NOTES

TENANT SELF-HELP REMEDIES UNDER THE IOWA RESIDENTIAL LANDLORD-TENANT ACT: IOWA TENANTS JOIN THE TWENTIETH CENTURY

I. INTRODUCTION

In an effort to modernize landlord-tenant law, the National Conference of Commissioners on Uniform State Laws[1] approved and recommended for enactment the UNIFORM RESIDENTIAL LANDLORD-TENANT ACT (URLTA) in August, 1972.[2] The American Bar Association subsequently approved the Act in February, 1974,[3] after certain clarifying additions were made to the comments.[4] Since that time sixteen states[5] have adopted the legislation, Iowa being the most recent in June, 1978.[6] Several important changes have been engineered by the URLTA, the most significant of which is a shift from the property law characterization of the lease as a conveyance of an estate in

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1. The Committee which drafted the URLTA operated under the reportership of Professor Julian H. Levi of the University of Chicago.

2. The URLTA was entitled the *MODEL LANDLORD-TENANT ACT* when first presented to the Conference in 1969. As the title indicates, the Act covers only residential tenancies. The Commentary to the URLTA states that the Act does not apply to "rental agreements made for commercial, industrial, agricultural or any purpose other than residential." URLTA § 1.101, comment.

3. ABA SUBCOMMITTEE ON THE MODEL LANDLORD-TENANT ACT OF COMMITTEE ON LEASES, *The Uniform Residential Landlord and Tenant Act: Some Suggestions for Improvements*, 9 REAL PROP. PROB. & TR. J. 402 (1974).

4. ABA SUBCOMMITTEE ON THE MODEL LANDLORD-TENANT ACT OF COMMITTEE ON LEASES, *Proposed Uniform Residential Landlord and Tenant Act*, 8 REAL PROP. PROB. & TR. J. 104 (1973) [hereinafter cited as ABA Subcommittee Report]. The Subcommittee gave various specific suggestions for revision, and expressed a general concern as to the haste with which the Act had been previously revised.

5. As of this printing, the sixteen states which have enacted the URLTA are: Alaska — ALASKA STAT. §§ 34.03.010-.380 (1974); Arizona — ARIZ. REV. STAT. ANN. §§ 33-1301 to 1381 (1974); Delaware — DEL. CODE ANN. tit. 25, §§ 5101-5517 (1974); Florida — FLA. STAT. ANN. §§ 83.40-.73 (Supp. 1979); Hawaii — HAWAII REV. STAT. §§ 521-1 to 76 (Supp. 1977); Iowa — IOWA CODE §§ 562A.1-.41 (1979); Kansas — KAN. STAT. ANN. §§ 58-2540 to 2573 (1976); Kentucky — KY. REV. STAT. ANN. §§ 383-505 to 715 (Supp. 1978); Montana — MONT. REV. CODES ANN. §§ 42-401 to 442 (Supp. 1977); Nebraska — NEB. REV. STAT. §§ 76-1401 to 1449 (Cum. Supp. 1976); New Mexico — N.M. STAT. ANN. §§ 70-7-1 to 51 (Supp. 1975); Ohio — OHIO REV. CODE ANN. §§ 5321.01 to .19 (Page 1978); Oregon — ORE. REV. STAT. §§ 91.700 - .865 (1977); Tennessee — TENN. CODE ANN. §§ 64-2801 to 2864 (Supp. 1976); Virginia — VA. CODE ANN. §§ 55-248.2 to .40 (Supp. 1978); Washington — WASH. REV. CODE ANN. §§ 59.18.010 to .900 (Supp. 1977).

6. 1978 Iowa Legis. Serv. 499. The Iowa version of the URLTA became effective January 1, 1979. *Id.* at 511. It covers all rental agreements "entered into or extended or renewed after the effective date. . . . " IOWA CODE § 562A.37 (1979). The Act will thus apply to a month-to-month tenancy which extends into 1979, but will not cover a one year rental agreement still in its original term, entered into during 1978.

land[7] to the layman's more appropriate conception of the lease as a contract between the landlord and the tenant[8] in which the covenants passing between the parties are interdependent rather than independent.[9]

This change in theory regarding landlord-tenant law is in response to fundamental changes in the housing needs of the American population. With the dramatic exodus from the farms to the cities over the last one hundred years,[10] the feudal property law recognition of the lease as a conveyance of land[11] has lost much of its "largely historical" validity[12] and has increasingly come under attack.[13] The central interest of the feudal tenant, usually a

7. 2 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 317 (1765). Prior to its recent legislative action, Iowa followed the common law in recognizing the lease as a conveyance "of a portion of the owner's interest therein to the lessee. It creates in the lessee an *interest* in the real estate." Jensen v. Nolte, 233 Iowa 636, 639, 10 N.W.2d 47, 49 (1943). It should be noted that even under the common law theory of the lease as a conveyance, contract law was still relevant with regard to the creation of the relationship of landlord and tenant. "[T]he relation of landlord and tenant is created by contract, either express or implied." Putnam v. McClain, 198 Iowa 287, 289, 199 N.W. 261, 262 (1924).

8. Kalish, *The Nebraska Residential Landlord and Tenant Act*, 54 NEB. L. REV. 603, 609-10 (1975); ABA Subcommittee Report, *supra* note 4, at 105. At least one commentator has suggested that the application of contract law to the landlord-tenant relationship will be useless, in view of the fact that most rental agreements are adhesion contracts. Kirby, *Contract Law and the Form Lease: Can Contract Law Provide the Answer?*, 71 NW. L. REV. 204, 212 (1976). Professor Kirby contends that since contract law has yet to deal satisfactorily with adhesion contracts, property law may make more substantial advances for the tenant, as with the recent implications of a warranty of habitability. *Id.* at 225.

9. IOWA CODE § 562A.2(2)(c) (1979). The comment to URLTA section 1.102 states that the "Act recognizes the modern tendency to treat performance of certain obligations of the parties as interdependent."

10. According to the U.S. Census of 1970, only 26.5% (53,886,996) of this country's population lived in rural areas, compared with 73.5% (149,324,930) in urban areas. The shift in population is made remarkably more clear when one considers that when the first census was taken in 1790, 94.9% (3,727,559) of the population lived in rural areas, while only 5.1% (201,655) resided in urban areas. The first census which demonstrated that most Americans were living in urban areas was in 1920, when 51.2% of the nation (54,253,282) were city dwellers, and 48.8% (51,768,255) lived in rural areas. U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, 1 CENSUS OF POPULATION: 1970, CHARACTERISTICS OF THE POPULATION 42 (1973) (Table 3).

11. The traditional primary emphasis of property law is the tenant's right to possess the land, with the condition of the buildings upon the land as only an incidental concern. 3 THOMPSON ON REAL PROPERTY § 1129 at 471 (J. Grimes ed. 1959); A. SIMPSON, AN INTRODUCTION TO THE HISTORY OF LAND LAW § 237 (1961); Daniels, *Judicial and Legislative Remedies for Substandard Housing: Landlord-Tenant Law Reform in the District of Columbia*, 59 GEO. L.J. 909, 922 (1971). *Accord*, Cohen v. Hayden, 180 Iowa 232, 244-45, 157 N.W. 217, 220-21 (1916); Burnett v. Lynch, 108 Eng. Rep. 220, 227 (K.B. 1826) (implying from the word "demise" a "covenant in law on the part of the lessor that he has good title, and that the lessee shall quietly enjoy during the term . . . . "). For a brief discussion of the historical development of landlord-tenant law, see Lesar, *The Landlord-Tenant Relation in Perspective: From Status to Contract and Back in 900 Years?*, 9 U. KAN. L. REV. 369 (1960).

12. Jones v. United States, 362 U.S. 257, 266 (1960).

13. Blumberg & Robbins, *Beyond URLTA: A Program for Achieving Real Tenant Goals*, 11 HARV. C.R.-C.L.L. REV. 1, 1 (1976). Boyer & Amato, *Up From Feudalism — Florida's New Residential Leasing Act*, 28 U. MIAMI L. REV. 115 (1973); QUINN & PHILLIPS, *The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future*, 3 FORDHAM L. REV.

farmer, was understandably in the land leased rather than the buildings upon the land.[14] The primary value of the lease to the modern American urban dweller, however, is "that it gives him a place to live."[15]

This Note will discuss the tenant self-help remedies as provided for in the IOWA RESIDENTIAL LANDLORD-TENANT ACT (IRLTA).[16] "Self-help" remedies are those which allow the tenant to take action without the necessity of first turning to the courts for authority, although such action will often result in a litigious response by the landlord.[17] While no attorney is required for the initiation of these remedies, it will usually be prudent for the tenant to obtain advice of counsel prior to proceeding under one of these remedies for, as will be demonstrated by this note such remedies are far from models of clarity. The tenant's judicial remedies will be considered only to the extent that they relate to the self-help remedies. By limiting the scope of this Note it is hoped that the practicing bar of Iowa will be able to utilize the information more readily than a more superficial review of the entire Act.

The tenant remedies to be discussed herein are: (1) repair of substandard conditions and deduction of the costs of those repairs from rent payments,[18] (2) rent withholding as compensation for the landlord's non-performance of his obligations,[19] and (3) termination of the rental agreement for a variety of landlord noncompliances.[20]

II. REPAIR AND DEDUCT

Tenants have always had available the remedy of damages where the landlord fails to make repairs as covenanted in the rental agreement.[21] How-

225 (1969). For a British evaluation of the outdated status of American landlord-tenant law in light of the British changes, see Donahue, *Change in the American Law of Landlord and Tenant*, 37 MOD. L. REV. 242 (1974).

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

15. Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1074 (D.C. Cir. 1970).

16. IOWA CODE § 562A.1 (1979) provides that the Act is to be entitled the UNIFORM RESIDENTIAL LANDLORD-TENANT ACT, but for purposes of distinguishing the Iowa legislation from the original URLTA this note will refer to the Iowa legislation as the IOWA RESIDENTIAL LANDLORD-TENANT ACT.

17. The authors of one article have referred to these remedies as "tenant-initiated" remedies. Lonnquist & Healey, *A Prospectus on the Uniform Residential Landlord and Tenant Act in Nebraska*, 8 CREIGHTON L. REV. 336, 360 (1975). The term "self-help" was used by the drafters of the URLTA to refer to one of the two tenant repair and deduct remedies. URLTA § 4.103 ("Self-Help for Minor Defects").

18. IOWA CODE § 562A.23 (1979) (deduction for procurement of essential services); IOWA CODE § 562A.27(4) (1979) (deduction for repair of conditions constituting noncompliance by the landlord with the provisions of either the rental agreement or section 562A.15).

19. *Id.* § 562A.24 (defense in landlord's action for rent or possession for any recovery the tenant may obtain under the IRLTA or the rental agreement).

20. *Id.* § 562A.21(1) (termination for the landlord's noncompliance with either section 562A.15 or the rental agreement); § 562A.25(1)(a) (termination for fire or casualty damage to the premises); § 562A.22(1)(a) (termination for failure to deliver possession); § 562A.26 (termination for landlord's unlawful ouster, exclusion, or diminution in services); § 562A.35(2) (termination for abuse of access by the landlord).

21. Resnick v. City of Fort Madison, 259 Iowa 578, 583, 145 N.W.2d 11, 14 (1966). The

ever, the civil damages remedy has generally proved to be of limited value to the tenant, and has been used only infrequently. Even where the meandering legal system eventually grants the tenant limited satisfaction through an award of damages, the landlord often responds by terminating the lease or taking some other retaliatory action to remove the "undesirable" tenant.[22] Meanwhile, if the tenant manages to remain in possession, he must endure the conditions of the dwelling, as well as the realization that the costs of moving, particularly the initial outlay of another rental deposit,[23] and the shortage of housing[24] effectively preclude him from moving. Consequently, many tenants, particularly the indigent, who inhabit dwellings desperately in need of repair, find themselves inescapably caught between a Scylla and Charybdis of poor conditions. The lack of meaningful alternatives leads many

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measure of damages is "the difference between the fair rental value of the premises if they had been as warranted and the fair rental value of the premises as they were during occupancy . . . plus any consequential damages." Dealers Hobby, Inc. v. Marie Ann Linn Realty Co., 255 N.W.2d 131, 134 (Iowa 1977); Darnall v. Day, 240 Iowa 665, 37 N.W.2d 277, 281 (1949).

At common law the only repair obligations of the landlord were those expressly provided in the rental agreement, which were usually few, if any. *See* Daniels, *supra* note 11. An important expansion of the obligations of the landlord in this regard has occurred in recent years, as courts began to find an implied warranty of habitability by the landlord. Mease v. Fox, 200 N.W.2d 791 (Iowa 1972). *See* notes 113-116 *infra* and accompanying text. The IRLTA retains and expands the tenant damage remedy in several sections, most notably section 562A.21(2).

22. Iowa Code § 562A.36 (1979) raises a presumption of retaliation on the part of the landlord where he takes certain actions against the tenant, including diminution in services and eviction, within one year of the tenant's complaint to either the landlord or a governmental body responsible for the enforcement of building and housing codes. The leading case on retaliatory eviction is Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969), in which the Court of Appeals for the District of Columbia held, on public policy grounds and its interpretation of the housing codes, that the landlord was not free to evict the tenant because of the tenant's complaint to the governmental authorities responsible for the enforcement of the code provisions. The court noted that the effectiveness of the code enforcement would be "inhibited" if the landlord were allowed to so evict the tenant. *Id.* at 701. As yet no case involving the issue of retaliatory eviction has reached the Iowa Supreme Court. *See* Note, *Current Interest Areas of Landlord-Tenant Law in Iowa*, 22 Drake L. Rev. 376, 384-86 (1973) [hereinafter cited as Drake Note]. The primary difference between Iowa Code section 562A.36 and the judicially created retaliatory eviction defense is that the former raises a *presumption* of retaliation, while the latter requires the tenant to prove the retaliation. In addition, the IRLTA provision is not limited to just eviction, but covers other types of retaliatory action by the landlord, including diminution of services and increases in rent. Iowa Code § 562A.36(1) (1979).

The one-year presumption raises the problem of abuse by the tenant. A tenant could complain to the housing authorities once a year and thereby raise a presumption that any increase in rent by the landlord is in retaliation. Protection against such tenant abuse is provided for in the requirement that the tenant's complaint be in good faith. Iowa Code § 562A.36(2) (1979).

23. The IRLTA uses the term *rental deposit* instead of the more common *security deposit*. Iowa Code § 562A.6(10) (1979).

24. Moskovitz, *The Model Landlord-Tenant Code — An Unacceptable Compromise*, 3 Urb. Law. 597 (1971). An adequate supply of affordable habitable housing is often cited as a key element for legislative efforts at increasing the tenant's bargaining position. Blumberg & Robbins, *Analysis of Recently Enacted Arizona and Washington State Landlord-Tenant Bills*, 7 Clearinghouse Rev. 134, 134 (1973); *see also* Lonnquist, *supra* note 17, at 361.

tenants to accept the poor conditions as the only "solution."[25]

The IRLTA allows tenants to cause needed repairs to be performed where the landlord has failed in the performance of his obligations under either the IRLTA or the rental agreement, and to then deduct the cost of the repairs from future rent payments.[26] The goal of the two sections so providing,[27] is to equip the tenant with an effective remedy by which he can expeditiously correct the conditions of his dwelling, while at the same time placing the burden upon the landlord to bring an action if he wishes to contest the tenant's action.[28]

A. *Repair and Deduct of Essential Services*

Where the landlord has "deliberately or negligently" failed to provide "essential services," the tenant may procure them on his own, and deduct their cost from future rent payments.[29] The services which may be procured are those required by either section 562A.15[30] or the rental agreement, and

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25. This "solution" has at times resulted in a violent response. Indeed, the Kerner Commission cited poor housing conditions as one of the primary causes of the civil disorder of the late 1960's. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 5 (March 1, 1968).

26. The IRLTA also provides a repair remedy for the landlord where the tenant has failed to maintain the premises. IOWA CODE § 562A.28 (1979). Under this section, the landlord may bill the tenant for the cost of repairs if the tenant fails to repair within fourteen days of notice from the landlord.

27. Section 562A.23 allows the tenant to procure essential services and deduct their cost from rent where the landlord has failed to provide them as required by either the rental agreement or section 562A.15. Section 562A.27(4) is more general, allowing a tenant to repair any condition which constitutes a landlord noncompliance with either the rental agreement or section 562A.15.

29. By repairing the defective condition, the repair and deduct remedies, in a sense, go beyond the implied warranty of the habitability remedy, which merely compensates without dealing with the problem. *See* Blumberg, *supra* note 13, at 12.

> 29. (1) If contrary to the rental agreement or section 562A.15 of this Act 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:
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> (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;
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> (b) Recover damages based upon the diminution in the fair rental value of the dwelling unit; or
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> (c) Recover any rent already paid for the period of the landlord's noncompliance which shall be reimbursed on a pro rata basis.

IOWA CODE § 562A.23(1) (1979).

> 30. (1) The landlord shall:
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> (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.

thus extends the landlord's repair obligations beyond the common law limitation of the express terms of the rental agreement.[31] The tenant is specifically allowed to procure "running water, hot water, or heat, or essential services."[32] While section 562A.15(1)(f)[33] is the principal statement of these landlord obligations, other subsections of section 562A.15(1) provide obligations of this type as well.[34]

Since the tenant is allowed to procure services only to the extent that they are required by section 562A.15, it is necessary to determine exactly what is required of the landlord under section 562A.15. For instance, section 562A.15(1) provides that the landlord shall be excused from supplying certain essential services where the landlord and the tenant so agree.[35] Consequently, if the landlord is excused under this subsection, the tenant could not exercise his repair and deduct remedy.

Section 562A.23 adds the words "and essential services" to the services

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(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 reasonable 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.

IOWA CODE § 562A.15(1) (1979).

31. Nutrena Mills, Inc. v. Yoder, 187 F. Supp. 415 (N.D. Iowa 1960), *aff'd.*, 294 F.2d 505 (8th Cir. 1961); Chicago Joint Stock Land Bank v. Eggers, 214 Iowa 710, 714, 243 N.W. 193, 194 (1932) ("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."). *See also* 3A THOMPSON ON REAL PROPERTY § 1230 at 131 (J. Grimes ed. 1959).

32. IOWA CODE § 562A.23 (1979). When the legislature drafted § 562A.23, it omitted from coverage "electric and gas" services, which URLTA § 4.104 included. It is questionable whether this change will be of much significance in view of the fact that the provision regarding "heat" in section 562A.23 would cover electric and gas furnaces. The area in which this change might limit the landlord's obligations is electric or gas appliances.

33. *See* note 30, *supra.*

34. *See, e.g.*, IOWA CODE §§ 562A.15(1)(a), (b), (d) (1979).

35. *Id.* § 562A.15 (2), (3). Under the IRLTA, the landlord's duty to provide essential services may be nullified by an express agreement between the landlord and the tenant wherein the tenant agrees to accept a portion of the landlord's duties. Subsection (2) applies to single-family residence tenants, while subsection (3) applies to all other tenants. Subsection (4) prohibits the landlord from treating the performance of any of his obligations as contingent upon the tenant's performance of such an assumption agreement, except where the tenant occupies a single-family residence.

specifically enumerated in the landlord obligations section.[36] This addition should be viewed as a demonstration of the legislative intent to allow repair of services other than those included in the more specific listing of "running water, hot water, or heat." It is possible, however, that some Iowa courts will reduce these two words to mere surplusage by finding that other services are not "essential." In attempting to establish the essentiality of a particular service, the implied warranty of habitability cases, of which *Mease v. Fox*[37] is the example in Iowa, may prove a valuable source. Those cases usually specify conditions considered *essential* for a dwelling to be "habitable."[38]

In order to use the repair and deduct remedy of section 562A.23, the tenant must give the landlord notice[39] of the condition causing the noncompliance, although there is some question as to what type of notice will suffice.[40] This section does not, however, prescribe a definite period of time which must elapse after the notice has been tendered before the tenant may deduct the cost of the services from the rent.[41] While this notice must be given

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36. *Id.* § 562A.15(1)(f) (1979). *See* note 30 *supra.*

37. 200 N.W.2d 791 (Iowa 1972). *See* notes 113-16 *infra,* and accompanying text.

38. Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970) (1500 housing code violations); Hinson v. Delis, 26 Cal. App. 3d 62, 102 Cal. Rptr. 661 (1972) (leaky toilet, hole in bathroom floor, draft through poorly fitted front door); Buckner v. Azulai, 251 Cal. App. 2d 1013, 59 Cal. Rptr. 806 (1967) (vermin); Lemle v. Breeden, 51 Hawaii 426, 462 P.2d 470 (1969) (rats); Lund v. MacArthur, 51 Hawaii 473, 462 P.2d 42 (1969) (unsafe electrical wiring); Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972) (structural defects); Mease v. Fox, 200 N.W.2d 791 (Iowa 1972) (housing code violations, especially unsafe ceiling); Reed v. Classified Parking System, 232 So. 2d 103 (La. App. 1970) (leaky roof, unsafe electrical system); Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969) (flooding caused by poor run-off); Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970) (leaky, cracked toilet); Berzito v. Gambino, 114 N.J. Super. 124, 274 A.2d 865 (1971) (insufficient window screening, no storm windows, missing windows boarded up, gaps in window panes, no radiators in two of four rooms, falling plaster, defective electrical fixtures, sewage backup in cellar, infestation by roaches and rodents); Glyco v. Schultz, 35 Ohio Misc. 25, 289 N.E.2d 919 (1972) (faulty furnace; deteriorating, unsafe stairs; weak upstairs floor). While many of the above cases involved conditions which violated housing code provisions, such violation is usually not required for a breach of an implied warranty of habitability, and was not required in *Mease.* Instead, the *Mease* court stressed the presence of conditions which would render the premises "unsafe or unsanitary, and thus unfit for habitation." Mease v. Fox, 200 N.W.2d 791, 796 (Iowa 1972). *But see* Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961) (warranty implied from enactment of housing code).

39. Iowa Code § 562A.8 (1979) defines the various aspects of notice under the IRLTA. In contrast to the notice requirement of section 562A.23, section 562A.27(4) does *not require* the notice of the repair and deduction to be in writing. *See* note 81 *infra.*

40. When procuring the "essential services" of section 562A.23(1), the tenant is not specifically required to give the landlord written notice of the defect. Rather, section 562A.23(1) provides that "the tenant *may* give written notice to the landlord specifying the breach . . . ." Iowa Code § 562A.23(1) (1979) (emphasis added). However, under section 562A.23(3), the tenant is required to tender some notice of his intent to repair and deduct. Thus, it would appear that the legislature would require that some type of notice be given, and would recommend that the notice be in writing.

41. In contrast, Iowa Code § 562A.27(4) requires a notice of at least fourteen days prior to the rent's deduction. *See* note 73 *infra* and accompanying text.

to the landlord prior to procurement of the services,[42] the absence of a specific waiting period before which the tenant can remedy the condition seems to suggest that the landlord need not be given an opportunity to repair.[43]

The only limitation on the amount which the tenant may deduct from rent is that the deducted cost be "reasonable."[44] Therefore, even though most tenants, particularly the indigent, will probably fail to do so, the tenant should protect himself from a claim of unreasonableness by obtaining estimates from several contractors prior to having the repairs performed.

Assuming the tenant meets the requirements of reasonableness, he is entitled to deduct the "actual" cost.[45] Considering the need to establish "actual and reasonable" cost, the tenant should be wary of performing the repairs himself and attempting to deduct the value of his own labor. In addition to the drawbacks of deducting the value of something for which he has not been required to make a cash outlay, the "self-repairing" tenant runs the risk of inviting a claim by the landlord that the repairs were performed negligently, and thus opening himself up to an action for damages resulting from negligently performed repairs.[46]

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42. While there is no express requirement of a statement in the notice of the tenant's intent to repair and deduct, as there is under section 562A.27(4), section 562A.23(3) provides that the tenant's right to repair and deduct does not arise "until the tenant has given notice to the landlord . . . ." Presumably the tenant's right to repair, as well as his right to deduct, does not arise until such notice. This interpretation is consistent with common law, which required both notice and an opportunity for the landlord to perform the repairs, even where the lease required the landlord to perform the work. Woodbury Co. v. Williams Tackaberry Co., 166 Iowa 642, 649, 148 N.W. 639, 642 (1914) (commercial tenant may not counterclaim or offset in the landlord's action for rent the amounts expended where the landlord was not given notice of the need for the work).

43. Since the tenant's notice is required before the repairs, and the landlord need not be given the opportunity to repair, it would seem that the primary purpose of the notice requirement is to inform the landlord of the impending deduction, so as to prepare him for a diminished rental payment, and thus allow him to adjust his financial affairs accordingly. Furthermore, there exists the possibility that some landlords will quickly respond to the notice by repairing the condition. The tenant may wish to give the landlord an opportunity to repair so that his failure to do so will satisfy the "deliberate or negligent" requirement of section 562A.23. *See* note 61 *infra*.

44. IOWA CODE § 562A.23(1) (1979). Section 562A.27(4), on the other hand, sets a limitation of one month's rent on the amount which may be deducted from rent.

45. *Id.* § 562A.23 (1979). The "cost" of the repairs is important with respect to the tax implications to the landlord. If the repairs are intended to be in lieu of rent, the landlord must recognize the *value* of the repairs as income in the year in which the repairs are performed, I.R.C. § 109, and thereby increase the basis of his property. *See* I.R.C. § 1019; 2 MERTEN, LAW OF FEDERAL INCOME TAXATION § 11.15a at 78-81 (1974). The income recognized under section 109 of the Internal Revenue Code is based on the value of the improvements rather than on the amount of rent for which it is substituted. However, since the tenant may only deduct the "reasonable and actual cost" of the improvements, the landlord should usually be able to equate the value of the improvements with the amount deducted from rent.

46. This problem may surface in two respects. First, the landlord may claim that since the repairs were performed negligently the tenant is not entitled to deduct their value from rent. The second type of landlord objection is that the negligently performed repairs have damaged the dwelling unit and have actually decreased the value of the building below that value which it had before the repairs were commenced. The landlord response to the former is in the nature

Since there is no limit on the amount which may be deducted from rent, the tenant may deduct the cost of the services over several months until the total cost is recovered. However, from a practical standpoint, this ability to deduct the repair costs from more than one month's rent will be of little value to the indigent tenant who has neither the cash nor the available financing for the initial outlay for the services.

In drafting section 562A.23, the legislature made a significant change from URLTA section 4.104 which may substantially alter the tenant's available remedies under the Iowa act. URLTA section 4.104 provides three alternative remedies,[47] each separated by the word "or," the first of which is the repair and deduct remedy already discussed. The other remedies are (1) to award damages based on the diminution in fair rental value, and (2) to excuse the payment of rent where the tenant obtains substitute housing during the period of the landlord's noncompliance.

In drafting the final version of section 562A.23, however, the Iowa legislature dropped the word "or" after the first alternative (repair and deduct).[48] Such an omission implies that the tenant may repair and deduct, *plus* elect one of the other two remedies.[49] A reading of only the IRLTA section without reference to the URLTA section will not disclose the effect of this change, yet this implied right to repair and deduct plus recover damages is consistent with the rest of the IRLTA. Since the tenant may not seek damages under

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of a defense, while the latter is more of an affirmative response.

The second type of landlord response mentioned above would likely take the form of a statutory action for forcible entry and detainer (FED) based upon waste. The Iowa Supreme Court has held that waste is a permissible ground for invoking the FED's procedures of chapter 648. Verlinden v. Godberson, 238 Iowa 161, 165-66, 25 N.W.2d 345, 347 (1947). In addition to the remedy of termination, the landlord may also recover damages for the waste. 3A THOMPSON, *supra* note 31, § 1279 at 392-93 (J. Grimes ed. 1959). At early English common law, the Statute of Gloucester (1278) entitled the landlord to a "Writ of Waste" by which he could recover treble damages from the tenant for the tenant's waste. 6 EDW. I, CH. 5. ("And he which shall be attained of Waste . . . shall recompense thrice so much as the Waste shall be taxed at.").

47. (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. (emphasis added).

URLTA § 4.104.

48. *See* note 29 *supra*.

49. The Iowa rules of statutory construction prohibit a court from construing a statute as including a portion of proposed legislation omitted by the legislature in the final version. Chelsea Theater Corp. v. City of Burlington, 258 N.W.2d 372, 374 (Iowa 1977).

the general damages section of the IRLTA[50] when he has repaired and deducted,[51] the tenant would be without compensation for the period of the landlord's noncompliance if he could not recover damages under section 562A.23(1) where he also repaired and deducted. Because an action for damages is only precluded under section 562A.21(2) when the tenant elects the repair and deduct remedy of section 562A.23(1), if the tenant needed to elect one of the damage remedies of section 562A.23 over the repair and deduct remedy, the damage remedies would become superfluous in view of the tenant's ability to obtain damages under the broader coverage of section 562A.21(2).[52]

Another modification by the legislature of the remedies of section 562A.23 is in subsection (1)(c).[53] That subsection was changed from the URLTA section which excuses the payment of rent where the tenant obtains substitute housing[54] to a pro rata recovery of the rent already paid during the period of the landlord's noncompliance,[55] regardless of whether the tenent obtains substitute housing.[56] The effect of this change is to give the tenant a second measure of damages as an alternative to the diminution in fair rental value measure provided in subsection (1)(b).

The tenant may not use the remedies of section 562A.23 together with those provided for in section 562A.21.[57] It should be emphasized that this preclusion extends only to the breach which the tenant is correcting under section 562A.23.[58] Thus, if the tenant is deducting for the repair of a portion of the plumbing, he is still entitled to utilize the remedies provided in section 562A.21 for other landlord breaches, such as noncompliance with a building or housing code.[59] The section 562A.23(2) preclusion applies *only* to the remedies of section 562A.21.[60] Thus, if the proper situation arises, the tenant

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50. Iowa Code § 562A.21(2) (1979).

51. *Id.* § 562A.23(2).

52. This is particularly true when one notes that damages are available under § 562A.21(2) for any noncompliance with the rental agreement or § 562A.15(1) for failure to maintain the premises.

53. *See* note 29 *supra*.

54. *See* note 49 *supra*.

55. Iowa Code § 562A.23(1)(c) (1979).

56. This change relieves Iowa tenants of a problem encountered under the URLTA version, which requires the tenant to find substitute housing before claiming damages. The problem arises where the tenant obtains substitute housing under the usual expedient of signing a rental agreement for a fixed term, say six months, and the noncomplying landlord thereafter corrects the condition causing the breach within those six months. The tenant so operating under URLTA § 4.104(a)(3) may find himself with rents due under leases to two separate landlords for two residences. *See* Kalish, *supra* note 8, at 631.

57. Iowa Code § 562A.23(2) (1979). Section 562A.21 provides the tenant with three remedies for the landlord's noncompliance with either the terms of the rental agreement or section 562A.15. *See* note 31 *supra*. These remedies include damages, injunctive relief and termination. *See* notes 131-56 *infra* and accompanying text.

58. *Id.* § 562A.23(2).

59. Failure to comply with the applicable housing or building code is violative of section 562A.15(1)(a). *See* note 30 *supra*.

60. In fact, the URLTA comments state that the tenant proceeding under that section is

should be able to proceed under both IRLTA repair and deduct sections during the same month, in order to remedy different noncompliances by the landlord.[61]

Repair and deduction under section 562A.23 is not without its hazards for the tenant, however. As already noted, the trap into which tenants will most frequently fall is the failure to give the landlord notice prior to the repair.[62] The tenant who has so failed seems to be left without the right to deduct the expense of the repairs. However, where the requirements of section 562A.23 have not been met, there appears to be no preclusion from an action for damages under section 562A.21(2).

Another hazard facing the tenant is the possibility that the landlord will respond to the rent deduction with an action for possession. Although section 562A.23 does not explicitly provide for such a defense, as does the other repair and deduct provision,[63] said defense would seem equally applicable. Aside from any right he may have to a defense under section 562A.23, the tenant may also set-off any claims he may have under the IRLTA by authority of section 562A.24,[64] section 413.106[65] or the implied warranty of habitability defense recognized in *Mease v. Fox.*[66] If the tenant proves that there is no rent still owing the landlord, the tenant may recover actual damages and attorney's fees for the landlord's retaliatory action.[67]

The most significant drawback to this remedy is that the cost of the repairs will often be prohibitively high.[68] The indigent tenant repairing under this section will simply not have the necessary cash immediately available

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not precluded from using the Act's remedies for the landlord's unlawful ouster, exclusion or diminution of services, IOWA CODE § 562A.26 (1979), or the landlord's retaliatory action, IOWA CODE § 562A.36 (1979). For a discussion of retaliatory action under the Act, *see* note 23 *supra*, discussing URLTA § 4.104, comment; IOWA CODE § 562A.23 (1979).

61. For instance, where the landlord has failed to supply running water, as well as neglected to provide waste receptacles, as required by section 562A.15(1)(c), the tenant could procure the running water and deduct such expense under section 562A.23, and also obtain waste receptacles and deduct their cost under section 562A.27(4). It is wise for tenants to avoid such "dual deduction," however, in view of the problems created in determining under which section the tenant action was being first deducted, particularly in light of the deduction limitation of section 562A.27(4).

If there is any question as to whether the landlord's failure to provide essential services is "deliberate or negligent," it would be wise for the tenant to proceed under the stricter procedures of section 562A.27(4), which also allows the repair and deduction of the services covered by section 562A.23, but does not require the "deliberate or negligent" involvement of the landlord.

62. *See* notes 39-43 *supra*.

63. IOWA CODE § 562A.27(4) (1979).

64. *See* note 92 *infra*.

65. *See* notes 117-120 *infra*.

66. 200 N.W.2d 791 (Iowa 1972). *See* notes 113-16 *infra*.

67. IOWA CODE § 562A.36 (1979). *See* note 22 *supra*.

68. *Id.* § 562A.11(1)(a) (1979). This section prohibits the rental agreement from containing a provision whereby the tenant "agrees to waive or to forego rights or remedies under this Act" unless the rental agreement covers a single-family residence on agricultural land in an unincorporated area. The effect of this provision is to preclude the landlord from "contracting around" his obligations or the tenant's means of enforcement of those obligations.

for the work, regardless of his ability to recover it later. A new $800 furnace will be well beyond the financial reach of the tenant who has trouble with a monthly rent payment of $175, and even if the tenant had the required cash it would take over four and a half months to recover the cost of the furnace through monthly rent deductions. The problem is compounded by the limited financing available to the tenant who seeks to utilize this type of remedy.

As a result, the most effective use of this remedy will probably be by members of tenant groups who contribute to the initial repair outlay as a group and then deduct the cost from each of their respective rent payments.[69] In the example of the $800 furnace, a group of five tenants could obtain the new furnace for a contribution from each of an amount less than their monthly rent, and could then recover their "investment" in less than a one month rent deduction.

B. *Repair and Deduct of Minor Noncompliances*

The other IRLTA repair and deduct remedy is located somewhat out-of-place and is found in the landlord remedies section.[70] Section 562A.27(4) provides the tenant with a defense in the landlord's action for possession[71] to the extent that the tenant has deducted the cost of repairs required to bring the landlord into compliance with either section 562A.15[72] or the rental agreement.[73] While section 562A.23 allows the tenant to repair only essential services, section 562A.27(4) covers *all* obligations under section 562A.15 or the

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69. Support for joint action with other tenants is found in the comment to URLTA § 4.104, which states: "Section 4.104(a)(1) permits collective action by tenants to secure essential services." The Iowa legislature recognized the significance of this section and therefore incorporated it in its entirety in the IRLTA. *See* IOWA CODE § 562A.23 (1979).

70. IOWA CODE § 562A.27 (1979). The Iowa legislature took this subsection of section 562A.27(4) from URLTA § 4.103, "Self-Help for Minor Defects," and, with a few modifications, moved it from the tenant remedies portion of the Act to the landlord remedies portion as a defense to the landlord's action for possession.

71. The landlord's action for possession is pursuant to the procedures of IOWA CODE ch. 648 (1979).

72. *See* note 30 *supra*.

73. (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 fifteen (15) of this Act; and

(b) That the tenant notified the landlord at least fourteen days prior to the due date 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 a receipt of written notice of the landlord's intention to terminate the rental agreement for nonpayment of rent.

IOWA CODE § 562A.27(4) (1979).

rental agreement,[74] and does *not* require the noncompliance to be "deliberate or negligent."[75]

In sharp contrast to the minimal procedures of section 562A.23, section 562A.27(4) prescribes considerably more detailed notice requirements. Before the tenant may correct the condition causing the noncompliance, notice must be given of his intention to repair, and only thereafter may he deduct the cost of the repairs.[76] Further, the rent due date on which the tenant deducts the cost from rent must be at least fourteen days after the date of the notice.[77] If the next rent payment is less than fourteen days after the date of the notice, the tenant will need to wait until the following month to deduct the cost of the repairs.[78] This section does not, however, require that the tenant have already paid the cost of the repairs prior to the deduction. Thus a tenant who has been billed, but has not yet paid for the services may still deduct their cost.[79] The tenant is not precluded from performing the repairs himself, although, as was earlier discussed, such an approach may not be the wisest course to follow.[80]

The notice tendered by the tenant need not be in writing,[81] though it is wise for the tenant to have such a written record for possible later litigation. The importance of the lack of a written notice requirement is that where the tenant has repaired the condition with a mere verbal complaint to the landlord, the cost of the repairs may still be deducted.[82]

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74. The comment to URLTA section 4.103, which forms the basis for IRLTA section 562A.27(4), provides that the tenant's right of "self-help" extends to areas outside the dwelling unit.

75. *See* note 60 *supra*.

76. IOWA CODE § 562A.27(4)(b) (1979). This raises the issue of whether the tenant may deduct where he has failed to give notice to the landlord prior to the repair, but has given notice prior to the deduction. *See* note 61 *supra* and accompanying text, wherein it is submitted that notice must be tendered prior to both the repair and the deduction.

77. *Id.* § 562A.27(4)(b) (1979). Under both repair and deduct remedies of the IRLTA the tenant is not required to provide the landlord with an opportunity to repair after the deduction. *See* note 43 *supra*. Under the URLTA, however, the landlord has fourteen days in which to cure the noncompliance, unless the noncompliance constitutes an emergency. URLTA § 4.103(a).

78. For instance, if the tenant gives notice on the nineteenth of April, and rent is due in eleven days, on the first of May, the tenant will need to wait until the first of June to deduct the cost.

79. Although there is no such requirement in the IRLTA, the landlord, for his protection, should demand either a receipt from the contractor, or at least a written statement from the contractor that he will not look to the landlord for payment of the work. One type of protection for the landlord is the use of lien waivers, which are statutorily required under Arizona's version of the URLTA. *See* Ariz. Rev. Stat. Ann. § 33-1363(A) (1974).

80. *See* note 45 *supra* and accompanying text. Unlike the IRLTA, the URLTA section specifically requires the repairs to be performed in "a workmanlike manner." URLTA § 4.103. The Arizona version of the URLTA takes this one step further and requires the work to be done by a licensed contractor. ARIZ. REV. STAT. ANN. § 33-1363(A) (1974). Such a requirement would effectively preclude most tenants from performing their own repairs.

81. IOWA CODE § 562A.23 (1979) appears to suggest that the notice must be in writing. *But cf.* Incorporated Town of Casey v. Hogue, 204 Iowa 3, 214 N.W. 729 (1927)(a statute which requires "notice" generally requires that the notice be in writing.) *See also* note 39 *supra*.

82. Some commentators have argued that tenants should not be required to give the

By limiting the amount of the deduction to one month's rent,[83] section 562A.27(4) sets an important limitation not present in section 562A.23 which sharply distinguishes the two remedies. This restriction significantly limits the usefulness of section 562A.27(4) where the amount to be deducted is in excess of one month's rent. As the result of the above limitation, any portion of the repair cost in excess of the first month's rent deduction is not recoverable by the tenant.[84] Where the deductions are less than one month's rent, the tenant may deduct the actual cost of the repairs, provided that cost is reasonable.[85] Although not expressly stated, it appears that the tenant may repair and deduct each month, and may deduct the cost of repairing several different items in one month, so long as the combined repair costs are not in excess of one month's rent.[86]

The section 562A.23 requirement that the conditions repaired may not have been caused by the tenant, by a member of the tenant's family or by anyone on the premises with the consent of the tenant,[87] is not repeated in section 562A.27(4). However, URLTA section 4.103(b), upon which section 562A.27(4) is based, repeats this limitation. It would seem inconsistent with several equitable principles, however, for the tenant to be permitted to deduct where he has either directly or indirectly been the cause of the conditions requiring repair.[88]

The tenant is prohibited from repairing the condition after receipt of a notice from the landlord of the latter's intention to terminate[89] the rental agreement for the tenant's nonpayment of rent. It should be noted that the section precludes the tenant only from *repairing* after that date, but does not preclude him from *deducting* after the notice if he has already repaired the condition.[90]

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landlord notice where he has actual knowledge of his own noncompliance, or where the breach results in serious defects affecting the basic habitability of the premises. *See* Blumberg, *supra* note 13, at 13. This argument seems precluded under the IRLTA by the language of section 562A.27(4)(b) which requires the tenant to have "notified" the landlord of his intent to repair and deduct.

83. IOWA CODE § 562A.27(4)(c) (1979). URLTA sets a deduction ceiling of the greater of $100 or an amount equal to one-half month's rent.

84. It may be argued, however, that section 562A.27(4) merely limits the amount of the *deduction* and that the tenant may still bring an action under section 562A.21(2) for an amount in excess of one month's rent.

85. IOWA CODE § 562A.27(4)(c) (1979).

86. Note, *Landlord-Tenant Reform: Arizona's Version of the Uniform Act*, 16 ARIZ. L. REV. 79 (1974). *But cf.* ABA Subcommittee Report, *supra* note 4, at 116 (questioning whether the limitation is per month, per tenancy, or per item).

87. IOWA CODE § 562A.23(3) (1979).

88. Equitable principles apply in the landlord's action for possession because IOWA CODE § 648.5 (1979) provides that the action "shall be treated as an equitable action." Among the equitable maxims which would seem appropriate are clean hands, and he who seeks equity must do equity.

89. IOWA CODE § 562A.27(4)(d) (1979). The landlord's notice of intent to terminate for nonpayment of rent must be tendered at least three days prior to the termination.

90. Thus, if the tenant repairs the condition on April tenth, and receives a notice of termination on the twelfth of April, he will still be entitled to deduct the cost of the repairs from

While the section 562A.23 repair and deduct remedy precludes the tenant from using that remedy in conjunction with the remedies provided for in section 562A.21, there is no similar limitation on the use of section 562A.27(4) in conjunction with other IRLTA remedies.

II. Rent Withholding

Where the tenant wishes neither to repair and deduct, nor to terminate the rental agreement, a third option is available for dealing with the landlord's noncompliance. Where the landlord has commenced an action for possession or rent, section 562A.24 allows the tenant to raise a defense or counterclaim[91] for any amount which the tenant may recover under either the IRLTA or the rental agreement.[92] The practical effect of the section is to allow the tenant to withhold rent any time he has a claim against the landlord arising out of their landlord-tenant relationship.

The obvious hazard to the withholding tenant lies in the fact that the amount withheld will usually be an unliquidated sum, and consequently, the tenant may "over-deduct," entitling the landlord to a favorable judgment in the action for possession or rent. However, the tenant who has withheld too much may gain some relief on the basis of the holding in *Darnall v. Day*.[93] In *Darnall*, the Iowa Supreme Court allowed a tenant to remain in possession despite the fact that he had deducted an amount in excess of that which the landlord owed, that is, the difference in the rental value with and without the improvement the landlord had agreed to make. Undoubtedly, one of the reasons the court held for the tenant was that he had placed the amount withheld in escrow, and was thus ready to tender to the landlord the money still owed if and when the court found that he still owed a small amount of the rent.[94]

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the May first rent payment. There is also the possibility that the tenant may have a cause of action for retaliatory action under section 562A.36. *See* note 22 *supra*.

91. This provision of a counterclaim for the tenant in the landlord's action for possession represents an implied limited repeal of § 648.19, which provides that the landlord's action for possession "cannot be brought in connection with any other (action), nor can it be made the subject of counterclaim." Iowa Code § 648.19 (1979).

92. (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 act. 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 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 one (1) of this section, but the tenant is not required to pay rent into court.

Iowa Code § 562A.24 (1979).

93. 240 Iowa 665, 37 N.W.2d 277 (1949).

94. The tenant in *Darnall* withheld $360 from the 1947 rent payment because the landlord

Perhaps in an effort to have all tenants set aside the contested rent, as the tenant did voluntarily in *Darnall,* section 562A.24(1) gives the court the power to require payment into court of all or part of the rent "accrued or thereafter accruing."[95] In anticipation of this possibility, it would be wise for the tenant to place the withheld rent in escrow,[96] where it should remain until either a release is obtained from the landlord, the tenant is ordered to pay the withheld rent into court or the action is settled in the tenant's favor. If such a course of action is not followed, there is always the possibility that the tenant will consider the withheld rent a "windfall" and spend it, thus leaving him without the necessary funds in the event that payment into court is required.

Whether or not payment into the court is required, the court will determine the amount due each party in order to find the net amount due the party with the greatest claim. Section 562A.24(1) specifically provides that if the net amount is due the tenant, the court must order the continued possession of the premises by the tenant.[97] However, there is no similar statement covering the reverse situation in which the net amount is found due the landlord. This omission implies that there are situations in which the landlord is entitled to the net amount, yet will not recover possession of the property due to the equities of the situation. This legislative action is consistent with the result in *Darnall* in that the circumstances may be such that the landlord should not be awarded the possession of the premises. Such a view is quite reasonable given the fact that the landlord has been guilty of at least some noncompliance.[98]

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had failed to install a new front on the tenant's store, as required by the lease. The trial court found that the tenant's damages for the period of the landlord's noncompliance amounted to only $300 ($20 per month), but allowed the tenant to tender the remaining $60, which had been kept in escrow. The Iowa Supreme Court affirmed the trial court's holding that the lease was still in effect, but reversed with regard to the specific performance ordered (that the landlord must install a new store front). Although the tenant in *Darnall* was a commercial tenant, the court did not appear to limit its holding to only commercial tenants. *Id.* at ____, 37 N.W.2d at 282.

95. IOWA CODE § 562A.24(2) (1979). This section provides that where the tenant is no longer in possession of the premises, and the landlord is thus suing only for rent, the tenant may not be ordered to pay the rent into the court.

96. This is a prime example of where it would be beneficial for the tenant to work with an attorney. If the tenant places the withheld rent in escrow with his attorney, the money will be "available to the court." Of course, there are other means of escrowing the rent other than with an attorney.

97. IOWA CODE § 562A.24 (1979).

98. There is another interpretation of IOWA CODE § 562A.24(1) (1979) which would always defeat the landlord's action for possession. The section provides that the party to whom the net amount is due will be first paid out of the money paid into court, with the balance paid by the other party. The next sentence of § 562A.24(1) states that if rent "does not remain due after application of this section" judgment in the action for possession will be rendered for the tenant. A literal reading would require an opportunity for the tenant to pay the landlord, either from the court-deposited funds or directly from his own resources, before the court determines whether there is still any rent owing. If such an interpretation prevails, the tenant could always tender payment of the rent, if such were required, and thus avoid being in default.

Withholding rent under section 562A.24 has several hazards of which the tenant should be apprised. As already noted, the tenant is withholding an unliquidated sum, and thus runs the risk of withholding too much and being evicted.[99] Secondly, some form of response by the landlord is almost certain when rent is withheld. While the tenant may initially withhold rent without litigation, he may soon need to establish in court that he was entitled to withhold the amount retained — a fact which is often not easily proven. Thirdly, a danger which must not be overlooked is the provision for tenant payment of the landlord's attorney's fees[100] where the tenant's counterclaim "is without merit[101] and is not raised in good faith."[102] The overly zealous tenant may thus find himself in the unsavory position of paying his landlord's proceeding expenses.[103] Although section 562A.24 itself has no comparable provision for recovery of the tenant's attorney's fees, by comparing two other sections of the IRLTA, a reasonable argument can be made in support of the recovery of attorney's fees by the tenant under the above section.[104] Under section 562A.21(2), the Iowa Legislature has provided that a *tenant* may obtain attorney's fees in an action for injunctive relief where the landlord's noncompliance is willful. Likewise, under section 562A.27(3), a *landlord* may obtain attorney's fees in a similar action for injunctive relief where the tenant's noncompliance is willful. Since the above two sections treat the landlord and the tenant on equal footing with regard to attorney's fees, and since section 562A.24(1) already authorizes landlord attorney's fees, it would not seem to circumvent the intent of the legislature if the tenant was also awarded attorney's fees under 562A.24(2) upon prevailing on his counterclaim.

Section 562A.24 has also had a significant impact on the scope of defects which will justify a withholding of rent by the tenant. Prior to the enactment

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99. *See* note 94 *supra* and accompanying text.

100. *See* IOWA CODE § 562A.6(14) (1979) which provides that: "Reasonable attorney's fees" are "determined by the time reasonably expended by the attorney and not by the amount of the recovery on behalf of the tenant or landlord." This is the same measurement provided for in the Iowa Consumer Credit Code. *See* IOWA CODE § 537.5201(8) (1979).

101. "[A]n unsuccessful defense is not necessarily without merit . . . the term implies a defense bordering on frivolity, ... " Can-Am Petroleum Co. v. Beck, 331 F.2d 371, 374 (10th Cir. 1964) (defining "without merit" as used in the Securities Act of 1933). There is no definition of "without merit" under either the URLTA, or Iowa case law. However, it would seem that the definition provided in *Can-Am* would be adequate for use in IRLTA § 562A.24.

102. IOWA CODE § 562A.24(1) (1979). "Good faith" is defined in the IRLTA as "honesty in fact in the conduct of the transaction concerned." *Id.* § 562A.6(3) (1979). The Iowa legislature omitted from the IRLTA section 1.302 of the URLTA which imposes an obligation of good faith on the parties in the performance and enforcement of their duties under the Act. The drafters of the URLTA commented that the purpose of this section was to set forth a basic principle running throughout the Act, in the same manner as the U.C.C. § 1-203 obligation of good faith. *See* URLTA § 1.302, comment.

103. The award of attorney's fees are limited to that part of the trial dealing with the prohibited conduct, and should not be extended to other joined causes of action. Porter v. Knight, 63 Iowa 365, 19 N.W. 282, 285 (1884).

104. *Cf.* IOWA CODE § 565A.21(2) (1979) *with* IOWA CODE § 562A.27(3) (1979).

of the IRLTA, the tenant could always raise the landlord's noncompliance with the rental agreement as a reason for the withholding of rental payments.[105] However, he could not do so in a summary action for possession brought under the forcible entry and detainer statutes[106] except in the limited circumstances of a breach of the implied warranty of habitability.[107] In *Chambers v. Irish*,[108] the court stated that there are only two relevant questions in a forcible entry and detainer action: "Does the relation of landlord and tenant exist between the parties? And, if so, is the defendant [tenant] holding over after the termination, or contrary to the terms, of his lease?"[109] This obviously left no room for questioning the extent of the landlord's compliance with the terms of the rental agreement.[110] While this view is consistent with the traditional property theory that the covenants passing between tenant and landlord are independent,[111] it is questionable whether such an approach is v ble under the IRLTA.[112]

Where the landlord's action sought recovery of unpaid rent rather than

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105. Darnall v. Day, 240 Iowa 665, 673-74, 37 N.W.2d 277, 282 (1949).

106. IOWA CODE ch. 648 (1979).

107. *See* Mease v. Fox, 200 N.W.2d 791, 796 (Iowa 1971), wherein the Supreme Court of Iowa held that the landlord impliedly guarantees that his rented premises shall be free from latent defects. While the *Mease* decision involved an action seeking recovery of unpaid rent, and not an action for possession, it would seem logical that its holding would apply equally to a possession action since both actions involve the same issue—the tenant's non-payment of rent. For a full discussion of the Mease decision and its implications, see notes 113-116 *infra*. *See also* DRAKE Note, *supra* note 22, at 380-84.

108. 132 Iowa 319, 109 N.W. 787 (1906).

109. *Id.* at 322, 109 N.W. at 788.

110. This view is consistent with the avowed purpose of the forcible entry and detainer statutes, which purportedly is to make it easier for the landlord to remove a tenant than the cumbersome and lengthy law action of ejectment. 3A THOMPSON, *supra* note 11, § 1370, at 718-20; Medoza v. Castiglioni, 14 Cal. App. 2d 710, ____, 59 P.2d 939, 941 (1936) ("The principal object of unlawful detainer, [summary possession action] . . . is to obtain speedy possession of the premises without vexatious litigation or the necessity of resorting to ejectment.") The primary means to achieve this is to limit the tenant's right to raise any counterclaims or defenses to the issues of the landlord's ownership of the land. Thus, the tenant is effectively precluded from raising the important issue of the landlord's compliance with the rental agreement.

111. Piper v. Fletcher, 115 Iowa 263, 88 N.W. 380 (1901). The traditional view taken by the court was that the tenant had a remedy in a separate action against the landlord for the landlord's failure to live up to the terms of the rental agreement, and that the landlord's noncompliance did not relieve the tenant of his rent obligation. *Id.* at 266, 88 N.W. at 381. *But see* Darnall v. Day, 240 Iowa 665, 37 N.W.2d 277 (1949), and its discussion in note 94 *supra*, wherein the court allowed the tenant to withhold a portion of the rent to compensate the tenant for the landlord's noncompliance. The dissent correctly pointed out that this was contrary to the theory enunciated in *Piper*. *Id.* at 676-77, 37 N.W.2d at 283-84 (Mulroney, J., dissenting).

112. The IRLTA states that one of its avowed purposes is insuring "that the right to the receipt of rent is inseperable from the duty to maintain the premises." IOWA CODE § 562A.2(2)(c) (1979). It should be noted that the basis for § 562A.2(2)(c) is § 1.102 of the URLTA, which provides that: "[t]his Act recognizes the modern tendency to treat performance of certain obligations of the parties as interdependent." URLTA § 1.102, comment. Thus, it is questionable whether a court would exclude evidence of the landlord's non-compliance with the rental agreement in an action for possession.

possession of the property, the tenant had two justifications for his failure to tender the amount due. In the 1972 case of *Mease v. Fox*,[113] the Iowa Supreme Court discussed one of the justifications and allowed the tenant to raise a defense in the landlord's action for nonpayment of rent.[114] The court stated that, in order to rely upon this defense, the landlord's breach must be of such a substantial nature that it renders the premises "unsafe or unsanitary, and thus unfit for habitation."[115] The tenant defending under *Mease* is thus able to set up a defense and counterclaim for an amount equal to the damages[116] which would be recoverable for the landlord's conduct. Section 562A.24 of the IRLTA goes well beyond *Mease* by allowing the tenant to withhold rent for a wide variety of defects, rather than just those which cause a dwelling to become "unsafe or unsanitary." Thus, section 562A.24 has not only codified *Mease*, but has greatly expanded its coverage.

The other authority under which the tenant may withhold rent is section 413.106 of the Iowa Code, which prohibits the "recovery"[117] of *any* rent where the landtord has not been issued[118] a certificate of habitability under section

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113. 200 N.W.2d 791 (Iowa 1972).

114. *Id.* at 798.

115. *Id.* at 796. The court pointed out that the question of habitability will generally be a question of fact to be determined by the circumstances of each case. *Id.* In determining whether a particular dwelling was in fact "unsafe or unsanitary" the court provided seven factors relevant in testing the materiality of the 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 used by the tenant.

Id. at 797.

Furthermore, the court stated that the tenant would need to give the landlord notice of any defects of which the landlord did not have actual knowledge in order to take advantage of this remedy. *Id.*

116. The court set two measures of damages, depending on whether the tenant was still in possession or had vacated the premises. In the former situation, the tenant may recover for the difference between "the fair rental value of the premises . . . as they were during occupancy . . . in the unsafe or unsanitary condition." Where the tenant has vacated, the measure is the difference between the "fair rental value of the premises if they had been as warranted and the promised rent . . . ." *Id.* at 797. In either case, the court stated that the tenant is entitled to incidental and consequential damages, relying on U.C.C. § 2-715 as the guiding section for their analysis.

117. Iowa Code § 413.106 (1979). By merely prohibiting "recovery" of rent when the dwelling has no certificate, it is possible to interpret this section as prohibiting a tenant from recovering rent already paid during the period of the landlord's noncompliance. While such seems inconsistent with the policy of the section, which is obviously to provide an incentive for landlords to maintain their property, a contrary interpretation could expose many landlords who for years have been in noncompliance to suits for recovery of substantial amounts of back rent.

118. The remedy of section 413.106 may also be available where the certificate of habitability has been revoked pursuant to Iowa Code § 413.103 (1979).

413.106.[119] The primary advantages of rent withholding which is based on the lack of certification by the muncipality are (1) the increased security which the tenant obtains from knowing he has governmental "approval" to withhold rent,[120] and (2) the prevention of abuse of the remedy by the tenant.[121] The major problem with such a system, however, is the lack of enforcement by the local housing officials.[122] The continuing importance of this remedy for the tenant is that it goes beyond the limitation of section 562A.24 by not allowing the landlord to recover *any* rent, whereas section 562A.24 merely allows the tenant to raise any claim he has as a result of the landlord's noncompliance, without setting the value of that claim. On the other hand, while section 413.106 covers only dwellings which do not have a certificate of habitability, section 562A.24 allows the tenant to withhold rent regardless of the issuance of a certificate.

While the rent withholding and repair and deduct remedies have given the tenant some "coercive strength" and monetary compensation for living in substandard housing,[123] they have been criticized as leading to increased rents and a greater incidence of landlord abandonment.[124] The effectiveness of rent withholding, as well as repair and deduct remedies, may well rest with the landlord's ability to obtain financing[125] for the necessary repairs, which is often limited due to deteriorating conditions, neighborhood instability, vandalism and limited rental values.[126]

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119. There are two important limitations on the applicability of section 413.106 which must be considered. These limits are: (1) If the building of which the dwelling is a part was constructed prior to 1919, this section does not apply, and the tenant must continue to pay rent, and (2) section 413.106 applicability only to those buildings in municipalities with populations greater than 15,000, and to buildings on less than ten acres within one mile of such municipalities. IOWA CODE § 413.106 (1979). It is thus important for the tenant to know whether he is precluded from action under section 413.106 so that he may plan his withholding under section 562A.24.

120. Daniels, *supra* note 11, at 926.

121. *Id.*

122. For a collection of articles providing a general overview of various aspects of the closely related area of housing code enforcement, see 3 URB. LAW. (Fall 1971). A recent case study from California suggests that tactical use of housing code enforcement by tenants may result in a more effective remedy than use of the breach of implied warranty of habitability defense. Heskin, *The Warranty of Habitability Debate: A California Case Study*, 66 CAL. L. REV. 37 (1978).

123. Levy, *Adjusting the Economic Relationship of Landlord and Tenant — Rent Alteration Remedies*, 11 URB. L. ANN. 155, 156 (1976). One commentator has contended that tenant rent withholding is essential to improvement of the tenant's bargaining position. Moskovitz, *supra* note 24, at 598.

124. Note, *Rent Withholding Won't Work: The Need for a Realistic Rehabilitation Policy*, 7 LOY. L. REV. (*L.A.*) 66, 83 (1974); DRAKE Note, *supra* note 22, at 383-84. *But see* Weitzman, *The Impact of Repair and Deduct Legislation: An Economic Analysis*, 11 CLEARINGHOUSE REV. 985 (1978).

125. The landlord's financial ability is important in that any incentive to maintain habitable housing present in the repair and deduct remedies loses its strength if the landlord cannot afford to make the repairs.

126. Levy, *supra* note 124, at 179.

III. TERMINATION

Five sections of the IRLTA provide the tenant with the power to terminate the rental agreement.[127] None of these sections require the tenant to initiate legal action to terminate. The terminating tenant's primary concern is to insure that his action does not constitute an abandonment.[128] In such a situation his liability for rent would continue for the period during which the dwelling is not relet.[129] If the tenant has properly terminated under one of the IRLTA termination sections, however, liability for the reserved rent is avoided. There may be situations in which the tenant is not only *allowed* to terminate but is *required* to do so in order to satisfy his obligation to mitigate damages,[130] which are recoverable under each termination section.

A. *Termination for Noncompliance with Section 562A.15 or the Rental Agreement*

Section 562A.21(1)[131] allows the tenant to terminate the rental agreement

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127. Prior to the enactment of the *IRLTA*, the tenant's primary rights of termination were under the doctrines of breach of an implied warranty of habitability, and constructive eviction. For a discussion of the implied warranty of habitability, see notes 113-116 *supra* and accompanying text.

Three elements are required to establish constructive eviction: (1) violation by the landlord of an obligation imposed by law or by the rental agreement, (2) the violation constitutes a disturbance of the tenant's quiet enjoyment, and (3) the tenant abandons the premises in reasonable time. Levy, *supra* note 123, at 158. The practical value of the termination remedy to the tenant, however, is limited by the need to prove a substantial disturbance of quiet enjoyment, the requirement of abandonment, and the lack of substitute housing. Note, *The Indigent Tenant and the Doctrine of Constructive Eviction*, 1968 WASH. U.L.Q. 461. While the Iowa Supreme Court has not used the precise words "constructive eviction," it has held that "[T]he landlord, without being guilty of an actual, physical disturbance of the tenant's possession, may yet do such acts as will justify the tenant in leaving the premises." Boyer v. Commercial Bldg. Inv. Co., 110 Iowa 491, 497, 81 N.W. 720, 722 (1900) (tenant's enjoyment of the premises disturbed by landlord's operation of boilers in the basement below, which made the floor and walls "uncomfortable").

128. "Abandonment as applied to leases involves an absolute relinquishment of premises by a tenant, and consists of acts or omissions and an intent to abandon." Vawter v. McKissick, 159 N.W.2d 538, 540 (Iowa 1968). "Abandonment" must be distinguished from "surrender" which is the "yielding up of the estate to the landlord so that the leasehold interest becomes extinct by *mutual agreement* between the parties." Ballenger v. Kahl, 247 Iowa 721, 725, 76 N.W.2d 196, 198 (1956) (emphasis added).

129. Packer v. Cockayne, 3 G. Greene 111, 113 (1851). The abandoning tenant gains some relief from a landlord's demand for reserved rent in the requirement that the landlord plead and prove that "reasonable diligence has been used to relet the property at the best obtainable rent." Vawter v. McKissick, 159 N.W.2d 538, 541 (Iowa 1968).

130. IOWA CODE § 562A.4(1) (1979).

131. (1) Except as provided in this Act, if there is a material noncompliance by the landlord with the rental agreement or a noncompliance with section fifteen (15) of this Act 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

where there has been a material noncompliance with a provision of either section 562A.15[132] or the rental agreement, and such noncompliance materially affects health and safety.[133] The tenant has the right to terminate under two circumstances. First, where the landlord noncompliance has not occurred previously, the tenant may terminate thirty days after delivery of a written notice to the landlord, if the landlord fails to cure the defect within fourteen days.[134] Secondly, the tenant may terminate where he has given notice of "substantially the same" noncompliance within the previous six months. Under these circumstances the tenant may terminate with merely a fourteen-day notice, and the landlord has no right to cure, unless he can demonstrate that he "has exercised due diligence and effort" to remedy the noncompliance.[135] Regardless of which termination procedure is followed, the tenant may also seek recovery of damages and injunctive relief under section 562A.21(2).[136] Where the tenant terminates, the landlord must return "all prepaid rent and security" recoverable by the tenant under the IRLTA's rental deposit provision.[137]

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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.

IOWA CODE § 562A.21(1) (1979).

132. *See* note 30 *supra*.

133. The requirement that the noncompliance "materially affect health and safety" is consistent with the common law rule that "substantial compliance" will prevent termination. Bentler v. Poulson, 258 Iowa 1008, 1010, 141 N.W.2d 551, 552 (1966); Beck v. Trovato, 260 Iowa 693-97, 160 N.W.2d 657-59 (1967). In determining whether or not a breach is material, the two factors most often considered are "the seriousness of the claimed defect and the length of time for which it persists." Hinson v. Delis, 26 Cal. App. 3d 62, 70, 102 Cal. Rptr. 661, 666 (1972).

134. IOWA CODE § 562A.21(1) (1979).

135. *Id.* § 562A.21(1)(b).

136. *Id.* § 562A.21(3). This right to seek damages in addition to termination is important to the tenant in that the damages provision, § 562A.21(2), also provides that if the landlord's noncompliance is willful the tenant may collect reasonable attorney's fees. Additionally, it should be recalled that section 562A.23(2) provides that the remedies of section 562A.23 may not be used contemporaneously with those at section 562A.21. *See* notes 58-60 *supra*.

137. *Id.* § 562A.21(4). Section 562A.12(3) allows the landlord to retain the tenant's rental deposit, or "such amounts as are reasonably necessary for the following reasons:

(a) To remedy a tenant's default in the payment of rent or of other funds due to the landlord pursuant to the rental agreement.

(b) To restore the dwelling unit to its condition at the commencement of the tenancy, ordinary wear and tear excepted.

In view of the fact that termination under section 562A.21(1) usually takes at least thirty days, the remedy is not of great importance to the month-to-month tenant, who may terminate with thirty days notice, regardless of compliance by the landlord.[138] Although the month-to-month tenant may terminate a few days earlier if there is a recurring noncompliance, the remedy is of much greater significance to the tenant locked into a long-term rental agreement.

Where the landlord's noncompliance[139] is a first-time breach, the notice required of the tenant must satisfy four requirements: (1) it must be in writing, (2) it must be delivered to the landlord, (3) it must specify the acts or omissions of the landlord which constitute the noncompliance, and (4) it must state that the rental agreement will be terminated in thirty days unless the noncompliance is remedied within fourteen days.[140]

Under the abbreviated termination procedures of section 562A.21(1)(b), the tenant's notice informing the landlord of "substantially the same" noncompliance must meet these same requirements, except that the notice is not required to be "delivered." As such, the tenant need only take "steps reasonably calculated to inform" the landlord.[141] In contrast, however, there are no requirements setting forth the type of notice required at the time of the *initial* noncompliance, other than that "notice was given."[142] Thus, the prior notice need not be in writing, nor must it be given with termination contemplated.

In addition to the requirement that the previous noncompliance be "substantially the same" as its present occurrence,[143] another restriction upon the tenant's use of the accelerated termination procedure is where the landlord can demonstrate that he exercised "due diligence and effort" to remedy

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(c) To recover expenses incurred in acquiring possession of the premises from a tenant who does not act in good faith in failing to surrender and vacate the premises upon noncompliance with the rental agreement and notification of such noncompliance pursuant to this Act.

IOWA CODE § 562A.12(3) (1979).

Section 562A.12(3) also provides that in any action concerning a rental deposit, the burden is upon the landlord to show by a preponderance of the evidence that the reason for retaining all or a portion of the deposit. This section does not, however, provide a remedy for the tenant where the landlord wrongfully retains the rental deposit, although it seems logical that the tenant may bring an action for its return.

138. The month-to-month tenant may terminate with a thirty-day notice without any justification required for the termination. *See* IOWA CODE § 562A.34(2) (1979). This represents a codification of prior common law. Verlinden v. Godberson, 238 Iowa 161, 168-69, 25 N.W.2d 347, 351 (1946). However, section 562A.34(1) modifies the general common law by requiring a ten-day notice from a week-to-week tenant desiring termination, rather than a mere seven-day notice. Smith v. Holt, 29 Tenn. App. 31, ____, 193 S.W.2d 100, 102 (1945).

139. The tenant may not terminate for a noncompliance 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." IOWA CODE § 562A.21(1)(c) (1979).

140. *Id.* § 562A.21(1).

141. *Id.* § 562A.8(2). "Delivery" of the notice is not defined in the IRLTA, but it is at least arguable that it is equivalent to "giving" notice under section 562A.8(2).

142. *Id.* § 562A.21(1)(b).

143. *Id.*

the previous noncompliance.[144] If the landlord demonstrates such diligence and effort, the tenant would presumably still be able to terminate under the procedures set forth for situations where there has been no prior noncompliance.

The issuance date of the tenant's notice of termination can have unfortunate consequences if it is ill-timed. Since section 562A.21(1) imposes no guidelines as to the time when the tenant may serve the notice upon the landlord, the tenant may tender the notice at any time during the rental period. This raises a problem of timing in two respects. First, if the effective date of the termination[145] lands in the middle of the month, the tenant is faced with the problem of what to pay as rent, if anything, for that month. For instance, suppose the rental period corresponds with the calendar month, with rent payable on the first. Assume also that the tenant gives a 14/30-day notice on the sixteenth of September, stating that he will terminate the rental agreement on October sixteenth if the conditions are not corrected within fourteen days, and that he will remain in the dwelling for only a portion of October (sixteen days).[146] When October first arrives, the tenant will have to decide whether to pay rent for October. The tenant in this situation has three alternatives. His first alternative would be to pay the entire rent for October. Although this will probably avoid any landlord response, it is inequitable for the tenant to pay a full month's rent for only a half month's occupancy in a dwelling which still constitutes landlord noncompliance. Secondly, the tenant could pay a pro rata amount for the time period when he will be in occupancy. The problems with this approach are that the tenant is still paying for something less than that for which he has bargained, and more significantly, that the landlord will probably respond by attempting to evict the tenant. Thirdly, he could withhold the payment of rent altogether. Although the tenant escapes paying for substandard housing by this action, his non-payment is almost certain to elicit a litigious response by the landlord.

The landlord's probable response to the tenant who pays a diminished rent will be an action for possession based upon the nonpayment of rent.[147] The procedures required for eviction are sufficiently time-consuming that the tenant will usually be able to remain in possession for the number of days stated in the notice.[148] If the landlord realizes the futility of an action for

144. *Id.*

145. The effective date of the termination is entirely within the discretion of the tenant as specified in the notice to the landlord, so long as it is at least thirty days after delivery of the notice, or at least fourteen days if the noncompliance is a recurring breach under section 562A.21(1)(b).

146. The tenant who tenders a fourteen-day notice under the accelerated termination procedure will be in the same position if he tenders the notice after September sixteenth, and intends to leave as soon as the fourteen days have expired. *But see* note 148 *infra.*

147. The landlord's action for possession is pursuant to IOWA CODE ch. 648 (1979).

148. The landlord must first give the tenant a notice of intent to terminate if the rent is not paid within three days. IOWA CODE § 562A.27(2) (1979). Upon expiration of the notice of intent to terminate, the landlord must serve upon the tenant a three-day notice to quit, until which time, the landlord must accept payment by the tenant. *Id.* § 648.3. If the tenant fails to

possession, and instead brings an action for rent, the tenant may defend under section 562A.24,[149] section 413.106,[150] if applicable, or the warranty of habitability case of *Mease v. Fox.*[151]

The second timing problem concerns the landlord's fourteen-day right to cure under the 14/30-day termination procedure. If the landlord still has a few days left in which to comply when the rent due date arrives, the tenant again must decide whether to pay rent. The lengthy eviction procedures already described[152] will usually protect the tenant in this situation.[153] The tenant may also defend in the actions for possession or for recovery of rent by utilizing section 562A.24,[154] section 413.106[155] or the implied warranty of habitability concept of *Mease.*

B. *Termination for Landlord's Unlawful Ouster, Exclusion or Dimunition of Services*

Where the landlord "unlawfully removes or excludes the tenant from the premises[156] or willfully[157] diminishes services to the tenant," the tenant may

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vacate by the expiration of those three days, the landlord may file a petition for forcible entry and detainer, which requires at least a five-day notice to the tenant prior to the hearing. *Id.* § 648.5. Considering the fact that the computation of time for notices excludes the date of receipt of the notice, the minimum amount of time required to remove a tenant is fourteen days:

Notice of intent to terminate	4
Notice to quit	4
Notice of forcible entry and detainer hearing	6
Total number of days to remove tenant (minimum)	14

In making the necessary calculation, it is important that some consideration be given to Iowa Code § 4.1(23) (1979) which provides, in pertinent part: "In computing time, the first day shall be excluded and the last included, unless the last falls on Sunday, in which case the time prescribed shall be extended so as to include the whole of the following Monday . . . ."

From a practical standpoint, however, the time will usually be several days longer since most landlords do not initiate procedures to remove a tenant until a number of days have passed without payment. As a result, the tenant terminating under the accelerated termination procedures will always be able to escape the landlord's action for possession, which will take at least that much time. The tenant terminating under the 14/30-day notice procedure may, however, be a few days short of escaping the action for possession, although he will not be without defense. *See* notes 149-151 *infra.*

149. *See* note 92 *supra* and accompanying text.

150. *See* notes 117-19 *supra* and accompanying text.

151. 200 N.W.2d 791 (Iowa 1972). *See* notes 113-116 *supra* and accompanying text.

152. *See* note 148 *supra.*

153. Although the IRLTA does not so specifically provide, it can be argued that the tenant in such a situation is not required to pay any rent at all until the landlord has at least made some efforts during the fourteen-day "cure" period to comply.

154. *See* note 92 *supra* and accompanying text.

155. *See* notes 117-19 *supra* and accompanying text.

156. IOWA CODE § 562A.33 (1979) limits the landlord's recovery of possession, "by an action or otherwise . . . except in case of abandonment, surrender, or as permitted in this Act." This section in effect makes unlawful the myriad of methods often used by landlords to remove tenants through harassment, such as the traditional "lock-out."

terminate the rental agreement.[158] Contrary to the general termination provision,[159] there are no procedures provided for the termination by the tenant. In view of the fourteen-day "cure period," it would be illogical for the procedures of that section to control termination under these circumstances.[160] Rather, the termination should be controlled by reasonableness in view of the circumstances. In the case of diminution of services it should be noted that if the landlord has not acted "willfully," the tenant should properly terminate under the general termination procedures.[161]

As an alternative to termination, the tenant "may recover possession,"[162] presumably by an action for possession.[163] While this is an appropriate remedy for dealing with the ouster or exclusion from the dwelling, it does not seem the proper remedy for the diminution of services.

Regardless of whether the tenant terminates or recovers possession, he is entitled to recover "actual damages" and reasonable attorney's fees as the result of the landlord's unlawful ouster, exclusion or diminution of services.[164] Furthermore, if the tenant terminates the rental agreement, the landlord must return all prepaid rent and security.[165]

C. *Termination for Landlord's Abuse of Access*

Under the IRLTA, the landlord has a limited right of access to the premises of the tenant,[166] and the tenant has an obligation to permit the

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157. "Willfully" has been defined as "an intentional act inconsistent with good faith and good intentions." State v. Aldrich, 231 N.W.2d 890, 894 (Iowa 1975). In the context of the landlord-tenant law, "willfully" has been defined as "intentionally, deliberately, with bad or evil purpose, contrary to known duty." Nelson v. Deering Implement Co., 241 Iowa 1248, 1256-57, 42 N.W.2d 522, 527 (1950) (holding that a tenant's willful "holding over" of the rented premises entitled the landlord to double damages).

158. If the landlord unlawfully removes or excludes the tenant from the premises or willfully diminishes services to the tenant by interrupting or causing the interruption of electric, gas, water or other essential service to the tenant, the tenant may recover possession or terminate the rental agreement and, in either case, recover the actual damages sustained by the tenant and reasonable attorney's fees. If the rental agreement is terminated, the landlord shall return all prepaid rent and security.

IOWA CODE § 562A.26 (1979).

159. *Id.* § 562A.21(1). *See* note 134 *supra.*

160. If the procedures of IOWA CODE § 562A.21(1) (1979) controlled the tenant's termination here, the landlord would be allowed to restrict the services for up to fourteen days, and still avoid the tenant's termination.

161. IOWA CODE § 562A.21(1) (1979).

162. *Id.* § 562A.26.

163. *Id.* ch. 648.

164. *Id.* § 562A.26. For the proper measurement of attorney's fees, *see* note 100 *supra.*

165. Section 562A.26 does make reference to the rental deposit of section 562A.12 with regard to the rights of the tenant upon termination, whereas the general termination section does not. *See* note 131 *supra.*

166. IOWA CODE § 562A.19 (1979) is the primary statement of the landlord's right of access to the rented premises. The landlord may enter:

to inspect the premises, make necessary or agreed repairs, decorations, alterations, or improvements, supply necessary or agreed services, exhibit the dwelling unit to pro-

landlord's entry.[167] Where the landlord abuses that right of access, the tenant may terminate the rental agreement.[168] As with termination for unlawful ouster, the abuse of access termination remedy fails to specify particular procedures to be followed. Such a failure could be logically interpreted as requiring only "reasonable" procedures under the circumstances.[169] The landlord misconduct which will constitute a sufficient breach to justify termination can be divided into three general violations: (1) where the landlord makes an unlawful entry,[170] (2) where the landlord makes a lawful entry in an unreasonable manner[171] and (3) where the landlord "makes repeated demands for entry otherwise lawful but which have the effect of unreasonably harassing the tenant. . . ."[172]

As an alternative to termination, the tenant may obtain injunctive relief to prevent the recurrence of the landlord's abuse of access. Regardless of which alternative is chosen, the tenant may also recover actual damages of "not less than an amount equal to one month's rent,"[173] and reasonable attorney's fees.[174] There is no provision for return of the rental deposit where the tenant terminates for abuse of access, as there is in the termination remedy for unlawful ouster. However, the rental deposit section[175] refers generally to the "termination of the tenancy" and would thus appear to govern termination under this section as well.[176]

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spective or actual purchasers, mortgagees, tenants, workmen, or contractors.

In addition, the landlord may enter in cases of emergency, abandonment, surrender, by court order, tenant absence, and where repairs are required due to the tenant's failure to maintain. *See* IOWA CODE §§ 562A.19(2) & (4), 562A.28, 562A.29(2) (1979).

167. IOWA CODE § 562A.19(1) (1979) prohibits the tenant from "unreasonably withhold[ing] consent" to the landlord's entry where the landlord has a right to access. The landlord's remedies for the tenant's refusal to allow access include injunctive relief or termination, as well as damages and attorney's fees. *Id.* § 562A.35(1).

168. (2) If the landlord makes an unlawful entry or a lawful entry in an unreasonable manner or makes repeated demands for entry otherwise lawful but which have the effect of unreasonably harassing the tenant, the tenant may obtain injunctive relief to prevent the recurrence of the conduct, or terminate the rental agreement. In either case, the tenant may recover actual damages not less than an amount equal to one month's rent and reasonable attorney's fees.

IOWA CODE § 562A.35(2) (1979).

169. *See* notes 160-62 *supra*. It would be illogical to require the procedures of section 562A.21(1) for the tenant terminating for the abuse of access of the landlord. Those procedures would allow the landlord to abuse his right of access for fourteen days before the tenant could terminate.

170. The "lawfulness" of the landlord's entry is determined by section 562A.19. *See* note 166 *supra*.

171. There is no guideline provided for the IRLTA as to what constitutes an "unreasonable manner" of entry.

172. The words "unreasonably harassing" lead one to question whether there is such a thing as "reasonable harassment."

173. IOWA CODE § 562A.35(2) (1979).

174. *Id. See also* note 100 *supra*.

175. *Id.* § 562A.12. *See* note 137 *supra*.

176. *Id.* § 562A.12(3).

D. *Termination for Failure to Deliver Possession*

The landlord is obligated to deliver possession of the premises to the tenant "at the commencement of the term."[177] By failing to specify whether this requires actual possession, or mere legal possession, the URLTA allows adopting states to interpret this obligation in light of each state's common law. Iowa follows the majority, or "English" rule, which requires the landlord to supply actual possession.[178]

Where the landlord fails to deliver actual possession to the tenant on the date agreed in the rental agreement the tenant has two options. Upon at least five days written notice to the landlord, the tenant may terminate the rental agreement.[179] In the alternative, the tenant may "demand performance" by the landlord and, "if the tenant elects," maintain an action for possession against the landlord or the person in possession.[180]

Section 562A.22(1) provides that rent abates until possession is delivered, and then states that "the tenant *shall*" terminate or demand performance.[181] This represents a change from section 4.102(a) of the URLTA which uses the discretionary word "may" rather than "shall." Thus, the URLTA raises the question of whether rent abates where the tenant does not pursue one of his other available remedies.

It appears that the Iowa legislature intended to require some form of notice to the landlord prior to the rent abatement, whether that notice be a demand for possession or a notice of termination.[182] Further, if the failure to deliver possession is "willful"[183] and "not in good faith",[184] the tenant may recover from the landlord actual damages and reasonable attorney's fees.[185]

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177. *Id.* § 562A.14.

178. Dilly v. Paynsville Lane Co., 173 Iowa 536, 155 N.W. 971 (1916). The "English" rule was first enunciated in Coe v. Clay, 130 Eng. Rep. 1131 (C.P. 1829), in which the court stated that "he who lets, agrees to give possession, and not merely to give a chance of a law suit." *Id.* In contrast, the "American" rule requires the landlord to deliver mere "legal" possession — the "chance of a law suit."

It should be noted that even under the "English" rule, the landlord's obligation is only to *deliver* the possession, not to protect it. McCullough v. Houar, 141 Iowa 342, 344, 117 N.W. 1110, 1111 (1908) (landlord not liable for the actions of a third party disturbing the quiet enjoyment of another tenant, except where the landlord ordered or authorized those actions).

179. IOWA CODE § 562A.22(1)(a) (1979). When the tenant terminates, the landlord must return "all prepaid rent and security," presumably as required by section 562A.12(2). *See* note 137 *supra.*

180. *Id.* § 562A.22(1)(b). Under prior law, the tenant could proceed against the party in possession, whether by an action for possession under Iowa Code ch. 648, or by a tort action for trespass. *See* Johnson v. Robertson, 156 Iowa 64, 135 N.W. 585 (1912) (construction of building on portion of leased land).

When the tenant makes demand for possession, he may also recover damages from either the landlord or the party wrongfully in possession.

181. IOWA CODE § 562A.22(1) (1979) (emphasis added).

182. This seems reasonable in view of the fact that the landlord will often not be aware of the fact that the prior tenant is holding over. However, where the landlord is directly responsible for failing to deliver possession, notice to him of that fact seems unreasonable.

183. *See* note 158 *supra.*

184. *See* note 101 *supra.*

185. The redundancy of damages in subsections (1)(b) and (2) of section 562A.22 is the

E. *Termination for Fire or Casualty Damage*

Where the tenant's dwelling unit or premises[186] are "damaged or destroyed by fire or casualty to an extent that enjoyment of the dwelling unit is substantially impaired," the tenant may either terminate or continue to occupy (if such is lawful), and have his rent reduced.[187] By using the phrase "fire or casualty," rather than "fire or *other* casualty," section 562A.25 allows the tenant to use its remedies even where the fire is due to the tenant's negligence.[188] Thus, the only time when a tenant may not invoke this section is where he intentionally sets the fire.[189]

If the tenant decides to terminate the rental agreement, he must give the landlord fourteen days' written notice of his intention to terminate, in which case the rental agreement terminates on the day the tenant vacates.[190] This section states that the notice must be "within fourteen days" of the casualty, which raises the question of whether a tenant who has vacated but failed to give the landlord notice can receive a rent abatement. A logical interpretation

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result of a change made by the legislature. URLTA § 4.102(b) provided a punitive damages section in which the tenant could recover the greater of three months' rent or actual damages where the landlord's failure to deliver possession was willful and not in good faith.

186. By including the "premises," section 562A.25 extends its coverage beyond the tenant's dwelling to "the structure of which it is a part and facilities and appurtenances of it and grounds, areas and facilities held for use of tenants generally or whose use is promised the tenant." IOWA CODE § 6(7) (1979).

187. (1) If the dwelling unit or premises are damaged or destroyed by fire or casualty to an extent that enjoyment of the dwelling unit is substantially impaired, the tenant may:

(a) immediately vacate the premises and notify the landlord in writing within fourteen days of the tenant's intention to terminate the rental agreement, in which case the rental agreement terminates as of the date of vacating;

* * *

(2) If the rental agreement is terminated, the landlord shall return all prepaid rent and security recoverable under section twelve (12) of this Act. Accounting for rent in the event of termination or apportionment is to occur as of the date of the casualty.

IOWA CODE § 562A.25 (1979).

188. Most courts limit "fire or *other* casualty" to only a casualty, or accidental, fire. "Fire or casualty" suggests a fire by any cause will make section 562A.25 available to the tenant. *See* Note, *Landlord-Tenant Reform: Arizona's Version of the Uniform Act*, 16 ARIZ. L. REV. 79, 120-21 (1974); Stone Mountain Indus., Inc. v. Bennett, 112 Ga. App. 466, ____, 145 S.E.2d 591, 593 (1965) ("the reference to 'fire . . . or other casualty' refers to a fire deemed to be a casualty and not one caused by the lessee's negligence."). *Contra*, New Hampshire Fire Ins. Co. v. Fox Midwest Theatres, Inc., 203 Kan. 720, ____, 457 P.2d 133, 141 (1969) ("fire or other casualty" includes negligence fire).

Iowa courts define casualty as an "inevitable accident, something not to be foreseen or guaranteed against." Bankers Mut. Cas. Co. v. First Nat'l Bank of Council Bluffs, 131 Iowa 456, 461, 108 N.W. 1046, 1048 (1906).

It should be noted that section 562A.17(6) obligates the tenant not to destroy or damage the premises, whether negligently or deliberately. The landlord remedy for the tenant's noncompliance with this obligation is found in section 562A.27 and should not limit the tenant's right to terminate or receive a rent apportionment.

189. IOWA CODE § 562A.25(1)(a) (1979).

190. *See* note 137 *supra*.

is that the fourteen day notice operates as a "relation-back" provision, and if the tenant fails to give the notice within fourteen days the rent abatement runs only from the date of the notice. If the rental agreement is terminated, the landlord must return all prepaid rent and security.

IV. Conclusion

The IRLTA self-help remedies equip the tenant with the long-needed means by which to deal with a landlord who fails to maintain the tenant's building at a minimum level of basic habitability. These remedies, together with the Act's judicial remedies, take most of the landlord-tenant relationship out of the ill-fitting and archaic property law rules, and place it instead under the more appropriate contract law theories and principles. While in theory this change should be of great benefit to tenants, its practical effect may be severely limited by the fact that residential leases are almost universally contracts of adhesion. This fact hits indigents hardest since they are traditionally in a weaker bargaining position than other tenants.

The IRLTA self-help remedies themselves have features which will severely limit their use by tenants acting solely on their own. The most obvious traps for tenants are the notice requirements of several of the remedies, particularly the complex notice procedures required for the various termination remedies, and the different notice requirements of the two repair and deduct remedies. In addition, the dollar limitation on repair and deduction under section 562A.27(4), which will often be too low, presents another trap for the unwary tenant. Nevertheless, despite these hazards, some tenants will certainly become aware of their rights and remedies under the IRLTA and use them to improve the condition of their housing.

Regardless of the extent to which tenants utilize their remedies under the IRLTA, the mere availability of the remedies is certain to place some pressure on landlords to maintain the habitability of their rental properties, which should be a legitimate goal of any landlord-tenant law.

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