unlikely that the average tenant, upon signing a form lease containing a jury waiver clause, comprehends exactly what he is giving up. The right to a jury trial provided by the Ohio Constitution³³⁰ is a basic right that should only be deemed waived when the waiver is exercised at the time a person is contemplating legal action, preferably after the opportunity to seek the advice of an attorney,³³¹ not at the time the tenant enters into a rental agreement. One would hope that at the time the tenant signs a lease, the tenant is not really thinking about what sort of trial he would like to have.³³²

While any individual jury waiver clauses could be held unconscionable under the circumstances of a particular case, such an inquiry would be time-consuming and would not always lead to just results. A much more equitable solution would be a blanket prohibition on such waivers. After all, either party always has the opportunity after the start of litigation either not to request a trial by jury or to waive a jury prior to trial.³³³

Finally, it should be noted that some of the more blatantly illegal lease terms are never tested through litigation. For instance, it is not uncommon to see a clause in a lease giving the landlord the right to immediate possession upon any breach by the tenant. Such a term is contrary to both Chapter 5321 and Chapter 1923 regarding the procedures for an action in forcible entry and detainer. That such a term is illegal and unenforceable does not mean that a tenant, when faced with the landlord's threat of throwing the tenant's belongings out onto the street (as the lease seems to give the landlord the right to do), will not believe that the landlord can

affirmatively accepting or rejecting the offered lease. Such a scheme is preferable to allowing automatic renewal clauses, even for a single year. In this way a bargain may be struck by a landlord and tenant for a specific period of time and eliminate the uncertainty created by automatic renewal and option clauses.

³²⁹ OHIO REV. CODE ANN. § 1923.10 (Anderson 1981) provides for the right to a jury trial in eviction actions. OHIO R. CIV. P. 38(A) states: "The right to trial by jury shall be preserved to the parties inviolate."

³³⁰ OHIO CONST. art. I, § 5 (Anderson 1981).

³³¹ Query: would a lease clause that waived the advice of counsel in any litigation arising from the rental agreement be upheld? It would seem that such a waiver would be deemed unconscionable and unenforceable.

³³² Indeed, one can only speculate as to the reason that a landlord would put such a clause in a rental agreement. It suggests that the landlord expects or even intends for litigation to result from this transaction.

³³³ OHIO R. CIV. P. 38(D), 39(A).

indeed accomplish such a self-help eviction. The tenant who so believes may simply succumb to the threat by moving or ceasing to demand repairs or halting whatever other behavior irks the landlord.

While no Ohio court has yet rendered an opinion on the matter, it is reasonable to consider lease terms that are directly contrary to law, *e.g.*, liquidated damages clauses, *etc.*, as violations of the Ohio Consumer Sales Practices Act.³³⁴ Elsewhere in this Article the rationale for application of the Consumer Act to landlord-tenant cases is discussed.³³⁵ Assuming that a landlord-tenant relationship is a consumer transaction, certain of the lease terms discussed above could be considered unfair, deceptive, and/or unconscionable and, therefore, prohibited by the Consumer Sales Practices Act. There are a number of specific provisions of this statute that would apply to lease terms that are contrary to law. For instance, section 1345.03(B) prohibits unconscionable consumer practices. One factor that is to be considered is whether a supplier of consumer goods has knowingly taken advantage of a consumer because of his inability to understand the language of an agreement. A lease term which is inconsistent with the statute or so ambiguous on its face that it allows a landlord to take advantage of a tenant who is misled as to his rights would fit this category. Similarly, a lease that purports to make a tenant responsible for obligations that are placed by law upon the landlord (*e.g.*, maintenance of a landlord-supplied furnace) would be a deceptive act or practice under section 1345.02(B)(10).

Thus, Ohio's consumer laws may provide a remedy for a rental agreement that misrepresents the respective right and duties of the parties.

H. Security Deposits: The Landlord's Interest Free Loan

The customary requirement by landlords of a security deposit, a deposit of funds by the tenant with the landlord to secure performance of the tenant's obligations under the rental agreement,³³⁶ was considered a subject of sufficient importance to mandate its own section of the Act.³³⁷ The first paragraph of that provision states:

(A) Any security deposit in excess of fifty dollars or one month's periodic rent, whichever is greater, shall bear interest on the

³³⁴ OHIO REV. CODE ANN. § 1345.01 (Anderson 1981).

³³⁵ See *supra* notes 285-307 and accompanying text.

³³⁶ See OHIO REV. CODE ANN. § 5321.01(E) (Anderson 1985) (specifically defining the term "security deposit").

³³⁷ OHIO REV. CODE ANN. § 5321.16 (Anderson 1981 & Supp. 1985). As stated by one commentator, "the legislators were aware of flagrant abuses resulting from the unjustified retention of 'security deposits' and set out deliberately to reform this area of the law." *Landlord-Tenant*, *supra* note 6, at 944.

excess at the rate of five percent per annum if the tenant remains in possession of the premises for six months or more, and shall be computed and paid annually by the landlord to the tenant.

By its provision for interest on amounts held in excess of one month's rent, the Act specifically acknowledges that a demand for such an amount is allowed in Ohio.³³⁸ The relatively low rate of five percent interest is not a significant deterrent to a demand of an amount exceeding the tenant's rent which can be used for the landlord's own purposes during the period of the tenancy, and beyond. Even at this period of relatively low interest rates, the landlord is systematically acquiring financing at interest well below the market rate. Indeed, a landlord who is content with a single month's rent as security has "a source of free loans."³³⁹ This result is in fundamental conflict with the historical Ohio common law principle that this money belongs to the tenant and the landlord is liable for its return.³⁴⁰

The security deposit provision is one of the few provisions of the Act that has been the subject of review by the Supreme Court of Ohio. In the first of two recent decisions on security deposits, *Vardeman v. Llewellyn*,³⁴¹ the court prefaced its holding by declaring, without benefit of reference or incorporation of any legislative record, the intent of the General Assembly in enacting the security deposit sections. The court stated that intent to be threefold:

One, to specifically permit the landlord, upon termination of the rental agreement, to deduct from the rental deposit any unpaid rents and actual damages to the premises occasioned by the tenant. Two, to require prompt refunds of all or part of the security deposit or, in the alternative, to provide an explanation to the tenant why all or any part of the deposit was not returned to him. And, three, to provide a penalty by way of damages and

³³⁸ Such is not the case in many jurisdictions. The Uniform Residential Landlord and Tenant Act does not permit the landlord to demand or receive security in an amount in excess of one month's rent. UNIF. RESIDENTIAL LANDLORD-TENANT ACT, *supra* note 47, § 2-101.

³³⁹ *Vardeman v. Llewellyn*, 17 Ohio St. 3d 24, 476 N.E.2d 1038 (1985)(Justice Douglas in a dissenting opinion, noting that the deposit belongs to the tenant, discussed the absence of a requirement to place security deposits in a separate account or in escrow to prevent the problems of landlord insolvency or conversion).

³⁴⁰ *In re Morrison-Barnhart Motors, Inc.*, 142 F. Supp. 845 (N.D. Ohio 1956); *Cain v. Brown*, 105 Ohio St. 264, 136 N.E. 916 (1922); *Tuteur v. P. & F. Enterprises, Inc.*, 21 Ohio App. 2d 122, 255 N.E.2d 284 (1970). The tenant's interest has been measured by one commentator as the amount he would have gained from a savings deposit. *Landlord-Tenant*, *supra* note 6, at 945. This measure makes the 5% interest reasonable. From the perspective of Justice Douglas in *Vardeman*, the more appropriate measure is the cost of financing which is double or triple the interest provided by the Act.

³⁴¹ 17 Ohio St. 3d 24, 476 N.E.2d 1038 (1985).

reasonable attorney fees against a noncomplying landlord for the wrongful withholding of any or all of the security deposit.³⁴²

The court in *Vardeman* approached the statute with the objective to “not construe any portion of the Act so as to render an inequity on the landlords of this state.”³⁴³ In doing so, the court failed to construe the statute as a remedial statute designed to correct the imbalance between the rights of landlords and tenants.³⁴⁴ By not liberally construing the Act, the court limited and in some cases, eliminated, the penalty for violations of the duty to promptly account to the tenant for the deposit. This interpretation imposes no penalty on a landlord for exceeding the statute’s time limit for notice to the tenant of damages arising from the tenancy or for failure to respond to a tenant’s inquiries about the deposit when he can justify, subsequently, the deductions. A tenant could incur substantial expenses including filing fees, discovery costs, and attorneys fees only to receive no reimbursement at all if the landlord succeeds in justifying a total withholding of the security deposit.

In *Vardeman*, the court held that a landlord who fails to timely account for the deposit but who does not owe any portion of it to the tenant, is not liable for damages or attorney fees. The landlord had provided neither written notice nor an itemization, and the tenant filed a complaint for return of the security deposit in municipal court. The landlord counter-claimed for rent due based on a failure to give a full thirty-day notice of intent to vacate and alleged damages to the apartment, including cleaning of the carpet, exterior refurbishing, lawn clean-up, and an unpaid utility bill in the amount of \$9.91. The trial court found the amount owed by the tenant to exceed the security deposit and held that the landlord was neither liable for double the security deposit nor for

³⁴² *Id.* at 28.

³⁴³ *Id.*

³⁴⁴ The court’s pronouncement of legislative intent contradicts that of the Lucas County Appellate Court in *Albrekt v. Chen*, 17 Ohio App. 3d 79, 477 N.E.2d 1150 (1983). The *Albrekt* court, by focusing on a legislative intent to insure prompt return of security deposits, penalized the untimely itemization by affirming an award of double the security deposit as damages under the statute. Justice Douglas in his dissent in *Vardeman* expressed the legislative intent in somewhat different terms but proposed a result similar to that of *Albrekt v. Chen*. “The purpose of considering the question of security deposits in landlord-tenant legislation was to insure the proper administration of such deposits by means of procedures designed to encourage tenant pursuit of legal remedies . . .” *Vardeman*, 17 Ohio St. 3d 24, 30. It is doubtful that the first element of the *Vardeman* majority’s statement of legislative intent, to enable the landlord to make deductions, was actually a motivating factor behind the legislation. Since landlords were regularly making deductions prior to the Act, such a provision was really not necessary. The real intent was to enable the tenant to obtain the prompt return of the security deposit. It was necessary to restrict the landlord to deductions for actual damages. Thus, the Act in no way enlarged the rights of landlords concerning security deposits and the focus of analysis of the security deposit provision should be, as stated by Justice Douglas, on the increased remedies provided for the tenant.

attorney fees. The Court of Appeals affirmed. The Supreme Court of Ohio did not consider the propriety of the deductions but limited its decision to a determination of the meaning of the terms "amount due", "money due" and "wrongfully withheld" as used in the Act.³⁴⁵

The terms "amount due" in subsection (B) and "money due" in subsection (C)³⁴⁶ were held to mean "the security deposit, less any amounts found to be properly deducted by the landlord for unpaid rent and damages . . ."³⁴⁷ Further, "the term 'amount wrongfully withheld' means the amount found owing from the landlord to the tenant over and above any deduction that the landlord may lawfully make."³⁴⁸ The court specifically rejected an interpretation that would require an automatic imposition of the full amount of the security deposit plus damages and attorney fees on the thirty-first day as being beyond the statutory language.³⁴⁹ The court concluded that where the landlord was later found properly to have withheld the portion of the security deposit in question, the tenant was not damaged and no penalties nor attorney fees may be awarded to him.³⁵⁰ Thus, according to the *Vardeman* court, only a tenant who proves that some amount of money was retained by the landlord is entitled to recover under subsection (C) of the Act.³⁵¹

³⁴⁵ *Vardeman*, 17 Ohio St. 3d at 27.

³⁴⁶ OHIO REV. CODE ANN. § 5321.16(B),(C) (Anderson 1981 & Supp. 1985). The act states as follows:

(B) Upon termination of the rental agreement any property or money held by the landlord as a security deposit may be applied to the payment of past due rent and to the payment of the amount of damages that the landlord has suffered by reason of the tenant's noncompliance with section 5321.05 of the Revised Code or the rental agreement. Any deduction from the security deposit shall be itemized and identified by the landlord in a written notice delivered to the tenant together with the amount due, within thirty days after termination of the rental agreement and delivery of possession. The tenant shall provide the landlord in writing with a forwarding address or new address to which the written notice and amount due from the landlord may be sent. If the tenant fails to provide the landlord with the forwarding or new address as required, the tenant shall not be entitled to damages or attorneys fees under division (C) of this section.

(C) If the landlord fails to comply with division (B) of this section, the tenant may recover the property and money due him, together with damages in an amount equal to the amount wrongfully withheld, and reasonable attorneys fees.

Id.

³⁴⁷ *Vardeman v. Llewellyn*, 17 Ohio St. 3d 24, 28-29, 477 N.E.2d 1150 (1985).

³⁴⁸ *Id.* at 29.

³⁴⁹ *Id.* at 28.

³⁵⁰ *Id.* at 29. This holding is consistent with *Jemo Assoc., Inc. v. Garman*, 70 Ohio St. 2d 167, 435 N.E.2d 439 (1982); *Dyche Fund v. Graves*, 55 Ohio App. 2d 153, 380 N.E.2d 767 (1978).

³⁵¹ This result overrules *Sherwin v. Cabana Club Apts.*, 70 Ohio App. 2d 11, 17-18, 433 N.E.2d 932, 937 (1980), which is discussed at length by Justice Douglas in his dissent in *Vardeman*. In *Sherwin*, an award of attorney fees had been held to be mandatory where the landlord fails to timely meet his statutory obligation.

Two issues are left unresolved by *Vardeman*. The first is whether a tenant whose deposit or that portion of the deposit due was returned *after* the statutory period would be entitled to statutory damages or attorney fees. The second is whether any itemization, no matter how accurate, if delivered within thirty days, automatically insulates the landlord from liability for double damages and attorney fees. The latter question was answered in the negative by the court in *Smith v. Padgett*.³⁵²

The issue before the court in *Smith* was whether a timely itemization of deduction that was found to be incorrect triggered the penalties under Ohio Revised Code section 5321.16(C). These facts differed from *Vardeman* where the landlord failed to itemize but was found not to have owed the tenant any amount. In *Smith*, the court below had found \$105 to have been wrongfully withheld. The Ohio Supreme Court reasoned that a landlord would not be deterred from making unfounded deductions from the security deposit if no penalty were imposed for deductions for "facially justifiable reasons" that were, in fact, incorrect.³⁵³ Therefore, the court held that liability for double damages and attorney fees is mandatory when a landlord fails to return a portion of the security deposit even if the landlord timely provides an itemization of the amount deducted.³⁵⁴

The *Smith* court refused to inject a requirement of bad faith into the statute where the legislature chose not to do so.³⁵⁵ The court adopted appellant's argument that a landlord who fails to return the correct amount has wrongfully withheld the amount owed, triggering the penalty provisions of the statute.³⁵⁶

The question not yet ruled on by the Ohio Supreme Court is whether the failure to return a deposit until *after* the statutory period entitles the tenant to statutory damages and attorney fees, even though the entire amount due is eventually returned. However, an appellate court has held that the late return of the deposit entitles the tenant to the statutory penalties.³⁵⁷

³⁵² 32 Ohio St. 3d 344, 513 N.E.2d 737 (1987).

³⁵³ *Id.* at 349.

³⁵⁴ *Id.*

³⁵⁵ *Id.* The *Smith* decision would seem to dispose of a generally unsuccessful defense of good faith frequently raised by landlords seeking to avoid the damage penalty. *Forquer v. Colony Club*, 26 Ohio App. 3d 178, 499 N.E.2d 7 (1985); *Paxton v. McGranahan*, 25 Ohio B. 352 (1986); *Katzin v. Murad*, No. 46553 (Cuyahoga County, Jan. 5, 1984). *But see Fant v. Stewart*, No. 49089 (Cuyahoga County, May 9, 1985) (landlord's check for tenant's security deposit was dishonored because of a restraining order placed on the account without landlord's notice. No damages awarded for landlord's failed attempt to return deposit within statutory period.) The *Smith* court relies on the absence of wording that would require a finding that the landlord willfully and unreasonably refused to return a security deposit to which the tenant is entitled. 32 Ohio St. 3d at 349 n. 7.

³⁵⁶ 32 Ohio St. 3d at 348.

³⁵⁷ *Forquer*, 26 Ohio App. 3d 178 (1985), held that providing the full amount of the security deposit beyond the 30-day statutory limit required the levy of the double damages

The penalties under the Act for an unlawful withholding of the security deposit are triggered by the tenant's return of possession and a written notice providing the forwarding or new address of the tenant.³⁵⁸ Return of possession is symbolically accomplished by return of the keys. In cases where the thirty days notice to vacate has not been provided, courts determine the allocation of rent from the security deposit from the time of the return of the keys.³⁵⁹ A tentative failure to take possession does not eliminate the landlord's obligation timely to return the security deposit.³⁶⁰

Apart from the question of damages, courts have also dealt with other security deposit issues. Regarding the notice of forwarding address required to be provided by the tenant, some courts have relied on the mandatory language of the Act.³⁶¹ Several courts have waived the written notice requirement where it can be deduced that the landlord had actual knowledge.³⁶²

On the issue of meeting the thirty-day time limit for itemization and return of deposit, Ohio courts have discussed what is timely delivery. If the landlord mails the itemization and/or money due the tenant "with proper postage and the correct mailing address . . ." on or before the thirtieth day, it will be considered timely.³⁶³

One of the questions not considered by the Ohio Supreme Court in *Vardeman* is whether the landlord's claimed deductions were properly considered "damages" for the purposes of calculating the "money due" the tenant from the security deposit.³⁶⁴ Damages for which lawful deduction can be made have been defined by one court as arising from the tenant's non-compliance with tenant obligations under the Act³⁶⁵ or the rental

clause. The court responded to the landlord's protestation regarding the penalty by stating that the landlord could have avoided the imposition of attorneys fees by remitting double the amount withheld voluntarily when the statutory time limit had been exceeded.

³⁵⁸ OHIO REV. CODE ANN. § 5321.16(C) (Anderson 1981).

³⁵⁹ Carr v. Ed Stein Realtors, 10 Ohio App. 3d 242, 461 N.E.2d 930 (1983).

³⁶⁰ Dearwester v. Lagos, 33 Ohio App. 3d 199, 514 N.E.2d 1136 (1986).

³⁶¹ *Id.* See also Green v. Northwood Terrace Apts., No. 78 AP-580 (Franklin County, Mar. 20, 1979).

³⁶² Prescott v. Makowski, 9 Ohio App. 3d 155, 458 N.E.2d 1281 (1983)(landlord knew tenant had moved to a building where he was renting from the landlord's sister); Boldan v. Suburban Apt. Mgmt. Co., No. 84 AP-47089 (Cuyahoga County, Mar. 2, 1984)(where landlord used address on lease and tenant received the notice, the argument that recordation failed to meet statutory requirement is rejected).

³⁶³ Paxton v. McGranahan, 25 Ohio B. 352, 354 (1986); Goldstein v. Spitz, 30 Ohio App. 3d 246, 507 N.E.2d 433 (1986).

³⁶⁴ The landlord's deductions included \$55.90 for carpet cleaning and \$134.00 for exterior refurbishing and lawn clean-up. Vardeman v. Llewellyn, 17 Ohio St. 3d 24, 25, 476 N.E.2d 1038 (1985).

³⁶⁵ OHIO REV. CODE ANN. § 5321.05 (Anderson 1981).

agreement.³⁶⁶ The landlord has the burden of proving the validity of the deductions.³⁶⁷

Damages for which deductions may be made from a security deposit are conditions not arising from normal wear and tear.³⁶⁸ In a recent case, the court declared that the landlord must prove his right to recover for an item, "taking into account the fact that plaintiffs (tenants) are not liable for normal wear and tear to the premises during their occupancy. . . ."³⁶⁹ The court ruled that the defendant-landlord had failed to prove its damages in order to recover on more than two items, patching a carpet and the broken commode seat. The court was not satisfied, based on evidence presented at trial, that the remaining items were properly deductible as damages.

Courts frequently have the opportunity to look at lease provisions through the "looking glass" of security deposit litigation.³⁷⁰ The cases indicate that some landlords, in attempting to justify retaining funds originally tendered as security deposits, attempt to incorporate provisions in the lease that automatically reserve a portion of the security deposit to meet a landlord obligation.³⁷¹ There is often a presumption written into a lease that any breach of the lease by the tenant, no matter how trivial, gives rise to damages equal to the amount of the security deposit.³⁷² Leases often simply grant landlords rights or privileges and then assign them arbitrary monetary values.³⁷³

³⁶⁶ *Albrecht v. Chen*, 17 Ohio App. 3d 79, 81, 477 N.E.2d 1150 (1983).

³⁶⁷ *Paxton*, 25 Ohio B. at 355; *Conyers v. Rushing*, No. 79 AP-0426 (Hamilton County, July 23, 1980)(landlord's claims included failure to clean the oven and carpet as the lease required, broken or damaged oven, kitchen plumbing, screen door, Venetian blinds, and the electric security system. It was further alleged that the tenant caused the building to be infested with roaches and damaged the front lawn when moving out. The appellate court overruled all assignments of error relating to the trier of fact's finding that the landlord failed to prove by preponderance of the evidence either that the injuries complained of were caused by the tenant or that the damages exceeded normal wear and tear).

³⁶⁸ *Mentor Lagoons, Inc. v. Mayor*, No. 10-180 (Lake County, Mar. 1, 1985)(LEXIS, States Library, Ohio File)(In absence of the transcript of the proceedings or statement of the facts, the court found it impossible to determine whether repairs were the result of extraordinary damages or the result of reasonable wear and tear).

³⁶⁹ *Konig v. Bella Dora Mgmt., Inc.*, 9 Ohio Misc. 2d 7, 458 N.E.2d 477 (1983)(court upheld repair and replacement costs but denied those for cleaning).

³⁷⁰ *Carr v. Ed Stein Realtors*, 10 Ohio App. 3d 242, 461 N.E.2d 930 (1983); *Albrecht v. Chen*, 17 Ohio App. 3d 79, 477 N.E.2d 1150 (1983); *Berlinger v. Suburban Apt. Mgmt. Co.*, 7 Ohio App. 3d 122, 454 N.E.2d 1367 (1982); *Riding Club Apts. v. Sargent*, 2 Ohio App. 3d 146, 440 N.E.2d 1368 (1981).

³⁷¹ *See, e.g., Albrecht*, 17 Ohio App. 3d at 81 (the lease declared that tenant agrees to pay \$60.00 for cleaning of carpeting upon vacation of the premises and the court held it may be deducted from the security deposit over and above any other charges).

³⁷² *Carr*, 10 Ohio App. 3d 242; *Riding Club Apts.*, 2 Ohio App. 3d 146 (forfeiture of security deposit when tenant vacates prior to end of lease term).

³⁷³ *Berlinger*, 7 Ohio App. 3d 122 (a lease term prohibited motorcycles on the premises).

The court in *Riding Club Apartments v. Sargent*³⁷⁴ reviewed a liquidated damage clause first from the perspective of Ohio Revised Code section 5321.06 that requires lease terms or other provisions governing the landlord-tenant relationship to be consistent with the statute or other rule of law. Also considered was Ohio Revised Code section 5321.13 which bars certain rental agreement terms but not liquidated damage clauses. Finally, the court discussed the provisions of Ohio Revised Code section 5321.16(B) and found a liquidated damage clause, otherwise enforceable, inconsistent with the security deposit provision that limits deductions from a security deposit to itemizations of "actual damages caused by reason of the tenant's noncompliance with Ohio Revised Code section 5321.05 or the rental agreement"³⁷⁵

Lease terms requiring an automatic forfeiture of all or part of the security deposit are quite common. While some of the deductions such terms purport to justify are successfully contested by tenants, the aura of legality conveyed by a printed lease misleads many tenants regarding their ability to contest a specific written term. Therefore, a specific prohibition of lease terms regarding security deposits inconsistent with section 5321.16 should be enacted.³⁷⁶

The amount of attorney fees to be awarded in collecting the portion of the security deposit which is wrongfully withheld is within the sound discretion of the trial court.³⁷⁷ In one reported decision, the Court of Appeals required the trial court to reconsider a \$250 award of attorney fees where \$1,756.25 was requested because the lower court made no specific finding that the time spent was inappropriate or the hourly rate charged was excessive.³⁷⁸ In another case where the record was silent as to the evidence before the court with regard to attorney fees, an appellate court upheld an award of \$100 on the ground that the proceedings were to be presumed valid and error free.³⁷⁹ Similarly, in *Hoerner v. GMS Mgt. Co., Inc.*,³⁸⁰ the court upheld an award of \$2,000 in attorney fees where the trial court had applied factors mentioned in the Code of Professional Responsibility in reducing the request of \$10,000. Any claim of abuse of discretion must be supported by facts.³⁸¹

Landlord provided, by separate document, a waiver of the provision at a charge of \$50.00 for each day).

³⁷⁴ 2 Ohio App. 3d 146, 440 N.E.2d 1368 (1981).

³⁷⁵ *Id.* at 147.

³⁷⁶ See *infra* text setting forth Proposed Amendments to the current statute.

³⁷⁷ *Forquer v. Colony Club*, 26 Ohio App. 3d 178, 180, 499 N.E.2d 7 (1985); *Sherwin v. Cabana Club Apts.*, 70 Ohio App. 2d 11, 433 N.E.2d 932 (1980)(error to permit the jury to determine the amount of attorneys fees to be awarded).

³⁷⁸ *Forquer*, 26 Ohio App. 3d at 180.

³⁷⁹ *Albrecht v. Chen*, 17 Ohio App. 3d 79, 477 N.E.2d 1150 (1983).

³⁸⁰ No. 46736 (Cuyahoga County, Dec. 15, 1983).

³⁸¹ *Boldan v. Suburban Apt. Mgmt. Co.*, No. 84AP-47089 (Cuyahoga County, Mar. 2,

The need to provide a record establishing the reasonable value of attorney fees is demonstrated by the discussion above. The manner of establishing the record was resolved in the Eighth District Court of Appeals in *Berlinger v. Suburban Apt. Mgt. Co.*³⁸² The court held that the amount of attorney fees should be decided by the court, not by the trier of fact, because attorney fees are to be taxed as costs,³⁸³ and evidence in affidavit or other documentary form including a trial transcript was sufficient.³⁸⁴

The Act's potential for curbing abuse resulting from the unjustifiable delay in returning the security deposits has not been realized. In order to implement the original legislative intent, several amendments to the statute are necessary. These are particularly important to achieve the desired balancing of the equities.³⁸⁵

The inherent unfairness in allowing landlords to hold security deposits interest free should be eliminated by requiring landlords to maintain security deposits in separate or escrow accounts or by permitting the landlord to use the money but requiring interest at a commercial rate to be returned to the tenant annually.³⁸⁶ This would not deprive the landlord of security in the event of any breach of the tenant's obligation to either pay rent or to refrain from causing damage. The interest could also be used, if necessary, to cover damages. This requirement also has the advantage of discouraging demands for excessive security deposits. In addition, the separation from the landlord's own cash assets protects these tenant funds from a landlord's bankruptcy or transfer of ownership. Another recommended precaution against the loss of security deposits when title to rental property transfers is a provision attaching liability for return of the security deposit to the person holding the landlord's interest at the termination of the tenancy.³⁸⁷

In light of the *Vardeman* court's interpretation of the current security

1984)(claim of abuse of discretion in the award of attorney fees is denied where appellant had barely demonstrated the claim).

³⁸² 7 Ohio App. 3d 122, 454 N.E.2d 1367 (1982).

³⁸³ *Drake v. Menczer*, 67 Ohio App. 2d 122, 425 N.E.2d 961 (1980).

³⁸⁴ *Berlinger*, 7 Ohio App. 3d 122; *Drake*, 67 Ohio App. 2d at 126, 425 N.E.2d at 964; *Cuyahoga Metro. Hous. Auth. v. Watkins*, 23 Ohio App. 3d 20, 491 N.E.2d 701 (1984).

³⁸⁵ "The Landlord-Tenant Act must be interpreted in such a manner that fair and equitable treatment will be afforded to both landlords and tenants." *Vardeman v. Llewellyn*, 17 Ohio St. 3d 24, 28, 476 N.E.2d 1038 (1985).

³⁸⁶ H.B. No. 141 of the 117th Ohio General Assembly, 1987, introduced by Representative Hagan, would require interest to be paid on all portions of security deposits held for six months or more at a rate of interest equal to the average prime rate charged by banks on short-term business loans for January of the year during which the deposit is made, as published by the Federal Reserve System. This proposal would more realistically reflect the true nature of the transaction, i.e., a loan from the tenant to the landlord.

³⁸⁷ UNIF. RESIDENTIAL LANDLORD-TENANT ACT, *supra* note 47, § 2:101(e) contains such a provision.

deposit section, amendments are needed to provide an adequate remedy both for a landlord's failure to provide a timely accounting and for the wrongful withholding of all or part of the security deposit. The ability to avoid statutory penalties by asserting counterclaims for damages in tenant security deposit actions, tends to promote litigation, rather than negotiations between the parties.³⁸⁸

In order to promote the settlement of disputes without litigation, a statutory penalty for failure to timely provide the tenant with either a refund or an itemization of deductions, should be added to the Act.³⁸⁹ A tenant who is forced to go to court to obtain information about the disposition of his security deposit should be assured of reimbursements for his costs. One option would be to mandate the double damages penalty provision of subsection (C) whenever the landlord fails to comply with the thirty-day requirement. An alternative would be a provision for statutory damages of \$200.00 and reasonable attorney fees as is provided in the Ohio Consumer Sales Practices Act.³⁹⁰ Such a provision would limit the liability of a landlord who inadvertently failed to deliver an itemization of damages to the tenant but who has not wrongfully retained any of the deposit, as in the *Vardeman* case. At the same time, it would relieve a tenant of the financial burden caused by his being forced to litigate to obtain, at the very least, an accounting of his deposit.

³⁸⁸ *Vardeman*, 17 Ohio St. 3d at 30 (dissenting opinion). A claim for the return of a security deposit is often filed in small claims court. This forum is appropriate for relatively small claims where the absence of legal training should not prevent just results. *Katzin v. Murad*, No. 46553 (Cuyahoga County, Jan. 5, 1984). Of course, a landlord can still be represented by counsel, and may even choose to have a case transferred by filing counterclaims over \$1500. The availability to the tenant of the relief provided by section 5321.16(C), which specifies the penalty of double damages, depends on being construed as other than "punitive damages" which are proscribed by the enabling section of the Code. OHIO REV. CODE ANN. § 5321.16(C) (Anderson 1981).

Section 1925.02, establishing a small claims division in municipal and county courts in Ohio, precludes punitive damage claims. OHIO REV. CODE ANN. § 1925.02 (Anderson 1981). Courts have uniformly held that the allocation of statutory double damages under the Act is not subject to a good faith exception and that proof of mental state is not necessary to invoke this limited penalty. *Forquer v. Colony Club*, 26 Ohio App. 3d 178, 180, 499 N.E.2d 7 (1985); *Paxton v. McGranahan*, 25 Ohio B. 352 (1986); *Katzin v. Murad*, No. 46553 (Cuyahoga County, Jan. 5, 1984). Courts of Appeal of Cuyahoga and Franklin County which have had the opportunity to review the appeal of small claims court awards of double damages, have affirmed them in each case. *Katzin v. Murad*, No. 46553 (Cuyahoga County, Jan. 5, 1984); *Dwork v. Offenbug*, 66 Ohio App. 2d 14, 419 N.E.2d 14 (1979), preserving this forum for tenants seeking their full range of remedies under the Act.

³⁸⁹ This would overrule any implication in *Vardeman* that a landlord may ignore the time limits in the Act. The authors believe the Act already provides for this relief, but *Vardeman* mandates a clear restatement of this principle by the General Assembly.

³⁹⁰ OHIO REV. CODE ANN. § 1345.09 (Anderson 1981).

IV. PROPOSED AMENDMENTS TO THE OHIO LANDLORD-TENANT LAW

The authors have drafted provisions to resolve the problems identified concerning the statute. These solutions are based in large part on the Uniform Residential Landlord and Tenant Act and the Model Residential Landlord-Tenant Code.

The present law is cited where appropriate with proposed amendments in italics.

Section 1923.08 Continuance and bond.

No continuance in an action under sections 1923.01 to 1923.14, inclusive, of the Revised Code, shall be granted for a longer period than eight days, unless the defendant, applying therefor, gives a bond *in the amount of any rent currently owed* to the adverse party, with good and sufficient surety, to be approved by the judge of the county court, *who may condition the approval of this bond on the timely payment to the court of future rents that may accrue.*

5321.01.0 *Legislative purpose.*

The Ohio General Assembly hereby finds that a significant proportion of the rental housing in the State is substandard in structure, equipment, sanitation, and maintenance; that the condition of this housing has had and will continue to have, unless corrected, a deleterious effect on the residents of this housing; that poorly maintained and overcrowded housing contributes to the development and spread of disease, crime, infant mortality, juvenile delinquency, broken homes, and other physical, social, and psychological problems, and constitutes a menace to the health, safety, morals, and welfare of the residents of this State; that these conditions have necessitated excessive and disproportionate expenditures of public funds for crime prevention and punishment, for public health and safety, and for other public services and facilities, and have impaired the efficient and economic provision of government services by municipalities and the State. Further, that these conditions result in part from the often unequal bargaining power of landlords and tenants; that in order to facilitate fair and equitable arrangements, to foster the development of housing which will meet the minimum standards of the present day, and to promote the health, safety, morals, and welfare of the people, it is necessary and appropriate that the State specify certain minimum rights and remedies, obligations and prohibitions, for landlords and tenants of certain kinds of residential property.

5321.01

(C) "Residential premises" means a dwelling unit for residential use and occupancy and the structure of which it is a part, the facilities and appurtenances therein, and the grounds, areas, facilities for the use of tenants generally or the use of which is promised the tenant. *Residential*

premises does include units of cooperative housing corporations occupied by shareholders thereof.

5321.02

(B) If a landlord acts in violation of division (A) of this section the tenant may:

- (1) Use the retaliatory action of the landlord as a defense to an action by the landlord to recover possession of the premises;
- (2) Recover possession of the premises; or
- (3) Terminate the rental agreement.

In addition, the tenant shall recover from the landlord three times the actual damages caused to the tenant or two hundred dollars, whichever is greater, together with reasonable attorney fees.

(D) *In an action by or against the tenant, evidence of a complaint within one [1] year before the alleged act of retaliation creates a presumption that the landlord's conduct was in retaliation. "Presumption" means that the trier of fact must find the existence of the fact presumed unless and until evidence is introduced which would support a finding of its nonexistence.*

5321.03

(A) Notwithstanding section 5321.02 of the Revised Code, a landlord may bring an action under Chapter 1923 of the Revised Code for possession of the premises *if the sole reason is shown to be that: . . .*

5321.04(B)

If the landlord violates any provision of this section, the tenant may recover any actual damages which result from the violation together with reasonable attorney fees. This remedy is an addition to any right of the tenant to obtain injunctive relief to prevent the landlord in violation of division (A)(8) of this section.

5321.05 (A)(7) *should be deleted in its entirety.*

5321.05(D)

If the tenant abandons the dwelling unit, the landlord shall make reasonable efforts to rent it at a fair rental. If the landlord rents the dwelling unit for a term beginning before the expiration of the rental agreement, it terminates as of the date of the new tenancy. If the landlord fails to use reasonable efforts to rent the dwelling unit at a fair rental or if the landlord accepts the abandonment as a surrender, the rental agreement is deemed to be terminated by the landlord as of the date the landlord has notice of the abandonment. If the tenancy is from month to month or week to week, the term of the rental agreement for this purpose is deemed to be a month or a week, as the case may be.

5321.06.01 [*Promises in Rental Agreement Mutual and Dependent Interpretation*]

(1) *Where a remedy is given to either party by this Chapter for particular breach by the other party, this remedy shall be exclusive of any unmentioned remedy arising by operation of existing law or by operation of subsection (2) of this section.*

(2) *Material promises, agreements, covenants, or undertakings of any kind to be performed by either party to a rental agreement shall be interpreted as mutual and dependent conditions to the performance of material promises, agreements, covenants, and undertakings by the other party.*

(3) *A party undertaking to remedy a breach of the other party in accordance with this Chapter shall be deemed to have complied with the terms of this Chapter if his non-compliance with the exact instructions of this Chapter is non-material and non-prejudicial to the other party.*

5321.08 [*Duties of clerk of court.*]

(F) *The clerk shall accept deposits of rent upon the receipt of an affidavit from a tenant showing that the provisions of 5321.07 have been met.*

5321.09 [*Landlord may apply for release of rent.*]

(B) *The tenant shall be named as a party to any action filed by the landlord under this section, and shall have the right to file an answer and counterclaim, as in other civil cases. A trial shall be held within sixty days of the date of filing of the landlord's complaint.*

(E) *If the court finds that there was a violation of an obligation imposed by Section 5321.04 of the Revised Code or by the rental agreement, or by any building, housing, health or safety code and that the condition was not remedied at the time the rent was deposited, the tenant shall recover any damages caused by the violation, including, but not limited to, the reduction in value of the rented premises. If the court finds that there was a violation of an obligation, the tenant shall be awarded reasonable attorney fees, whether or not the tenant is also awarded actual damages for the violation.*

5321.13 [*Rental agreement terms barred.*]

(G) *No agreement by a tenant to pay a liquidated damage shall be recognized in any rental agreement for residential premises or in any other agreement between the landlord and tenant.*

(H) *No agreement by a tenant to waive the right to a jury trial shall be recognized in any rental agreement for residential premises or in any other agreement between the landlord and tenant.*

(I) *No agreement by a tenant for automatic renewal for more than one month shall be recognized in any rental agreement for residential premises or in any other agreement between the landlord and tenant.*

(J) No agreement by a tenant to automatically forfeit all or any part of a security deposit upon a breach of the rental agreement by the tenant shall be recognized in a rental agreement for residential premises or any other agreement between the landlord and tenant.

(K) A provision prohibited by this section included in a rental agreement is unenforceable. If a landlord knowingly uses a rental agreement containing provisions to be prohibited, the tenant shall recover in addition to his actual damages, the amount of three months periodic rent and reasonable attorney fees.

5321.15 [Residential premises landlord restrictions.]

(C) A landlord who violates this section is liable in a civil action for three times the actual damages caused to a tenant or to a tenant whose right to possession has terminated or two hundred dollars, whichever is greater, together with reasonable attorney fees.

5321.16 [Security deposit procedures.]

(A) A landlord may not demand or receive security, however denominated, in an amount or value in excess of one [1] month[s] periodic rent. Such security deposit shall be kept in a separate interest bearing escrow account. This account shall bear interest at the rate of five per cent per annum if the tenant remains in possession of the premises for six months or more, and shall be computed and paid annually by the landlord to the tenant. This account shall be held and administered for the benefit of the tenant. The tenant's claim to such money shall be prior to that of any creditor of the landlord, including a trustee in bankruptcy, even if such security funds are unlawfully co-mingled. Upon the transfer of a residential premises, any monies in this account shall be transferred to the new landlord.

(C) If the landlord fails to comply with any provision of division (A) or (B) of this section the tenant shall recover three times the property or money due him or two hundred dollars, whichever is greater, together with reasonable attorney fees.

