Recent Statutory Developments in Texas Landlord-Tenant Law: A Sword without a Shield

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RECENT STATUTORY DEVELOPMENTS IN TEXAS LANDLORD-TENANT LAW: A SWORD WITHOUT A SHIELD

by Rebecca Hurley

In 1978 the Texas courts precipitated contemporary landlord-tenant reform by creating an implied warranty of habitability in residential leasing and by recognizing a cause of action for retaliatory conduct against a tenant. The Texas Legislature responded in its 1979 session by enacting House Bill 1773, a statute intended to govern the rights and responsibilities of residential landlords and tenants. Article 5236f codifies the landlord’s duty to repair leased premises and specifies the tenant remedies that are available if the landlord fails to comply. In addition, the statute proscribes certain forms of retaliatory action by both landlord and tenant. In defining the respective rights and duties of the lessor and lessee, the statute both limits and expands upon the judicial decisions that preceded it.

This Comment traces the common law foundations of the landlord-tenant relationship from the twelfth to the twentieth centuries, examining in particular the recent judicial decisions that have changed the focus of landlord-tenant law from its outmoded origins to a more modern and realistic approach. Additionally, this Comment analyzes and discusses the Uniform Residential Landlord and Tenant Act, as well as the similar statutes enacted in other jurisdictions, comparing them with the recent Texas legislation. Finally, an analysis and critique of article 5236f is provided, together with suggestions for interpretation by the courts, use by tenants, and revision by the legislature.

I. THE HISTORICAL FOUNDATION OF LANDLORD-TENANT LAW

A. The Common Law Background

The English feudal economy of the late twelfth century considered the lease as a purely contractual right. The lessee was not entitled to the pro-

4. See 2 F. Pollock & F. Maitland, THE HISTORY OF ENGLISH LAW 106 (2d ed. 1968). The estate for years was uncommon during the feudal period of English legal history. It was used most frequently as a device for securing the repayment of loans and evading the
tection afforded by the real actions because the leasehold was not regarded as an estate in land. He was by definition "one who had no right in the land, but merely the benefit of a contract." Over the next three centuries, however, the remedies of the lessee were gradually improved, and his interest came to be considered as one of the estates in land. The lease instrument was therefore deemed a conveyance rather than a contract.

From the sixteenth century on, the property theory of leases prevailed; a lease was said to convey a possessory estate in land for a specified term. While parties to a lease ordinarily exchanged mutual promises in the instrument, the general rule was that the covenants were not mutually dependent. A breach of a landlord's covenant to repair, therefore, was not considered a defense to an action for nonpayment of rent because the two covenants were independent. In return for his promise to pay rent, the tenant received only the right to possess the land. The landlord's part of the bargain was fulfilled by the mere delivery of possession, provided he refrained from later interference with the tenant's use and enjoyment of the premises. In the absence of an express covenant, the landlord had no obligation to repair the premises prior to the commencement of the lease term, nor was he required to make any repairs while the tenant was in possession.

The doctrine of caveat emptor was said to justify the rule that the landlord had no duty to keep rented premises in repair. Presumably the par-
ties to the lease were engaged in an arm’s-length bargaining transaction; the lessee was expected to examine the premises, determine their suitability, and assume all risks as to their condition. This attitude was the product of a landowner-dominated, agricultural society in which structures and improvements were far less important than the land itself. The tenant’s only recourse was to secure from his landlord an express covenant to keep the premises in repair. Even if he succeeded in obtaining such an agreement, however, its breach would not relieve the tenant of his responsibility to pay rent because the two were considered independent covenants.

The courts created a few limited exceptions to mitigate the harshness of the caveat emptor doctrine in leasing transactions. The “furnished house” exception originated with the English case of Smith v. Marrable, in which the lessee of a furnished house abandoned the premises because they were bug-infested. The lessee was held to have a defense to an action for nonpayment of rent on the grounds that a landlord lets a furnished house under the implied condition that it is fit for occupancy. The apparent rationale for the “furnished house” exception to the rule of caveat emptor was that the parties intended an immediate occupancy of the premises, without time for any inspection or repairs on the part of the lessee.

Other cases protected the lessee if the terms of the lease restricted his use of the premises, or if he accepted the lease while the premises were under construction. The courts in such situations implied a covenant that the property would be suitable for the purpose for which it was leased. In J.D. Young Corp. v. McClintic the parties executed a commercial lease before the building was completed. A leaking roof caused water damage to the lessee’s goods, and he sued for cancellation of the lease in addition to damages. Reciting the general rule that there was no implied covenant on the part of a landlord that the demised premises were fit for their intended


18. 1 American Law of Property, supra note 4, § 3.45; 2 R. Powell, supra note 8, ¶ 233; 1 H. Tiffany, supra note 5, § 99. For a discussion of the doctrine of caveat emptor and its impact in the area of real estate sales, see Humber v. Morton, 426 S.W.2d 554 (Tex. 1968).
19. 2 R. Powell, supra note 8, ¶ 233.
20. 1 American Law of Property, supra note 4, § 3.45.
21. See notes 12-13 supra and accompanying text.
23. Id. at 694.
24. 1 American Law of Property, supra note 4, § 3.45. Most of the cases which follow the rule of Smith v. Marrable have involved short-term leases of furnished premises under circumstances suggesting that immediate occupancy was intended. See, e.g., Young v. Povich, 121 Me. 141, 116 A. 26 (1922); Ingalls v. Hobbs, 156 Mass. 348, 31 N.E. 286 (1892).
27. Id.
28. 26 S.W.2d at 460-61.
29. Id. at 461.
purpose, the court noted that caveat emptor applies to a building under construction if it is sufficiently near completion to permit the prospective tenant to ascertain its suitability for use. In the instant case, however, construction had not progressed far enough for the tenant to inspect the premises. He was therefore protected by one of the exceptions to the rule of caveat emptor, and the landlord was held liable for damage to the tenant's goods.

The courts also have used the remedy of constructive eviction to alleviate the harshness of the rule of caveat emptor. The concept of constructive eviction developed from the theory that a covenant of quiet enjoyment is implicit in the nature of the landlord-tenant relationship. Breach of that covenant entitled the lessee to abandon the leased premises and to cease making rental payments if the landlord's affirmative, wrongful acts rendered the premises uninhabitable. Constructive eviction, however, provides the tenant with only limited relief. The tenant is required to vacate the premises in order to exercise his remedy, thereby assuming the risk of liability for accrued rentals should litigation later determine that his reasons for vacating were inadequate. The abandonment requirement is particularly inappropriate in light of the realities of modern urban living. The difficulties of locating alternative housing and financing moving expenses may prevent the tenant from effectively utilizing the constructive eviction remedy. Perhaps most importantly, constructive eviction in no way improves the condition of the premises. The tenant simply abandons his leasehold, and the landlord is not required to repair the alleged defects.

The development of exceptions to the rule of caveat emptor reflected an increasing judicial recognition of the concept's lack of practicality. In light of the social and economic changes that were occurring in both England and the United States, the presumptions based on agrarian landlord-tenant law were recognized as inappropriate and artificial. In an effort to

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30. Id. at 462.
31. Id.
32. See generally 1 American Law of Property, supra note 4, § 3.51; 2 R. Powell, supra note 5, § 225[3]; 1 H. Tiffany, supra note 5, § 92; Comment, Constructive Eviction of a Tenant, 13 Baylor L. Rev. 62 (1961).
33. 1 American Law of Property, supra note 4, § 3.47.
34. See Comment, supra note 12, at 67.
37. See Comment, supra note 12, at 68.
38. Two other recognized exceptions are worthy of note. The landlord is generally held responsible for the condition of the common areas of the demised premises as well as any areas over which he retains control. 1 American Law of Property, supra note 4, § 3.78. In addition, responsibility for repairs falls on the lessor if the premises are leased with any fraud, deceit, or wrongdoing on his part. Yarbrough v. Booher, 141 Tex. 420, 174 S.W.2d 47 (1943).
39. Industrial specialization and increasing urbanization have altered radically the traditional landlord-tenant relationship. The sociological and economic components of this change are traced in J. Levi, P. Hablutzel, L. Rosenberg & J. White, Model Residen-
provide an equitable, contemporary solution to the problems inherent in the landlord-tenant area, the courts began to borrow a concept from the law of sales: the implied warranty.\textsuperscript{40}

\textbf{B. Recognition of the Implied Warranty of Habitability}

The Wisconsin Supreme Court's opinion in \textit{Pines v. Persson}\textsuperscript{41} was a harbinger of the imminent change in landlord-tenant law. Although the "furnished house" exception to the doctrine of caveat emptor\textsuperscript{42} would have applied under the facts of the case,\textsuperscript{43} the court's reasoning rested instead upon an implied warranty of habitability:

To follow the old rule of no implied warranty of habitability in leases would, in our opinion, be inconsistent with the current legislative policy concerning housing standards. The need and social desirability of adequate housing for people in this era of rapid population increases is too important to be rebuffed by that obnoxious legal cliche, \textit{caveat emptor}.\textsuperscript{44}

In \textit{Lemle v. Breeden}\textsuperscript{45} the Hawaii Supreme Court recognized an implied covenant of habitability based on the contractual relationship between the parties. The court emphasized that the lease is a sale as well as a transfer of an estate in land and found that the nature of the transaction as well as contemporary housing realities necessitated the implication of such a warranty.\textsuperscript{46} The court continued by noting that such a contractual view of the lease agreement would afford tenants a more consistent and responsive set of remedies than those that were provided under traditional property law principles, because the common contract remedies of damages, rescission, and reformation would be appropriate.\textsuperscript{47}

A federal court recognized the implied warranty concept in \textit{Javins v. First National Realty Corp.}\textsuperscript{48} In \textit{Javins} the court allowed the lessee to raise the breach of an implied warranty of habitability as a defense to an action for nonpayment of rent.\textsuperscript{49} Using the local housing code as a standard, the


\textsuperscript{41} 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

\textsuperscript{42} Id. at 593, 111 N.W.2d at 412; see notes 22-24 supra and accompanying text.

\textsuperscript{43} The tenants in \textit{Pines} were students who had leased a dwelling "suitable for student housing" for a term of one year. Furniture was to be included. 14 Wis. 2d at 593, 111 N.W.2d at 412.

\textsuperscript{44} Id. at 593-94, 111 N.W.2d at 412-13.


\textsuperscript{46} Id. at 433, 462 P.2d at 474.

\textsuperscript{47} Id. at 436, 462 P.2d at 475.


\textsuperscript{49} 428 F.2d at 1072-73.
court found that a warranty of habitability was implied, by operation of law, into urban leases that were subject to the housing regulations. Recognizing that the feudal concepts of property law no longer reflected the needs of tenants, the court observed that the modern apartment dweller is more concerned with obtaining shelter and a package of goods and services than he is with receiving an interest in land. The court compared the tenant to a consumer and suggested that the rationale for implying warranties of fitness and merchantability in the sales of goods and services applied with equal force to the leasing of residential premises. Examining the nature of the urban housing market, the court emphasized the inability of the modern-day tenant to make the necessary complicated repairs and the inequality of bargaining power between landlord and tenant. Integrating the terms of the local housing code into the lease agreement, the court found that the landlord had a legal obligation to provide and maintain habitable premises for the tenant's use.

Javins proved to be the landmark case. A number of state courts have since followed the lead of the District of Columbia Court of Appeals, judicially adopting an implied covenant of habitability in residential leases.

50. Id.
51. Id. at 1074.
52. Id. at 1075-76. See generally 8 S. Williston, supra note 13, §§ 983-989.
53. 428 F.2d at 1078-79. Unlike the tenant farmer of English common law, the urban dweller usually possesses a specialized skill unrelated to those required to make apartment repairs. In addition, the increasing complexity of apartment buildings makes them difficult to repair in the absence of some expertise in maintenance. Tenants who attempt such repairs could conceivably have problems arranging financing as well as obtaining access to areas in the landlord's control. Id. See also J. Levi, P. Hablutzel, L. Rosenberg & J. White, supra note 39, at 6-7.
54. 428 F.2d at 1079. The court noted in particular the increasingly severe shortage of housing, the use of standardized form leases, and racial and classification discrimination against tenants as impediments to a lessee's bargaining strength. Id.
55. Id. at 1080-81.
56. Id. at 1082.
57. In one commentary Javins was hailed as the "Miranda decision" of residential evictions. Committee on Leases, Trends in Landlord-Tenant Law Including Model Code, 6 Real Prop., Prob. & Tr. J. 550, 576 (1971).
59. Not all courts have been receptive to the notion of a judicially imposed covenant of tenantability. See Blackwell v. Del Bosco, 191 Colo. 344, 558 P.2d 563 (1976), in which the Colorado Supreme Court stated: "[H]owever desirable the adoption of the rule of implied warranty of habitability might be, the resolution of this issue is more properly the function of the General Assembly." 558 P.2d at 565. See also Posanski v. Hood, 46 Wis. 2d 172, 174 N.W.2d 528 (1970) (no intention that housing code should be implied covenant mutually dependent with tenant's covenant to pay rent, and code violations afford no defense to recovery of rent).
The state cases generally have relied on the factors that the *Javins* court cited. Some courts have modeled their decisions after *Javins* by incorporating into the lease the provisions of local housing, health, and safety laws.59 Regardless of the rationale embraced by the particular court, however, the implied covenant of habitability warrants the suitability of the premises as living quarters; it is breached if the premises are unsafe, unsanitary, or otherwise unfit.60 Tenant remedies that are allowed for such a breach have included termination of the lease, damages, rent abatement, rent application, and rent withholding.66

**C. Retaliatory Action by the Landlord**

While the development of the implied warranty of habitability substantially improved the lot of the modern apartment dweller, it did not provide a complete answer to the tenant's problems. Under a short-term or month-to-month rental agreement, a landlord has the right to evict his tenant merely by providing the specified statutory notice; he need not furnish any reason for the eviction.67 The landlord's liberal right of removal has been used in retaliation against tenants who have attempted to protect their rights by reporting housing code violations and breaches of the implied covenant of habitability.68 In order to protect a tenant's right to a tenanta-

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59. See, e.g., Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972); Mease v. Fox, 200 N.W.2d 791 (Iowa 1972); Steele v. Latimer, 214 Kan. 329, 521 P.2d 304 (1974). See also Foisy v. Wyman, 83 Wash. 2d 22, 515 P.2d 160 (1973) (housing code violations merely evidence of uninhabitability). Cf. RESTATEMENT (SECOND) OF PROPERTY § 5.1, Comment e (1977) [hereinafter cited as RESTATEMENT] (“A significant violation of any controlling building or sanitary code, or similar public regulation, which has a substantial impact upon safety or health, is conclusive that the premises are unsafe or unhealthy, but other modes of proof are acceptable.”).


61. The Restatement would allow a variety of remedies, including termination of the lease, damages, rent abatement, and rent withholding. RESTATEMENT, supra note 59, §§ 5.1, 4.


ble dwelling, courts have created the doctrine of retaliatory eviction, which may be used as a defense by the tenant in an eviction action.

In the leading case of Edwards v. Habib the tenant, Edwards, rented residential housing from Habib on a month-to-month basis. When the landlord failed to repair the housing code violations that she had reported, Edwards complained to the Department of Licenses and Inspections. Subsequent investigation revealed over forty housing code violations, and the department ordered the landlord to correct them. The landlord then gave Edwards the required statutory notice to vacate and obtained a default judgment that granted him possession of the premises. A lengthy procedural battle ensued, in which Edwards alleged that the notice to quit was a direct retaliation for her complaints to the housing authorities. The Court of Appeals for the District of Columbia Circuit ultimately determined that proof of retaliatory motive on the part of a landlord constituted a valid defense in an eviction proceeding.

Although the court devoted a large part of its opinion to an examination of constitutional issues raised by the tenant, the holding of the case rested on public policy considerations. Taking judicial notice of the housing problems in the District of Columbia, the court recognized that the local housing code embodied a strong congressional policy in favor of safe and adequate housing. The court stated that "while the landlord may evict for any legal reason or for no reason at all, he is not ... free to evict in retaliation for his tenant's report of housing code violations to the authorities." Allowing retaliatory evictions would neutralize the effectiveness of housing regulations, which depend on private reporting by tenants for their enforcement. The tenant, therefore, should be allowed to present evidence of the landlord's retaliatory intentions as a defense in an eviction proceeding.

Following the Edwards decision, tenant requests for legal protection

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70. Id. at 690.
71. Id. at 690-98. The tenant had argued that the eviction abridged her right of free speech under the first amendment, but the court declined to reach the constitutional issues. Id. at 690. See Note, supra note 67, at 91-94. Nevertheless, some subsequent decisions have been based upon the Edwards court's discussion of the first amendment implications of retaliatory eviction. See, e.g., E. & E. Newman, Inc. v. Hallock, 116 N.J. Super. 220, 281 A.2d 544 (Super. Ct. App. Div. 1971). See also RESTATEMENT, supra note 59, Reporter's Note § 14.9, item 1c, at 76-80 (1977); McElhaney, supra note 68, at 223-25.
72. 397 F.2d at 700.
73. Id.
74. Id. at 699.
75. Id. at 700-01.
76. Id. at 690. The court cautioned that proof of retaliatory purpose on the part of the landlord does not give the tenant an unlimited right to possession. The court indicated that once the illegal purpose has dissipated, the landlord may evict his tenants or raise their rents for any legitimate reason or for no reason at all. Id. at 702.
from a landlord's retaliatory action became more common. State courts began to adopt the defense of retaliatory eviction, relying on the public policy rationale advanced by the Edwards court, that to permit the landlord's retaliatory conduct would frustrate the purposes of local housing laws.\textsuperscript{77} Other decisions have enunciated constitutional bases for the doctrine of retaliatory eviction, similar to those asserted by the tenant in Edwards.\textsuperscript{78} While the courts most often have allowed the tenant to use retaliatory eviction as an affirmative defense in eviction actions,\textsuperscript{79} other remedies may be available. Some cases have held that a court may enjoin the landlord from evicting a tenant if his motives are shown to be retaliatory,\textsuperscript{80} or have permitted the evicted tenant to recover damages.\textsuperscript{81}

\textbf{D. Landlord and Tenant Law in Texas}

Until recently, Texas courts steadfastly adhered to the common law doctrines that governed the landlord-tenant relationship. A long line of Texas cases recited the rule that, in the absence of fraud or deceit, there is no implied warranty on the part of a lessor that the leased premises are suited for their intended use.\textsuperscript{82} While maintaining the strict principle of caveat emptor, however, the Texas courts gradually narrowed its application through a number of exceptions similar to those adopted in other jurisdictions.\textsuperscript{83} Texas did not join the growing number of states that have adopted the theories of implied warranty of habitability and retaliatory eviction until 1978.


\textsuperscript{78} See note 71 supra.


\textsuperscript{81} See, e.g., Markese v. Cooper, 70 Misc. 2d 478, 333 N.Y.S.2d 63 (Monroe County Ct. 1972).

\textsuperscript{82} Yarbrough v. Booher, 141 Tex. 420, 174 S.W.2d 47 (1943); Morton v. Burton-Lingo Co., 136 Tex. 263, 150 S.W.2d 239 (1941); Perez v. Raybaud, 76 Tex. 191, 13 S.W. 177 (1890); Lynch v. Ortlieb, 70 Tex. 727, 8 S.W. 515 (1888); Weinstein v. Harrison, 66 Tex. 546, 1 S.W. 626 (1886); Cameron v. Calhoun-Smith Distrib. Co., 442 S.W.2d 815 (Tex. Civ. App.—Austin 1969, no writ); Jackson v. Amador, 75 S.W.2d 892 (Tex. Civ. App.—Eastland 1934, writ dism'd); Weiss v. Mitchell, 58 S.W.2d 165 (Tex. Civ. App.—Dallas 1933, writ dism'd). A number of these cases, however, involved leases of property designed for commercial use. See Perez v. Raybaud, 76 Tex. 191, 13 S.W. 177 (1890); Lynch v. Ortlieb, 70 Tex. 727, 8 S.W. 515 (1888); Weinstein v. Harrison, 66 Tex. 546, 1 S.W. 626 (1886); Cameron v. Calhoun-Smith Distrib. Co., 442 S.W.2d 815 (Tex. Civ. App.—Austin 1969, no writ); Jackson v. Amador, 75 S.W.2d 892 (Tex. Civ. App.—Eastland 1934, writ dism'd); Weiss v. Mitchell, 58 S.W.2d 165 (Tex. Civ. App.—Dallas 1933, writ dism'd). Even today the application of the implied warranty of habitability generally has been limited to residential leases. The Restatement (Second) of Property takes no position on whether the concept should be extended to leases of commercial or industrial property. See RESTATEMENT, supra note 59, §§ 5.1, .5.

\textsuperscript{83} See notes 22-37 supra and accompanying text. For a complete analysis of the Texas exceptions to caveat emptor see Comment, supra note 12, at 71-82.
The Texas Supreme Court recognized the concept of an implied covenant of habitability in *Kamarath v. Bennett*. The tenant, Kamarath, held property pursuant to an oral month-to-month lease. A number of serious defects in the condition of the premises became apparent after the tenant and his family began to occupy the apartment. When city building inspectors surveyed the property and observed the defects, they notified the landlord either to repair or to vacate the premises. Instead, the landlord gave Kamarath notice to vacate. The tenant ceased paying rent and moved out shortly later. He then brought an action for damages against his landlord, alleging breach of an implied warranty of habitability in urban residential property. The Texas Supreme Court held in favor of the tenant, implying into rentals of residential property a warranty by the landlord that the premises are habitable and fit for living. The court imposed the warranty for public policy reasons, finding that such a covenant arises out of the nature of the lease transaction and the landlord-tenant relationship by operation of law. According to the court, any defect that would render the premises unsafe, unsanitary, or otherwise unfit for living would constitute a breach of the implied warranty of habitability. The court enumerated eight factors to be considered in determining whether a breach had occurred, including:

- The nature of the deficiency, its effect on habitability, the length of time for which it persisted, the age of the structure, the amount of rent, the area in which the premises are located, whether the tenant waived the defects, and whether the defects resulted from malicious, abnormal, or unusual use by the tenant.

One month after the *Kamarath* decision, the Dallas court of civil appeals addressed another contemporary development in landlord-tenant law, the doctrine of retaliatory eviction. In *Sims v. Century Kiest Apart-

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85. Id. The tenant in Kamarath used the asserted warranty as an offensive maneuver, seeking affirmative relief. In Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970), the lessee used breach of the implied warranty as a defense to an eviction action. The *Kamarath* court did not discuss the possible defensive use of the implied warranty.

86. 568 S.W.2d at 660-61. The court cited a number of similar decisions from other jurisdictions in support of its holding.

87. Id. at 660. The court listed several factors that were crucial to its decision. First, the court found that state legislation granting cities the power to adopt housing ordinances constituted recognition of a legislative concern for safe and adequate housing. Additionally, the court recognized that the modern landlord's knowledge of the condition of the premises is superior to that of his tenant. Finally, because the landlord actually owns the property, the court reasoned he should bear the cost of making the necessary repairs. *Id.*

88. Id. at 661.

89. Id.

90. Id. See also Mease v. Fox, 200 N.W.2d 791 (Iowa 1972); Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970).
the tenant Sims had made repeated complaints to the management of his apartment complex about the deteriorating condition of the property. He also had helped to organize a tenants’ council and had reported housing, health, and building code violations to the city authorities. Although his rent was fully paid, he received written notice to vacate his apartment, and the landlord rejected his tender of future rental payments. The landlord filed suit for forcible entry and detainer and recovered possession of the premises, whereupon Sims brought suit for damages for retaliatory eviction.

Relying primarily on the decision in Edwards v. Habib, the court held that a cause of action for retaliatory eviction does exist in Texas. "[I]f the evidence shows that the tenant probably would not have been evicted had he not reported violations of regulations enacted for his benefit,” the court stated, “then such an eviction is an affirmative wrong for which an action for damages will lie in favor of the aggrieved tenant.” The court based its holding on the public policy implicit in state statutes and local ordinances and did not confront the constitutional issues of freedom of speech, freedom of assembly, and freedom of petition for redress of grievances. While recognizing the landlord’s common law and statutory power to terminate a tenancy, the court determined that the power should not grant the landlord a legal right to evict in retaliation for the tenant’s report of housing violations. In the court’s view the controlling principle was "the policy against intimidation or coercion that would discourage or inhibit reports of violations of the law by persons for whose benefit the law has been enacted.”

With the decisions in Kamarath and Sims, Texas courts designed two new remedies to provide tenants with more adequate housing facilities. Nearly a decade after the landmark holdings in Javins and Edwards, Texas courts acknowledged the realities of the modern landlord-tenant relationship and the obsolescence of the doctrine of caveat emptor. While

91. 567 S.W.2d 526 (Tex. Civ. App.—Dallas 1978, no writ). For a discussion of Sims, see Bentley, supra note 84, at 96-98.
93. 567 S.W.2d at 527-28.
94. Id. at 527. The Sims case involved offensive use of retaliatory eviction principles; the tenant sought affirmative relief in the form of damages. In Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968), cert. denied, 393 U.S. 1016 (1969), retaliatory eviction was asserted as a defense in an eviction proceeding. The Sims court “[did] not go so far as to hold that [retaliatory eviction] would constitute a defense in forcible detainer.” 567 S.W.2d at 532.
96. 567 S.W.2d at 527.
97. Id. at 532.
98. Id. Like the Edwards court, however, the Sims court devoted considerable attention to the matter. Id. at 529-30.
99. Id. at 531. The court cautioned that its holding was a narrow one. The retaliatory eviction principle was not to be extended to a case in which the tenant’s complaints were not made in good faith. Furthermore, if the landlord has some affirmative ground for eviction, such as nonpayment of rent, the retaliatory eviction cause of action should not be recognized. Id. at 532.
"Kamarath" and "Sims" were important statements of public policy, they left many questions for judicial resolutions.

II. Recent Statutory Modifications of the Landlord-Tenant Relationship

A. The Uniform Residential Landlord and Tenant Act

The Uniform Residential Landlord and Tenant Act (URLTA) had its origin in an American Bar Foundation research project. The project produced a tentative draft of the Model Residential Landlord-Tenant Code (MRLTC), a document that was intended primarily as a basis for discussion rather than for adoption as a model act. In 1970 a subcommittee of the National Conference of Commissioners on Uniform State Laws continued the research that the American Bar Foundation had initiated. The subcommittee's efforts culminated in the drafting of the URLTA, which the American Bar Association adopted in February 1974. Thirteen states now have adopted the legislative package of reforms contained in the URLTA with some variation.

100. Among the issues left unresolved by "Kamarath" and "Sims" was the waiver of the implied warranty of habitability. Compare Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.) (indicating that the implied warranty could not be waived), cert. denied, 400 U.S. 925 (1970), with Kamarath v. Bennett, 568 S.W.2d 658, 660 n.2 (Tex. 1978) ("our holding should not be construed to mean that a tenant may not, by express agreement, waive the warranty of habitability"). See also RESTATEMENT, supra note 59, §§ 5.1, .4-.5 ("except to the extent the parties to a lease validly agree otherwise").

The "Kamarath" court also failed to consider the issue of damages for breach of the implied warranty, as well as the question of its use as a defense. See note 85 supra. The "Sims" court left open the possible use of retaliatory eviction as a defense. See note 94 supra. The problem of proving a landlord's retaliatory motive was also unaddressed.

101. Prior to any judicial interpretations of "Kamarath" and "Sims", the Texas Legislature passed a statute that superseded those decisions. TEX. REV. CIV. STAT. ANN. art. 5236f (Vernon Supp. 1980-1981); see notes 155-205 infra and accompanying text.

102. Principal financial support for the project was provided by the Office of Economic Opportunity. J. LEVI, P. HABLUTZEL, L. ROSENBERG & J. WHITE, supra note 39, at 3.


The URLTA incorporates a number of basic fair treatment and decent housing protections, including the warranty of habitability and protection against retaliatory action by landlords. Section 2.104 contains the basic warranty provisions of the statute.\textsuperscript{106} One important feature of section 2.104 is an enumeration of the landlord's maintenance responsibilities. The URLTA requires the landlord to comply with all applicable building and housing codes that materially affect health and safety. He must also put and keep the premises in fit and habitable condition, make all necessary repairs, and keep common areas clean and safe. In addition, the landlord must provide and maintain appropriate and necessary services, such as water, heat, electricity, and garbage removal.\textsuperscript{107}

The URLTA permits landlords and tenants of single family dwellings to agree to their own maintenance arrangements, subject to a good faith requirement. The agreements are not allowed if they are made "for the purpose of evading the obligations of the landlord."\textsuperscript{108} Similar agreements are permitted between landlords and tenants in multiple-unit dwellings, subject to some additional restrictions.\textsuperscript{109}

A variety of tenant remedies for breach of the implied warranty are available through the URLTA.\textsuperscript{110} If a landlord's noncompliance with the Act's warranty provisions materially affects health and safety, the tenant may receive damages, seek injunctive relief, or terminate his lease. The availability of these remedies, however, is predicated upon the tenant's compliance with the statutory notice provision.\textsuperscript{111} For a landlord's wrongful failure to provide essential services as required by section 2.104, the tenant is allowed to recover damages, use rent application procedures,\textsuperscript{112} or suspend rental payments.\textsuperscript{113} When the landlord initiates an action for rent or possession based on nonpayment of rent, the tenant may counterclaim for damages resulting from the landlord's breach.\textsuperscript{114}

\begin{footnotesize}
\textsuperscript{106} VA. CODE §§ 55-248.2 to 40 (Supp. 1980). For a recent evaluation of URLTA as it has been applied in Ohio and Oregon, see Brakel & McIntyre, \textit{The Uniform Residential Landlord and Tenant Act (URLTA) in Operation: Two Reports}, 1980 AM. B. FOUNDATION RESEARCH J. 555.

\textsuperscript{107} Uniform Residential Landlord and Tenant Act § 2.104.

\textsuperscript{108} Id. § 2.104(a).

\textsuperscript{109} Id. § 2.104(c).

\textsuperscript{110} Id. § 2.104(d). In order for a substituted maintenance agreement to be valid, it must be entered into in good faith and set forth in a separate written document supported by adequate consideration. The maintenance that is the subject of the agreement must not be necessary to achieve compliance with the housing codes. Finally, the agreement must not affect the rights of other tenants. Id.

\textsuperscript{111} See id. §§ 4.101, .107.

\textsuperscript{112} Id. §§ 4.101(a)-(b). Variable notice provisions are provided by the drafters.

\textsuperscript{113} Id. §§ 4.104(a)(1)-(2). Application of rent upon a landlord's default is a tenant's self-help remedy. The tenant, after proper notice to the landlord, is permitted to apply his rent to eliminate the default and then deduct from his rent the reasonable costs incurred. See Restatement, supra note 59, § 11.2, Comment a. See also Uniform Residential Landlord and Tenant Act § 4.103.

\textsuperscript{114} Uniform Residential Landlord and Tenant Act § 4.104(a)(3) allows the tenant to obtain substitute housing and cease making rental payments for the duration of the landlord's default.

\textsuperscript{114} Id. § 4.105. Section 4.105 also establishes the remedy of rent withholding or rent
are damaged or destroyed by fire or other casualty, rent abatement is permitted.\footnote{115}

Although the remedies that the URLTA provides far exceed those available at common law, noticeable shortcomings exist. The statute neither mandates repair of the premises through a provision for specific performance nor enables the tenant to finance such repairs. Furthermore, the rent abatement and damage provisions essentially shift the repair obligation from the landlord to the tenant and ignore the compensatory nature of the awards.\footnote{116} Mechanisms such as receivership, retroactive rent abatement, landlord security deposits, and tenant-mortgage negotiating may provide further reform in the future.\footnote{117}

Among the fair treatment provisions of the URLTA is a prohibition against retaliatory conduct by the landlord.\footnote{118} The URLTA shields the tenant from landlord retaliation in the form of increased rent, decreased services, or actual or threatened suits for possession.\footnote{119} The Act protects tenant activities such as complaints to either the landlord\footnote{120} or government authorities\footnote{121} with regard to the condition of the premises, tenant organizing, and tenant union membership.\footnote{122} The Act also creates a presumption of the landlord's retaliatory motive if his conduct occurs within a year of any of the protected activities.\footnote{123} The URLTA does recognize limited exceptions to the retaliatory eviction action; under certain circumstances the landlord may lawfully bring a possessory action.\footnote{124} Affirmative tenant remedies for a landlord's retaliatory conduct include termination of the escrow. The court may require the tenant to deposit unpaid and accruing rent into the court pending the outcome of the case. Courts have not favored this practice because it discourages the use of other remedies for breach of the warranty of habitability. See Cooks v. Fowler, 459 F.2d 1269 (D.C. Cir. 1971); Bell v. Tsintolas Realty Co., 430 F.2d 474 (D.C. Cir. 1970). \textit{Contra}, Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1083 n.67 (D.C. Cir.), \textit{cert. den[d]}, 400 U.S. 925 (1970).

115. "The tenant's liability for rent is reduced in proportion of the diminution in the fair rental value of the dwelling unit." \textsc{Uniform Residential Landlord and Tenant Act \S\ 4.106(a)(2)}; see \textsc{Restatement}, \textit{supra} note 59, \S\ 11.1.

116. The economic sanction of prospective rent abatement may not induce the landlord to make repairs if the capitalized repair expenses exceed the capitalized cost of continued rent abatement. The tenant thus may be forced to finance repairs from available money damages, savings from rent abatements, and his own income. \textit{See} Blumberg & Robbins, \textit{supra} note 104, at 22-39.

117. For a comprehensive analysis of these suggested reforms in the URLTA's implied warranty provisions, see Blumberg & Robbins, \textit{supra} note 104, at 11.

118. \textsc{Uniform Residential Landlord and Tenant Act \S\ 5.101}. The URLTA also addresses the landlord's distress and distraint remedy (\textit{Id.} \S\ 4.205) and the use of security deposits (\textit{Id.} \S\ 2.101).

119. \textit{Id.} \S\ 5.101(a).

120. \textit{Id.} \S\ 5.101(a)(2).

121. \textit{Id.} \S\ 5.101(a)(1).

122. \textit{Id.} \S\ 5.101(a)(3).

123. \textit{Id.} \S\ 5.101(b). "Presumption" is a defined term under the URLTA. The trier of fact is required to find the existence of the presumed fact unless evidence is admitted that would support a contrary finding. The presumption of retaliation does not arise if the tenant's complaint was made after notice of a proposed rent increase or diminution of services. \textit{Id.}

124. \textit{Id.} \S\ 5.101(c). If the tenant defaults on his rent or causes the code violation himself, the landlord's action is considered lawful. Further, the landlord may evict if compliance
lease, recovery of possession, and damages. The URLTA also authorizes a defense that is based upon the retaliatory action in any suit for possession.

As with the implied warranty provisions, the retaliatory conduct prohibitions are helpful but incomplete. The difficult task of proving retaliatory intent on the part of the landlord is alleviated by the statutory presumption of intent, but the provision arguably only postpones the retaliation. The categories of protected tenant activities should be broadened. Perhaps other forms of landlord retaliation should be proscribed in order to protect better the tenant's rights.

B. Other State Statutes

Many states recently have enacted comprehensive residential landlord-tenant statutes. While language and style vary, the purpose of the new wave of legislation is uniform: the encouragement of proper maintenance and operation of residential properties in compliance with health and safety standards.

The majority of the states now have statutes requiring the landlord to put leased premises into a condition fit for their intended use. In addi-
tion, the statutes ordinarily impose upon the landlord a duty to repair any defects that may arise or be discovered during the lease term. If the landlord defaults in his obligation to repair, the tenant may have any one or more of a number of remedies available to him.

Statutory remedies for breach of the landlord’s duty to maintain the premises differ widely. In a number of states the tenant has the right to terminate the lease upon default by the landlord. The right to seek damages is another common form of relief. A number of jurisdictions


have approved some method of rent abatement by which the tenant is allowed to reduce the amount of the rental payment in proportion to the loss of rental value of the premises.\footnote{132} Rent abatement primarily is allowed when the premises have suffered from casualty destruction. Rent application, another potential remedy for the aggrieved tenant, permits the tenant to repair defects himself and to deduct the expenses from his rental payments; the "repair and deduct" procedure has become a popular self-help maneuver.\footnote{133} Some statutes allow the tenant to suspend rental payments under limited circumstances;\footnote{134} others provide for a rent withholding mechanism whereby the tenant continues to pay rent to another party (usually the court) pending resolution of the landlord-tenant dispute.\footnote{135}


133. Statutes allowing rent application fall into three groups. One group of laws provides for a simple "repair and deduct" remedy, while others have a very carefully detailed procedure. A third set of statutes provides for rent application only upon court order.


Legislation that prohibits retaliatory action by the landlord also differs from one jurisdiction to another. Most statutes enumerate certain acts of the landlord that are forbidden in retaliation for tenant activities. Protected tenant activities may include enforcement of a lessee's rights under his lease, enforcement of a tenant's legal rights, tenant complaints to


137. In some states the landlord's exercise of his rights is deemed retaliatory if his motivation is to penalize the tenant's enforcement of rights under the lease: MINN. STAT. ANN. § 566.03 (Supp. 1980); N.J. STAT. ANN. §§ 2A:42-10.10 to .12 (West Supp. 1980-1981); R.I. GEN. LAWS §§ 34-20-10, -11 (1969).

the landlord\textsuperscript{139} or government authorities,\textsuperscript{140} or tenant involvement in an organization of tenants.\textsuperscript{141} Most statutes also contain exceptions to the retaliatory eviction provisions, allowing the landlord to act in certain specified circumstances.\textsuperscript{142} The statutes uniformly permit the tenant to use retaliatory conduct as an affirmative defense to the landlord’s suit for possession. Some statutes also entitle the tenant to damages.\textsuperscript{143}


III. Article 5236f: Rights and Duties of Landlords and Tenants in Texas

A. Legislative and Judicial Background

Until 1973 Texas tenants had little statutory protection against abuse by their landlords. In that year, however, a consumer-oriented legislature enacted a number of reforms that attempted to equalize the landlord-tenant relationship. Provisions that dealt with tenant security deposits, utility shut-offs, and landlord’s liens were included in the new laws. During the following legislative session, the Texas Deceptive Trade Practices-Consumer Protection Act was amended to include real property purchased or leased for consumer use within the definition of “goods.”

Despite the importance of these measures, Texas tenants still lacked the remedies of implied warranty of habitability and the retaliatory eviction ban, which other jurisdictions were rapidly adopting. A number of bills were introduced during the sixty-fifth Legislature in an attempt to rectify the situation, but none was enacted. Within the context of this statutory vacuum, the 1978 decisions in *Kamarath v. Bennett* and *Sims v. Century Kiest Apartments* provided the impetus for landlord-tenant reform.

Within a year following *Kamarath* and *Sims*, however, the legislature enacted a new statute designed to govern the rights and duties of landlords and tenants. While the Texas law is not as comprehensive as the URLTA or the laws of some states, it does include some significant and necessary reforms. The law both codifies and modifies the *Kamarath* and *Sims* cases, providing some statutory limits where the judiciary had left

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146. Id. art. 5236c.
147. Id. art. 5236d.
149. Id. § 17.45(1).
150. See notes 58, 77 supra.
151. For a detailed description of the bills and their various provisions, see Sohns & Fuller, *supra* note 144, at 504-08.
152. 568 S.W.2d 658 (Tex. 1978).
154. Chief Justice Guittard discussed the issue of judicial legislation in his majority opinion in *Sims*. “The objection is made that this court is engaging in judicial legislation . . . . We agree that a well-drawn statute would be a superior solution to this problem for future cases. Such a solution, however, is not available in this case.” He then challenged the legislators: “If legislation is needed to govern future cases of this sort, it may be enacted, regardless of this decision.” *Id.* at 533.
room for interpretation. The statute itself, however, is not without ambiguity.

B. Statutory Warranty of Habitability

The Texas Act is limited in its application to residential property. Section 2 of the Act delineates the landlord's duty to make repairs. Upon actual notice, the landlord must make a "diligent effort to repair or remedy any condition which materially affects the physical health or safety of an ordinary tenant." The duty to repair does not extend to repairs necessitated by actions of the tenant or his family, guests or invitees; it does embrace conditions caused by normal wear and tear that also materially affect the tenant's physical health or safety. The Act does not require a landlord to furnish utility service if it is not reasonably available, nor does it mandate security guard protection.

Under the Act an aggrieved tenant has the right to either judicial or nonjudicial relief. Before he can avail himself of these remedies, however, he must comply with the Act's elaborate prerequisites. Initially, the tenant must be current in his rental payments; if they are in arrears, he is entitled to no relief. The tenant must then notify the landlord of the defective condition and allow him a reasonable time to make repairs. The tenant is free to pursue his statutory remedies only if the landlord fails to cure within this time.

156. TEX. REV. CIV. STAT. ANN. art. 5236f, § 1 (Vernon Supp. 1980-1981). Like Texas, most states have limited the application of the statutory warranty of habitability to residential leases. But see CAL. CIV. CODE § 1941 (West 1954); LA. CIV. CODE ANN. arts. 2692-2693, 2695 (West 1952). The American Law Institute currently takes no position as to whether a warranty of habitability should be available to a tenant of property leased for commercial or industrial purposes. See RESTATEMENT, supra note 59, § 5.1.

157. "Landlord" is a defined term under the Act, meaning the owner, lessor, or sublessor of a residential rental unit. For purposes of notice and other communications that may be necessary, a managing agent, leasing agent, or resident manager is considered the agent of the landlord. TEX. REV. CIV. STAT. ANN. art. 5236f, § 1 (Vernon Supp. 1980-1981). The importance of this definitional provision is apparent to the many apartment dwellers who live in properties owned by out-of-town individuals or business entities. By creating an agency relationship between landlord and manager, the Act alleviates the difficulties inherent in contacting the absentee landlord and obtaining jurisdiction over him.

158. Id. § 2(a).

159. "Normal wear and tear" is the deterioration that occurs within the scope of the normal use for which the premises are intended. Id. § 1(e).

160. Id. § 2(b).

161. Id. § 2(c). The Act does not indicate what the landlord's responsibilities may be if utility lines are readily available.

162. Id.

163. Id. § 3(b).

164. Id. § 3(a). A managing agent, leasing agent, or resident manager is considered the landlord's agent for purposes of notice. Id. § 1(a); see note 157 supra.

165. The condition must be one that materially affects the physical health or safety of an ordinary tenant. Id. § 3(c).

166. Id. § 3(e). The reasonableness of the time allowed for repairs will depend upon the nature of the problem and the availability of goods and services necessary to remedy it. Id. The Dallas Tenants' Association suggests that a "reasonable time" might be one day for such emergencies as backed-up sewage or lack of water and recommends a five-day rule of thumb in less pressing circumstances. DALLAS TENANTS' NEWS, July-Aug. 1980, at 1.
make a diligent effort to remedy the condition.\textsuperscript{167}

The Act makes available to the tenant both judicial and self-help remedies. The tenant may terminate the lease without a court appearance,\textsuperscript{168} provided he has complied with all the prerequisites outlined in section 3\textsuperscript{169} and allowed reasonable time for repairs.\textsuperscript{170} In order to terminate his lease obligations, the tenant must give the landlord written notice that he will terminate the rental agreement unless the landlord remedies the condition within seven days.\textsuperscript{171} Upon termination of the lease, the tenant may recover both his rent and his security deposit.\textsuperscript{172}

The Act provides a number of judicial remedies, and the tenant is entitled to recover under any of them.\textsuperscript{173} As with self-help termination, the tenant must fulfill all of the section 3 requirements prior to seeking judicial relief. In addition, the tenant must notify the landlord that he will file suit under the statute unless the landlord remedies the condition within seven days.\textsuperscript{174} When a tenant institutes a proceeding under the Act, the court may order specific performance and require the landlord to repair or remedy the condition of the premises.\textsuperscript{175} Rent abatement is another available remedy by which the court is authorized to reduce rental payments temporarily in proportion to the diminution in rental value of the defective premises.\textsuperscript{176} The tenant may be granted actual\textsuperscript{177} or statutory damages\textsuperscript{178} as well as court costs and attorneys' fees.\textsuperscript{179} The tenant, however, is not allowed to use breach of the landlord's duty to repair as a defense in an eviction proceeding.\textsuperscript{180}

A separate section of the Act governs insured fire and casualty losses.\textsuperscript{181} For damage to the rented premises caused by fire, smoke, hail, explosion, or similar occurrences, the allowable time period for repairs does not begin until the landlord receives his insurance proceeds.\textsuperscript{182} If the casualty loss renders the premises totally unusable from a practical standpoint, either

\begin{itemize}
  \item 168. Id. § 5.
  \item 169. Id. § 5(a)(1).
  \item 170. Id. § 5(a)(2).
  \item 171. Id.
  \item 172. Id. § 5(b). Pro rata rent refunds are calculated from the date of termination or of moveout, whichever is later. Id.
  \item 173. Id. § 6.
  \item 174. Id.
  \item 175. Id. § 6(a).
  \item 176. Id. § 6(b). The abatement of rental payments is to continue until the premises are repaired. Id. When coupled with the specific performance relief of § 6(a), this provision takes on added significance. The landlord is required to repair the premises, and the tenant is partially relieved of payment responsibilities until he does.
  \item 177. Id. § 6(d).
  \item 178. Id. § 6(c). The court is empowered to award a civil penalty of one month's rent plus $100. Id. This provision seems primarily punitive in nature and appears designed for situations in which the tenant's actual damages are small or difficult to calculate.
  \item 179. Id. § 6(e). See also id. § 10.
  \item 180. Id. § 9.
  \item 181. Id. § 4.
  \item 182. Id. § 4(a).  
\end{itemize}
party is entitled to terminate the lease. If, however, the premises remain partially usable, termination is not available; the tenant is limited to the remedy of rent abatement, for which he must apply to the court.

C. Prohibition of Retaliatory Conduct

The statute prohibits the landlord from taking certain action in retaliation for a tenant's notice to repair a defective condition or the tenant's exercise of his legal rights under the Act. For a period of six months from the date of such tenant action, the landlord may not file eviction proceedings, deprive the tenant of his use of the premises, decrease the tenant's services, or notify the tenant of a rent increase or termination of the lease which is to be effective within six months. Violation of this section entitles the tenant to recover a statutory penalty, reasonable moving costs, court costs, and attorneys' fees. Additionally, the Act allows a retaliatory conduct defense to a possessory proceeding against the tenant.

The statute lists numerous exceptions to the retaliation section. The landlord is free to evict the tenant if he is delinquent in his rent, or has otherwise materially breached the rental agreement. Threats or intentional property damage by the tenant, his family, guests, or invitees are also valid grounds for eviction under the Act. Under some circumstances the landlord may proceed with eviction proceedings if the tenant holds over. Finally, increases in rent or decreases in service that are clearly not induced by retaliatory motives may be allowed.

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183. Id. § 4(b). In the case of such termination, the tenant may recover a pro rata refund of rent as well as his security deposit. Id.
184. Id. § 4(c).
185. Id. § 7(a).
186. Id. § 7(a). But see id. § 7(b).
187. Id. § 7(a).
188. Id. § 7(d)(1). Statutory damages of one month's rent plus $100 may be awarded to the tenant who has suffered from retaliation by the landlord. Id.
189. Id. § 7(d)(2).
190. Id. § 7(d)(3). See also id. § 10.
191. Id. § 9.
192. Id. § 7(b).
193. Id. § 7(b)(1). To avoid eviction, the rental payment must be current as of the time of the landlord's written notice to vacate or as of the time the eviction proceedings are filed. Id.
194. Id. § 7(b)(4).
195. Id. § 7(b)(3).
196. Id. § 7(b)(2).
197. The landlord is free to evict if the tenant holds over after having given notice of his own intention to vacate. Id. § 7(b)(5). Furthermore, if the landlord has given notice to vacate prior to his actual receipt from the tenant of a repair notice, he may evict the holdover tenant. Id. § 7(b)(6). Finally, the Act includes a catchall provision for the landlord that allows him to evict a holdover tenant if he believes that the tenant may affect adversely the health, safety, quiet enjoyment, or property of the landlord or the other tenants. Id. § 7(b)(7).
198. Id. § 7(c). Increases or decreases in rent that are made pursuant to an escalation clause in the rental agreement or as part of a project-wide pattern are not considered retaliatory.
D. Miscellaneous Provisions

While the Texas Act is largely tenant-oriented, it does offer protections for the landlord as well. The Act gives the landlord a cause of action for retaliatory rent withholding. If the tenant withholds a rental payment in retaliation for the landlord’s failure to repair the condition of the premises, the landlord may recover a statutory penalty of one month’s rent plus $100. In addition, the Act relieves the landlord of his statutory responsibilities if he decides to demolish or close the rental premises.

Section 13 of the Act contains three sentences that are among the most important in the entire statute:

The provisions of this Act may not be waived except where the rental agreement is in writing and the waiver is underlined or in bold print in the rental agreement or in a separate written addendum. Such waiver must be specific and must list with clarity what duties are being waived. Such waiver must be made knowingly, voluntarily, and for consideration.

The section allows the parties to the lease agreement to bargain with the legal protections that the Act establishes. The possibility of a waiver arguably works to the landlord’s advantage.

Section 14 of the Act provides that the statutory duties and remedies are intended to supersede and replace existing common law and statutory law that govern habitability and retaliatory eviction. The Act expressly preserves, however, the contractual rights of both landlord and tenant.

Section 14 also clarifies the limited scope of the Act, noting that the statute does not affect actions for personal injury and property damage. Thus, common law doctrines and statutory remedies currently in force remain valid in these actions.

IV. Toward the Future: Suggested Interpretations and Reform

The enactment of article 5236f significantly altered the landlord-tenant relationship in Texas by codifying the contemporary concepts of retaliatory eviction and implied warranty. Litigation is certain to arise from a number of the Act’s provisions that lend themselves to more than one interpretation. The following portion of this Comment addresses areas of potential conflict, as well as those areas that arguably are in need of legislative alteration.

The most ambiguous language in the new law appears in one of its key

199. Id. § 8.
200. Id. § 12.
201. Id. § 13.
202. See notes 228-35 infra and accompanying text.
204. Id.
205. Id.
206. The Act applies only to residential rental agreements executed, renewed, or extended after Sept. 1, 1979. Id. § 17.
sections. Section 2, which delineates the landlord's duty to repair leased premises, extends that obligation to "any condition which materially affects the physical health or safety of an ordinary tenant." The language of section 2 is certain to form the subject matter of future litigation because of the ambiguity of the phrase "materially affects." One possible guide to an interpretation of the language may be found in Kamarath v. Bennett, in which the Texas Supreme Court outlined eight factors to be used in determining whether the landlord had breached the implied warranty of habitability. The use of these factors, while not a complete solution, could provide a measure of guidance in defining the statutory language.

The intricate procedural aspects of the Texas Act may prove burdensome to the average urban tenant. Especially onerous are the notice provisions, which require "double notice" to the landlord before the tenant may exercise his statutory rights. Before the landlord's duty to repair will arise, the tenant must provide him with written notice of the defective condition of the premises. The Act requires a second notification prior to the tenant's self-help termination of the lease or resort to the judicial process. The "double notice" requirement serves no apparent purpose because the goal of notifying the landlord may be accomplished in one simple step. The "double notice" provisions present a procedural trap.

207. Id. § 2.
208. Id. (emphasis added).
209. The Dallas Tenants' Association and the Greater Dallas Community Relations Commission have made an effort to provide guidance to tenants by enumerating examples of such "material" conditions. They suggest that defective wiring or plumbing, leaks, holes, infestation of vermin, lack of heat or hot water, and unsafe stairways constitute conditions that materially affect health and safety. Violations of city housing, fire, and health codes would also fall in this category. Items such as the condition of the carpet, unsatisfactory draperies, and nonfunctioning appliances would not.

210. 568 S.W.2d 658 (Tex. 1978).
211. See text accompanying note 90 supra.
212. While the URLTA also uses the "materially affecting health and safety" language, it goes on to list a number of specific landlord duties. Uniform Residential Landlord and Tenant Act § 2.104. See text accompanying notes 106-07 supra. In Park West Management Corp. v. Mitchell, 47 N.Y.2d 316, 391 N.E.2d 1288, 418 N.Y.S.2d 310, cert. denied, 444 U.S. 992 (1979), housing conditions were adversely affected by a strike of the building service employees' union. Garbage removal and janitorial services were interrupted by the strike, and some of the tenants refused to pay rent. When the landlord sued for nonpayment, the tenants counterclaimed for breach of the implied warranty of habitability. They ultimately were awarded a rent reduction for the breach. While the landlord argued that the warranty would not be violated unless the deprivation rendered the premises uninhabitable and dangerous, hazardous, or detrimental to the tenants' health and safety, the New York Court of Appeals disagreed. The court found that the conditions that existed during the strike were serious enough to constitute a health emergency. Id. at 329, 391 N.E.2d at 1295, 418 N.Y.S.2d at 317.

214. Id. § 5(a)(2).
215. Id. § 6.
216. The URLTA endorses a one-step notice procedure. Under the URLTA, the tenant lists in his notice to the landlord the acts and omissions which constitute a breach of the statutory warranty of habitability. The notice may also state that the rental agreement will terminate within 30 days unless the breach of warranty is corrected within 14 days. Un-
for the unwary tenant who neglects to fulfill the second portion of the requirement.\textsuperscript{217}

The remedies authorized under the Texas statute for breach of the implied warranty are of particular concern to tenants. One of the most significant provisions of the Act is the availability of specific performance.\textsuperscript{218} By directly requiring the landlord to repair the alleged defects, specific performance achieves decent housing more effectively than the economic sanction of rent reduction.\textsuperscript{219} Tenants should be encouraged to seek both specific performance and rent abatement to maximize the relief that the statute affords.\textsuperscript{220}

A number of weaknesses are apparent, however, with respect to the statutory remedies. While the Act provides for nonjudicial termination of the lease by the tenant, it fails to address the question of moving expenses.\textsuperscript{221}

\textit{FORM RESIDENTIAL LANDLORD AND TENANT ACT § 4.101.} No additional notice is required prior to filing suit under the Uniform Act. \textit{See id. §§ 4.102, .104.}

\textsuperscript{217} The following are forms proposed for use by Texas tenants to satisfy the notice requirements of the Act. They are adapted from \textsc{R. Blumberg \& J. Grow, \textit{The Rights of Tenants} 170-71 (1978).} The tenant always should keep a copy of any communication sent to the landlord.

**FORM 1: NOTICE OF DEFECTIVE CONDITIONS**

\begin{verbatim}
(date)

To ___, landlord of premises located at (street name, number, unit number, city, and state).

Certain defective conditions and/or housing code violations exist at the premises named above. These conditions materially affect my physical health and safety and are a violation of \textit{TEX. REV. CIV. STAT. ANN. art. 5236f}. The conditions are:

I would appreciate your repair of these conditions as soon as possible. If they are not remedied within a reasonable time, I intend to exercise fully my rights under Texas law, which entitles me to terminate the lease or seek damages, specific performance, and rent abatement.

Thank you for your cooperation.

(tenant)
\end{verbatim}

**FORM 2: NOTICE OF INTENTION TO PURSUE STATUTORY REMEDIES**

\begin{verbatim}
(date)

To ___, landlord of premises located at (street name, number, unit number, city, and state).

The defective conditions of which you were notified on (date of first notice) remain unrepaired. Unless the condition is repaired or remedied within seven days, I intend to (check one):

___ terminate the rental agreement
___ file suit under \textit{TEX. REV. CIV. STAT. ANN. art. 5236f, § 6}.

(tenant)
\end{verbatim}

\textsuperscript{218} Even the \textit{URLTA} does not require the landlord to make repairs. \textit{See \textit{UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT §§ 4.101-107}.}

\textsuperscript{219} See \text{}\textsc{Blumberg \& Robbins, supra note 104, at 26-30.}

\textsuperscript{220} See note 176 supra.

\textsuperscript{221} \textit{See TEX. REV. CIV. STAT. ANN. art. 5236f, § 5} (Vernon Supp. 1980-1981). Apparently the tenant must seek judicial relief under § 6 of the Act in order to recover his moving expenses as "actual damages." \textit{See id. § 6(d).}
Due to the difficulty and expense of seeking substitute housing and moving, few tenants are likely to avail themselves of this otherwise attractive remedy.

The issue of rent withholding is another possible problem area. The Act requires the tenant to be current in his rent prior to the exercise of his statutory rights. Additionally, the Act enables the landlord to sue the tenant if he withholds rent in retaliation for nonrepair. The statutory language is clear and appears to be unavoidable. In contrast, a Michigan court has held that a breach of a statutory covenant to repair may excuse payment of rent under a similar statute. The result follows from a theory that covenants in a lease are mutually dependent; the breach of a covenant by one party relieves the other party of his responsibility to perform.

A major shortcoming of the Act is the prohibition against defensive use of the warranty of habitability. The URLTA allows the use of the warranty as a defense in an eviction action for nonpayment of rent, and other states have interpreted their statutes to allow for defensive use of the warranty. The requirement that the tenant take the initiative by instituting legal proceedings may prevent indigent plaintiffs from exercising their statutory rights. This area requires legislative action; in order to effectuate the purposes of landlord-tenant reform, breach of the statutory warranty should be allowed as a defense in possessory proceedings.

Waiver is another of the primary issues raised by the terms of the Texas statute. By allowing the parties to the lease to waive their statutory obligations, the Act provides "a ready means for emasculating the effect of its own intricately-crafted provisions." Within months after the Kamarath decision, the Texas Apartment Association had developed new standardized lease forms containing a waiver of the implied warranty of habitability. In order to comply with the terms of the statute, the waiver must be

222. Id. § 3(b).
223. Id. § 8.
227. See Steinegger v. Rosario, 35 Conn. Supp. 151, 402 A.2d 1 (Super. Ct. 1979) (construing Conn. Gen. Stat. § 47a-4 (1979)); Fritz v. Warthen, 298 Minn. 54, 213 N.W.2d 339 (1973) (construing Minn. Stat. Ann. §§ 504.18, 566.07 (1947 & Supp. 1981)). In Fritz the court articulated a persuasive policy argument, noting that the legislative purpose in enacting the statutory covenants would be frustrated if a landlord could regain possession of the premises in spite of his failure to fulfill his obligations. The tenant would have little choice in asserting his statutory right to habitable housing if his only alternatives were abandonment or continued payment of rent to which the landlord is not entitled because of the defective condition of the premises. 213 N.W.2d at 342.
228. See notes 201-02 supra and accompanying text.
230. Note, Recognition of an Implied Covenant of Habitability in Residential Leaseholds: Kamarath v. Bennett, 32 Sw. L.J. 1037, 1042 n.41 (1978). Such a waiver typically reads as follows: "By accepting the premises . . . resident accepts the apartment and furnishings, if any, as is, and hereby expressly waives any warranty of habitability of the premises . . . ."
underlined or printed in boldface and must be contained in a written rental agreement or other written document. While this requirement is easily disposed of by the use of a boilerplate clause, the other provisions may be more difficult to embody in a form lease. The waiver must "list with clarity" the duties that are being waived and must be made "knowingly, voluntarily and for consideration." These specifications may offer a tenant grounds for avoidance of a waiver clause because few tenants are likely to receive consideration in exchange for accepting the waiver. The question of the "voluntariness" of the tenant's acceptance of such a waiver in the light of current housing conditions must be considered. The urban tenant ordinarily is not in a position to negotiate the terms of a printed form lease. Such a lease therefore may resemble an adhesion contract, susceptible to invalidation as an unconscionable agreement. The URLTA forbids the inclusion of an express waiver in a rental agreement, providing instead a limited set of circumstances under which the landlord and tenant may enter into a separate agreement that alters their mutual obligations. The legislature should reconsider this portion of the Act in light of the relative bargaining positions of the lessor and lessee under current and projected housing availability.

With respect to the retaliatory action section of the statute, several additional problems arise, including the limited number of tenant activities that are protected under the Act. The statute protects only the tenant's notice to repair and his exercise of legal remedies. The most notable omission is that of tenant unionization or organization, which is covered

A copy of a sample lease can be obtained from the Citadel Apartments, 5936 East Lovers Lane, Dallas, Texas 75206, a member of the Texas Apartment Association.


232. Id.

233. Ordinarily the parties to a lease should be allowed to allocate their rights and responsibilities. Often, however, the tenant is in a weak bargaining position. A waiver of the tenant's rights, particularly in a form lease, may not be a product of an arm's-length bargaining position. Under these circumstances, the contract doctrine of unconscionability may be held to apply to the provisions of a form lease. See U.C.C. § 2-302; RESTATEMENT (SECOND) OF CONTRACTS § 234 (Tent. Drafts Nos. 1-7, 1973). See also Henningen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960). In several decisions courts have adopted this view in order to void onerous provisions in a lease. See Weidman v. Tomaselli, 81 Misc. 2d 328, 365 N.Y.S.2d 681 (Rockland Cty. Ct. 1975) (clause requiring tenant to pay landlord's attorneys' fees in default proceeding found unconscionable); Seabrook v. Commuter Hous. Co., 72 Misc. 2d 6, 338 N.Y.S.2d 67 (Civ. Ct. N.Y. 1972) (clause requiring tenant to maintain lease obligations even if premises remain uncompleted on date of commencement of lease found unconscionable when buried in a 10,000-word lease); Tai On Luck Corp. v. Cirotta, 35 A.D.2d 380, 316 N.Y.S.2d 438 (1970) (landlord's raising of rent from $400 to $2000 per month under agreement that landlord could fix rent held unconscionable), appeal dismissed, 29 N.Y.2d 747, 276 N.E.2d 234, 326 N.Y.S.2d 400 (1971).

The concept of unconscionability suffers from imprecision. For a list of factors that the courts may consider, see RESTATEMENT, supra note 59, § 5.6, Comment e.

234. UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 1.403.

235. Id. § 2.104(c); see note 109 supra and accompanying text.

by the URLTA. Other retaliatory conduct that should be included is the landlord’s failure to allow renewal of a lease.

Furthermore, the Act provides the landlord with an undue number of escape provisions that enable him to avoid liability for conduct that is retaliatory in nature. While some of these exceptions to the retaliation section are valid, such as those that deal with nonpayment of rent and intentional property damages, others are purely gratuitous. Particularly burdensome to the tenant is section 7(b)(7), which allows the landlord to continue with eviction if he holds a “good faith belief” that the tenant may harm the quiet enjoyment, health, safety, or property of those in and on the premises. This sweeping language gives landlords a catchall provision with which to protect themselves.

A final difficulty inherent in the retaliation legislation is proof of the landlord’s retaliatory motive. Although the Texas law provides that the landlord may not institute eviction proceedings within six months of a protected tenant activity, the provision arguably postpones rather than alleviates the potential problems of proof. The adoption of a standard of “just cause eviction” might solve this and other problems involved in implementing the retaliatory action statute. The procedure places the burden of proof on the landlord who is seeking to evict his tenant and requires him to present the reasons for his conduct as part of his cause of action. Such a scheme provides the tenant with a security of tenure that is not afforded by retaliatory eviction prohibitions.

V. Conclusion

The common law of Texas, like that of most other American jurisdictions, provided few safeguards for the residential tenant. Under the strict rule of caveat emptor the lessee was bound to accept the leased premises as the landlord presented them to him. The use of a number of judicial exceptions and the recognition of the implied covenant of habitability gradually modified and eventually abrogated the harsh doctrine. Development


242. The security of tenure/just cause eviction theory is discussed in Blumberg & Robbins, supra note 104, at 39-44.
of the twin concepts of implied warranty and retaliatory eviction provided the tenant with the leverage to help equalize the historic disparity in bargaining power between the landlord and tenant.

Judicial recognition of the tenant-oriented reforms of implied warranty and retaliatory eviction eventually led to legislative action. The drafting of the Uniform Residential Landlord-Tenant Act, which a number of jurisdictions adopted, heightened the awareness of the need for statutory revision. Other states, including Texas, enacted their own original landlord-tenant statutes.

The Texas Act obviously is a creature of legislative compromise. Lacking the cohesiveness of the URLTA and a number of the other state statutes, the Texas Act contains provisions both onerous and beneficial to tenants. For example, both the “double notice” requirement of the Act and the prohibition of defensive use of the statutory warranty are particularly burdensome to the lessee. Yet the Texas Act allows for specific performance of the landlord's statutory duty to repair, a form of relief that the URLTA does not yet allow. In addition to its unsystematic approach, the Act is unnecessarily intricate and procedurally complex. The elaborate prerequisites for obtaining judicial relief under the statute inhibit their exercise by the class they were designed to protect.

Most importantly, the Act provides far too many escapes for the shrewd landlord. The statute not only allows waiver of all the responsibilities that it creates, but it also provides the mechanics for accomplishing the waiver. In addition, it exempts a number of landlord activities from the scope of its retaliatory conduct protection. Such provisions undercut the substantive benefits that the statute affords.

While article 5236f represents a noteworthy attempt by the Texas Legislature to modify existing statutory landlord-tenant law, its numerous shortcomings render it far less helpful than it might be. The legislature should consider amending the statute to grant more and stronger protections for the growing number of Texas tenants. Without such revision, the statute fails to reach the goals of safe and adequate housing.