DRAKE
LAW REVIEW

Volume 31 1981-1982 Number 2

THE IOWA UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT AND THE IOWA MOBILE HOME PARKS RESIDENTIAL LANDLORD AND TENANT ACT*†

Russell E. Lovell II††

TABLE OF CONTENTS

PART I

 The author would like to acknowledge the excellent research and assistance received from several student research assistants, Charles Leibold, Mark Young, Greg Biehler and Molly Maloney in the preparation of this manuscript and Part II which will be published in a subsequent issue of the *Drake Law Review*.

† NOTE: A special citation system is used to refer to the Acts which are examined in this Article. Sections from chapters 562A and 562B of the 1981 Iowa Code are cited without reference to the Code, chapter or date. For example, a citation to section 562A.1 of the 1981 Iowa Code will appear as "§ A.1" rather than "IOWA CODE § 562A.1 (1981)." See footnotes four and five below for a fuller explanation.

†† B.B.A., 1966, University of Notre Dame; J.D., 1969, University of Nebraska; LL.M., 1971, University of Missouri-Kansas City. Professor of Law, Drake University Law School.

I. Introduction

The law of landlord and tenant, so settled for centuries, has witnessed a veritable upheaval in the past fifteen years. As recently as 1965, one of the leading commentators could state that the tenant has "the right to pay rent and precious little else."[1] Levi's quaint synopsis, so accurate when made in 1965, has been rendered obsolete in most jurisdictions as a result of the case law evolution of an implied warranty of habitability and legislative enactments.[2] Certainly, that is the case in Iowa, where the landmark 1972 warranty of habitability case of *Mease v. Fox*[3] was followed in 1978 by comprehensive legislative law reform of both residential landlord-tenant law and mobile home park landlord-tenant law. The passage of the Iowa Uniform Residential Landlord and Tenant Act[4] (IURLTA) and the Iowa Mobile

1. Levi, The Legal Needs of the Poor 2 (June 23, 1965) (paper delivered at Nat'l Conf. on Law and Poverty, Washington, D.C.).

2. *See* Blumberg & Robbins, *Beyond URLTA: A Program for Achieving Tenant Goals*, 11 Harv. Civ. R.-Civ. L.L. Rev. 1, 7 n.28 (1976) for state-by-state citation to case law and legislation establishing a warranty of habitability as of 1976.

3. 200 N.W.2d 791 (Iowa 1972).

4. Iowa Code ch. 562A (1981). The official "short title" is the "Uniform Residential Landlord and Tenant Act." *Id.* § 562A.1. In this Article, however, the Iowa codification will be referred to as the "Iowa Uniform Residential Landlord and Tenant Act," or the "IURLTA," to distinguish it from the Uniform Act as approved by the Uniform Law Commissioners. *See* note

Home Parks Residential Landlord and Tenant Act[5] (IMHP-RLTA), both of which became effective on January 1, 1979, was followed in 1981 by repeal of the Iowa Housing Law[6] and substitution of "home rule" legislation[7] requiring covered municipalities to enact one of five approved model housing codes.

This Article will examine the new Iowa legislation and its effect on prior Iowa law, with intensive treatment of the IURLTA[8] and the IMHP-RLTA,[9] and will suggest possible interpretations of ambiguous sections. Both of these Acts were modeled after the Uniform Law Commissioners' Uniform Residential Landlord and Tenant Act (URLTA).[10] While numerous Iowa modificaions were made to the URLTA, the new Iowa Acts are close facsimiles of the Law Commissioners' work. The more substantial modifications occurred in the IMHP-RLTA, which would be anticipated because the URLTA was not envisioned as applying to the mobile home park rental situation. There will be a subsequent opportunity to consider in detail the rationale for considering the mobile home park tenancy so unique as to warrant individualized legislative treatment.[11] For present purposes, it is

---

10 *infra*. In addition, for ease of reference, citations to specific IURLTA provisions will be made, for instance, to section A.21(1) rather than the complete, but more cumbersome citation, section 562A.21(1). Note also that the original Iowa legislation, H.F. 2244, identified as the Uniform Residential Landlord and Tenant Act, is comprised of 41 sections, the first 37 of which are codified in Iowa Code sections 562A.1 to .37. *See* 1978 Iowa Acts, ch. 1172.

5. Iowa Code ch. 562B (1981). The official "short title" is the "Mobile Home Parks Residential Landlord and Tenant Act." *Id.* § 562B.1. In this Article this Iowa codification will be referred to as the "Iowa Mobile Home Parks Residential Landlord and Tenant Act," or the "IMHP-RLTA." In addition, for ease of reference, citation to specific IMHP-RLTA provisions will be made, for instance, to section B.22(1), rather than the complete, but more cumbersome citation, section 562B.22(1). Note also that the original Iowa legislation, H.F. 2135, identified as the Mobile Home Parks Residential Landlord and Tenant Act, is comprised of 38 sections, the first 32 of which are codified as Iowa Code sections 562A.1 to .32, the remaining sections are amendments or additions to Iowa Code chapter 135D. 1978 Iowa Acts, ch. 1173.

6. Iowa Code ch. 413 (repealed 1980 Iowa Acts, ch. 1126, § 3, eff. Jan. 1, 1981).

7. Iowa Code § 364.17 (1981).

8. Iowa Code §§ 562A.1-.37 (1981) (1978 Iowa Acts, ch. 1172, § 2, eff. Jan. 1, 1979).

9. Iowa Code §§ 562B.1-.32 (1981) (1978 Iowa Acts, ch. 1173, § 2, eff. Jan. 1, 1979).

10. The National Conference of Commissioners on Uniform State Laws approved and recommended the URLTA for enactment in all states in August, 1972. The American Bar Association subsequently approved the URLTA in February, 1974, after clarifying additions were made to the comments. The final amended version of the URLTA, with comments, was approved by the Uniform Law Commissioners in August, 1974.

11. The mobile home park tenant is a mobile home owner who rents a small area of land, the mobile home space, on which to place his home. The mobile home park owner is a landlord by virtue of his rental of the mobile home space. If the park owns the mobile home and rents the mobile home and the mobile home space, the park is a landlord under both the IURLTA and the IMHP-RLTA, and both acts apply. *See* text accompanying notes 83-84 *infra*. In the usual case, the mobile home is privately owned by the resident and is separately treated for taxation and licensing. *See* Stewart v. Green, 300 So. 2d 889, 891-92 (Fla. 1974). See also note 110 *infra* discussing the "captivity" problem that has arisen because of the substantial expense

sufficient to observe that the Iowa legislature perceived the mobile home park tenancy as sufficiently unique from the residential tenancy that it merited separate legislative treatment, but sufficiently similar to that tenancy that it based the legislation on the URLTA. Consequently, while there are numerous provisions unique to the IMHP-RLTA, for instance section B.16(2)'s regulation of tying agreements and section B.19(3)'s regulation of entrance and exit fees, the foundation of the legislation is distinctly the URLTA.

This Article will examine not only substantive law reform but also will emphasize the remedies which give that law reform meaning. The two Acts will be compared with one another and again with the URLTA, and instances in which they differ will be explored. For purposes of organization and clarity, those sections of the two Acts which find a common heritage in the URLTA will be considered first, which of course is the great bulk of the statutory coverage. Those sections unique to the mobile home park tenancy will be explored at the conclusion of the manuscript, published as a second Article and hereinafter referred to as Part II.[12]

Part I will be comprised of four sections. Section I will summarize the historical overview of landlord-tenant law and will consider problems of general statutory interpretation and coverage under the two new Acts. Section II will examine the rental agreement, and the legislative regulation of that contract and the contracting process. Section III will focus on the warranty of habitability, its codification in the two Acts, and the effect of 1980 Iowa legislation repealing the Iowa Housing Law but mandating local enactment of a model housing code. Section IV will consider tenant self-help remedies for breach of the landlord's habitability obligations, including termination, repair and deduct, and rent withholding. Part II, as mentioned earlier, will cover those IMHP-RLTA provisions unique to the mobile home park tenancy, but it will also continue the examination of the common areas of coverage of the two Acts, including the substantive law regulating rental deposits, tenant maintenance obligations, landlord access, landlord retaliatory action, tenant judicial remedies, and all landlord remedies.

A. *Historical Overview of Landlord-Tenant Law*

The early common law, apparently without much of a doctrinal struggle, characterized the lease as a conveyance, an estate for a stated term.[13] This conclusion was not without foundation in an agrarian economy, where rental of farm land was the essence of most leases. Dwelling units were often not even included in such leases, and even when included, were usually tan-

---

involved in moving a mobile home and the severe shortage of mobile home park sites for rent.

12. Part II of this manuscript will be published in a subsequent issue of the *Drake Law Review*.

13. *See* Mease v. Fox, 200 N.W.2d 791, 793 (Iowa 1972).

gential to the farm land.[14] From this initial premise flowed a body of case law which applied other principles of real property law to the residential landlord-tenant relationship, including such doctrines as caveat lessor, independent covenants and waste.

As urbanization occurred the needs and expectations of tenants changed, but the law did not. The urban tenant sought shelter and services, not agricultural land. The tenant's tale of common law woe has been told many times and need not be recapitulated here. The Iowa Supreme Court did an able job of describing the evolution of residential landlord-tenant law and the practical impact of that law on the urban tenant in *Mease v. Fox*,[15] and Chief Judge Cooke of the New York Court of Appeals recently wrote a masterful opinion on this very question in *Park West Management Corp. v. Mitchell*.[16] As Judge Cooke pointed out so well, of the many common law rules that dealt harshly with the urban tenant, none was harsher than the doctrine of independent covenants. Typically, the bargaining leverage of the landlord enabled him to avoid covenants to repair in the lease, but even if the landlord expressly covenanted to repair, that promise was ancillary to the tenant's obligation to pay rent; thus, the failure of the landlord to make the required repairs afforded the tenant only the right to sue for damages. The tenant who thought the landlord's breach of a covenant to repair allowed him to withhold rent, would shortly find himself on the street as the breach did not vest in him a defense to an action for possession based on nonpayment of rent.[17]

---

14. *See id.*

15. *See id.* at 793-96.

16. 47 N.Y.2d 316, 391 N.E.2d 1288, 418 N.Y.S.2d 310, *cert. denied*, 444 U.S. 992 (1979).

17. Chief Judge Cooke's succinct discussion of the common law rules, and their adverse impact on housing quality is a particularly helpful summary of law that took decades, if not centuries, to evolve.

> Under the traditional common law-principles governing the landlord-tenant relationship, a lease was regarded as a conveyance of an estate for a specified term and thus as a transfer of real property. Consequently, the duty the law imposed upon the lessor was satisfied when the legal right of possession was delivered to the lessee. The lessor impliedly warranted only the continued quiet enjoyment of the premises by the lessee. This covenant of quiet enjoyment was the only obligation imposed upon the landlord which was interdependent with the lessee's covenant to pay rent. As long as the undisturbed right of possession of the premises remained in the tenant, regardless of the condition of the premises, the duty to pay rent remained unaffected.
>
> Because the common law of leasehold interests developed in rural, agrarian England, the right to possession of the land itself was considered the essential part of the bargain; structures upon the land were deemed incidental. Thus, notwithstanding that the building may have constituted the substantial part of the tenant's consideration for entering into the lease, its destruction did not suspend his duty to pay the entire rent or afford him the right to rescind the lease. . . . Indeed, even if the landlord had expressly covenanted to repair structures on the demised premises, that promise was considered ancillary to the tenant's obligation to pay rent. Hence, the failure of the lessor to perform the obligations imposed by his promise to repair gave

The common law of leaseholds effectively placed the responsibility for

---

the lessee only the right to maintain an action for damages; it did not vest in him a defense to an action grounded upon nonperformance of his covenant to pay rent. . . .

As society slowly moved away from an agrarian economy, the needs and expectations of tenants underwent a marked change. No longer was the right of bare possession the vital part of the parties' bargain. The urban tenant seeks shelter and the services necessarily appurtenant thereto—heat, light, water, sanitation and maintenance. Unfortunately, the early attempts of the common law to adapt to the changes encompassed by this societal transition and to mitigate the severity of the rule holding that the tenant's covenant to pay rent was independent of all but the most basic of the landlord's obligations proved less than satisfactory.

The harshness of the common-law rule was mitigated to a degree by decisions holding that performance of a tenant's covenant to pay rent was excused when the premises were destroyed through no fault of his own. . . . Subsequent judicial holdings' expanded the scope of the landlord's covenant of quiet enjoyment to include a duty to refrain from any act or omission which would render the premises unusable by the tenant. . . . Again, however, development of this theory of constructive eviction did not meet the needs of tenants in a society rapidly undergoing urbanization and, as a practical matter, was of no aid in helping them obtain essential services. It simply afforded the tenant the option to abandon the premises and cease paying rent if the failure of services was sufficiently severe. While the constructive eviction principle mollified the rigors of the common law to some extent, it was fraught with uncertainty, for the reasonableness of the tenant's action was subject to the vicissitudes of judicial review in an action by the landlord. If the condition of the dwelling was later determined not to have justified vacation of the premises, the tenant remained liable for unpaid rent. Further, rescission of the lease and abandonment of the premises did not spur landlords into making necessary repairs in locales in which the demand for housing greatly exceeded its supply and compelled tenants living in uninhabitable premises to undergo the expense of locating new premises and moving their belongings. Thus, since the common law imposed no implied service obligations on the landlord, maintenance and other essential services often were never performed, especially in low-income neighborhoods.

These early attempts presaged a distinct trend among courts and legislatures toward characterizing a lease of residential property as a contract containing an implied warranty of habitability interdependent with the covenant to pay rent. . . . A number of factors mandated departure from the antiquated common-law rules governing the modern landlord-tenant relationship. The modern-day tenant, unlike his medieval counterpart, is primarily interested in shelter and shelter-related services. He is usually not competent to perform maintenance chores, even assuming ability to gain access to the necessary equipment and to areas within the exclusive control of the landlord. . . . Since a lease is more akin to a purchase of shelter and services rather than a conveyance of an estate, the law of sales, with its implied warranty of fitness (Uniform Commercial Code, § 2-314) provides a ready analogy that is better suited than the outdated law of property to determine to the respective obligations of landlord and tenant. . . .

The transformation of the nature of the housing market occasioned by rapid urbanization and population growth was further impetus for the change. Well-documented shortages of low- and middle-income housing in many of our urban centers has placed landlords in a vastly superior bargaining position, leaving tenants virtually powerless to compel the performance of essential services. Because there is but a minimal threat of vacancies, the landlord has little incentive to voluntarily make repairs or ensure the performance of essential services. . . .

maintenance and repair on the tenant, the person in possession and control. While urban dwellers who made their living at specialized jobs were often less inclined and less able to make household repairs than their rural counterparts, the complexities of twentieth century facilities such as electricity and indoor plumbing also discouraged the unsophisticated handyman tenant. In multi-unit dwellings, even the eager tenant often found himself unable to make repairs because he did not have access to the part of the building where the difficulty lay. It became evident as early as the turn of this century that the practical consequence of this body of common law was that very few repairs were being made in the multi-unit dwellings of the cities. Until the advent of housing legislation, neither the landlord nor the tenant assumed responsibility.[18]

As a result of the disrepair of the multi-unit dwellings in New York, the first housing law[19] was passed in 1901, and it imposed a duty on the owner to repair and maintain not only the common parts of the building but also the dwelling units themselves. Unfortunately, the landmark case of *Davar Holdings, Inc. v. Cohen*[20] held that the statutory obligation of the owner to repair and maintain was owed to the municipality solely. It rejected the proposition that a housing code also created an implied contractual right in favor of the tenant enforceable against the owner.

Iowa followed New York's lead and enacted a state housing law[21] in 1918 which became effective on January 1, 1919. It set minimum standards for rental units constructed thereafter in cities of 15,000 or larger. Unlike most housing code legislation it did make one remedy available to the private tenant. Section 413.106 provided that the landlord could neither sue for possession for nonpayment of rent nor sue for rent unpaid where the rental unit lacked a certificate of habitability from an appropriate public agency at the inception of the tenancy.[22] This rents uncollectible provision was upheld

---

Id. at 323-26, 391 N.E.2d at 1291-92, 418 N.Y.S.2d at 313-14 (citations omitted).

18. *Id. See also* Grad, Legal Remedies for Housing Code Violations, Research Report No. 14 to the Nat'l Comm'n on Urban Problems, 109-10 (1968).

19. New York Tenement House Act of 1901, 1901 N.Y. Laws, ch. 334.

20. 255 A.D. 445, 7 N.Y.S.2d 911 (1938), *aff'd*, 280 N.Y. 828, 21 N.E.2d 882 (1939).

21. Iowa Code ch. 413 (1979) (repealed 1980 Iowa Acts, ch. 1126, § 3, eff. Jan. 1, 1981).

22. *Id.* § 413.106 (1918). Section 413.106 provided:

> Rents uncollectible: If any building hereafter constructed as, or altered into, a dwelling be occupied in whole or in part for human habitation in violation of section 413.105, during such unlawful occupation no rent shall be recoverable by the owner or lessee of such premises for said period, and no action or special proceeding shall be maintained therefor or for possession of said premises for nonpayment of said rent, and said premises shall be deemed unfit for human habitation and the health officer may cause them to be vacated accordingly.

Section 413.105 provided:

> New or altered buildings—habitation. No part of a building hereafter constructed as or altered into a dwelling shall be occupied in whole or in part for human habitation until the issuance of a certificate by the health officer that such part of

as constitutional in 1942 in the case of *Burlington & Summit Apartments v. Manolato*.[23] Although this statute would appear to have had enormous potential for improving the quality of rental housing, the statute apparently had little impact—primarily because it was considered an affirmative defense[24] and seldom raised by unknowing and unrepresented tenants.[25] In any event, the remedial potential of section 413.106 went untapped, and will likely remain untapped. The rents uncollectible remedy was one of the main casualties of the repeal of the Iowa Housing Law in 1980. Although the 1980 legislation authorizes the covered municipalities to include a rents uncollectible remedy among the remedies each provides to enforce its housing code,[26]

---

said dwelling conforms to the requirements of this chapter relative to dwellings hereafter erected. Such certificate shall be issued within three days after written application therefor if said dwelling at the date of such application shall be entitled thereto.

23. 233 Iowa 15, 7 N.W.2d 26 (1942).

24. *Id.* at 21-22, 7 N.W.2d at 30. One of the principal issues raised by appellants in *Dittmer v. Baker*, 280 N.W.2d 398 (Iowa 1979) was whether the dicta in *Burlington & Summit Apartments v. Manolato*, 233 Iowa 15, 21, 7 N.W.2d 26, 30 (1942), that the burden was on the tenant to prove the certificate of habitability had not been issued was consistent with the language of section 413.106 that "no action or special proceeding shall be maintained" if the landlord does not have the certificate. Brief for Appellant at 9-10, Dittmer v. Baker, 280 N.W.2d 398 (Iowa 1979). Appellants argued that the landlord should be required, as part of the action for possession, to file with the clerk of court a copy of the required certificate and an affidavit from the city code enforcement agency that the certificate exists and was current. *Id.* at 10. Appellants argued the holding in *Twin Bridges Truck City, Inc. v. Halling*, 205 N.W.2d 736, 738-39 (Iowa 1973), was analogous. There, the court held that a creditor seeking a deficiency judgment after repossession and resale was required to plead *and* prove compliance with the notice of sale requirements of UCC section 9-504 (Iowa Code Section 554.9504) as a condition precedent to the maintenance of its suit for a deficiency. *See* Brief for Appellant at 10, Dittmer v. Baker, 280 N.W.2d 398 (Iowa 1979). The Iowa Supreme Court refused to reach the merits of the issue, concluding that it had improvidently granted discretionary review. Dittmer v. Baker, 280 N.W.2d at 399.

25. Tenants rarely had the advice of counsel. Legal aid to the poor with regard to civil matters, such as landlord-tenant problems, was virtually nonexistent prior to the advent of Office of Economic Opportunity Legal Services in 1965. The program slowly expanded so that it was able to provide free legal assistance to the very poor in many urban cities. It has only been in the past two or three years, following the enactment of the National Legal Services Corporation legislation and increased federal funding under the Carter Administration, that such services have been available to the rural poor of Iowa.

It has not been a coincidence that the rapid development and reform of landlord-tenant law has occurred since 1965. Without a lawyer, cases never get to the highest courts and arguments that the law should change are never heard by the decision-makers who can make the change, whether they be judges or legislators. Although suggesting the need for legal services in an entirely different context, the Chicago Title Company recently ran a full page ad in Time Magazine, with a take off on the old property law adage, that drives the point home all too clearly: "Possession of a lawyer is nine-tenths of the law." Time, April 6, 1981, at 29. *See generally* Ventantonio, *"Equal Justice Under the Law": The Evolution of a National Commitment to Legal Services for the Poor and a Study of its Impact on New Jersey Landlord-Tenant Law*, 7 SETON HALL L. REV. 233 (1976).

26. IOWA CODE § 364.17(3)(h) (1981) IOWA CODE ch. 413 was repealed by 1980 Iowa Acts, ch. 1126, § 3.

the decision is left totally to the municipality.

The only Iowa legislation prior to the IMHP-RLTA regulating health and safety conditions at mobile home parks is contained in Iowa Code chapter 135D, originally enacted in 1954. That chapter provides for the licensing and inspection of mobile home parks on an annual basis by the Iowa Department of Health.[27] Licenses can be denied,[28] revoked or suspended,[29] where conditions at a park create a nuisance, or are unsanitary or unhealthful. No private remedies are provided in the act.

The passage of housing codes at the local level has mostly occurred since 1954, when the Federal Housing Act of that year required certification that a locality had a housing code in effect as one aspect of its "Workable Program" requirement.[30] Although municipalities enforced these housing codes through administrative agencies and had the power to use judicial process, it is safe to state that most had only a marginal impact on the quality of rental housing. Many codes provided for criminal sanctions of fines or jail terms for landlords who did not maintain their apartments. Judicial reluctance to invoke serious sanctions for such "strict liability" crimes, however, rendered such proceedings ineffectual. Fines as small as $50 were not infrequent for serious and persistent code violations, an amount which the slum landlord could easily afford as a cost of doing business. As a general rule, code enforcement agencies were left to cajole and encourage landlords to comply out of the goodness of their hearts—and the results were not unexpected. Most had available the ultimate remedy of ordering a dwelling vacated until repairs were made (where the problems were really serious), and demolished if the repairs were not then made. But when the building was so far gone that this remedy was invoked, the usual result was abandonment and then demolition. The desired result of restoring low income housing units to a habitable condition was seldom effectuated. Perhaps because the agency approach proved only marginally successful, courts in the 1960's began to reappraise tenant claims that the common law should be modified to afford them with enforceable private rights.

Following the lead of a number of other jurisdictions, the Iowa Supreme Court in 1972 in the case of *Mease v. Fox*[31] recognized an implied warranty of habitability "in either the oral or written lease of a dwelling, including a house, condominium or apartment."[32] *Mease* was a landmark decision, one

---

27. *Id.* §§ 135D.2-.5.
28. *Id.* § 135D.8.
29. *Id.* § 135D.17.
30. Housing Act of 1949, as amended, 63 Stat. 413, 414; 42 U.S.C. § 1.
31. 200 N.W.2d 791 (Iowa 1972).
32. *Id.* at 796. The court expressed this warranty as follows:

> Under these circumstances we hold the landlord impliedly warrants at the outset of the lease that there are no latent defects in facilities and utilities vital to the use of the premises for residential purposes and that these essential features shall remain during the entire term in such condition to maintain the habitability of the dwelling.

made even more important by the decision of the United States Supreme Court earlier that year in *Lindsey v. Normet*[33] in which the Court gave clear signals that it would leave questions of landlord-tenant law reform to the state courts and legislatures. *Lindsey* sustained, against constitutional challenge, an Oregon statute that barred tenants from asserting that the landlord had failed to maintain the premises as a defense to the landlord's action for possession based on nonpayment of rent.[34] The Court added that the Constitution had not federalized the substantive law of landlord-tenant relations, and if Oregon chose to retain the doctrine of independent covenants in the area of landlord-tenant law, that was its prerogative.[35]

Mease represented a benchmark and served as a catalyst for further reform. The court was cautious and did not seek to anticipate or address the many unanswered questions that would follow.[36] Perhaps the most important of these was the very problem addressed in *Lindsey*: could the tenant raise a breach of the warranty of habitability as a defense to an eviction action based on nonpayment of rent (where the tenant has withheld rent due to the breach) in the face of section 648.19's bar on counterclaims in the summary possession action?[37] My impression, and one without empirical support, is that many small claims courts did not permit such a defense to be raised because of section 648.19—and this procedural constraint worked to seriously thwart the new substantive law of the implied warranty of habitability. Consequently, as has so often proved to be the case, the expression of legal principle is a far cry from its implementation. Although *Mease v. Fox* has been "the law of Iowa" since 1972, one senses that its impact on the lives of tenants and the quality of their housing has been minimal. The major reason for the limited impact of *Mease*, is, perhaps, the reality that a lone judicial opinion can seldom be the vehicle for providing the necessary detail to fully implement a major overhaul of the law.

A secondary reason might be a reluctance, or perhaps inertia, on the part of the community to accept decided and sweeping legal changes made by non-elected public officials, even those with the stature and prestige of

---

> Further, the implied warranty we perceive in the lease situation is a representation there neither is nor shall be during the term a violation of applicable housing law, ordinance or regulation which shall render the premises unsafe, or unsanitary and unfit for living therein.

Id.

33. 405 U.S. 56 (1972).

34. *Id.* at 65-69.

35. *Id.* at 68.

36. *Cf.* Pugh v. Holmes, 253 Pa. Super. 76, 405 A.2d 897 (1979) (the court addressed the related issues).

37. IOWA CODE § 648.19 (1981) provides: "*No joinder or counterclaim*—An action of this kind cannot be brought in connection with any other, nor can it be made the subject of counterclaim." *See* Comment, *Tenant Protection in Iowa—Mease v. Fox and the Implied Warranty of Habitability*, 58 IOWA L. REV. 656, 670-71 (1973).

the Iowa Supreme Court. The most striking example of this reality was the blatant refusal of public school officials in the South to implement the school desegregation decision of *Brown v. Board of Education.*[38] For some, *Brown* was not "the law of the land"[39] until Congress' passage of the Civil Rights Act of 1964, which not only required desegregation but also provided the imprimatur of a publicly-elected body on the principle of law recognized in *Brown*. I certainly do not mean to imply that lower Iowa courts have been recalcitrant in following *Mease*, but, true to the common law tradition, they have been guarded in any application of its principles beyond the facts of the case. This was understandable because the implied warranty of habitability represented a revolution to centuries of landlord-tenant law.

The Iowa legislature responded to this felt need for further clarification and revision of landlord-tenant law by creating a study committee[40] to consider whether the Uniform Residential Landlord and Tenant Act, as approved and recommended for enactment in all states by the National Conference of Commissioners on Uniform State Laws, should be enacted in Iowa. This Uniform Landlord-Tenant Act Subcommittee of the Joint Standing Committee on State Government held hearings on the URLTA at several locations across Iowa during 1977. As a result of this study, the State Government Committee of the House introduced two bills in January 1978: House File 2135, which was destined to become the Iowa Mobile Home Parks Residential Landlord and Tenant Act, and House File 2244, which became the Iowa Uniform Residential Landlord and Tenant Act.

The Iowa legislature's enactment of the IURLTA and the IMHP-RLTA in 1978 can be viewed in a less dramatic, but similar light as the Civil Rights Act of 1964. These pieces of legislation not only provide the necessary specifics needed to implement *Mease v. Fox* (and, indeed, to provide tenants with additional rights and protection), but also reflect the mandate of a popularly-elected legislative body.[41] They provide the mechanisms and remedial tools to fulfill the promise of *Mease*.

Although most Iowa housing law developments in the latter part of the 1970's were in the legislature, 1979 found the Iowa Supreme Court weighing in again on the issue of housing code enforcement in the case of *Wilson v.*

---

38. 347 U.S. 483 (1954). *See, e.g.*, Cooper v. Aaron, 358 U.S. 1 (1958).

39. *Contra* Cooper v. Aaron, 358 U.S. 1, 17 (1958).

40. The Iowa legislative council approved the formation of a joint subcommittee of the State Government Committee to study the URLTA in August 1977. *See* Minutes of the Legislative Council (August 10 and August 17, 1977).

41. The correlation between reform of landlord-tenant law and the provision of legal aid to the poor was noted in note 25 *supra*. It is usually foolhardy to even attempt to assign credit for any piece of legislation, whether to particular legislators or supporters. Such wise counsel is equally true with regard to the IURLTA and the IMHP-RLTA. There can be no doubt, however, that advocacy by the Legal Services Corporation of Iowa, particularly its Deputy Director for Legislative Advocacy, Robert Bray, was a major factor in the passage of both Acts.

Nepstad.[42] In *Wilson*, a Des Moines apartment building fire resulted in deaths and injuries. The plaintiffs sued the City of Des Moines on the theory that the city was liable for negligent inspections conducted pursuant to state statutes and city ordinances regarding fire safety in apartment buildings. The Iowa Supreme Court held that the lower court erred in dismissing the plaintiffs' petitions on the ground that they failed to state a cause of action because the city owed no duty to occupants of the apartment building.[43] The court specifically held that Iowa Code chapter 613A imposed liability upon municipalities for torts committed by their employees while acting within the scope of their duties, and that breach of an actionable duty created by statute is tortious conduct under chapter 613A.[44] The court pointed out that the ordinances and statutes allegedly violated by the code enforcement agency "were designed for the protection of a special, identifiable group of persons—lawful occupants of multiple dwellings—from a particular harm, injury or death from fire."[45] The court stressed that these ordinances and statutes imposed on the city and its employees the authority *and* the duty to require correction of defects found.[46] The court also considered the plaintiffs' second negligence theory, that not only did the city fail to perform its duty to enforce the statutes and ordinances, but negligently issued a certificate declaring that the building was in compliance with the code following an inspection conducted some seven months prior to the fire.[47] The court held that this second theory also stated a cause of action.[48] It first noted that "[i]n the absence of an immunizing statute . . . an insurer may be liable for a negligent inspection gratuitously undertaken."[49] The court then underscored that the plaintiffs had made out an even stronger case for the "city's duty to inspect and rectify hazards [was] imposed by statutes and ordinances and [was] not undertaken gratuitously."[50]

The municipalities' new tort liability exposure should provide the impetus for more vigilant enforcement of housing codes in Iowa.[51] Undoubtedly

---

42. 282 N.W.2d 664 (Iowa 1979). *See* 29 DRAKE L. REV. 207 (1979).
43. 282 N.W.2d at 666.
44. *Id.* at 669.
45. *Id.* at 672.
46. *Id.*
47. *Id.* at 673.
48. *Id.*
49. *Id.*
50. *Id.*
51. There is, however, reason to doubt the validity of this assumption as a result of a recent investigation by the *Des Moines Register and Tribune*, which indicated that perhaps half of Des Moines' sixteen housing inspectors had been spending significant portions of their work days on personal errands or in private recreation. *See* Des Moines Tribune, July 20, 1981, at 1. The City Council has taken disciplinary action since the story broke and has recently passed an ordinance which shifts responsiblity for housing code enforcement from the Department of Building to the fire department. DES MOINES, IOWA MUNICIPAL CODE § 2-34 (1981). Presumably, the transfer of authority to a para-military department was for the purpose of

at least in part in response to *Wilson v. Nepstad*, the Iowa legislature took up the question of housing code standards and enforcement in 1980. The result was an amendment to Iowa Code chapter 364 on the Powers and Duties of Cities and the repeal of the state housing law, chapter 413, effective January 1, 1981. The new home rule legislation mandates that all cities with a population of 15,000 adopt a housing code from among five specified model codes.[52] Any city which fails to do so by January 1, 1981, is deemed to have adopted the uniform housing code promulgated by the international conference of building officials.[53] The new legislation mandates covered cities to adopt enforcement procedures, which shall include a program for regular rental inspections, rental inspections upon receipt of complaints, and certification of inspected rental housing.[54] In addition, it authorizes the cities to enact both municipal and private remedies to enforce the code, and specifically lists eight remedies as among those for consideration, including a rents uncollectible remedy.[55] As mentioned earlier, section 413.106 of the state housing law had made such a rents uncollectible remedy available to tenants, but this private remedy was lost in the repeal of chapter 413.[56]

The intense legislative activity in the landlord-tenant area slowed during the most recent legislative session. There was one piece of legislation which did make minor amendments to both the IURLTA and the IMHP-RLTA,[57] but this represented only tinkering, or fine tuning, if you will, of

---

tightening up the discipline.

52. Iowa Code § 364.17(1) (1981).

53. *Id.* § 364.17(2).

54. *Id.* § 364.17(3).

55. Section 364.17(3) of the Iowa Code provides that municipal housing codes may include but are not limited to the following remedies:

a. A schedule of civil penalties or criminal fines for violations.

b. Authority for the issuance of orders requiring violations to be corrected within a reasonable time.

c. Authority for the issuance of citations pursuant to sections 805.1 to 805.5 upon a failure to satisfactorily remedy a violation.

d. Authority, if other methods have failed, for an officer to contract to have work done as necessary to remedy a violation, the cost of which shall be assessed to the violator and constitute a lien on the property until paid.

e. An escrow system for the deposit of rent which will be applied to the costs of correcting violations.

f. Mediation of disputes based upon alleged violations.

g. Injunctive procedures.

The enforcement procedures shall be designed to improve housing conditions rather than to displace persons from their homes.

h. Authority by ordinance to provide that no rent shall be recoverable by the owner or lessee of any dwelling which does not comply with the housing code adopted by the city until such time as the dwelling does comply with the housing code adopted by the city.

56. *See* text accompanying notes 22-26 *supra*.

57. The 1981 legislation was contained in House File 154. One important procedural change involved an amendment to section 648.3, which eliminated a "double notice" require-

the primary legislation.

B. *Statutory Interpretation*

Only a few brief observations will be made concerning the approach to general statutory construction problems that may arise under the two new acts. This brief treatment should not be taken as implying that such issues are unimportant but only that I have seldom found discussions of statutory construction issues very helpful except in the context of a specific construction problem. There will be numerous opportunitites for such specific consideration when the specific text of the new legislation is examined.

The starting point is section 2 of both Acts which describes the underlying purposes and policies of the legislation.[58] The two purposes stated by the IMHP-RLTA, except for the context of rental of mobile home spaces rather than residential dwellings, are essentially the same as the first two purposes of the IURLTA. The IMHP-RLTA's purposes are "(1) to simplify, clarify and establish the law governing the rental of mobile home spaces and rights and obligations of landlord and tenant"[59] and "(2) to encourage landlord and tenant to maintain and improve the quality of mobile home living."[60] Following the text of the first two purposes set forth in the URLTA[61] verbatim, the IURLTA's first two purposes are "(1) to simplify, clarify, modernize and revise the law governing the rental of dwelling units and the rights and obligations of landlord and tenant,"[62] and "(2) to encourage landlord and tenant to maintain and improve the quality of housing."[63] Although the

---

ment previously imposed by the combination of the notice to quit requirement of 648.3 and the notice of right to cure requirement of sections A.27(2) and B.25(2). Now, if the landlord has given the tenant the three day right to cure notice (required by section A.27(2) or B.25(2), as the case may be), and the tenant has failed to cure his rent default, the landlord can terminate the lease *and* immediately file suit for possession without giving the tenant any additional notice (other than that required as a result of the commencement of the suit). The notice requirements imposed by the forcible entry and detainer provisions of chapter 648 of the Iowa Code will be discussed more fully in the context of the summary action for possession in Part II of this Article to be published in a subsequent issue of the *Drake Law Review*.

See Note, *Tenant Self-Help Remedies under the Iowa Residential Landlord-Tenant Act: Iowa Tenants Join the Twentieth Century*, 28 DRAKE L. REV. 407, 430 n.148 (1979) [hereinafter cited as DRAKE Note]. This able note was authored by Mark Young, one of the student research assistants whose help was so valuable to me in the preparation of this manuscript.

Section 3 of the Act repealed an earlier "repeal." It repealed section B.29 which provided that a landlord lien on the tenant's personal property was not enforceable unless perfected before January 1, 1979, the effective date of the IMHP-RLTA. 1981 Iowa Legis. Serv. 583-84 (West).

58. *See* §§ B.2 and A.2.
59. § B.2(1).
60. § B.2(2).
61. U.R.L.T.A. § 1.102(b)(1), (2).
62. § A.2(2)(a).
63. § A.2(2)(b).

IURLTA speaks of modernizing and revising the law, while the IMHP-RLTA speaks of establishing the law, the different text would appear to be merely descriptive in that unlike the residential tenancy area where there was a substantial body of case law and statutory law, the legislature was writing on virtually a clean slate in the area of mobile home park tenancies.

The other textual difference lies in the second purpose. Arguably, the IMHP-RLTA's objectives are broader than those of the IURLTA for it speaks of encouraging landlord and tenant to maintain and improve the quality of mobile home *living* where the IURLTA talks of encouraging landlord and tenant to maintain and improve the quality of *housing*. Again, this textual difference does not appear to be of much moment.

The IURLTA adds a third purpose not found in the IMHP-RLTA: to insure that the right to the receipt of rent is inseparable from the duty to maintain the premises.[64] This Iowa addition to the URLTA represents legislative awareness of the difficult problems that have been posed by summary possession statutes, which restrict claims and issues in the action for possession based on nonpayment, and legislative intent that such procedural constraints not thwart the tenant's rights under the implied warranty of habitability. The issue will receive exhaustive treatment below.[65]

In addition to section A.2(2)(c), the major change made by the Iowa legislature from the URLTA statement of purpose is in the purpose it failed to adopt. Neither of the Iowa pieces of legislation adopted URLTA section 1.102(b)(3), which states as a purpose to make uniform the law with respect to the subject of the Act among enacting states.[66] This rejection of the purpose of enhancing uniformity, although seemingly inconsistent with the concept of a uniform act, is rather a recognition of certain realities. The first reality is that the URLTA, although enacted in some fifteen states by 1978,[67] has not been enacted without modifications and, in some instances, very major modifications. Consequently, in a very real sense, it may be impossible to derive a uniform approach to many specific legal issues where states have departed from the URLTA text and struck out on their own. The second reality is that there is not the same need for uniformity as there is, for example, in the area of commercial law, where parties frequently are involved in interstate transactions. Landlord-tenant law is local law, and the requisite certainty as to what the law requires can be ascertained by an examination of the Iowa law. There has been no indication that this would place any undue burden on out-of-state, absentee landlords.

It is important to point out that the deletion of the uniformity purpose is by no means a rejection of the URLTA and its purposes and objectives. Indeed, nothing could be further from the legislative intent, as evidenced

---

64. § A.2(2)(c).
65. *See* Section IV(c)(1) *infra*.
66. U.R.L.T.A. § 1.102(b)(3).
67. DRAKE Note, *supra* note 57, at 407 n.5.

from the title chosen by the Iowa legislature for the residential act—the "Uniform Residential Landlord and Tenant Act." Consequently, the official comments appended to each section of the official text of the URLTA, while not enacted by the legislature and not entitled to as much weight as ordinary legislative history, remain relevant and very useful aids to interpretation and construction of both Iowa Acts.[68]

Finally, the deletion of the uniformity purpose likewise does not render irrelevant decisions from the appellate courts of other jurisdictions construing their version of the URLTA. In at least two recent opinions the Iowa Supreme Court has acknowledged that it will be guided by interpretations by courts in other jurisdictions of statutory language identical to that in Iowa statutes, and that such interpretations are entitled to great weight, although neither conclusive nor compulsory.[69]

A final contrast between the purpose section of the IURLTA and the IMHP-RLTA is the directive in section A.2(1) that the IURLTA is to be liberally construed and applied and the omission of this directive in the IMHP-RLTA. The comment to URLTA section 1.102 states that liberal construction of the act will permit development by the courts in light of unforeseen and new circumstances and practices.[70] The omission of the liberal construction language from the IMHP-RLTA was probably an oversight, but the omission would appear of no consequence in light of section 4.2 of the Iowa Code. Section 4.2 provides: "The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this Code. Its provisions and all proceedings under it shall be liberally construed with a view to promote its objects and assist the parties in obtaining justice."[71]

The liberal construction directive is very relevant to one of the most controversial problems of interpretation—where there is a gap in either the IURLTA's or the IMHP-RLTA's coverage of a situation. Both Acts incorporate URLTA section 1.103 virtually verbatim, which indicates the continued applicability of all supplemental bodies of law except in so far as they are explicitly displaced by the provisions of the new legislation.[72] Sections A.3

---

68. *See* J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 12-14 (2d ed. 1980) (in regard to both the relevance and persuasiveness of the official comments to the UCC).

69. Young v. City of Des Moines, 252 N.W.2d 612, 619 (Iowa 1978); Cassady v. Wheeler, 224 N.W.2d 649, 652 (Iowa 1974).

70. U.R.L.T.A. § 1.102.

71. IOWA CODE § 4.2 (1981).

72. Both sections A.3 and B.3 provide:

> SUPPLEMENTARY PRINCIPLES OF LAW APPLICABLE. Unless displaced by the provisions of this Act, the principles of law and equity in this state, including the law relating to capacity to contract, mutuality of obligations, principal and agent, real property, public health, safety and fire prevention, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating

and B.3 clearly contemplate that existing Iowa law continues to apply except where it has been changed by either Act. There is sometimes, however, tension between the liberal construction mandate and this supplemental law provision in those instances in which it is unclear just how much prior law has been displaced by the new legislation.

Finally, sections A.4 and B.4 should be noted because remedies are so crucial to the implementation of the substantive rights created by the new legislation. Both Acts adopt URLTA section 1.104 verbatim:

> (1) The remedies provided by this Act shall be so administered that an aggrieved party may recover appropriate damages. The aggrieved party has a duty to mitigate damages.
> (2) Any right or obligation declared by this Act is enforceable by action unless the provision declaring it specifies a different and limited effect.[73]

Subsection (2) provides that if a section provides a right but not a remedy, it will supply a cause of action to enforce that right.[74] For example, section A.18, and section B.19 limit the ability of the landlord to arbitrarily adopt rules.[75] There is, however, no remedy provided for a tenant whose landlord violates the section. In this situation, sections A.4(2) and B.4(2) allow the tenant to maintain an action to enjoin the landlord from enforcing the rules or for a declaration that enforcement of the rules would be in violation of the new law.[76]

Another example of the operation of section A.4(2) may be seen in connection with problems arising under section A.31. This section renders unenforceable the landlord's lien[77] and abolishes distraint, but does not provide a remedy against a landlord's attempted enforcement. Section A.35(2), and perhaps section A.26, would afford the tenant a remedy, but section A.4 makes clear the tenant can also draw upon the many remedies available under existing Iowa law, such as trespass, conversion and breach of the implied covenant of quiet enjoyment.

In addition to the guidance provided by both Acts in the approach to statutory construction questions, chapter 4 of the Iowa Code is expressly addressed to the construction of statutes. Among its provisions which will have obvious application to construction questions arising under the IURLTA and IMHP-RLTA are sections 4.1(22) on computing time,[78] 4.6 on

---

cause, shall supplement its provisions.

73. §§ A.4, B.4.

74. §§ A.4(2), B.4(2).

75. §§ A.18, B.19. *See* text accompanying notes 220-32 *infra*.

76. §§ A.4(2), B.4(2).

77. The 1981 amendment resurrecting the landlord lien in the mobile home space rental context was limited to the IMHP-RLTA. *See* note 57 *supra*. The IURLTA bar contained in section A.31 was left intact.

78. IOWA CODE § 4.1(22) (1981). Computation of time is of particular importance in the context of notice requirements related to both termination of tenancies and to commencement

interpreting ambiguous statutes,[79] 4.7 on conflicts between general and special statutes,[80] and 4.8 on construing irreconcilable statutes.[81]

C. *Coverage of the New Acts*

Both the Iowa Uniform Residential Landlord and Tenant Act and the Iowa Mobile Home Parks Residential Landlord and Tenant Act were modeled after the Uniform Residential Landlord and Tenant Act drafted and approved by the National Conference of Commissioners on Uniform State Laws.[82] While the Iowa legislature made numerous modifications of the URLTA in enacting the Iowa URLTA, these modifications do not destroy the sense and coherency of the URLTA. The National Conference did not contemplate that URLTA would cover the rental of mobile home spaces,

---

of the summary action for possession, subjects which receive close scrutiny in Part II of this Article to be published in a subsequent issue of the *Drake Law Review*. Although it goes into considerably more detail, the general rule stated by Iowa Code section 4.1(22) is that "[i]n computing time, the first day shall be excluded and the last included. . . ." *Id.* Iowa Rule of Civil Procedure 366 makes this statute applicable to the Rules of Civil Procedure as well. There is a very old Iowa case, *Aiken v. Appleby*, 1 Morris 8 (Iowa 1839), which states the same rule. Exclude the first, include the last. As Part II of this Article will develop, knowing how to count is often crucial to eviction defense in Iowa.

79. IOWA CODE § 4.6 (1981). Section 4.6 provides:

> Ambiguous statutes—interpretation. If a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters:
> 1. The object sought to be attained.
> 2. The circumstances under which the statute was enacted.
> 3. The legislative history.
> 4. The common law or former statutory provisions, including laws upon the same or similar subjects.
> 5. The consequences of a particular construction.
> 6. The administrative construction of the statute.
> 7. The preamble or statement of policy.

80. *Id.* § 4.7. Section 4.7 provides:

> Conflicts between general and special statutes. If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision.

See Story County v. Hansen, 178 Iowa 452, 453, 159 N.W.1000, 1000-01 (1916).

81. IOWA CODE § 4.8 (1981). Section 4.8 provides: "Irreconcilable statutes. If statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of enactment by the general assembly prevails. If provisions of the same Act are irreconcilable, the provision listed last in the Act prevails." *See also* Llewellyn v. Iowa State Commerce Comm'n, 200 N.W.2d 881, 884 (Iowa 1972). Neither Act enacted URLTA section 1.104, which provides: "This Act being a general act intended as a unified coverage of its subject matter, no part of it is to be construed as impliedly repealed by subsequent legislation if that construction can reasonably be avoided."

82. The National Conference approved and recommended for enactment its draft of the URLTA at its annual conference on August 4-11, 1972. Amendments to this draft and comments were approved in August, 1974. The 1972 draft of URLTA was approved by the American Bar Association at its mid-year meeting in Houston, Texas, February, 1974.

consequently, the Iowa legislature's decision to model the Iowa MHP-RLTA after URLTA led to numerous modifications to meet the special problems of the mobile home space rental arrangement.

While the two new Iowa Acts are not duplicative in coverage, both Acts may occasionally apply to the same transaction. One example of this dual coverage is the situation where a mobile home park operator rents not only a mobile home space but also a mobile home to the tenant. Because the definition of "dwelling unit" contained in section A.6(2) of the IURLTA[83] is broad enough to include a mobile home, that portion of the rental agreement concerning the dwelling unit (mobile home) will be governed by the IURLTA while the portion concerning the mobile home space will be governed by the IMHP-RLTA.[84]

Statutory coverage questions should not be a source of major litigation under either of the new pieces of legislation. While neither the IURLTA nor the IMHP-RLTA specifically define their coverage, the broad parameters of each Act are clear. Each Act covers only *residential* tenancies[85] and each

---

83. "Dwelling unit" means "a structure or the part of a structure that is used as a home, residence or sleeping place." § A.6(2).

84. *See* Op. Iowa Att'y Gen. No. 79-9-4 (Sept. 5, 1979).

85. The title of each act is unambiguous as to the *residential* nature of the rental arrangements covered. It is an important rule of statutory construction that statutes be construed consistently with their titles, and this rule was early recognized by the Iowa Supreme Court in *Siegel v. Chicago R.I. & P. Ry. Co.*, 201 Iowa 712, 720, 208 N.W. 78, 81 (1926). Section A.1 specifically states that this act "shall be known and may be cited as the Uniform *Residential* Landlord and Tenant Act." (Emphasis added.) Section B.1 provides that this chapter "shall be known and may be cited as the Mobile Home Parks *Residential* Landlord and Tenant Act." (Emphasis added.)

The statements of purpose of both acts further confirm that coverage is limited to the *residential* landlord-tenant relationship. Section A.2(2)(a) states that one of the purposes of the IURLTA is to "simplify, clarify, modernize and revise the law governing the rental of dwelling units. . . ." The companion section of the IMHP-RLTA, section B.2(1), provides that one of the purposes of that act is to "simplify, clarify and establish the law governing the rental of mobile home spaces." "Dwelling unit," as defined by section A.6(2), means "a structure or the part of a structure that is used as a home, residence or sleeping place." "Mobile home space," as defined by section B.7(5), means "a parcel of land for rent which has been designed to accommodate a mobile home," and, "mobile home park," as defined by section B.7(8), means "any site, lot, field or tract of land upon which two or more occupied mobile homes are harbored. . . ."

Further indicia of legislative intent to limit the coverage of the URLTA to residential tenancies is apparent from the fact that the legislature only repealed those sections of the prior Iowa Code (sections 562.8-.16) dealing with residential security deposits. 1978 Iowa Acts ch. 1172, § 38. Sections 562.1 through 562.7 were retained because they would continue to serve as the controlling body of law for non-residential tenancies. In sum, there is no doubt that only residential landlord-tenant arrangements are covered by both the IURLTA and the IMHP-RLTA, and that tenancies of a commercial, industrial, or agricultural nature are outside of the coverage of the two acts but governed by Iowa Code chapter 562.

See also comment to URLTA section 1.101: "This Act concerns landlord-tenant relationships under rental agreements for residential purposes (Section 1.201). This Act does not apply to rental agreements made for commercial, industrial, agricultural or any purpose other than

Act has *statewide* applicability. While neither Act includes URLTA section 1.201, which affirmatively states that the act applies to rental agreements for dwelling units located within the state, presumably, the Iowa legislature omitted this coverage provision from each Act because it considered it superfluous in light of the titles, the statements of purpose of both Acts, the detailed definitions of key terminology contained in both Acts, general maxims of statutory construction and the Iowa constitutional requirement that laws of a general nature have a uniform application throughout the state.[86] In any event, whether the decision to omit URLTA section 1.201 was conscious or inadvertent, no statutory construction problems should be presented for non-residential tenancies (commercial, industrial, agricultural and the like) are clearly not covered by either Act and both Acts have uniform statewide application.

Both Acts provide for the exclusion of certain residential arrangements

---

residential."

86. It is true that no provision in the IURLTA specifically states that it applies to the rental of every dwelling unit located in the State of Iowa; likewise, no provision in the IMHP-RLTA specifically states that it applies to the rental of every mobile home space located in the State of Iowa. Of greater importance, however, is the fact that there is no language in either act that in any way limits the applicability of the legislation. This legislative silence must be contrasted with both the original Iowa Housing Law, IOWA CODE ch. 413 (1918) (repealed 1980 Iowa Acts, ch. 1126, § 3, aff. Jan. 1, 1981), whose coverage was specifically limited to cities with populations of 15,000 or more, and the new city housing code legislation, IOWA CODE § 364.17 (1981), whose coverage was similarly limited. While such legislative limits on coverage have been sustained as not violative of the Iowa constitutional requirement that laws of a general nature shall have a uniform application, *State ex rel. Wright v. Iowa State Bd. of Health*, 233 Iowa 872, 875-76, 10 N.W.2d 561, 563 (1943), the Iowa legislature plainly did not provide for other than uniform application for both the IURLTA and the IMHP-RLTA. *See* IOWA CONST., art. I, § 6.

Although URLTA, as drafted by the National Conference, contemplated statewide applicability, some states have chosen to limit coverage to metropolitan communities. Tennessee is a case in point. The Tennessee version of URLTA limits the application of the act to "counties having a population of more than 200,000." TENN. CODE ANN. § 64-2802 (1976). Nowhere is the importance of coverage questions made clearer than the case of *Schratter v. Development Enterprises, Inc.*, 584 S.W.2d 459 (Tenn. Ct. App. 1979). The issue before the Tennessee Court of Appeals was "whether exculpatory clauses in residential leases will be enforced to bar recovery against [the] landlord for his negligent acts which cause loss or damage to his tenant[s]." 584 S.W.2d at 459. The residential apartment lease in question was entered into in Bradley County, a county with fewer than 200,000 residents. The Tennessee URLTA, like Iowa sections A.11 and B.11, prohibits provisions in rental agreements in which the tenant "agrees to the exculpation or limitation of any liability of the landlord to tenant arising under law. . . ." 584 S.W.2d at 460 (quoting TENN. CODE ANN. § 64-2813(a)(2) (1976)). The court of appeals acknowledged that it was "disconcerting that the rights of tenants in certain counties of the state should differ so greatly from the rights of tenants in the four metropolitan counties," 584 S.W.2d at 460, but the court further noted that it was its obligation to give effect to the legislature's expressly stated intention to limit the application of the act to the four metropolitan counties. *Id.* The court then concluded that the Tennessee URLTA left the prior Tennessee case law sustaining such exculpatory provisions and residential leases in full force in the remaining 91 counties of Tennessee. 584 S.W.2d at 461.

from coverage. The legislative drafting improved with regard to exclusions. This is, in part, as a result of the legislature's virtually verbatim enactment of URLTA section 1.202 as IURLTA section A.5,[87] but also as a result of some independent draftsmanship in the IMHP-RLTA. Indeed, none of the exclusions set forth in URLTA section 1.202 find their way into section B.5 of the IMHP-RLTA, nor into sections 135D.1(12) or 135D.14.[87.1]

The introductory clause of IURLTA section A.5 reflects an awareness that the characterization of a rental arrangement is subject to some manipulation, and specifically provides that the exclusions enumerated apply only to genuine, bona fide arrangements not "created to avoid the application of this Act." The section A.5[88] exclusions exclude certain institutional,[89] fraternal[90] and transient[91] residential arrangements, purchase arrangements under

---

87. The only modification made by the Iowa legislature to URLTA section 1.202 was the addition of the phrase "or other similar lodgings" to section A.5(4).

87.1 Iowa Code sections 135D.1(12) and 135D.14 are the codification of sections 34 and 35 of H.F. 2135. 1978 Iowa Acts, ch. 1173, §§ 34-35. *See* note 5 *supra*.

88. Section A.5 provides:

> EXCLUSIONS FROM APPLICATION OF ACT. Unless created to avoid the application of this Act, the following arrangements are not governed by this Act:
>
> 1. Residence at an institution, public or private, if incidental to detention or the provision of medical, geriatric, educational, counseling, religious, or similar service.
>
> 2. Occupancy under a contract of sale of a dwelling unit or the property of which it is a part, if the occupant is the purchaser or a person who succeeds to his or her interest.
>
> 3. Occupancy by a member of a fraternal or social organization in the portion of a structure operated for the benefit of the organization.
>
> 4. Transient occupancy in a hotel, motel or other similar lodgings.
>
> 5. Occupancy by an employee of a landlord whose right to occupancy is conditional upon employment in and about the premises.
>
> 6. Occupancy by an owner of a condominium unit or a holder of a proprietary lease in a co-operative.
>
> 7. Occupancy under a rental agreement covering premises used by the occupant primarily for agricultural purposes.

89. Section A.5(1) excludes "[r]esidence at an institution, public or private, if incidental to detention or the provision of medical, geriatric, educational, counseling, religious, or similar service." It should be noted that the exclusion is *not* limited to *public* institutions. It should also be underscored that this is not an automatic exclusion of every landlord-tenant relationship into which such an institution might enter. The key limiting words are "incidental to detention or the provision of" the listed services. The relevant URLTA comment to section 1.202 confirms that the act "is not intended to apply where residence is incidental to another primary purpose such as residence in a prison, a hospital or nursing home, a dormitory owned and operated by a college or school." While dormitories operated by a college should obviously be excluded, off-campus residences owned by the college and leased to students or faculty very likely do not qualify as incidental to the college's educational services.

90. Section A.5(3) excludes "[o]ccupancy by a member of a fraternal or social organization in the portion of a structure operated for the benefit of the organization." This exclusion applies only if the tenant is a member of the organization which operates the residence. Thus, the rental arrangement of a member of the YMCA who rents a room at the YMCA will be excluded from the IURLTA by this subsection. On the other hand, a non-member renting the

same room would not be excluded by this subsection, but may be excluded under section A.5(4) if his occupancy is "transient." *See* note 91 *infra.*

91. Section A.5(4) excludes "[t]ransient occupancy in a hotel, motel or other similar lodgings." There are two inquiries in any question involving this exclusion: Was the occupancy in a "hotel, motel, or similar lodging?" Was the occupancy "transient"? This exclusion was the focus of *Lyons v. Kamhoot*, 281 Or. 615, ___, 575 P.2d 1389, 1390 (1978), litigated under Oregon's version of the URLTA, which specifically excludes "[t]ransient occupancy in a hotel or motel."

In the *Lyons* case, defendant Kamhoot owned the Cascadian Residential Hotel, which rented rooms on a daily, weekly or monthly basis as chosen by the guests. The hotel also provided meals at the option of the guests. Lyons and her daughter moved into the hotel on October 15, 1974, after her house was rendered uninhabitable by a fire. She intended to stay in the hotel until her house was repaired, which was estimated to take approximately 30 days. In addition to clothing and personal items, Lyons brought her electric organ, which was stored in the lobby of the hotel. Her house was repaired by November 15, 1974, and she moved from the hotel to her home, taking her personal items but leaving the organ. Later that day she returned for the organ and was told by the hotel manager it was being held for the balance due on the hotel bill and it would not be released until the hotel charges were paid. Lyons was unable to obtain the money to pay the hotel bill until April 1975. When she contacted the hotel and stated that she would pay the bill and pick up the organ, the manager of the hotel replied that the organ had been sold to satisfy the charges.

Lyons then brought suit alleging that the hotel converted her electric organ. *Id.* at ___, 575 P.2d at 1390. She argued that her occupancy of the room in the hotel was covered by the Oregon URLTA, and that under that act the innkeeper's lien was not valid. The Oregon Supreme Court agreed that the hotel's lien would have been invalid at the time of the alleged conversion on November 15, 1974, if Lyons' occupancy was covered by the Oregon URLTA. *Id.* at ___, 575 P.2d at 1390. The primary question was then: Whether Lyons' one month's stay at the hotel was within the scope of the Oregon URLTA.

The Oregon Supreme Court noted that "transient occupancy" is not defined in the Oregon URLTA. *Id.* at ___, 575 P.2d at 1390. With only a cursory discussion, the court first held that the "residential hotel" was a "hotel" within the meaning of the exclusion in the act because the rooms could be rented on a daily, weekly or monthly basis as the guest desires. *Id* at ___, 575 P.2d at 1391.

The court then reached the second question, whether Lyons' occupancy in the hotel was transient. On this question of "transient occupancy," the court concluded that the "critical factor is the intent of the occupier of the premises to establish a relatively permanent residence in the facilities designed for that purpose." *Id.* at ___, 575 P.2d at 1391. In reaching this conclusion, the court looked to case law construing Title II of the 1964 Civil Rights Act, 42 U.S.C. section 2000a(b)(1), whose coverage extended to "any inn, hotel, motel, or other establishment which provides lodging to *transient* guests." (Emphasis added). The Oregon court noted that the federal case law had "not agreed upon a precise length of stay which would distinguish a transient from a non-transient guest," but that the "phrase was generally accepted as meaning short-term guests who stay from one day to a few weeks but who do not reside permanently in the establishment. *Id.* at ___, 575 P.2d at 1391. In essence these establishments were characterized by temporary living arrangements not permanent residences." *Id.* at ___, 575 P.2d at 1391. The court concluded that Lyons established only a temporary living arrangement until her home was made habitable, and therefore her occupancy was not covered by the Oregon URLTA. *Id.* at ___, 575 P.2d at 1391.

The analysis of the Oregon court in *Lyons* was considerably simplified by the fact that Lyons was residing in the hotel only because her permanent home was damaged by fire and only until her home could be repaired. Because of these facts, it was relatively easy for the Oregon court to conclude that the hotel was a transient residence. More difficult questions may arise, however, where a roomer enters into a week-to-week arrangement in a residential hotel.

a land sale contract,[92] condominium or cooperative residences,[93] and occupancies related to a managerial relationship[94] or to premises rented prima-

---

Section A.9(4) clearly contemplates that some week-to-week rental agreements are covered under the Iowa URLTA. The comment to URLTA section 1.202 confirms this coverage: "This Act applies to roomers and boarders but is not intended to apply to transient occupancy." The comment does suggest a possible source of standards not considered in *Lyons*: "In many jurisdictions transient hotel operations are subject to special taxes and regulations and, where available, determinations under such authority constitute appropriate criteria." U.R.L.T.A. § 1.202 comment.

One possible source of guidance may be ordinances enacted pursuant to Iowa Code chapter 422A, which authorizes municipal hotel and motel taxes. Section 422A.1 provides that "such tax shall not apply to the gross receipts from the renting of a sleeping room, apartment, or sleeping quarters while rented by the same person for a period of more than thirty-one consecutive days." Perhaps the intent approach developed by *Lyons* should be supplemented by a one month or thirty-one day minimum standard, which would deem hotel guests as non-transient occupants (and therefore covered by the IURLTA) even though the guest does not consider the hotel a permanent residence but resides there for 31 consecutive days. Under the *Kamhoot* facts, the proposed standard would probably have required a different result.

92. Section A.5(2) excludes "[o]ccupancy under a contract of sale of a dwelling unit or the property of which it is a part, if the occupant is the purchaser or a person who succeeds to his or her interest." This exclusion applies only to the purchaser as an occupant. Thus, if one purchases property on a land contract and then leases it to another, the purchaser stands as landlord and the rental agreement with his or her tenant would consequently be covered by the IURLTA. The vendor-purchaser arrangement under the land sale contract would of course still be covered by chapter 656 of the Iowa Code. URLTA comment to section 1.202 also adds that the Act does apply "to occupancy by the holder of an option to purchase, as distinguished from a contract of sale."

93. Section A.5(6) provides for the exclusion of "[o]ccupancy by an owner of a condominium unit or a holder of a proprietary lease in a co-operative." As with the land contract purchaser, this exclusion applies only to the owner or leaseholder as resident, and would not be applicable should such persons lease their interest in the property.

94. Section A.5(5) excludes "[o]ccupancy by an employee of a landlord whose right to occupancy is conditional upon employment in and about the premises." The URLTA comment to section 1.202 (section A.5) makes clear that this subsection is intended to exclude "residence by a landlord's employee such as a custodian, janitor, guard or caretaker rendering service in or about the demised premises." One question which may arise in agricultural states such as Iowa is whether this A.5(5) exclusion pulls migrant worker housing out from under the Iowa URLTA. The answer depends on whether an employer-employee relationship exists between the farmer providing the housing and the farmworker.

Where the farmer who provides the housing also employs the farmworker to work in his fields or orchards, the occupancy appears to be excluded from coverage under the IURLTA by section A.5(5). A rather lame argument can be made that a migrant farmworker who is provided housing while working the fields and crops of a farmer does not work "in and about the premises" within the meaning of section A.6(7). That section defines "premises" as a "dwelling unit and the structure of which it is a part . . . and grounds, areas and facilities held out for the use of tenants generally." § A.6(7). Arguably, the migrant farmworker working the fields is not employed in and about the premises as the cornfields are not grounds held out for the use of tenants generally.

Where the farmer who employs the farmworker does *not* provide the housing, but housing is provided by a neighbor for a fee or rent, the section A.5(5) exclusion would not apply. Since the farmer providing the housing is not the employer of the occupant, the occupancy does not

rily for agricultural purposes.[95] It should be noted that while section A.5(1)

---

fall under the section A.5(5) exclusion and the IURLTA would govern. This distinction may prove academic because section A.11(1)(a) authorizes the farmer-landlord to conclude rental agreements with migrant farmworkers that waive their IURLTA rights and remedies. *See* text accompanying notes 149-53 *infra*.

The Iowa Department of Health has the responsibility to regulate minimum health conditions at migrant labor camps in the state. IOWA CODE ch. 138 (1981). Although the coverage definition is complex, generally a farmer will be found to be operating a migrant labor camp where he employs and provides housing for seven or more migrants at one time. *Id.* § 138.1(1). Thus, those farmworkers whose occupancy is excluded from IURLTA coverage by section A.5(5) because of their employee-employer relationship will be covered by chapter 138 (where living quarters for seven or more migrants or two or more shelters are furnished). However, housing rented by migrants from someone other than their employer is not covered by chapter 138. This is one of the major loopholes in the Act. *Conoceme en Iowa*, The Official Report of the Governor's Spanish Speaking Task Force, submitted to Governor Ray and The 66th General Assembly 46 [hereinafter *Conoceme en Iowa*].

Chapter 138 provides a permit procedure by which the Department of Health can license such camps, inspection authority, and a procedure by which the department can suspend or revoke camp permits for noncompliance. IOWA CODE § 138.5 (1981). The Spanish Speaking Task Force Report casts a skeptical eye at the adequacy of the minimal health standards legislated and at the inspection-licensing effort of the Department of Health. *Conoceme en Iowa* at 46-47. The act provides no private remedies for the migrants who reside in the camps.

One question which has received judicial consideration lately is the question of the process owed, if any, to the migrant farmworker whose employment has been terminated and whose employer wants to evict him from the employer-furnished housing. In *Vasquez v. Glassboro Service Association*, 83 N.J. 86, ___, 415 A.2d 1156, 1162 (1980), the New Jersey Supreme Court held that although a migrant worker is not a tenant within the meaning of its summary dispossess statute, the worker may be evicted from employer-furnished living quarters only through judicial proceedings. *See also* 12 RUTGERS L.J. 391 (1980).

The correlation of the sectionA.5(5) exclusion with section A.15 should also be noted. For tenants who are renting units other than a single family residence, IURLTA section A.15(3) limits the work which the landlord can contract out to a tenant to a few enumerated tasks. While IURLTA section A.15(2) allows considerably greater latitude with regard to contracting out work to the tenant residing in a single family residence, section A.15 clearly does not allow the exclusion of the tenant from the Act's coverage. The common arrangement by which the tenant agrees to cut the grass, shovel the walks or do necessary painting in return for decreased rent is governed by section A.15 rather than by section A.5(5).

If a tenant *is* excluded by section A.5(5), chapter 562 of the Iowa Code and the common law govern the landlord-tenant relationship.

95. Section A.5(7) provides for the exclusion of "[o]ccupancy under a rental agreement covering premises used by the occupant primarily for agricultural purposes." This exclusion should be limited to those tenants who rent a farm with a dwelling *and* actually farm the land (or sublet the agricultural lands for farming). The tenant who rents a house on an acreage clearly should not be excluded because the premises are not being used by the occupant "primarily for agricultural purposes." Although the term "agricultural purposes" is not defined in the IURLTA, the case of *Farmegg Products, Inc. v. Humboldt County*, 190 N.W.2d 454 (Iowa 1971) may provide some guidance. Chapter 358A.2 of the 1966 Iowa Code, which dealt with zoning, exempted "agricultural property" from its coverage, but did not define that term. In that context, the Iowa Supreme Court stated that " 'agricultural' is variously defined; but generally, in its broad sense, it is said to be 'the art or science of cultivating the ground, including harvesting of crops and rearing and management of livestock.' " Farmegg Prods. Inc. v. Humboldt County, 190 N.W.2d at 457-58.

excludes certain public institutional residences, the IURLTA does not exclude tenants of public housing from its coverage in contrast to the IMHP-RLTA.

The principal exclusion from the coverage of the Iowa Mobile Home Parks Residential Landlord and Tenant Act is codified at Iowa Code section 135D.1(2), which requires classification of mobile home parks into residential or recreational or both. Section 135D.1(2) provides that the IMHP-RLTA applies only to residential mobile home parks, and that Iowa Code sections 135D.14-.15 govern recreational mobile home parks. However, all municipally owned mobile home parks are governed by the IMHP-RLTA with the exception of recreational mobile home parks where the length of stay is limited to not more than fourteen days.[96] In addition, as noted above, occupants of public housing are excluded from coverage under the IMHP-RLTA.[97]

Both Acts became effective on January 1, 1979.[98] Section 37 of H.F. 2244 provides that the IURLTA "shall apply to rental agreements entered into or extended or renewed after the effective date of this act." The URLTA savings clause section 6.103 was enacted in section 39 of H.F. 2244.[99] Unfortunately, in this regard, the concluding draftsmanship of the Iowa Mobile Home Parks Residential Landlord-Tenant Act was sloppy. It contains no provisions comparable to H.F. 2244, sections 37 and 39. While H.F. 2135, section 38 does prescribe the IMHP-RLTA's effective date, the Act is silent with regard to its impact on both rental agreements in effect at the time of the effective date and with regard to transactions entered into before the effective date. Nonetheless, it would not appear that this omission should prove insurmountable for Iowa courts dealing with such "twilight zone" transactions. Statutes are presumed prospective in operation unless expressly made retrospective.[100] This statutorily mandated rule of statutory construction fills most of the gap created by the omission of

---

96. Iowa Code § 135D.14 (1981).

97. § B.5.

98. It should be noted that the effective dates of both pieces of legislation were delayed approximately six months after the dates of enactment pursuant to H.F. 2244, section 37, and H.F. 2135, section 38, based on the idea that this would give ample time to all who may be affected by the provisions of the new legislation to become familiar with them. 1978 Iowa Acts, ch. 1172, § 37, ch. 1173, § 38, eff. Jan. 1, 1979. *See* U.R.L.T.A. § 6.101 comment.

99. 1978 Iowa Acts, ch. 1172, § 39, provides:

> Transactions entered into before the effective date of this Act, and not extended or renewed after that date, and the rights, duties, and interests flowing from them remain valid and may be terminated, completed, consummated, or enforced as required or permitted by any statute or other law amended or repealed by this Act as though the repeal or amendment had not occurred.

The IMHP-RLTA failed to adopt this URLTA savings clause, or any savings clause for that matter. Consequently, such issues will be resolved by reference to section 4.13, the general savings provision. Iowa Code § 4.13 (1981).

100. Iowa Code § 4.5 (1981).

URLTA sections 6.101 and 6.103 from the IMHP-RLTA.[101]

II. The Rental Agreement

In a very real sense the common law proposition that any agreements between the landlord and tenant, usually contained in a lease, are the heart of their relationship,[102] is no longer true in Iowa, at least for the low income tenant. For the low income tenant, the heart of the bargain almost certainly will be the statutory assurances that the dwelling unit or mobile home space rented must meet the minimum standards of habitability set by the IURLTA or the IMHP-RLTA, as the case may be. Other tenants, with greater income and mobility, may be able to bargain for other amenities, or, if such bargaining is unrealistic in this day of form leases, at least shop around for other rental housing that may offer the desired amenities. The new legislation will probably have little impact on this group of affluent tenants whose pocketbooks ensure that the quality of their units far surpasses minimum quality standards.

The Iowa legislation reflects the view of the drafters of the URLTA who early recognized that merely recasting residential landlord-tenant law as a contract, rather than as a conveyance, would fall short of resolving the inequities endemic to the landlord-tenant relationship except for the select few affluent tenants. The economic bargaining position of landlords, primarily because of the shortage of low cost habitable housing, continues to be such that landlords who so desire can insure that the tenant's rights under their contract would effectively be limited to the right to pay rent as before. Consequently, the IURLTA and IMHP-RLTA do set minimum standards that rental housing and mobile home spaces must meet with regard to quality and do extensively regulate other aspects of the landlord-tenant relationship. At the same time, both Acts seek to find a middle ground that allows the parties to contract as to the terms of the rental arrangement above and beyond the minimum standards they impose. This concept of the rental agreement was codified in sections A.15 and B.16,[103] which set minimum habitability standards, and sections A.9(1) and B.10(1), which provide that the landlord and tenant may include in a "rental agreement" terms and conditions "not prohibited by this Act or other rule of law including rent, term of the agreement, and other provisions governing the rights and obligations

---

101. This is not to suggest that there have not been difficult coverage questions under H.F. 2244 sections 37 and 39. A common, and seemingly simple question was: Did a periodic month-to-month tenancy entered into on December 1, 1978 "renew" on January 1, 1979, and thereafter come under the IURLTA? It would seem so, even should the parties do nothing more than tender and accept the January rent.

102. *See generally* Kalish, *The Nebraska Residential Landlord-Tenant Act*, 54 Neb. L. Rev. 603, 609 (1975).

103. *See* notes 259-60 *infra* for text of sections A.15 and B.16.

of the party."[104]

It is important to note that the term "rental agreement," as defined by both of the Iowa Acts,[105] encompasses both written and oral rental agreements and landlord promulgated rules. Awareness of the scope of this definition will prove beneficial to both landlords and tenants because both Acts provide numerous remedies for violations of the rental agreement (and the substantive provisions of the legislation). Landlords will want to remember that a tenant violation of a valid rule will constitute a violation of the rental agreement, while tenants will frequently find it of value to know that an oral rental agreement is recognized under both pieces of legislation and that the remedies available for a breach of a written agreement are available for a breach of an oral agreement as well.

A. *Signature, Delivery and Related Requirements*

Although both Acts recognize oral rental agreements where indeed there was "an agreement,"[106] neither will honor a landlord-promulgated rule unless it is in writing and meets a number of other protective requirements.[107] The importance of placing these agreements in a writing is underscored by the IMHP-RLTA which goes so far as *to require* the landlord to provide the tenant with the opportunity to sign a written lease.[108]

The section B.14(1) requirement that the tenant be afforded the opportunity to sign a written lease is an innovative idea[109] which should lend im-

---

104. *See* §§ A.9(1), B.10(1).

105. Section A.6(9) defines a "rental agreement" as "an agreement written or oral, and a valid rule, adopted under section 562A.18 [of this Act], embodying the terms and conditions concerning the use and occupancy of a dwelling unit and premises." While the IURLTA expressly includes oral agreements in the above definition, one must look beyond the definition of rental agreement under the Iowa Mobile Home Parks Residential Landlord-Tenant Act to reach this same conclusion. The definition of rental agreement in section B.7(10) includes both written agreements and agreements "implied by law." Further indication that oral rental agreements will be recognized can be found in section B.10(2), which provides for the implication of certain terms and conditions "[i]n the absence of a rental agreement." It seems obvious, however, that such terms and conditions will only be implied where the parties have reached some type of agreement to rent the property.

While both acts then will recognize oral rental agreements, the statute of frauds will hold unenforceable any oral agreements whose term is for more than one year. IOWA CODE § 622.32(4) (1981). If the rental agreement is written, however, there is no express limitation upon its term under either act.

106. *See* Putnam v. McClain, 198 Iowa 287, 289, 199 N.W. 261, 262 (1924): "[T]he relation of landlord and tenant is created by contract, either expressed or implied." Even under prior Iowa law, which viewed leases as conveyances rather than as contracts, the relationship of landlord and tenant was always created by contract.

107. *See* §§ A.18, B.19. *See also* text accompanying notes 220-32 *infra* (discussion of the statutory requirements for a valid landlord rule).

108. § B.14(1).

109. Several states require the mobile home park owner to offer a written lease to a prospective tenant. *E.g.*, CONN. GEN. STAT. ANN. § 21-70(b) (West Supp. 1980); N.J. STAT. ANN. §

portant additional protection to the tenant. It seems particularly important to have the bargain between the parties in writing in the mobile home landlord-tenant situation because the stakes are usually substantial. An eviction from a mobile home park will mean considerable expense in the relocation of the mobile home and perhaps real difficulty in obtaining a new site because of the substantial shortage of mobile home spaces in many communities.[110] As a practical matter, there may be some difficulty in enforcing this section B.14 right, inasmuch as the section provides no remedy. However, injunctive relief should be available under section B.4(2). One's initial reaction is that injunctive relief is more theoretical than real, but the extreme shortage of mobile home spaces could influence the actions of tenants here. One would ordinarily assume that a tenant concerned about not being offered a written lease would not enter into an oral rental agreement and would seek another location. This may not be a viable option for the mobile home tenant if there are no other available spaces at other parks in the community. Consequently, it is conceivable that such a tenant might enter

---

46:8C-4(a,b) (West Supp. 1980); *See* Note, *The Necessity for Specific Legislation to Deal with the Mobile Home Park Landlord-Tenant Relationship*, 9 GA. L. REV. 212, 231 (1974).

110. *See* Kuklin, *Housing and Technology: The Mobile Home Experience*, 44 TENN. L. REV. 765, 805-09 (1977) (noting that the pressure of supply and demand for mobile home sites is responsible for many of the problems confronting mobile home owners). Occupancy rates approaching 100% afford park owners a monopolistic leverage over mobile home owners or prospective owners. Restrictive zoning, health, safety and building codes, the expense of developing parks, the low status afforded park developers among homebuilders, and the slow rate of profit return are factors which have deterred the development of an adequate number of spaces. *Id.* at 807-08. Subsequently, the evicted mobile home tenant faces the nightmare of locating a new space on short notice; if a space can't be found the only alternatives are abandoning the home, attempting to sell it or placing it in storage. Shepard's *Mobile Homes and Mobile Home Parks* 56 (1975). Even if a site can be found, the costs of relocating, including the costs of disengaging the home from the previous site, hauling, hook ups and tiedowns at the new site can range from hundreds of dollars for short moves to $5,000 for longer distances. Note, *Mobile Home Park Practices: The Legal Relationship Between Mobile Home Park Owners and Tenants Who Own Mobile Homes*, 3 FLA. ST. L. REV. 103, 120, nn.104 & 105 (1975). *See also* Kuklin, *supra*, at 784-85 (and authorities cited therein).

Iowa data has proved difficult to come by. Hopefully, the 1980 census data, when available, will fill in some of the gaps. Interviews were conducted with mobile home sales personnel in the Des Moines area, and these suggest that the current Iowa figures are in the area of $900-950 for a secondary move in the Des Moines area for a standard 14'x70' mobile home. This figure includes all services necessary to relocate the unit in the same condition prior to the move—removing and replacing skirting and tie down, utility disconnection and reconnection, blocking and leveling, and transportation costs. A move from Des Moines, Iowa, to Sioux City, Iowa, a distance of approximately 207 miles, was estimated at approximately $1500. Interview with Chris Shuling, General Manager, County Living Mobile Homes Sales, Des Moines, Iowa, in Des Moines, Iowa (Sept. 3, 1981) (interview conducted by M. Maloney).

See also Mobile-Home Owners and Landlords Fight Over Rent, Portending Problems for Makers, The Wall St. J., Sept. 8, 1981, at 31 (quoting Lloyd Zimmerman, president of the Golden State Mobile Home Owners League (California), a 185,000-member association, that moving costs range from $3000 to $5000 in California today—if the tenant can find a place to move his home).

into possession and then sue to obtain relief ordering the landlord to provide a written agreement as required by B.14(1). Although the IURLTA has no comparable provision, it does afford the tenant desirous of a written rental agreement another alternative in section A.10.

Section A.10 is primarily aimed at addressing a somewhat related problem which can arise where the parties draw up a lease agreement and one of them fails to sign. It seems most likely that the problem arises when a landlord tenders the tenant a lease at the time of taking possession and the tenant either fails to sign or loses the lease. A knowledgeable tenant, however, could invoke the section's protection by tendering a written lease to the landlord.

Under prior Iowa law, there appears to be no case requiring or excusing signature and delivery. In many jurisdictions, however, both elements are required for a valid lease.[111] The two Iowa Acts take divergent approaches on this question.

The IMHP-RLTA tries to nip this problem in the bud. Section B.14(5) requires the landlord to tender and deliver a signed copy of the rental agreement to the tenant and the tenant to sign and deliver to the landlord one fully executed copy of the lease within ten days after the agreement is executed. The signature requirement has some teeth, too. Noncompliance is "deemed a material noncompliance" of the rental agreement,[112] and such material noncompliances are grounds for termination of a rental agreement under sections B.25(1) and B.22(1).[113] This self-help remedy should be an effective one in the hands of the landlord, for it seems doubtful that many mobile home tenants would continue to balk at signing a lease initially agreed to if facing the prospect of eviction. The remedy will probably be of less utility in the less common situation where it is the tenant demanding that the landlord sign the lease, for the substantial costs of removing and relocating a mobile home and the shortage of mobile home spaces may render the tenant's threat of termination an empty one.

One of the beneficial aspects of the IMHP-RLTA approach is that it provides a mechanism to get the lease question resolved quickly and early in the rental term, with both parties fully aware of the terms which will govern their relationship. When, however, neither party invokes section B.14's "sign or else" mechanism, or fails to terminate when the nonsigner continues to refuse to sign, the IMHP-RLTA does not resolve the question of signature and delivery. The IURLTA lacks a "sign or else" provision but it does defin-

---

111. *See* 51C C.J.S. *Landlord and Tenant* §§ 216-19 (1968).

112. § B.14(5).

113. Both sections authorize termination by delivery of written notice to the defaulting party to the effect that the lease will terminate in 30 days if the breach (here, the failure to sign the lease) is not remedied in 14 days. *See* Section IV(A) *infra* (discussion of tenant's 14/30-day termination remedy). For discussion of landlord's corresponding 14/30-day termination remedy, see discussion in Part II of this Article in subsequent issue of the *Drake Law Review*.

itively resolve signature and delivery issues.

Section A.10 provides that if either party signs and delivers to the other a written rental agreement and the other fails to sign, that agreement will be effective upon the landlord's acceptance of rent[114] when it is the landlord who is the non-signer or upon the tenant's entry into possession[115] when it is the tenant who is the non-signer.[116] The effect of IURLTA section A.10 is to expressly place Iowa with those jurisdictions which excuse formal requirements where the parties' conduct is consistent with a valid agreement. In theory, section A.10 assures both landlords and tenants that when they rely on a written rental agreement, their legitimate expectations will be enforced even if there is a technical defect, such as a missing signature.

There is some reason for concern that section A.10(2) could be abused by some landlords. The scenario feared is where an oral rental agreement has been reached, and then the landlord tenders a written agreement to the tenant on the date of possession obtensibly stating the prior oral agreement but in reality containing numerous terms adverse to the tenant. If the tenant takes possession of the dwelling unit without either rejecting the written agreement or reserving the right to do so, the tenant will probably be deemed to have accepted the written agreement even though the tenant assumed the written lease merely restated their prior oral rental agreement. The IURLTA does not expressly provide an answer, which means the courts will have to turn to existing Iowa case law for guidance.[117] The Iowa case law supports the proposition that any prior oral agreements concerning a lease or tenancy will be merged into a separate and subsequent written contract.[118] Although the tenant might seek to set aside the written rental agreement, or some of its provisions, on the ground that the belated tender of the written form contract was unconscionable, this argument may well

---

114. Section A.10(1) provides: "If a landlord does not sign and deliver a written rental agreement signed and delivered to the landlord by the tenant, acceptance of rent without reservation by the landlord gives the rental agreement the same effect as if it had been signed and delivered by the landlord."

115. Section A.10(2) provides: "If a tenant does not sign and deliver a written rental agreement signed and delivered to the tenant by the landlord, acceptance of possession without reservation gives the rental agreement the same effect as if it had been signed and delivered by the tenant."

116. Section A.10(3) provides: "If a rental agreement given effect by the operation of this section provides for a term longer than one year, it is effective only for one year."

117. § A.3. *See* note 16 *supra.*

118. The early Iowa case law viewed the lease for tenancy as a contract and oral agreements for tenancy as an oral contract. Ashdown v. Ely, 140 Iowa 739, 741-42, 117 N.W. 976, 977 (1908). Modification of lease agreements was allowed. Biae v. Nordstrom, 238 Iowa 866, 871, 29 N.W.2d 211, 214 (1947). Pursuant to this treatment of the lease as a contract, oral agreements between the parties prior to entering into a written contract are likely to be viewed as negotiations, and thus subject to the doctrine of merger. The doctrine mandates incorporation of prior negotiations between the parties into the written contract. Jacobsen v. Moss, 221 Iowa 1342, 268 N.W. 162 (1936); Hinn v. McGinnis, 182 Iowa 131, 134-35, 165 N.W. 406, 407 (1917).

fail as section A.7's unconscionability protection only extends to the specific terms of the rental agreement and not to any inducements or the setting of the rental agreement.[119] Where the evidence, however, is convincing that the lease has changed or added unfavorable terms, it seems likely that courts would be favorably inclined to finding that the tenant reserved the right to review and reject the written lease after accepting possession, at least where the tenant did repudiate the written lease promptly. It may also be possible for the tenant to overturn the lease based on theories of estoppel, unclean hands or fraud.[120]

---

119. *See* text accompanying notes 178-204 *infra* (discussion of unconscionability under both the IURLTA and the IMHP-RLTA).

120. Both acts are silent as to fraud and misrepresentation. Obviously, the new legislation has not "displaced" the existing Iowa law of fraud and misrepresentation, and pursuant to sections A.3 and B.3 the "old" law supplements the "new."

Where the tenant can show fraud either in the execution or in the inducement, he will have a defense to the enforcement of the contract in both law and equity. Commercial Sav. Bank v. Kietges, 206 Iowa 90, 219 N.W. 44 (1928); B.F. Bonewell & Co. v. Jacobson, 130 Iowa 170, 106 N.W. 614 (1906). There is a distinction between fraud in the execution and fraud in the inducement. While it is generally held that fraud in the execution renders the contract void, fraud in the inducement renders it merely voidable at the option of the defrauded party. Eldorado Jewelry Co. v. Darnell, 135 Iowa 555, 113 N.W. 344 (1907); Kearny Milling & Elevator Co. v. Union Pac. Ry. Co., 97 Iowa 719, 66 N.W. 1059 (1896); 17 AM. JUR. 2d *Contracts* § 151 (1964).

Common law fraud, such as would sustain a tort action for damages, is not as broad as equitable fraud upon which rescission may be granted. Detrick v. Aetna Cas. & Sur. Co., 261 Iowa 1246, 158 N.W.2d 99 (1968). The essential elements of legal fraud are false representation, materiality, scienter, intent to deceive, reliance and resulting injury. Grefe v. Ross, 231 N.W.2d 863, 864 (Iowa 1975). Intent to deceive is not strictly necessary to establish fraud in equity. *In re* Lorimor's Estate, 216 N.W.2d 349 (Iowa 1974); Lorensen v. Langman, 204 Iowa 1096, 216 N.W. 768 (1927). Fraud may be inferred from the relationship of the parties or the circumstances of the particular transaction. Curtis v. Armagast, 158 Iowa 507, 138 N.W. 873 (1912); *see also*, Stout v. Vesely, 228 Iowa 155, 290 N.W. 116 (1940). In addition, intent to deceive and scienter may be shown not only through actual knowledge of falsity, but also by reckless disregard of the truth or falsity of the statement. B & B Asphalt Co. v. T.S. McShane Co., 242 N.W.2d 279 (Iowa 1976); Grefe v. Ross, 231 N.W.2d 863 (Iowa 1975).

Under Iowa law, a person who has been induced by fraudulent representations to enter into a lease may rescind or, having changed his position before ascertaining the truth, may sue for damages. Franke v. Kelsheimer, 180 Iowa 251, 163 N.W. 239 (1917). As a general proposition, the measure of damages is the actual pecuniary loss sustained as a direct result of the wrong. Lamasters v. Springer, 251 Iowa 69, 99 N.W.2d 300 (1959). More specifically in the landlord-tenant situation, fraudulent statements made by the landlord concerning the value or quality of the leased premises which induce the tenant to enter into the lease will entitle the tenant to damages measured by the difference between the actual rental value of the premises and the rental value if the premises had been as represented by the landlord. Franke v. Kelsheimer, 180 Iowa 251, 163 N.W. 239 (1917). Thus, the tenant is entitled to the benefit of his bargain. Where these damages are not sufficient to make the plaintiff whole, additional damages may be awarded. B & B Asphalt Co. v. T.S. McShane Co., 242 N.W.2d 279, 285 (Iowa 1976).

Where fraud is shown, exemplary damages may be awarded. Briggs Transp. Co. v. Starr Sales Co., 262 N.W.2d 805 (Iowa 1978); Grefe v. Ross, 231 N.W.2d 863 (Iowa 1975); Northup v. Miles Homes, Inc., 204 N.W.2d 850 (Iowa 1973); Syester v. Banta, 257 Iowa 613, 133 N.W.2d

B. *Disclosure Requirements*

Both Acts use a variety of regulatory techniques in their effort to ensure the fairness of the rental contract. One technique given consideration above in the discussion of section B.14(5) is that of imposing an affirmative obligation on the landlord. Section B.14(5), of course, mandates the mobile parks landlord to deliver a signed copy of the rental agreement to the tenant (and the tenant to sign and return it within ten days). A second example of this important regulatory technique is evidenced in sections A.13 and B.14, which impose a mandatory disclosure obligation on landlords and mobile home park owners. Unlike either the federal Freedom of Information Act[121] or the Iowa Public Records Act,[122] the disclosure requirements imposed by the IURLTA and the IMHP-RLTA do not require a triggering request from the party seeking the information (in this case, the tenant).

There are several objectives of the disclosure requirements of sections A.13 and B.14, but undoubtedly the foremost objective is to "smoke out" the absentee landlord. A widespread problem that tenants have encountered is the difficulty, if not impossibility, of dealing with an anonymous or absentee landlord. The problem typically arises when the tenant is allowed to deal only with the landlord's agent. If the tenant has a complaint or demand to make, she naturally approaches the agent because she knows only the agent. Should the agent disclaim responsibility with respect to the problem, as all too often has happened in the low income housing context, any further efforts by the tenant to seek redress of the grievance would be thwarted by a wall of silence as to the identity of the owner of the apartment building. Both Acts seek to overcome this problem by requiring the landlord, or a person authorized to enter into the rental agreement on behalf of the landlord, to disclose *in writing* to the tenant no later than at the commencement of the tenancy, the name and address of (1) the manager of the premises, and (2) the owner of the premises (or a person authorized "to act for and on behalf of the owner for the purposes of service of process and for the purpose of receiving of and receipting for notices and demands").[123] The names and addresses given the tenant must be kept up to date.[124] Current supplementation is required of any successor landlord as well.[125]

The crucial question is that of enforcement: What assurance is there that an agent who would refuse to reveal the identity of the landlord at the time of a tenant grievance will make the disclosure at the time of leasing?

---

666 (1965). Equity may also award exemplary damages for intentional fraud. Charles v. Epperson & Co., 258 Iowa 409, 431, 137 N.W.2d 605, 618 (1965). Thus, if a tenant seeks rescission of the lease in equity, he may still be entitled to exemplary damages.

121. 5 U.S.C. § 552 (1970).
122. Iowa Code ch. 68A (1981).
123. § B.14(2)(a), (b); § A.13(1)(a), (b).
124. § B.14(3); § A.13(2).
125. *Id.*

The answer is found in the subtle but coercive remedy contained in sections A.13(3) and B.14(4). If a person who is obligated under sections A.13(1) or B.14(2) to disclose the required names and addresses to the tenant fails to do so, that person "becomes" the agent of the landlord for the purpose of service of process, receiving and receipting for notices and demands, performing the obligations of the landord under the IURLTA or IMHP-RLTA and lease, and expending or making available for that purpose all rent collected from the premises.[126] In short, this remedy seeks to ensure that the tenant will have someone on whom to serve notices and demands, and, if the occasion arises, to sue. This remedy also ensures that any judgment obtained can be executed against at least the rent proceeds. The remedy should work. It seems doubtful that many landlords will want to be exposed to default judgments, a real risk when an agent can receive service. It is even more doubtful that their agents will want to be exposed to liability for their landlords' breaches.

Unfortunately, there is a potential snag to this rosy analysis. Professor Kalish[127] has identified a potential loophole to the URLTA disclosure remedy section, a problem also applicable to both the IURLTA and IMHP-RLTA sections since they adopted URLTA section 2.102(c) verbatim. Under both Acts, only the person with whom the tenant entered into the rental agreement can be deemed the landlord's agent. The URLTA comment identifies the "person authorized to enter into a rental agreement" with the "person collecting the rent."[128] This would often, if not usually, be the case. But what if it is not? What if the person authorized to enter into the rental agreement is not the person authorized to collect the rent? Kalish urges in that situation that the statute be interpreted as the URLTA drafters contemplated so that the person collecting rent is deemed the landlord's agent for remedy purposes.[129] In addition to the URLTA comment, this interpretation finds support in the language of sections A.13(3)(b) and B.14(4)(b) indicating that the person deemed to be the landlord's agent for purposes of suit is also deemed to have the authority to pay any judgments obtained against the landlord from rents collected. This key remedy would be superfluous if the statute were construed so that the person actually collecting the rents was outside the reach of sections A.13 and B.14 when he was not the person originally entering into the rental agreement with the tenant. Such a construction should not prevail, for the Iowa Supreme Court has on numerous occasions invoked the rule of statutory construction that it must give effect to the whole statute and construe it in such a manner that no part will be rendered superfluous.[130]

---

126. § B.14(4)(a), (b); § A.13(3)(a), (b).
127. Kalish, *supra* note 102, at 631.
128. U.R.L.T.A. § 2.102, comment.
129. Kalish, *supra* note 102, at 631.
130. *E.g.*, Millsap v. Cedar Rapids Civil Service Comm'n, 249 N.W.2d 679, 688 (Iowa

Professor Kalish also points out the URLTA's ambiguity in its treatment of the agent's potential liability.[131] Both section A.6(4) and section B.7(3) define "landlord" to include a manager who fails to make the required disclosures. An inference could be drawn that such a manager would be responsible as a landlord but for the more explicit language holding him liable *only* as the agent of the landlord for the purpose of performing the obligations of the landlord and expending or making available for that purpose all rent collected from the premises. This is a statutory ceiling on the agent's liability only, apparently immunizing the agent from personal liability but exposing him to the extent of the rent monies he collects to execution on any judgment won by a tenant against the landlord. There is, however, no statutory ceiling on the landlord's liability. Should a tenant recover a judgment against the landlord in excess of rents collected, the tenant could execute against the agent to the extent of the rents collected and then proceed against the landlord for the balance owed. The tenant would also have the option to execute monthly as rents are collected. All rent collected from the premises, or from the mobile home park, may be utilized to satisfy such a judgment. The express language of both Acts refutes any lame argument that the rents subject to execution are limited to those collected from the tenant-plaintiff who did not receive the required disclosures.

Two additional pre-rental agreement disclosure obligations are imposed by the two pieces of legislation. In what are helpful Iowa additions to the original URLTA text, sections A.13(4) and B.14(6) require the landlord to inform the tenant of utility rates, charges and services before the rental agreement is signed. The IURLTA provision requires "full explanation,"[132] the IMHP-RLTA "written explanation." An exception is made so that disclosure is not required if the tenant pays for the services directly to the utility company, a common arrangement in rentals of single family residences.

Both statutes leave us adrift when we look for remedies for breach of the utility rate disclosure obligations. The IURLTA distinguishes single family residence tenancies from "other than single family residence" tenancies for some purposes,[133] and this distinction may be relevant in the context of utility rate disclosure. Business custom and usage would of course be sub-

---

1977); Goergen v. State Tax Comm'n, 165 N.W.2d 782, 786 (Iowa 1969).

131. Kalish, *supra* note 102, at 631-32.

132. The "fully explain" language of section A.13(4) does not contemplate the written explanation required by section B.14(6). House Bill 2244, as introduced, contained the written explanation requirement, but that language was struck and the full explanation language substituted in amendment H-5517, which was adopted on March 2, 1978. H.J. 766-67 (1978). It should be recalled, however, that the URLTA does not require any explanation as to utility charges, so both Iowa Acts are a major improvement.

133. *See* § A.15(2, 3). Note that multiple units in a traditional apartment building are included in the IURLTA definition of "other than single family residences," while multiple units of the rowhouse type are deemed "single family residences." *See* note 153 *infra*.

ject to proof. Without hearing that proof, it would seem that utility charges are included in the rent in the vast majority of other than single family residential tenancies, and that they are often, perhaps usually, separate from and not included in the rent of single family residences and mobile home spaces. Courts will probably be more inclined to invoke their full remedial power on behalf of tenants whose landlord now claims that the utilities are in addition to the rent, than where that fact was understood but the charges were not discussed.

At least in the context of an other than single family residence tenancy, failure to include an express provision in the lease providing that the utility charges were in addition to rent, should be an appropriate opportunity for a court to invoke the doctrine of merger on behalf of a tenant and to hold that the agreed rent is all the tenant owes.[134] When the rental agreement does require the tenant to pay utility charges in addition to rent, or when that is the custom and practice with such tenancies, *and* there is no disclosure of utility rates and charges, the appropriate remedy is less clear. Rescission of the rental agreement would not seem inappropriate where a tenant finds herself facing an unexpectedly large utility-plus-rent payment. If rescission is granted, the tenant should also recover damages for her costs in relocating under sections A.4 and B.4.

Under the IMHP-RLTA the disclosure obligations are not entirely one-sided. Upon rental of a mobile home space, the tenant is required to fill out a standarized registration form "showing the mobile home make, year, serial number and license number and also showing if the mobile home is paid for," if it has a lien on it, and, if there is a lien, the lienholder and the legal owner.[135] A duty to keep the information on this card current is also imposed by section B.27(2). The landlord must be given notice "within ten days of any new lien, changes of existing lien or settlement of lien."[136] This information is necessary in order for a landlord to fulfill his duty to notify the legal owner or lienholder should the tenant abandon her mobile home. Although no specific remedy is prescribed for a tenant's breach of her disclosure obligaton, the landlord can probably terminate the lease pursuant to section B.25 (subject to the tenant's right to cure by making the required disclosures within fourteen days).

The final subsection to each Act's principal disclosure section deals with advance notice of rent increases.[137] Unlike the other mandatory disclosure provisions, the rent increase subsections do not come into play at the time of entering into a rental agreement. Because of their post-agreement application, they will be treated in the discussion of rules that follows in Section II(D).

---

134. *See* note 118 *supra*.
135. § B.27(2).
136. *Id.*
137. §§ A.13(5), B.14(7). *See* text accompanying notes 233-36 *infra*.

C. *Prohibited and Unconscionable Lease Provisions*

Both Acts contain strong provisions designed to ensure that the new protections afforded the tenants are not lost through the contracting process. This is accomplished by prohibiting the inclusion in rental agreements of a handful of clauses which have proved oppressive to tenants over the years.[138] Both Acts provide that a rental agreement[139] may not include clauses in which the tenant or landlord: (1) "[A]grees to waive or to forego rights or remedies under [the Act];"[140] (2) "[a]grees to pay the other party's attorney's fees;"[141] (3) agrees to the exculpation of any liability of the other party[142] or to the indemnification of the party for that liability.[143] In addition, the IURLTA prohibits any clause authorizing any "person to confess judgment on a claim arising out of the rental agreement."[144] Although the

---

138. Although both sections A.11 and B.11 prohibit the use of the listed provisions by either the landlord or the tenant, experience has shown that such clauses have been almost universally used by landlords against tenants. Indeed, URLTA section 1.403 prohibits the use of these provisions only by landlords. The comment to URLTA section 1.403 provides: "Rental agreements are often executed on forms provided by landlords, and some contain adhesion clauses, the use of which is prohibited by this section."

139. Both statutes apply only to the rental agreement which, of course, includes landlord promulgated rules. Neither Act precludes the subsequent settlement of claims arising under the new laws by the landlord and tenant, and such settlement agreements are expressly authorized by sections A.7(1)(b) and B.8(1)(b) so long as the settlement is not unconscionable. *See* Kalish, *supra* note 102, at 617-20 for rationale for distinguishing rental agreements from settlement agreements.

140. §§ A.11(1)(a), B.11(1)(a).

141. §§ A.11(1)(c), B.11(1)(b). A provision of the Iowa Consumer Credit Code, IOWA CODE 537.2507 (1981), also bars payment by the consumer of the creditor's attorney's fees, and any contract provision which so provides is unenforceable. In addition, the Iowa Consumer Credit Code authorizes the consumer to sue for actual damages, a penalty not less than $100 nor more than $1000, IOWA CODE § 537.5201(1)(d) (1981), and reasonable attorney's fees. *Id.* § 537.5201(8).

142. §§ A.11(1)(d), B.11(1)(c). It should be noted that these provisions prohibit exculpatory clauses with regard to "*any* liability . . . arising under law," and are not limited to liability created only by the IURLTA or the IMHP-RLTA. Thus, the rental agreement cannot be used to impose any limitations on the landlord's general tort or contract liability.

143. §§ A.11(1)(d), B.11(1)(c). Like the prohibition of clauses limiting the landlord's liability, *see* note 142 *supra*, the prohibition of indemnification agreements extends to all liabilities arising out of the landlord-tenant relationship, and not merely to liabilities arising under the IURLTA or the IMHP-RLTA. Section B.11(2) does specifically state, in an Iowa IMHP-RLTA addition to URLTA, that a landlord can require a tenant to "maintain liability insurance which names the landlord as an insured as relates to the mobile home space rented by the tenant." § B.11(2).

144. Section A.11(1)(b) is based on URLTA section 1.403(a)(2). The comment to this URLTA section analogizes this prohibition to a similar one contained in the Uniform Consumer Credit Code section 2.415. The Iowa Consumer Credit Code, enacted in 1974, which covers consumer credit transactions, voids the confession of judgment clause. Iowa Code section 537.3306 states that unless executed after default, any authorization to confess judgment on a claim arising from a consumer credit transaction is void. IOWA CODE § 537.3306 (1981). The consumer is also authorized to sue for actual damages, a penalty not less than $100 nor more

Iowa Mobile Home Parks Residential Landlord-Tenant Act inexplicably did not include the bar on confession of judgment clauses, it did employ the prohibited provisions approach to address a number of problems unique to the mobile home space rental situation. These problems will be discussed in Part II.[145]

---

than $1000, *id.* § 537.5201(1)(n), and reasonable attorney's fees. *Id.* § 537.5201(8).

A constitutional challenge would still, of course, be available to the mobile home park tenant who stands to be injured by the operation of such a clause. The unfairness of such clauses, which authorize the entry of judgment without notice or hearing, is obvious in the typical residential tenancy. Such clauses have on occasion been held unconstitutional as applied when aimed at low income consumers, in recognition of the weak or nonexistent bargaining position of such consumers and the lack of due process in the judgment. Swarb v. Lennox, 405 U.S. 191 (1972); Bond v. Dentzer, 494 F.2d 302 (2d Cir. 1974), *cert. denied*, 419 U.S. 837 (1974); North Penn Consumer Discount Co. v. Shultz, 250 Pa. Super. 530, 378 A.2d 1275 (1977).

145. There are a number of additional troublesome aspects of the mobile home space rental relationship that are regulated in the IMHP-RLTA by the technique of prohibiting the inclusion of certain provisions in the rental agreement. These will be examined in the subsequent Part II article, so only a brief sketch of the more important provisions follows.

Several abuses that have arisen when tenants wish to sell their mobile homes are dealt with in sections B.11 and B.19. Section B.11(1)(d) specifically prohibits any provision in a rental agreement agreeing "to a designated agent for the sale of tenant's mobile home." Section B.19(3)(d) prohibits the landlord from "[exacting] a commission or fee with respect to the price realized by the tenant selling [his or her] mobile home, unless the park owner has acted as agent for the mobile home owner pursuant to a written agreement." The Act does not limit the amount of commission that may be permissibly charged by a park owner who properly acts as an agent. In addition, section B.19(3)(c) prohibits the landlord from denying residents the right to sell their mobile homes at a price of their choosing, but it does allow the landlord to "reserve the right to approve the purchaser of such mobile home as a tenant but such permission may not be unreasonably withheld. . . ." Should a mobile home be sold "in a rundown condition or in disrepair," the Act provides the landlord with the authority to require the new purchaser to remove it from the park within 60 days in order to "upgrade the quality of the mobile home park." § B.19(3)(c).

Another tying arrangement situation is addressed by the new legislation in section B.16(2). Section B.16(2) prohibits a landlord from

> imposing any conditions of rental or occupancy which restrict the tenant in the choice of a seller of fuel, furnishings, goods, services or mobile homes connected with the rental or occupancy of a mobile home space unless such condition is necessary to protect the health, safety, aesthetic value or welfare of mobile home tenants in the park.

Although this last qualification would seem to give the landlord considerable discretion, the statute also provides in section B.16(2) that where such conditions are imposed and these result in charges for goods or services, "the charges shall not exceed the actual cost incurred. . . ." Finally, the section does expressly authorize the landlord to impose reasonable requirements designed to standardize methods of utility connection and hook-up.

Another area of potential landlord abuse is the requirement of payment of entrance fees or exit fees. Landlords are prohibited by section B.19(3)(b) from requiring "as a precondition to renting . . . or removing from a mobile home space . . . [the payment of] an entrance or exit fee of any kind unless for services actually rendered or pursuant to a written agreement." Although the "written agreement" language might be broad enough to include written rental agreements, the fact that the statute did not use "rental agreement" suggests that it contemplates a separate writing. The towing of a mobile home into the park and preparing a lot with a

The importance of the statutory bar against waiver clauses cannot be underscored enough. The legislature has unequivocally spoken. The warranty of habitability and other rights afforded tenants under both Acts cannot be overcome by the inclusion of waiver clauses in a form lease. This legislation clearly overrides the vague language in *Mease v. Fox*[146] which suggested that the warranty of habitability could be waived. Although not construing the URLTA, the California Supreme Court recently addressed the question of waiver of the warranty of habitability in *Knight v. Hallsthammar*.[147] The California court emphasized that the very "reasons which imply the existence of the warranty of habitability—the inequality of bargaining power [and] the shortage of housing—[likewise] compel the conclusion" that the warranty cannot be waived.[148]

Section A.11 makes only one significant change from the text of URLTA section 1.403, an amendment which authorizes the waiver of IURLTA rights and remedies of certain migrant farmworkers.[149] Migrant

---

platform, tie-downs and anchors, would be services that would qualify for the charge of an entrance fee.

Section B.19(3)(e) further prohibits the landlord from requiring the "tenant to furnish permanent improvements which cannot be removed without damage . . . to the mobile home space at the expiration of the rental agreement." Some examples would be concrete patios, platforms, tie-downs and anchors. A corollary protective provision is section B.10(7) which provides that

> [i]mprovements, except a natural lawn, purchased and installed by a tenant on a mobile home space shall remain the property of the tenant even though affixed to or in the ground and may be removed or disposed of by the tenant prior to the termination of the tenancy, provided that [the] tenant . . . leave[s] the mobile home space in substantially the same or better condition than upon taking possession.

146. 200 N.W.2d 791, 797 (Iowa 1972).

147. 29 Cal.3d 46, 623 P.2d 268, 171 Cal. Rptr. 707 (1981) (en banc).

148. *Id.* at 55, 623 P.2d at 273, 171 Cal. Rptr. at 712.

149. The original bill, House File 2244, as introduced in the Iowa House, contained no limitations regarding single family residences located on agriculturally assessed land. Attempts to amend section A.5 to exclude rentals of single family residences altogether, amendment H-5546, or those located on agriculturally assessed land in unincorporated areas, amendment H-5537, from application of the Act failed. *See* Iowa H.J. 807-08 (1978). The House did adopt, however, the provision presently found in section A.11(1)(a) which effectively allows a landlord to exclude migrant farmworker/tenants from coverage of the Act by means of this waiver clause.

The Senate tried to eliminate this waiver proviso. Senate amendment S-5623A struck the proviso clause in bill section 11(1)(a), Iowa S.J. 1079-80 (1978), and this amendment was adopted by a voice vote on April 28, 1978. Senate amendment S-5623A, and all other Senate amendments that passed, are set forth in the composite in Senate amendment H-6397. Iowa H.J. 2046-48 (1978).

The House refused to concur with the Senate amendment striking the 11(1)(a) proviso. On Monday, May 1, 1978, H.F. 2244, as amended by the Senate amendment H-6397, was called up for consideration. Amendment H-6413 was offered to amend Senate amendment H-6397 by striking lines 14 and 15 from page one. To understand this amendment takes some doing as the stricken lines contained language striking language from H.F. 2244. The effect of H-6413 was to restore the section 11(1)(a) proviso that allows the farmer-landlord to exclude the migrant worker-tenant from coverage under the Act by inserting such a clause in the lease. H-6413 was

farmworkers who are provided housing by their employers are excluded from IURLTA coverage by section A.5(5); but this exclusion does not apply when the migrant is provided housing by someone other than his employer, for instance, by a neighboring farmer.[150] The section A.11(1)(a) prohibition does not extend to "rental agreements covering single family residences on land assessed as agricultural land and located in an unincorporated area. . . ." On first blush, this proviso would also seem to cover tenant farmers who rent a dwelling on the land they rent, but they are completely excluded from IURLTA coverage by section A.5(7).[151] Consequently, the proviso seems aimed at the migrant farmworker occupancy, and, while it does not, of course, mandate the exclusion of these occupants from the coverage of the IURLTA, it does afford that option to the contracting process. The migrant farmworker lacks the bargaining position to negotiate equally with the landlord as to such waivers,[152] so one suspects that such waiver clauses will become boilerplate provisions in leases tendered to such workers. Although the waiver proviso extends only to single family residences, the IURLTA definition of single family residence is broad enough to include rowhouse-type multiple dwelling units[153] but might not include the barracks-type housing sometimes used for migrant housing.

Both Acts forthrightly proclaim that any prohibited provision contained in a rental agreement is unenforceable.[154] That favorable rule of law will not,

---

adopted by a vote of 46 to 37. Iowa H.J. 2059-60 (1978).

The House then concurred in Senate amendment H-6397, as amended by H-6413. The House then passed the bill, as amended by the Senate and further amended and concurred in by the House, by a vote of 65 to 18 on May 1, 1978. Iowa H.J. 2060-61 (1978). With the unanimous consent of the House, H.F. 2244 was immediately messaged to the Senate.

On May 2, 1978, H.F. 2244, as amended by the Senate and further amended by the House, was called up for consideration. The Senate then concurred in the House amendment to the Senate amendment. That is, the Senate concurred in House amendment S-5737 to Senate amendment H-6397. House amendment S-5737 is identical to H-6413 and is found on page 1173 of the Senate Journal. House amendment S-5737 amended Senate amendment H-6397 so that the section 11(1)(a) proviso is in the Act. Iowa S.J. 1182 (1978).

As amended by the Senate, further amended by the House and concurred in by the Senate, H.F. 2244 passed the Senate by a vote of 34 to 5. Iowa S.J. 1182-83 (1978).

150. *See* note 94 *supra*.

151. *See* note 95 *supra*.

152. *See* Vasquez v. Glassboro Service Ass'n, 83 N.J. 86, ___, 415 A.2d 1156, 1164 (1980).

153. Section A.6(12) defines "single family residence" as

> a structure maintained and used as a single dwelling unit. Notwithstanding that a dwelling unit shares one or more walls with another dwelling unit, it is a single family residence if it has direct access to a street or thoroughfare and shares neither heating facilities, hot water equipment, nor any other essential facility or service with another dwelling unit.

Most rowhouse units have direct access to a street and their own heating facilities, hot water equipment and other essential facilities. Under section A.6(12), such multiple units would be classified as single family residences.

154. §§ A.11(2), B.11(2).

however, excise prohibited provisions from leases without judicial review, and the reality is that many an unknowing tenant could still be prejudiced by unenforceable clauses in his lease. There was a sufficient body of experience in the consumer contract setting for the URLTA drafters to conclude there was a real possibility that uniformed tenants might fail to assert valid claims or defenses against their landlords due to the presence of unenforceable waiver clauses in their rental agreements. There was further concern that without the prospect of other remedial sanctions, there would be some unscrupulous landlords who would continue to insert prohibited provisions in their leases and exploit those provisions against unsuspecting tenants.

Both sections A.11(2) and B.11(2) deal with such egregious landlord conduct, but the IURLTA provides the stronger remedy and therefore the greater deterrent. Money does talk, and both acts provide for monetary liability where the landlord knowingly "uses a rental agreement containing provisions *known* by the landlord to be prohibited. . . ."[155] In such a situation, the IURLTA provides that the "tenant may recover actual damages," a minimum statutory dollar penalty ("not more than three months' periodic rent"), and reasonable attorney's fees.[156] The IMHP-RLTA counterpart is much weaker, providing only for the recovery of "actual damages sustained."[157] In those instances in which a landlord is seeking to invoke a prohibited provision against a knowledgeable tenant, the tenant should have no difficulty getting a court to hold the provision unenforceable. That result may well mean that the tenant will suffer no actual damages, other than the costs of litigation. It would seem that such litigation costs should be includable as actual damages under section B.11(2) at least where the tenant was forced to defend against the enforcement of such a clause.[158] Such a construction would not mean that the attorney's fees recovery provision contained in section A.11 is a nullity. Section A.11 would authorize the award of fees to any tenant who successfully brought a suit to recover the minimum statutory dollar penalty against a landlord who included a prohibited provision in the lease, whether or not the landlord was seeking to enforce that

---

155. A very slight, and arguably innocuous change in the wording of the two remedy sections should be pointed out. Liability is imposed under both Acts only where the landlord has used a rental agreement "containing provisions known by the landlord to be prohibited." §§ A.11(2), B.11(2). In addition, section A.11(2) requires the landlord's actions to be "willful," while section B.11(2) requires them to be "knowing." The relevant URLTA provision, section 1.402(b), used the word "deliberate."

156. § A.11(2).

157. § B.11(2).

158. *See* Kuiken v. Garrett, 243 Iowa 785, 51 N.W.2d 149 (1952). *See also* Harmont v. Sullivan, 128 Iowa 309, 317, 103 N.W. 951, 954 (1905). In *Kuiken*, a tenant was forced to defend his possession in four forcible entry and detainer actions. The court held that by bringing these actions, the landlord had breached the covenant of quiet enjoyment and that the attorney's fees incurred by the tenant in defending the possession actions were recoverable as damages for the breach. 243 Iowa at 799, 51 N.W.2d at 158.

provision against the tenant. Liability under both Acts is limited to truly bad faith conduct on the part of the landlord. Both Acts use a subjective standard and impose liability only where the landlord knew that the provision was prohibited.[159]

Although attorney fees will be discussed more fully when remedies are considered,[160] more than passing mention must be made of section A.11(2)'s authorization of tenant recovery of attorney fees. This provision, and several other provisions sprinkled throughout the IURLTA,[161] reflect the recognition that substantive rights can be effectively nullified where the party meant to be protected cannot obtain legal assistance to enforce those rights. The attorney fees provisions are particularly crucial to tenants, who otherwise often would be unable to afford to retain counsel to pursue their rights under the new legislation. This reality may be the result where the tenant is indigent;[162] however, it also may be the result where the tenant is not indigent but the potential dollar recovery from vindicating the tenant's new substantive rights in court would not exceed the fees charged by the attorney to bring the necessary legal action on behalf of the tenant. The statutory attorneys fees provisions are intended to fill this gap and to implement the new substantive law provisions through the private attorney general concept.[163] This concept seeks to overcome the economic disincentives to vindication of substantive rights under these Acts by encouraging private attorneys to represent tenants with bona fide claims with the expectancy of a recovery of their attorney fees from the landlord should they prevail. The IURLTA implicitly recognizes that the importance of the rights at stake cannot be determined solely by the size of the tenant's judgment, and pro-

---

159. §§ A.11(2), B.11(2).

160. *See* Part II of this Article in a subsequent issue of the *Drake Law Review*. *See also* Note, *Interpreting the Attorneys' Fees and Materiality Provisions of the Iowa Uniform Residential Landlord and Tenant Act*, 65 IOWA L. REV. 1074 (1980) [hereinafter cited as *IURLTA Attorneys' Fees*].

161. Sections A.21(2), A.22(2), A.26, A.35(2) and A.36(2) authorize recovery of attorney's fees by the tenant under the IURLTA. Sections A.24(1), A.27(3), A.34(3) and A.35(1) authorize recovery of fees by the landlord. Section A.12(8) authorizes recovery of fees by the prevailing party in actions concerning rental deposits.

162. *IURLTA Attorney's Fees, supra*, note 160, at 1076-77 (discussing the reality that legal aid has been unavailable to the poor in many rural and smaller communities, both in Iowa and elsewhere). The future of legal aid to the poor is very uncertain at the present time in light of the Reagan Administration's vehement opposition to the program. *See* 67 A.B.A.J. 954 (Aug. 1981).

163. *See generally* Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968). There, in the context of a case arising under Title II of the Civil Rights Act of 1964, the Court described the theory behind such fees awards:

> If [the plaintiff] obtains an injunction, he does so not for himself alone but also as a "private attorney general", vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest. . . .

Id. at 402.

vides that fee awards are to be determined by the time reasonably expended by the attorney and not by the amount of the recovery.[164]

Another new area which both Acts regulate by means of a prohibited provision section is that of the rental deposit.[165] Iowa rental deposit law remains basically unchanged with regard to residential tenancies,[166] but both Acts make an important addition to the law by imposing a dollar ceiling on the amount that can be demanded. The IURLTA prohibits a landlord from collecting or demanding "as rental deposit and prepaid rent" an amount in excess of two months' rent."[167] Its IMHP-RLTA counterpart is not as tightly written. The IMHP-RLTA prohibits the landlord from demanding or receiving "as rental deposit an amount or value in excess of two months' rent."[168] Both Acts define rental deposit similarly, as a deposit of money to secure performance of either a residential rental agreement or a mobile home space rental agreement and both expressly exclude deposits exclusively in advance payment of rent.[169]

Because it places a dollar ceiling on the combined amount of "rental deposit and prepaid rent," and not merely on the rental deposit alone, the IURLTA provides greater tenant protection than the IMHP-RLTA. The IURLTA approach is an innovation on the URLTA,[170] which does not limit the amount of prepaid rent, as distinguished from security. One question that will surely arise is whether prepaid rent within the meaning of section

---

164. Section A.6(14) defines "reasonable attorney's fees" as "fees determined by the time reasonably expended by the attorney and not by the amount of recovery on behalf of the tenant or landlord." This is a helpful Iowa addition to the URLTA, which failed to define the term in section 1.301. The IURLTA definition is modeled on that of the Iowa Consumer Credit Code, section 537.5201(8). The calculation of fees awards in civil rights and public interest cases has received considerable attention in the federal courts in the last few years. The federal case law would seem an appropriate touchstone for Iowa courts making fees awards under the IURLTA. *See generally* E. LARSON, FEDERAL COURT AWARDS OF ATTORNEY'S FEES (1981); Larson, *Attorney's Fees Under the Civil Rights Attorney's Fees Awards Act of 1976*, 15 CLEARINGHOUSE REV. 309 (1981).

165. *See* §§ A.12, B.13.

166. Sections 562.8 through 562.16 were repealed by section 38 of H.F. 2244. 1978 Iowa Acts, ch. 1172, § 38, eff. Jan. 1, 1979. However, with essentially three changes, those provisions were reenacted in section A.12 of the IURLTA and B.13 of the IMHP-RLTA. *See* Part II to be published in a subsequent issue of the *Drake Law Review*. Although neither Act really follows the URLTA approach to security or rental deposits, the concept of a dollar ceiling is new to Iowa law and is derived from URLTA section 2.101.

167. § A.12(1).

168. § B.13(1).

169. §§ A.6(10), B.7(11). The definitions are identical to that contained in section 562.8 of the prior Iowa Code. As Professor Kalish points out, a functional security deposit, however denominated, will be covered by these sections. This will force courts to examine the substance of the arrangement, not its form, and if the deposit either secures, or is intended to secure, a tenant obligation, it will fall under these sections. Kalish, *supra* note 102, at 625. *But see* Zemp v. Rowland, 31 Or. App. 1105, 572 P.2d 637, 639 (1977) (a narrow view as to what constituted a security deposit). *See* text accompanying notes 194-202 *infra*.

170. U.R.L.T.A. § 2.101.

A.12(1) includes the prepayment of the first month's rent. If so, that would effectively result in a dollar ceiling of one month's rent on the rental deposit. Tenant's counsel would argue that such a result would be consistent with URLTA section 2.101, which, while not regulating prepaid rent, does suggest a security deposit ceiling of one month's periodic rent. Landlords will undoubtedly respond that payment of the first month's rent should not be characterized as prepaid rent, and that the custom and usage is to regard prepaid rent as including only prepayments of the last month's rent. In any event, even under the pro-landlord construction of section A.12(1), the most a landlord can demand up front is the payment of three months' periodic rent, that is, the first month's rent and a separate payment of two additional month's rent, whether characterized as rental deposit or prepaid rent.

Section B.13(1) does not pose the construction difficulties of the IURLTA provision, but it likewise provides the tenant with less protection. Like URLTA section 2.101, it does not place a dollar ceiling on what a landlord can require in the way of prepaid rent. Consequently, while it places a dollar ceiling of two months' periodic rent on rental deposits, the sky is the limit with regard to what the landlord can demand as prepaid rent.[171]

The IURLTA approach is a balanced one. The dollar ceilings are certainly generous enough so as to provide ample protection to the landlord, and not so generous as to render the ceilings meaningless. Section A.12(1) does mean new protection for tenants who sometimes have found the security deposit manipulated by landlords to discriminate on racial or economic grounds. The IURLTA provisions in particular will place important limitations on a landlord's ability to "jack up" the deposit requirement so as to preclude or discourage "undesirable" tenants from renting the unit. Unfortunately, problems may arise with regard to enforcement of these new tenant protections. Neither Act provides a specific remedy where a landlord demands a rental deposit in an amount in excess of the statutory ceiling. In such a situation, the tenant should be able to obtain injunctive relief ordering the landlord to rent the property to the tenant and to charge a rental deposit no greater than the statutory ceiling.[172] While it is unfortunate that

---

171. Prepaid rent, however, cannot be used to cover the cost of damages caused by a tenant to the property, and the unused portions of the prepaid rent must be returned to the tenant on termination. Kalish, *supra* note 102, at 625. Neither Act prescribes a procedure for the return of unused prepaid rent, though they go into elaborate detail with regard to the return or withholding of rental deposits. At a minimum, the tenant is entitled to the unused prepaid rent at the time the landlord returns the deposit or provides the written statement of deductions (required within 30 days of termination and receipt of tenant's new address, sections A.12(3), (4), B.13(3), (5)). Although the literal language of both sections A.12(7) and B.13(8) authorize the award of "punitive damages not to exceed two hundred dollars [only for] bad faith retention of a deposit," a liberal construction ought to permit such recovery where prepaid rent is withheld as well.

172. Injunctive relief undoubtedly would be subject to the caveat on injunctive relief under the Fair Housing Act of 1968: "That any . . . rental consummated prior to the issuance

neither Act provide for a minimum statutory dollar recovery for violation of the rental deposit ceiling, a sanction which would serve as an important deterrent, injunctive relief and perhaps damages may be more realistic alternatives than would appear at first blush. At least in those instances where the deposit is used as a tool by the landlord to discriminate on racial grounds, black or Hispanic tenants may be able to join their IURLTA or IMHP-RLTA claim with claims under Title VIII of the Federal Civil Rights Act[173] or section 1982.[174]

In the situation where the landlord has demanded and received a rental deposit in excess of the statutory ceiling, another remedial approach is available under both Iowa Acts.[175] Sections A.12(7) and B.13(8) provide that the bad faith retention of any portion of the rental deposit in violation of the statute "shall subject the landlord to punitive damages not to exceed $200 in addition to actual damages." Consequently, for the tenant who has paid a rental deposit in excess of the statutory ceiling, a minimum statutory dollar recovery is available, as well as actual damages, should the landlord refuse to return the excess amount upon the tenant's demand.

The most important step that either Act takes toward enforcement of the tenant's rights with regard to the rental deposit is IURLTA section A.12(8), which provides that the prevailing party in any action concerning rental deposits can recover a court award of reasonable attorney fees from the other party. Even more than the potential recovery of $200 punitive damages, the provision for recovery of attorney fees will make it economically viable for tenants to sue in order to vindicate their rights, and thereby also serve as a deterrent to wrongful withholding of deposits by landlords.[176]

The prohibited provisions sections of both Acts provide significant tenant protection in the contracting process. The barometer as to the scope of this protection will be the liberality of the Iowa court's construction of the primary prohibition—the subsection (1)(a) bar on any agreement to waive or forego rights or remedies under the Act.[177] Any lease provision which limits or undercuts tenant rights or remedies should fall under the anti-waiver bar, even though not written in waiver language. For example, a lease provision which purports to limit repair and deduct remedies to a maximum of one month's rent should be held unenforceable where there was a failure of essential services governed by IURLTA section A.23, which prescribes no dollar ceiling on such repairs.

---

of any court order . . . and involving a bona fide . . . tenant without actual notice of the existence of the filing of a complaint or civil action . . . shall not be affected." 42 U.S.C. § 3612(a) (1976).

173. 42 U.S.C. § 3612(c) (1976).

174. *Id.* § 1982.

175. §§ A.12(7), B.13(8).

176. *See* text accompanying notes 160-64 *supra*.

177. §§ A.11(1)(a), B.11(1)(a).

Both Acts are cognizant that their provisions barring certain terms do not exhaust all clauses that may be oppressive. Consequently, the Acts supplement the prohibited provisions sections with unconscionability sections A.7 and B.8, which provide express legislative authorization for judicial examination of lease clauses. Both Acts adopt ULRTA section 1.303 without change, which provides remedies where an unconscionable provision is found in a rental agreement (or a settlement agreement).[178] Sections A.7 and B.8 preceded the Iowa Supreme Court's holding in *Casey v. Lupkes*[179] that the defense of unconscionability is available in any contract action. *Lupkes*, however, did attempt to define unconscionability, a task avoided by both the legislature and the URLTA. The court in *Lupkes* quoted *Hume v. United States*[180] and held: "A bargain is said to be unconscionable at law if it is 'such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other.' "[181] The *Lupkes-Hume* definition is the traditional one and is consistent with the Uniform Commercial Code view,[182] which the comment to URLTA section 1.303 states was the one contemplated by URLTA. Actually, neither the UCC nor the URLTA define unconscionability in their statutory text, but both state the same text in the commentary:

> The basic test is whether in light of the background and setting of the market, the conditions of the particular parties to the rental agreement, settlement or waiver of right or claim are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the agreement or settlement.[183]

Obviously, difficulties arise where the defined term is a part of the definition. Although the Iowa Supreme Court has found only infrequent occasion to supply judicial gloss to the doctrine of unconscionability, it has stressed the dynamic nature of the doctrine.

In *C & J Fertilizer, Inc. v. Allied Mutual Insurance Co.*,[184] the court held unenforceable an unusually narrow, liability-avoiding definition of "burglary" in a standard form storekeepers and mercantile burglary and

---

178. Both Acts provide, in pertinent part:

> 1. If the court, as a matter of law, finds that: a. A rental agreement or any provision of it was unconscionable when made, the court may refuse to enforce the agreement, enforce the remainder of the agreement without the unconscionable provision, or limit the application of an unconscionable provision to avoid an unconscionable result.

§ A.7(1)(a). Section B.8(1)(a) is essentially the same.

179. 286 N.W.2d 204, 207 (Iowa 1979).

180. 286 N.W.2d at 207 (quoting Hume v. United States, 132 U.S. 406, 411 (1889)).

181. 286 N.W.2d at 207.

182. IOWA CODE § 554.2302 (1981).

183. U.R.L.T.A. § 1.303, comment.

184. 227 N.W.2d 169 (Iowa 1975).

robbery policy.[185] The court noted the fine print of the definition, the placement of the liability-avoiding clause in the definitions section of the policy rather than the exclusions section, the disparity of bargaining power, the fact that the insurance was purchased and the policy sent out afterwards, and the limited education of the insured.[186] The court stated that in considering a claim of unconscionability, a court should "examine the factors of assent, unfair surprise, notice, disparity of bargaining power and substantive unfairness."[187] The doctrine of unconscionability is available to landlords where the tables have been turned,[188] although the situation would rarely arise in residential or mobile home tenancies due to the reality that it is the landlord who almost always prepares the lease (typically, on standard forms). *Lupkes* involved a farm lease and the landlord's representatives challenged the terms of the lease on grounds of unconscionability, particularly the unusually long term and the price term (rent).[189]

Sections A.7(2) and B.8(2) provide that unconscionability may be put into issue by either party or by the court. Each goes on to state that if put in issue, the "parties shall be afforded a reasonable opportunity to present evidence as to the setting, purpose, and effect of the rental agreement or settlement to aid the court in making the determination."[190] Finally, each specifically states that the relevant time in any claim of unconscionability is the time of executing the agreement or settlement.[191] Thus, if a provision not unconscionable at the time of execution becomes so at some later time, a claim of unconscionability will not be successful.

The Iowa Supreme Court has not yet been presented with the question of whether its common law doctrine of unconscionability will reach selling practices. As indicated above, the relevant URLTA comment suggests the UCC test is a standard not nearly as broad as that contained in the Iowa Consumer Credit Code. Iowa Consumer Credit Code section 537.5108 not only measures the agreement terms against the standard of unconscionability, but also the selling practices involved in making the sale.[192] Under the Iowa Consumer Credit Code a court can refuse to enforce a contract which was induced by unconscionable conduct.[193] This is an important addition to the doctrine of unconscionability for frequently it is the sales pitch or practice that is offensive and not any specific contract term.

---

185. *Id.* at 181.

186. *Id.* at 172-77.

187. *Id.* at 181.

188. Casey v. Lupkes, 286 N.W.2d 204, 207-08 (Iowa 1979). The comment to URLTA section 1.303 also specifies that either landlords or tenants may avail themselves of the section.

189. 286 N.W.2d at 207-08.

190. §§ A.7(2), B.8(2).

191. §§ A.7(1), B.8(1).

192. IOWA CODE § 537.5108(1) (1981).

193. *Id.*

The recent case of *Zemp v. Rowland*,[194] arising under the Oregon version of the URLTA, exemplifies this distinction. There the parties entered into a one-year lease providing for rent of $185 per month on June 25, 1975. The tenant paid the first month's rent and an additional $185. In April 1976, after giving proper notice, the tenant vacated and, five days later, the landlord re-rented the premises.[195] The landlord did not return the $185 fee on the ground that it was consideration for the right to terminate early.[196] Tenant sued, claiming that the non-refundable fee was unconscionable.[197]

The court first examined the lease. Paragraph II was a bold-faced paragraph describing a non-refundable fee for the right to terminate upon thirty days' notice without further liability, but it was not filled in as to dollar amount.[198] Buried in Paragraph III of the three poorly photocopied 8-½" x 14" pages of single-spaced typed paragraphs was a provision that tenants would have the last month of tenancy "rent free" if they stayed the entire one-year term.[199]

The facts were hotly disputed by the Oregon Court of Appeals. The majority, rejecting a trial court finding of unconscionability, concluded the tenants read the lease before signing and that the lease was written in understandable terms and provided that the fee was consideration for the right to terminate early.[200] The majority found "nothing shocking to the conscience" in a provision that allowed the tenants to exchange their risk of liability in an early termination situation for the $185 fee.[201] The dissent concluded the $185 non-refundable provision was disguised and that the tenant had been misled into believing the $185 constituted the payment of the last month's rent in advance.[202]

The Oregon Court of Appeals' majority decision is consistent with the UCC doctrine of unconscionability. It just cannot be said that no person in his or her senses would have agreed to the clause. Under the Iowa Consumer Credit Code, however, that conclusion would only complete the first stage of inquiry. The next question would be whether the sales practice involved was unconscionable and, in particular, whether the landlord did conceal and disguise or mislead the tenants as to the nature of the $185 fee.

The ultimate scope of the unconscionability defense in the Iowa residential and mobile home tenancy remains for judicial evolution. Certainly, neither the text of the IURLTA or the IMHP-RLTA, nor the URLTA comment, compel adoption of the more limited UCC view. It can be argued that

---

194. 31 Or. App. 1105, 572 P.2d 637 (1977).
195. *Id.* at ___, 572 P.2d at 638.
196. *Id.* at ___, 572 P.2d at 639.
197. *Id.*
198. 31 Or. App. at ___, 572 P.2d at 641.
199. *Id.*
200. 31 Or. App. at ___, 572 P.2d at 639.
201. *Id.* at ___, 572 P.2d at 640.
202. *Id.* at ___, 572 P.2d at 641.

the legislature was aware of its broader unconscionability definition in the Iowa Consumer Credit Code, and that its failure to define the term in either the IURLTA or the IMHP-RLTA indicates it did not intend that definition to apply. But the counterargument is not without support, that the legislature contemplated that the Iowa Consumer Credit Code definition would be incorporated because the consumer contracts it regulates are more nearly analogous to the residential and mobile home lease situations. Finally, independent of these statutory construction questions is the court's inherent power to fashion the common law of unconscionability, recognized in *Casey v. Lupkes*. To the extent there is ambiguity under the IURLTA and the IMHP-RLTA, and there is, the Iowa courts remain free to evolve the appropriate scope and application of the doctrine to sales practices.

While there is some uncertainty as to the substantive scope of the doctrine, there is agreement on remedies. When a court is confronted with an unconscionable rental agreement provision (or settlement), it has three options under both section A.7(1) and B.8(1): (1) "refuse to enforce the [entire rental] agreement [or settlement];" (2) "enforce the remainder of the agreement [or settlement] without the unconscionable provision;" or (3) "limit the application of [the] unconscionable provision to avoid an unconscionable result."[203] The remedies available under both the UCC and the Restatement (Second) of Contracts are identical to the three prescribed by the two Iowa Acts.[204]

D. *"Contracting Out" Agreements and Rules*

Both Acts impose substantial obligations on landlords with regard to the habitability and maintenance of the rental unit or the mobile home space, as the case may be. These obligations are discussed in Section III below.[205] The following discussion is limited to the extent to which the landlord can shift her statutory habitability and maintenance obligations to tenants who reside on the premises by either a contracting out agreement or rules. The two Acts regulate landlord rulemaking in substantially the same way, both modeled on URLTA section 3.102, but they take sharply divergent approaches in regulating contracting out agreements. Contracting out agreements receive detailed attention in IURLTA section A.15(2-4), which is a verbatim adoption of URLTA section 2.104(c)-(e). The IMHP-RLTA is notable for its total silence on this issue.

The IURLTA's approach to the regulation of contracting out agreements is based on two classifications of rental housing: single family resi-

---

203. *See* note 178 *supra* for text of sections A.7(1) and B.8(1).

204. The Iowa Consumer Credit Code also provides for an award of reasonable attorney's fees where a consumer prevails on a claim of unconscionability. IOWA CODE § 537.5108(6) (1981).

205. *See* text accompanying notes 249-333 *infra* (Landlord Obligations with Regard to the Habitability of the Dwelling and Mobile Home Space).

dences and everything else (in the nondescript classification "other than single family residences").[206] As will become evident shortly, the IURLTA allows considerably greater latitude to the parties when the tenancy involves a single family residence. In classifying a dwelling unit, one should refer to the section A.6(12) definition of single family residence and should avoid the pitfall of automatically classifying units in multiple-unit buildings as other than single family residences.[207] The IURLTA definition of single family residence covers not only the dwelling normally thought of as a single family house, but most rowhouse and townhouse units as well. Consequently, some multiple units of the rowhouse type are deemed single family residences under the IURLTA, while multiple units of the more traditional apartment variety are denominated as "other than single family residences."

Where the rental unit is *not* a single-family residence, the parties may agree, pursuant to section A.15(3), that the tenant will perform "specified repairs, maintenance tasks, alterations, and remodeling *only*."[208] Section A.15(3) not only restricts the types of tasks which may be shifted to the tenant, it also seeks to ensure full tenant awareness of the "deal." There are four requirements which must be satisfied before such a contracting out agreement is valid: (a) the agreement must be in a document separate from the rental agreement, (b) it must be "entered into in good faith," (c) it must be "supported by adequate consideration," and (d) it must "not diminish or affect the obligation of the landlord to other tenants in the premises."[209]

A few comments concerning these requirements are in order. The "separate agreement" requirement minimizes the risk of the tenant unknowingly "contracting" to take on these duties, for any fine print clause in a rental agreement which purports to shift these landlord obligations to the tenant is unenforceable. The "adequate consideration" requirement will redound to the benefit of the tenant who has been victimized by a particularly sharp landlord bargain, allowing a court to investigate the value of the tenant's bargain and to refuse to enforce the agreement if the consideration is inadequate. This may be an important defense where the maintenance tasks assumed prove to involve much more work than represented by the landlord, a not uncommon occurrence. The requirement that the contracting out agreement not "diminish or affect" the landlord's obligations to the other tenants confirms that ultimate responsibility for compliance with section A.15 and the rental agreement always remains with the landlord. This ultimate responsibility cannot be shifted by a contracting out agreement. This last requirement makes clear that the tenants are not left with the hollow rights of proceeding against a fellow tenant, frequently impecunious, who has alleg-

---

206. § A.15(2)-(4).

207. *See* note 153 *supra* for text of section A.6(12) and a discussion of its application to multiple-unit rowhouses and townhouses.

208. § A.15(3) (empahsis added).

209. *Id.*

edly performed inadequate maintenance, but rather retain full recourse against the landlord regardless of the tenant's breach of a contracting out agreement.

Section A.15(4) affords the tenant who has entered into a separate maintenance agreement an important, additional protection—it prohibits the landlord from treating the tenant's "performance of the separate agreement" as a condition to the performance of an obligation imposed by the rental agreement. Thus, if the tenant has agreed to perform certain tasks around the premises, such as cutting the grass and shoveling the walks, and fails to do so, the landlord cannot refuse to perform his obligations to the tenant, including the promise to continue the tenancy for the full term agreed. The landlord of course would be entitled to normal contract damages relief. It should be noted that the prohibition against treating the two agreements as dependent upon one another covers *only* those agreements by tenants in other than single family residences.

The "single family residence" definition in the IURLTA[210] is surprisingly broad, and frequently will cover multi-unit buildings of the townhouse or rowhouse variety.[211] Where the tenant is renting a single-family residence, subsection (2) of section A.15 permits contracting out agreements to cover the landlord's obligation under section A.15(1)(e) (provision and maintenance of waste receptacles), section A.15(1)(f) (furnishing of running water, hot water, and heat), and "specified repairs, maintenance tasks, alterations, and remodeling." It should be recalled, for purposes of contrast, that A.15(3) does not permit the shifting of the landlord's A.15(1)(e) and (f) obligations to the multi-unit apartment tenant. It is also important to stress the limited scope of an agreement contracting out the landlord's section A.15(1)(e) and (f) obligations. The landlord's overriding obligations to maintain the unit in a habitable condition and in compliance with housing code requirements materially affecting health and safety continue. Further, the landlord remains obligated to "maintain in good and safe working order and condition all electrical, plumbing, sanitary, heating [and] ventilating facilities" and appliances pursuant to section A.15(1)(d). Consequently, while it is permissible to provide in the lease that the tenant will make arrangements to have the various utilities provide heat, water and garbage pickup, the landlord clearly remains obligated to fix the furnace or plumbing should either need repairs or replacement.[212]

---

210. § A.6(12).

211. *See* note 153 *supra*.

212. The lease can specify the tenant is to perform "specified repairs" and "maintenance tasks." Whether this language is broad enough to allow a lease provision to require the tenant to perform all plumbing repairs that may arise seems doubtful. If the tenant is unable to perform such repairs, section A.15(1)(d) requires the landlord to get the repairs done. That does not resolve, however, the question of whether the landlord can terminate the lease because of the tenant's inability to accomplish the repairs. Certainly, if the tenant failed to make a reasonable effort, that would probably constitute a material noncompliance with the rental agreement.

Contracting out agreements in the single family residence contract must be in writing, and entered into in good faith.[213] There is no requirement, however, that such agreements be contained in a separate writing from the rental agreement (as is required of similar agreements entered into by "other than single family residence" tenants under section A.15(3)). Furthermore, the landlord is not prohibited from treating the tenant's performance of the contracting out agreement as a condition to the performance of the landlord's obligations under the rental agreement.[214] Consequently, the impact of a tenant default will depend upon the terms of the rental agreement. "Material noncompliance" by the tenant with the rental agreement is a ground for the landlord to commence the self-help termination procedure under section A.27(1);[215] if the rental agreement is terminated, the landlord may have a claim for possession (and perhaps for rent) and for actual damages for breach of the rental agreement under section A.32.

There is uncertainty as to the effect of the IMHP-RLTA's silence as to contracting out agreements. At least three interpretations are possible; the first two are diametrically opposed. One, the parties are totally free to contract out any obligations imposed on landlords by section B.16(1). Two, landlords are absolutely prohibited by section B.11(1)(a) from contracting out any obligations imposed on them by section B.16(1).[216] Three, the parties can contract out certain section B.16 obligations but none deemed critical to the warranty of habitability. This latter interpretation would seem the appropriate middle ground and finds support in the case law holding that the warranty of habitability cannot be waived,[217] the IURLTA treatment of contracting out agreements in the single family residence context and the

---

But, if the tenant made a reasonable effort, and the repair was not one specifically known at the time the lease was executed, it would seem unlikely that a court would sustain a termination under section A.27(1). *See* text accompanying notes 214-15 *infra*.

213. § A.15(2).

214. § A.15(4).

215. Section A.27(1) requires the landlord to afford the tenant a 14 day period in which he can cure the breach; if cure is not made, then the lease can be terminated 30 days after the right to cure notice was delivered. *See* Part II of this Article to be published in a subsequent issue of the *Drake Law Review*. *See* Section IV(A) *infra* (discussion of the tenant's corollary termination procedure under section A.21(1)).

216. A solid argument can be made for a construction which would prohibit such agreements completely. Section B.11(1)(a) prohibits any provision in a rental agreement that agrees to waive or forego rights under the Act, and certainly section B.16 is a source of tenant rights. In contrast to the IURLTA provisions which expressly allow some contracting out but attempt to regulate such agreements so that tenants will not be shortchanged, section B.11's prohibition is absolute. It does not authorize waiver of rights even where the landlord offers adequate consideration. IURLTA section A.11(1)(a) contains the same general prohibition against rental agreement waivers, but section A.15 also expressly authorizes contracting out agreements in limited situations. To the extent those provisions arguably conflict, they would undoubtedly be construed *in pari materia*, and the section A.15 exceptions recognized. *See* IOWA CODE § 4.7 (1981).

217. *E.g.*, Knight v. Hallsthammar, 29 Cal. 3d 46, 623 P.2d 268, 171 Cal. Rptr. 707 (1981).

anti-waiver language of section B.11.

Again, it should be recalled that the IMHP-RLTA regulates the rental of mobile home *spaces*, and not the rental of mobile homes. If a mobile home rental were involved, contracting out would be regulated by IURLTA section A.15(2), because a mobile home, as a structure maintained and used as a single dwelling unit, would be considered a single family residence. When only IMHP-RLTA coverage is involved, the tenant has provided his own mobile home and the landlord has provided the space and primary services. The responsibility for the habitability of the interior of the mobile home obviously rests with the tenant; however, services such as electrical, water, sewer, gas and garbage removal are directly related to habitability, and these services are the obligation of the landlord under section B.16. Although IURLTA section A.15(2) would allow a contracting out agreement to require the tenant to deal directly with various utilities in order to get service and to pay bills, the ultimate responsibility to maintain the necessary appliances for the utility services always remains with the landlord.[218] Although the analogy is not perfect, the mobile home park owner should, at a minimum, have a similar continuing obligation to furnish and maintain the outlets for electric, water and gas service. The public policy that is the basis for section B.11(1)(a)'s bar against waivers of IMHP-RLTA rights and the warranty of habitability itself[219] should preclude the contracting out agreement from diminishing or destroying at least these basic landlord habitability obligations.

Both Acts recognize a limited rulemaking power in the landlord concerning the tenant's use and occupancy of the premises. Sections A.18 and B.19 impose a number of procedural and substantive limitations on such rules, which are warranted because rules are deemed to be part of the rental agreement.[220] As a consequence, a serious violation of a valid rule could well qualify as a material noncompliance with the rental agreement and be a basis for termination. At the same time, the landlord cannot do by rules what she cannot do in the rental agreement.

The procedural requirements are essentially three: rules must be in writing,[221] tenants must have notice of all rules at the time of entering into the rental agreement,[222] and, in the case of post-lease rules, reasonable notice of new rules must be given all tenants in advance of their effective date.[223] Although the writing requirement may well be implicit in URLTA section 3.102, it is a prudent explicit requirement of both Iowa Acts. Both Acts seek to insure that the tenant will be aware of all landlord rules at the

---

218. *See* note 212 *supra*.
219. *See* text accompanying notes 309-28 *infra*.
220. *See* text accompanying note 105 *supra*.
221. §§ A.18, B.19(1).
222. §§ A.18(6), B.19(1)(f).
223. §§ A.18 ___, (2d para.) (reasonable notice), B.19(2)(30 days notice).

time the tenant enters into the rental agreement. In a minor difference, section B.19(1)(f) requires the landlord to give the prospective tenant a copy of all rules before the rental agreement is entered into, while section A.18(6) requires that the tenant have notice of all rules at the time of entry into the rental agreement. The IMHP-RLTA provision is slightly more protective, as a person who has reason to know that such rules exist is deemed to have notice under the IURLTA[224] even if he has no actual notice of the rule and has not received a copy. The final procedural limitations govern the situation when the landlord seeks to implement additional rules after the tenant enters into the rental agreement. Both Acts provide that such rules will be enforceable against the tenant, if "reasonable notice" of their adoption is given to residential tenants under section A.18, or if notice is given to all mobile home tenants thirty days before they become effective under section B.19(2). Obviously, these latter notice requirements do little to protect tenants from major changes in their bargain pursuant to the landlord's post-lease rulemaking power. Fortunately, there are significant substantive limitations in both statutes which insure that tenant rights will not be eroded by unilateral rulemaking.

Both Acts require that a rule must concern the tenant's use and occupancy of the premises,[225] must have as its purpose one of several enumerated general purposes,[226] must be reasonably related to the purpose for which it is adopted,[227] must have general applicability,[228] must give fair warning to the tenants[229] and must not be for the purpose of evading the obligations of the landlord.[230] Although both pieces of legislation give considerable latitude to the landlord with regard to legitimate purposes, the other provisions stand as meaningful safeguards against onerous rules. They in effect impose a means test, a general applicability test, a void for vagueness test, and finally a "bottom line" test that the rule is not for the purpose of evading the landlord's obligation. Furthermore, section B.19(2) provides mobile home tenants with an additional opportunity to challenge the substance of post-lease rules. Section B.19(2) specifically decrees that any such rule which is "unfair and deceptive" or "which does not conform to the requirements of this chapter" shall be unenforceable. The power to strike

---

224. § A.8(1).

225. §§ A.18, B.19.

226. IURLTA section A.18(1) provides that a rule is enforceable only if "its purpose is to promote the convenience, safety, or welfare of the tenants in the premises, preserve the landlord's property from abusive use, or make a fair distribution of services and facilities held out for the tenants generally." IMHP-RLTA section B.19(1)(a) states these same three purposes and adds a fourth: "to facilitate mobile home park management." This latter purpose seems so broad that it could virtually cover any landlord prerogative.

227. §§ A.18(2), B.19(1)(b).

228. §§ A.18(3), B.19(1)(c).

229. §§ A.18(4), B.19(1)(d).

230. §§ A.18(5), B.19(1)(e).

down mobile home park rules on the ground that they are "unfair and deceptive" will allow even closer judicial scrutiny as to the substance of such rules.[231]

Both Acts do approve post-lease rulemaking where notice requirements are met and where the rule "does not work a substantial modification of the rental agreement."[232] Although the limiting language suggests that such post-lease rules can be more than mere clarifying amendments to prior rules or lease provisions, it is clear that such a rule cannot be the basis for either a significant reduction of landlord duties or an increase in tenant obligations. The Iowa Acts do make one very significant change from URLTA section 3.102(b), by deleting the URLTA clause allowing substantial modifications of the original rental agreement by rulemaking if the tenant consents in writing. The Iowa legislation recognizes that the landlord's advantageous bargaining position continues after the initial bargain when post-lease rulemaking is allowed, and renders unenforceable any rule that substantially modifies the initial bargain, regardless of whether the landlord has been successful in getting a tenant to "consent" to such a rule. There will be opportunity enough for such new bargains when the lease term expires.

Of course, it goes without saying that it would be a section A.11 or B.11 violation for a landlord to insert one of the prohibited provisions in a rule. It would also be a violation of those sections for a landlord to insert a provision in the rental agreement stating either that the tenant agrees to all rules promulgated hereafter or that the tenant waives his rights concerning post-lease rules.

Although tucked away in the "disclosure" sections,[233] A.13(5) and B.14(7), post-agreement rent increases come under regulation, too. Both sections require that each tenant be "notified" in writing in advance of any rent increase. The IURLTA requires at least thirty days notice prior to the effective date of the increase, while the IMHP-RLTA, consistent with minimum notice requirements for termination, requires sixty days prior notice. There of course can be no increase at all before the expiration date of the original agreement "or any renewal or extension thereof."[234] Although neither statute specifically so provides, any rent increase in noncompliance with these notice requirements would be unenforceable.

In an age of rapidly rising utility costs, some landlords may wish to include a provision in the rental agreement allowing the landlord to "pass through" utility cost increases to the tenants during the term. This of course is no problem where the tenant pays utility charges directly to the utility

---

231. The section B.19(2) clause rendering nonconforming rules unenforceable is redundant and its impact would appear inconsequential.

232. §§ A.18 (2d para.), B.19(2).

233. These provisions are Iowa additions to the URLTA. *Compare* U.R.L.T.A. § 2.102 *with* §§ A.13(5), B.14(7).

234. §§ A.13(5), B.14(7).

company, as is typical in the rental of single family residences and mobile home spaces, inasmuch as both Acts recognize that utility charges are not a part of the rent. However, in the typical multi-unit apartment building where each tenant's utility usage is not monitored, an across-the-board percentage increase of each tenant's rent to cover, for example, the power company's 15% mid-term rate hike looks very much like a prohibited mid-term rent increase. Such a pass through clause would first have to satisfy the utility costs disclosure requirement,[235] a difficult task considering the detail necessary to explain both what utility action would be the basis for passing through increased charges and the formula for calculating how those increased charges for the apartment building would be broken down to each tenant. Even should such a clause be written with the specificity required by sections A.13(4) and B.14(6), the passed through charges would still constitute a rent increase within the meaning of both Acts. Both define "rent" as a payment to be made to the landlord under the rental agreement.[236] Without a specific exception for utility charges or costs, and there is none in either Act, the pass through clearly constitutes rent, and therefore a prohibited mid-term rent increase.

E. *Implied Terms in the Incomplete Agreement*

Both Acts address the problem of "filling in" the non-express terms in an "incomplete" lease. Subsections (2), (3) and (4) of sections A.9 and B.10 provide, by operation of law, the basic terms of the rental agreement where they are either not included in the rental agreement, or where a rental agreement is not executed at all. Although neither section expressly so states, a condition precedent is, obviously, that there has in fact been agreement between the landlord and the tenant that the latter will rent the dwelling from the former—that they are in the contractual relationship of landlord and tenant.[237]

The price term is of major concern to both parties, that is, the amount which the tenant will pay as rent for the dwelling or mobile home space. Sections A.9(2) and B.10(2) provide, not surprisingly, where the parties do not agree upon what shall be paid as rent, "the tenant shall pay as rent the fair rental value for the use and occupancy of the dwelling unit."

The problem of the "unavailable landlord" is addressed by sections A.9(3) and B.10(3), which provide that rent "shall be payable without demand or notice at the time and place agreed upon." The IURLTA provision goes one step further, for if there is no agreement as to where the rent is to be paid, it prescribes that the rent is payable "at the dwelling unit."[238] Both

---

235. *See* §§ A.13(4), B.14(6). *See* text accompanying notes 132-34 *supra*.
236. §§ A.6(8), B.7(9).
237. Putnam v. McClain, 198 Iowa 287, 199 N.W. 261 (1924).
238. § A.9(3).

Acts provide that, unless otherwise agreed, the rent is payable at the beginning of any term and in equal monthly installments and is uniformly apportionable from day to day.[239]

The two Acts go different ways on the implication of the term of a rental agreement. Adopting URLTA section 1.401(d), the IURLTA provides that, unless the rental agreement fixes a definite term, the tenancy shall be month-to-month, except in the case of a roomer who pays weekly rent, and then it will be week-to-week.[240] The IMHP-RLTA breaks from the URLTA approach in section B.10(4), and although ambiguities lurk as to its scope, it affords mobile home tenants a greater degree of security than their IURLTA counterparts.

A number of jurisdictions require mobile home park owners to offer tenants at least a one-year lease.[241] Others provide even greater security of tenure by limiting terminations by landlords to just cause.[242] The Iowa Legislature considered both of these measures, but ultimately worked only a

---

239. §§ A.9(3), B.10(3).

240. § A.9(4).

241. *E.g.*, CONN. GEN. STAT. ANN. § 21-70(b) (West Supp. 1980) ("The term of such rental agreement shall not be less than one year unless the resident requests, in writing, a term for less than one year."); N.J. STAT. ANN. § 46.8C-4.b (West Supp. 1980); N.Y. REAL PROPERTY LAW § 233(e) (McKinney 1980).

242. Because of the uncertainty, expense and inconvenience a forced relocation of a mobile home can entail, numerous jurisdictions have enacted provisions protecting mobile home tenants from unexpected termination. These provisions generally limit a landlord's right to evict a mobile home tenant to four basic reasons: 1) nonpayment of rent, 2) violation of a state, federal or local ordinance which detrimentally affects the health, safety and welfare of other tenants, 3) change of use of the land, and 4) violation of a reasonable park rule. *See* ALASKA STAT. § 34.03.225 (Supp. 1980); CAL. CIV. CODE § 798.56 (West Supp. 1980); CONN. STAT. ANN. § 21-80 (West Supp. 1980); FLA. STAT. ANN. § 83.759 (West Supp. 1980).

The concept behind this "just cause" limitation is that the burden that termination places on the tenant can only be justified if the interests of the park owners are substantially jeopardized. *See* Note, *Mobile Homes: Present Regulation and Needed Reforms*, 27 STAN. L. REV. 159, 173 (1974).

The constitutionality of such provisions was upheld in the Florida decisions of *Palm Beach Mobile Homes v. Strong*, 300 So. 2d 881 (Fla. 1974) and *Stewart v. Green*, 300 So. 2d 889 (Fla. 1974). While recognizing that section 83.69 of the Florida Statutes (now section 83.759) restricted the freedom to contract and use one's property, the court in *Strong* held that such restraints are reasonable in light of the serious problems unexpected termination can present to mobile home tenants. 300 So. 2d at 885-86. The court noted that nothing in this provision prevented a landlord from promulgating reasonable rules, even to the effect that a tenancy may be terminated with 12 months notice. *Id.* at 888. Such a rule, contained in a lease was upheld as reasonable and thus valid in *Japanese Gardens Lot Renters Protective Association v. Japanese Gardens Mobile Estates, Inc.*, 345 So. 2d 409, 411 (Fla. 1977).

Of course, the question arises whether the protection contemplated by a "just cause" eviction statute is undermined by allowing "reasonable" rules to set the standard for "cause." A recent Alaska case, *Osness v. Dimond Estates, Inc.*, 615 P.2d 605 (Alaska 1980), interpreted Alaska's provision allowing eviction only for the enumerated reasons. The court held that evictions for the reason of violation of a reasonable rule should be limited to substantial violations and only if not remediable by repairs or the payment of damages or otherwise. *Id.* at 608.

minor modification of the periodic tenancy in the mobile home space rental context. Thus, the IMHP-RLTA left the status quo relatively unchanged with regard to the security of tenure of tenants—they receive only modest protection.

Section 10(4) of House File 2135, as introduced, amended and passed by the House provided as follows:

> Rental agreements shall be for a term of one year and shall be automatically renewed on a yearly basis unless otherwise specified in the original written or oral rental agreement or any renewal thereof or may be canceled by at least sixty days written notice given before the expiration of any such lease by either party. A sixty-day notice to cancel a rental agreement initiated by a landlord shall be for just cause.[243]

This provision provided for a one-year lease automatically renewable and, while the lease could be cancelled upon 60 days written notice, the landlord could only cancel for just cause. Unfortunately for tenants, neither of these provisions prevailed when the legislation reached the Senate. The State Government Committee of the Senate offered amendment S-5400B to the bill which was ultimately passed by the House. This amendment struck subsection 10(4) in its entirety and inserted in its place the language in present section B.10(4). The amendment passed as proposed[244] and H.F. 2135, as amended, was passed by the Senate.[245] The House subsequently concurred with the Senate version of H.F. 2135.[246]

Section B.10(4) provides:

> Rental agreements shall be for a term of one year unless otherwise specified in the rental agreement. Rental agreements shall be cancelled by at least 60 days written notice given by either party. A landlord shall not cancel a rental agreement solely for the purpose of making the tenant's mobile home space available for another mobile home.

The legislature obviously elected to take a hesitant step toward a minimum one-year lease term, a step that will be for naught if mobile home park owners develop their own standard form lease specifying a fixed term, or even a periodic tenancy. The section is silent with regard to the renewal of tenancies, in contrast to the original text which made the one-year term automatically renewable on a yearly basis. In light of the changed text, it seems likely that a tenant who continues to reside on a mobile home space after the expiration of his term without a specific agreement will be subject to termination under the sixty days written notice procedure prescribed by the section.[247] This change of course doubles the traditional notice require-

---

243. H.F. 2135 at 6-7.
244. S.J. 722 (1980).
245. *Id.* at 795.
246. H.J. 1534 (1980).
247. Unlike IURLTA section A.34(3), which expressly provides that a tenant who holds

ment in the consensual holdover situation and apparently also in the periodic tenancy. It falls far short, however, of the security of tenure that seems warranted in light of the substantial expense involved in relocating a mobile home and the shortage of mobile home spaces to rent.

The final sentence in section B.10(4) is less clear. Except for the unambiguous legislative history, it might appear to support an argument that the landlord can only evict for just cause. It builds in additional tenant protection, but the language is freighted with ambiguity and seems inconsistent with the elimination of the just cause eviction requirement. This final sentence appears to address one of the more onerous practices employed by some mobile home park owners. Commonly, park owners are also dealers. Because of the high demand for spaces, dealer/owners have been able to condition the rental of spaces upon purchase of homes from their dealerships or vice versa (if the park owners needed to fill up their parks) and thus create closed parks. Some park owners have evicted tenants from their parks in order to make space for homes they just sold.

Section B.10(4)'s final sentence appears to be modeled after a similar California statute, which prohibits this latter practice. The California statute provides that "[n]o tenancy shall be terminated for the purpose of making a tenant's site available for a person who purchased a mobile home from the owner of the park or his agent."[248] Although it may be difficult to establish the landlord's motive, section B.10(4)'s final sentence should put a stop to such landlord conduct when it is a pattern and practice.

III. Landlord Obligations with Regard to the Habitability of the Dwelling and Mobile Home Space

This section has proved difficult to write, not so much because of the intricacies of the maintenance duties of the landlord under the new legislation, but because of the uncertainty as to the actual impact of the warranty of habitability on Iowa housing quality. The warranty of habitability, as recognized in *Mease v. Fox*[249] and refined by sections A.15 and B.16, with its promise of decent housing for all, is at the core of the new legislation, and yet it seems elusive and ephemeral. Initial nonemperical studies of other jurisdictions which have adopted the URLTA suggest that in the short term the law has had very little positive impact on the general quality of housing,[250] causing one to wonder about its impact in Iowa after three years under the new legislation.

No Iowa studies have been conducted, although the legislature author-

---

over with the consent of the landlord is deemed a periodic tenant, the IMHP-RLTA is silent on this issue. *See* §§ B.30, B.10(4).

248. Cal. Civ. Code § 798.58 (West Supp. 1980).

249. 200 N.W.2d 791 (Iowa 1972).

250. McCabe, *URLTA in Operation: Foreward*, 1980 A.B. Found. Research J. 557, 558.

ized such a study when it passed the 1980 housing code legislation.[251] There are no current state-wide studies of Iowa rental housing quality.[252] The 1980 census data should be available soon, and hopefully it will assist in evaluating the extent of Iowa's substandard housing. A comprehensive study of the type authorized by the legislature is, however, warranted. Such a study would enable a more enlightened resolution of the issues impacted by the tough economic considerations that lie hidden beneath the warranty of habitability.

Some observations should be kept in mind as the details of sections A.15 and B.16 are examined. While the doctrinal changes may be considered revolutionary in the context of the prior common law, particularly when the warranty of habitability is coupled with the statutory bar against waiver of the warranty,[253] most observers will evaluate the new doctrine in terms of impact—what it does, rather than what it states. Here, economic considerations are at the bottom line. If the jurisdiction's housing stock is basically sound, that is, its substandard housing is not large quantity and is economically repairable, the new landlord duties can be borne fairly easily and without significant reduction of the number of low income housing units.[254] In jurisdictions in which the housing stock contains substantial numbers of dilapidated units, vigorous enforcement of the warranty of habitability will be expensive, and will undoubtedly result in a reduction of low

---

251. *See* note 270 *infra*.

252. As of this writing, the 1980 census data concerning housing conditions in Iowa has not been publicly released. This author has not been able to obtain current housing stock data for Iowa, and, consequently, cannot even begin to estimate the extent of substandard housing in the state. A recent housing conditions survey for the City of Des Moines estimates that 7,666 of the city's 30,647 rental units are substandard, and that 6,929 of the substandard units are suitable for rehabilitation. This survey suggests that while approximately 25% of Des Moines' rental housing is substandard, 90% of those substandard units are economically repairable. The Des Moines survey defined "substandard structure" as "housing in a deteriorating or dilapidated condition or housing units in which multiple minor repairs are needed." The key terms were further defined:

> a) Deteriorating: Major repairs required; may have one major structural defect in the foundation, exterior walls or roof, or may have major defects in roofing, fascia, chimney, porches, windows, etc.
>
> b) Dilapidated: Must have 2 structural faults to foundation, exterior walls, or roof.
>
> c) Multiple Minor Repairs: Residence is structurally sound but has four or more deficiencies to roofing, fascia, chimney, porches, windows, doors or painting.

1980 Survey of Housing Conditions, Des Moines Housing Assistance Plan Table 1, letter from Gary Lozano, Assistant Planner, City of Des Moines, to Russell E. Lovell II, (September 3, 1981). The survey's conclusions as to the number of units suitable for rehabilitation were based in part on a 1977 sample survey. The survey definition of units suitable for rehabilitation is unclear. It states that houses with "multiple minor repairs" are considered suitable for rehabitation, while those considered "dilapidated" are not. *Id.* It is silent as to which category "deteriorating" units are assigned.

253. §§ A.11(1)(a), B.11(1)(a).

254. *See* Heskin, *The Warranty of Habitability Debate: A California Case Study*, 66 CAL. L. REV. 37, 67 (1978).

income housing.[255] Substandard units which are not economically repairable will be taken off the market. Those that are repairable will certainly have substantial rent increases upon completion of the necessary improvements and upon conclusion of the lease term. Obviously, it is very important to know into which category Iowa's housing falls.

These economic realities are not lost on the poor. While there is unquestionably a need for tenant education with respect to tenant rights under the new legislation,[256] the tenant knows from hard experience the economic workings of the rental housing market place. Although both Acts provide protection from landlord retaliation when the tenant has sought to enforce habitability rights, including short-term protection against rent increases,[257] neither Act controls rents nor limits rental increases after the expiration of a lease term.[258] Consequently, there are substantial economic deterrents that discourage the low income tenant from seeking enforcement of the warranty of habitability.

With this overview in mind, it is appropriate to examine the detail of the legislative scheme. The economic factors sketched above will reappear in this context, for they are relevant to both the content of the warranty of habitability and to the manner in which the court and legislature resolve the question of waiver.

A. *The Content of the Habitability Standard*

The basic obligations of the landlord with regard to housing quality and services can be found in sections A.15(1)[259] and B.16(1).[260] These sections

---

255. R. Posner, Economic Analysis of Law 357-59 (2d ed. 1977).

256. Blumberg, *Application of State Consumer Protection Acts to Landlord-Tenant Practices*, 15 Clearinghouse Rev. 399, 402 (1981).

257. *See* §§ A.36(1), B.32(1). *See also* Blumberg & Robbins, *supra* note 2, at 14.

258. Op. Iowa Att'y Gen. No. 79-4-23 (April 30, 1979).

259. Section A.15 provides:

1. The landlord shall:

a. Comply with the requirements of applicable building and housing codes materially affecting health and safety.

b. Make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition.

c. Keep all common areas of the premises in a clean and safe condition. The landlord shall not be liable for any injury caused by any objects or materials which belong to or which have been placed by a tenant in the common areas of the premises used by the tenant.

d. Maintain in good and safe working order and condition all electrical, plumbing, sanitary, heating, ventilating, air-conditioning, and other facilities and appliances, including elevators, supplied or required to be supplied by the landlord.

e. Provide and maintain appropriate receptacles and conveniences, accessible to all tenants, for the central collection and removal of ashes, garbage, rubbish, and other waste incidental to the occupancy of the dwelling unit and arrange for their removal.

f. Supply running water and reasonable amounts of hot water at all times and reason-

state six general landlord duties: (1) comply with those requirements of governmental codes that materially affect health and safety; (2) make all repairs and maintain the premises in a fit and habitable condition; (3) keep all common areas in a clean and safe condition; (4) maintain in good and safe working order all facilities and appliances supplied; (5) provide for removal of garbage and waste from the premises; and (6) supply running, hot water and heat (in the rental of a dwelling unit), or furnish outlets for electric, water and sewer service (in the rental of a mobile home space).

Before exploring these statutory obligations in detail, an examination of recent changes to the Iowa houseing code law is warranted. In 1980, two years after enactment of the IURLTA and the IMHP-RLTA, the Iowa legislature repealed the state houseing law which had been on the books since 1918.[261] In its place, the legislature enacted a home rule provision mandating the adoption of one of five listed model housing codes by cities of 15,000 or more.[262] Failure to act upon this statutory mandate by January 1, 1981

---

able heat, 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.

If the duty imposed by paragraph "a" of this subsection is greater than a duty imposed by another paragraph of this subsection, the landlord's duty shall be determined by reference to paragraph "a" of this subsection.

260. Section B.16 provides:

1. The landlord shall:

a. Comply with the requirements of all applicable city, county and state codes materially affecting health and safety which are primarily imposed upon the landlord.

b. Make all repairs and do whatever is necessary to put and keep the mobile home space in a fit and habitable condition.

c. Keep all common areas of the mobile home park in a clean and safe condition.

d. Maintain in good and safe working order and condition all facilities supplied or required to be supplied by the landlord.

e. Provide for removal of garbage, rubbish, and other waste from the mobile home park.

f. Furnish outlets for electric, water and sewer services.

261. 1980 Iowa Acts, ch. 1126, § 3, eff. Jan. 1, 1981. *See* notes 21-26 and 52-56 and accompanying text *supra*.

262. Iowa Code section 364.17(1)-(2) provides:

1. A city with a population of fifteen thousand or more may adopt by ordinance the latest version of one of the following housing codes before January 1, 1981:

a. The uniform housing code promulgated by the International Conference of Building Officials.

b. The housing code promulgated by the American Public Health Association.

c. The basic housing code promulgated by the Building Officials Conference of America.

d. The standard housing code promulgated by the Southern Building Code Congress International.

e. Housing quality standards promulgated by the United States department of housing and urban development for use in assisted housing programs.

A city which has adopted a housing code listed in this section before January 1,

means that the defaulting city will be deemed to have adopted the uniform housing code promulgated by the International Conference of Building Officials, which was the first of the five listed codes from which cities could choose.[263] Smaller cities were authorized but not mandated to enact any of the listed codes.[264] In addition, "[a] city may adopt housing code provisions which are more stringent than those in the model housing code it adopts or to which it is subject."[265]

Iowa Code section 364.17 is similar to its predecessor in its coverage and general approach. Iowa Code chapter 413, the repealed state housing law, actually set minimum housing code standards for every Iowa city with a population of 15,000 or more.[266] In contrast to the new legislation, chapter 413 codified in detail the minimum housing code standards, and prescribed that the state code superseded local codes which set lower standards.[267] Cities were allowed, however, to adopt local housing codes which set higher standards than those set by chapter 413.[268] In all other cities, the housing law authorized but did not mandate the city council to adopt housing code ordinances.[269]

It is difficult to fully assess the impact of this new legislation without studying and comparing the five approved codes with the repealed state housing law.[270] Such a study has not been attempted by this author and is

---

1981, is no longer subject to chapter 413.

2. Every city with a population of fifteen thousand or more which has not adopted another housing code under this section by January 1, 1981, is subject to and shall be considered to have adopted the uniform housing code promulgated by the International Conference of Building Officials, as amended to January 1, 1980. A city which reaches a population of fifteen thousand, as determined after July 1, 1980, has six months after such determination to comply with this section.

263. IOWA CODE § 364.17(2) (1981).

264. IOWA CODE § 364.17(6) (1981).

265. IOWA CODE § 364.17(7) (1981).

266. IOWA CODE § 413.1 (1979) (repealed 1980 Iowa Acts, ch. 1126, § 3, eff. Jan. 1, 1981). This housing law also applied to "any dwelling in any area adjacent to and within one mile of such municipalities, except estates of real property of ten acres or more in said adjacent area." *Id.*

267. IOWA CODE § 413.125 (1979) (repealed 1980 Iowa Acts, ch. 1126, § 3, eff. Jan. 1, 1981).

268. *Id.*

269. IOWA CODE § 413.2 (1979) (repealed 1980 Iowa Acts, ch. 1126, § 3, eff. Jan. 1, 1981).

270. Although it had already enacted the new law, the legislature at least paid lip service to a thorough evaluation and comparison of the various housing codes by authorizing a legislative subcommittee to study the subject during the 1980 interim session. H.F. 2536, 79th Iowa G.A. (Interim Session 1980). The bill authorized the legislative council to establish a joint subcommittee of the senate and house standing committees on cities to make this study. *Id.* The study contemplated would have been quite comprehensive, because section 2(3) of the bill suggested the following subjects for inquiry:

a. Possible reorganization of state government to provide for administration of housing codes, building codes including rehabilitation codes, and fire prevention codes under one state agency.

b. Whether there is a need for a state housing code and state housing code

beyond the scope and needs of this Article. Consequently, the temptation to generalize that the five approved codes, or some of them, modernize or water down or toughen the prior law's standards will be resisted. The new legislation, although authorizing a number of enforcement remedies for adoption by municipalities, did eliminate the powerful tenant "rents uncollectible" remedy when it repealed chapter 413.[271]

In suggesting that the specific content of the approved housing codes is beyond the needs of this Article, it is not meant to denigrate the importance of these codes to housing quality standards. These codes are important because they supply the necessary detail to fill in the gaps inherent in the warranty of habitability concept. Indeed, most codes set higher standards, but those higher standards are not necessarily the measure of the landlord's private obligation to tenants under the IURLTA and the IMHP-RLTA.[272] Both Acts limit the landlord's compliance obligation to those code provi-

---

administration.

c. Whether there is a need for the state to mandate specific housing code enforcement procedures by cities.

d. Whether cities with a population of less than fifteen thousand should be required to adopt housing codes.

e. Consideration of the need for statutory guidelines regarding nuisance abatement procedures by cities as applied to housing which constitutes a nuisance, including procedures for the demolition of condemned buildings.

f. The most desirable state role in the areas of housing, building, rehabilitation and fire prevention codes, balancing the state's concerns against the concept of home rules for cities.

Id.

The study, unfortunately, never took place. The statutory language was directory, rather than mandatory, and the legislative council never acted to establish the joint subcommittee. Telephone interview with Bernie Koebernick, Legislative Service Bureau of Iowa, in Des Moines, Iowa, (August 31, 1981).

271. IOWA CODE § 413.106 (1979) (repealed 1980 Iowa Acts, ch. 1126, § 3, eff. Jan. 1, 1981). *See* text accompanying notes 22-26 *supra*.

272. *See also* Mease v. Fox, 200 N.W.2d at 796-97; Park West Management Corp. v. Mitchell, 47 N.Y.2d 316, 418 N.Y.S.2d 310, 391 N.E.2d 1288, *cert. denied*, 444 U.S. 992 (1979). The New York Court of Appeals explained the relationship between the codes and the warranty of habitability in *Mitchell*:

> However, the standards of habitability set forth in local housing codes will often be of help in resolution of this question. Substantial violation of a housing, building or sanitation code provides a bright-line standard capable of uniform application and, accordingly, constitutes prima facie evidence that the premises are not in habitable condition. However, a simple finding that conditions on the lease premises are in violation of an applicable housing code does not necessarily constitute automatic breach of the warranty. In some instances, it may be that the code violation is de minimis or has no impact upon habitability. Thus, once a code violation has been shown, the parties must come forward with evidence concerning the extensiveness of the breach, the manner in which it impacted upon the health, safety or welfare of the tenants and the measures taken by the landlord to alleviate the violation. . . .

Park West Management Corp. v. Mitchell, 47 N.Y.2d at 327-28, 418 N.Y.S.2d at 316, 391 N.E.2d at 1294.

sions that materially affect health and safety.[273] Ultimately, the primary duty of the landlord is to comply with the warranty of habitability, a warranty that exists under both Acts, even in rural areas and small communities which have no housing code.[274] In communities with housing codes, code violations which materially affect health and safety would almost always also constitute a breach of the warranty of habitability, and vice versa. Rather than rushing to this conclusion at a time when the case law is scant and habitability standards are evolving on a case-by-case basis, the IURLTA wisely provides in the last paragraph of section A.15(1)(a) that should a housing code standard (which materially affects health and safety) impose a greater duty than imposed by warranty of habitability subsection (b) or subsections (c) through (f), the landlord's obligation will be determined by reference to section A.15(1)(a). Section B.16 has no comparable provision, but a similar construction would seem warranted, because in the absence of an express provision to the contrary, the higher duty should govern.

Consequently, it is probable that as a result of the new housing code legislation, there will be less uniformity in housing code standards in Iowa communities. It does not follow, however, that the substantive content of the landlord's obligations under sections A.15 and B.16 will vary from community to community. The warranty of habitability, codified in sections A.15(1)(b) and B.16(1)(b), applies to all Iowa residential and mobile home space rentals, and that warranty is unaffected by either the lack of an applicable housing code or a watered-down code that sets weak standards.[275] It is at least conceivable, however, that a stringent housing code would heighten the landlord's obligations under the IURLTA and the IMHP-RLTA. That is the likely rationale for separate subsections (1)(a) and (1)(b) and the section A.15(1) provision prescribing the precedence of the (1)(a) obligation should

---

273. *See* §§ A.15(1)(a), B.16(1)(a).

274. *Id.* (both authorities). Again, the New York Court of Appeals in *Mitchell* explained:

> But, while certainly a factor in the measurement of the landlord's obligation, violation of a housing code or sanitary regulation is not the exclusive determinant of whether there has been a breach. Housing codes do not provide a complete delineation of the landlord's obligation, but rather serve as a starting point in that determination by establishing minimal standards that all housing must meet. . . . In some localities, comprehensive housing, building or sanitation codes may not have been enacted; in others, their provisions may not address the particular condition claimed to render the premises uninhabitable. Threats to the health and safety of the tenant—not merely violations of the codes—determine the reach of the warranty of habitability.

Park West Management Corp. v. Mitchell, 47 N.Y.2d at 328, 418 N.Y.S.2d at 316, 391 N.E.2d at 1294.

275. Conceptually at least, this observation is true. The reality is, however, that the specific content of the warranty of habitability remains to be "fleshed out." If the Iowa courts find themselves working with five different codes, rather than one, their task of ascertaining the correct bottom line floor of the warranty of habitability undoubtedly has been complicated.

it exceed the other subsection (1) obligations. The case law is still so scant with regard to defining the specific content of the warranty of habitability that it is impossible to predict whether there really are circumstances under some codes in which the landlord will have a greater obligation under (1)(a) than under (1)(b). If there are such circumstances, the IURLTA has properly anticipated them in section A.15.

In sum, where there are applicable building and housing codes, one should keep in mind that proof of a code violation does not establish that the landlord has breached a section A.15(1)(a) or B.16(1)(a) obligation. These sections are violated only when a code violation occurs, and the violation is one which "materially affects health and safety." Neither Act defines that phrase, which surely will pose something of an obstacle to the enforcement of habitability standards due to tenant uncertainty as to whether a code violation is serious enough.[276] The only tenant remedy which the new legislation specifically conditions upon a material breach is the termination remedy under sections A.21(1) and B.22(1).[277] It is possible that the damages remedy is so conditioned as a matter of common law,[278] but both sections A.21(2) and B.22(2) authorize damages for any noncompliance with the lease or section A.15 or B.16, whichever is applicable.[279] In addition, at least under the IURLTA, tenants have available a general repair-and-deduct remedy which is triggered by any noncompliance without regard to materiality.[280]

Sections A.15(1)(b) and B.16(1)(b) represent the codification of the implied warranty of habitability recognized by the Iowa Supreme Court in *Mease v. Fox*.[281] The court held that this warranty exists as a matter of law in every residential tenancy.[282] The warranty now also arises as a matter of positive law in every residential and mobile home space tenancy. Both Acts impose an affirmative obligation to make "all repairs and do whatever is necessary" to keep the premises or mobile home space in a "fit and habitable condition."[283] The URLTA made no attempt to define "habitability,"

---

276. *See IURLTA Attorney's Fees, supra* note 160, at 1082-97.

277. *See* Section IV(A) *infra*.

278. *See* Mease v. Fox, 200 N.W.2d at 797 (discussing the measure of damages for a *material* breach of the implied warranty of habitability).

279. *See* note 351 *infra*.

280. *See* note 387 *infra*.

281. 200 N.W.2d 791 (Iowa 1972).

282. *Id.*

283. The affirmative obligation to make repairs imposed by the new legislation represents a dramatic change from the common law. Prior to *Mease v. Fox*, there was no obligation in Iowa for the landlord to make repair of the tenant's premises without an express agreement to that effect. The concept of leaving cure of tenancy defects in the hands of the tenant without express agreement to the contrary was expressed by the Iowa Supreme Court in *Healy v. Tyler*:

> It is elementary that the lessor is under no obligation to make repairs unless such obligation is imposed by the terms of the lease. . . . If by inevitable accident the building ceased to be capable of occupancy, the lessees remained liable for rent, and

and both Iowa Acts decline a definitional attempt in favor of case-by-case evolution of the standards. The *Mease v. Fox* case began this inquiry by suggesting that courts first determine whether there has been a housing code violation, and then weigh seven factors pertinent to testing "the effect and materiality of the alleged breach":

1. the nature of the deficiency or defect,
2. its effect on safety and sanitation,
3. the length of time for which it persisted,
4. the age of the structure,
5. the amount of the rent,
6. whether tenant voluntarily, knowingly and intelligently waived the defects, or is estopped to raise the question of the breach, and
7. whether the defects or deficiencies resulted from unusual, abnormal or malicious use by the tenant.[284]

The court's principal task of defining or measuring materiality lies before it.[285] It has merely suggested the road map, a map which indeed has been changed since *Mease*. Factors (5) and (6) would appear to have been legislatively overruled by sections A.11(1)(a) and B.11(1)(a), which forbid, and render unenforceable, rental agreement clauses waiving rights or remedies under the legislation.[286] The waiver issue is often obscured, but its resolution is crucial. The economic implications latent in this issue are discussed below in the context of the recent California Supreme Court case, *Knight v. Hallsthammar*.[287]

The third habitability-related landlord obligation imposed by both Acts is the duty to keep all common areas safe and clean.[288] Common areas are those which are used by more than one of the tenants, but not necessarily all of the tenants.[289] This represents an enlargement of the landlord's com-

---

could repair or not at their discretion.

150 Iowa 169, 129 N.W. 802, 803 (1911). Twenty years later, the Iowa Supreme Court stated the rule as follows: "It is the well-settled rule in this state that, in the absence of a covenant or agreement by the landlord to make repairs or maintain the leased premises in a safe and suitable condition for occupancy and use of the tenant, he is not bound to do so." Chicago Joint State Land Bank v. Eggers, 214 Iowa 710, 710, 243 N.W. 193, 194 (1932).

284. 200 N.W.2d at 796-97.

285. In the context of attorneys' fees awards in civil rights cases, the Fifth Circuit Court of Appeals directed trial courts to consider twelve factors in computing the amount of the fees award. Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974). The Second Circuit Court of Appeals pointed out the shortcomings of any such list, stating that "more is needed than a mere listing of factors. Such a list, standing alone, can never provide meaningful guidance." Detroit v. Grinnell Corp., 495 F.2d 448, 470 (2d Cir. 1974). Obviously, the seven factors in *Mease* are subject to the same criticism.

286. *See* text accompanying notes 146-153 *supra*.

287. 29 Cal. 3d 46, 623 P.2d 268, 171 Cal. Rptr. 707 (1981) (en banc).

288. §§ A.15(1)(c), B.16(2)(c).

289. *See, e.g.*, Kline v. 1500 Massachusetts Ave. Apt. Corp., 439 F.2d 477 (D.C. Cir. 1970).

mon law duty. At common law, the landlord was required to maintain the common areas in a clean and safe condition, but only those areas in which the landlord retained control.[290] In areas over which the landlord retained no control, the landlord was under no obligation to repair in the absence of an agreement to the contrary.[291]

The full dimension of this safe common area duty will await judicial resolution. Certainly it contemplates well-lighted and maintained stairways and hallways. Whether it also contemplates security precautions and safeguards against criminal entry is less clear, but such a construction finds support in recent case law recognizing the warranty of habitability. The leading case is *Kline v. 1500 Massachusetts Avenue Apartment Corp.*[292] The court in *Kline* held that there is a duty of protection owed by the landlord to the tenant in an urban multiple-unit apartment dwelling, at least when the landlord had notice that tenants were being subjected to crimes against their persons and their property in common hallways.[293]

The duty imposed by the court in *Kline* received implicit approval from the Iowa Court of Appeals in *Johnson v. Palmer College Foundation.*[294] In that case, the landlord had torn down buildings adjacent to the building in which the tenant had his machine shop, and had ordered other tenants out

---

290. *Id.*

291. *Id.*

292. 439 F.2d 477 (D.C. Cir. 1970). *See also* Trentacost v. Brussel, 82 N.J. 214, 412 A.2d 436 (1980).

293. The plaintiff, a tenant in a 585-unit apartment building, "sustained serious injuries when she was criminally assaulted and robbed [at 10:15 p.m.] by an intruder in the common hallway" just outside her apartment. *Id.* at 478. Although the street entrance to the building had once been attended, that security precaution had been eliminated for several months before the assault on Ms. Kline, even though there had been an increasing number of assaults, larcenies and robberies perpetrated against the tenants in the building's common areas. *Id.* at 479.

In finding liability, Judge Wilkey stressed that the holding did not make the landlord "an insurer of the safety of his tenants," and that the landlord was "not expected to provide protection commonly owed by a municipal police department." *Id.* at 487. He focused on the realities that "[a]s between tenant and landlord, the landlord is the only one in the position to take the necessary acts of protection required," and that, indeed, the landlord is in a better position to do this with regard to the building's common areas than are the police. *Id.* at 484. Thus, the landlord is under a duty, whether viewed as grounded in tort or contract, to take steps to protect tenants from foreseeable criminal acts committed by third parties.

The *Kline* court found the applicable standard of care to be the protective measures the landlord had provided the building seven years earlier when the plaintiff-tenant moved in—this the court took to be the standard of protection commonly provided in apartments of that character and type in the community. *Id.* at 486. The court was fully cognizant that discharge of this duty of protection will undoubtedly increase many landlords' expenses, costs which will ultimately be passed on to the tenant in the form of increased rents. *Id.* at 488. But that prospect was no deterrent to the court's obligation to give force to the landlord's duty to provide his tenant a secure premises. *Id. See also Annots.* 68 A.L.R.3d 382 (1976), 66 A.L.R.3d 202 (1975).

294. 271 N.W.2d 768 (Iowa Ct. App. 1978).

of the apartments above tenant.[295] Vandals broke into these vacant apartments and turned on the faucets, causing water damage to tenant.[296] The court held that there was insufficient evidence of notice to the landlord of prior break-ins to establish a duty to provide additional security.[297]

The second sentence of section A.15(1)(c), another Iowa addition to the URLTA text, excuses the landlord for any injuries caused by an object left in a common area by a tenant.[298] Although the wording of this second sentence is not so limited, it seems likely that the statute will be construed as reflecting the law of contributory negligence, so that the landlord will be protected from tort liability only against the tenant who left the object. A broader, literal construction of this sentence would work a substantial change in the landlord's duty of care under tort law, and the legislature should not be presumed to have engineered the change in such an indirect manner. The IMHP-RLTA did not include this liability-avoiding provision.

Sections A.15(1)(d) and B.16(1)(d) require the landlord to keep all facilities supplied or required to be supplied in "good and safe working order and condition." The IURLTA clarifies this provision by listing electrical, plumbing, sanitary, heating, ventilation, air conditioning equipment, and elevators, but one should be careful not to misread section A.15(1)(d) as requiring the landlord to provide the facilities and appliances so listed.[299] The landlord's obligation to supply facilities and appliances is not governed by A.15(1)(d), but rather by the lease, the pertinent housing and building codes, if any, the warranty of habitability and section A.15(1)(f) of the IURLTA. The mobile home park owner's corresponding duty under section B.16(1)(d) would clearly require the landlord to keep all electrical, water and sewage outlets in good working condition and to similarly maintain any other facilities and appliances supplied.[300]

Subsection (e) of section A.15(1) obligates the landlord to provide and maintain appropriate waste receptacles, accessible to all tenants for the central collection of waste, and to arrange for their removal. Section B.16(1)(e) imposes essentially the same duty of waste removal, but it does not require the landlord to provide waste receptacles.[301]

Both Acts mandate the provision of essential services.[302] The IMHP-RLTA is simpler, but the mobile home park owner's duties are usually less complex than those of the residential counterpart under the IURLTA. Section B.16(1)(f) requires the landlord to furnish *outlets* for electric, water

---

295. *Id.* at 769.
296. *Id.*
297. *Id.*
298. *See* § A.15(1)(c).
299. *See* note 259 *supra* for text of section A.15(1).
300. § B.16(1)(d). *See* note 260 *supra* for text of section B.16(1).
301. § B.16(1)(e).
302. §§ A.15(1)(f), B.16(1)(f).

and sewer services. The landlord's basic obligation under section A.15(1)(f) is to supply the tenant's dwelling with "running water and reasonable amounts of hot water at all times and reasonable heat." There are two very limited exceptions to this provision. First, the landlord does not have to supply heat when the "building that includes the dwelling unit is not required by law to be equipped for that purpose."[303] Second, the landlord is not required to supply hot water or heat when they are "generated by an installation within the exclusive control of the tenant and supplied by a direct public utility connection."[304]

The first exception seems intended to cover the summer cottage or cabin rental, and perhaps migrant farmworker housing. In rural areas with no housing code there is arguably no "law"—at least in the sense of a statute or ordinance—which requires the landlord to supply heat. On the other hand, would not the implied warranty of habitability recognized in *Mease v. Fox*[305] be "law" within the meaning of section A.15(1)(f) and normally require that heat be provided? The question is rhetorical when emphasis is placed on the "normal" tenancy. But the summer cabin and farmworker tenancies are atypical, often for no more than a week's duration and during the warm weather months. It is inconceivable that the Act would be construed to preclude rental of such units *in the summertime* because they lacked a furnace or other heating facility. Consequently, such a summertime rental would not be a habitability violation and would be expressly permissible under A.15(1)(f). Rental of the same unit during an Iowa winter, however, would be a violation of the implied warranty of habitability and, therefore, outside the A.15(1)(f) exception, because the warranty would constitute a requirement of "law" that heat be furnished to the dwelling during cold

303. Any interpretation of the first exception to this provision must be somewhat qualified because of the ambiguity of its language. Although it is possible that the first exception is intended to eliminate the landlord's obligation to supply all three services—running water, hot water and heat—a fair reading of its wording leads to the conclusion that the exception only eliminates the landlord's obligation to supply heat, and that the landlord must supply running water and hot water "at all times," without exception. Section A.15(1)(f) provides in pertinent part: "1. The landlord shall . . . f. Supply running water and reasonable amounts of hot water *at all times* and reasonable heat, except where the building that includes the dwelling unit is not required by law to be equipped for that *purpose*. . . ." (Emphasis added.) One can argue for an interpretation that a landlord need not supply running water and hot water at any time if the building is not required by other positive law to be so equipped, and that the "at all times" language only has application where the building is required by law to provide running water and hot water. This is a strained reading of the "at all times" modifying phrase, but, more importantly, it is grossly inconsistent with the exception clause wording, which is in the singular. It speaks of a "dwelling unit not required by law to be equipped *for that purpose*." *Id.* It noticeably does not use the plural "purposes" or "services." Consequently, the exception should be read to modify only the obligation to supply heat.

304. § A.15(1)(f).

305. 200 N.W.2d 791 (Iowa 1972).

weather months.[305.1]

The second exception appears to protect the landlord from liability when, under the rental agreement, responsibility for the delivery of hot water and heat is left to the utility company and the tenant.[306] This is the typical arrangement in the single-family residence rental. The exception would appear to absolve the landlord from all liability should, for instance, the gas company fail to provide gas necessary to run the tenant's furnace.[307] It may be so broad as to extinguish any duty the landlord would otherwise have in the circumstance described under section A.15(1)(b) to provide another heating facility. This exception, however, even when combined with the contracting out authorization of subsection (2),[308] should not eliminate

---

305.1 Section A.15(1)(f) has an identical counterpart in the habitability standards section of the New Mexico version of the URLTA. N.M. STAT. ANN. §§ 47-8-1 to -51(1978). In *T.W.I.W., Inc. v. Rhudy*, 96 N.M. 354, 630 P.2d 753 (1981), the tenant sought to defend against an unlawful detainer suit on the ground that the rent abated because the landlord did not supply reasonable heat for the rental unit which was located in Eagle Nest, a town without a housing code. Under the New Mexico Uniform Owner-Resident Relations Act, the subsections analogous to IURLTA subsections A.15(1)(b-f) only apply if there is no applicable housing code. *Id.* at 630 P.2d at 756. Consequently, the New Mexico Supreme Court considered the landlord's duty to supply reasonable heat and the exception language to this subsection 47-8-20(A)(6) duty.

The New Mexico court acknowledged that the exception could "be reasonably interpreted to mean that unless there is a law requiring the owner to supply reasonable heat, the owner need not supply it." *Id.* at ___, 630 P.2d at 755. The court also pointed out that the language could "mean that the owner is required to provide reasonable heat unless there is some law specifically exempting him from providing it." *Id.* at ___, 630 P.2d at 755. Noting the language was ambiguous, the court sought to ascertain the legislative intent from the Act's statement of purpose, *id.*, a virtually verbatim enactment of URLTA section 1.102(a) and (b). *See* text accompanying notes 61-63 *supra*. The new legislation was found to be remedial and in derogation of the common law, imposing new duties upon landlords to maintain rental housing. 96 N.M. at ___, 630 P.2d at 756. The court held "that the Legislature intended to require owners to provide reasonable heat unless they could show some specific law exempting them from the requirement." *Id.* at ___, 630 P.2d at 756.

The rationale for the court's holding in *Rhudy* is readily transferrable to Iowa, and, indeed, there would appear to be even clearer support for such an interpretation of IURLTA section A.15(1)(f). Iowa not only adopted the same two URLTA purposes adopted by New Mexico, *see* § A.2(2)(a)-(b), and text accompanying notes 61-63 *supra*, it added the important third purpose to "insure that the right to the receipt of rent is inseparable from the duty to maintain the premises." § A.2(2)(c). Furthermore, the landlord's obligation to supply reasonable heat is obviously a major component of the warranty of habitability in a northern state like Iowa, a warranty that under *Mease v. Fox*, 200 N.W.2d 791 (Iowa 1972), and the IURLTA applies to every rental unit in Iowa, regardless of whether it is located in a community with a housing code. *See* text accompanying notes 85-86 *supra*.

306. *See* § A.13(4).

307. *Cf.* 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) (holding landlord liable for breach of warranty of habitability where garbage accumulated for 17 days during a strike by the maintenance and janitorial staff).

308. *See* Section II(D) *supra*.

the landlord's duty under A.15(1)(d) to maintain in good and safe working order the furnace, water heater or plumbing. The second exception should not be allowed to swallow the A.15(1)(d) duty without the most explicit of language.

This part of the article began by outlining the economic factors that can influence both the content of the habitability standard and the approach to waiver of the standard. The considerable impact of these factors on the law's development warrants a final examination and a restatement of the issues ahead.

B. *The Economics of Enforcement*

The starting point is the case of *Knight v. Hallsthammar*,[309] in which the California Supreme Court faced one of the tough waiver issues: Does a residential tenant, who enters into a rental agreement aware that the premises are uninhabitable, thereby waive the landlord's breach of the implied warranty of habitability? *Hallsthammar* involved a change of ownership in a thirty-unit apartment building.[310] Immediately upon purchase, the new landlord sent notices that there would be a substantial increase in the rent.[311] One week later, the tenants association responded that the tenants would withhold all future rent payments because of the state of disrepair of the apartment building.[312] No repairs were made and the tenants refused to pay the increased rent.[313] The landlord brought and consolidated eviction actions.[314] The tenants sought to defend on the ground that the new landlord had breached its implied warranty of habitability.[315] There was proof of wall cracks, peeling paint, water leaks, heating and electrical fixture problems, broken or inoperable windows, rodents and cockroaches, and a lack of sufficient heat, all of which existed before the change of ownership as well as thereafter.[316] The trial court had ruled that a tenant could not assert a habitability defense in an unlawful detainer action unless the defective condition was unknown to the tenant at the time of occupancy of the apartment.[317] With a lone dissenting vote, the California Supreme Court reversed.[318]

Relying heavily on the public policy rationale which formed the basis for its initial recognition of an implied warranty of habitability in *Green v.*

---

309. 29 Cal. 3d 46, 623 P.2d 268, 171 Cal. Rptr. 707 (1981) (en banc).
310. *Id.* at 50, 623 P.2d at 270, 171 Cal. Rptr. at 709.
311. *Id.*
312. *Id.*
313. *Id.*
314. *Id.*
315. *Id.*
316. *Id.*
317. *Id.* at 54, 623 P.2d at 273, 171 Cal. Rptr. at 712.
318. *Id.* at 60, 623 P.2d at 276, 171 Cal. Rptr. at 715.

Superior Court,[319] the court held:

> [T]he fact that a tenant was or was not aware of specific defects is not determinative of the duty of a landlord to maintain premises which are habitable. The same reasons which imply the existence of the warranty of habitability—the inequality of bargaining power, the shortage of housing, and the impracticability of imposing upon tenants a duty of inspection—also compel the conclusion that a tenant's lack of knowledge of defects is not a prerequisite to the landlord's breach of the warranty.[320]

The court emphasized the low income tenant's lack of bargaining power with the following quote from *Green*: " '[E]ven when defects are apparent the low income tenant frequently has no realistic alternative but to accept such housing with the expectation that the landlord will make the necessary repairs.' "[321] Again quoting from *Green*, the court stated that " 'public policy requires that landlords generally not be permitted to use their superior bargaining power to negate the warranty of habitability rule.' "[322] In a footnote in which it acknowledged that the dicta in *Mease v. Fox*[323] might indicate a contrary result,[324] the court found further support for its holding in the Washington case of *Foisy v. Wyman*:[325]

> A disadvantaged tenant should not be placed in a position of agreeing to live in an uninhabitable premises. [Uninhabitable] [h]ousing conditions . . . are a health hazard, not only to the individual tenant, but to the community. . . . [S]uch housing conditions are at least a contributing cause of such problems as urban blight, juvenile delinquency and high property taxes for the conscientious landowners.[326]

The court in *Hallsthammar* addressed only the facts and parties before it. The dissenter trumpeted the radical implications of the decision. His principal concern was that the decision would preclude rental of substandard property to tenants who, though fully aware that the dwelling was in bad shape, still wanted to rent the unit because the asking price was so low as to be a bargain.[327] The dissent was also concerned that crafty tenants might be able to exploit the decision by renting substandard housing at low rent, fully aware of the defects and having no expectation of landlord repair,

---

319. 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974).

320. 29 Cal. 3d at 54, 623 P.2d at 273, 171 Cal. Rptr. at 712.

321. *Id.* at 52, 623 P.2d at 271-72, 171 Cal. Rptr. at 710-11 (quoting from *Green v. Superior Court*, 10 Cal. 3d at 625, 517 P.2d at 1168, 111 Cal. Rptr. at 704).

322. 29 Cal. 3d at 52, 623 P.2d at 271, 171 Cal. Rptr. at 710 (quoting from *Green v. Superior Court*, 10 Cal. 3d at 625 n.9, 517 P.2d at 1168 n.9, 111 Cal. Rptr. at 704 n.9).

323. 200 N.W.2d 791 (Iowa 1972).

324. 29 Cal. 3d at 52 n.2, 323 P.2d at 271 n.2, 171 Cal. Rptr. at 710 n.2.

325. 82 Wash. 2d 22, 515 P.2d 160 (1973).

326. 29 Cal. 3d at 52 n.2, 623 P.2d at 271 n.1, 171 Cal. Rptr. at 710 n.2, (quoting from *Foisy v. Wyman*, 82 Wash. 2d at ___, 515 P.2d at 164-65).

327. 29 Cal. 3d at 64, 623 P.2d at 279, 171 Cal. Rptr. at 718 (Clark, J., dissenting).

and then either refusing to pay rent or suing for damages for breach of the warranty of habitability.[328]

The underlying issue is clothed in the economic considerations discussed at the outset of Section III of this Article. If courts really do enforce the warranty of habitability, will this not result in a marked reduction in the low income housing stock? The answer is: It all depends. As noted earlier, if a substantial percentage of the low income housing in Iowa is dilapidated, vigorous enforcement could well reduce the supply of low income housing. Those units which are in substantial disrepair would probably be torn down or abandoned, while those units which are repaired and improved would undoubtedly be repriced.[329] While this, at least in theory, may result in a state housing stock that meets habitability standards, the concern is that there will no longer be sufficient numbers of units to house the poor, and that the units available due to renovation will be out of the price range of the low income tenant.[330] On the other hand, if most of the Iowa low income housing stock is considered declining but economically repairable, vigorous enforcement may be able to accomplish the necessary upgrading without pushing rents out of the reach of the low income tenant.[331]

Responsible decision-making, whether by the Iowa courts or the legislature, must be based on housing quality information from which reliable predictions can be made. Such information is not presently available. Its importance warrants a careful and comprehensive study.

Although the issue is too complex to permit easy or casual conclusions, it should not be assumed, in the absence of such a study, that there would be a significant shortfall of available, habitable low income housing in Iowa were the warranty of habitability strictly enforced. Although the legislature made no findings on this point, it seems safe to infer that the legislature did not contemplate a shortfall as a result of the new law. Indeed, the legislature eliminated one of the escape mechanisms when it prohibited the inclusion of waiver clauses in the lease agreement.

It is also important to caution against hasty abandonment of the warranty of habitability should a good study predict a shortfall of low income housing. Much depends on the extent of the shortfall, and the dollars needed to overcome it, but it does not follow that poor people must be allowed to live in substandard housing by either judicial manipulation of the substantive content of the habitability standard, or by judicial sanction of

---

328. *Id.* at 65, 623 P.2d at 280, 171 Cal. Rptr. at 719.

329. Although the landlord may not raise a tenant's rent to cover the cost of improvements required to bring substandard housing into compliance during the period of the lease term, the new legislation does not prevent him from raising the rent in subsequent lease periods. Op. Iowa Att'y Gen. No. 79-4-23 (April 24, 1979).

330. R. POSNER, *supra* note 255, at 357.

331. *See* Heskin, *The Warranty of Habitability Debate: A California Case Study*, 66 CAL. L. REV. 37, 67 (1978).

waivers of the standard in exchange for an affordable price, or outright repeal of the warranty of habitability. These are scarcely positive alternatives, although they are politically attractive in that they entail no direct public expenditures.

There are at least two other alternatives in the low income housing shortfall scenario. One contemplates that low income families will purchase higher-priced habitable housing by doubling up. Obviously, the poor will pay for their new quarters by foregoing the value of greater space and privacy of single-family occupancy.[332] Such a policy seems short-sighted, because overcrowding can quickly lead to a physical deterioration of the dwelling unit and substantially reduce the quality of the residents' lives. The policy does, however, possess the politically attractive quality of entailing no initial public expenditures.

The other alternative is to respond with sufficient governmental assistance to enable the low income tenant to afford the price of admission to decent housing. Numerous techniques have been tried and are available. Whether the medium be construction of additional public or subsidized housing, or direct housing allowances or increased public assistance, the tools chosen are relatively inconsequential if the commitment is truly there.[333]

Hopefully, Iowa's housing stock is of such quality that the really hard choices need not be made. Certainly, those choices should not be considered without a quality study of the extensiveness of Iowa's substandard housing problem and the economic commitment that it would take to rectify the problem.

IV. Self-Help Remedies For Breach of the Warranty of Habitability

Remedies are crucial to the enforcement of any substantive right, including, of course, the implied warranty of habitability. The *Mease v. Fox* opinion was especially strong on this point, stating: "Recognition of an implied warranty of habitability makes available to the tenant the basic remedies of damages, reformation and rescission."[334] The court in *Mease* was not required to address the question of what other remedies, if any, might be available to tenants beyond these basic contract remedies. Although there was uncertainty as to the availability of other remedies after *Mease*, that

---

332. R. Posner, *supra* note 255, at 358.

333. The suggestion of such a governmental undertaking, and its concomitant redistribution of income, would appear to conflict with the fiscal policy initiatives of the present federal administration. On the other hand, as the *Hallsthammar* and *Foisy* courts point out so well, there are very real human and societal costs when families grow up in uninhabitable housing. The ideal of a decent home for every American may be an idea whose time has not yet come, but there is nothing that precludes Iowa from taking that stride forward. Is that ideal not at the heart of the legislative commitment in the IURLTA and the IMHP-RLTA?

334. 200 N.W.2d at 796.

uncertainty has been considerably diminished by the two new pieces of legislation.[335] Without question, it is in the area of remedies that both Acts make their greatest contributions.

The tenant's remedies for noncompliance by the landlord with the provisions of either sections A.15 or B.16 or the terms of the rental agreement can be divided into two categories: Self-help remedies initiated by the tenant and judicial remedies, which require the tenant to file a complaint or petition in court. The characterization of the self-help remedy is drawn from URLTA section 4.103.[336] The term is used to refer to action that the tenant can take on his own to accomplish desired results without the necessity and expense of employing an attorney or of initiating litigation. This does not mean, however, that the tenant self-help remedy will not result in litigation. There is always a risk that the landlord will respond to a tenant's deduction for repairs or rent withholding by commencing an action for possession. Similarly, a tenant termination notice may result in an action for rent. In the event the landlord does initiate litigation to challenge the tenant's action, the tenant has a valid defense if he has properly utilized an authorized self-help remedy.

The remedies authorized by the IMHP-RLTA[337] are essentially the

---

335. IOWA CODE chs. 562A, 562B (1981).

336. URLTA section 4.103 (Self-Help for Minor Defects) provides:

(a) If the landlord fails to comply with the rental agreement or Section 2.104, and the reasonable cost of compliance is less than [$100], or an amount equal to [one-half] the periodic rent, whichever amount is greater, the tenant may recover damages for the breach under Section 4.101(b) or may notify the landlord of his intention to correct the condition at the landlord's expense. If the landlord fails to comply within [14] days after being notified by the tenant in writing or as promptly as conditions require in case of emergency, the tenant may cause the work to be done in a workmanlike manner and, after submitting to the landlord an itemized statement, deduct from his rent the actual and reasonable cost or the fair and reasonable value of the work, not exceeding the amount specified in this subsection.

(b) A tenant may not repair at the landlord's expense if the condition was caused by the deliberate or negligent act or omission of the tenant, a member of his family, or other person on the premises with his consent.

337. Section B.22 provides:

(1) Except as provided in this chapter, if there is a material noncompliance by the landlord with the rental agreement, the tenant may deliver a written notice to the landlord specifying the acts and omissions constituting the breach and that the rental agreement will terminate upon a date not less than thirty days after receipt of the notice if the breach is not remedied in fourteen days. If there is a noncompliance by the landlord with section 562B.16 materially affecting health and safety, the tenant may deliver a written notice to the landlord specifying the acts and omissions constituting the breach and that the rental agreement will terminate upon a date not less than thirty days after receipt of the notice if the breach is not remedied in fourteen days. The rental agreement shall terminate and the mobile home space shall be vacated as provided in the notice subject to the following:

a. If the breach is remediable by repairs or the payment of damages or otherwise and the landlord adequately remedies the breach prior

same as approved in *Mease*, damages and termination, though the Act gives explicit approval to injunctive relief as well. The IURLTA adopted the text of URLTA section 4.101 with only two significant modifications,[338] and, as a consequence, the IURLTA affords the tenant a fuller complement of reme-

---

to the date specified in the notice, the rental agreement will not terminate.

b. The tenant may not terminate for a condition caused by the deliberate or negligent act or omission of the tenant, a member of the tenant's family or other person in the mobile home park with the tenant's consent.

(2) Except as provided in this chapter, the tenant may recover damages, and obtain injunctive relief for any noncompliance by the landlord with the rental agreement or with section 562B.16.

(3) The remedy provided in subsection 2 of this section is in addition to any right of the tenant arising under subsection 1 of this section.

338. Section A.21 provides:

(1) Except as provided in this chapter, if there is a material noncompliance by the landlord with the rental agreement or a noncompliance with section 562A.15 materially affecting health and safety, the tenant may elect to commence an action under this section and shall deliver a written notice to the landlord specifying the acts and omissions constituting the breach and that the rental agreement will terminate upon a date not less than thirty days after receipt of the notice if the breach is not remedied in fourteen days, and the rental agreement shall terminate and the tenant shall surrender as provided in the notice subject to the following:

a. If the breach is remediable by repairs or the payment of damages or otherwise, and if the landlord adequately remedies the breach prior to the date specified in the notice, the rental agreement shall not terminate.

b. If substantially the same act or omission which constituted a prior noncompliance of which notice was given recurs within six months, the tenant may terminate the rental agreement upon at least fourteen days' written notice specifying the breach and the date of termination of the rental agreement *unless the landlord has exercised due diligence and effort to remedy the breach which gave rise to the noncompliance.*

c. The tenant may not terminate for a condition caused by the deliberate or negligent act or omission of the tenant, a member of the tenant's family, or other person on the premises with the tenant's consent.

(2) Except as provided in this chapter, the tenant may recover damages and obtain injunctive relief for any noncompliance by the landlord with the rental agreement or section 562A.15 *unless the landlord demonstrates affirmatively that the landlord has exercised due diligence and effort to remedy any noncompliance, and that any failure by the landlord to remedy any noncompliance was due to circumstances reasonably beyond the control of the landlord.* If the landlord's noncompliance is willful the tenant may recover reasonable attorney's fees.

(3) The remedy provided in subsection 2 is in addition to any right of the tenant arising under subsection 1.

(4) If the rental agreement is terminated, the landlord shall return all prepaid rent and security recoverable by the tenant under section 562A.12.

The italicized text denotes the Iowa additions to URLTA section 4.101.

dies for habitability violations. The most notable differences in the two Acts' habitability remedies are the availability of repair and deduct remedies and the awarding of reasonable attorney's fees to tenants under the IURLTA in the case of willful violations. The absence of a repair and deduct remedy in the IMHP-RLTA may be justified in that the mobile home park owner typically provides fewer services (only the plot and certain outlets or hookups) than the residential landlord. No such distinction is possible for the omission of an attorney's fees award where the landlord's breach is willful. This unfortunate omission undermines the private attorney general concept which is the foundation of tenant remedies under the URLTA.[339]

A brief summary of the various habitability-related remedies is in order before examining them individually. Under the IURLTA, the self-help remedies are: (1) termination under section A.21(1); (2) repair and deduct under section A.23; (3) repair and deduct under section A.27(4); and (4) rent withholding under section A.24. The IURLTA judicial remedies are: (1) section A.21(2) damages, injunctive relief, and attorney's fees; and (2) section A.23 damages. Under section A.24, the damages remedy can also be utilized as a defense to a possession action.[340] The only self-help remedy authorized by the IMHP-RLTA is termination under section B.22(1). Section B.22(2) authorizes judicial remedies of damages and injunctive relief. The IMHP-RLTA contains no section similar to section A.24, and this omission undoubtedly will cause considerable consternation for mobile home tenants since it leaves in doubt whether they can assert a damage remedy as either a counterclaim or defense to a possession action.[341]

A. *Termination*

The *Mease v. Fox*[342] case authorized rescission as one of the contract remedies available to tenants where the landlord has breached the implied warranty of habitability.[343] Both of the new Acts codify this remedy and construct procedures which nicely balance the landlord's interest that there be an opportunity to cure in order to maintain the lease and the tenant's concern that termination will not be construed as abandoment and expose the tenant to additional rental liability.

Section A.21(1) and section B.22(1) allow the tenant to terminate the rental agreement when there has been a material noncompliance with a provision of the rental agreement, or a noncompliance with sections A.15 or B.16 which materially affects health and safety.[344] The tenant is authorized

339. *See* notes 160-64 and accompanying text *supra*.
340. *See* Section IV(C) *infra*.
341. *See* Section IV(C)(1) *infra*.
342. 200 N.W.2d 791 (Iowa 1972).
343. *Id.* at 796.
344. Not surprisingly, the termination remedy is denied where the noncompliance was deliberately or negligently caused by either the tenant, by a member of the tenant's family, or

by the IURLTA to terminate under two different procedures.[345] Section A.21(1)(a), which deals with first-time landlord noncompliances, provides the tenant with a qualified right to terminate upon thirty days notice, subject to the landlord's right to cure the defect within fourteen days of delivery of the notice. Section A.21(1)(b), which deals with recurring landlord noncompliances, provides the tenant with a right to terminate, subject to only one qualification,[346] upon fourteen days notice. Although its wording is more cumbersome, section B.22(1) authorizes the same "fix or I leave" termination procedure as in A.21(1)—if the landlord doesn't fix the noncompliance in fourteen days, the lease terminates in thirty days. The IMHP-RLTA omits the accelerated termination remedy which is available to residential tenants when the same problem recurs. One final observation from the perspective of the congruency of the Acts is that each Act affords the landlord the same termination procedure (where tenants have breached their corresponding obligations under the Acts or lease) that it affords the tenants.[347]

The basic self-help termination remedy, a thirty-day termination which is subject to the landlord's fourteen-day right to cure, will seldom be of importance to the tenant who has a month-to-month tenancy, the most common situation for the residential low income tenant, as he can always terminate without cause by giving thirty days notice.[348] IMHP-RLTA section B.10(4) has eliminated the periodic tenancy in the mobile home space rental context by prescribing that in the absence of an agreement as to the term, the term will be deemed to be for one year.[349] A landlord and tenant may agree, however, to a tenancy that renews every other month under B.10(4). The parties are precluded from agreeing to a tenancy that renews every

---

by any person on the premises with the consent of the tenant. §§ A.21(1)(c), B.22(1)(b).

345. Sections A.21(1) and B.22(1) provide a termination remedy for habitability problems. It should be acknowledged, however, that there are other provisions for termination by the tenant in specific remedy sections of both Acts. The IURLTA provides four additional termination remedies, while the IMHP-RLTA provides an additional three. Two of them provide for a specific termination procedure, as under sections A.21(2) and B.22(1), while the other two merely provide for "termination" without further elaboration. The four situations in which the termination remedy is available to the tenant are: (1) failure to deliver possession (section A.22—five-day notice required; section B.23—written notice required); (2) fire or casualty damage (section A.25—notice required within 14 days; no IMHP-RLTA coverage); (3) unlawful ouster, exclusion or diminution in services (sections A.26 and B.24—no termination procedure); (4) abuse of access (sections A.35(2) and B.31(2)—no termination procedure).

See DRAKE Note, *supra* note 57, at 431-36. *See also* Part II of this Article to be published in a subsequent issue of the *Drake Law Review* for more detailed coverage of these other termination remedies.

346. The tenant may not terminate if the landlord has exercised due diligence to remedy the breach which gave rise to the noncompliance. § A.21(1)(b).

347. §§ A.27(1), B.25(1).

348. Section A.34 codifies existing law by providing that a "tenant may terminate a month-to-month tenancy by a written notice given to the [landlord] at least thirty days prior to the periodic rental date specified in the notice."

349. *See* text accompanying notes 240-48 *supra*.

month by B.10(4), because this provision prohibits either party from cancelling the agreement without giving at least sixty days written notice. Consequently, the basic fourteen/thirty-day termination remedy will prove to be of greater utility to mobile home tenants, but it will also allow the month-to-month residential tenant to terminate a few days earlier (sometimes weeks earlier) than under section A.34.[350] Still, the basic termination remedy is primarily of import to the tenant who wants out of a one-year lease because of habitability defects.

The nature of the breach which affords the tenant the option of the basic fourteen/thirty-day termination remedy warrants scrutiny. Both Acts make termination conditional upon a showing of a material noncompliance with the rental agreement or noncompliance with an obligation imposed by either section A.15 or B.16 which materially affects health and safety. So, a materiality requirement must be satisfied in order for the tenant to rescind.[351]

---

350. The following examples enable a comparison of the three termination procedures: the ordinary 30-days notice termination of a residential month-to-month tenancy under section A.34(3) (60 days for mobile home tenants under B.10(4)), the 14/30-day basic termination procedure under sections A.21(1) and B.22(1), and the accelerated termination procedure under section A.21(1)(b).

Section A.34(3) and Section B.10(4): Assume a residential month-to-month tenancy with rent due on the 1st. Tenant gives notice on September 21 that the tenancy will terminate on October 31. Even though the 30th day would be October 21, the general rule is that termination notices for periodic tenancies must be geared to the end of the tenancy period (that is, the last day before rent is again due). *See* 50 Am. Jur. 2d, *Landlord & Tenant*, § 1209 n.14 (1970). Consequently, in order to terminate as of October 31, the tenant must give notice 30 days prior thereto, but the fact that he has given earlier notice will not effectuate termination prior to October 31.

In the mobile home space tenancy, there is no periodic tenancy. The shortest termination notice period which can be included in a rental agreement is 60 days. § B.10(4). Consequently, assuming that is the case, a tenant giving notice on September 21 could terminate the tenancy effective November 30.

Sections A.21(1)(a) and B.22(1)(a)—The 14/30-Day Basic Termination Procedure: Assume that the tenant gives the 14/30-day notice on September 21, designating the lease to terminate on October 22, the thirty-first day, unless cure has been made by October 5, the fourteenth day. Thus, where there is no cure, termination would be well over a month quicker for the mobile home tenant, and approximately ten days quicker for the month-to-month residential tenant.

Section A.21(1)(b) - The Accelerated Termination Procedure: Assume that the residential tenant gives notice of termination on September 21, designating October 5, the fifteenth day, as the date of termination. There is no right to cure in the landlord. Termination would be some 26 days earlier than pursuant to section A.34(3).

See note 78 *supra*, discussing the Iowa rules on computation of time.

351. Another option afforded tenants in the breach situation is judicial relief in the form of damages and injunctive relief. These remedies will be given extensive treatment in Part II of this Article to be published in a subsequent issue of the *Drake Law Review*, but for present purposes it should be noted that the judicial remedies are, at least in theory, more readily available to the tenant than is the termination remedy, because the judicial remedies are triggered by "any noncompliance" with the rental agreement or with sections A.15 or B.16. *See* §§

The materiality standard is not defined in either Act. Although the legislature's decision to avoid definitions is understandable—in light of the lack of applicable case law, the multitude of conditions which may be encountered, and the rapid evolution of the implied warranty of habitability—a commentator has suggested that tenants will be deterred or inhibited from exercising this self-help remedy because of uncertainty whether the seriousness of the breach meets the requisite level of materiality.[352] This may be true, but this author is not certain that the definitional problem warrants the anxiety expressed by the commentator. It seems probable that the Iowa courts, in determining materiality, will balance the IURLTA and IMHP-RLTA guidelines as did the court in *Mease v. Fox* in its seven-factor balancing test.[353] Other than to make clear that mere breach of a housing code does not necessarily constitute a material breach, the *Mease* approach adds little to present predictability. The *Mease* court, however, only intended to outline the approach to the question, not the definitive resolution. I am not persuaded by the plea for more precise legislative standards at this time. I fear such standards would be premature and might unduly restrict the case-by-case evolution of the materiality standard. The hardship to the tenant of the approach taken by the IURLTA and the IMHP-RLTA is overstated by the commentator, for he overlooks the ready availability of the general repair-and-deduct remedy to the residential tenant under section A.27(4) in the minor breach situation.[354]

The potential beneficial role which housing code enforcement agencies can play should not be overlooked. Ordinarily, the tenant's first call ought to be to the landlord, particularly if the landlord has been responsive in the past. When the landlord fails to respond promptly, or can't be reached, or has a record of non-responsiveness, the tenant should not hesitate to complain to the code enforcement agency.[355] Iowa communities of 15,000 or more are still expressly mandated to enforce their codes through programs for both regular and complaint-initiated rental inspections.[356] An inspection

---

A.21(2), B.22(2). Upon reflection, the distinction makes sense. The drastic remedy of termination should only be available for material breaches. Monetary relief ought to be available, however, to compensate the tenant for any breach which deprives her of her rental bargain. The distinction is more academic than real. Few people are inclined to initiate litigation, with all of its actual and psychological costs, or to risk a possession action as a result of having withheld some rent, unless the breach was one of consequence. In the minor breach situation, the most likely remedial choice is the general repair-and-deduct remedy available only to residential tenants under IURLTA section A.27(4).

352. *See* IURLTA Attorney's Fees, *supra* note 160, at 1082-97.

353. *Id.* at 1088.

354. *See* Section IV(B) *infra*.

355. Both Acts provide protection to the tenant from landlord retaliation when the tenant has made a good faith complaint to either the landlord or the code enforcement agency about habitability violations. §§ A.36, B.32. These provisions will be discussed in Part II of this Article to be published in a subsequent issue of the *Drake Law Review*.

356. IOWA CODE § 364.17(3) (1981).

report concluding that the noncompliance materially affects health and safety would certainly be a proper basis to invoke either the basic fourteen/thirty-day or the accelerated termination procedure, as the inspection report would be accorded a rebuttable presumption of materiality by most courts.[357] Such an official report should not, and is not, a condition precedent to a finding of materiality. But the code enforcement inspection, when available, is an effective way to minimize the tenant's risk and, at the same time, give weight to the seriousness of his complaints. An official inspection report is not a condition precedent to a finding of materiality. It has been suggested, and properly so, that even if the inspector finds that the noncompliance does not materially affect health and safety, the tenant should not be foreclosed from terminating his lease and bearing the risk of the landlord's action for rent.[358] In such an action for rent, there would be no presumption of materiality and the inspection report could be introduced as evidence on behalf of the landlord.[359]

In order to invoke the basic fourteen/thirty-day termination remedy, both Acts require the tenant to deliver a detailed written notice to the landlord.[360] The notice must specify the acts or omissions of the landlord which constitute the noncompliance and the date the rental agreement will terminate (no sooner than thirty days after receipt of the notice) if the noncompliance is not remedied within fourteen days.[361] The same basic notice requirements are imposed on the tenant by the IURLTA when the accelerated fourteen-day termination procedure is used. This remedy, which is only available under the IURLTA, requires a recurrence of substantially the same noncompliance of which notice was given within the preceding six months. Section A.21(1)(b) requires that this notice be in writing and that it specify the breach and the date of termination (not less than fourteen days from the receipt of the notice).[362]

---

357. *See IURLTA* Attorney's Fees, *supra* note 160, at 1095-96.

358. *Id.* at 1096.

359. *Id.*

360. Both sections A.21(1) and B.22(1) require the tenant to "deliver" the 14/30-day notice, which creates some ambiguity since "delivery" of notice is not defined in either section A.8 or B.9. The delivery of notice requirement is apparently the equivalent of requiring receipt of the notice. A person " 'receives' a notice . . . when it comes to that person's attention or in the case of the landlord, it is *delivered* at the place of business of the landlord through which the rental agreement was made or at a place held out by the landlord as the place for receipt of the communication." §§ A.8(2), B.9(2) (emphasis added).

361. §§ A.21(1), B.22(1).

362. *See* DRAKE Note, *supra* note 57, wherein the author points out that both sections A.21(1) and B.22(1) require the notice to be "delivered," whereas section A.21(1)(b) speaks only of "written notice." The Note suggests that delivery is not required and that the accelerated termination procedure notice is satisfied where the tenant has "given" notice by taking "steps reasonably calculated to inform" the landlord. *See* DRAKE Note *supra* note 57, at 429. The plain language of the sections would appear to support the suggested construction, but the distinction is a fine one. The delivery requirement in the case of a landlord can be satisfied by

Although the basic fourteen/thirty-day termination procedure seems clear, if the initial problem of materiality is set aside, there are two issues that create uncertainty in the accelerated termination procedure. The first is caused by an Iowa addition to URLTA section 4.101(a)(2) which withholds the accelerated procedure if the landlord affirmatively demonstrates that she has "exercised due diligence and effort to remedy the breach which gave rise to the noncompliance."[363] The exception undoubtedly refers to the landlord's efforts to cure the noncompliance at the time of the first complaint, but a broad construction of the exception could render the accelerated procedure a nullity.[364] The second issue is whether the giving of a prior fourteen/thirty-day termination notice is a condition precedent to exercising the accelerated termination procedure, or whether it is available to a tenant who has given prior notice of the noncompliance, but who has not given a fourteen/thirty-day notice. Section A.21(1)(b) does not expressly require that the prior notice be of the thirty-day termination/fourteen-day right to cure variety, nor that the previous notice have been in writing. Section A.21(1)(b) merely requires that the present repeated noncompliance be "substantially the same" as a prior noncompliance "of which notice was given."

The author of the Drake Note[365] concludes a literal construction is appropriate, and therefore, that any prior notice, even oral notice, should be adequate. This conclusion appears hasty.[366] First, the accelerated termination procedure is contained in subsection (b) of section A.21(1) which sets forth the basic fourteen/thirty-day termination procedure. Second, the principle of congruency is relevant because the termination procedure set up in section A.27(1),[367] which governs landlord terminations for tenant mainte-

---

delivery of the notice to his place of business. *See* §§ A.8(2), B.9(2).

363. U.R.L.T.A. § 4.101(a)(2).

364. *See IURLTA Attorney's Fees*, *supra* note 160, at 1083-84 n.99. The author points out that the Iowa modification reflects concern that landlords should not be penalized if their noncompliance is due to circumstances beyond their control. The author also notes that no similar due diligence defense was afforded the tenant in section A.27.

365. *See* DRAKE Note, *supra* note 57, at 429.

366. One example can demonstrate how the Drake Note's literal construction could conflict with the basic fourteen/thirty-day procedure. Assume the following: A tenant orally complains to her landlord about an electrical short. The landlord fails to respond, or attempts to make the repair himself. One week after the initial complaint, the short is still occurring. Had the tenant initially invoked the fourteen/thirty-day termination procedure, the landlord could presumably try again since he is still within the fourteen-day cure period. Under the Drake Note's suggested interpretation, however, the tenant could arguably execise an unqualified right to terminate the tenancy upon the recurrence of the short one week after the initial notification.

367. Section A.27(1) provides:

> (1) Except as provided in this chapter, if there is a material noncompliance by the tenant with the rental agreement or a noncompliance with section 562A.17 materially affecting health and safety, the landlord may deliver a written notice to the tenant specifying the acts and omissions constituting the breach and that the rental agreement will terminate upon a date not less than thirty days after receipt of the notice if

nance noncompliances, is identical in this regard to that in section A.21(1). While there may be occasions when the same statutory language should be construed to hold landlords to a higher standard than tenants due to their business knowledge and experience, this does not appear to be such a circumstance.

Neither Act imposes a limitations period as to when a tenant can invoke the basic fourteen/thirty-day termination procedure. The sole prerequisite is an existing material breach. This could be a breach only hours old or one with a history of neglect. A tenant considering this remedy should determine precisely when she would want to move out should the landlord fail to cure. The rental agreement can be terminated no earlier than thirty days from the delivery of the notice, but both Acts allow the tenant to pick a later date. A later date may be preferable to the earliest time possible, for the latter leaves the tenant with only sixteen days to find a new dwelling and to move. In any event, the prudent tenant should not bluff. She should only use this remedy if she is in fact prepared to move out if the landlord fails to make the necessary repairs.[368] If the tenant is not prepared for that consequence and the possible inconvenience of a move, she would be wise to investigate other alternatives, such as the repair-and-deduct remedy.

One question which is bound to arise when the tenant uses the fourteen/thirty-day basic termination procedure is whether the tenant should pay full rent when the due date comes up prior to the end of the landlord's fourteen-day cure period if the landlord has yet to take any steps to cure the defects.[369] For instance, where the rental period is based on the calendar month with the rent payable on the first, the tenant who gives a fourteen/thirty-day notice on September 21st that she will vacate on October 21 if the conditions are not repaired, will remain in the dwelling unit for only 21 days of October (October 1-21) if cure is not made. When October 1st arrives, the tenant will have to decide whether to pay October's rent before the landlord's cure period has expired. If the entire October rent is paid and the landlord fails to cure, the tenant will be paying for ten days (October 21-

---

the breach is not remedied in fourteen days, and the rental agreement shall terminate as provided in the notice subject to the provisions of this section. If the breach is remediable by repairs or the payment of damages or otherwise and the tenant adequately remedies the breach prior to the date specified in the notice, the rental agreement shall not terminate. If substantially the same act or omission which constituted a prior noncompliance of which notice was given recurs within six months, the landlord may terminate the rental agreement upon at least fourteen days' written notice specifying the breach and the date of termination of the rental agreement.

368. The Act is silent as to whether a tenant can rescind a 14/30-day termination notice once it has been delivered. Since the termination is not effective until the expiration of the cure period, the tenant should be able to rescind the notice during that two-week time period. The rescission notice very likely would have to satisfy the notice requirements of either section A.21 or B.22, whichever is applicable, in terms of a writing and a receipt.

369. *See generally* DRAKE Note, *supra* note 57, at 430-41.

31) when she will not be using the dwelling. If only a pro rata (21/31) portion of the October rent is paid, the tenant would still be paying for a dwelling which is in material noncompliance with the terms or the statute or the rental agreement and is not that for which the tenant bargained.

Failure to pay October rent on October 1 does expose the tenant to a possible possession action by the landlord. The exposure, however, is not all that great. Such a possession action cannot be initiated for nonpayment until the landlord has given the tenant written notice of intent to terminate the rental agreement and of the tenant's right to cure, as required by section A.27(2) and section B.25(2). Upon the receipt of such notice, the tenant has three days in which to cure her nonpayment and to observe whether the landlord has cured his own default. If the tenant has received the required notice of intent to terminate, and the tenant's three-day cure period will expire before the conclusion of the landlord's fourteen-day cure period, the tenant's dilemma occurs. It would seem safe to assume that in this situation it is very unlikely that the landlord intends to cure and, therefore, under the tenant's own fourteen/thirty-day notice, the tenancy will terminate at the end of the thirty days. If the tenant is in doubt as to whether the landlord might still attempt to cure, the tenant should contact the landlord and determine his intention, as well as indicate a willingness to pay the balance of the rent upon completion of the repairs. In the unlikely event that the landlord does cure in time and persists in a possession action because of the tenant's failure to pay full October rent, tenant can set up the landlord's noncompliance as a defense under section A.24 and may be able to argue she paid all the rent required under the day-to-day apportionable rent provisions of section A.9(3) and B.10(3).[370] In addition, as of October 1, the tenant was entitled to a rebate of a portion of September's rent, since her dwelling was in material noncompliance during at least the last nine days of September.

Tough factual questions may obviously arise as to the "adequacy" of any attempted cure by the landlord. A cure can be attempted by making repairs, but both Acts also authorize "the payment of damages or otherwise."[371] Where repairs have been attempted and the tenant remains unsatisfied, the tenant might wish to seek inspection (or re-inspection) by the code enforcement agency and obtain its evaluation of the situation. Its evaluation, while not conclusive, would undoubtedly be given substantial weight by any court in determining the correctness of the tenant's termination decision.

Although termination is usually viewed as an alternative to judicial relief, the use of both remedies may be necessary in some cases to fully redress

---

370. For a discussion of section A.24 and the assertion of habitability defenses/claims in the landlord's summary action for possession see Section IV(C)(1) *infra*.

371. §§ A.21(1)(a), B.22(1)(a).

the tenant's injuries.[372] Neither Act requires an election of remedies. Both expressly provide that the tenant may seek damages and injunctive relief in addition to termination.[373] Finally, section A.21(4) requires the landlord to return any rental deposit or prepaid rent recoverable by the tenant under section A.12. Inexplicably, the IMHP-RLTA omits this latter provision of URLTA section 4.101(d). The omission should not result in a substantive change, however, since the rental deposit refund requirements of section B.13 automatically apply to any termination regardless of its origin.[374]

B. *Repair-and-Deduct Remedies*

The principal remedy for breach of the implied warranty of habitability that has evolved in the case law has been damages, sometimes characterized as rent abatement.[375] A major shortcoming of this remedy has been its inability to obtain for the tenant what she really wants—her present home in habitable condition. The damages remedy does not mandate repair of the premises by the landlord, though the landlord may indirectly be induced to repair when faced with prospective rent abatement. The damages remedy may provide the tenant with the funds to make repairs, but such an application of the damages award would nullify its essentially compensatory character. Blumberg and Robbins point out that tenants should not be expected to spend their damages award on repairs that the landlord is obligated to make, because the award is made as compensation for damages already incurred by the tenant.[376]

There is more than one possible solution to this problem. The possibility of greater usage of injunctive relief, or specific performance, will be explored in Part II of this Article to be published in a subsequent issue of the Drake Law Review, along with other judicial relief. The possibility of a repair-and-deduct remedy, which has on occasion been fashioned by judicial decision,[377] has become a reality for residential tenants in Iowa by virtue of the IURLTA. This self-help remedy provides for landlord-financed repair of the premises, but at the initiation of the tenant. Although the tenant is authorized to spend money to make necessary repairs on her dwelling and then deduct those expenditures from the monthly rent, there are sufficient statu-

372. Blumberg & Robbins, *supra* note 2, at 11.

373. §§ A.21(3), B.22(3).

374. Section A.12(3) sets forth three reasons for a landlord to retain the rental deposit of the tenant: To remedy a tenant's default in rent or other funds; to restore the dwelling unit to the condition at the commencement of the tenancy, except for ordinary wear and tear; and, to recover the expenses incurred in removing the tenant from possession if the tenant did not surrender the dwelling in good faith. Section B.13(3) authorizes withholding of the deposit for only the first two reasons set out in A.12(3). It does not authorize recovery of removal expenses from the deposit.

375. Blumberg & Robbins, *supra* note 2, at 11.

376. *Id.*

377. *See, e.g.*, Pugh v. Holmes, 253 Pa. Super. 76, 405 A.2d 897, 907-08 (1979).

tory checks on the amount and frequency of deductions and on the advance notice required to minimize abuse. From the tenant's perspective, these limits can sometimes hinder the effectiveness of the remedy. The major limitation for the tenant who repairs and deducts, however, is the risk that her landlord will bring an action for rent for the portion of rent deducted, or, worse, an action for possession based on nonpayment. Either type of action can be defeated when the tenant can justify the deduction.[378] The tenant, however, bears the risk that the defect will be found insufficient or the notice inadequate. Although a good faith error of judgment by the tenant will not preclude liability for an erroneous deduction, it should at least result in an opportunity to cure the rent default after the judicial determination of liability, and thereby avoid judgment in a possession action.[379]

No repair-and-deduct remedy is authorized in the IMHP-RLTA. The most likely explanation for this omission lies in the reality that the mobile home park owner supplies much less of his tenants' living quarters and environment than does the residential landlord. The mobile home tenant furnishes his own mobile home, while his landlord furnishes only the mobile home space, utility hookups, garbage removal and clean common areas.

Although the IMHP-RLTA failed to provide the tenant with a repair-and-deduct remedy, it nonetheless afforded the landlord with a repair-and-bill remedy under section B.26.[380] In light of the legislature's reluctance to provide a direct statutory repair-and-deduct remedy to the mobile home tenant, the likelihood of its implication by the Iowa courts would ordinarily be remote. The principle of congruency, however, calling as it does for even-handed treatment of tenants and landlords, when coupled with the purpose of the IMHP-RLTA to "encourage landlord and tenant to maintain and improve the quality of mobile home living,"[381] might enable some creativity by the Iowa courts.[382]

There are two separate repair-and-deduct remedies authorized by the IURLTA. Section A.27(4) authorizes a general repair-and-deduct remedy to correct any noncompliance with either the rental agreement or section

---

378. For a discussion of section A.24 and the assertion of habitability defenses/claims in the landlord's summary action for possession, see Section IV(C)(1) *infra*.

379. *See* Section IV(C)(2) *infra*.

380. Section B.26 provides:

> If there is noncompliance by the tenant with section 562B.18 materially affecting health and safety that can be remedied by repair, replacement of a damaged item or cleaning and the tenant fails to comply as promptly as conditions require in case of emergency or within fourteen days after written notice by the landlord specifying the breach and requesting that the tenant remedy it within that period of time, the landlord may enter the mobile home space, and cause the work to be done in a workmanlike manner and submit an itemized bill for the actual and reasonable cost or the fair and reasonable value thereof as additional rent on the next date when periodic rent is due, or if the rental agreement was terminated, for immediate payment.

381. § B.2(2).

382. *See, e.g.*, Pugh v. Holmes, 253 Pa. Super. at ___, 405 A.2d at 907-08.

A.15.[383] Section A.23 provides an essential services repair-and-deduct remedy, authorizing such tenant self-help where the landlord "deliberately or negligently fails to supply running water, hot water, heat, or essential services."[384] It is important to remember that the tenant will almost always have a potential claim for judicial relief, damages and sometimes injunctive relief, in addition to the repair-and-deduct remedy.

The general repair-and-deduct remedy found in section A.27(4) is characterized as a tenant defense to the landlord's action for possession based on

---

383. Section A.27(4) provides:

(4) In any action by a landlord for possession based upon nonpayment of rent, proof by the tenant of the following shall be a defense to any action or claim for possession by the landlord, and the amounts expended by the claimant in correcting the deficiencies shall be deducted from the amount claimed by the landlord as unpaid rent:

a. That the landlord failed to comply either with the rental agreement or with section 562A.15; and

b. That the tenant notified the landlord at least fourteen days prior to the due date of the tenant's rent payment of the tenant's intention to correct the condition constituting the breach referred to in paragraph "a" of this subsection at the landlord's expense; and

c. That the reasonable cost of correcting the condition constituting the breach is equal to or less than one month's periodic rent; and

d. That the tenant in good faith caused the condition constituting the breach to be corrected prior to receipt of written notice of the landlord's intention to terminate the rental agreement for nonpayment of rent.

384. Section A.23 provides:

1. If contrary to the rental agreement or section 562A.15 the landlord deliberately or negligently fails to supply running water, hot water, or heat, or essential services, the tenant may give written notice to the landlord specifying the breach and may:

a. Procure reasonable amounts of hot water, running water, heat and essential services during the period of the landlord's noncompliance and deduct their actual and reasonable cost from the rent;

b. Recover damages based upon the diminution in the fair rental value of the dwelling unit; or

c. Recover any rent already paid for the period of the landlord's noncompliance which shall be reimbursed on a pro rata basis.

(2) If the tenant proceeds under this section, the tenant may not proceed under section 562A.21 as to that breach.

(3) The rights under this section do not arise until the tenant has given notice to the landlord or if the condition was caused by the deliberate or negligent act or omission of the tenant, a member of his family, or other person on the premises with the consent of the tenant.

Section A.23(3) states that the tenant is precluded from proceeding under section A.23 if the condition causing the noncompliances was caused by the tenant, by a member of the tenant's family, or by a person on the premises with the tenant's consent. There is no similar limitation included in section A.27(4), but it seems likely that such a limitation will be implied by the courts. *See, e.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir), *cert. denied*, 400 U.S. 925 (1970). "[T]he contract principle that no one may benefit from his own wrong will allow the landlord to defend by proving the damage was caused by the tenant's wrongful action." *Id.* at 1082 n.62.

nonpayment of rent. While the characterization is not faulty, the location of the remedy is odd and quite different from the URLTA approach which positions the remedy squarely in the middle of its "Article IV, Part I on Tenant Remedies."[385] The essential services repair-and-deduct remedy, although suffering a number of Iowa modifications to URLTA section 4.101,[386] was properly positioned in the "Tenant Remedies" part of the IURLTA as section A.23.

The two IURLTA repair-and-deduct remedies are not mutually exclusive. In contrast to the section A.23 repair-and-deduct remedy, which is available only where there has been a failure of an essential service, the section A.27(4) remedy is available in all instances in which the landlord has failed to provide services or facilities which the landlord is obligated to provide and maintain under either section A.15 or the rental agreement.[387] Any noncompliance by the landlord which would be serious enough to allow the tenant to repair and deduct under section A.23 would obviously be sufficient to allow the tenant to proceed under section A.27(4), if she would rather do so. For the tenant who has such a choice, there are a number of reasons why a tenant may wish to proceed under section A.27(4) rather than under the simpler procedures of section A.23. First, there may be a question whether the landlord's noncompliance is "deliberate or negligent" so as to qualify under section A.23. Second, if there is a problem other than lack of the enumerated services of running water, hot water, or heat, there may be a question whether the service sought to be restored qualifies as "essential" within the meaning of section A.23. But most importantly, the tenant considering remedies under section A.23 appears to be faced with the dilemma of electing between the repair-and-deduct remedy and damages.[388] No such election of remedies is imposed when a tenant repairs and deducts pursuant to section A.27(4).

---

385. *See* notes 396-400 and accompanying text *infra*.

386. For a discussion of the Iowa modifications to section A.23 as they affect the election of remedies issue, see Section IV(B)(4) *infra*.

387. Note that the general repair-and-deduct remedy is available under section A.27(4) for *any* noncompliance with the rental agreement or section A.15. Unlike the termination remedy made available under section A.21(1), there is no material breach requirement. *See* notes 351-54 and accompanying text *supra*. It is true that there is a materiality requirement built into the section A.15(1)(a) housing code standard, and probably into the section A.15(1)(b) habitability standard, but that is not the case for the landlord duties under subsections (1)(c) through (1)(f) of section A.15. Consequently, while the tenant may not repair and deduct merely because the problem is a housing code violation, since a code violation which does not materially affect health and safety is not a noncompliance with A.15(1)(a), and would not, therefore, trigger A.27(4), it is likely that almost every code violation will breach some landlord duty under subsections A.15(1)(c)-(f), where there is no materiality requirement. In addition, the general repair-and-deduct remedy is available for any breach of the rental agreement. In contrast, the more drastic termination remedy is available under section A.21(1) only for a material noncompliance with the rental agreement.

388. *See* Section IV(B)(4) *infra*.

1. *The Mandatory Cure Question*

Both repair-and-deduct statutes create uncertainty for tenants because each fails to address the question whether the landlord must be afforded an opportunity to cure before the tenant can repair and deduct. Section A.23(3) merely provides that the rights under this section do not arise until the tenant has given notice to the landlord. Section A.27(4) states that the tenant must notify[389] the landlord of the tenant's intention to repair the condition at the landlord's expense, and to deduct the cost on the next rent due date which is at least fourteen days thereafter.

Whether the tenant *must* wait before making repairs in order to give the landlord a chance to repair is an issue which will seldom be litigated. As a practical matter, it is almost inconceivable that the tenant would not first attempt to contact the landlord and ask him to make the necessary repairs before laying out the cash himself. It is obviously in the best interests of the tenant, as well as the landlord, for the tenant to contact the landlord and request that he take the necessary corrective action. Clearly, the tenant would prefer to keep his money in his pocket, and have the repairs made, rather than to spend his cash on repairs and be left with a credit that can be applied to a future rent obligation. Moreover, the landlord would prefer to choose the contractor and materials used to make the repairs, possibly capitalizing on economies of scale. It would be consistent with human experience and business custom to construe both sections to require the tenant to afford the landlord a reasonable opportunity to make the repairs.

A mandatory cure opportunity would also be consistent with numerous URLTA sections that incorporate cure opportunities when there has been a breach, for example, sections A.21(1) and A.27(1), and sections A.27(2) and A.28. Sections A.28's cure opportunity has particular significance because of the principle of congruency. Section A.28 provides the landlord with a repair-and-bill remedy.[390] This repair-and-bill remedy clearly contemplates a

---

389. Section A.8(2) provides that a person "notifies" another "by taking steps reasonably calculated to inform the other in ordinary course whether or not the other actually comes to know of it." *Id.* Consequently, as with section A.23, the tenant's right to repair and deduct under section A.27(4) is not contingent upon actual notice to the landlord, as long as the tenant has made the effort required by section A.8(2). It should be noted that in contrast to section A.23, written notice is not required under section A.27(4), though obviously the tenant would be prudent to put it in writing in order to protect himself if notice is ever disputed.

390. Section A.28 provides:

> If there is noncompliance by the tenant with section 562A.17, materially affecting health and safety that can be remedied by repair or replacement of a damaged item or cleaning, and the tenant fails to comply as promptly as conditions require in case of emergency or within fourteen days after written notice by the landlord specifying the breach and requesting that the tenant remedy it within that period of time, the landlord may enter the dwelling unit and cause the work to be done in a workmanlike manner and submit an itemized bill for the actual and reasonable cost or the fair and reasonable value of it as rent on the next date when periodic rent is due, or if the

cure opportunity even in emergency situations, and expressly provides a fourteen-day cure period where less serious breaches are involved.

A mandatory cure opportunity also has strong common law support. Where leases have contained provisions specifying landlord duties of repair, Iowa courts have implied a requirement of notice in order that the landlord might have a reasonable time within which to make the necessary repairs.[391] Indeed, *Mease v. Fox*[392] expressly stated that since basic contract remedies are available to the tenant, basic contract duties are imposed on the tenant.[393] *Mease* held that the tenant was under a duty to give notice of a deficiency or defect not known to the landlord before he could invoke the remedies there recognized.[394] Finally, two of the courts which have fashioned common law repair-and-deduct remedies have also required that the landlord be afforded a reasonable time within which to eliminate the defective condition.[395]

The case is concededly strong, but before concluding that there is a mandatory cure opportunity implicit in both sections and turning to the concomitant question of what constitutes a reasonable time to cure, one must consider important Iowa legislative history which suggests that such a cure opportunity is not required in the case of section A.27(4).

House Bill 2244, as introduced by the House State Government Committee, provided a general repair-and-deduct remedy in section 25.[396] Sec-

---

rental agreement has terminated, for immediate payment.

391. *See* Woodbury Co. v. Williams Tackaberry Co., 166 Iowa 642, 646, 148 N.W. 639, 642 (1914). The court in *Woodbury* stated that rule of law as follows:

> It is only when the landlord, upon notice or with knowledge of a defect, has failed to repair within a reasonable time, that the tenant may make the necessary repair at the lessor's expense, or, without making them, recover from the lessor an amount representing the consequent dimunition of the rental value of the leased property.

Id. at 649, 148 N.W. at 642.

392. 200 N.W.2d 791 (Iowa 1972).

393. *Id.* at 794.

394. *Id.* at 797.

395. Pugh v. Holmes, 253 Pa. Super. at ___, 405 A.2d at 907-08; Marini v. Ireland, 56 N.J. 130, 146, 265 A.2d 526, 535 (1970). *See also* RESTATEMENT (SECOND) OF PROPERTY § 11.2 (1977).

396. As introduced in the Iowa House, section 25 provided:

> Sec. 25 *NEW SECTION.* SELF-HELP FOR MINOR DEFECTS.
>
> 1. If the landlord fails to comply with the rental agreement or section seventeen (17) of this Act, and the reasonable cost of compliance is less than one hundred dollars, or an amount equal to one-half of the periodic rent, whichever amount is greater, the tenant may recover damages for the breach under section twenty-three (23) of this Act or in the alternative shall notify the landlord of the tenant's intention to correct the condition at the landlord's expense. If the landlord fails to comply within fourteen days after being notified by the tenant in writing or as promptly as conditions require in case of emergency, the tenant may cause the work to be done, which work shall be done in a workmanlike manner, and after submitting to the landlord an itemized statement, deduct from the tenant's rent the actual and reasonable cost or the fair and reasonable value of the work, not exceeding the amount specified in this subsection.

tion 25(1) was essentially URLTA section 4.103(a).[397] It allowed the tenant to correct the noncompliance at the landlord's expense if the landlord failed to comply within fourteen days after notification by the tenant in writing or as promptly as conditions require in the case of an emergency. It imposed a dollar ceiling of $100 or one-half of the periodic rent, whichever was greater. In addition, section 25(2) provided a procedure not found in URLTA section 4.103, whereby the landlord could contest the tenant's claim of noncompliance, and thereby require the tenant to obtain a finding of noncompliance by a code enforcement agency. If such a finding resulted, the landlord was still afforded a seven-day cure period after receiving notice of noncompliance from the agency. Only at the conclusion of this last cure period could the tenant repair and deduct.

The general repair-and-deduct section was amended substantially in the Iowa House.[398] As amended, it retained the dollar ceilings of section 25(1),

---

2. However, if within seven days of being notified by the tenant of noncompliance with any applicable building or housing codes regulation materially affecting the health and safety of the tenant as provided in paragraph a, subsection one (1) of section seventeen (17) of this Act, the landlord notifies the tenant that the landlord in good faith does not believe there is a noncompliance, the tenant shall notify the proper health or housing code inspection authority which shall determine whether the dwelling unit or premises are in noncompliance with the requirements of applicable building and housing codes.

If the health or housing inspector finds that the landlord is in noncompliance, the landlord shall remedy or contract to remedy the defect within seven days. If the landlord fails to remedy or contract to remedy the defect within seven days after the notice from the health or housing inspector, the tenant may exercise the right to self-help as provided in subsection one (1) of this section and subsection two (2) of section thirty (30) of this Act, shall not apply to the amount deducted for self-help.

3. A tenant may not repair at the landlord's expense if the condition was caused by the deliberate or negligent act or omission of the tenant, a member of the tenant's family, or other person on the premises with the tenant's consent.

4. The recovery of separate amounts expended for self-help in any rent period may be cumulative in each rental period, but recovery for a single rent period shall not exceed the greater of one-half the periodic rent or one hundred dollars.

397. *See* note 336 *supra*.

398. One of the amendments offered to H.F. 2244 in the Iowa House was H-5544. This amendment provided the tenant with the right to repair and deduct habitability violations up to $100 or a half month's rent if the tenant gives notice in writing and if the landlord failed to begin repairs within three days after receiving the notice or to complete the work within fourteen days after receiving the notice. If the tenant did repair and deduct he was considered to have made an election of remedies and could not sue for damages under present section A.21(2). An amendment to H-5544 was adopted which required that the landlord be afforded seven days within which to begin repairs (rather than only three) and thirty days to complete repairs (rather than only fourteen). H-5551 was adopted on March 7, 1978. H.J. 829, 68th Iowa G.A. (1978). H-5544, as amended by H-5551, was adopted by a vote of 61 to 34. H.J. 827, 68th Iowa G.A. (1978).

As a result of this amendment, H.F. 2244, as amended and passed by the Iowa House, contained the following section 28(2):

2. In the event of a breach of the duty or warranty specified in subsection one (1) of

but deleted the code enforcement agency role of section 25(2) in its entirety. In its place, new section 28(2) of the bill provided that the tenant could only utilize the general repair-and-deduct remedy if the "landlord either fails to initiate action to correct or repair the defects within seven days after receiving the notice or fails to complete the work within thirty days after receiving the notice." This language again retained a cure opportunity for the landlord and was similar to URLTA section 4.103(a). When the Iowa Senate amended the bill, however, it struck the above-quoted section 28 entirely, and at the same time added the present subsection (4) to present section A.27,[399] which, of course, is silent as to a mandatory cure opportunity.

---

this section, the tenant shall have the right to cause the defects constituting the breach to be corrected or repaired if:

a. The reasonable cost of correcting or repairing the defects is less than one hundred dollars or an amount equal to one-half of the periodic rent, whichever is greater; and

b. The tenant notifies the landlord in writing of the defects and of the tenant's intention to correct the condition at the landlord's expense; and

c. The landlord either fails to initiate action to correct or repair the defects within seven days after receiving the notice or fails to complete the work within thirty days after receiving the notice. In the event the tenant causes the defects to be corrected or repaired, the tenant shall have the duty to see that the work is done in a workmanlike manner, and the duty to submit to the landlord an itemized statement of the actual and reasonable cost or value of the work.

399. H.F. 2244 was referred to the State Government Committee of the Senate on March 15, 1978, S.J. 581, 68th Iowa G.A. (1978), and to a subcommittee composed of Rush, Chairperson, Junkins, and Ashcraft, on March 16, S.J. 593, 68th Iowa G.A. (1978). The Committee Report was filed on April 21, 1978, and it recommended that the bill be amended as provided in amendment S-5623, and, when so amended, that it be passed. S.J. 974, 68th Iowa G.A. (1978). Committee Amendment S-5623 was filed on April 21, 1978. S.J. 976, 68th Iowa G.A. (1978).

On April 28, 1978, the Senate took up H.F. 2244 and the report of the committee was adopted. S.J. 1080, 68th Iowa G.A. (1978). The text of committee amendment S-5623 is not set out in the Senate Journal. The committee amendment S-5623 was divided into divisions: A, B, and C. Among the substantive amendments included in S-5623A is a provision striking in its entirety bill section 28, which authorized repair-and-deduct for minor repairs. Bill section 28 had been added by amendment H-5544, which was discussed in note 398 *supra*. Amendment S-5623A was adopted by a voice vote on April 28, 1978. S.J. 1080, 68th Iowa G.A. (1978).

Amendment S-5623C proposed an addition to present section A.27 in new subsection (4), which sets out a repair-and-deduct remedy for minor repairs. New subsection (4) is the repair-and-deduct provision that ultimately survived and is present A.27(4). It allows the tenant to repair and deduct the cost of repairs up to one month's rent for habitability or lease violations if the tenant gave notice at least fourteen days before the rent due date.

Amendment S-5718 was offered to S-5623C and adopted by a voice vote on April 28, 1978. S.J. 1115, 68th Iowa G.A. (1978). The text of S-5718 is not in the Senate Journal. It made clear, however, that the tenant had to establish each of the conditions (a through d) in order to qualify for repair and deduction. Amendment S-5623C, as amended by S-5718, was then adopted by a voice vote on April 28. S.J. 1116, 68th Iowa G.A. (1978).

Following a number of floor amendments to other sections, the Bill was read the last time and was passed by a vote of 29 to 8. S.J. 1118, 68th Iowa G.A. (1978). All of the Senate amend-

Section A.27(4) requires the tenant to notify the landlord of the tenant's intention to repair the noncompliance at the landlord's expense and to deduct the cost on the next rent due date which is at least fourteen days thereafter. It does not require the tenant to wait fourteen days before making repairs. Had the statute required this latter type of delay, it would strongly support the implication of a cure opportunity. The apparent purpose of this deduction delay requirement is to give the landlord sufficient advance notice of the diminished rental payment upcoming so that he can adjust his financial affairs accordingly. Such advance notice could prove quite beneficial to both the landlord with one house who relies on one tenant's rental payment to meet his mortgage payment, and to the large landlord faced with a number of tenants exercising the repair-and-deduct remedy in the same month.

In sum, a mandatory cure period was carefully considered by both the Iowa House and Senate, was expressly included in the bill at two important points in the legislative deliberation, but was finally deleted in favor of a deduction delay period.

Nonetheless, a persuasive argument can be made that this analysis of the legislative history of A.27(4) proves too much, and that without an explicit statutory rejection of a mandatory cure period, such a provision should still be implied in light of the considerable body of case law supporting a cure opportunity. The deduction delay period is not necessarily inconsistent with a mandatory cure period, because the two provisions can exist side by side. It also can be argued with force that the legislature's ultimate rejection of section 28 as initially passed by the House is ambiguous with respect to the question of a mandatory cure period. The legislature clearly wanted to provide higher dollar ceilings, and it did so in A.27(4). Whether more should be read into the rejection of section 28 is debatable. It may be that the legislature thought the seven-day cure period was too short—the bill as introduced had used the fourteen-day cure period of URLTA section 4.103(a).

On the other hand, it must be conceded that the legislature's failure to provide bright line rules as to the length of a cure period supplies an important policy reason for a construction of section A.27(4) that omits any mandatory cure opportunity. With nothing more definite than "a reasonable time" to guide them, tenants would have no firm yardstick by which to know when they could safely proceed with the repairs. It must also be conceded that, because of the statutory dollar ceiling and the reality that tenants will not pay money out of their own pockets "willy-nilly" where there is a reasonable chance the landlord will promptly repair, the landlord's exposure is quite limited and abuses should rarely occur.

---

ments that passed are set forth in the composite in Senate Amendment H-6397. H.J. 2046-48, 68th Iowa G.A. (1978).

It is arguable, but the implication of a mandatory cure opportunity for the landlord seems warranted. The concern, however, that a cure requirement without bright line rules of the kind rejected in the bill originally passed by the House will inhibit tenants from utilizing the repair-and-deduct remedy cannot be dismissed. Reviewing courts should be generous to tenants when deductions are challenged on the ground that the landlord was not given a reasonable time to cure. Obviously, legislative action could provide a helpful clarification of the procedure. If a cure opportunity is contemplated, a specific waiting period should be prescribed by the legislature. In the absence of a legislative clarification of section A.27(4), the Iowa Supreme Court should not hesitate to fashion bright line rules as to the time period within which the landlord must act. A fourteen-day cure period seems an obvious choice. Not only is that the cure period afforded the landlord under the section A.21(1) termination procedure, it is the cure period suggested by URLTA section 4.103. Some confusion may also be avoided by using the same time period for both the deduction delay period and the landlord cure period.[400]

The language of section A.23 more readily allows a construction that the landlord must be afforded a reasonable opportunity to make repairs before the tenant may act. While implication of a cure period under section A.27(4) appears likely, the case is much more compelling under Section A.23. The latter section does not contain the flat dollar ceiling on such repairs imposed by section A.27(4), so the landlord's exposure is much greater. In addition, section A.23 involves what may be major structural or system repairs, the sort of repairs that may frequently require access to areas other than the tenant's apartment and may be dangerous for most tenants to make on their own. Section A.23 also speaks of deliberate or negligent failure to supply essential services, and it may be necessary for the tenant to demonstrate that she gave notice to the landlord (or attempted to do so and could not reach the landlord), and that the latter took no immediate action to correct the problem. On the other hand, because of the serious nature of the problems covered by section A.23, the reasonable deferral time required may frequently be only a matter of hours. A tenant whose dwelling lacks heat in an Iowa winter should not have to wait days for the landlord to act.

2. *Procedure under Section A.27(4)*

Section A.27 limits the general repair-and-deduct remedy by imposing a dollar ceiling on allowable deductions. Although the deduction ceiling has a potential issue or two lurking in its language, it seems incredibly straightforward compared to the maze created by the notice language.

---

400. A case can be made, however, against implying a 14-day cure period for that was the precise cure period in the legislation as introduced in the House, and subsequently rejected. *See* note 396 *supra*.

Section A.27(4)(c) limits the tenant to a deduction of the "reasonable cost of correcting the condition constituting the breach" but not to exceed one month's periodic rent. Consequently, a tenant can deduct the actual cost of a repair so long as it is reasonable and does not exceed one month's rent. The dollar ceiling of section A.27(4)(c) is imposed for each breach. A tenant could, therefore, deduct the entire month's rent for March if that amount were spent in getting the toilet fixed and then deduct the entire month's rent for April if that amount were spent plugging a leak in the roof. If the cost of fixing the toilet exceeded one month's rent, however, the deduction is limited to the one-month rental ceiling. The tenant who took the first deduction in March is precluded from taking a deduction for the balance of the cost in April. While the IURLTA dollar ceiling may frustrate a tenant's desire to make expensive repairs, it is double the amount authorized by URLTA section 4.103.

Section A.27(4) is silent as to whether the tenant who has "charged" the cost of the repairs or has otherwise become personally obligated to pay their cost can deduct the cost from his rental payment prior to his actual payment. If the landlord is exposed to a mechanic's lien as a result of the repairs, courts understandably will be reluctant to allow the tenant to deduct the "charged cost" prior to his actual payments, unless he presents the landlord with lien waivers.[401]

The knowledgeable tenant should be particularly careful to comply with the fourteen-day deduction delay requirement of section A.27(4), but the fears of some that it would prove an invidious trap for the unwary tenant should prove unwarranted. If the date the tenant gives notice is less than fourteen days prior to the next rent payment, the tenant should wait until the rent due date of the following month to deduct the cost of repairs. For instance, if the tenant gives notice on September 21, and rent is due on the first of October, the tenant will need to wait until the first of November to deduct the cost. But what happens when the unwary tenant mistakenly deducts on October 1, and the landlord sues for possession based on nonpayment of rent? If there was a noncompliance properly remediable by the repair-and-deduct remedy, and the tenant's error is the misfortune of deducting the cost one month too soon, traditional equitable principles, as outlined in the important dicta in *Dittmer v. Baker*,[402] should preclude forfeiture of the lease without affording the tenant the opportunity to pay the rent still owing in October (and then to properly deduct the repair from his November 1 payment).

Since section A.27(4) speaks of the tenant giving notice of the *intent* to correct the condition, it follows that the notice must be given prior to the

---

401. Indeed, Arizona's version of the URLTA requires the tenant to present to the landlord lien waivers before the tenant may deduct the cost of repairs from rent. ARIZ. REV. STAT. ANN. § 33-1363(a) (1974). *See also* DRAKE Note, *supra* note 57 at 419 n.79.

402. 280 N.W. 2d 398, 400 (Iowa 1979).

repair, and not just prior to the deduction. The notice need not be written.[403] Written notice, however, is always preferable as a record of giving notice, the date the notice was given, and the specifics of the notice given. Nonetheless, if the tenant has given the required notice to the landlord orally, she may deduct. In sum, the key dates in the A.27(4) procedure are as follows: the tenant must give the notice no later than the sixteenth of the month (seventeenth if the month has thirty one days; fourteenth in February) if the rent is paid on the first of the month. If notice is given later than the sixteenth in a thirty-day month or the seventeenth in a thirty one-day month, the tenant must wait until the first of the following month to deduct, although the repairs need not be similarly delayed.

What is the result when the tenant has repaired without giving any notice? Is this deduction barred? The statute is silent. If construed to provide a mandatory cure opportunity, it follows that the tenant would, as a general rule, have no right to deduct the cost of the repairs under section A.27(4). An exception is warranted, however, when the landlord had actual knowledge of the conditions causing the noncompliance, or the tenant had a reasonable belief, based on past experience, that the landlord would not repair.[404] If there is no mandatory cure period, there is no reason to bar deduction, though the failure to give notice could constitute a proper basis for deferring the time of the deduction by one month.

Section A.27(4) prohibits the tenant from repairing the condition after the receipt of a notice of the landlord's intention to terminate the rental agreement for the tenant's nonpayment of rent. It should be noted that this section precludes the tenant from having the repairs made *after* that date. If, however, the repairs have already been made at the time the tenant receives the notice, the tenant is not precluded from deducting the cost of repairs after the notice. This situation most commonly arises when the tenant has withheld part of the month's rent due to the habitability problems and thereafter utilizes the provisions of A.27(4) to have the repairs made. Obviously, the tenant would be ill-advised to proceed with repairs after receiving the notice of intent to terminate. The tenant's better course of action would be to defend the subsequent possession action based on his habitability defense, and to affirmatively counterclaim for injunctive relief to compel the landlord to make the necessary repairs.

As has been mentioned, and will be demonstrated below, the essential services repair-and-deduct remedy provided in section A.23 precludes the tenant from using that remedy together with the remedies provided in section A.21, and probably requires an election between the remedies afforded in section A.23.[405] There is no similar limitation in section A.27(4). Conse-

---

403. § A.27(4).

404. Blumberg & Robbins, *supra* note 2, at 13.

405. For a discussion of election of remedies under section A.23 see Section IV(B)(4) *infra*.

quently, the tenant who has repaired and deducted under section A.27(4) also may bring an action for damages under section A.21(2) to compensate her for the period of the landlord's noncompliance.[406] Although there would appear to be other considerations which would make the termination remedy and injunctive relief less likely when the tenant has repaired and deducted,[407] there is nothing in either section A.27(4) or section A.21 that expressly precludes such relief.

In sum, section A.27(4) repair-and-deduct represents an important new self-help remedy available to tenants. Its value lies in providing a means to obtain fairly prompt correction of minor problems at the landlord's expense. Although such problems may be minor in terms of physical repair, they often are the source of much frustration and bitterness if they go uncorrected. Its drawbacks are the tricky notice requirement and the dollar ceiling on any deduction which can be taken.

3. *Procedure under Section A.23*

The essential services repair-and-deduct remedy is available to the tenant when, contrary to either section A.15 or the rental agreement, the landlord "deliberately or negligently fails to supply running water, hot water, heat, or essential services."[408] There are two elements that must be established before a tenant can exercise this remedy. First, there must be a breach of the landlord's obligations under section A.15 or the lease with regard to the supply of running water, hot water, heat or essential services.

---

406. Indeed, the legislative history of section A.23 strongly suggests that a tenant can repair and deduct under section A.27(4) *and* sue for damages under section A.23(1)(b) or (1)(c). As originally proposed in the Iowa House, subsection (2) of what is now section A.23, stated: "If the tenant proceeds under this section, the tenant may not proceed under Section twenty-three (23) or twenty-five (25) of this Act as to that breach." This was amended by H5545B by striking "or twenty-five." H.J. 831 (1978). The section 23 referred to is IURLTA section A.21. The section 25 referred to was later struck by the Senate from the bill passed by the House, modified and adopted as present IURLTA section A.27(4). By this action, it appears that a tenant may utilize the remedies available to him under both section A.23 and section A.27(4), the general repair-and-deduct remedy. Since it would usually be duplicative for a tenant to repair and deduct under both sections, the Iowa Legislature must instead have contemplated that a tenant could sue for either damages remedy under section A.23(1)(b) or (c) and still use the repair-and-deduct remedy under A.27(4). If the proper situation arises, however, the tenant should be able to repair and deduct under both section A.23 and A.27(4) at the same time, with neither section precluding action under the other. Such a situation arises when there is plumbing work required (section A.23) as well as repairs on storm windows (section A.27(4)).

407. A tenant who has repaired and deducted the cost of fixing a leak in the roof may also have a damages claim for damage done to furniture, carpeting and so forth before the leak was fixed. It is also conceivable that a tenant might repair and deduct the cost of fixing the worst leak and initiate a suit for injunctive relief to mandate the landlord to re-roof or fix the remaining leaks. Such combined tenant action is possible under sections A.27(4) and A.21(2), but it seems likely that injunctive relief will not be readily forthcoming if the major problem has been corrected by the repair-and-deduct remedy.

408. § A.23.

Second, the landlord's breach must be negligent or deliberate.

Generally speaking, with the principal exception being the single family residence rental where the tenant pays the utility bill directly to the utility company, the landlord's failure to supply any of the three enumerated services is contrary to subsection (1)(f) of section A.15.[409] While section A.15(1)(f) is the primary statement of the landlord's obligation covered by section A.23, subsections (1)(d) (requiring the landlord to keep heating, plumbing, and other facilities in good working order), (1)(a) (compliance with building and housing codes), and (1)(b) (requiring the landlord to keep the premises in a fit and habitable condition) of section A.15, also could be breached by a landlord's failure to provide these crucial services.

The inclusion of the phrase "essential services," which is not defined in the IURLTA, demonstrates that the legislature contemplated the existence of other services which may be the subject of this repair-and-deduct remedy, yet are not included in the more specific listing of "running water, hot water, or heat." The scope of the term's coverage was rendered uncertain, however, by the Iowa legislature's deletion of electric and gas service from those enumerated by URLTA section 4.104.[410] Obviously, either of these services are covered if they constitute the dwelling unit's heat source. The deletion of these two utility services from section A.23's coverage may require the cautious tenant to turn to the general repair-and-deduct remedy in sec-

---

409. *See* text accompanying notes 302-08 *supra*.

410. URLTA section 4.104 provides:

(a) If contrary to the rental agreement or section 2.104 the landlord willfully or negligently fails to supply heat, running water, hot water, electric, gas, or other essential service, the tenant may give written notice to the landlord specifying the breach and may

> (1) take reasonable and appropriate measures to secure reasonable amounts of heat, hot water, running water, electric, gas, and other essential service during the period of the landlord's noncompliance and deduct their actual and reasonable costs from the periodic rent; or
>
> (2) recover damages based upon the diminution in the fair rental value of the dwelling unit; or
>
> (3) procure reasonable substitute housing during the period of the landlord's noncompliance, in which case the tenant is excused from paying rent for the period of the landlord's noncompliance.

(b) In addition to the remedy provided in paragraph (3) of subsection (a) the tenant may recover the actual and reasonable cost or fair and reasonable value of the substitute housing not in excess of an amount equal to the periodic rent, and in any case under subsection (a) reasonable attorney's fees.

(c) If the tenant proceeds under this section, he may not proceed under Section 4.101 or Section 4.103 as to that breach.

(d) Rights of the tenant under this section do not arise until he has given notice to the landlord or if the condition was caused by the deliberate or negligent act or omission of the tenant, a member of his family, or other person on the premises with his consent.

tion A.27(4) when gas or electrical problems curtail use of a stove, clothes dryer, washing machine, or air conditioner. The main difficulty posed by this alternative is the statutory dollar ceiling on the repair costs that can be deducted.

In addition to establishing a breach of this essential services obligation, the tenant must also establish the landlord's negligence or deliberate failure to supply the services.[411] This showing will normally be satisfied by proof that the tenant gave the landlord the required notice and opportunity to cure, and that the landlord either refused to repair or took action which failed to solve the problem.

In order to take advantage of the self-help remedy under section A.23, the tenant must give the landlord written notice of the loss of the essential service which constitutes a noncompliance with either section A.15 or the rental agreement. Section A.23 only requires specification of the breach in the notice, but tenants would be wise to further state that they intend to have the condition repaired at the landlord's expense if the landlord does not promptly repair.

The section A.23 notice requirement seems to contemplate a mandatory cure opportunity for the landlord. This requirement will normally work to the tenant's best interests, because if the notice leads to corrective action by the landlord, the tenant will have obtained the desired result without expense. Clearly, that approach is preferable to a credit that can be applied to a future rent obligation; but problems can arise when the landlord does not immediately cure. How long must the tenant wait without essential services before she can repair and deduct? Section A.23 does not attempt to provide a bright line rule, and it would be difficult to state a definite rule that would assure the flexibility needed in the variety of circumstances that could occur. It is clear, however, that a failure to supply any of these services for even a few hours can quickly become an emergency for the tenant. That reality should be the touchstone for any post-repair judicial consideration of whether the tenant gave her landlord a reasonable time to cure before having the repairs made.

There is no limitation on the dollar amount which the tenant may deduct under section A.23. The only limitation is that the deducted cost must be "actual and reasonable."[412] In contrast, the deduction under section A.27(4) has a ceiling of one month's rent. Under section A.23 the tenant may deduct allowable repair costs from rent payments until that have been fully recovered.[413] For instance, if the repair cost is $500 and rent is $350, the tenant may deduct $350 from the first month's rent (thus not paying any rent for that month) and then deduct the remaining $150 from the second month's rent, paying the landlord only $200. If the tenant were deducting

411. *Id.*
412. § A.23.
413. *Id.*

under section A.27(4), she could only deduct $350 (the amount equal to one month's rent) and could not deduct the remaining $150 from any other rent payments.

It should be noted that there is nothing in section A.23 which prevents the tenant from performing the repairs personally, although the serious nature of these emergency defects suggests that this might not be the prudent course of action. In the event that the tenant performed the repairs, she should be able to deduct the reasonable value of her services, in addition to the cost of materials. There are obvious proof problems in establishing the value of the tenant's labor, though these conceivably can be overcome by obtaining various estimates from professionals to establish a reasonable value for the work performed, or by using the minimum wage as a bottom line hourly rate.

Where the breach affects more than one tenant, as might frequently be the case in a multi-unit building, collective action by the tenants is possible. Where the repairs are expensive, as may often be the case where essential services are involved, use of the repair-and-deduct remedy by a single tenant would usually be impractical. A large sum of cash, though recoverable, would be required immediately, and little financing is available. The remedy could, however, become a reality if a group of tenants were to join together, pool their funds to pay for the repairs, and then, with their combined rental deductions, recover the cost through their rent deductions.[414]

4. *The Election of Remedies Question*

One of the principal disadvantages of section A.23 is that it may require an election of remedies. That is, if the tenant repairs and deducts under A.23(1)(a), she may be unable to sue for damages under (1)(b) or (1)(c), and vice versa. This construction is not a foregone conclusion, as a close examination will disclose.

The starting point is URLTA section 4.104, which provides three alternative remedies, each separated by the conjunction "or" in its text.[415] The URLTA text does not expressly require an election of remedies, but an election is implied by its use of "or" as the conjunction between the remedy provided in 4.104(a)(1) and 4.104(a)(2), and again between the remedy provided in 4.104(a)(2) and 4.104(a)(3). The three URLTA remedies are (1) repair-and-deduct, *or* (2) damages based on diminution in fair rental value, *or* (3) an excuse of rent during the period of the landlord's noncompliance where the tenant obtains substitute housing. This third remedy was further supplemented by section 4.104(b), which also allowed the tenant the actual and reasonable cost of the substitute housing (subject to a dollar ceiling equal to the periodic rent). Further, section 4.104(b) authorized tenant re-

414. *See* U.R.L.T.A. § 4.104, comment.

415. For the text of URLTA section 4.104, *see* note 410 *supra*.

covery of attorney's fees when the tenant properly exercised any of the three subsection (a) remedies.

As a consequence, a construction of URLTA section 4.104 requiring an election of remedies is not necessarily inconsistent with traditional remedial concepts that seek to make the injured person whole. Except when the tenant suffers consequential damages, a tenant electing to repair and deduct within a short time of the breach will be made whole upon deducting the repair costs from future rent and upon recovering his attorney's fees. If the breach does not constitute an emergency, and if there were no consequential damages, the second alternative remedy permitting recovery of damages based on partial rental abatement may qualify as a fully compensatory remedy when coupled with an attorney's fees award. Finally with the exception of a tenant who has suffered consequential damages, a tenant electing substitute housing at the landlord's expense and rent abatement on his dwelling, and who recovers his attorney's fees has been fully compensated.

The analysis is further complicated because the Iowa legislature made several modifications of URLTA section 4.104 when it enacted section A.23. First, section A.23(1)(c) substitutes a rent abatement damages remedy for the substitute housing alternative provided in URLTA section 4.104(a)(3). Second, section A.23 deletes the authorization for tenant recovery of attorney's fees contained in URLTA section 4.104(b). Third, section A.23 contains no conjunction "or" between the remedies provided in subsections (1)(a) and (1)(b).

All of these modifications are important to the argument against construing section A.23 to require an election of remedies. The new measure of damages added in section A.23(1)(c) appears essentially duplicative of the damages remedy in subsection (1)(b).[416] The elimination of the substitute housing and rent abatement option deprives Iowa tenants of a compensatory remedy with real potential, albeit one with possible headaches.[417] The elimination of the authorization for attorney's fees is particularly unfortunate as it will inhibit tenants from obtaining counsel, and will undercut the "make-whole" concept because fees will have to be deducted from the damages recovered.

These first two Iowa modifications to section A.23 belie any argument

---

416. Section 23(1)(c) authorizes retroactive rent abatement and thereby enables the tenant to recover rents paid, or a pro rata portion of the rent, which could have justifiably been withheld but were not. Section 23(1)(b) authorizes recovery of damages ("based upon the diminution in the fair rental value of the dwelling unit") from the time of the initial breach. Part II of this Article to be published in a subsequent issue of the *Drake Law Review* will discuss some of the evidentiary problems tenants face in proving benefit-of-the-bargain measure of damages and the percentage diminution approach to damages approved by some courts. *See* Academy Spires v. Brown, 111 N.J. Super. 477, 268 A.2d 556 (Dist. Ct. 1970); Pugh v. Holmes, 253 Pa. Super. at ___, 405 A.2d at 909-10. Both A.23(1)(b) and (1)(c) appear to offer damages measured on the percentage diminution approach.

417. *See* Kalish, *supra* note 102, at 651.

that each of the three remedies is in and of itself a make-whole remedy. Particularly where the tenant had to live without essential services for a significant length of time, an election of remedies which allows the tenant to repair and deduct but bars a recovery of other damages would leave the tenant without a complete remedy. Even if the essential services were procured, the tenant nevertheless had to contend with a serious breach for some time, and should be compensated. Therefore, the third modification, the deletion of the conjunction "or" after the first alternative (repair-and-deduct), may take on significance.[418] The author of the Drake Note argues that this language change implies that the tenant may repair and deduct, *and* elect one of the two damages remedies.[419]

Such a construction of section A.23 would be consistent with the IURLTA treatment of the general repair-and-deduct remedy. Where the tenant utilizes the section A.27(4) repair-and-deduct remedy, he can still sue for damages under section A.21(2) or even under section A.23(1)(b) or (1)(c).[420] Such a construction is, however, arguably inconsistent with section A.23(2), which flatly bars the tenant from proceeding under section A.21 if the tenant has exercised rights under A.23. If a tenant who has repaired and deducted under section A.23 cannot sue for damages under section A.21, she should likewise be precluded from suing for damages under section A.23, or so the argument goes.

There is a rebuttal, however. The damages formula of section A.21(2) provides a more liberal measure of damages than either section A.23(1)(b) or (1)(c);[421] an attorney's fee recovery is also available under section A.21(2)[422] whereas none is authorized by section A.23; and, finally, termination is authorized by section A.21(1) but not by section A.23. Consequently, it is con-

---

418. The Iowa Supreme Court has held that when a statute has been passed omitting a portion proposed to the legislature, that statute must be construed so as not to include the omitted portion. Chelsea Theater Corp. v. City of Burlington, 258 N.W.2d 372, 374 (Iowa 1977). Unlike the statute in *Chelsea Theater*, however, the "or," which was deleted from section A.23(1)(a), was struck by the original drafters of H.F. 2244, and not by the legislature during its deliberations on the bill. Consequently, one suspects the court would be inclined to give less weight to this change from the URLTA. This change of conjunctions, however, when coupled with the other Iowa modifications to URLTA § 4.104, may make the difference, as the text discusses.

419. *See* DRAKE Note, *supra* note 57, at 415-16.

420. *See* note 406 *supra*.

421. Section A.21(2) does not specify the measure of damages available to the tenant. The *Mease v. Fox* court, however, expressly approved benefit of the bargain damages *plus* incidental and consequential damages incurred in securing "cover." 200 N.W.2d at 797 (emphasis added). *See also* Blumberg & Robbins, *supra* note 2, at 24-26. Arguably, by expressly stating the measure of damages in A.23(1)(b) and (1)(c), the tenant invoking those provisions would be limited to the damages authorized and, consequently, unable to recover incidental and consequential damages.

422. Indeed, landlord refusal to repair should be persuasive evidence that the noncompliance is willful—the necessary predicate for an award of attorney's fees under section A.21(2).

ceivable that the Iowa legislature did not intend to preclude a tenant from using both the section A.23 repair-and-deduct remedy and one of the limited damages remedies of section A.23, even though it clearly did preclude the tenant who repairs and deducts under section A.23 from using any of the tough section A.21 remedies.

This rebuttal argument is further bolstered by the availability of the damages remedies of sections A.26 and A.36 in some instances where section A.23 is also applicable. For instance, where the failure to supply an essential service is the result of an intentional utility cutoff by the landlord, the remedies provided in section A.26 supplement those available under section A.23.[423] If the landlord's utility cut-off was also retaliatory, the tenant can further choose from additional remedies under section A.36.[424]

The essential services repair-and-deduct remedy may prove to be an important tool for better housing, particularly where used collectively. It provides a mechanism by which tenants can acquire the funds to tackle major habitability problems at the landlord's expense. The uncertainty as to the length of the landlord's cure period and to whether an election of remedies is required are its principal limitatons.

C. *Rent Withholding*

Neither Act expressly authorizes rent withholding as a remedy for habitability violations, but this third self-help remedy is implicit under both pieces of legislation. The remedy is an important one, for it conforms Iowa landlord-tenant law with human nature and consumer law[425] by allowing the tenant to stop paying rent without penalty until the dwelling unit is restored to habitability standards. Like the consumer, the tenant who utilizes this remedy risks having to defend his action in court, because a landlord who disputes the tenant's action may file an action for possession based on nonpayment of rent. But this threat (and the spectre of eviction) is mitigated greatly by allowing the tenant the opportunity to defend the possession action by asserting habitability defenses or claims. Both Acts offer this opportunity, recognizing that full rent cannot be owing where habitability violations exist. Even so, few tenants would exercise this remedy were they to run the risk of over-deduction, as there is almost always some uncertainty as to the precise damages that are suffered as a result of a particular defect. The tenant who correctly deducts because of habitability defects, but who deducts too much, is protected because he is afforded an opportunity to cure his payment default following judicial determination of the precise amount owing, and, upon doing so, can avoid a judgment for possession.

The remedy is made viable by these procedural protections, even

423. *See* U.R.L.T.A. § 4.104, comment.
424. *Id.*
425. U.C.C. § 2-711.

though they activate only when litigation results. In addition, there are built-in procedural mechanisms that should minimize any potential for tenant abuse of the remedy. The IURLTA expressly provides for rent escrow during the pendency of the litigation and for the award of attorney's fees where the tenant has asserted a habitability defense in bad faith.[426] If, as is suggested, the IMHP-RLTA is construed to allow rent withholding, a rent escrow procedure undoubtedly will be implied as well.

The above sketch of the rent withholding remedy and its availability as a defense to an action for possession warrants closer scrutiny because the conclusions stated are not self-evident from a casual reading of the statutory text. There are four major issues: (1) The availability of habitability and other defenses in the Iowa summary action for possession; (2) the availability of a cure opportunity for the tenant who properly deducts rent but is judicially determined to have deducted too much; (3) the flexibility of the IURLTA section A.24 rent escrow provision and its constitutionality if construed to require escrow of accrued rent; and (4) the availability of an attorney's fees award to the landlord where the tenant's rent withholding defense/counterclaim is judicially rejected.

1. *Assertion of the Habitability Defense in the Landlord's Summary Action for Possession*

First, the question of rent withholding must be addressed. In a very real sense, this remedy is the very heart of the new Acts. A gross overstatement? Not really. The tenant whose apartment contains habitability violations may choose either self-help remedies (termination, repair-and-deduct, and rent withholding) or judicial remedies. For a number of reasons, the most prominent of which is probably the expense, litigation will usually be the remedy of last resort. For the tenant who does not want to terminate and move, the repair-and-deduct and rent withholding remedies are the most promising; but they hold promise only to the extent that tenants who properly invoke these remedies (and thereby pay less than the rent originally agreed upon) are protected from eviction on the ground of nonpayment of rent. Such protection seems a necessary concomitant of the IURLTA sections that expressly authorize the repair-and-deduct remedy.[427] This same protection likewise should be available where rent withholding is properly exercised due to both Acts' recognition of the implied warranty of habitability and rejection of the doctrine of independent covenants. Iowa tenants receive this protection by virtue of the new legislation and the common law warranty of habitability, but the analysis which supports this conclusion is complicated by the Iowa legislature's failure to amend Iowa Code chapter 648 on Forcible Entry or Detention of Real Property (FED), the statutes

426. § A.24.
427. §§ A.23, .27(4). *See also* Section IV(B) *supra*.

which regulate the summary action for possession. The most troublesome provision of the Iowa FED statute is section 648.19, which provides that a summary action for possession "cannot be brought in connection with any other, nor can it be made the subject of counter-claim."[428]

A brief discussion of the Iowa FED procedure is warranted because this is one area in which the substantive law is profoundly affected by the procedural law's constraints. Although there are six grounds which can form the basis for an FED proceeding seeking possession under section 648.1,[429] the three which are most applicable to tenants and most commonly relied upon by landlords are: (1) When the tenant holds over; (2) when the tenant fails to pay rent when due; and (3) when the tenant holds contrary to the lease. Typical of such forcible entry and detainer statutes, the Iowa FED statutes afford the landlord a special civil remedy—summary process to recover possession.[430] Without such a remedy the only alternative to self-help methods of regaining possession is the statutory or common law action of ejectment,[431] a slow, cumbersome remedy. Self-help, with the attendant risks of violence and injury, once was common when a landlord was faced with the prospects of a costly delay in a nonpayment of rent case.[432] The landlords' concerns were met by the extension of coverage of the FED statutes to cover the holdover and nonpayment situations,[433] which thereby afforded the landlord an expeditious, simple and inexpensive remedy.

Almost all possession actions at the present time are brought under the FED statutory procedure because it is by far the quickest judicial procedure to accomplish what the landlord wants—the eviction of the tenant as soon as possible. The Iowa FED procedure for possession is a summary proceed-

---

428. IOWA CODE § 648.19 (1981).

429. Iowa Code section 648.1 provides:

A summary remedy for forcible entry or detention of real property is allowable:

1. Where the defendant has by force, intimidation, fraud, or stealth entered upon the prior actual possession of another in real property, and detains the same.
2. Where the lessee holds over after the termination of his lease.
3. Where the lessee holds contrary to the terms of his lease.
4. Where a defendant continues in possession after a sale by foreclosure of a mortgage, or on execution, unless he claims by a title paramount to the lien by virtue of which the sale was made, or by title derived from the purchaser at the sale; in either of which cases such title shall be clearly and concisely set forth in the defendant's pleading.
5. For the nonpayment of rent, when due.
6. When the defendant or defendants remain in possession after the issuance of a valid tax deed.

430. IOWA CODE ch. 648 (1981).

431. IOWA CODE ch. 646 (1981)

432. A. BERNEY, J. GOLDBERG, J. DOOLEY & D. CARROLL, LEGAL PROBLEMS OF THE POOR 321-22 (1975).

433. The early FED statutes provided a summary proceeding for recovery of land to restore a peaceful possession which had been disturbed by force, or which was withheld from the rightful possessor by force. *Id. See* IOWA CODE § 648.1(1) (1981).

ing, given precedence in hearing, and one in which only the right to possession can be litigated. The time span of a normal civil action is reduced by the following FED procedural techniques:[434] (1) The final hearing on the landlord's claim can be heard as rapidly as the sixth day after service of the FED petition,[435] rather than some time (typically, months) after the normal twenty-day period within which the party has to appear and plead; (2) FED actions "shall be accorded reasonable priority for assignment to assure their prompt disposition," over all other pending civil actions;[436] (3) the defendant's right to counterclaim is prohibited;[437] and (4) FED actions are tried as equitable actions with no right to jury trial.[438]

The limitation on the number of issues that could be litigated in the FED proceeding made sense in the context of substantive law which was based on the doctrine of independent covenants, because the tenant's obligation to pay rent was in no way excused by his landlord's breach of, for example, a covenant to repair. However, as the substantive law of landlord-tenant has evolved to view the residential lease as a contract containing an implied warranty of habitability interdependent with the covenant to pay rent, the new substantive law was often frustrated by FED statutes limiting the issues cognizable in the action for possession. The rare tenant who acted upon advice of counsel would know he could initiate an affirmative action for damages or rent abatement on a breach of warranty of habitability theory and avoid the FED issue limitation problem entirely. Litigation, however, is expensive and not lightly undertaken. The far more typical scenario found the tenant reaching the attorney's office after being served with a notice to quit because the tenant withheld rent. Even when the tenant had a bona fide claim that there were serious habitability violations on the premises, some courts construed their FED statutes to preclude tenants from raising them as a defense in the FED action. Although in theory the tenant could still bring a separate suit for damages, the impact of such rulings on tenants was devastating. If the tenant could not justify his withholding of rent in the FED proceeding, he would soon find himself on the street. This spectre of eviction, with all the attendant costs, anxieties and inconvenience in a tight housing market, gave the landlord enormous negotiating leverage with regard to the tenant's habitability claims.

---

434. *See generally* DRAKE Note, *supra* note 57, at 430 n.148 (outlining the minimum amount of time to obtain a judgment for possession). The minimum 14-day time frame (from the service of the right to cure notice to the judgment) has been reduced to 10 as a result of the 1981 amendment to section 648.3. The landlord no longer is required to give both a right to cure notice (under section A.27(2) or section B.25(2), whichever is applicable) and a notice to quit under section 648.3. When the landlord has given the right to cure notice, section 648.3, as amended, allows her to commence the FED action without giving a three day notice to quit.

435. IOWA CODE § 648.5 (1981).

436. *Id.* § 648.16.

437. *Id.* § 648.19.

438. *Id.* § 648.5.

Another characteristic of the FED action for possession merits mention. Iowa case law, consistent with that of many jurisdictions, has viewed the proceeding as one for the forfeiture of a leasehold and, therefore, equitable in nature.[439] As a consequence, a number of equitable defenses have emerged in the Iowa cases.[440] In practice, this has meant that since the ten-

---

439. Indeed, section 648.5 specifically states that the FED action "shall be tried as an equitable action." IOWA CODE § 648.5 (1981).

440. An important equitable doctrine available to a tenant defending a landlord's possession action is the maxim that "equity abhors a forfeiture." Steele v. Northup, 259 Iowa 443, 451, 143 N.W.2d 302, 307 (1966); Bentler v. Poulson, 258 Iowa 1008, 1012, 141 N.W.2d 551, 553 (1966); Kilpatrick v. Smith, 236 Iowa 584, 593, 19 N.W.2d 699, 703 (1945). Compensation is the preferred remedy. Mathews v. Gilliss, 1 Iowa 242, 255 (1855). A party seeking forfeiture must show that the equities are clearly on his side before relief will be awarded. Roshek Realty Co. v. Roshek Bros. Co., 249 Iowa 349, 358, 87 N.W.2d 8, 13 (1945). "Forfeiture" has been defined as a deprivation or destruction of a right as a consequence of the noncompliance with some obligation or condition. Connellan v. Federal Life & Cas. Co., 134 Me. 104, ___, 182 A.13, 14 (1935). *See also*, State v. Cowen, 231 Iowa 1117, 1122-23, 3 N.W.2d 176, 179-80 (1942). Thus, forfeiture of a leasehold means that the tenant has lost all rights in the leased premises conferred upon the tenant by the lease.

The Iowa Supreme Court denied the landlord forfeiture of the leasehold in the following situations: landlord failing to provide provable delivery of a demand for rent, Roshek Realty Co. v. Roshek Bros. Co., 249 Iowa 349, 87 N.W.2d 8 (1945); landlord allowing the breach complained of to occur when he could have easily prevented it, landlord accepting rent for a lengthy period after he learned of the breach, and retaliation. Bentler v. Poulson, 258 Iowa 1008, 141 N.W.2d 551 (1966).

Bentler recognized that the corollary to the equity abhors a forfeiture doctrine is the rule that substantial compliance with the terms of a lease will avoid a forfeiture. A minor breach of the lease will not justify a forfeiture. *Id.*

A third equitable maxim is the clean hands doctrine. The maxim states that "he who would come into equity must come with clean hands." Sisson v. Janssen, 244 Iowa 123, 130, 56 N.W.2d 30, 34 (1952). The clean hands doctrine is based on conscience and good faith. *Id.* It goes beyond condemnation of acts which are violative of statutes or malum in se. *Id.* Thus, it has been held that equity will refuse to aid a party who has been guilty of inequitable conduct in the matter with relation to which he seeks relief. Boss Hotels Co. v. City of Des Moines, 258 Iowa 1372, 141 N.W.2d 541, *cert. denied*, 385 U.S. 852 (1966).

The clean hands doctrine has been invoked to deny relief to a person who has ratified or acquiesced in the complained of wrong. Liken v. Schaffer, 64 F. Supp. 432, 442 (N.D. Iowa 1946). Thus, when a landlord knows that a breach by the tenant is occurring or is about to occur and does nothing, equity will not grant relief to the landlord. Bentler v. Poulson, 258 Iowa at 1012, 141 N.W.2d at 553 (Iowa 1966). The factual situations to which the ratification and acquiescence theory of the clean hands doctrine apply are very similar to those which would support a defense of estoppel.

There are two factors which limit the use of the doctrine. First, it may be invoked only to prevent affirmative equitable relief such as an award of possession. Sisson v. Janssen, 244 Iowa at 131, 56 N.W.2d at 34. Thus, it may not be used in an action for rent. Second, the clean hands doctrine is not a favorite of the courts. Butler v. Butler, 253 Iowa 1084, 1125, 114 N.W.2d 595, 619 (1962).

The equitable maxim that he who seeks equity must do equity, a corollary of the clean hands doctrine just discussed, is also available to the tenant defending a possession action. The doctrine requires all persons seeking equitable relief (e.g. possession) to accord or, offer to accord, other parties all of their equitable rights regarding the subject matter of the action. City

ant's normal procedural rights have been reduced, the courts require strict compliance by the landlord with all the FED statutory requirements, particularly with regard to the sequence and time of notice,[441] form and service of notice,[442] and form and substance of the petition.[443]

The question of issue limitation in the FED proceeding was not eliminated by the enactment of the IURLTA and the IMHP-RLTA. In passing the two new comprehensive pieces of legislation, the legislature left the FED statutes completely intact. There is nothing inconsistent between the FED summary remedy and the IURLTA or IMHP-RLTA when the landlord's claim for possession is undisputed. A serious problem develops, however, when the tenant wants to assert his habitability claims and defenses in the FED action for possession. Does Iowa Code Section 648.19 preclude him from doing so?

The short answer is "no" under both Acts. The tenant can set up habitability defenses in the landlord's FED action for possession, even if the defenses necessarily abort the summary nature of the proceeding in every instance in which such defenses are raised.[444] The issue is one of statutory construction, the resolution of which requires rather elaborate analysis of both Acts. As will be seen, the potential statutory conflict is resolved much more directly under the IURLTA than under the IMHP-RLTA.

The key IURLTA section is A.24(1), which provides that the tenant may counterclaim in the landlord's action for possession or rent for any amount which he may recover under the rental agreement or the Act, and which provides that the tenant may set off any such recovery as a defense to

---

of Des Moines v. Harvey, 243 N.W.2d 606 (Iowa 1976); Myers v. Smith, 208 N.W.2d 919 (Iowa 1973). The maxim is limited to conduct in dealings between the parties to the controversy. Myers v. Smith, 208 N.W.2d 919 (Iowa 1973). *See also* 27 Am Jur. 2d, *Equity* § 133 (1966).

441. Warren v. Yocum, 223 N.W.2d 258 (Iowa 1974); McRobert v. Bridget, 168 Iowa 28, 149 N.W. 906 (1914).

442. Murphy v. Hilton, 224 Iowa 199, 275 N.W. 497 (1937). In that case, a 30-day notice was held ineffective to terminate a lease. The notice told the tenant to vacate 30 days from the date of the notice. Unfortunately for the landlord, the notice was dated the day before the service, thus giving the tenant only 29 days' notice.

443. *Id.*

444. An FED action based on holdover, nonpayment of rent, or breach of the lease can be brought as a small claims action. IOWA CODE § 631.(2) (1981). Civil actions for a money judgment where the amount in controversy is $1,000 or less, exclusive of interest and costs, can also be brought as a small claim. *Id.* § 631.1(1). *See also* Peoples Trust & Savings Bank v. Armstrong, 297 N.W.2d 372, 373 (Iowa 1980). Iowa Code section 631.8(4) outlines the options for the court when a counterclaim is filed in a small claims action in a greater amount than that of a small claim: "The court shall either order such counterclaim . . . to be tried by regular procedure and the other claim to be heard under this division, or order the entire action to be tried by regular procedure." *Id.* As shall be discussed below, *see* notes 445-72 and accompanying text *infra*, the tenant's counterclaim is inextricably linked to the action for possession and, therefore, both would necessarily have to be tried in district court under regular procedure when the tenant's counterclaim exceeds $1,000. *E.g.*, Wilson v. Iowa District Court, 297 N.W.2d 223 (Iowa 1980).

the landlord's claim for rent.[445] It further provides that "if rent does not remain due after application of this section, judgment shall be entered for the tenant in the action for possession."[446] Approval of rent withholding as a self-help remedy is implicit in section A.24. This conclusion is further supported by section A.2(2)(c) which provides that one of the three purposes of the Act is to "insure that the right to the receipt of rent is inseparable from the duty to maintain the premises." Section A.24 is a verbatim enactment of URLTA section 4.105, which makes particularly relevant the comment to 4.105. The comment states that the section "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."[447]

To the extent that there is irreconciliable conflict between Iowa Code section 648.19 and sections A.24(1) and A.2(2)(c) of the IURLTA, the latter statutes control.[448] As will be developed in the treatment of this issue under the IMHP-RLTA, at least with regard to habitability defenses, there is sound precedent for a construction of section 648.19 that allows assertion of such defenses without even reaching the impact of section A.24 on Iowa Code section 648.19. Finally, there is the important dicta in the recent Iowa case of *Dittmer v. Baker*[449] concerning section A.24(1): "Under this section, even if the tenant overdeducts rent, the tenant will be able to remain in possession 'if he is willing and able to meet his obligation to pay the net rental amount due.' "[450] Obviously, the court need not reach the over-deduction question if the tenant cannot withhold or deduct rent under any circumstances.

Iowa Code section 648.19 looms as a more formidable obstacle to rent

---

445. Section A.24 provides:

1. In an action for possession based upon nonpayment of the rent or in an action for rent where the tenant is in possession, the tenant may counterclaim for an amount which the tenant may recover under the rental agreement or this chapter. In that event the court from time to time may order the tenant to pay into court all or part of the rent accrued and thereafter accruing, and shall determine the amount due to each party. The party to whom a net amount is owed shall be paid first from the money paid into court, and the balance by the other party. If rent does not remain due after application of this section, judgment shall be entered for the tenant in the action for possession. If the defense or counterclaim by the tenant is without merit and is not raised in good faith the landlord may recover reasonable attorney's fees.

2. In an action for rent where the tenant is not in possession, the tenant may counterclaim as provided in subsection 1, but the tenant is not required to pay any rent into court.

446. *Id.*

447. *See* U.R.L.T.A. § 4.105, comment.

448. Iowa Code § 4.8 (1981) (for text of this section, *see* note 81 *supra*). *See also* Llewellyn v. Iowa State Commerce Comm'n, 200 N.W.2d 881, 884 (Iowa 1972).

449. 280 N.W.2d 398 (Iowa 1979).

450. *Id.* at 400 (quoting 63 U. Ky. L.J. 1046, 1065 (1975)).

withholding under the IMHP-RLTA, because the Iowa legislature omitted URLTA section 4.105 (section A.24) and the IURLTA additional third purpose, section A.2(2)(c), from the IMHP-RLTA. On the other hand, there is one IMHP-RLTA section not found in the IURLTA and another with significant modifications from its IURLTA counterpart which support a construction allowing tenants to assert habitability defenses in the action for possession. Most importantly, the IMHP-RLTA's codification of the implied warranty of habitability in section B.16 supports this construction.

Section B.12, which has no IURLTA counterpart, provides that "[a] rental agreement shall . . . not permit the receipt of rent, unless the landlord has agreed to comply" with the habitability obligations imposed by section B.16(1). The IURLTA, as amended and passed by the Iowa House, contained a section 12 identical to section B.12. In a Senate amendment to the House bill, subsequently concurred in by the House, this section 12 was struck.[451] On the same day, however, the Senate also amended the bill by adding a third purpose to the IURLTA (present a section A.2(2)(c)).[452] The section A.2(2)(c) language[453] is stronger than the B.12 language, but the same result is mandated by both. The tenant is clearly entitled to withhold rent if the rental agreement does not obligate the landlord to comply with section B.16(1). It is a very small step to construe section B.12 as authorizing the withholding of rent when the rental agreement requires compliance with section B.16, and the condition of the dwelling unit places it in noncompliance with both section B.16 and the rental agreement. Section B.12 is closely patterned after URLTA section 1.404.[454] The comment to that section states that the landlord's habitability obligations and the tenant's rights and remedies under the Act "cannot be defeated or thwarted by the assignment of rents."[455] If section B.12 contemplates that an assignee will always be subject to the tenant's claims and defenses to the landlord's claim for rent, surely the landlord is subject to such claims and defenses, also.

The final, and perhaps dispositive, argument that the mobile home park tenant can assert habitability-related defenses and counterclaims in an FED action for possession is based on the total concept of the warranty of habitability. The case of *Mease v. Fox*[456] is the appropriate starting point. There, the Iowa Supreme Court held that a breach of an implied warranty of habit-

---

451. *See generally* note 399 *supra* for the legislative history of H.F. 2244. Section 12 of the bill was struck in its entirety in the Senate by Senate amendment S-5623A. Amendment S-5623A was adopted by a voice vote on April 28, 1978. S.J. 1080, 68th Iowa G.A. (1978).

452. This language was added by floor amendment S-5702A, which was adopted by a voice vote of the Senate of 23 to 20. S.J. 1116-17.

453. *See* text accompanying notes 447-51 *supra*.

454. URLTA section 1.404 provides: "A rental agreement assignment, conveyance, trust deed or security instrument may not permit the receipt of rent free of the obligation to comply with section 2.104(a)."

455. *See* U.R.L.T.A. § 1.404, comment.

456. 200 N.W.2d 791 (Iowa 1972).

ability by the landlord would constitute a defense to an action for rent.[457] Although not expressly within the holding, it seems logical that such a breach would also be a defense in an action for possession based upon nonpayment of rent.[458] The dispositive issue in the action for rent is the same as in the possession action. Namely, is the landlord entitled to any rent which has not been paid?

A number of leading state courts have so held. It was based on this reasoning that the Pennsylvania Supreme Court recently held, in *Pugh v. Holmes*,[459] that a breach of the "implied warranty of habitability may be asserted as a defense" to the action for possession.[460] "If the landlord totally breached the implied warranty of habitability, the tenant's obligation to pay rent would be abated in full [and] the action for possession would fail" because no rent would be unpaid.[461] "If there ha[s] been a partial breach of the warranty, the obligation to pay rent would be abated in part only."[462] In the situation where the landlord's breach is partial, "judgment for possession will be denied if the tenant agrees to pay that portion of the rent not abated."[463]

The California Supreme Court's 1974 decision in *Green v. Superior Court*[464] is the landmark decision. California apparently did not have a statutory limitation barring the assertion of counterclaims in the FED action for possession, but such a limitation had developed under California case law.[465] The landlord contended that in order to preserve the summary nature of the FED proceeding, it was necessary to foreclose the tenant from utilizing a breach of warranty defense.[466] The Court in *Green* concluded that once it is recognized that "the tenant's obligation to pay rent and the landlord's warranty of habitability are mutually dependent"—which *Mease* held and which has been codified in IURLTA sections A.24 and A.2(2)(c) and arguably in IMHP-RLTA section B.12—"the landlord's breach of such warranty is directly relevant" to the question of possession.[467] "If the tenant can prove such a breach [of warranty, then] his nonpayment of rent [can be] justified," as no rent, or at least less than the agreed rent, is due and owing.[468]

Consequently, a characterization of the breach of the IMHP-RLTA

---

457. *Id.* at 796.
458. See DRAKE Note, *supra* note 57 at 424 n.107.
459. 253 Pa. Super. 76, 405 A.2d 897 (1979).
460. *Id.* at 907.
461. *Id.*
462. *Id.*
463. *Id.*
464. 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974).
465. *Id.* at ___, 517 P.2d at 1178, 111 Cal. Rptr. at 717.
466. *Id.*
467. *Id.*
468. *Id.*

warranty of habitability as a defense rather than a counterclaim and setoff, should enable Iowa mobile home park tenants to avoid the bar of Iowa Code section 648.19 altogether. This approach would be equally applicable to the Iowa residential rental situation and would be a sound basis for avoiding a construction of IURLTA section A.24(1) overriding section 648.19 but for the breadth of A.24's authorization of tenant counterclaims. The tenant is not limited to habitability-related defenses and counterclaims by section A.24(1). Rather, she can assert any counterclaim based on either the rental agreement or the Act,[469] and set up any recovery as a defense to the action for possession. To the extent that even with a *Green-Holmes* construction, section 648.19 conflicts with section A.24, the IURLTA provision will control as the later statute.

A corollary issue is whether the new legislation also overrides section 648.19 so that landlords can assert any claims for back rent or damages they might have in the FED action for possession. Section A.24 holds no answer, but the IURLTA makes clear in sections A.32 and section A.34(3) that a landlord may seek damages as well as possession for the same breach. The IURLTA does not, however, state that the landlord can seek both remedies in the expedited FED action. In contrast, the language of IMHP-RLTA section B.30(2) is certainly broad enough to permit a construction that mobile home park landlords can seek possession, back rent and damages in the summary FED action. Section B.30(2) provides that "[n]otwithstanding Section 648.19, if the tenant remains in possession . . . after expiration of the term . . . or its termination, the landlord may bring an action for possession and recover actual damages."

A construction of section B.30(2), however, allowing the landlord to assert a damages claim in the summary FED action,[470] might very well run afoul of the Constitution. The Oregon FED procedure's speedy trial provisions were upheld in *Lindsey v. Normet*, but the Supreme Court emphasized the issue in such litigation "is simply whether he has paid or held over."[471]

---

469. *See* DRAKE Note, *supra* note 57, at 425.

470. If section B.30(2) is construed to allow the landlord to assert a claim for damages in the FED action, the principle of congruency should require a construction of Iowa Code section 648.19 which would allow mobile home park tenants to set up any defenses or counterclaims they might have. Due process and equal protection of law may also require such a construction. In *Lindsey v. Normet*, 405 U.S. 56 (1972), the Court sustained the Oregon FED statute, which restricted the issues in the summary possession action to whether the tenant owed rent and had honored the covenants he had assumed, against constitutional challenge. It was clearly important to the Court in *Lindsey* that the Oregon statute's limitations of issues provision imposed what the Court perceived to be equal burdens on landlords and tenants. The Court emphasized that while the tenant was barred from raising claims in the Oregon FED action (to the effect that the landlord had failed to maintain the premises), the landlord was "also barred from claiming back rent or asserting other claims against the tenant." *Id.* at 65-66.

471. 405 U.S. at 64-65. The Oregon FED procedure gave the tenant "not less than two or more than four days" after service of summons to go to trial. *Id.* at 59 n.3; OR. REV. STAT. § 105.135 (1979). There could be no continuance for more than two days unless the tenant posted

The *Lindsey* rationale suggests the Court would look with disfavor on a statutory scheme that would allow a landlord's claim for back rent or damages to be tried on the sixth day after service of the petition as the issues in such cases are seldom simple. Despite the divergent language of the pertinent IURLTA and IMHP-RLTA provisions, a harmonizing construction does emerge which avoids the due process issue latent in section B.30(2) and represents an equitable balance of tenant and landlord interests.

It is proposed that the summary FED procedure remain, at least at the time of commencement of suit, limited to actions for possession. In those cases in which the tenant defends or counterclaims raising habitability or other claims, however, the landlord should be able to amend his petition and seek back rent and damages in the same action. If either the counterclaim filed by the tenant or the landlord's amended claim for back rent and damages exceed the dollar limits on small claims court jurisdiction, then the action would be governed by regular district court procedure.[472]

This construction satisfies the landlord's overriding priority of prompt possession in the uncontested case, and protects the tenant from the spectre of a quick default money judgment. In those actions for possession in which the tenant raises habitability or other defenses, the action loses its summary nature. Since the rent escrow procedure is available to protect the landlord during the pendency of the litigation, there is no reason for not trying the case under normal procedure. If normal procedure is followed, it is clearly in the interest of the parties and the administration of the courts to allow the landlord to bring in his back rent and damages claims, and thereby enable the court to dispose of the entire controversy in one action.

2. *Protection for the Tenant Who Withholds Too Much*

Having demonstrated that tenants can withhold rent under both Acts and can assert habitability-related defenses in any resultant FED action for possession, the next consideration is the effect on the action for possession when the trial court concludes that the landlord breached the warranty of habitability, but that the amount deducted or withheld from rent by the tenant was in excess of that warranted by the breach. The IMHP-RLTA does not even consider the issue. The IURLTA only addresses the converse situation, when the court has determined that there has been a breach and that, after a set off of tenant damages against any valid rent claims, a net amount is due the tenant. In that situation, section A.24(1) explicitly pro-

---

security. 405 U.S. at 59 n.3; OR. REV. STAT. § 105.410 (1979). Iowa Code Section 648.5 provides that the landlord's petition and the notice of hearing shall be served on the tenant "at least five days prior to the date set for hearing." *See* text accompanying note 435 *supra*. Consequently, while the Iowa FED procedure is slightly more protective of the tenant than the Oregon FED procedure considered in *Lindsey*, the difference is miniscule and certainly is not sufficient to permit speedy trial of landlord claims for damages and back rent.

472. *See* note 444 *supra*.

vides: "If rent does not remain due after application of this section, judgment shall be entered for the tenant in the action for posession."[473] The legislative silence of both Acts means the issue will be resolved by judicial craftsmanship. There is a substantial body of case law that supports a conclusion that the tenant will be able to retain possession when he has mistakenly withheld too much, as long as he is prepared to promptly pay the balance held to be owing. Such a construction has been forecast by the Iowa Supreme Court in *Dittmer v. Baker*,[474] and is in keeping with equitable principles developed in Iowa FED cases,[475] with the spirit of the right to cure nonpayment recognized in sections A.27(2) and B.25(2),[476] and with *Javins v. First National Realty Corp.*,[477] *Pugh v. Holmes*,[478] and *Green v. Superior Court*.[479]

Before turning to the legal analysis, a few words on the practical context of this issue will establish its importance. A resolution of this issue allowing tenants the opportunity to cure after trial is absolutely critical to the self-help rent withholding remedy, because there are, at present, virtually no standards, either in the statutes or case law by which the tenant can reliably determine how much he can properly deduct. Quite frankly, at this early stage of the law's development, all are guessing when it comes to determining the value of habitability violations.

The following example is typical. The landlord has brought an FED action for possession based upon nonpayment of rent when the tenant withheld one month's rent due to defective plumbing. Assume further that the court found that the landlord, in fact, breached section A.15 of the IURLTA, but the amount which the tenant may recover for the breach is $20 less than the amount of rent withheld. In this situation, application of section A.24 leaves $20 owing by the tenant. The landlord argues that since there is still "rent due," he should be awarded possession.

The emerging case law, as exemplified by *Javins*, *Green* and *Holmes*, rejects the landlord's position. Each case holds that in the partial breach situation where part of the tenant's rental obligation has been suspended but the other part of the unpaid back rent is owed to the landlord, no judgment for possession should issue if the tenant agrees to pay the partial rent found to be due. Only if the tenant refuses to pay the partial amount will judgment for possession be entered.[480]

---

473. § A.24(1).

474. 280 N.W.2d 398 (Iowa 1979).

475. *See* note 440 *supra*.

476. Both Acts provide that when rent is unpaid when due, the landlord can terminate the rental agreement only if he has given the tenant a right to cure notice and the tenant has failed to pay the rent within the three-day cure period. §§ A.27(2), B.25(2).

477. 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

478. 253 Pa. Super. 76, 405 A.2d 897 (1979).

479. 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974).

480. In *Javins v. First Nat'l Realty Corp.*, 428 F.2d at 1082, the court stated:

The Iowa Supreme Court has declined at least one opportunity to address this and other issues relevant to common law defenses in FED cases. Although the court dismissed the appeal in *Dittmer v. Baker*[481] on the ground that discretionary review was improvidently granted, it seized the opportunity to provide some guidance on the over-deduction issue. The court noted that section A.24(1) had recently been enacted as part of the IURLTA, and quoted it in its entirety, then added that the section was said to give tenants a great deal of leverage to force landlords to make repairs.[482] The court finally commented that under that section, "even if the tenant over-deducts rent, the tenant will be able to remain in possession 'if he is willing and able to meet his obligation to pay the net rental amount due.' "[483] One will seldom find more definitive dicta.

In addition to *Javins, Green, Holmes,* and *Dittmer,* strong support for affording the tenant the right to cure following the court's determination of the rent owing can be found in right to cure provisions of sections A.27(2) and B.25(2). In order for the landlord to have commenced the FED action he must have given the tenant such a three-day right to cure notice.[484] Upon receipt of the notice, the tenant has three days within which to cure the default by paying the rent owing.[485] But that notice was given at a time

---

> In the present cases, the landlord sued for possession for nonpayment of rent. Under contract principles, however, the tenant's obligation to pay rent is dependent upon the landlord's performance of his obligations, including his warranty to maintain the premises in habitable condition. In order to determine whether any rent is owed to the landlord, the tenant must be given an opportunity to prove the housing code violations alleged as breach of the landlord's warranty.
>
> At trial, the finder of fact must make two findings: (1) whether the alleged violations existed during the period for which past due rent is claimed, and (2) what portion, if any or all, of the tenant's obligation to pay rent was suspended by the landlord's breach. If no part of the tenant's rental obligation is found to have been suspended, then a judgment for possession may issue forthwith. On the other hand, if the jury determines that the entire rental obligation has been extinguished by the landlord's total breach, the action for possession on the ground of nonpayment must fail. The jury may find that part of the tenant's rental obligation has been suspended but that part of the unpaid back rent is indeed owed to the landlord. In these circumstances, no judgment for possession should issue if the tenant agrees to pay the partial rent found to be due. If the tenant refuses to pay the partial amount, a judgment for possession may then be entered.

Id. at 1082-83. *See also* Green v. Superior Court, 10 Cal. 3d at 639, 517 P.2d at 1184, 111 Cal. Rptr. at 720; Pugh v. Holmes, 253 Pa. Super. at ___, 405 A.2d at 907.

481. 280 N.W.2d 398, 400 (Iowa 1979).

482. *Id.* at 400.

483. *Id.* (quoting 63 U. KY. L.J. 1046, 1065 (1975)).

484. The right to cure notice must be written and it must advise the tenant of both the nonpayment and the landlord's intention to terminate the rental agreement if the rent is not paid within three days of the notice. Neither Act expressly states that the right to cure must state the amount of rent owing, but such a requirement is surely implicit. *See* §§ A.27(2), B.25(2).

485. Assume that rent is due on the 1st and that payment is not made. The landlord can

when the actual rent due was disputed. When it is concluded that the tenant had some valid setoff coming, the amount of rent claimed owing in the right to cure notice served prior to the FED action will never be the correct amount found to be due by the court. Consequently, the only meaningful right to cure in this context exists at the time the court has determined the precise rent owing after all setoffs.

Finally, it should be recalled that the Iowa FED action is an equitable action. There are a number of equitable doctrines and defenses recognized by Iowa case law that support the proposed construction of both Acts, the most notable being the maxims that equity abhors a forfeiture and that he who comes into equity must come with clean hands.[486]

3. *Protection of the Landlord through Rent Escrow and Attorney's Fees Awards*

The rent withholding remedy now available to the Iowa tenant is an important law reform. The IURLTA builds in precautionary measures to guard against tenant abuse of this new remedy; the most notable of which are authorization for rent escrow during the pendency of litigation and for the award of attorney's fees when the tenant defended in bad faith. Since the IMHP-RLTA did not expressly provide a rent withholding procedure, it of course did not enact these two safeguards. But that does not mean mobile home park landlords are left bereft of protection.

The key IURLTA provision is section A.24(1), which applies to both actions for possession and actions for rent when the tenant is in possession. It authorizes the trial court to order the tenant to pay into court "all or part of the rent accrued and thereafter accruing" when the tenant has asserted any defense or counterclaim under the IURLTA or rental agreement.[487] It further provides that if the defense or counterclaim of the tenant is determined to have been "without merit" and "not raised in good faith," the landlord may recover reasonable attorney's fees.[488]

The IMHP-RLTA does not include URLTA section 4.105 and, therefore, is silent with regard to the judicial authority to require rent escrow during the pendency of litigation when the tenant remains in possession. Even without specific statutory authorization, however, courts have readily concluded that the discretion to order such rent escrow resides in the trial court as part of its inherent power to issue protective orders.[489] This reflects

---

give the right to cure notice as early as the 2d, or can wait to see if payment will be shortly forthcoming. Assume, rent remains unpaid and the landlord served the right to cure notice on the tenant on the 6th. Under Iowa rules for calculation of time, *see* note 78 *supra*, the tenant could cure by paying the rent prior to midnight of the 9th (the end of the third day).

486. *See* note 440 *supra*.

487. § A.24(1).

488. *Id.*

489. Pugh v. Holmes, 253 Pa. Super. at ___, 405 A.2d at 907; Javins v. First Nat'l Realty

the reality that the recent legal reform which permits tenants to assert defenses and counterclaims in the action for possession has also of necessity altered the summary nature of that action. The landlord is exposed to a prolonged period of litigation without rental income, the very problem that earlier led to the enactment of the FED statutes' summary proceeding. The rent escrow mechanism, a discretionary tool available to the trial judge, enables the judge to strike the proper balance. Under this procedure the judge, upon evaluation of the fiscal needs of the landlord and the apparent merits of the defense based on housing code violations, *may* issue an order requiring that rent payments be made into court pending the litigation.[490]

Whether the mobile home park landlord can also recover attorney's fees in an FED action when the tenant has defended in bad faith is more problematic. Iowa trial courts have not been held to have the inherent authority to make attorney's fees awards on this basis in the absence of statutory authorization.[490.1] There is one IMHP-RLTA provision which has bearing on this issue. Section B.30(2) provides:

> Notwithstanding section . . . 648.19 of the Code, if the tenant remains in possession without the landlord's consent after expiration of the term of the rental agreement or its termination, the landlord may bring an action for possession and recover actual damages. If the tenant's holdover is willful and not in good faith the landlord in addition may recover an amount not to exceed two months' periodic rent and twice the actual damages sustained by the landlord. In any event, the landlord may recover reasonable attorney's fees and court costs.[491]

The full dimension of this statute will be discussed in Part II of this Article to be published in a subsequent issue of the *Drake Law Review* with coverage of landlord remedies. A few observations concerning the third sentence of the statute regarding attorney's fees awards are pertinent here. It is unclear whether the third sentence modifies sentence one of B.30(2) and authorizes landlord recovery of fees whenever the landlord successfully obtains a judgment for possession against a holdover tenant, or whether it modifies sentence two and authorizes landlord recovery of fees only when the landlord obtains a judgment for possession and the court further determines that the holdover was willful and in bad faith.

In the rent withholding context, the answer is two-fold. First, section B.30(2) should not have application to the tenant who loses an action for possession when the court concludes that he was not entitled to withhold rent. The tenant who withholds rent and who is sued for possession because of nonpayment is not a holdover tenant within the meaning of section

---

Corp., 428 F.2d at 1083 n.67.

490. Pugh v. Holmes, 253 Pa. Super. at ___, 405 A.2d at 907; Javins v. First Nat'l Realty Corp., 428 F.2d at 1083 n.67; Bell v. Tsintolas Realty Co., 430 F.2d 474, 479 (D.C. Cir. 1970).

490.1. *See* text accompanying notes 536-43 *infra*.

491. § B.30(2).

B.30(2). The punitive damages and attorney's fees provisions of section B.30(2) only have application when the tenant holds over after the conclusion of a fixed term or after a periodic tenancy has been concluded by proper notice.[492] A contrary construction would represent a striking departure from the URLTA, one which would tip the economic scales heavily in favor of the landlord in litigation under the IMHP-RLTA and, therefore, one which should not be adopted without a clear manifestation of legislative intent. Second, should section B.30(2) nonetheless be construed to apply to the tenant who was terminated for withholding rent, the principle of congruency would be furthered by a construction which would only authorize the award of fees and costs in the willful, bad faith holdover context.[493] Construing the last sentence of section B.30(2) as modifying the second sentence of the section would achieve this result and is clearly permitted by the plain language of B.30(2).

Although there is uncertainty whether section B.30(2) allows a landlord to recover fees from a tenant who mistakenly withholds rent, it is probable that a rent escrow procedure of the nature provided in IURLTA section A.24 will be implied by the Iowa court into the IMHP-RLTA. The balance of this article will assume that to be the case, and that the procedure is identical under both Acts.

Two questions remain concerning the rent escrow procedure. The first relates to the constitutionality of such procedure to the extent that it might require the payment of rent which allegedly accrued prior to the commencement of the landlord's action for possession. The second question relates to considerations relevant to the trial court's exercise of its discretion to require the escrow of rent during the pendency of the litigation.

a. *The Constitutionality of Requiring Escrow of Accrued Rent.* In *Lindsey v. Normet*[494] the United States Supreme Court upheld against constitutional challenge an Oregon FED statute which both required trial of the landlord's possession action no later than six days after service of the complaint unless the tenant posted security for accuring rent and restricted the litigable issues to whether the tenant had paid rent and honored the cove-

---

492. *Id.*

493. The IMHP-RLTA, with the exception of B.30(2), makes no provision for the award of attorney's fees as one of the remedies available under the Act. In contrast, the IURLTA has several sections which make fees available, to both tenants and landlords, where there has been a willful noncompliance with certain key provisions of the legislation. *Compare* § A.21(2) *with* § A.27(3). Under section A.34(3), when there has been a holdover and it is found to have been "willful and not in good faith," the landlord may recover reasonable attorney's fees. URLTA section 4.301(c) was the basis for section A.34(3) and it, too, only authorizes recovery of fees where the holdover was willful and not in good faith. In light of section A.34(3), URLTA 4.301, and the absence of provisions in the IMHP-RLTA for fees awards to tenants, an even-handed construction of section B.30(2) would likewise make a fees award contingent upon a showing of a willful, bad faith holdover.

494. 405 U.S. 56 (1972).

nants he had assumed. The tenants in *Lindsey* had argued that these procedures denied them due process and equal protection of the laws because the rental payments were not suspended while their alleged habitability violations were litigated.[495] The Court responded: "A requirement that the tenant pay or provide for the payment of rent during the continuance of the action is hardly irrational or oppressive. . . . We see no constitutional barrier to Oregon's insistence that the tenant provide for *accruing* rent, pending judicial settlement of his disputes with the lessor."[496]

Section A.24(1), to the extent that it authorizes rent escrow of *accurring* rent, obviously is consistent with *Lindsey v. Normet*. But section A.24(1) also provides that the trial court "may order the tenant to pay into court all or part of the rent *accured*" as well.[497] The question is essentially one of statutory construction. Does the "rent accured" language of section A.24 mean rent allegedly owing at the time the landlord commenced the action for possession (i.e., back rent), or does it mean rent which has accrued subsequent to the commencement of the action for possession to the time of the trial court's ruling on the landlord's motion for a protective order? Neither the legislative history to the IURLTA nor the URLTA comments yield an answer. It is submitted that the latter construction should be adopted in order to avoid the constitutional problems inherent in a construction of section A.24 that would permit a trial court to require a tenant to pay into court alleged back rent as a condition to raising counterclaims in the FED action.

The question of the constitutionality of a rent escrow requirement as to rent allegedly owing at the time the landlord commenced the action for possession was not before the Supreme Court in *Lindsey v. Normet*, and has yet to be addressed by any appellate court. In *Bell v. Tsintolas Realty Company*[498] the United States Court of Appeals for the District of Columbia emphatically suggested that rent escrow protective orders should not include back rent alleged to be due,[499] but the court had no occasion to reach the constitutional question. The court in *Bell* pointed out that requiring prepayment of such back rent would depart from the protective purpose served by requiring payment of rent during the pendency of the litigation "since the landlord cannot recover back rent in a suit for possession, and would be in the nature of a penalty on the tenant."[500] The court also stressed that rent escrow protective orders, even ones requiring only future rent payments, should be employed in a limited fashion because they represent "a noticeable break with the ordinary processes of civil litigation, in

495. *Id.* at 66.
496. *Id.* at 65-67 (emphasis added).
497. § A.24(1) (emphasis added).
498. 430 F.2d 474 (D.C. Cir. 1970).
499. *Id.* at 483-84.
500. *Id.* at 483.

which, as a general rule, the plaintiff has no advance assurance of the solvency of the defendant."[501]

While there are exceptions to the general rule against advance assurance of solvency, they may be found in provisions allowing prejudgment attachment and garnishment, procedures which are now substantially regulated by the consumer due process line of cases spawned by *Sniadach v. Family Finance Corp.*[502] and *Fuentes v. Shevin.*[503] One of the more recent consumer due process cases, *Memphis Light, Gas & Water Division v. Craft,*[504] is of particular interest because the Justices engaged in a footnote debate as to the implications of the *Lindsey v. Normet* holding. The issue in *Craft* was whether due process required a hearing, and, if so, the nature and timing of the hearing when a municipal utility wants to terminate utility service to a residential customer on grounds of nonpayment.[505] The Court held that, at a minimum, due process required that the customer be afforded an opportunity to present his complaint that he was erroneously billed to designated utility company personnel (empowered to rectify errors in disputed bills).[506] The Court rejected the utility's argument that any inadequacy in its termination procedure was cured by the customer's common-law remedy of paying the disputed bill and then suing for a refund.[507]

Three dissenters disagreed with the majority in *Craft* and concluded that there was no need to order the in-house "prior" hearing because a customer can always avoid termination "by the simple expedient of paying the disputed bill and claiming a refund."[508] They cited *Lindsey* as authority:

> If there is no constitutional objection to requiring a tenant to pay a disputed charge in order to retain possession of his home, I do not understand why there should be a more serious objection to requiring payment of a lesser charge in order to retain utility service. In *Lindsey v. Normet*, . . . a tenant sought to defend a possessory action brought by his landlord for nonpayment of rent on the ground that the premises were uninhabitable and therefore there was no obligation to pay rent. State law did not permit such a defense in a possessory action. In order to litigate that particular dispute, the tenant had to bring his own action against the landlord. If the tenant had not in fact paid the disputed rent, the landlord would prevail in the possessory action. Thus, in order to retain possession while litigating the dispute, the tenant not only had to pay the accruing rent (a requirement upheld in *Lindsey* . . .) but also had to pay the back rent, an obligation which he disputed. If he did not pay the

501. *Id.* at 479.
502. 395 U.S. 337 (1969).
503. 407 U.S. 67 (1972).
504. 436 U.S. 1 (1978).
505. *Id.* at 10-11.
506. *Id.* at 22.
507. *Id.* at 19-22.
508. *Id.* at 28.

> back rent, he would lose possession while he was prosecuting his own suit against the landlord. Thus, the Court sustained a procedure which required the payment of a disputed charge in order to maintain the status quo while litigating the dispute.[509]

The six-member majority disagreed with this reading of *Lindsey*:

> The dissent intimates that due process was satisfied in this case because "a customer can always avoid termination by the simple expedient of paying the disputed bill and claiming a refund. . . ." This point ignores the predicament confronting many individuals who lack the means to pay additional, unanticipated utility expenses. Even under MLG & W's admirable credit procedures, the customer must make immediate payment of one-half of a disputed past due bill, with the balance to be paid in three equal installments, in addition to current charges. Contrary to the dissent's suggestion, this Court's decision in *Lindsey v. Normet* . . . did not uphold a procedure that conditioned a tenant's continued possession on payment of "the back rent, an obligation which he disputed." . . . Under the procedure upheld in *Lindsey*, certain tenant defenses were excluded but the landlord still had to prove nonpayment of rent due or a holding contrary to some covenant in the lease before the tenant could be deprived of possession. . . .[510]

The *Craft* dissenters' view of *Lindsey* is descriptive of the practical consequences of upholding the Oregon FED provision restricting litigable issues. The tenants' primary concern was clearly the FED provision which precluded them from litigating habitability issues as a defense to the action for possession. Indeed, tenants' counsel stated their willingness to accept a rent escrow condition as to "rent paid by tenants during litigation" as a condition to maintaining possession.[511] The Oregon FED rent escrow provision was irrelevant in all but the rare case where the tenant disputed the landlord's allegation that he had failed to pay the rent. Thus, the reality of *Lindsey* is accurately described by the dissent in *Craft*: Any Oregon tenant who withheld rent, regardless of the validity of his habitability claim, would lose in the FED action and would lose possession while litigating his affirmative action against the landlord.[512]

On the other hand, the *Craft* majority is clearly correct that *Lindsey* did not hold that it was constitutional to condition the tenant's right to assert habitability defenses in the possession action upon the tenant first paying into court all alleged back rent. That question was not before the Court because under Oregon law such defenses were not cognizable in the possession action under any circumstances.[513] The *Craft* majority opinion is

---

509. *Id.* at 28-29 n.11 (Stevens, J., dissenting).
510. *Id.* at 20 n.26.
511. 405 U.S. at 67 n.13.
512. 436 U.S. at 28-29 (Stevens, J., dissenting).
513. *Id.* at 28 n.11 (Stevens, J., dissenting).

not revisionistic as to the doctrinal holding of *Lindsey*, though it does appear to discount the actual operational impact of the Oregon FED statutes it sustained. Whatever, the *Craft* holding and footnote dialogue on *Lindsey* strongly suggest that a court cannot constitutionally condition the tenant's right to defend or counterclaim in the action for possession on the tenant's prepayment of all back rent alleged owing.

In the consumer due process cases, the issue was whether there had to be a prior hearing (or a prompt post-seizure hearing) as to the likelihood of the plaintiff-creditor's success on the merits before a trial court could issue an interloctory writ authorizing seizure of the alleged debtor's property during the litigation.[514] In none of these cases did the statute impose upon the alleged debtor the obligation to pay into court the alleged arrearage in order to defend on the merits. Even in those situations where the trial court held the required hearing, determined that the alleged creditor would likely win on the merits, and issued a writ of garnishment or attachment, there was no suggestion that the defendant could be required to pay into court the alleged arrearage in order to defend on the merits at the final hearing. Such a requirement could obviously result in default judgments merely because of the defendant's inability to pay the disputed amount. Even for those defendants who could pay the disputed amount, they would lose the interim use of that money during the pendency of the litigation—the very sort of deprivation that concerned the Court in *Sniadach*.[515] Even in the situation where the constitutionally required pre-judgment hearing has been conducted and a garnishment properly issues against the defendant's wages, the constitutional case law does not permit the defendant to be defaulted if the alleged arrearage has not been garnished from his wages by the time of trial. It is one thing to require future payments of rent into court, but it is entirely another to require payment of alleged back rent into court in order for the tenant to have his day in court on his defenses and counterclaims.

The constitutional problems can be avoided by a construction of section A.24 that limits rent escrow protective orders to "rent accrued" from the date of the commencement of the action for possession to the date of the hearing on the landlord's request for a rent escrow order and all future rents. Such a construction could, of course, be readily applicable in IMHP-RLTA cases, because the Iowa courts have yet to address the rent escrow question in that context.

If *Craft* suggests that a majority of the Court might be willing to reconsider its holding in *Lindsey* on the preclusion of issues question, in light of its present awareness of the harsh results worked by such a requirement, that would be regarded as a welcome developement by tenants' counsel across the nation. That question is of only academic interest to Iowa tenants for legislative reform has overcome the problem in Iowa. *See* Section IV (C) (1) *supra*.

514. *Compare* Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974) *with* North Georgia Finishing Inc. v. Di-Chem Inc., 419 U.S. 601 (1975).

515. 395 U.S. at 342 (Harlan, J., concurring).

b. *The Trial Judge's Discretion as to Rent Escrow.* The discretionary nature of the rent escrow mechanism, even as to future rent, should be underscored. Both the language of section A.24(1) and the case law make clear that the procedure is not mandatory, and should be employed in a limited fashion. Section A.24(1) specifically provides that the trial court "from time to time may order" the tenant to make rent escrow payments.[516] Not only is the language not mandatory, but the "from time to time" wording suggests that continuing judicial review of any escrow order entered is appropriate during the pendency of the suit. Indeed, the case law suggests that such a protective order should only be considered upon motion of the landlord, and only after notice and opportunity for oral argument by both parties.[517]

Both *Bell v. Tsintolas Realty* and *Pugh v. Holmes* outline several factors which the trial court should weigh in exercising its discretion on a motion for an escrow order, with *Bell* going into considerable detail.[518] First, the landlord must make a showing of financial need.[519] If the landlord has

---

516. § A.24(1).

517. Bell v. Tsintolas Realty Co., 430 F.2d at 483-84; Pugh v. Holmes, 253 Pa. Super. at ___, 405 A.2d at 907. Relying upon *Lindsey v. Normet*, 405 U.S. 56 (1972), the District of Columbia Court of Appeals has held that the due process clause does not require an evidentiary hearing in setting pre-trial protective orders. McNeal v. Habib, 346 A.2d 508, 513 (D.C. App. 1975); *see* Dameron v. Capitol House Assocs. Ltd. Partnership, 431 A.2d 580, 583 (D.C. App. 1981). The court did hold that the tenant or his counsel "should be afforded an adequate opportunity to be heard as to the equities of a protective order before one is entered." McNeal v. Habib, 346 A.2d at 514 (footnote omitted); *see also*, Dameron v. Capitol House Assocs. Ltd. Partnership, 431 A.2d at 583. The court in *Dameron* explained the rationale for not mandating a full evidentiary hearing as a basis for issuing a pre-trial rent escrow protective order:

> A protective order, on the other hand, is filed pre-trial when the tenant appears and defends the suit on the basis of housing code violations. At this early stage in the proceedings, the evidentiary hearing which is mandated by *McNeal v. Habib* for dispersal of funds at the termination of the case is not permissible because it would preempt the controversy and might deny a party's constitutional right to trial by jury. Consequently, a protective order entered by the trial judge is valid only if it is a legitimate exercise of the court's equity power as contemplated by *Bell*, . . . and effects no permanent disposition of property to the prejudice of the parties such as the order overturned in *McNeal v. Habib*. . . . Otherwise, a *McNeal*-type hearing would be required, and we refuse to impose such a requirement at the preliminary stage.

431 A.2d at 584. While the receipt of testimony is therefore not required, the trial court may hold an evidentiary hearing if it concludes "that hearing some testimony would be of assistance in determining the amount to be specified in a protective order." McNeal v. Habib, 346 A.2d at 514 n.12. The court also held that it was permissible for the landlord to make his motion for a protective order orally, though it did caution that "[i]n an appropriate case, the interests of justice might call for a continuance for a hearing on a motion for a protective order." *Id.* at 512 n.8.

518. Bell v. Tsintolas Realty Co., 430 F.2d at 483-85.

519. *Id.* at 483-84. The court in *Bell* noted that "whether the landlord faces a substantial threat of foreclosure" should be a very relevant consideration in the trial court's determination of the landlord's financial need. *Id.* at 484. While a showing of an imminent foreclosure would certainly satisfy the landlord's burden, the subsequent caselaw indicated that a landlord can

adequately demonstrated financial need, the trial court "must compare that need with the apparent merits" of the tenant's habitability defense.[520] Issuance of a rent escrow protective order is not an "all or nothing" proposition.[521] Although such an order will ordinarily require the tenant "to pay into the court registry each month the amount [the tenant] originally contracted to pay as rent," the court can order payment of a lesser amount.[522] The *Bell* court suggested that such a reduction would be appropriate where the tenant made a strong showing that the dwelling was in violation of the housing code, or that he had spent some of the rent on repairs to the premises, or that a change in the tenant's financial condition has made the burden of the rent escrow so heavy as to preclude litigation of meritorious defenses.[523] The *Bell* court further suggested that in such cases a reasonable rent escrow payment might be the equivalent of the cost of the premises to the landlord, taking into consideration "principal, interest, taxes, and whatever proportion of the utilities payments the landlord has assumed."[524]

---

satisfy his burden with less dramatic showings of financial need. In *Blanks v. Fowler*, 459 F.2d 1282 (D.C. Cir. 1971), the United States Court of Appeals for the District of Columbia affirmed a pre-trial rent escrow protective order, holding that the following evidence satisfied the landlord's showing of financial need:

> Our attention is directed to the evidence at the hearing showing that the 15-unit building is which appellant's apartment is located was mortgage-free and had a productive capability of $13,500 in annual gross rent. But the evidence also disclosed that at the time of the hearing about a third of the units were vacant, and that the landlord was financially unable to absorb an operating deficit that was more than $3,300 and was still mounting. That, we think, was sufficient.

459 F.2d at 1284 (footnotes omitted).

520. Bell v. Tsintolas Realty Co., 430 F.2d at 484.

521. *See* Blanks v. Fowler, 459 F.2d 1282, 1284 (D.C. Cir. 1971) (affirming a pre-trial rent escrow protective order setting the amount of the monthly payments at $50 rather than the $72.50 specified in the lease as rent).

522. Bell v. Tsintolas Realty Co., 430 F.2d at 484. *See also* Blanks v. Fowler, 459 F.2d 1282 (D.C. Cir. 1971).

523. Bell v. Tsintolas Realty Co., 430 F.2d at 484.

524. *Id.* Ordinarily, when a rent escrow protective order is issued, the tenant will pay the monthly payment into the court registry, and the fund will be retained by the court pending resolution of the litigation. *Id.* In *Dameron v. Capitol House Associates Limited Partnership*, 431 A.2d 580 (D.C. App. 1981), the District of Columbia Court of Appeals affirmed a pre-trial protective order that passed through most of the monthly escrow payment to the landlord. The underlying issue in the action for possession related to the propriety of the landlord's rent increase. In view of the de minimis nature of the alleged housing code violations, the trial court "ordered deposit of the full rent into the registry of the court with that portion of the fund equal to the 'old' undisputed rent released to the landlord on a monthly basis." *Id.* at 582. The court of appeals held "the order of the trial court is a justified exercise of discretion" because there was "no dispute as to the 'old' rent which was passed through to the landlord." *Id.* at 585. The court went on to stress the preliminary nature of such protective orders:

> [A pre-trial protective order] is subject to revision at any time during the pendency of the action. . . . Final entitlement to specific amounts is determined only at the conclusion of what may be prolonged litigation. This protective order has no permanent impact on the rights of the parties. . . . If the amount in the registry of the court at

The *Bell* case also clarified a number of questions concerning the disbursement of the rent escrow fund after the conclusion of the litigation. Although the summary possession action in the District of Columbia can only result in a judgment for possession and not for back rent, the court in *Bell* held that if the landlord is exonerated of all substantial housing code violations, the rent escrow fund could properly be paid to the landlord as rental for the litigation period.[525] In suing only for possession, the landlord passes up his right to collect back rent, but he is entitled to judicial protection of his fair compensation "for the possession he loses during the period of litigation."[526] In essence, the courts have concluded that it is within the ancillary jurisdiction of the trial court to disburse the escrow fund at the conclusion of the litigation. It should be stressed, however, that a judgment for possession does not automatically establish the landlord's entitlement to the escrow fund. The tenant must be afforded an opportunity to present "evidence as to the extent to which the rental contract figure should be abated . . . due to [habitability] violations . . . which might have existed during her continued use and occupancy of the premises while the protective order was in effect."[527] If the trial results in a determination that habitability violations nullified the tenant's obligation to pay rent for the period at issue, the tenant may also recover "the escrow fund on the assumption that" those habitability violations continued during the pendency of the litigation.[528] Obviously, the landlord could offer proof to rebut that assumption. If it is determined that "a portion of the rent is owing," that same proportion "will be applied in dividing the escrowed funds between the landlord and tenant," again subject to proof "that the condition of the premises changed during the litigation period."[529] Finally, should the underlying case become moot as a result of a voluntary surrender by the tenant, the tenant is still entitled to an opportunity for an evidentiary hearing at which he could show that the rental contract figure should be abated because of habitability violations during the time the protective order was in effect.[530] Because the escrowed monies will normally be relatively small amounts, settlement agreements between the parties will undoubtedly be encouraged by the courts in order to obviate the need for evidentiary hearings in most cases.[531]

---

the conclusion of the case is insufficient to satisfy a judgment rendered in favor of the tenants, the landlord can remedy the insufficiency through other means.

Id. at 585 (footnote omitted).

525. Bell v. Tsintolas Realty Co., 430 F.2d at 485.

526. Cooks v. Fowler, 459 F.2d 1269, 1274 (D.C. Cir. 1971).

527. McNeal v. Habib, 346 A.2d 508, 514 (D.C. App. 1975).

528. Bell v. Tsintolas Realty Co., 430 F.2d 485.

529. *Id.*

530. McNeal v. Habib, 346 A.2d 509, 514 (D.C. App. 1975); *see also* Armwood v. Rental Assocs., Inc., 429 A.2d 190, 191 (D.C. Cir. 1981).

531. McNeal v. Habib, 346 A.2d at 515 n.16.

The above discussion of pre-trial rent escrow protective orders is not irrelevant to the ap-

c. *The Availability of Attorney's Fees Awards where the Landlord Prevails in the FED Action.* The rent escrow procedure is clearly the principal protection for the landlord where habitability and related issues are litigated in an action for possession, or in an action for rent where the tenant is in possession. A second and more limited safeguard is provided by the IURLTA's authorization of a reasonable attorney's fees award[532] to the landlord if the defense or counterclaim by the tenant is "without merit and is not raised in good faith."[533] No corresponding attorney fees provision exists in the IMHP-RLTA.[534]

As a general rule, except when expressly provided by statute, Iowa case law does not allow a party to recover her fees from the other party as damages or costs.[535] The Iowa cases appear more restrictive with regard to allowances of attorney's fees than the so-called "American rule" articulated by the United States Supreme Court in *Alyeska Pipeline Service Co. v. Wilderness Society*.[536] Under the "American rule," a "prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser."[537] The *Alyeska* case held there were only three exceptions to the rule: (1) where there was statutory authorization for such an award; (2) where the losing party litigated in bad faith; and (3) where the litigation generated a common fund in which other beneficiaries of relief share.[538] The Iowa cases have not recognized the second and third exceptions and appear to limit the

---

pellate stage of landlord-tenant litigation. It is clear that a trial judge may fashion such a protective order as a condition of a stay of eviction pending appeal. Although the judgment on the merits strengthens the case for requiring prepayment of rent, *Bell v. Tsintolas Realty Co.*, 430 F.2d 474, 483 (D.C. Cir. 1970); *Cooks v. Fowler*, 459 F.2d 1269, 1272 (D.C. Cir. 1971), the "judgment establishes the landlord's entitlement to repossession, but not to past or future rent." Cooks v. Fowler, 459 F.2d at 1276. Consequently, the trial court's inquiry will track the same criteria found applicable in the pre-trial protective order determination. Nonetheless, unless the tenant can make a showing that the dwelling unit has present habitability violations, violations which the court presumably has found were not present during the time period in question in the litigation, it would be very unlikely the court would not impose a protective order requiring payment of the full rent into the registry of the court.

The rent escrow disbursement procedure developed by the District of Columbia courts is sensible and fair, and undoubtedly was contemplated by the IURLTA in section A.24. Section 648.19, which limits the litigable claims in the Iowa FED for possession, is not inconsistent with a rent escrow procedure for accuring rent.

532. § A.24(1).

533. See text accompanying note 554 *infra* for a definition of "good faith."

534. Section B.30(2) does authorize the recovery of attorney's fees where the tenant has committed a "willful and not in good faith" holdover. It is unclear whether section B.30(2) has any application to a termination for nonpayment when the tenant has withheld rent alleging habitability violations, but it seems to contemplate the traditional holdover situations in which the tenant has stayed on without the landlord's consent after expiration of a fixed term or after termination of a periodic tenancy. *See* note 493 and accompanying text *supra*.

535. Virginia Manor, Inc. v. City of Sioux City, 261 N.W.2d 510, 513 (Iowa 1978).

536. 421 U.S. 240 (1975).

537. *Id.* at 247.

538. *Id.* at 257-59.

award of fees to cases in which there is express statutory authorization.

The strict Iowa position is manifest in *Harris v. Short*.[539] In *Harris*, the trial court awarded attorney's fees to a tenant who had successfully defended an FED action for possession.[540] On appeal, the tenant argued that the award should be sustained because the landlord's "action was brought without probable cause."[541] The Iowa Supreme Court first stated that "neither a court of law nor equity has inherent power to tax costs to the losing party in any action" unless authorized by statute.[542] The court in *Harris* found it unnecessary to reach the question whether malice or want of probable cause would qualify as a second exception to the traditional bar, because the evidence showed that the landlord believed she had a good cause of action.[543]

Section A.24 clearly satisfies the Iowa case law requirement of an express statutory authorization for an attorney's fees award. Under section A.24, the landlord must do more than prevail in the possession action in order to establish entitlement to a fees award. In order to recover fees, the landlord must prove that the tenant's defense or counterclaim was (1) without merit and (2) not raised in good faith.[544] The first prerequisite may in practice be subsumed by the second. Would not all claims or defenses which are not raised in good faith necessarily be without merit?[545] Still, section A.24 states the prerequisites separately,[546] and consequently, each will receive independent consideration here. It is clear that the landlord's burden is a difficult one.

Although there is no case law which has construed the "without merit" language in the context of the URLTA, the United States Supreme Court recently had occasion to discuss meritless claims in the context of attorney's fees awards for employers who successfully defended against charges of discrimination under Title VII.[547] In *Christiansburg Garment Co. v. EEOC*,[548] the Court construed the Title VII fees statute to permit an award to the prevailing defendant only when the action brought is found to be unreasonable, frivolous, meritless or vexatious.[549] The Court went on to state that a finding of subjective bad faith would, of course, support a fees award, but that it was not necessary prerequisite under Title VII. The award could be based solely on a finding that the case brought was "frivolous, unreasonable,

---

539. 253 Iowa 1206, 115 N.W.2d 865 (1962).
540. *Id.* at 1207, 115 N.W.2d at 865.
541. *Id.* at 1210, 115 N.W.2d at 867.
542. *Id.*
543. *Id.*
544. § A.24.
545. *See* Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421-22 (1978).
546. § A.24(1).
547. Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978).
548. *Id.*
549. *Id.* at 422.

or without foundation."[550]

The *Christiansburg Garment* opinion contains a particularly enlightening discussion of the meaning of the term "meritless," a discussion of obvious relevance to the fees question under IURLTA section A.24. The Court stressed that "meritless" meant "groundless or without foundation, rather than simply that the plaintiff has ultimately lost his case."[551] The Court explained the *ratio decidendi* for its distinction:

> In applying these criteria, it is important that a district court resist the understandable temptation to engage in post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonble or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success. No matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation. Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit.[552]

The IURLTA standard is, of course, even more stringent than the "meritless" standard of *Christiansburg Garment*, because section A.24(1) imposes the additional prerequisite that the claim was not raised in good faith.[553]

The second prerequisite for a fees recovery under section A.24—that the tenant's defense or counterclaim was not raised in good faith—has not been construed by an appellate court, but its plain language suggests that it contemplates liability only where the tenant brought or continued to litigate a case dishonestly or in bad faith. A fees award to the landlord would seem appropriate under section A.24 where it can be shown that the tenant raised meritless claims, knowing that they were without merit and for the purpose of delaying the eviction action or harassing the landlord. Such a construction would be consistent with the section A.6(3) definition of "good faith," once negatived. The IURLTA definition of "good faith" is borrowed from the Uniform Commercial Code: "honesty in fact in the conduct of the transaction concerned."[554] Although this construction of section A.24 would mean that it has essentially the same content as the subjective bad faith basis for fees awards recognized in *Alyeska*,[555] it would not be superfluous because

---

550. *Id.*
551. *Id.*
552. *Id.* at 421-22.
553. § A.24(1).
554. § A.6(3).
555. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975).

the Iowa Supreme Court has never recognized an inherent power in its trial courts to award attorney's fees where a party has proceeded in bad faith.[556]

556. In *Christiansburg Garment*, the United States Supreme Court rejected an argument of the EEOC that an employer should only recover fees under the "prevailing party" standard of Title VII if the plaintiff litigated in bad faith. 434 U.S. at 418-19. A principal reason for rejecting the EEOC's argument was that it would render the statute irrelevant, as federal courts were recognized to have inherent power to make fees awards when a party has litigated in bad faith. *Id.* at 419.