University of Arkansas at Little Rock Law Review

Volume 35
Issue 4 *The Ben J. Altheimer Symposium: A Question of Balance: 40 Years of the Uniform Residential Landlord and Tenant Act and Tenant's Rights in Arkansas*

Article 8

2013

Landlord Protection Law Revisited: The Amendments to the Arkansas Residential Landlord-Tenant Act of 2007, Ark. Code Ann. §§ 18-17-101 et seq.

Marshall Prettyman

LANDLORD PROTECTION LAW REVISITED: THE AMENDMENTS TO THE ARKANSAS RESIDENTIAL LANDLORD-TENANT ACT OF 2007, ARK. CODE ANN. §§ 18-17-101 ET SEQ.

*Marshall Prettyman**

In the 2008 *Arkansas Law Notes*, I wrote in an article on the Residential Landlord-Tenant Act of 2007 ("Act") that the Act would better be titled the "Landlord Protection Act."[1] The article pointed out that the Arkansas Act essentially followed the Uniform Residential Landlord and Tenant Act ("Uniform Act") drafted by the National Conference of Commissioners on Uniform State Laws except that it removed every provision of the Uniform Act favorable to tenants, hence the title "Landlord Protection Act."[2] The Arkansas Act also engrafted on the Uniform Act a new remedy for eviction that was to be cognizable in the district courts and had a simpler, more-pro-se-friendly procedure. In the 2009 Legislative session there were a number of changes made to the Act. It would appear that this was in part in response to the concerns raised in the article. This article will first review the changes made to the Act and then address what is perhaps more important, the changes that were not made.

I. 2009 AMENDMENTS TO THE ACT

The first area addressed by the Legislature was the service provisions of the Act. This was to be expected because the provisions as drafted contained one obvious error. As originally written the Act provided in section 18-17-903(a) of the Arkansas Code[3] that service may be in the manner provided by law for service of a summons in circuit court. Obviously, no problems were created there. However, the Act went on to provide in 18-17-903(b)(1) that service could be made by affixing notice to the most conspicuous part of the premises.[4] Sections 18-17-903(b)(2)(A)–(B) of the Arkansas

* Adjunct Professor, University of Arkansas School of Law and Director of Litigation for Legal Aid of Arkansas. The author wishes to acknowledge the invaluable assistance of Charles Kester, Esq., to the section on investigation of criminal activity by a landlord. Mr. Kester is a highly experienced criminal attorney.

1. Marshall Prettyman, *The Landlord Protection Act, Arkansas Code § 18-17-101 et Seq.* 2008 ARK. L. NOTES 71, 71.

2. *Id.*

3. Arkansas Residential Landlord-Tenant Act of 2007, No. 1004, § 1, 2007 Ark. Acts 5110, 5127 (codified at ARK. CODE ANN. § 18-17-903(a) (Supp. 2007)).

4. §1, 2007 Ark. Acts at 5127 (codified at ARK. CODE ANN. § 18-17-903(b)(1) (Supp. 2007)).

Code were apparently meant to delineate the circumstances under which service could be made by affixing notice to the premises.[5]

In a blatant drafting error, instead of saying if service could not be made pursuant to section (a) (standard civil service), the Act stated when service could not be made under section (b)(1) (affixing to the premises). The nonsensical result was the Act authorized tacking under certain circumstances when you were already unable to serve the notice by tacking.

In the 2009 amendments to the Act, the Legislature simply eliminated sections 18-17-903(b)(2)(A)–(B) of the Arkansas Code.[6] Section 18-17-903(b) now reads: "When service in accordance with subsection (a) of this section has been unsuccessfully attempted and no person is found in possession of the premises, the copy of the order to vacate may be served by leaving it affixed to the most conspicuous part of the premises."[7] This amendment to the Act raises two distinct problems.

The first problem with the service amendment is one of interpretation. What is unsuccessful service? Under the language deleted, if there was one unsuccessful attempt to serve the notice, it could be tacked. However, sheriffs' officers and process servers rarely return notice as undeliverable after only one attempt at service. Is service under subsection (a) only unsuccessful after the sheriff or process server has made his or her usual efforts to effect service or if he or she goes out once and no one is home? Similarly, what is meant by "no person is found in possession?" Is it simply that no one is present at the time of attempted service even though all of the tenant's belongings are in the premises and it clearly appears lived in, or does it have to appear that no one is still living at the premises? After all, many people are not physically in their homes from nine to five but are definitely still living there; this is the primary reason process servers make several attempts at service during various times of the day.

The second problem with the service amendment is whether service by affixing the notice to the premises is sufficient under the due process clauses of the United States[8] and Arkansas Constitutions.[9] Actual notice is the essence of due process. In the case of *Mullane v. Central Hanover Bank &*

---

5. *See* §1, 2007 Ark. Acts at 5127 (codified at ARK. CODE ANN. § 18-17-903(b)(2)(A)–(B) (Supp. 2007)).

6. *See* Act of Mar. 6, 2009, No. 311, § 5, 2009 Ark. Acts 1251, 1256 (codified at ARK. CODE ANN. § 18-17-903(b) (Supp. 2011)).

7. ARK. CODE ANN. § 18-17-903(b) (Supp. 2011).

8. *See* Smith v. Edwards, 279 Ark. 79, 83, 648 S.W.2d 482, 484 (1983) (citing Davis v. Schimmel, 252 Ark. 1201, 1207, 482 S.W.2d 785, 788 (1972)).

9. *See* Patsy Simmons Ltd. P'ship v. Finch, 2010 Ark. 451, at 4–5, 370 S.W.3d 257, 260 (citing Trusclair v. McGowan Working Partners, 2009 Ark. 203, at 4, 306 S.W.3d 428, 430; Smith v. Sidney Moncrief Pontiac, Buick, GMC Co., 353 Ark. 701, 709, 120 S.W.3d 525, 530 (2003); Carruth v. Design Interiors, Inc., 324 Ark. 373, 374–75, 921 S.W.2d 944, 945 (1996)).

Trust[10] the United States Supreme Court found sufficient notice under due process must be by the means most likely to apprise the parties of the action.[11]

In keeping with the constitutional requirements, the Arkansas Rules of Civil Procedure provide that if the whereabouts of a defendant are known, service must be personally on the defendant, a member of his household over the age of fourteen, or a person authorized by appointment or law to receive service or by a writing where the defendant acknowledges receipt, such as certified mail or an acknowledgment of service.[12] Affixing notice on the premises provides no such assurance. A posted notice is subject to being blown away, washed away, or torn off by a curious passerby. As originally drafted, the Act required that notice also be mailed if service was by affixing to the premises.[13] That requirement was deleted in the amendments,[14] which made the present provision for tacking less likely to apprise the defendant of the action, and therefore, that much more likely to be constitutionally infirm.

There are situations where affixing the notice to the premises, especially with the added requirement of a mailing, would be appropriate and constitutionally sound. Arkansas law recognizes that, where after diligent inquiry the defendant cannot be found, some form of constructive service is acceptable.[15] There will be cases where good faith attempts at personal service will fail; and there will be a legitimate question as to whether the defendant remains in the premises.

In those cases, affixing notice to the premises, especially if coupled with mailing, is the means most likely to apprise the defendant of the action. Indeed, it is more likely to notify a defendant than a warning order published in a paper or posted at the courthouse would be. However, there would seem to be no reason that, as in the case of the warning order, the affixing to the premises should not also include a mailing to the last known address, which is most likely that of the premises. The cost of a first-class stamp is hardly an inordinate burden to put on the plaintiff.

---

10. 339 U.S. 306, 314 (1950).

11. *See* Mullane v. Central Hanover Bank & Trust, 339 U.S. 306, 314 (1950) (citing Milliken v. Meyer, 311 U.S. 457, 463 (1940); Grannis v. Ordean, 234 U.S. 385, 394 (1914); Priest v. Bd. of Trs. of Las Vegas, 232 U.S. 604, 614–15 (1914); Roller v. Holly, 176 U.S. 398, 409 (1900)).

12. *See* ARK. R. CIV. P. 4(d).

13. ARK. CODE ANN. § 18-17-903(b)(2)(A) (Supp. 2007) (emphasis added) (repealed 2009) read, "When service as provided in subdivision (b)(1) of this section has been attempted unsuccessfully, a copy of the order may be served by affixing it to the most conspicuous part of the premises and *mailing a copy of the notice*."

14. *See* Act of Mar. 6, 2009, No. 311, § 5, 2009 Ark. Acts 1251, 1256 (codified at ARK. CODE ANN. § 18-17-903(b) (Supp. 2011)).

15. *See* ARK. R. CIV. P. 4(f).

In the case of *Gorman v. Ratliff*,[16] the Arkansas Supreme Court found self-help evictions by the landlord were illegal and any provision in a lease authorizing self-help eviction would be invalid.[17] In a case where the tenant abandons the premises without notice to the landlord, personal service will often not be feasible. However, if the landlord merely changes the locks, he or she runs the risk of engaging in a self-help eviction. Since the remedy sought is possession of the premises, affixing notice to the premises along with a mailing to the last known residence, namely the premises in question, seems to be the means that is not only most likely to notify a tenant not available for personal service but also singularly appropriate to the remedy requested.

The Act as originally written created a new remedy for eviction with jurisdiction in the district court rather than circuit court. [18] The new eviction-remedy had a simplified procedure wherein the landlord was to file an affidavit with the court and the court would issue an order to the tenant to vacate the premises or appear within ten days and show cause why the tenant should not be evicted.[19] If the tenant failed to appear, a writ of eviction would issue.

The Act specifically stated that the district court along with the circuit court would have jurisdiction to hear the action.[20] As the 2008 article pointed out, there was a serious problem with the Legislature granting jurisdiction to the district court. Amendment 80 of the Arkansas Constitution gives the supreme court, not the Legislature, the power to determine the jurisdiction of the district courts and what matters may be heard in district court. The supreme court has exercised that power through Administrative Rule 18. The supreme court's grant of jurisdiction to the district courts does not include evictions, either under the Act or under the unlawful detainer act,[21] which had for years been the civil remedy for eviction. Actions under the detainer statute had always been limited to circuit court.[22]

At the time of the 2009 amendments to the Act, this author and others had successfully argued in a number of district courts that the court lacked jurisdiction for the reasons stated above. Additionally, the Benton County

16. 289 Ark. 332, 712 S.W.2d 888, (1986).

17. *See id.* at 337–38, 712 S.W.2d at 890–91.

18. Section 18-17-701(c)(1) of the Arkansas Code as originally written provided an action under the Act could be commenced in district or circuit court. *See* Arkansas Residential Landlord-Tenant Act of 2007, No. 1004, § 1, 2007 Ark. Acts 5110, 5127 (codified at ARK. CODE ANN. § 18-17-701(c)(1) (Supp. 2007)).

19. *See* ARK. CODE ANN. § 18-17-902(b) (Supp. 2007).

20. *See* Arkansas Residential Landlord-Tenant Act of 2007, No. 1004, § 1, 2007 Ark. Acts 5110, 5113 (codified at ARK. CODE ANN. § 18-17-203 (Supp. 2007)).

21. *See* ARK. CODE ANN. §§ 18-60-301 to -312 (Repl. 2003 & Supp. 2011).

22. *See* Act of Mar. 28, 2007, No. 535, § 1, 2007 Ark. Acts 2734, 2735 (codified at ARK. CODE ANN. § 18-60-306 (Supp. 2011).

district judges decided they lacked jurisdiction after one of them had read the 2008 article and brought it to the attention of his colleagues. The amendments appear to also recognize the problem as the language was changed from an outright grant of jurisdiction to the district court to provide the action could be brought in a "district court having jurisdiction over the eviction proceeding."[23] The amended language appears to be a clear recognition that until the supreme court should choose to grant such jurisdiction, it does not exist.

To date the supreme court has made no such grant of jurisdiction, and the change it has made to district court jurisdiction would seem to indicate it is not inclined to do so. As was stated earlier, the remedy of eviction contained in the Act is in addition to the long-standing civil remedy for eviction, the forcible entry and detainer statute. The detainer statute provides for a landlord to bring an eviction proceeding in circuit court.[24] The action is served on the tenant, who has to file an objection within five working days or a writ of possession will issue and the tenant will be locked out by a sheriff's officer.[25]

If the tenant files an objection, the matter will be scheduled for a hearing on possession.[26] Possession hearings are scheduled in an expedited manner, often within ten days to two weeks. The landlord must show a prima facie case for possession, and the tenant may present evidence rebutting that prima facie case.[27] If the landlord prevails, a writ of possession will issue on the landlord posting a bond unless the tenant within five days posts a bond of his own.[28] Needless to say, a tenant who cannot pay the rent will not be able to post a bond. As such, the bond requirement only comes into play in cases that are other than for non-payment of rent. The case will be scheduled for final hearing at a later date, after the opportunity for both parties to fully plead the case and engage in discovery and other pretrial matters. The final hearing can be tried to a jury if requested by either party, the possession hearing being solely to the judge.[29]

The supreme court has, in recent years, been exploring the possibility of extending district court jurisdiction. To that end, the court has designated certain district courts as pilot courts and granted them extended jurisdiction under Administrative Rule 18. One of the additional grants of jurisdiction is for the pilot courts to be empowered to hear forcible entry and detainer and

---

23. ARK. CODE ANN. § 18-17-901(a) (Supp. 2011).
24. *See id.* § 18-60-306.
25. *See id.* § 18-60-307(b) (Supp. 2011).
26. *See id.* § 18-60-307(c)(1).
27. *See id.* § 18-60-307(d)(1)(A).
28. *See id.* § 18-60-307(d)–(e).
29. The right to a trial by jury in civil cases is constitutionally mandated in article 2, section 7 of the Arkansas Constitution.

unlawful detainer actions if referred by a circuit court.[30] Significantly, there was no similar grant to the pilot courts or to any district court to hear the additional eviction remedy provided by the Act.

It now appears well settled that the district courts have no jurisdiction over the remedy provided for in the Act. This takes on much greater import in light of another of the Act's amendments; all references to initiating the remedy in circuit court were deleted. Without the option of bringing the Act's eviction proceeding in circuit court, the remedy was cast into limbo. It is on the books, but no court has jurisdiction to hear the remedy's actions.

The only apparent reason for removing the circuit courts' jurisdiction stems from another provision of the Act. Under the Act the eviction remedy's filing fee was $25.00, which coincided with the district court's filing fee at that time.[31] The circuit court filing fee at that same time was $140.00. With the district courts' unavailability, landlords started to file the actions in circuit court along with the $25.00 filing fee. In some counties, the clerks simply refused to file the actions. Other counties permitted filing, leading one judge to open a case with: 'This is one of those $25.00 evictions." Needless to say, neither the circuit court judges, nor the circuit court clerks, were pleased with the $115.00 difference.

The $25.00 filing fee provision was later replaced with one referencing that Ark. Code Ann. 16-17-705, the statutory provision for district court filing fees, governed the cost.[32] Presently, the statute lists the district courts' filing fees as $65.00 for civil actions, and $50.00 for small claims actions.[33] The amended Act begs an interesting question: whether the action may be brought in small claims, where the parties cannot have counsel, or must it be brought in the civil division, where at least a corporation or an LLC would have to have counsel? In any case, tying the filing fee to the statute for district court fees further underscores that the amendments intended to eliminate circuit court jurisdiction over initial filings. Lacking any grant of jurisdiction, the Act's eviction remedy became a nullity.

Another question is why the supreme court hasn't granted the district courts jurisdiction to hear these actions. Perhaps the answer lies in exploring the competing considerations at play within summary possession actions. At common law, the remedy for removing a non-paying tenant was ejectment.

---

30. As part of its study of landlord-tenant laws in Arkansas, the Non-Legislative Commission on the Study of Landlord-Tenant Laws authorized by a 2011 act of the General Assembly tried to find if any district courts were being referred detainer actions. The Commission could find no incidents of any such referrals.

31. *See* Arkansas Residential Landlord-Tenant Act of 2007, No. 1004, § 1, 2007 Ark. Acts 5110 (codified at ARK. CODE ANN. § 18-17-902 (Supp. 2007).

32. *See* ARK. CODE ANN. § 18-17-902(a)(2) (Supp. 2011).

33. *See id.* § 16-17-705.

A major disadvantage was that ejectment actions took a lot of time to bring to judgment. Removal of the tenant prolonged the process even further.

If the action was based upon continuing non-payment, the landlord would be at a loss of a significant amount of money over an extended period of time. Further, any judgment for the unpaid rent would probably be uncollectible; a tenant who is unable to pay his or her own rent is highly likely to be judgment-proof. On the other hand, a tenant with legitimate claims against his or her landlord is entitled to a full and complete hearing under the most basic concepts of due process.

Constitutional precedent mandates the highest protection of the individual's homestead. To deal with these concerns, jurisdictions have developed various summary proceedings for expedited possession hearings. Damages for either party are the subject of a later hearing either in the same or a separate action. The damage hearing is held after the parties have had a full opportunity to plead the matter (including any tenant counter claims), to engage in discovery, and to have the matter tried to a jury.

The existing Arkansas forcible entry and detainer statute addresses all of the competing concerns.[34] It goes a step further and provides that if the landlord prevails at the possession hearing, he or she must post a bond to cover any damage sustained by the tenant if the court finds that possession should not have been granted.[35] Additionally, the tenant has the option of posting a bond, which protects the landlord while allowing the tenant to remain in possession. As written, the statute protects the rent payment's security for the landlord and it protects the due process rights for the tenant.

The remedy under the Act only addresses the landlord's concern for expedited relief. It is totally vague as to what happens when a tenant appears and contests the action. Under the Act if the tenant appears to contest the action, "the court shall hear and determine the case as any other civil case."[36] What does that mean? If the case is heard on the return date of the order to show cause, that is not how any other civil case is determined. Is the case to be continued for the tenant to file an answer and counterclaim and engage in discovery? And to what does the tenant file an answer? The landlord began the action by filing an affidavit. How long does the tenant have to respond?

The order from the court under the provisions of the Act provides for the tenant to show cause within ten days why a writ of possession should not issue. Under the Rules of Civil Procedure, a defendant has thirty days to respond.[37] Similarly, if the tenant files a counterclaim, what is the time for

34. *See* ARK. CODE ANN. §§ 18-60-301 to -312 (Repl. 2003 & Supp. 2011).
35. *See* ARK. CODE ANN. § 10-60-307(d)(1)(B)(i).
36. ARK. CODE ANN. § 18-17-905 (Supp. 2013).
37. ARK. R. CIV. P. 12(a)(1).

the landlord to respond? Normally it would be another thirty days.[38] What about discovery, both with respect to the nature and the timing? The supreme court promulgates the Rules of Civil Procedure. Certainly, the court must have concerns granting jurisdiction to district courts to hear actions so at odds with those very rules.

Similarly, the supreme court is the final arbiter of questions of due process. At its most basic level, due process (as mandated by the Arkansas and the United States Constitutions) requires the opportunity to be heard at a meaningful time, and in a meaningful manner. The Act is vague as to how matters are to proceed in a contested case, which makes it almost impossible to assess whether the due process standards have been met.

Certainly if the matter is to be heard at the point the tenant appears in response to the order to show cause, due process is not met. The tenant has been given no chance to file any counterclaims, has not been given an opportunity to conduct discovery, and is limited as to the nature of the claims against him or her by the detail or lack of detail in the affidavit of the landlord.

Section 18-17-706(3)(B)(ii) of the Arkansas Code provides that if the tenant has not paid to the landlord rent allegedly due or cannot produce a receipt for such rent, a writ of possession will issue.[39] Not all landlords give receipts. Receipts can also be lost. There may not be a receipt because there was an agreement between the landlord and the tenant to make repairs instead of rent. The tenant may not have paid all or part of the rent because of an inordinately high water bill caused by the landlord's failing to repair a water leak in the water line to the premises. The tenant may not have paid all or part of the rent because the tenant paid the bill for utility services that were to be provided by the landlord under the terms of the lease. The tenant may have legitimate questions as to whom the rent should be paid after receiving notice that the property is in foreclosure or after getting notice from a party claiming to have purchased the property in a tax or foreclosure sale. For all these reasons and more a tenant might not pay the rent but would not have the opportunity to assert his or her reason prior to possession under the statute—that is, at a meaningful time and in a meaningful manner as dictated by due process.

The problem is not cured by the provision that a judgment will issue against the landlord if the tenant can show at a final hearing that the rent was not due.[40] That provision assumes the landlord is good for the judgment. However, a landlord who cannot afford to pay for basic services or repairs or who is subject to foreclosure, may very well be judgment-proof. All these

38. *Id.*
39. ARK. CODE ANN.§ 18-17-706(3)(B)(ii) (Supp. 2013).
40. *See id.* § 18-17-706(4)(B).

due process considerations are concerns for the supreme court in granting jurisdiction to district courts to hear the remedy under the Act.

II. WHAT WAS NOT ADDRESSED

The 2009 amendments to the Act were essentially corrective rather than substantive. The change to the service provision was obviously necessitated by a clear mistake in drafting. Changing the language from an outright grant of jurisdiction to the district court to a provision that a district court having jurisdiction could hear the new remedy was a recognition that the Act as written exceeded the power of the Legislature. Finally, the elimination of initial jurisdiction in circuit court is to some degree a correction in that the Act ignored the established circuit court filing fee and provided for an action to be filed in circuit court for the bargain-basement price of twenty-five dollars.

Given that circuit court jurisdiction was eliminated at the same time the lack of district court jurisdiction was recognized in the statute, the amendments had the substantive effect of indirectly repealing the remedy under the Act. Had the Legislature wished to retain the remedy, it could have resolved the problem by providing the same fee to file in circuit court as any other circuit action.

The amendments made no effort to address the 2008 article's many substantive criticisms of the statute. The article pointed out that there were a number of URLTA sections that were deleted for no apparent reason, other than that they might be of value to a tenant.[41] By way of example, one of the early sections of URLTA provides that a court may refuse to enforce any rental agreement, or section of a rental agreement, that was unconscionable when made. It also provides that a court may enforce the agreement without the unconscionable provision, or it may limit the unconscionable provision to avoid an unconscionable result.[42]

And further, if unconscionability is raised as an issue, the provision indicates that the parties shall have the opportunity to present evidence as to the setting, purpose, and effect of the agreement or provision to assist the court in its determination.[43] The unconscionability language in URLTA is not controversial. It mirrors almost word for word the language in the Arkansas version of the Uniform Commercial Code dealing with the sale and lease of goods.[44] Additionally, the unconscionability defense is a widely recognized principle of contract law; both in Arkansas and nationally. In-

41. Prettyman, *supra* note 1, at 72.
42. UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 1.303(a)(1) (1974).
43. *See id.* § 1.303(b).
44. *See* ARK. CODE ANN. § 4-2-302 (Repl. 2001); *id.* § 4-2A-108(1), (3) (Repl. 2001).

deed, there is room to argue that unconscionable lease provisions should not be enforced under general contract law. What is the justification for not making that clear as provided in URLTA?

Other deleted provisions of URLTA bear on the unconscionability issue. Under URLTA, certain provisions are prohibited in lease agreements. These prohibited provisions include: 1) authorizing a person to confess judgment for the tenant, 2) paying the landlord's attorney's fees in all cases, and 3) agreeing to waive the landlord's liability under other laws.[45] Such provisions are clearly unconscionable. The tenant would be giving up any right to challenge the actions of the landlord and would be agreeing to pay the landlord's attorney's fees even if he or she won. Significantly, the same provisions are prohibited in the federal regulations governing all federally assisted housing. While it is unlikely that a court would enforce such a provision, once again, what is the justification for taking it out of the Act?

In a similar vein, the Act eliminated URLTA provisions that dealt with rules and regulations.[46] Increasingly, landlords are presenting tenants with sets of multipage rules and regulations, in addition to multipage leases. Somewhere in these dense agreements, there will be a provision that the tenant is also bound by the landlord's rules and regulations, which thereby incorporates them into the lease.

URLTA attempts to define a proper purpose for a rule or regulation, and provides that it must be for the purpose of promoting the convenience, safety, or welfare of the tenant; preserving the landlord's property from abuse; or making a fair distribution of services and facilities for all the tenants.[47] In addition, the rule or regulation must be reasonably related to the purpose for which it was adopted, must be applied fairly to all of the tenants, must be explicit enough for the tenant to understand what may or may not be done, and must not be for the purpose of evading any obligation of the landlord.[48]

URLTA also provides that the rule or regulation must be presented to the tenant at the beginning of the tenancy or when the rule or regulation is adopted.[49] If it is not presented to the tenant at the beginning of the tenancy, and the rule or regulation significantly modifies the lease, the tenant must agree to the rule or regulation in writing in order for it to be enforceable.[50] Typically, an individual who is looking to rent residential housing needs something quickly. They are not likely to be in a position to carefully read

45. UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 1.403 (1974).
46. *See id.* § 3.102
47. *See id.* § 3.102(a)(1)
48. *See id.* §§ 3.102(a)(2), (3), (4) and (5).
49. *See id.* § 3.102(a)(6).
50. *See id.* § 3.102(b).

and understand all of the provisions in a multipage lease and it's incorporated multipage rules and regulations.

The average tenant's main concern is how much the rent will be and how quickly he or she will be able to move in. Allowing landlords unfettered latitude to impose rules and regulations provides them with unmerited power over tenants, especially if they may do so at will. URLTA's limitations on that power are not unreasonable. There is no justification for completely rejecting them. While it is true that a rule or regulation, especially one changing the terms of the lease, might very well run afoul of general contact law on unconscionability, why not make it clear what the bounds of a proper rule or regulation should be?

The landlord's access to the premises was greatly expanded by URLTA. But URLTA also provided the tenant with counterbalance protection against the abuse of those rights of access.[51] The Act, however, further expanded the landlord's rights to access. It then deleted all of the protections that had been provided for the tenant.[52]

At common law, a landlord had no right to come onto the premises without the tenant's permission.[53] Tenancies were the subject of property law, and not contract law. A landlord transferred a property right (exclusive use) to the tenant upon entering into the tenancy. As a direct result, most modern leases contain a provision allowing the landlord access to make repairs, access to show the property during the last month of a tenancy, and access to enter in an emergency. Typically, with the exception of emergent situations, the provisions limit the landlord's access by requiring that the tenant be provided with reasonable notice, as well as requiring that entry be at reasonable times of the day.

URLTA recognized that landlords needed access to the premises in certain situations and that the leases typically provided them with such access. For that reason, URLTA limits tenants from unreasonably withholding permission for the landlord to enter. Under the URLTA, landlords may enter to inspect the premises; to make necessary repairs, alterations, or improvements; to supply necessary or agreed upon services; or to show the premises to prospective purchasers, tenants, mortgagees, workmen, or contractors.[54] It requires the landlord to give the tenant two days notice, and it limits entry to reasonable times unless an emergency exists.[55]

---

51. UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 3.103, (1974).

52. *See* ARK. CODE ANN. §18-17-602 (Supp. 2011).

53. *See* Watson v. Calvin, 69 Ark. App. 109, 113, 9 S.W.3d 571, 574 (Ark. Ct. App. 2000) (citing 51C C.J.S. *Landlord & Tenant* § 308 (1968); 49 AM.JUR.2d *Landlord and Tenant* § 1 (2d ed.1995).

54. UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 3.103(a) (1974).

55. UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 3.103(c) (1974).

These protections were eliminated from the Act. The Act also eliminated the tenant's right to injunctive relief upon a violation by the landlord. Not surprisingly, the Act simultaneously retained the landlord's right of injunctive relief, despite the fact that URLTA provides this mode of relief bilaterally.[56] Ironically, the heading of the section dealing with the right to injunctive relief reads, "landlord and tenant remedies for abuse of access." The body of this section only contains a remedy for the landlord.[57]

The overt failure to restore the above deleted provisions of URLTA clearly demonstrates the mean spirited and one-sided nature of the Act. There is nothing controversial about the deleted provisions; except that they are basic protections afforded to tenants.[58] Along the same lines, URLTA has an extensive section dealing with tenants rights. It is deleted from the Act. Do tenants have any rights in Arkansas? Is Arkansas's landlord-tenant law really just for the protection of the landlord? It would appear so, as the Legislature flagrantly ignored the Act's glaring omissions during the 2009 amendments.

More disturbing still, the Act supplemented the landlord access provisions, effectively giving landlords unlimited access to the tenants' premises. Essentially, with no consideration or justification, Arkansas leapt from the common-law position of no access to one with unlimited and unchecked rights of access for landlords. The Act added provisions that are not found in URLTA. These provisions allow the landlord entry to "investigate possible rule or lease violations" or to " investigate possible criminal activity."[59] It appears that this radical change was put into effect with little discussion or thought. The Act quickly sailed through the Legislature—without controversy—when originally enacted and, the access provisions were not even considered in the 2009 amendments.

URLTA's provisions for landlord access have clearly specified purposes that are objectively evaluable. The landlord's need to repair, alter, or improve the premises either exists, or it does not. Similarly, the exterminator or service provider is either scheduled for an appointment, or is not. A prospective buyer or tenant wishing to inspect the premises either exists, or does not. Whereas, investigations of lease violations or criminal activity appear to be completely subjective, or at least no objective basis is contained in the Act. Indeed, it is just the opposite as the standard is "possible."[60] As is often argued in court, anything is possible. Does this mean any access is justifiable under the Act? If it is not, under what circumstances and when is access

56. UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 4.302 (1974).
57. ARK. CODE ANN. §18-17-705.
58. UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 4.101–4.107.
59. ARK. CODE ANN. §18-17-602
60. *Id.*

by the landlord not justified? And more importantly, how does the tenant prevent the landlord's access without the Act providing remedies for protection? Given that the Act chose to omit the unconscionability and rules-and-regulations provisions, the opportunity for "possible" violations to investigate is totally unchecked.

The provision allowing landlord access to investigate possible criminal activity is even more troublesome. There is an extensive body of law governing the right of law enforcement officials to enter into, and inspect, premises for suspected criminal activity. There is a requirement of probable cause, not merely possible criminal activity, and there are typically limits on the extent and nature of the search. No such safeguards against the landlord exist in the Act.

In essence, a landlord can impulsively enter the premises and invade the tenant's privacy. On a mere whim, or with an ulterior motive, the landlord could look through every bag, box, or package in the tenant's premises, hoping to find evidence of possible criminal activity. What limits the scope of the investigation? Is he allowed to root through all of the tenant's personal possessions at will? In stark opposition to limitations (such as the warrant requirement) for law enforcement personnel, the Act places no limits on a landlord's search of the premises.

Allowing the landlord to investigate possible criminal activity creates a "Devil's Triangle" of law enforcement, landlord, and tenant that raises all sorts of policy and constitutional questions. The basic question is whether landlords, with no experience in law enforcement, should be investigating in the first place? This is increasingly pertinent given the many ways that the landlord and tenant's interests may be at odds with each other. The tenant may have rejected the landlord's sexual advances. The landlord may want the premises for himself, or for a family member. The tenant may have made legitimate complaints about the conditions of the premises to the landlord or code enforcement. The tenant may have testified for another tenant in an action against the landlord, or may have brought his or her own action against the landlord. Inserting the criminal process into the landlord-tenant relationship does not assist any of the triangle's parties.

One troubling scenario is when the landlord initiates the entry of the premises and subsequently involves law enforcement. How reliable is evidence that is discovered by a landlord? What can be done with it? If the landlord enters and finds illegal drugs, can they be turned over to law enforcement in order to prosecute the tenant? Who is to say that the drugs came from the tenant and not the landlord, especially if the two were already at odds? Even more troubling are cases that involve items that, unlike illicit street drugs, are not in-and-of-themselves illegal to possess. If the landlord enters and discovers syringes, is the tenant using illegal drugs or merely a diabetic? If the tenant appears to be living beyond her means, is she engaged in some criminal enterprise or just racking up credit-card debt? If the tenant

is truly not engaging in criminal activity, the explanation will often require the tenant to provide sensitive personal-health or financial information to the landlord, which the landlord has no legitimate reason to obtain.

A second equally troubling scenario is one where law enforcement instigates the entry—either through encouraging the landlord to enter or through obtaining the landlord's consent to enter the premises. The Fourth Amendment prohibits unreasonable searches and seizures by law enforcement.[61] There is a whole body of law that governs whether a search is proper, and what to do with evidence obtained through an improper search. In *Breshears v. State*,[62] the Arkansas Court of Appeals reversed a drug conviction where the drugs were discovered after the tenant had refused entry, but the landlord consented to the search. The court found that the search violated the tenant's Fourth Amendment rights. Does the Act reverse *Breshears* and abrogate Fourth Amendment rights for tenants? Are only home owners exempt from unreasonable searches of their living space? If not, are landlords given the same restrictions and limitations for criminal searches as law enforcement? And finally, if landlords are given such restrictions, are the cities and their law enforcement officials liable for federal civil rights violations by landlords?

Finally, even if the landlord does not involve law enforcement, but chooses instead to confront the tenant, is this really something that should be encouraged by statute? If the tenant is truly guilty of a crime, a confrontation would be counterproductive; at best it gives the tenant a chance to conceal the evidence, and at worst it could be lethally dangerous, especially in cases where drugs are involved. The Act's unnecessary confusion of the roles of the landlord and law enforcement creates more problems than it solves, and it raises more questions than it answers. This is not to say landlords should ignore illegal activity on their premises. If a landlord has a valid suspicion of illegal activity, the proper course of action is to do what landlords have done for the last century and a half: notify law enforcement so that any criminal investigation can be handled by the professionals.

Last but very far from least, the amendments did not address the issue of habitability. Arkansas retains the unique distinction of being the only state that does not recognize a landlord's duty to maintain residential premises at minimally livable standards. In 2006, as part of adopting URLTA, Alabama joined every other state (save Arkansas) in recognizing an implied warranty of habitability.[63] All of URLTA's sections dealing with habitability were deleted from the Act. Those deletions were made in spite of three sepa-

---

61. U.S. CONST. amend. IV.

62. Breshears v. State, 94 Ark. App. 192, 228 S.W.3d 508 (2006).

63. *See* ALA. CODE. § 35-9A-204; UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 2.104 (1974).

rate articles advocating for such a warranty and the abandonment of the doctrine of caveat lessee.[64] In two Arkansas Supreme Court cases, the court plainly asked the Legislature to act.[65] Indeed, in *Thomas v. Stewart*, Justice Brown, in his concurrence, warned that the Legislature's failure to act might cause the Court to do so.[66] Despite this warning, Arkansas is still without any protection for tenants from slumlords.

The concept of caveat lessee, or renter beware, is a relic of old common law and a time when tenants were typically farmers. Back then, the land was the primary consideration in a rental agreement, not the buildings. The tenant was responsible for the maintenance of any buildings on the land because they were related to his use of the property for farming. Modern residential tenants are primarily interested in the building and the shelter it provides. This fundamental change was recognized in the 1970 case of *Javins v. First National Realty Corporation*:

> Today's urban tenants, the vast majority of whom live in multiple dwelling houses, are interested, not in the land, but solely in "a house suitable for occupation." Furthermore, today's city dweller usually has a single, specialized skill unrelated to maintenance work; he is unable to make repairs like the "jack-of-all-trades" farmer who was the common law's model of the lessee. Further, unlike his agrarian predecessor who often remained on one piece of land for his entire life, urban tenants today are more mobile than ever before. A tenant's tenure in a specific apartment will often not be sufficient to justify efforts at repairs. In addition, the increasing complexity of today's dwellings renders them much more difficult to repair than the structures of earlier times. In a multiple dwelling repair may require access to equipment and areas in the control of the landlord. Low and middle income tenants, even if they were interested in making repairs, would be unable to obtain any financing for major repairs since they have no long-term interest in the property.[67]

What was true in 1970 remains true in 2013. Indeed, part and parcel of Arkansas's Act was the repeal and replacement of sections of landlord-tenant law that were archaic. And in fact, Arkansas's Act repealed a number

---

64. *See generally* Jeremy K. Brown, *A Landlord's Duty to Mitigate in Arkansas: What it was, What it is and What it Should be*, 55 ARK. L. REV. 123 (2002); Kathryn Hake, *Is Home Where Arkansas's Heart is?: State Adopts Unique Statutory Approach to Landlord Tort Liability and Maintains Common Law "Caveat Lessee"*, 59 ARK. L. REV. 737 (2006); Ashley E. Norman, *A Tenant's Dilemma: The Arkansas Residential Landlord-Tenant Act of 2007*, 62 ARK. L. REV. 859 (2009).

65. Propst v. McNeill, 326 Ark. 623, 626, 932 S.W.2d 766, 768 (1996); Thomas v. Stewart, 347 Ark. 33, 41, 60 S.W. 3d 415, 420 (2001).

66. *Thomas*, 347 Ark. At 41, 60 S.W.3d at 421.

67. Javins v. First Nat. Realty Corp., 428 F.2d 1071, 1078–79 (D.C. Cir. 1970).

of antiquated provisions of the then-existing landlord-tenant law.[68] However, the stated goal of the Act, "to simplify, clarify, modernize, and revise the law governing rental of dwelling units and the rights and obligations of landlords and tenants"[69] seems to have been lost, at least as far as the warranty of habitability is concerned.

Ironically the Arkansas Supreme Court has, for a number of years, recognized an implied warranty of habitability with respect to new-home sales.[70] Sellers are liable to buyers for defects in the home. With respect to the sale of homes, there is an entire industry devoted to inspecting homes to discover defects for potential buyers. Many buyers will seek the service of a professional inspector before purchasing a home. This is not regularly the case for a tenant.

In almost all cases, tenants will not have the means to purchase an inspection. Similarly, tenants likely do not have the expertise necessary to do such an inspection on their own. Landlords, on the other hand, will generally know about—or at least should be charged with knowledge of—any defects in their property. As such, a purchaser who buys defective real property is protected under Arkansas law, but a tenant rents at his peril. No liability is imposed upon a landlord who is aware of defective conditions.

An argument defending Arkansas's lack of a warranty of habitability is that Arkansas has the lowest average rent of any state. The fallacy of this argument is that it rests upon the presumption that Arkansas's highly pro-landlord laws are to thank for the low rent. It ignores the fact that housing costs in Arkansas are lower than many parts of the country, as are property taxes; the two costs are directly reflected in rental rates. A landlord wishing to make a profit must charge enough to cover his mortgage and taxes, among other expenses. Additionally, because of the lower housing costs, many middle and even lower middle class individuals will buy rather than rent.

Further, Arkansas does not have the kind of great urban center that will attract large numbers of upper middle class and upper class tenants who will rent luxury apartments. There is no New York City, Los Angeles, San Francisco, or Chicago equivalent in Arkansas. The average tenant in Arkansas is poor, or a student, and will be renting the more modest apartments. When compared to states with similar circumstances but with a warranty of habitability, there is no appreciable difference in the average rent prices.[71]

---

68. The Act repealed ten sections of chapter 16 of Title 18, the chapter titled LANDLORD AND TENANT.

69. ARK. CODE ANN. § 18-17-102(a)(1).

70. *See* Wawak v. Stewart, 247 Ark. 1093, 1096, 449 S.W.2d 922, 924 (1970).

71. Arkansas's fair market rent of $593 is not appreciably lower than West Virginia at $598, South Dakota at $599, Kentucky at $616 and Mississippi at $622, and all those states have a warranty of habitability.

The absence of a warranty of habitability encourages bad landlords at the expense of good ones. A landlord who fails to make necessary repairs will either charge less rent or make a larger profit charging similar rent. If all landlords are held to the same standard, there is no competitive advantage. More importantly, society as a whole will benefit. Housing stock will remain more stable with the imposition of minimum standards. Poor tenants and their children will not have to live in substandard and potentially dangerous housing. A well written habitability statute prevents tenants from coming up with excuses to avoid paying rent. Any such statute should provide a requirement for notice of defects to the landlord, and provide the landlord with a reasonable time to make repairs. Rent payments can be made to the court or in an escrow account to protect landlords while repairs are being done. Needless to say, defects cannot be the result of abuse to the property by the tenant or the tenant's guests. A proper habitability statute provides a realistic balance between the needs of the tenant, society, and the landlord.

III. CONCLUSION

In 2011, the Arkansas General Assembly enacted a statute creating the Non-Legislative Commission on the Study of Landlord-Tenant Laws.[72] While the Commission members were evenly split between those favoring landlords, and those favoring tenants, the Commission report unanimously recommended nearly all of the matters that were not addressed in the Act's 2009 amendments. The Commission unanimously recommended the Act include the unconscionability provision,[73] the section on prohibited provisions,[74] and URLTA's access provisions.[75] There was also a unanimous recommendation that the other deleted provisions of the model act be reviewed for applicability to Arkansas.[76] The Commission report, with respect to the additional provisions, indicates that there was simply insufficient time to review all the deleted provisions.[77] Most importantly, the Commission recommended Arkansas join the rest of the nation in providing a warranty of habitability.[78]

---

72. 2011 Ark. Acts 1198.

73. *Non-Legislative Commission on the Study of Landlord-Tenant Laws: Report to Governor Mike Beebe, President Pro Tempore of the Senate, and Speaker of the House*, 5 (December 31, 2012), http://ualr.edu/lawreview/files/2013/01/Foster_Commission-Report.pdf.

74. *Id.*

75. *Id.*

76. *Id.* at 6.

77. *Id.* at 24.

78. *Id.* at 4–5.

Once again, the recommendation was unanimous. As written, the warranty of habitability recommendation strikes a balance between the need to make necessary repairs and the landlord's need for protection from abusive tenants. While the recommendation provides a number of conditions subject to redress under the warranty, it also provides that the landlord must be given a reasonable time to make repairs, that the tenant must not be in default of rent payments, and that the landlord has no duty to make repairs which are caused by the tenant or the tenants' guests. The work of the Commission illustrates the balanced approach that comes when both sides of an issue are fairly and equally represented. Unfortunately, in the past that has not been the case in our Legislature, as evidenced by the totally one-sided 2007 Act. Hopefully, the Legislature will act on the recommendations of the Commission, and it can be said in the future that Arkansas has "landlord-tenant law" instead of "landlord protection law."