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Report to Governor Mike Beebe, President Pro Tempore of the Senate, and Speaker of the House

Non-legislative Commission on the Study of Landlord-Tenant Laws

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**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
December 31, 2012**

Members

Stephen R. Giles, Chair
Lynn Foster, Vice Chair
Russ Altizer
Jay Barth
Jim Cargill
John Hill
Robin Miller
John V. Phelps
William Marshall Prettyman
Howard Warren

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PROCESS

In 2011, the Arkansas General Assembly enacted a statute creating the Non-Legislative Commission on the Study of Landlord-Tenant Laws (the “Commission”).¹ The statute stated that the charge of the commission was to “study, review and report on the landlord-tenant laws in Arkansas and in other states,” and to issue a report by December 31, 2012 containing “the results of its findings and activities and any of its recommendations.”² Various persons and entities were charged with appointing or designating the members of the Commission.

In the spring of 2012, the Governor’s Office appointed attorney Stephen Giles to call the first meeting, at which he was elected chair. John Hill was the appointee of the President Pro Tem of the Senate. Dr. Jay Barth was appointed by the Speaker of the House. The deans of the University of Arkansas and University of Arkansas at Little Rock law schools designated attorney Marshall Prettyman and Professor Lynn Foster, respectively. The Arkansas Realtors Association designated Robin Miller. Jim Cargill was designated by the Arkansas Bankers Association, and attorney John V. Phelps by the Arkansas Bar Association. The Landlords’ Association of Arkansas designated Howard Warren, and the Affordable Housing Association of Arkansas designated Russ Altizer.

The Commission met during April, June, August, September, October, November and December. It agreed to restrict its scope of consideration to residential landlord-tenant law, for the reasons that commercial landlord-tenant law is virtually all contract law, and does not present the same issues as residential landlord-tenant law. The Commission considered and discussed how to craft a more streamlined eviction statute for residential landlords; the different aspect of eviction law in general, including Arkansas’s failure to vacate statute and retaliatory eviction; the missing sections of the Uniform Residential Landlord and Tenant Act; the implied warranty of habitability; tort liability; domestic violence; anti-discrimination; and security deposits.

In some of these areas, such as the failure to vacate statute and the implied warranty of habitability, Arkansas is unique. In others, such as retaliatory eviction and tort liability of landlords, it is in a distinct minority of states. And in some areas, such as security deposits and protection of victims of domestic violence, it is in the mainstream.

1. Act of Ark. No. 1198 (2011).

2. *Id.*

Little Rock District Court Judge Alice Lightle and attorney David Simmons, who represents landlords as a significant portion of his practice, each attended a meeting of the Commission, and the Commissioners are grateful for their assistance.

The Commissioners also wish to thank Jennifer Davis, Ashley Haskins and John Ahlen, law students at the University of Arkansas at Little Rock Bowen School of Law, who assisted in the research and writing of this report.

Commission members discussed the agreed-upon issues thoroughly, frankly, courteously and with respect for differing viewpoints.

PREAMBLE AND RECOMMENDATIONS

A healthy society depends on fair and balanced laws. As this report demonstrates, Arkansas's residential landlord-tenant law is significantly out of balance. Arkansas residential tenants have significantly fewer rights than tenants in any other state. The fifteen recommendations of the Commission appear throughout the report accompanying discussions of the law to which they apply. The fifteen recommendations are also listed here immediately following.

1. Unlawful detainer.

The Commission unanimously recommends the unlawful detainer statute be amended in the following ways:

- The statute should include official statutory forms for the eviction process, including but not limited to a notice to vacate, complaint, answer, counterclaim, tenant's complaint to recover personal property, landlord's answer, and writ of possession. These forms should be required to be used and should be available on the Supreme Court's website. The complaint should require verification.
- The appropriate forms (such as the notice to vacate and the complaint) should notify tenants of their rights. Many tenants already go through the eviction process pro se (representing themselves, with no attorney), and if the Commission's recommendations are adopted more will do so. If no attorney is informing them of their rights, the process should provide for it.
- Landlords should be able to file residential unlawful detainer complaints in district courts, pro se if desired, for simple nonpayment cases. Where the tenant pleads not guilty or counterclaims, the statute should allow a removal to circuit court for a trial de novo, if the case progresses that far, with the opportunity for both sides to retain

attorneys if they do not already have them. This would entail the Supreme Court giving district courts the power to issue eviction orders and writs of possession.

- District courts should establish registries. It would seem this could be done by statute.
- Landlord entities (such as LLCs and corporations) should be able to designate an agent who can file a complaint and appear at the hearing stage in district court. This also may require approval by the Supreme Court.
- The possession hearing must be scheduled within one week of the deadline for the tenant's filing of the written answer.
- If possession is granted to the landlord and the tenant does not appeal for a trial de novo, possession must be returned to the landlord within a specific number of days.
- If possession is granted to the landlord and the tenant appeals for a trial de novo, the tenant must pay any rent already due and rent as it comes due into the registry of the court.
- Judges should encourage mediation after the possession hearing. Currently, it is the duty of Arkansas judges to encourage the settlement of cases and controversies by suggesting the referral of a case or controversy to an appropriate dispute resolution process agreeable to the parties.

2. "Civil eviction" statute, Ark. Code Ann. §§ 18-17-701 through 707 and 901 et seq.

In light of the Commission's recommendations to streamline the unlawful detainer statute, and its findings that: 1) this statute does not fairly balance landlords' and tenants' rights, 2) this statute sets out different time periods from the unlawful detainer statute, 3) the statute is flawed and self-contradictory, and 4) district courts have no power to conduct the eviction procedure set out in this statute, the Commission unanimously recommends that this statute be repealed.

3. Criminal failure to vacate statute, Ark. Code Ann. § 18-16-101.

Recommendation: The Commission finds that the criminal eviction statute 1) appears to be unique to Arkansas; 2) criminalizes breach of a civil contract, using the criminal law to enforce a civil matter; and 3) is enforced unevenly (in some places not at all) throughout Arkansas. For these reasons, it should be repealed. The Commissioners are evenly divided as to when it should be repealed. Five recommend repeal once Recommendation Number One is carried out and a better civil eviction procedure is in place, and the

other five recommend immediate repeal, but the Commissioners are unanimous in recommending that the failure to vacate statute should be repealed.

4. Self-help actions.

Recommendation: The Commission unanimously recommends that Arkansas enact a statute clarifying that self help action by landlords is illegal, similar to section 4.207 of the Uniform Residential Landlord and Tenant Act (the “URLTA”), and codifying the Arkansas Supreme Court’s decision in *Gorman v. Ratliff*.

5. Retaliatory eviction.

Recommendation: The Commission unanimously recommends that Arkansas enact a statute prohibiting retaliatory eviction by landlords, similar to section 5.101 of the URLTA.

6. Implied warranty of habitability.

Recommendation: The Commission unanimously recommends the enactment of a statute creating an implied warranty of habitability with the following features.

- It will require landlords to:
 - Comply with requirements of applicable building and housing codes that materially affect health and safety.
 - Make all repairs and do whatever is necessary to put and keep premises in a reasonably safe and habitable condition.
 - Keep all common areas of premises in a clean and reasonably safe condition.
 - Maintain the structural components including, but not limited to, the roofs, floors, walls, chimneys, fireplaces, foundations, and all other structural components, in reasonably good repair so as to be usable.
 - 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 him or her.
 - Provide (unless provided by local government) and maintain appropriate receptacles and conveniences for the removal of ashes, garbage, rubbish, and other waste

incidental to the occupancy of the dwelling unit and arrange for their removal.

- Supply running water and reasonable amounts of hot water at all times and reasonable heat between October 1 and May 1 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.
- Supply smoke detection devices and, if applicable, carbon monoxide detection devices.
- Provide tenants with current contact information of the person authorized to take repair requests.
- In addition:
 - If the duty imposed by housing or building codes is greater than the specific duty, then the housing or building code provision shall take precedence.
 - The warranty will allow landlords to have a reasonable amount of time in which to make repairs.
 - The tenant must not be in default of rent payments as a prerequisite to petitioning the court.
 - Landlords will not be liable for repairs to conditions caused by the negligent or wrongful act or omission of the tenant, a member of the tenant's family, or other person on the premises with the consent of the tenant.

7. Unconscionable lease provisions.

The Commission unanimously recommends the enactment of a statute similar to section 1.303 of the URLTA, prohibiting the enforcement of unconscionable leases and lease provisions.

8. Prohibited provisions in leases.

The Commission unanimously recommends the enactment of a statute similar to section 1.403 of the URLTA, prohibiting certain provisions in leases that would unfairly limit tenants' legal rights.

9. Landlord's access.

The Commission unanimously recommends that Ark. Code Ann. § 18-17-602 be amended to conform generally to section 3.103 of the URLTA, allowing the landlord entry without consent in case of emergency, and limit-

ing unreasonable access by landlords. In addition, the Commission unanimously recommends that Ark. Code Ann. § 18-17-705 be amended to generally conform to all and not just part of section 4.302 of the URLTA, and to provide tenants with a remedy for a landlord's abuse of access.

10. Failure to deliver possession.

The Commission unanimously recommends the enactment of a statute similar to section 4.102(a) of the URLTA, allowing a tenant to either terminate a lease or demand performance, and obtain possession and damages.

11. Remaining missing sections of the URLTA.

The Commission unanimously recommends that the remaining missing sections of the URLTA not discussed above should be reviewed for applicability to Arkansas.

12. Domestic violence.

Recommendation: The Commission unanimously recommends amendment of Arkansas's protection for victims of domestic abuse statute, Ark. Code Ann. § 18-16-112, to allow a victim to terminate a lease early without penalties if certain conditions are met, including a restraining order from a judge, against the aggressor. The statute should address issues including, but not limited to, return of the security deposit.

13. Anti-discrimination.

Recommendation: The Commission unanimously recommends amendment of Arkansas's fair housing statute, Ark. Code Ann. §§ 16-123-201 et seq., to add the category of sexual orientation.

14. Severability.

With the exception of Recommendation Numbers One and Three, and Five and Six, the Commission intends that these Recommendations are severable, and although the Commission urges action on them as the votes above indicate, failure to enact one should not in any way hinder the enactment of the others. With respect to One and Three, the Commission recommends the failure to vacate statute should not be repealed until a valid, satisfactory civil eviction statute for residential landlords is in place. With respect to Five and Six, a warranty of habitability without protection from retaliatory eviction will be ineffective.

15. General.

The Commission expressly recognizes and defers to the roles of both the Arkansas Supreme Court and the Arkansas General Assembly with respect to future action on these recommendations and respectfully requests they take appropriate action.

BACKGROUND

Our landlord-tenant law has a long history, dating back a thousand years to shortly after the Norman Conquest. Its roots lie in English feudalism, in a society where tenants rented for terms of years and built and repaired their own structures on the premises. By the latter half of the twentieth century, American society was dramatically different, and leases could be classified into three types: agricultural leases, which most closely resembled the original term for years; commercial leases, negotiated at arms' length between businesses; and residential leases. In this last type of lease, tenants typically rent for a fixed term of a year or from month to month. They rent an apartment (usually) or a house. Tenants range from persons who cannot afford to buy a home and are receiving subsidies from the federal government to pay their rent, to persons living in public housing, to persons who intend to live somewhere short-term (such as students), to persons who can afford to buy a home but choose to rent. In Arkansas, according to the 2010 Census, 32% of householders are renters.³ This percentage is almost identical to the national percentage of 33%.⁴

Landlord-tenant law is chiefly governed by state law. In some areas federal law preempts state law, particularly where federal subsidies are present, such as public housing, privately owned federally subsidized housing, and Section 8 housing (where tenants receiving federal vouchers rent from private landlords). Except where it is particularly relevant, federal law is outside the scope of this report. Generally, tenants in federally subsidized housing have more rights under federal law than tenants whose relationships with their landlords are governed solely by Arkansas law.

3. 2010 Census, Table 993, Homeownership Rates by State, <http://www.census.gov/compendia/statab/2012/tables/12s0993.pdf>; National Low Income Housing Coalition, *Out of Reach 2012*, <http://nlihc.org/sites/default/files/oor/2012-OOR-State-Summary-Table.pdf> (both last visited on Oct. 13, 2012).

4. 2010 Census, Table 993, Homeownership Rates by State, <http://www.census.gov/compendia/statab/2012/tables/12s0993.pdf> (last visited on Oct. 13, 2012).

EVICITION

Background

Other States: During the nineteenth and twentieth centuries, because of landlord dissatisfaction with existing slow, cumbersome procedures for evicting tenants, all states enacted “summary dispossession” statutes. These statutes were intended to restore landlords into possession quickly, typically in a matter of weeks. Most jurisdictions refer to the landlord’s cause of action as “Unlawful Detainer” or “Forcible Detainer.”⁵ Some states have enacted additional statutes for specialized situations, for example if the tenant lives in a mobile home.⁶ In a very unusual approach, in an “expedited eviction” proceeding, Missouri even allows neighborhood associations to sue to evict tenants if there is criminal activity on the premises and the parties with standing have not taken action.⁷ Most states prohibit “retaliatory eviction,” forbidding a landlord from evicting a tenant because the tenant has reported a housing code violation or taken similar action.

Arkansas: Arkansas’s summary dispossession statute calls the procedure “unlawful detainer.” It applies to all tenancies, residential, commercial and agricultural.

In addition, Arkansas has a second eviction statute, enacted in 2007 and expressly restricted to residential tenancies (except that it contains one section expressly for commercial tenancies).

Arkansas, alone among the states, has a so-called “criminal eviction” statute, the failure to vacate statute, that criminalizes the nonpayment of rent by a tenant in possession.

Finally, Arkansas does not prohibit retaliatory eviction. These statutes and areas of the law are discussed below. For ease of reading, the sections are divided between the discussion of Arkansas and the other states.

5. *See, e.g.*, ALA. CODE § 6-6-310; D.C. CODE § 42-3505.01(b) (allowing recovery of possession if tenant is violating a tenancy obligation and fails to correct within thirty days after receiving notice); GA. CODE ANN. § 44-7-50; 735 ILL. COMP. STAT. ANN. 5/9-102; MINN. STAT. ANN. § 504B.285; MONT. CODE ANN. § 70-24-422; N.Y. REAL PROP. ACTS. LAW § 711 (McKinney) (allowing proceeding to recover possession where lease term has expired or on tenant’s failure to pay rent); OHIO REV. CODE ANN. § 1923.02; OR. REV. STAT. ANN. § 90.392(2); 68 Pa. Stat. Ann. § 250.501(a); TEX. PROP. CODE ANN. § 24.002 (Vernon); UTAH CODE ANN. § 78B-6-802; WASH. REV. CODE ANN. § 59.12.030.

6. *See, e.g.*, ALASKA STAT. § 34.03.225; R.I. GEN. LAWS § 31-44-2; WASH. REV. CODE ANN. § 59.20.080.

7. MO. ANN. STAT. §§ 441.710, 730.

Unlawful Detainer (Ark. Code Ann. §§ 18-60-301 et seq.)

Grounds for the Action

Arkansas: Ark. Code Ann. § 18-60-304 lists various grounds for unlawful detainer. They are:

- Holding over after the end of a tenancy;
- Unlawfully retaining possession lawfully obtained, after a demand in writing for surrender by a person with a superior right to possession;
- Failing to pay rent, and after three days' written notice to quit or vacate from the landlord, refusing to quit possession;
- Causing or permitting the premises to become a common nuisance under Ark. Code Ann. § 14-54-1501 et seq., or Ark. Code Ann. § 16-105-401 et seq. (the Arkansas Drug Abatement Act), or any other law; or
- Causing or permitting the premises to become a public or common nuisance under Ark. Code Ann. § 14-54-1701 et seq., as determined by a criminal nuisance abatement board.

The second of these grounds includes the common occurrence of a landlord evicting a tenant because the tenant has violated one or more lease provisions (other than payment of rent) and the lease includes a provision that allows the landlord to terminate the lease on the tenant's breach of any of its provisions.

The unlawful detainer action has three stages—pre-hearing, possession hearing, and trial. Very few cases proceed past the possession hearing.

Other States: Most states have similar grounds for summary dispossession actions. At least one state, Colorado, declares that every lease has an implied covenant that the tenant may not commit certain criminal acts, and if the tenant does so, the landlord may terminate the lease.⁸

Pre-Hearing

Arkansas: First, a landlord must give a tenant three days' notice to vacate. The notice must be hand-delivered or mailed to the tenant. Arkansas does

8. COLO. REV. STAT. ANN. § 13-40-107.5 ("It is declared to be an implied term of every lease of real property in this state that the tenant shall not commit a substantial violation while in possession of the premises.").

not provide a statutory form for the notice to vacate. If a tenant does not leave after the three-day notice period, the landlord may file a civil unlawful detainer complaint in circuit court. The Commission heard from some sources that in some counties, landlords could file unlawful detainer actions in the “state district courts” with county-wide jurisdiction created by Amendment 80, which would then hold the possession hearings. Commissioners heard from others that district court judges could hold possession hearings when these were referred to them by circuit court judges. However, the Commission was unable to verify that district courts are hearing any unlawful detainer actions or portions of unlawful detainer actions. To the best of the Commissioners’ knowledge, only circuit courts hear unlawful detainer actions.⁹

Because the filing fee is \$165 in circuit court but only \$65 in district court, being able to file in district court would represent a savings for landlords. This is one reason why many residential landlords prefer to bring eviction actions in district courts.

Ark. Code Ann. § 18-60-307 states that the complaint must:

- Be signed by the landlord or the landlord’s agent or attorney;
- Specify the land allegedly being unlawfully detained;
- Specify the person committing the unlawful detainer;
- Specify the date when the unlawful detainer was committed; and
- By affidavit state that the plaintiff is lawfully entitled to the possession of the possessions set out in the complaint and that the defendant unlawfully detains them after demand has been made.

The complaint is complicated and difficult for most non-lawyers to complete. Landlords expressed a strong preference for a simple complaint form for simple cases. The commission also discussed requiring landlords to attach a copy of the lease to the complaint. This would provide useful evidence and also encourage landlords to use written leases.

Landlords also expressed a strong preference to proceed pro se in simple nonpayment situations. A person may always represent him or herself, and requiring a statutory complaint form, including instructions, to be used

9. Currently, circuit courts “may” refer unlawful detainer cases to state district courts. However, the circuit court filing fee and technical pleadings are still required. Ark. S. Ct. Admin. Order 18(6)(b)(3), 2012 Ark. 468.

would facilitate pro se appearances. However, it is probably not legal for entities, such as corporations and LLCs, to appear pro se. At least one state, Florida, has solved this problem (see the discussion below on page 11).

Once the complaint has been filed, the tenant is served with the complaint and a “notice of intention to issue writ of possession.” Process server fees vary from approximately \$35 to \$85. Service may also take place by certified mail. After the tenant has been served, the tenant has five days (excluding Sundays and legal holidays) to file a written objection. Providing tenants with a statutory form for the written objection would assist tenants in exercising their rights. A number of states also inform tenants of their rights at this stage, or when the tenant receives the notice to vacate.¹⁰

If no written objection is filed, the landlord wins the case and the clerk issues a writ of possession to the sheriff, who will serve it and execute it, by removing the tenant, within twenty- four hours after service. If the tenant timely files a written objection, the court sets a date for a possession hearing. While typically the possession hearing is expedited, it still may take several weeks to schedule. The landlord must give the tenant (or the tenant’s attorney) notice of the date, time, and place of the hearing by certified mail. Such a short period of time before the hearing raises due process concerns but typically these types of statutes allow for a continuance if the tenant appears and requests it. A second reason why many residential landlords wish the initial hearing to be moved to district court is that district court hearings are scheduled much more quickly than those in circuit courts. One of the recommendations of the Commission is to require the possession hearing to take place within a week of the deadline for the tenant’s reply. An objection made to this recommendation of the Commission was that a statute could not call for a hearing within a particular time. However, there are numerous instances where Arkansas statutes mandate civil hearings within certain time periods.¹¹

10. *See, e.g.*, D.C. Super. Ct. R. Civ. Pro. for the Landlord & Tenant Branch Form 1S; KAN. STAT. ANN. § 58-25, 105; NEV. REV. STAT. ANN. § 118B.070; N.J. STAT. ANN. §§ 2A:42-10.16 and N.J. STAT. ANN. §§ 46:8-45 and 46.

11. *See, e.g.*, ARK. CODE ANN. § 2-17-404 (clerk of court to set hearing on receivership grain distribution within ten and fifteen days of filing of petition); § 3-3-313 (district court to set hearing on interest in seized alcoholic beverages); § 8-6-505 (court of competent jurisdiction to schedule hearing on illegal dumping of solid waste within fourteen days of filing of petition); § 9-15-204 (circuit court to hold hearing on domestic abuse within thirty days of or next court date after filing of petition); § 9-27-341 (circuit court to hold termination of parental rights hearing within ninety days of filing of petition); and § 14-123-414 (circuit court to hold suit on delinquent levee assessments at first term or if term in progress within twenty days, on residents, of petition). These are representative examples. County courts are also required to hold numerous types of hearings within certain time periods.

If the tenant remains in possession of the premises until the hearing, at the time of filing the written objection, the tenant must also post a bond equal to the amount of rent due and continue paying rent to the court registry. Failure by the tenant to make the initial and subsequent deposits due is grounds for the court to issue a writ of possession.

Other States: Some states provide a statutory form for the notice to vacate.¹² States vary in the amount of time a tenant has to pay rent or move before the landlord can file for eviction. Three days, Arkansas's period, is at the short end of the spectrum, but is the period in approximately fifteen states, and is the most common period.¹³ Other common periods are five days¹⁴ and seven days.¹⁵ A significant number of states allow for unlawful detainer statutes to be heard by lower courts of limited jurisdiction (similar to Arkansas's district courts).¹⁶

At least four states, Arizona, New Jersey, Oregon and Rhode Island, have form complaints, found in either the statutes or court rules, and at least Oregon and Rhode Island have statutory forms for the entire eviction process.¹⁷ Some states require the landlord to attach the lease to the complaint.¹⁸ Nevada requires the landlord to file an affidavit only but the statutes require numerous allegations to be included, including a copy of the written notice served, and the written lease, if any.¹⁹ Some states allow mere posting on the premises to suffice as service, usually as an alternate form in addition to personal service, or if personal service is not effective.²⁰ States that supply statutory forms for landlords also have statutory forms for tenants. Some states facilitate pro se representation by landlords and tenants.²¹

12. See, e.g., forms for Oregon at <http://courts.oregon.gov/Clackamas/pages/forms.aspx> (last visited Dec. 16, 2012) and for Rhode Island at <http://www.courts.ri.gov/publicresources/forms/default.aspx> (last visited Dec. 16, 2012).

13. See, e.g., KAN. STAT. ANN. § 58-2564; MONT. CODE ANN. § 70-24-422; N.Y. REAL PROP. ACTS. LAW § 711 (McKinney).

14. See, e.g., 735 ILL. COMP. STAT. ANN. 5/9-209; VA. CODE ANN. § 55-225.

15. See, e.g., ALA. CODE § 35-9A-421; ALASKA STAT. § 09.45.090; KY. REV. STAT. ANN. § 383.660.

16. See, e.g., IND. CODE ANN. § 32-31-6-2 (small claims court can hear emergency possessory actions); MICH. COMP. LAWS ANN. § 600.5704 (district court, municipal court and common pleas court); NEB. REV. STAT. ANN. § 76-1441 (district or county court); NEV. REV. STAT. ANN. § 40.253 (justice court or district court).

17. See, e.g., Ariz. R. Proc. Eviction Action R. 5; N.J. Ct. R. 6:3—4, and N.J. R. Prac. App. 11-X; OR. REV. STAT. § 105.124; R.I. GEN. LAWS § 34-18-56.

18. See, e.g., CAL. CIV. PRO. CODE § 1166; MICH. CT. R. 4.201.

19. NEV. REV. STAT. ANN. § 40.253.

20. See, e.g., N.D. CENT. CODE § 47-32-02.

21. See, e.g., CONN. GEN. STAT. ANN. § 47a-23a; D.C. Super. Ct. R. - Land. and Ten. R. 11-I; N.J. R. Prac. App. 11-X.

To solve the problem of pro se representation by landlords that are entities, Alaska allows nonprofit housing corporations to designate a non-attorney officer or employee of the corporation to commence and maintain detainer actions.²² An Ohio statute includes agents of owners or persons authorized by owners under the definition of “landlord.”²³ However, the Ohio Supreme Court declared that the Ohio legislature could not unconstitutionally expand the category of persons authorized to practice law, as this was under the court’s own jurisdiction.²⁴

Similarly, the Arkansas Supreme Court interprets the Arkansas Constitution to vest it with exclusive power to regulate the practice of law.²⁵ On the other hand, the Florida Supreme Court has carved out an exception to the unauthorized practice rules to allow property managers to file evictions for non-payment of rent on behalf of landlords, if they use Supreme Court-approved forms.²⁶

In a significant departure from Arkansas law, some states do not require an answer from the tenant, simply requiring the tenant to appear at a hearing.²⁷ A writ of possession thus cannot issue prior to the hearing, and the tenant is guaranteed the opportunity to appear before being evicted. With respect to how quickly the hearing occurs, a few states allow for extremely expedited hearings. For example, in Arizona the summons is issued on the day the complaint is filed, and the tenant is commanded to be present at the hearing, which must occur between three and six days later.²⁸ In Kansas, the tenant must appear in between three and fourteen days after the date the summons is issued.²⁹ Some states also limit the time period of continuances.³⁰

22. ALASKA STAT. § 09.45.158.

23. OHIO REV. CODE ANN. §§ 1923.01(C)(2), 5321.01(B).

24. *Ebbing v. Lawhorn*, 2012 WL 2877434 (Ohio 2012); *Cleveland Bar Association v. Picklo*, 772 N.E.2d 1187 (Ohio 2002). See also *LAS Collection Management v. Pagan*, 858 N.E.2d 273 (Mass. 2006); *Unger v. Landlords’ Management Corp.*, 168 A. 229 (N.J. Ch. 1933).

25. Ark. Const. Amend. 28; *Ligon v. Davis*, 2012 Ark. 440, ___ S.W.3d ___.

26. *The Florida Bar re Advisory Opinion—Nonlawyer Preparation of and Representation of Landlord in Uncontested Residential Evictions*, 627 So.2d 485 (1993).

27. See, e.g., MD. CODE ANN. § 8-401; NEB. REV. STAT. ANN. § 76-1442; N.D. CENT. CODE § 47-32-02; R.I. GEN. LAWS § 34-18-35 (tenant may file answer either before or at the hearing).

28. ARIZ. REV. STAT. ANN. § 33-1377.

29. KAN. STAT. ANN. § 61-3805.

30. For example, New York allows a continuance in the court’s discretion if either party shows delay because of the procurement of witnesses, or if all parties agree. Unless all parties agree to a longer period, however, a continuance shall not be longer than ten days. N.Y. REAL PROP. ACTS LAW § 745(1) (McKinney). Similarly, in Oregon, a court may grant a continu-

Possession Hearing

Arkansas: At the possession hearing, the landlord presents evidence showing that the landlord is entitled to possession of the property. If the court decides the landlord is likely to succeed on the merits at trial, then the court orders a writ of possession. The landlord must also provide adequate security as determined by the court. The court will not issue the writ of possession until the security has been posted. If the sheriff executes the writ of possession before the final trial, the tenant's personal property will be stored. On the other hand, if the tenant wishes to remain on the premises, as usually happens if the proceedings reach this stage, the court will allow it as long as the tenant posts adequate security within five days after the writ of possession is issued.

Other States: Most states do not have an initial hearing. At least two states—Delaware and Georgia—allow tenants to answer orally.³¹ New Hampshire statutes allow the landlord to use records of complaints from other tenants as evidence, as a special hearsay exception, if certain conditions are met.³² New Hampshire also allows tenants to request a recording of the lower court hearing.³³

Trial

Arkansas: Parties may request a jury trial. If the landlord wins money damages, the tenant's personal property may be sold, with the proceeds paid to the landlord. The landlord may be awarded the rental value as damages, along with possession. If the tenant wins, the tenant is entitled to damages for any dispossession, and to possession of the premises. Arkansas does not prohibit retaliatory eviction, so retaliation may not be raised as a defense. Nor may the landlord's failure to repair be raised as a defense to nonpayment of rent, even if the landlord promised to make repairs in the lease.

Other States: Most states offer jury trials, although not necessarily in lower courts of limited jurisdiction (like Arkansas district courts).³⁴ Defenses to a

ance—although it shall not be longer than fifteen days—for a tenant to obtain legal services. OR. REV. STAT. ANN. § 105.137.

31. DEL. CODE ANN. tit. 25, § 5709; GA. CODE ANN. § 44-7-51.

32. N.H. REV. STAT. ANN. § 540:16-a.

33. N.H. REV. STAT. ANN. § 540:13.

34. See, e.g., CAL. CIV. PRO. CODE § 1174; CONN. GEN. STAT. ANN. § 47a-44; IDAHO CODE ANN. § 6-316. Arkansas district courts do not allow jury trials. ARK. CODE ANN. § 16-17-703.

summary dispossession complaint recognized by most states are breach of warranty of habitability, retaliation, and domestic violence.

Recommendation: The Commission unanimously recommends the unlawful detainer statute be amended in the following ways:

- The statute should include official statutory forms for the eviction process, including but not limited to a notice to vacate, complaint, answer, counterclaim, tenant's complaint to recover personal property, landlord's answer, and writ of possession. These forms should be required to be used and should be available on the Supreme Court's website. The complaint should require verification.
- The appropriate forms (such as the notice to vacate and the complaint) should notify tenants of their rights. Many tenants already go through the eviction process pro se, and if the Commission's recommendations are adopted more will do so. If no attorney is informing them of their rights, the process should provide for it.
- Landlords should be able to file residential unlawful detainer complaints in district courts, pro se if desired, for simple non-payment cases. Where the tenant pleads not guilty or counterclaims, the statute should allow a removal to circuit court for a trial de novo, if the case progresses that far, with the opportunity for both sides to retain attorneys if they do not already have them. This would entail the Supreme Court giving district courts the power to issue eviction orders and writs of possession.
- District courts should establish registries. It would seem this could be done by statute.
- Landlord entities (such as LLCs and corporations) should be able to designate an agent who can file a complaint and appear at the hearing stage in district court. This also may require approval by the Supreme Court.
- The possession hearing must be scheduled within one week of the deadline for the tenant's filing of the written answer.
- If possession is granted to the landlord and the tenant does not appeal for a trial de novo, possession must be returned to the landlord within a specific number of days.
- If possession is granted to the landlord and the tenant appeals for a trial de novo, the tenant must pay any rent already due and rent as it comes due into the registry of the court.

- Judges should encourage mediation after the possession hearing. Currently, it is the duty of Arkansas judges to encourage the settlement of cases and controversies by suggesting the referral of a case or controversy to an appropriate dispute resolution process agreeable to the parties.

Civil Eviction (Ark. Code Ann. §§ 18-17-701 through 707 and 901 et seq.)

This statute was enacted in 2007, purportedly as part of the URLTA. However, the original URLTA does not include an eviction procedure. Before the URLTA was introduced as a bill, all of its pro-tenant provisions were removed, and an additional eviction procedure, duplicative because Arkansas already has an unlawful detainer procedure, was added.

This eviction procedure appears to have been copied from that of South Carolina, although in the process, pro-tenant provisions were weakened or deleted.³⁵ For example, South Carolina's statute has a fairly complex provision regarding the service of the court's order requiring the tenant to vacate or show cause. South Carolina allows notice to be posted, but only after personal service has been attempted twice, with the second attempt occurring more than forty-eight hours after the first attempt, and the times of day separated by at least eight hours.³⁶ If these requirements are met notice may be posted but must also be mailed. Arkansas's statute simply states that if service under the rules for district courts is not successful, the copy of the order may be posted.³⁷ South Carolina's requirement is more stringent. The South Carolina statute allows trial by jury.³⁸ Arkansas's statute rather confusingly states that if "the tenant appears and contests eviction, the court shall hear and determine the case as any other civil case."³⁹ However, few civil cases are tried in district court, and there are no juries in district court.

In addition, and as discussed by Commissioner Marshall Prettyman in his article,⁴⁰ not only were all pro-tenant provisions stripped out of the URLTA, but additional pro-landlord provisions relating to eviction were added. For example, under "landlord remedies," Ark. Code Ann. § 18-17-701(c)(1) provides that "the landlord may recover actual damages and obtain injunc-

35. S.C. CODE ANN. §§ 27-37-10 through 27-37-160.

36. S.C. CODE ANN. § 27-37-30.

37. ARK. CODE ANN. § 18-17-903.

38. S.C. CODE ANN. § 27-37-60.

39. ARK. CODE ANN. § 18-17-905.

40. *The Landlord Protection Act, Arkansas Code § 18-17-101 et seq.*, 2008 ARK. L. NOTES 71 (2008).

tive relief, judgments, or evictions in circuit court or district court *without posting bond for any noncompliance by the tenant with the rental agreement.*" The italicized words are not part of the URLTA. They were added to the Arkansas bill, and are contrary to both the current unlawful detainer statute and Arkansas court rules.

Right now, legally the eviction statute seems to be unusable. Ark. Code Ann. §18-17-203 states that "the district court or appropriate court of this state shall exercise jurisdiction over any landlord with respect to any conduct in this state governed by this chapter," but many subsequent sections refer only to "a district court having jurisdiction." The Arkansas Supreme Court determines what types of cases district courts may hear, and eviction cases are not included (although unlawful detainer cases may be transferred to a state district court by a circuit court). Nonetheless, because the law is on the books, and new judges are continuously appointed, the Commission was told that from time to time a new district judge will try an eviction case under this statute because the judge does not realize that the district court does not have jurisdiction.

Under Ark. Code Ann. § 18-17-901, if a tenant is noncompliant with regard to the rental agreement, the landlord may notify⁴¹ the tenant of the noncompliance and that the rental agreement will terminate in fourteen days if the tenant fails to remedy the noncompliance.⁴² Additionally, if the tenant fails to pay rent within five days of the due date, a landlord may terminate the rental agreement. No additional notice is required—the fact that rent is five days late is notice enough that the landlord has the right to evict.

This statute allows a landlord to file an affidavit in any district court with jurisdiction to initiate eviction proceeding (right now no district court appears to have that jurisdiction). The court will issue a show cause order to the tenant, to either vacate the premises or show cause why the eviction is not justified, within ten days. If the tenant fails to appear and show cause, the court will issue a writ of possession to the sheriff. If the tenant appears and contests the eviction, the district court will hear the case. If the landlord wins, the district court will issue a writ of possession. If the tenant wins, the tenant remains in possession of the property. Either side may appeal, but an appeal will not stay eviction unless the tenant files an appeal bond within five days of the notice to appeal.

41. *Id.* Notice must be written delivery to the tenant. *Id.*

42. In addition to nonpayment of rent, the landlord may file to recover possession of the property from a tenant when the term of vacancy has expired or the tenant has breached the terms of the lease. ARK. CODE ANN. § 18-17-901.

In his article,⁴³ Marshall Prettyman raised many other concerns with this statute including:

- The right of a landlord to evict for any minor breaches of a lease;
- The right of a landlord to evict without notice if rent is five days late;
- The lack of any requirement for a landlord to post bond resulting in no guarantee that funds would be available to pay damages to a tenant who wins; and
- The requirement that a tenant pay the landlord “all rent allegedly owed” (instead of depositing it with the court) before the initial hearing.

Recommendation: In light of the Commission’s recommendations to streamline the unlawful detainer statute, and its findings that: 1) this statute does not fairly balance landlords’ and tenants’ rights, 2) this statute sets out different time periods from the unlawful detainer statute, 3) the statute is flawed and self-contradictory, and 4) district courts have no power to conduct the eviction procedure set out in this statute, the Commission unanimously recommends that this statute be repealed.

Criminal Failure to Vacate, Ark. Code Ann. § 18-16-101

Arkansas is the only state that criminalizes the tenant who fails to pay rent, and also fails to vacate the premises after being notified to leave.⁴⁴ The Commission discovered that there is a strange dual state of affairs under this statute: what the statute says, and what actually happens, which varies from court to court.

Under this statute:

- A tenant who does not pay rent and has not responded after ten days’ notice in writing is guilty of a misdemeanor.
- Upon conviction, the tenant will be fined \$25 per day for each day the tenant failed to vacate the premises.

43. *The Landlord Protection Act, Arkansas Code § 18-17-101 et seq.*, 2008 ARK. L. NOTES 71 (2008).

44. The Commission was told that Cleveland and Columbus, both in Ohio, have criminal eviction procedures, but despite investigating has found no evidence of that.

- A tenant who pleads not guilty and refuses to vacate must deposit any rent allegedly due into the registry of the court. In other words, a tenant (who is a criminal defendant at this point) who refuses to vacate and wishes a trial must, in essence, pay money to the court.
- Rent must continue to be paid while the action is pending. If the tenant is found guilty, the landlord will receive the rental payments from the court.
- If the tenant is acquitted, the payments will be returned to the tenant.
- If the tenant either pleads guilty, pleads *nolo contendere* or is found guilty and has not paid the “required rental payments,” the tenant is automatically guilty of a Class B misdemeanor.
- The penalties for a Class B misdemeanor are a fine of up to \$1,000,⁴⁵ and a sentence of up to ninety days.⁴⁶

What actually happens:

- Arrest warrants issue for tenants, which are served by police. It is possible for a tenant to be booked and even jailed prior to trial, if not released on the tenant’s own recognizance, however this is rare.
- The landlord files an affidavit to initiate the process. Prosecutors typically do not investigate landlords’ claims, and thus it is possible for landlords to make false representations, simply to evict the tenant, even though to do so would be a crime.
- Despite the fact that the statute imposes a penalty of either fines or jail, and gives district courts no jurisdiction to evict tenants, nonetheless, in some courts the fine is waived, and the tenant is (invalidly) ordered to leave the premises. In one court the same amount of fine was imposed on multiple tenants even though the number of days they remained on the premises differed, and the statute calls for a fine of \$25 per day.
- In some counties trials are very infrequent; in others they occur more frequently. Even if a tenant is truly not guilty (i.e., the tenant has already paid the rent, or thinks there is an agreement with the landlord to pay rent late) few tenants have the money to pay for a trial.

45. ARK. CODE ANN. § 5-4-201.

46. *Id.*

- The statute requires a tenant to pay rent into the registry of the court if the tenant pleads not guilty, but as already noted, district courts have no registries.
- Some prosecutors refuse to bring charges under the statute. Thus there are no failure to vacate cases in, e.g., Fayetteville and Pine Bluff, and in those places landlords must use the unlawful detainer statute.

In 1989, the Arkansas Supreme Court found the previous version of this statute to be constitutional.⁴⁷ In 2001, the legislature amended the statute, upping the fine to \$25 per day and requiring the tenant to pay rent into the registry of the court as discussed above. Afterward, Professor Carol Goforth of the University of Arkansas at Fayetteville School of Law wrote an article criticizing the statute on due process grounds.⁴⁸ She noted that:

- The statute is arguably unconstitutional because it deprives the tenant of a significant right in property before the tenant is given the right to be heard.
- The statute comes dangerously close to imposing a criminal sentence *before* a finding of guilt. “While the bond itself does not seem to be the equivalent of a criminal sentence, it is difficult to view the threatened incarceration for failure to pay as anything else.” In other words, if the tenant, the defendant, wants a trial, the tenant has to pay for it. No other criminal proceeding imposes this requirement, and it would seem to violate due process.
- The statute conditions the tenant’s right to defend himself or herself on the ability to pay amounts into court that a private party, the landlord, merely alleges to be owed.

The Arkansas Supreme Court has not ruled on the constitutionality of the statute in its current form. The United States Department of Housing and Urban Development (“HUD”) forbids its use in federally subsidized housing, or by landlords with Section 8 tenants.

The Commission met with Little Rock District Court Judge Alice Lightle, who raised other flaws with the statute. In today’s legal system, restitution to a private party is a remedy that is typically enforced through civil and not criminal court. In civil court, the rules of civil procedure ensure that both

47. Duhon v. State, 299 Ark. 503, 774 S.W.2d 830 (1989).

48. Carol R. Goforth, *Arkansas Code §18-16-101: A Challenge to the Constitutionality and Desirability of Arkansas’ Criminal Eviction Statute*, 2003 ARK. L. NOTES 21, 22 (2003).

parties have equal opportunities to present their claims and counterclaims. Each side pays its own attorney's fees and has access to discovery measures. But in a failure to vacate case in criminal court, the prosecuting attorney argues the case on the landlord's behalf. If the defendant tenant is convicted, then the rent alleged to be owed is paid to a private party landlord. In criminal court, a tenant may not bring a counterclaim against the landlord. Essentially, the statute allows landlords to use the resources of the criminal justice system to get restitution for an alleged breach of contract.

It can be argued that this statute victimizes the poor. There is really no difference between this statute and a statute that would criminalize persons who default on their mortgages and remain on the premises. However, if instead of being subject to a foreclosure process, homeowners were summoned into district court by police, and fined by a judge unless they agreed to move out, more lawmakers and enforcers would be concerned about this law.

One argument Commissioners heard in favor of the criminal failure to vacate statute is that it impacts tenants less than a civil eviction would. At least in Little Rock, typically no fines are collected. However, the Commission believes that is not necessarily the case in other district courts. Since the crimes are a general misdemeanor and a Class B misdemeanor, no record is maintained by the Arkansas Criminal Information Center, although the Commission was told that local law enforcement may have a record. For example, if a tenant is summoned in Little Rock, the Little Rock police will have a record of the arrest.⁴⁹

Alternatively, it was argued that landlords who had to go to the expense of suing the tenant would expect to collect rent, costs and attorney's fees, and that this would harm tenants' credit scores. It is true that a court judgment adversely affects a credit score. However, the adverse effect typically lasts no longer than seven years, while continuously diminishing during that period.⁵⁰ If a streamlined unlawful detainer procedure is adopted as the Commission recommends, such court costs will be kept to a minimum. Additionally, in the other forty-nine states, civil evictions are used exclusively, with no catastrophic results nationwide on tenant credit.

49. Interview by Lynn Foster with Little Rock District Court Judge Alice Lightle (Dec. 5, 2012).

50. MyFICO, How Long Will Negative Information Remain on My Credit Card? <http://www.myfico.com/CreditEducation/Questions/Negative-Items-On-Credit-Report.aspx>.

Another argument in opposition is that since landlords do not have to pay to evict tenants, this helps keep rent low. First, not all landlords use the criminal eviction statute. Second, a streamlined unlawful detainer procedure would enable landlords to evict with relatively low costs. For more discussion of Arkansas's low rent, see that section, below, at p. 768.

Recommendation: The Commission finds that the criminal eviction statute 1) appears to be unique to Arkansas; 2) criminalizes breach of a contract, using the criminal law to enforce a civil matter; and 3) is enforced unevenly (and in some places not at all) throughout Arkansas. For these reasons, it should be repealed. The Commissioners are evenly divided as to when it should be repealed. Five recommend repeal once Recommendation Number One is carried out and a better civil procedure is in place, and the other five recommend immediate repeal, but the Commissioners are unanimous in recommending that the failure to vacate statute should be repealed.

Self-Help

“Self help” refers to the process of a landlord evicting a tenant without resort to courts or any type of legal process. Methods of self help include but are not limited to changing locks, removing doors, and removing a tenant's personal property. Thirty-seven states forbid self-help evictions by statutes and several more do so by case law.⁵¹ Virtually all give tenants the right to recover damages if landlords resort to self help.

Arkansas has no such statute, but the Arkansas Supreme Court declared self help to be illegal in 1986, holding that the Arkansas forcible entry statute⁵² forbids self help by landlords.⁵³ In addition, the court held that any provision in a lease whereby the tenant authorized the landlord to exercise self help was invalid. Nevertheless, the Commission was told that some Arkansas landlords do routinely practice self help, particularly where prosecutors do not enforce the criminal failure to vacate statute, since some landlords are unwilling or unable to hire attorneys to pursue unlawful detainer statutes because of the aforementioned perceived expense, delay and complexity, or unavailability of an attorney, for whatever reason.

It should be noted that Arkansas tenants may bring an action for wrongful eviction against landlords who practice self-help—that is, assuming the ten-

51. See Marcia Stewart, Ralph Warner & Janet Portman, *Every Landlord's Legal Guide* 434 (10th ed. 2010).

52. ARK. CODE ANN. §§ 18-60-301 *et seq.*

53. *Gorman v. Ratliff*, 289 Ark. 332, 712 S.W.2d 888 (1986).

ant can afford legal assistance. One district court judge told Commissioners that in his court criminal mischief charges may be brought against landlords practicing self-help, but this may well be an isolated practice.

Recommendation: The Commission unanimously recommends that Arkansas enact a statute clarifying that self help action by landlords is illegal, similar to section 4.207 of the Uniform Residential Landlord and Tenant Act, and codifying the Arkansas Supreme Court's decision in *Gorman v. Ratliff*.

Retaliatory Eviction

At common law, a landlord could terminate a periodic tenancy—such as a month-to-month tenancy—for any reason or no reason, simply by giving timely notice to the tenant. Today, however, over forty states forbid eviction if it is deemed “retaliatory” by statute.

Retaliatory eviction occurs typically when a landlord evicts a tenant because the tenant has either exercised his or her legal rights, by reporting a housing code or similar legal violation by the landlord, or taken similar action. The URLTA prohibits “retaliatory conduct,” which it defines as increasing rent, decreasing services, or evicting or threatening to evict a tenant who complains to a government agency about a code violation breaching the implied warranty of habitability, complains to the landlord about a breach of the implied warranty of habitability, or who joins a tenants’ union or similar group.⁵⁴ If a landlord engages in retaliatory conduct, the tenant is entitled to recover possession or terminate the lease, and in either case recover the greater of three months’ rent or treble damages, and attorney’s fees.

Under the URLTA, any of these actions by a landlord within one year of action by the tenant creates a presumption that the landlord’s action was retaliatory. The presumption can be rebutted by evidence, and it does not arise if the code violation was caused by the tenant, the tenant is in default on rent payments, or compliance with the code would require repairs so extensive as to deprive the tenant of the use of the premises.⁵⁵

Forty-two states forbid retaliatory eviction of a tenant who has complained to the landlord or government agency.⁵⁶ Typically these statutes cover viola-

54. URLTA § 5.101 (1972). The URLTA is available online at <http://www.uniformlaws.org/shared/docs/residential%20landlord%20and%20tenant/urlta%201974.pdf>.

55. *Id.*

56. Stewart, Warner & Portman, *supra* note 51, at 417.

tions of building or housing codes, health ordinances, etc.⁵⁷ Twenty-nine states forbid retaliatory eviction of a tenant who is involved with a tenants' organization.⁵⁸ Twenty-six states forbid retaliatory eviction of a tenant who is enforcing a legal right or remedy.⁵⁹ Only eight states have no law respecting retaliatory eviction.⁶⁰

In many states the law forbidding retaliatory eviction was enacted as part of the URLTA. Indeed, it makes no sense to impose an implied warranty of habitability but allow landlords to evict tenants who complain about violations of the warranty. Typically retaliatory eviction is an issue that can be raised as a counterclaim in a summary dispossession action, but under the URLTA a tenant must be up-to-date with rent payments to raise it.

Arkansas forbids retaliatory eviction for only one narrow reason: if the tenant has complained about lead hazards, and the landlord has received notice of such lead hazards.⁶¹

Recommendation: The Commission unanimously recommends that Arkansas enact a statute prohibiting retaliatory eviction by landlords, similar to section 5.101 of the Uniform Residential Landlord and Tenant Act.

THE IMPLIED WARRANTY OF HABITABILITY

At common law, the landlord had no duty to repair. Since the tenant had a duty not to commit "waste," a limited duty of repair fell on the tenant. Housing codes changed this to a limited extent, requiring landowners to keep housing up to a standard and typically imposing citations and fines if they did not. The argument has been made that Arkansas tenants do not need an implied warranty of habitability because they can simply report housing code violations. There are at least three weaknesses in this argument. First, only the largest of Arkansas's cities have housing codes. No housing codes exist in rural areas and most smaller cities and towns. Second, oftentimes code enforcement officers take weeks or longer to respond to complaints, and landlords may take several months or more to make repairs, obtaining

57. See, e.g., MONT. CODE ANN. § 70-24-431; N.J. STAT. ANN. § 2A:42-10.10; VA. CODE ANN. § 55-248.39.

58. See, e.g., ALA. CODE 35-9A-501; N.C. GEN. STAT. § 42-37.1; N.M. STAT. ANN. 47-8-39.

59. See, e.g., ALASKA STAT. 34.03.310; MISS. CODE ANN. § 89-8-17; TEX. PROP. CODE ANN. § 92.331 (Vernon).

60. Georgia, Idaho, Indiana, Louisiana, Missouri, North Dakota, Oklahoma and Wyoming. Stewart, Warner & Portman, *supra* note 51, at 417.

61. ARK. CODE ANN. § 20-27-608.

continuances from code enforcement officials and judges. Third, if the tenant is a month-to-month renter, the landlord may simply and easily terminate the lease of any tenant who reports defects to the authorities, giving the tenant one month's notice. It was all of these inadequacies of housing codes as a remedy for tenants that led to the creation of the implied warranty of habitability.

The implied warranty of habitability is a comparatively recent doctrine in landlord-tenant law, arising in the 1960s. It, or an equivalent,⁶² is now law in every state except for Arkansas. State statutes establish either a warranty or place a duty to repair on landlords in forty-eight states; in New Jersey, case law adopts a warranty of habitability.⁶³ Simply stated, the warranty or promise is implied in every residential lease, whether or not it is expressly written. The nature of the promise is that the landlord will provide habitable premises—premises that are safe, sanitary and fit to live in.

A similar warranty, of habitability, sound workmanship and quality of construction, exists in most states for housing. Arkansas recognizes this warranty, which allows a home buyer to sue the builder-vendor of a home for a material, latent defect that arises within five years from the substantial completion of construction.⁶⁴ However, Arkansas does not recognize the right of tenants to safe, habitable conditions. In Arkansas, a landlord has no duty of repair unless the landlord expressly agrees to such in the lease. Nor does Arkansas allow tenants to make repairs and deduct the cost from the rent payments absent agreement by the landlord. If a landlord has not agreed to make repairs in the lease, a tenant has no direct recourse, in or out of court. If a landlord agrees to make repairs but does not, a tenant's only recourse is to sue.

The Scope of the Warranty

The URLTA lists the following duties of the landlord:

- To comply with all building and housing code requirements that materially affect health and safety;

62. Georgia imposes a duty of repair on landlords. GA. CODE ANN. § 44-7-13.

63. "Warranty of Habitability Damages," prepared for the Uniform Law Commission Drafting Committee for the Revised Uniform Residential Landlord and Tenant Act, 2012 (on file with Landlord-Tenant Study Commission).

64. *Crumpacker v. Gary Reed Const., Inc.*, 2010 Ark. App. 179, ___ S.W.3d ___; *Graham Const. Co. v. Earl*, 362 Ark. 220, 208 S.W.3d 106 (2005); *Wawak v. Stewart*, 247 Ark. 1093, 449 S.W.2d 922 (1970).

- To take all actions necessary to put and keep premises in a fit and habitable condition;
- To maintain all electrical, plumbing, sanitary, heating, ventilating, air-conditioning, and other facilities and appliances, including elevators, supplied or required to be supplied by the landlord in good and safe working order;
- To provide for waste disposal, including appropriate receptacles;
- To supply running water and reasonable amounts of hot water at all times, and heat during cold months, unless the provision of hot water and heat are under the exclusive control of the tenant; and
- To keep common premises (such as stairs, hallways, parking lots) in clean and reasonably safe condition.⁶⁵

Housing codes, of course, contain numerous specific requirements, but since not all housing in Arkansas is covered by housing codes, a warranty for Arkansas should contain more specific requirements, such as:

- Maintain the structural components including, but not limited to, the roofs, floors, walls, chimneys, fireplaces, foundations, and all other structural components, in reasonably good repair so as to be usable.;
- Maintain in good and reasonably 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 him or her.; and
- Install smoke alarms and (if premises have a fossil fuel burning heater, appliance, fireplace or an attached garage) carbon monoxide detectors and keep them in working order.

The URLTA allows for agreement between the landlord and tenant for the tenant to make repairs, if this agreement is entered into separately and for valuable consideration (for example, a reduction in rent).⁶⁶

Some states have amended the URLTA. Others have their own versions of the implied warranty of habitability. Some notable non-URLTA provisions follow.

65. URLTA § 2.104 (1972).

66. *Id.*; *see, e.g.*, State Water Resources Bd. v. Howard, 729 A.2d 712 (R.I. 1999).

- Oklahoma requires landlords to disclose prior meth manufacture on the premises to tenants unless the contamination is below a certain amount.⁶⁷
- Hawaii and Utah require the landlord and tenant to sign an inventory at the beginning of the lease term. In Hawaii, if such an inventory is not executed, then at the conclusion of the tenancy the condition of the premises is rebuttably presumed to be that at the beginning as well.⁶⁸
- New Mexico requires the landlord to provide the tenant with a written lease prior to occupancy.⁶⁹
- Maine requires the landlord to keep apartments at a minimum temperature.⁷⁰
- North Carolina requires landlords to install smoke alarms and carbon monoxide detectors, and lists dangerous conditions the landlord is required to repair, e.g. unsafe flooring or steps, lack of operable locks on outside doors and ground-level windows, and rodent infestation, to name a few. If the tenant has caused the condition the landlord can recover the cost of repair.⁷¹
- Washington requires landlords to provide tenants with fire safety and protection information.⁷²
- Nevada and Oregon require plumbing, electrical and other systems to conform to the law in effect when they were installed, as well as smoke and carbon monoxide detectors, and waterproofing and weather protection of roofs, exterior walls, doors and windows.⁷³
- Texas and West Virginia exempt the landlord from making repairs if the tenant has not paid rent, or if the tenant or tenant's invitee has caused the damage (unless it is normal wear and tear).⁷⁴

The URLTA and most states do not allow tenants to waive their right to the implied warranty.

67. 41 OKLA. STAT. ANN. § 118.

68. HAW. REV. STAT. ANN. § 521-42; UTAH CODE ANN. § 57-22-4.

69. N.M. STAT. ANN. 1978, § 47-8-20.

70. ME. REV. STAT. tit. 14, § 6021.

71. N.C. GEN. STAT. § 42-42.

72. WASH. REV. CODE ANN. § 59.18.060.

73. NEV. REV. STAT. ANN. § 118A.290; OR. REV. STAT. § 90.320.

74. TEX. PROP. CODE ANN. § 92.052 (Vernon); W. VA. CODE ANN. § 37-6-30.

Remedies for Landlord's Breach of the Warranty

Under the URLTA, tenants have several remedies from which they may choose.

First, if the breach materially affects health and safety, and the condition has not been caused by the tenant or tenant's guests, the tenant may terminate the tenancy. To do this, the tenant must notify the landlord of the landlord's noncompliance and the tenant's intent to terminate. The landlord must be given fourteen days in which to remedy the breach, by repairs, payment of damages or otherwise. If the landlord does so the tenant may not terminate the lease, unless the landlord had already committed the same breach within the past six months.

Second, the tenant is entitled to damages or injunctive relief. If the landlord's noncompliance is willful the tenant is entitled to attorney's fees.

Third, if the breach is minor (repair costing less than \$100 or half a month's rent, whichever is greater), the tenant may either recover damages or, after notification to the landlord, make the repairs himself, and submit the bill to the landlord, deducting the cost from the rent. This remedy is not available if the damage was caused by the tenant.

The "repair and deduct" provisions of the URLTA proved controversial. Of the states that adopted the URLTA, a few eliminated the provisions entirely. Some limited them only to provision of essential services. Two states allow repair and deduct only by court order. Several states that did not adopt the URLTA (Hawaii, Illinois, Texas and Washington) allow tenants this remedy but have detailed procedures. For example, Texas allows a tenant to repair and deduct if: 1) the condition materially affects health or safety; 2) the tenant has given the landlord notice (in some cases two notices are required); 3) a reasonable time (seven days is rebuttably presumed to be reasonable) has passed and the landlord has not made the repair; and 4) the tenant is not in arrears on rent.⁷⁵

All told, thirty-one states allow some form of repair and deduct. Some states allow tenants more latitude if the repair is one of emergency. Some allow the tenant to repair and others restrict to licensed contractors or repairmen listed in yellow pages or newspapers. Most have raised the URLTA's dollar amount for minor repairs, some to \$500. Hawaii requires tenants to obtain two estimates for the repair amount.

75. TEX. PROP. CODE ANN. § 92.056 (Vernon).

Finally, if the breach is caused by the landlord's failure to supply "reasonable amounts of heat, hot water, running water, electric, gas, and other essential service," the tenant is, on giving notice, allowed to secure such services and deduct the cost from the rent; recover damages based on diminution in value of the premises; or procure substitute housing and be released from the obligation to pay rent to the noncomplying landlord. A tenant may not pursue one of these and also terminate the lease. Several states that adopted the URLTA have omitted the tenant's right to procure substitute housing.

Breach of Warranty as a Defense

The URLTA allows tenants to use the landlord's breach of the implied warranty of habitability as a defense to a landlord's action for summary dispossession. It allows the tenant to counterclaim for any amount owed to the tenant, and to pay any rent owed into the registry of the court. If the tenant's claim is not in good faith, the landlord may recover attorney's fees. Some states require the tenant to expressly inform the landlord of the tenant's intent to withhold rent beforehand.

Tenants' Duties

Just as the URLTA imposes an implied warranty of habitability on landlords, so it imposes similar duties on tenants. For example, tenants are obligated to: 1) "comply with all obligations imposed upon tenants by applicable provisions of building and housing codes materially affecting health and safety;" 2) keep the premises they occupy "as clean and safe as the condition of the premises permit;" 3) similarly keep plumbing fixtures clean, to "not deliberately or negligently destroy, deface, damage, impair, or remove any part of the premises or knowingly permit any person to do so;" 4) keep premises free of trash; and 5) use electricity, heat, vents, etc. in a reasonable manner. Arkansas already imposes these duties on tenants, with minor modifications, as part of the portion of the URLTA enacted in 2007.⁷⁶

ARKANSAS'S LOW RENT

Raised in opposition to the imposition of any type of implied warranty of habitability and to the repeal of the criminal failure to vacate statute is the assertion that Arkansas has the lowest rent of any state in part because landlords have no implied warranty of habitability in Arkansas, no tort liability,

76. ARK. CODE ANN. § 18-17-601.

and pay no attorney's fees or court costs when using the criminal failure to vacate statute.

In the spring of 2012, the National Low Income Housing Coalition released its report on the state of rental housing availability for low income renters, *Out of Reach 2012*.⁷⁷ This report indicated that Arkansas had the lowest fair market rent ("FMR") for a two-bedroom dwelling unit (\$593 per month) of all fifty states. However, Arkansas was not drastically below all other states. West Virginia's FMR was \$598, South Dakota's \$599, Kentucky's \$616, Mississippi's \$622, Iowa's \$637 and North Dakota's \$639. Lest the reader think that this means housing is a terrific bargain in Arkansas, it should also be pointed out that Arkansas's annual median income ("AMI"), at \$51,900, was the third lowest of the states. Lower than Arkansas are Mississippi, at \$48,871, and West Virginia, at \$51,549. All of these states have an implied warranty of habitability, two of them (Iowa and Kentucky) have enacted the URLTA, and all but North Dakota prohibit retaliatory eviction.⁷⁸

Recommendation: The Commission unanimously recommends the enactment of a statute creating an implied warranty of habitability with the following features.

- It will require landlords to:
 - Comply with requirements of applicable building and housing codes that materially affect health and safety.
 - Make all repairs and do whatever is necessary to put and keep premises in a reasonably safe and habitable condition.
 - Keep all common areas of premises in a clean and reasonably safe condition.
 - Maintain the structural components including, but not limited to, the roofs, floors, walls, chimneys, fireplaces, foundations, and all other structural components, in reasonably good repair so as to be usable.

77. Available at <http://nlihc.org/sites/default/files/oor/2012-OOR.pdf> (visited on Dec. 8, 2012).

78. Warranty of habitability: IOWA CODE ANN. § 562A.15; KY. REV. STAT. ANN. § 383.595; MISS. CODE ANN. § 89-8-23; N.D. CENT. CODE § 47-16-13.1; S.D. CODIFIED LAWS § 43-32-8; W. VA. CODE ANN. § 37-6-30. For a map of states that have enacted the URLTA, see <http://uniformlaws.org/Act.aspx?title=Residential%20Landlord%20and%20Tenant%20Act>. For a table of states with statutes restricting retaliatory eviction, see Stewart, Warner & Portman, *supra* note 51, at 417.

- 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 him or her.
- Provide (unless provided by local government) and maintain appropriate receptacles and conveniences for the removal of ashes, garbage, rubbish, and other waste incidental to the occupancy of the dwelling unit and arrange for their removal.
- Supply running water and reasonable amounts of hot water at all times and reasonable heat between October 1 and May 1 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.
- Supply smoke detection devices and, if applicable, carbon monoxide detection devices.
- Provide tenants with current contact information of the person authorized to take repair requests.
- In addition:
 - If the duty imposed by housing or building codes is greater than the specific duty, then the housing or building code provision shall take precedence.
 - The warranty will allow landlords to have a reasonable amount of time in which to make repairs.
 - If the landlord refuses to perform the repair, the tenant will have the right to either terminate the lease and vacate the premises or petition a court to order the repair.
 - The tenant must not be in default of rent payments as a prerequisite to petitioning the court.
 - Landlords will not be liable for repairs to conditions caused by the negligent or wrongful act or omission of the tenant, a member of the tenant's family, or other person on the premises with the consent of the tenant.

THE MISSING HALF OF THE UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT

In 1972, the Uniform Law Commission ("ULC") adopted the Uniform Residential Landlord and Tenant Act. It modernized landlord-tenant law to reflect realities of the residential landlord-tenant relationship. Its chief innova-

tions were the adoption of the contract doctrines of unconscionability and the implied warranty of habitability into the law of leases, and the prohibition of retaliatory eviction. Twenty-one states have enacted the URLTA, and it is currently proposed for enactment in Colorado.⁷⁹ The process of creating a uniform law is a careful and lengthy one: all stakeholders are invited to the table, and opposing interests are carefully considered. This is especially important in an area like landlord-tenant law, where to be good a law must strike a fair balance between the two opposing groups.

Arkansas is not listed on the ULC's website as a state that has enacted the URLTA, because as explained above, in 2007 the Arkansas legislature enacted only the pro-landlord provisions of the URLTA. This exacerbated the already-existing imbalance in Arkansas landlord-tenant law. The Commission did not have time to examine all of the omitted URLTA sections but would recommend most of those it did examine, with some modifications. Three sections, the prohibition against retaliatory eviction and self help, and the implied warranty of habitability, are discussed above and substantially recommended. Following are four additional sections the Commissioners have also discussed and recommend for enactment.

Unconscionable Lease Provisions

The Uniform Commercial Code, which governs the sale of goods and is the law in Arkansas and all other states, prohibits the enforcement of an unconscionable contracts and unconscionable provisions in a contract.⁸⁰ The URLTA contains a similar provision respecting leases, section 1.303.⁸¹

79. For a map of states that have enacted the URLTA, see <http://uniformlaws.org/Act.aspx?title=Residential%20Landlord%20and%20Tenant%20Act>.

80. ARK. CODE ANN. § 4-2-302.

81. § 1.303. [Unconscionability]

(a) If the court, as a matter of law, finds

(1) a rental agreement or any provision thereof was unconscionable when made, the court may refuse to enforce the agreement, enforce the remainder of the agreement without the unconscionable provision, or limit the application of any unconscionable provision to avoid an unconscionable result; or

(2) a settlement in which a party waives or agrees to forego a claim or right under this Act or under a rental agreement was unconscionable when made, the court may refuse to enforce the settlement, enforce the remainder of the settlement without the unconscionable provision, or limit the application of any unconscionable provision to avoid an unconscionable result.

(b) If unconscionability is put into issue by a party or by the court upon its own motion the parties shall be afforded a reasonable opportunity to present evidence as to the setting, purpose, and effect of the rental agreement or settlement to aid the court in making the determination.

Uniform Residential Landlord and Tenant Act.

Recommendation: The Commission unanimously recommends the enactment of a statute similar to section 1.303 of the URLTA, prohibiting the enforcement of unconscionable leases and lease provisions.

Prohibited Lease Provisions

The URLTA also renders unenforceable any “adhesion clause” of a lease, such as are often found in standard form leases, for example a provision requiring the tenant to waive his or her legal rights against the landlord.

Recommendation: The Commission unanimously recommends the enactment of a statute similar to section 1.403⁸² of the URLTA, prohibiting certain provisions in leases that would unfairly limit tenants’ legal rights.

Landlord’s Access

At common law, tenants had exclusive possession of premises, with only a few narrow exceptions. Today, residential landlords have much greater access to premises. This is appropriate particularly if landlords have a duty of repair. However, the landlord’s right of access must still be balanced against a tenant’s rights to privacy, and to use and enjoyment of the premises. Under current Arkansas law, landlords have excessive access rights compared to most other states. The statute giving landlords these rights, Ark. Code Ann. § 18-17-602, is another example of a section taken from the URLTA (in this case section 3.103) that enacted part but not all of the section. Enactment of the rest of section 3.103⁸³ will strike a more fair balance between the inter-

82. § 1.403. [Prohibited Provisions in Rental Agreements]

(a) A rental agreement may not provide that the tenant:

(1) agrees to waive or forego rights or remedies under this Act;
 (2) authorizes any person to confess judgment on a claim arising out of the rental agreement;
 (3) agrees to pay the landlord’s attorney’s fees; or
 (4) agrees to the exculpation or limitation of any liability of the landlord arising under law or to indemnify the landlord for that liability or the costs connected therewith.

(b) A provision prohibited by subsection (a) included in a rental agreement is unenforceable. If a landlord deliberately uses a rental agreement containing provisions known by him to be prohibited, the tenant may recover in addition to his actual damages an amount up to [3] months’ periodic rent and reasonable attorney’s fees.

83. § 3.103. [Access] [Currently unenacted subsections are in italics.]

(a) A tenant shall not unreasonably withhold consent to the landlord to enter into the dwelling unit in order to inspect the premises, make necessary or agreed repairs, decorations, alterations, or improvements, supply necessary or agreed services, or exhibit the dwelling unit to prospective or actual purchasers, mortgagees, tenants, workmen, or contractors.

(b) *A landlord may enter the dwelling unit without consent of the tenant in case of emergency.*

ests of landlord and tenant. It will allow landlords entry without consent in case of emergency; forbid use of the right of entry to harass tenants, requiring at least one day's notice in non-emergency situations, and allowing any other entry only in cases of a court order, or failure to maintain, or abandonment or surrender by the tenant.

In addition, tenants should have a remedy for a landlord's abuse of access, just as currently Arkansas landlords have a remedy for a tenant's refusal of access. This remedy is found in section 4.302 of the URLTA,⁸⁴ part of which (the landlords' remedy) was enacted as Ark. Code Ann. § 18-17-705.

Recommendation: The Commission unanimously recommends that Ark. Code Ann. § 18-17- 602 be amended to conform generally to section 3.103 of the URLTA, allowing the landlord entry without consent in case of emergency, and limiting unreasonable access by landlords. In addition, the Commission unanimously recommends that Ark. Code Ann. § 18-17-705 be amended to conform generally to all and not just part of section 4.302 of the URLTA, and to provide tenants with a remedy for a landlord's abuse of access.

Failure to Deliver Possession

Arkansas case law allows a tenant whose landlord fails to deliver possession to recover damages. Section 4.102(a) of the URLTA codifies this remedy and in addition expressly allows the tenant to obtain possession, or else terminate the lease.

(c) A landlord shall not abuse the right of access or use it to harass the tenant. Except in case of emergency or unless it is impracticable to do so, the landlord shall give the tenant at least [2] days' notice of his intent to enter and may enter only at reasonable times.

(d) A landlord has no other right of access except

(1) pursuant to court order;

(2) as permitted by Sections 4.202 and 4.203(b); or

(3) unless the tenant has abandoned or surrendered the premises.

84. § 4.302. [Landlord and Tenant Remedies for Abuse of Access] [Currently unenacted subsections are in italics.]

(a) If the tenant refuses to allow lawful access, the landlord may obtain injunctive relief to compel access, or terminate the rental agreement. In either case the landlord may recover actual damages and reasonable attorney's fees.

(b) 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 [1] month's rent] and reasonable attorney's fees.

Recommendation: The Commission unanimously recommends the enactment of a statute similar to section 4.102(a) of the URLTA, allowing a tenant to either terminate a lease or demand performance, and obtain possession and damages.

Remaining Missing Sections of the URLTA

Recommendation: The Commission unanimously recommends that the remaining missing sections of the URLTA not discussed above should be reviewed for applicability to Arkansas.

TORT LIABILITY OF LANDLORDS

A tort is a “private wrong,” as opposed to a crime. Typically, a tort arises when someone with a legal duty toward another breaches that duty (in other words, in landlord-tenant context, is negligent), and the breach or negligence is the proximate cause of a reasonably foreseeable injury to a person or damage to property. The state will not prosecute the breach, but the injured person may sue in tort and recover damages, i.e., money. Injunctive relief may be available as well. It should be noted that this section of the report discusses only injuries caused by defective premises, and not injuries caused by criminal acts of third parties, which are outside the scope of this report.

At common law, the general rule was “caveat tenant.” If a tenant or the tenant’s guest was injured because of a defect of the premises, usually the landlord was not liable. This rule stemmed from several reasons. First, during the middle ages when the law of landlord and tenant arose, a tenant was in as good a position as the landlord to make repairs to rural, often unimproved property. Second, since the landlord usually had no right to enter the property, having conveyed it for a term of years, it would be inequitable to require the landlord, who had no control over the premises, to make repairs. Over time, however, exceptions to this rule were created. Following are some of the major exceptions:

- The landlord is liable for damage or injury resulting from a latent defect of which the landlord is aware but which he failed to disclose to the tenant. Arkansas has apparently never recognized this rule.⁸⁵

85. Propst v. McNeill, 326 Ark. 623, 932 S.W.2d 766 (1996).

- The landlord is liable for defective premises where the premises have been leased for purposes involving admission of the public. Arkansas has never recognized this rule.⁸⁶
- The landlord is liable for defective premises located in common areas, such as hallways, stairs, elevators and parking lots. This rule makes eminent sense, since common areas are not under tenants' control, and landlords have free access to them. This is currently the majority rule,⁸⁷ although Arkansas has never followed it.⁸⁸ Unless the lease expressly states otherwise, no one is responsible for keeping the common areas of leased premises reasonably safe.
- The landlord is liable for defective premises where the landlord has agreed to (supported by consideration, e.g. in a lease) or has assumed by conduct a duty to repair. Arkansas does recognize this rule.⁸⁹
- The landlord is liable if he undertakes a repair but performs it negligently. Arkansas also recognizes this rule.⁹⁰

The adoption and widespread enactment of the URLTA, however, imposed a duty on landlords to comply with applicable housing codes affecting health and safety, and to keep rental premises in a safe, sanitary and habitable condition. And the imposition of this duty meant that now, arguably, landlords would be liable in tort for injuries caused by its breach. Even though only about half of the states adopted the URLTA, the other half adopted an implied warranty of habitability independently of the uniform law, again imposing a duty on landlords, the breach of which could perhaps result in tort liability for injuries.

Thus, today all states (except for Arkansas) recognize a duty of a landlord to provide safe, sanitary, habitable premises. Breach of that duty gives rise to a variety of remedies throughout the states. Suing for damages under the lease ("contract damages") normally would allow a tenant to recover the difference between the rental value of the premises without the defect, and the reduced value with the defect. Or, the tenant could recover for the cost of repairing the defect. The URLTA also allows tenants to, depending on the circumstances, repair and deduct from the rent, obtain substitute housing,

86. The "public place" exception is, however, mentioned in Justice McFadden's dissent in *Ford v. Adams*, 212 Ark. 458, 207 S.W.2d 311 (1948) (for the majority opinion in the South Western Reporter see *Ford v. Adams*, 206 S.W.2d 970 (1947)).

87. 62 Am. Jur. 2d. Premises Liability § 16.

88. *Eoff v. Warden*, 330 Ark. 244, 953 S.W.2d 880 (1997).

89. ARK. CODE ANN. § 18-16-110.

90. *Id.*

and obtain injunctive relief. States vary greatly in which of these remedies they allow, as discussed above.

But what of a defect in the premises that causes a personal injury, or damage to the personal property of the tenant? May the tenant sue in tort? The URLTA itself is silent on this point, although the comment to Section 105 states that “whether tort action, specific performance or equitable relief, is available is determined not by this section but by specific provisions and supplementary principles.”

The approaches of the states vary widely. Some states expressly state, by statute or case law, that there is no tort liability for any breach of an implied warranty of habitability, or for negligence, except for one or more of the traditional common law exceptions discussed above. For example, Alabama adds a provision to the URLTA that states “the act creates no duties in tort.”⁹¹ Virginia has ruled that the provision of its version of the URLTA requiring landlords to comply with building and housing codes creates liability in contract but not in tort.⁹² Pennsylvania similarly holds that breach of the implied warranty of habitability does not give rise to tort liability.⁹³ Other states impose tort liability, either by statute or, more typically, by case law. For example, the Alaska Supreme Court stated that “landlords are liable for injuries caused by their failure to exercise reasonable care to discover or remedy dangerous conditions,” citing the state’s adoption of the URLTA and needs of modern society.⁹⁴ California and Massachusetts allows tenants to recover for emotional distress and personal property damage caused by a landlord’s failure to maintain the premises as required by statute.⁹⁵ Massachusetts allows tenants and their guests to recover in tort for injuries caused by breach of the implied warranty of habitability.⁹⁶ Florida, Montana, New Hampshire, Ohio, and Wisconsin, among others, all recognize some standard of care on the part of landlords, whether connected to the implied warranty or not, with respect to premises occupied by tenants.⁹⁷

91. ALA. CODE § 35-9A-102.

92. *Steward v. Holland Family Props., LLC*, 726 S.E.2d 251 (Va. 2012).

93. *Staley v. Bouril*, 718 A.2d 283 (Pa. 1998).

94. *Newton v. Magill*, 872 P.2d 1213 (Alaska 1994).

95. *Stoiber v. Honeychuck*, 162 Cal. Rptr. 194 (Ct. App. 1980); *Simon v. Solomon*, 431 N.E.2d (Mass. 556).

96. *Scott v. Garfield*, 912 N.E.2d 1000 (Mass. 2009).

97. *Mansur v. Eubanks* 401 So. 2d 1328 (Fla. 1981); *Corrigan v. Janney*, 626 P.2d 838 (Mont. 1981); *Sargent v. Ross*, 308 A.2d 528 (N.H. 1973); *Shroades v. Rental Homes, Inc.*, 427 N.E.2d 774 (Ohio 1981); *Pagelsdorf v. Safeco Insurance Co.*, 284 N.W.2d 55 (Wis. 1979).

The Commission was evenly divided as to repeal or amend Ark. Code Ann. § 18-16-110, which limits the tort liability of landlords to two narrow circumstances. Thus, the Commission makes no recommendation with respect to the tort liability of landlords.

DOMESTIC VIOLENCE PROTECTION IN ARKANSAS

Arkansas law offering protection of tenants who are victims of domestic violence is comparable to that of other states. Protection is found at Ark. Code Ann. §18-16-112 and includes provisions for:

- Protection against retaliatory eviction;
- Tenants' rights to change the locks;
- Barring the abuser from the property;
- Evicting the abuser;
- Liability of the abuser for damages;
- Immunity from liability for a landlord acting in good faith; and
- Protection of the tenants right to call law enforcement assistance.

The domestic violence protection of some states applies only to the tenant, and in other states also applies to members of the tenant's household. Arkansas law applies to the tenant, an applicant for tenancy, or a member of the tenant/applicant's household.

Arkansas law, like the other states, protects against domestic abuse and sex crimes. However, Arkansas also protects victims of stalking. About half of the states provide protection for this type of abuse.

Most states require the landlord receive some type of notice in order for the tenant to be protected. While Arkansas requires a court order evidencing domestic abuse, in many states a police report or no contact/protection order will suffice.

The only significant area in which Arkansas is lacking in its protection of victims is early termination of the lease. At this time, twenty states allow tenants who are victims of domestic violence to terminate their lease before the term expires.⁹⁸

98. See, e.g., ARIZ. REV. STAT. ANN. § 33-1318; N.M. STAT. ANN. § 47-8-33; TEX. PROP. CODE ANN. § 92.016 (Vernon). For a complete list of states allowing early termination of leases to victims of domestic violence, see "Existing State Statutes on Victims of Domestic Violence," (2012) prepared for the Uniform Law Commission Drafting Committee for the

Of these states that allow early termination, a few require rent through the time the tenant vacates plus an additional fourteen to thirty days of rent.⁹⁹ However, most require rent payments only to the date of termination.¹⁰⁰

Recommendation: The Commission unanimously recommends amendment of Arkansas's protection for victims of domestic abuse statute, Ark. Code Ann. § 18-16-112, to allow a victim to terminate a lease early without penalties if certain conditions are met, including a restraining order from a judge, against the aggressor. The statute should address issues including, but not limited to, return of the security deposit.

ANTI-DISCRIMINATION

Restrictions on the rights of landlords to discriminate against tenants are found in both federal and state law. The Fair Housing Act is the federal statute that prohibits discrimination against the protected classes of race, color, sex, religion, national origin, handicap/disability, and familial status (children).¹⁰¹ Virtually all states also have their own fair housing statutes.¹⁰² Many states' categories mirror those of the federal statute (Arkansas's do) but some states protect additional categories from discrimination as well, such as age,¹⁰³ marital status¹⁰⁴ and source of income.¹⁰⁵ Sexual orientation is protected by eighteen states.¹⁰⁶

Recommendation: The Commission unanimously recommends amendment of Arkansas's fair housing statute, Ark. Code Ann. §§ 16-123-201 et seq., to add the category of sexual orientation.

Revised Uniform Residential Landlord and Tenant Act (2012) (on file with Landlord-Tenant Study Commission).

99. See, e.g., MINN. STAT. ANN. § 504B.206.

100. See, e.g., IND. CODE ANN. § 32-31-9-12; OR. REV. STAT. ANN. § 90.453.

101. 42 U.S.C. §§ 3601 et seq.

102. See, e.g., ALA. CODE §§ 24-8-1; GA. CODE ANN. §§ 8-3-201 et seq.; FLA. STAT. ANN. § 760.23.

103. See, e.g., CAL. CIV. CODE §§ 51.2 to 51.3; DEL. CODE ANN. tit. 6, § 4607(c); FLA. STAT. ANN. § 760.29(4)(a); N.H. REV. STAT. ANN. §§ 354-A:8, 354-A:15; and VA. CODE ANN. § 36-96.7(A).

104. See, e.g., OR. REV. STAT. ANN. § 659.033; R.I. Gen. Laws § 34-37-4; VT. STAT. ANN. tit. 9, § 4503.

105. See, e.g., CAL. GOV'T CODE § 12955(a)(1) (2011); CONN. GEN. STAT. ANN. § 46a-63(3) (2011); ME. REV. STAT. ANN. tit. 5, § 4582 (2002).

106. See, e.g., CAL. GOV'T CODE § 12947.5(a); DEL. CODE ANN. tit. 25, § 5116; MASS. GEN. LAWS ANN. ch. 151B, § 4.

SECURITY DEPOSITS

Arkansas's security deposit statute is in line with that of other states. However, the length of time landlords may keep the security deposit before returning it—sixty days—is unusually long. No other state allows sixty days in all cases. California allows a fixed-term lease to contain a 60-day period.¹⁰⁷ Colorado allows leases to specify a 60-day period but if the lease is silent, the default period is one month.¹⁰⁸ Vermont allows sixty days for seasonal rentals.¹⁰⁹ New York and Kentucky do not specify a set time period.¹¹⁰ Of the other forty-five states, twenty-two require deposits to be returned within a month or thirty days. Arkansas used to require return within thirty days, but the statute was amended in 2009. Commissioners were divided on the issue of whether to return the deadline to thirty days. Landlords discussed the problems they have with getting prompt repair estimates. Others raised the hardships caused for tenants who are paying rent at a new location but who have not yet received their security deposit back. Another issue raised was that of landlords who fail to comply with the statute. A suggestion was made that all leases must inform tenants of their rights with regard to security deposits. However, no vote was made as to any of these issues.

CONCLUSION

The thirteen specific recommendations of the Commission are discussed above. Most stand alone (and therefore, if enacted in a larger bill, the legislation should have a clear severability clause) but a few of them are related to others. For example, the Commissioners unanimously voted to delay the repeal of the failure to vacate statute (Recommendation Number Three) until a less expensive, faster, yet balanced civil eviction statute is in place (Recommendation Number One). Enacting an implied warranty of habitability (Recommendation Number Six) will not be fully effective unless retaliatory eviction is forbidden (Recommendation Number Five).

Additionally, the Commission recognizes that landlord-tenant law is not just a legislative issue. The Supreme Court regulates the practice of law and arguably has jurisdiction over whether landlord entities such as LLCs can designate an individual to appear for them in court. The Supreme Court also regulates district courts and what they may hear, and thus should be at the

107. CAL. CIV. CODE § 1950.5.

108. COLO. REV. STAT. ANN. § 38-12-103.

109. 9 VT. STAT. ANN. § 4461.

110. KY. REV. STAT. ANN. § 383.580; N.Y. GEN. OBLIG. LAW § 7-103 (McKinney).

table when action is taken on these recommendations, otherwise useless statutes will be the result.

Finally, the Commissioners hope that action will be taken to implement these recommendations. As past legislative action has demonstrated, however, bills that are drafted without all stakeholders at the table result in unbalanced legislation. Such legislation has caused some of the problems addressed by this report. The Commissioners hope that tenants' groups will be represented in the legislative process, as well as landlords' groups, to ensure a fair and workable outcome. This report should be viewed as only a first step in the process of generating more balanced landlord-tenant law.