



12-1-1977

Affirmative Remedies for the Tenant.

Robin Vaughn Dwyer

Follow this and additional works at: <https://commons.stmarytx.edu/thestmaryslawjournal>



Part of the [Consumer Protection Law Commons](#), and the [Property Law and Real Estate Commons](#)

Recommended Citation

Robin Vaughn Dwyer, *Affirmative Remedies for the Tenant.*, 8 ST. MARY'S L.J. (1977).

Available at: <https://commons.stmarytx.edu/thestmaryslawjournal/vol8/iss4/10>

This Article is brought to you for free and open access by the St. Mary's Law Journals at Digital Commons at St. Mary's University. It has been accepted for inclusion in St. Mary's Law Journal by an authorized editor of Digital Commons at St. Mary's University. For more information, please contact egoode@stmarytx.edu, sfowler@stmarytx.edu.

TEXAS LANDLORD-TENANT LAW AND THE DECEPTIVE TRADE PRACTICES ACT—AFFIRMATIVE REMEDIES FOR THE TENANT

ROBIN VAUGHAN DWYER

The lease of real property is a dual legal concept, combining both property and contract principles in an often unhappy and inequitable alliance.¹ At common law a lease of real property was generally held to be a sale or conveyance of an estate for a specified term giving the tenant a right of uninterrupted possession for the length of the term.² Traditionally the landlord's duties to the tenant ended with the execution of the lease agreement when the tenant assumed the position of an owner and occupier of land.³ The conveying theory of lease agreements has prevented the use of the principle of mutually dependent covenants inherent in contract law. Despite the lease agreement's predominantly contractual nature, lease covenants are treated independently, often resulting in hardships to the tenant.⁴ Although some courts recognized the lease's foundation in contract law in order to create exceptions to the strict property rules, most decisions still followed the doctrine of caveat emptor in determining a lessee's rights under the lease agreement.⁵ Texas courts have recognized that both contract and property concepts exist in lease agreements⁶ and use the former to temper the harshness of the property rules.

LANDLORD'S DOMINANT POSITION

Adherence to the feudal concept of lease agreements has led to a system in which the landlord enjoys a vastly superior position in both bargaining for

1. *E.g.*, C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 69 (1962); 3 G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 1110, at 377-79 (repl. 1959); see Bennett, *The Modern Lease—An Estate In Land Or A Contract (Damages for Anticipatory Breach and Interdependency of Covenants)*, 16 TEXAS L. REV. 47 (1937).

2. See 6 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 890, at 580-91 (3d ed. 1962).

3. See *Barfield v. Damon*, 245 P.2d 1032, 1033-34 (N.M. 1952); *Hannan v. Dusch*, 153 S.E. 824, 825 (Va. 1930); Annot., 70 A.L.R. 151 (1931).

4. See *Edwards v. Ward Assocs.*, 367 S.W.2d 390, 393 (Tex. Civ. App.—Dallas 1963, writ ref'd n.r.e.) (rent and repair covenants are independent); *Graham Hotel Co. v. Garrett*, 33 S.W.2d 522, 527 (Tex. Civ. App.—El Paso 1930, writ dism'd) (failure to supply heat does not relieve tenant of duty to pay rent).

5. Compare *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1075 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970), with *Oliver v. Hartzell*, 280 S.W. 979, 980 (Ark. 1926), and *Cameron v. Calhoun-Smith Distrib. Co.*, 442 S.W.2d 815, 816 (Tex. Civ. App.—Austin 1969, no writ).

6. See *Rohrt v. Kelley Mfg. Co.*, 162 Tex. 534, 537-40, 349 S.W.2d 95, 97-99 (1961).

and enforcing the lease agreement. A recent problem inherent in the enforcement of lease agreements has been the judicial interpretation of the lease as a relationship creating two distinct levels of rights and duties.⁷ On one level was the promise of uninterrupted possession in return for a quid pro quo—rent. The second level, independent of the first and based on contract, consisted of the landlord's promise to heat, light, and provide services. Breach of level two obligations gave rise to a suit by the tenant for breach of contract but did not affect the tenant's obligation to pay rent. The tenant was therefore subject to eviction, distress, and statutory landlord liens if he refused to pay rent in an attempt to coerce the landlord into honoring his promises. The tenant's redress of the landlord's breach, however, was by a burdensome suit on the contract.⁸

Distress and Landlord's Liens

At common law the landlord had the right of distress—to seize chattels belonging to the tenant and hold them until the rent was paid, or if not paid, to sell them and keep the proceeds.⁹ Texas, while retaining distress warrants, has also enacted a landlord lien statute which purports to give any residential landlord a lien on all property found within the leased premises for the value of all unpaid and due rentals.¹⁰ Because of the statute's coercive effect, both remedies may be effectively utilized by landlords to prevent tenants from withholding rent.

Distress statutes and landlord liens have been subjected to strict standards when measured against the requirements for notice set out by the due process clause of the fourteenth amendment. In *Hall v. Garson*¹¹ the Court of Appeals for the Fifth Circuit ruled that the Texas landlord lien statute¹² was unconstitutional. In rendering its decision, the court stated that article 5238a worked "a deprivation of property without due process of law insofar as [it

7. Quinn & Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future*, 38 *FORDHAM L. REV.* 225, 233-34 (1969). See also *Frazier v. Riley*, 111 So. 10, 12 (Ala. 1926); *Graham Hotel Co. v. Garrett*, 33 S.W.2d 522, 527 (Tex. Civ. App.—El Paso 1930, writ dism'd).

8. *Peters v. Kelly*, 237 A.2d 635, 636-37 (N.J. Super. Ct. App. Div. 1968); *Waldorf Sys., Inc. v. Dawson*, 139 A. 789 (R.I. 1928); *Graham Hotel Co. v. Garrett*, 33 S.W.2d 522, 527 (Tex. Civ. App.—El Paso 1930, writ dism'd); see *Reaume v. Brennan*, 300 N.W. 97 (Mich. 1941).

9. Comment, *Fuentes v. Shevin: The Constitutionality of Texas' Landlord Laws and Other Summary Procedures*, 25 *BAYLOR L. REV.* 215, 222 (1973); see *TEX. REV. CIV. STAT. ANN.* art. 5227 (1962) (giving landlord right of distress).

10. The present statute is *TEX. REV. CIV. STAT. ANN.* art. 5236d (Supp. 1976-1977), enacted to replace the former article 5238a, *Tex. Laws* 1969, ch. 686, §§ 1-7, at 2008-09, which was repealed by the 1973 Texas Legislature.

11. 468 F.2d 845, 847 (5th Cir. 1972).

12. *Tex. Laws* 1969, ch. 686, §§ 1-7, at 2008, 2009.

denies] the right to a prior opportunity to be heard before chattels are taken from their possessor.'"¹³

The Texas distress warrant statute and its procedures met with the same fate three years later. The Houston Court of Civil Appeals for the 14th District held that the distress warrant statute in conjunction with the procedural rules¹⁴ did not meet the required standards of minimal due process and therefore was unconstitutional.¹⁵ The result of the application of this due process explosion¹⁶ to a landlord's summary remedies has been to limit the degree of advantage held by the landlord over the tenant. The present Texas landlord lien statute replaced the one struck down in *Hall v. Garson*¹⁷ and provides for a lien on all nonexempt property, but only if it operates pursuant to the terms of a written rental agreement between landlord and tenant.¹⁸ Although the present statute recognizes tenant remedies for the landlord's willful violation of the statute,¹⁹ the actual rights of the tenant have not been increased by the mere requirement of a conspicuously printed contractual lien in the lease agreement.²⁰ For the present, Texas still sanctions the idea that the landlord is the feudal lord of the landlord-tenant relationship.

EROSION OF CAVEAT EMPTOR

The historical doctrine of caveat emptor, applied because the lease was considered a conveyance, has influenced the judicial interpretation of lease agreements so that the courts will not imply covenants as to a premises' fitness for use. Under the doctrine of caveat emptor and absent any fraud or active concealment by the landlord, the lessee is deemed to take the premises as he finds them.²¹ Despite the fact that the presumptions underlying the doctrine of caveat emptor in lease agreements have long ceased to exist, it

13. *Hall v. Garson*, 468 F.2d 845, 847 (5th Cir. 1972), citing *Fuentes v. Shevin*, 407 U.S. 67, 96 (1972).

14. TEX. R. CIV. P. 610-20.

15. *Stevenson v. Cullen Center, Inc.*, 525 S.W.2d 731, 735 (Tex. Civ. App.—Houston, [14th Dist.] 1975, no writ); TEX. REV. CIV. STAT. ANN. art. 5239 (1962).

16. Major cases expanding due process to require hearings or notice in summary proceedings include: *North Ga. Finishing, Inc. v. DiChem, Inc.*, 419 U.S. 601, 606 (1975), noted in 7 ST. MARY'S L.J. 423 (1975); *Fuentes v. Shevin*, 407 U.S. 67, 96 (1972); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969).

17. 468 F.2d 845, 847 (5th Cir. 1972).

18. TEX. REV. CIV. STAT. ANN. art. 5236d, §§ 1-8 (Supp. 1976-1977).

19. *Id.* § 7; see *Johnson v. Lane*, 524 S.W.2d 361, 364 (Tex. Civ. App.—Dallas 1975, no writ) (tenant received judgment for conversion where landlord failed to follow statutory procedure).

20. See TEX. REV. CIV. STAT. ANN. art. 5236d, § 4 (Supp. 1976-1977) (lien valid only if included in lease agreement in bold print).

21. E.g., *Jackson v. Amador*, 75 S.W.2d 892, 893 (Tex. Civ. App.—Eastland 1934, writ dism'd); *Archibald v. Fidelity Title & Trust Co.*, 296 S.W. 680, 682 (Tex. Civ. App.—Eastland 1927, no writ); see *Grimes, Caveat Lessee*, 2 VAL. U.L. REV. 189, 190 (1968).

remains the basis of a landlord's duty and a tenant's rights concerning a leasehold's physical condition. Today the residential lease agreement typically concerns a purchase of habitable space for a consideration of rent, not a conveyance of real estate with the right of uninterrupted possession. As a result of this historical anomaly many jurisdictions are beginning to reject the caveat emptor doctrine altogether while many others recognize limited, but well-known exceptions.²²

Constructive Eviction

The erosion of the doctrine of caveat emptor has affected the residential tenant's rights primarily through the use of express and implied warranties and legal fictions. The legal fiction of constructive eviction, when used as a defense to a suit for the payment of rent, has prevented inequitable results where a landlord has failed to repair or provide essential services, such as heat and water, which were needed for quiet enjoyment of the leasehold.²³ Constructive eviction, however, is of little use to a tenant who wishes to remain on the premises since he must abandon the premises to prove the constructive eviction.²⁴ The strict requirements of constructive eviction have effectively limited its use as a tenant's remedy for problems arising from the condition of leased housing under the doctrine of caveat emptor.

Implied Warranties

The implied warranty of habitability or fitness for intended use is another major exception to the doctrine of caveat emptor. A state's acceptance of

22. *Lemle v. Breeden*, 462 P.2d 470, 473 (Hawaii 1969) (general rule of caveat emptor should be reexamined); *Horton v. Marston*, 225 N.E.2d 311, 313 (Mass. 1967) (caveat emptor does not apply because a furnished dwelling for temporary use should be fit for immediate occupancy); *Humber v. Morton*, 426 S.W.2d 554, 555 (Tex. 1968) (caveat emptor does not apply where builder-vendor conveys finished dwelling to vendee with warranty of habitability or fitness); *J.D. Young Corp. v. McClintic*, 26 S.W.2d 460, 462 (Tex. Civ. App.—El Paso) (caveat emptor does not apply where construction has not yet reached point where lessee can determine fitness), *rev'd on other grounds*, 66 S.W.2d 676 (Tex. Comm'n App. 1933, holding approved).

23. See *Rust v. Eastex Oil Co.*, 511 S.W.2d 358, 361 (Tex. Civ. App.—Texarkana 1974, no writ); *Steinberg v. Medical Equip. Rental Servs., Inc.*, 505 S.W.2d 692, 696-97 (Tex. Civ. App.—Dallas 1974, no writ); *Stillman v. Youmans*, 266 S.W.2d 913, 916 (Tex. Civ. App.—Galveston 1954, no writ).

24. See Annot., 91 A.L.R.2d 638 (1963). A constructive eviction requires: (1) An intention on the part of the landlord that the tenant shall no longer enjoy the premises, which intention may be inferred from the circumstances proven; (2) A material act by the landlord . . . that substantially interferes with the use and enjoyment of the premises for the purpose for which they are let; (3) The act must permanently deprive the tenant of the use and enjoyment of the premises; and (4) The tenant must abandon the premises within a reasonable time after the commission of the act.

Comment, *The Implied Warranty of Habitability in Landlord-Tenant Relationships: The Necessity of Application in Texas*, 5 ST. MARY'S L.J. 64, 75-77 (1973); see *Richker v. Georgandis*, 323 S.W.2d 90, 95-96 (Tex. Civ. App.—Houston 1959, writ *ref'd n.r.e.*).

such a warranty evinces a major change in its view of the landlord-tenant relationship. The warranty is a term of implied contract obligating residential landlords to provide and maintain housing that complies with basic standards of habitability as expressed in local housing codes.²⁵ Twenty-eight states and the District of Columbia have either enacted statutes or have judicially established the implied warranty of habitability.²⁶ In Texas the concept of an implied warranty of habitability in the sale of new housing by a builder-vendor has been clearly expressed by the supreme court in *Humber v. Morton*.²⁷ Logically, if such a warranty exists as to the sale of new housing, it should also extend to a sale of habitable space for a set term. Nevertheless, despite the court's reasoning in *Humber*, Texas cases clearly reject the existence of such an implied warranty in lease agreements.²⁸ In the absence of an express agreement to the contrary, Texas landlords have no duty to repair any defect in the leased premises and therefore no liability for injuries arising from such defects.²⁹ The effect of this position is to give the landlord an unjust advantage in the enforcement of residential leases where express provisions to repair and warranties of fitness for intended use rarely, if ever, appear.

If the Texas consumer-tenant of rented living space is to achieve parity with the vendor-landlord it will have to originate from a source other than

25. The majority of the states adopting the warranty have defined habitability in terms of applicable housing codes. *E.g.*, *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1082 (D.C. Cir. 1970); *Jack Spring, Inc. v. Little*, 280 N.E.2d 208, 217 (Ill. 1972); *see Marini v. Ireland*, 265 A.2d 526, 534 (N.J. 1970) (housing codes admissible as evidence of habitability). *See also Berzito v. Gambino*, 308 A.2d 17, 21-22 (N.J. 1973), *noted in* 2 *FORDHAM URB. L.J.* 433 (1974).

26. Representative jurisdictions and their legislative or judicial authority include: *Arizona* - ARIZ. REV. STAT. ANN. §§ 33-1324, 33-1361 (1974); *California* - CAL. CIV. CODE §§ 1941, 1942 (Deering 1974); *Illinois* - *Jack Spring, Inc. v. Little*, 280 N.E.2d 208, 217 (Ill. 1972); *Kansas* - *Steele v. Latimer*, 521 P.2d 304, 309-10 (Kan. 1974); *Massachusetts* - MASS. ANN. LAWS. ch. 239, § 8A (Michie/Law. Co-op Supp. 1975), and *Boston Hous. Auth. v. Hemingway*, 293 N.E.2d 831, 843 (Mass. 1973); *Ohio* - OHIO REV. CODE ANN. §§ 5321.04, .07 (Baldwin Supp. 1975), and *Glyco v. Schultz*, 289 N.E.2d 919, 925 (Mun. Ct. Ohio 1972); *Washington* - WASH. REV. CODE ANN. § 59.18.060 (Supp. 1976), and *Foisy v. Wyman*, 515 P.2d 160, 164 (Wash. 1973). For a complete list of the states adopting this concept see *Blumberg & Robbins, Beyond URLTA: A Program For Achieving Real Tenant Goals*, 11 *HARV. C.R.-C.L. L. REV.* 1, 7-8 n.28 (1976).

27. 426 S.W.2d 554, 559 (Tex. 1968) (supreme court effectively limited doctrine of caveat emptor and rejected reasons for its existence in Texas).

28. *C.R. Miller & Bro. v. Nigro*, 230 S.W. 511, 513 (Tex. Civ. App.—Amarillo 1921, no writ); *Blackwell v. Speer*, 98 S.W. 903, 904 (Tex. Civ. App. 1906, no writ); *see Lynch v. Ortlieb & Co.*, 70 Tex. 727, 728-29, 8 S.W. 515, 516 (1888); *Angelo v. Deutscher*, 30 S.W.2d 707, 710 (Tex. Civ. App.—Beaumont 1930, writ ref'd). *But see Line, Implied Warranties of Habitability and Fitness For Intended Use In Urban Residential Leases*, 26 *BAYLOR L. REV.* 161, 177 (1974) (claiming no Texas court has ever negated the existence of an implied warranty of habitability in urban residential leases).

29. *Morton v. Burton-Lingo Co.*, 136 Tex. 263, 266, 150 S.W.2d 239, 240 (1941); *Kallison v. Ellison*, 430 S.W.2d 839, 840 (Tex. Civ. App.—San Antonio 1968, no writ); *Goldstein v. Corrigan*, 405 S.W.2d 425, 427 (Tex. Civ. App.—Waco 1966, no writ).

the common law lease provision and its exceptions. Currently, tenants are confronted with lease agreements that impose no express or implied duties on landlords to place or maintain their units in a habitable condition. In addition, the use of exculpatory clauses in standard-form lease agreements exempts landlords from the minimal responsibility which the Texas law places upon them. As the situation now stands, a landlord's right to receive rent is not conditioned on his delivery and maintenance of habitable housing. As a result, the tenant lacks adequate reciprocal rights with the landlord because of the antiquated view that the modern residential lease is a conveyance rather than a purely contractual transaction.

THE DECEPTIVE TRADE PRACTICES ACT AND THE TENANT'S NEW REMEDIES

The Texas Deceptive Trade Practices-Consumer Protection Act³⁰ [DTPA] was enacted by the 1973 Texas Legislature for the purpose of "[p]rotect[ing] consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty"³¹ by affording consumers a direct action against those parties engaging in such practices. When first enacted, this legislation applied only to individuals who sought or acquired by purchase or lease any goods or services.³² "Goods" were then defined as "tangible chattels bought for use," and this definition did not include the sale or lease of real property.³³ To prevent the recurrence of problems with the interpretation of "goods," as in *Cape Conroe v. Specht*,³⁴ the legislature enacted an amendment effective on August 31, 1975, that changed the definition of "goods"³⁵ and, presumably, the public policy concerning the landlord-tenant relationship. "Goods" are now defined as "tangible chattels or real property purchased or leased for use."³⁶ By amending the DTPA to encompass the sale and lease of real property, the legislature has expressed a new position on the theories underlying the landlord-tenant relationship. The legislature has now sanctioned the theory that a residential lease agreement is a contract for the sale of "goods." The placement of this sale of goods provision in a consumer protection statute by the legislature illustrates its intent to expand the rights and remedies of the tenant-consumer against the landlord-vendor of a residential lease.

30. TEX. BUS. & COMM. CODE ANN. §§ 17.41-.63 (Supp. 1976-1977).

31. *Id.* § 17.44.

32. Tex. Laws 1973, ch. 143, § 17.45(4), at 323; see *Cape Conroe Ltd. v. Specht*, 525 S.W.2d 215, 219 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ).

33. *Bourland v. State*, 528 S.W.2d 350, 358 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.) (sale of real estate); *Cape Conroe Ltd. v. Specht*, 525 S.W.2d 215, 219 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ) (sale of real estate).

34. 525 S.W.2d 215, 219 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ).

35. TEX. BUS. & COMM. CODE ANN. § 17.45(1) (Supp. 1976-1977).

36. *Id.*

Organization and Intent of the Statute

The addition of the DTPA to the current body of landlord-tenant law has the real effect of not only increasing tenants' rights, but of changing the entire concept of the lease in Texas. The statutory provisions permitting recovery of treble damages, injunctive relief, and reasonable attorneys' fees³⁷ have created a potential not only for providing the tenant with a remedy, but also for making that remedy readily available to those people with a viable claim who would normally be precluded from initiating a lawsuit by virtue of their financial position.

The DTPA divides actionable conduct into four distinct classes: (1) those acts falling under the specific provisions of the "laundry list,"³⁸ (2) those lying for breach of warranty, (3) unconscionable acts, and (4) any acts violating article 21.21 of the amended Texas Insurance Code.³⁹ This discussion will concern only the first three classes and how they provide new remedies for the traditional tenant problems of inequitable leases, dilapidated housing, and breach of warranty. The drafters of the DTPA evidently intended to encompass as many general types of inequitable conduct within the statute's broad provisions as possible, while at the same time ensuring that certain other practices were specifically outlawed. In order to evaluate the statute's operation, each section will be examined in the context of the landlord-tenant relationship and the tenant-consumer's goals.

The "Laundry List"

The "laundry list" provisions, subsections 17.46(b)(1)-(20) of the DTPA, set out in detail certain conduct deemed to be deceptive trade practices. The specific sections germane to landlord-tenant problems encompass representations made in the conduct of trade or commerce.⁴⁰ Making false representations for the purposes enumerated may subject the maker to either a public action brought by the Consumer Protection Division of the Attorney General's Office under section 17.47 or a private consumer action under section 17.50.⁴¹ The provisions cited⁴² deal mainly with the misrepresentation of "goods" as to their characteristics, uses, age (new as opposed to used), origin, and quality. Subsections 12 and 19 provide protection against false representations as to the rights conferred by agreements, guarantees, and warran-

37. *Id.* § 17.50(b)(1), (2).

38. *Id.* § 17.46(b)(1)-(20).

39. *Id.* § 17.50(a)(1)-(4). For a discussion of actions brought under the Texas Insurance Code, see p. 664 *supra*.

40. *Id.* § 17.46(a), (b)(5)-(7), (9), (12), and (19) (the term "deceptive acts or practices" includes, but is not limited to the enumerated acts).

41. *Id.* § 17.47(a)-(e); *id.* § 17.50(a).

42. *Id.* § 17.46(b)(5) (representing goods have characteristics they lack); *id.* § 17.46(b)(6) (representing used goods as new); *id.* § 17.46(b)(7) (representing goods as

ties.⁴³ Because of the broad scope of each of these provisions, it appears that most misrepresentations concerning the lease of real property will be actionable.⁴⁴ The DTPA does not require that the misrepresentation be express; rather, it appears that even implied representations may be actionable conduct depending on the circumstances surrounding the lessor-lessee communication.⁴⁵

The misrepresentation provisions will provide protection for the tenant who is shown a model apartment with a representation that his future premises will contain similar standards of furnishings and workmanship, but which standards are not met upon occupancy.⁴⁶ Upon proof of the misrepresentation, subsection 7 would allow application of the treble damages provision, although the actual damages incurred would probably be limited to the difference between the contractual rental price and the apartment's fair market rental value.⁴⁷ Subsection 9, which makes the advertising of goods or services with intent not to sell them as advertised actionable, is also an effective deterrent to the practices of unscrupulous salesmen who lease dwelling space for future occupancy. Prospective tenants often sign lease agreements that take effect upon completion of a housing project. Problems arise when the developer fails to provide services or facilities promised at the time of contracting.⁴⁸ Prior to the DTPA a tenant without a written promise was bound by the price provision in his lease agreement although the price term was agreed to in reliance upon the lessor's promises of increased services.⁴⁹ Under subsections 17.50(b)(1)-(3) and 17.51(b)

a particular style or quality if they are not); *id.* § 17.46(b)(9) (not intending to sell goods as advertised).

43. *Id.* § 17.46(b)(12) (falsely representing an agreement's rights or obligations); *id.* § 17.46(b)(19) (claiming warranty confers or involves rights which it does not).

44. See generally Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function, and Legal Liability For Product Disappointment*, 60 VA. L. REV. 1109, 1327-34 (1974) (discussion of the levels of abstraction involved in representing products or "goods" to a consumer).

45. See Lynn, *A Remedy For Undermade and Oversold Products—The Texas Deceptive Trade Practices Act*, 7 ST. MARY'S L.J. 698, 709-13 (1976) (discussing scope of misrepresentation under the DTPA).

46. See generally *Schipper v. Levitt & Sons, Inc.*, 207 A.2d 314, 321-23 (N.J. 1965), citing other cases involving a similar practice in sale of new house.

47. See *Crawford Chevrolet, Inc. v. McLarty*, 519 S.W.2d 656, 663 (Tex. Civ. App.—Amarillo 1975, no writ) (in purchase of new car plaintiff awarded difference in cost of represented price and higher final price). The award of money damages would not affect the validity of the lease agreement and the tenant's duty to pay rent, although the court could enjoin the landlord from enforcing it. See TEX. BUS. & COMM. CODE ANN. § 17.50(b)(2), (4) (Supp. 1976-1977).

48. See *Bourland v. State*, 528 S.W.2d 350, 352 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.) (extreme example of this practice utilized in sale of land).

49. This result was required by the independence of covenants in a lease agreement. See *Edwards v. Ward Assocs.*, 367 S.W.2d 390, 393 (Tex. Civ. App.—Dallas 1963, writ ref'd n.r.e.).

(1)-(3),⁵⁰ however, either individuals or a group of injured parties as a class may bring suit to remedy their financial loss and enjoin enforcement of the lease agreements.⁵¹ Perhaps the most effective method of deciding whether a client has a viable cause of action under the DTPA is to determine if there has been a false representation concerning "goods or services" resulting in actual damage to a "consumer."⁵²

Subsections 12 and 19, which concern representations of rights created by agreements and warranties,⁵³ will provide relief for an entirely different set of problems confronting the tenant. The standard-form lease agreement usually includes provisions that heavily favor the landlord.⁵⁴ Problems arise from such written agreements when either by implication or through a lessor's oral statement the rights and liabilities created by the contract are represented to a future tenant. A tenant-consumer may be misled into believing that the written agreement protects his rights and includes all the promises that the landlord has orally made when actually it disclaims responsibility. Alternatively, a tenant may be misled into believing that he has no rights under an agreement and that unenforceable terms are actually valid, thus preventing him from pursuing a legally enforceable claim. Although subsection 19 was probably written to cover product guarantees, it could be applied to problems similar to those just discussed that arise out of express warranties contained in the lease agreement.

Unconscionability—Protection from Inequitable Conduct Through Judicial Discretion

The DPTA recognizes a cause of action by an individual consumer who has been adversely affected by "[a]ny unconscionable action or course of action by any person."⁵⁵ Inherent in any discussion of unconscionability is the question of the precise meaning of the term. In the context of the

50. TEX. BUS. & COMM. CODE ANN. § 17.50(b)(1)-(3) (Supp. 1976-1977).

51. There are distinctions between class action suits and consumer suits in that class actions allow a defense of "bona fide" error. *Crawford Chevrolet, Inc. v. McLarty*, 519 S.W.2d 656, 660-61 (Tex. Civ. App.—Amarillo 1975, no writ), *construing* TEX. BUS. & COMM. CODE ANN. § 17.54(1) (Supp. 1976-1977). Class actions also require a 30-day notice and a demand for relief made on the defendant. *Id.* § 17.53(a)-(d). Further, in class actions no treble damages are awarded. *Id.* § 17.51(b)(1)-(4).

52. TEX. BUS. & COMM. CODE ANN. § 17.45(1), (2), (4) (Supp. 1976-1977).

53. *Id.* § 17.46(b)(12), (13).

54. The use of standard-form lease agreements drafted and printed by apartment owners' associations is apparently the general practice in the "negotiations" for rental of urban residential housing. *See, e.g.*, Texas Apartment Ass'n Official State Form 71A (rev. Aug. 1976); 5A C. NICHOLS, *CYCLOPEDIA OF LEGAL FORMS ANNOTATED* §§ 5.1873a(1), .1873a(5) (1974). *See also* Bentley, *An Alternative Residential Lease*, 74 COLUM. L. REV. 836, 875-76 (1974); Berger, *Hard Leases Make Bad Law*, 74 COLUM. L. REV. 791, 809-13, 821 n.122 (1974) (examination of form leases from 16 cities).

55. TEX. BUS. & COMM. CODE ANN. § 17.50(a)(3) (Supp. 1976-1977).

DTPA unconscionability means what the trial judge believes it to mean, subject to certain guiding principles. Among the most persuasive of those guides are the Uniform Commercial Code provisions concerning unconscionability.⁵⁶ The leading cases on those provisions state that the courts should inquire into whether or not the contract terms were unreasonably one-sided, whether the parties had a meaningful choice, and whether they had a reasonable opportunity to understand the contract.⁵⁷ Courts have also tended to find agreements unconscionable when the parties were bargaining from unequal positions⁵⁸ and when price terms were far greater than the actual value of the item or service bargained for.⁵⁹ A statutory remedy for unconscionable acts necessarily implies that public policy opposes one party taking unfair advantage of the other. Considering the DPTA's provisions setting out construction and purpose,⁶⁰ unconscionability may be used to remedy the problem of dilapidated housing and the landlord's refusal to repair or correct defects.

In the absence of express agreements otherwise, there is no implied warranty of habitability or duty to repair imposed upon a Texas landlord.⁶¹ As a result, the tenant whose leasehold is now, or later becomes, uninhabitable is left with no remedy for enforcing the needed repairs and with only the undesirable and often impossible defense of constructive eviction to the landlord's suit for the rent due on the remaining term of the lease. Because of the unconscionability provision in the DTPA, however, new hope for the urban residential tenant is now available.

Unconscionable actions are those which violate society's standards of morality and fair play. These standards often reflect the public policy expressed by local regulatory legislation. In the field of housing standards public policy has been expressed through the implementation of local housing codes and ordinances.⁶²

56. *Id.* § 2.302 (Tex. UCC 1968).

57. *E.g.*, *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449-50 (D.C. Cir. 1965); *Unico v. Owen*, 232 A.2d 405, 410-11 (N.J. 1967); *Frostifresh Corp. v. Reynoso*, 274 N.Y.S.2d 757, 759, *rev'd per curiam on other grounds*, 281 N.Y.S.2d 964, 965 (Sup. Ct. 1967); see *Comment, Unconscionability—The Code, the Court, and the Consumer*, 9 B.C. INDUS. & COM. L. REV. 367 (1968).

58. *Crowell v. Housing Auth.*, 495 S.W.2d 887, 889 (Tex. 1973) (bargaining position of lessor and lessee voided exculpatory clause).

59. *American Home Improvement, Inc. v. MacIver*, 201 A.2d 886, 889 (N.H. 1964) (overvalued price for home improvement purchased on credit); *Central Budget Corp. v. Sanchez*, 279 N.Y.S.2d 391, 392 (Civ. Ct. N.Y. 1967) ("excessively high prices may constitute unconscionable contractual provision"); *State v. ITM, Inc.*, 275 N.Y.S.2d 303, 321 (Sup. Ct. 1966) (referral sales scheme with high priced items.).

60. TEX. BUS. & COMM. CODE ANN. § 17.44 (Supp. 1976-1977).

61. *E.g.*, *Morton v. Burton-Lingo Co.*, 136 Tex. 263, 266, 150 S.W.2d 239, 240 (1941); *Lynch v. Ortlieb & Co.*, 70 Tex. 727, 729, 8 S.W. 515, 516 (1888); *C.R. Miller & Bro. v. Nigro*, 230 S.W. 511, 513 (Tex. Civ. App.—Amarillo 1921, no writ).

62. The number of cities enacting housing codes increased greatly after certain

Many large and medium-sized cities in Texas have enacted municipal housing codes which set minimum standards of habitability for occupied residential housing within the city limits.⁶³ Statutes grant the city government both the authority to set standards and the power to enforce them by fine or imprisonment or both.⁶⁴ Unfortunately, the ability of a city government to effectively enforce and punish housing code violations is severely limited by physical and monetary restrictions on one hand and lack of interest by municipal politicians on the other.⁶⁵ Under the DTPA, however, a strong argument can be made that if a landlord allows his building to remain in violation of local housing codes, he has committed an unconscionable act, creating a cause of action for treble damages and attorneys' fees for the violation of subsection 17.50(a)(3).⁶⁶ Since housing codes represent a community's lowest acceptable housing standards, a violation of such codes constitutes a violation of public policy and therefore is an unconscionable act. The fact that a housing code violation is a penal offense⁶⁷ contrary to the public health and welfare only adds to its unconscionable nature. The mandate to liberally construe the statute⁶⁸ and the traditionally broad interpretation the courts have given "unconscionability" only strengthen the argument that housing code violations should be considered unconscionable and therefore actionable under the DTPA.

Use of Class Actions

In many instances where housing code violations occur, the more appropriate DTPA remedy would be a class action suit rather than individual con-

provisions of the Federal Housing Act of 1954 and the amendments of the 1964 Housing Act linked the existence of housing codes to the availability of urban renewal funds. 42 U.S.C. § 1451 (1970); see Blumberg & Robbins, *Beyond URLTA: A Program For Achieving Real Tenant Goals*, 11 HARV. C.R.-C.L. L. REV. 1, 6 n.22 (1976). See also TEX. REV. CIV. STAT. ANN. art. 1269 I-3, § 2 (1963) (declaration of legislative intent to prevent the spread or recurrence of slums and blighted housing and the causes thereof under the "Urban Renewal Law").

63. See SAN ANTONIO, TEX., CODE ch. 19A-1 (1972) (minimum housing code); San Antonio, Tex., Ordinance 32,308, §§ 1-10 (May 14, 1964) (ordinance providing for vacation, removal, or repair of dangerous premises). San Antonio has among its definitions of dangerous premises "[t]hose buildings or structures which have become or are so dilapidated, decayed, unsafe, unsanitary or which so utterly fail to provide the amenities essential to decent living that they are unfit for human habitation" *Id.* § 1(e).

64. TEX. REV. CIV. STAT. ANN. art. 1015(24) (1963) (setting out powers of city councils).

65. See generally Gribetz & Grad, *Housing Code Enforcement: Sanctions and Remedies*, 6 COLUM. L. REV. 1254 (1966); Note, *Enforcement of Municipal Housing Codes*, 78 HARV. L. REV. 801 (1965); Comment, *Housing Codes and a Tort of Slumlording*, 8 HOUS. L. REV. 522 (1971).

66. TEX. BUS. & COMM. CODE ANN. § 17.50(a)(3) (Supp. 1976-1977).

67. E.g., SAN ANTONIO, TEX., CODE ch. 19A-1(c) (1972).

68. TEX. BUS. & COMM. CODE ANN. § 17.44 (Supp. 1976-1977).

sumer actions. In a class action, however, the landlord must knowingly violate the code because the DTPA requires that the consumer give the intended defendant notice of his complaint and demand relief for all members of the class at least thirty days before a suit is filed.⁶⁹ The notice of intended litigation may have the effect of bringing the landlord into compliance.⁷⁰ Confronted with the expense of litigation, the possibility of a large adverse judgment, and probable future suits, many lessors of substandard housing may elect to bring their facilities into compliance with the housing codes.⁷¹

One possible remedy in either a successful individual or class action suit is the appointment of a receiver where a judgment obtained under the DTPA has not been satisfied within six months after final rendition.⁷² Although the purpose of the receivership is not specifically for the collection of rents to repair the premises,⁷³ there appears to be no prohibition against such use by the court. The innovative use of this provision would expand the tenant's rights by providing a remedy for the cure of dilapidated housing and not merely reimbursement for a tenant's financial injuries. In addition, the recognition of housing code violations as unconscionable under the DTPA could provide workable, effective remedies needed to rectify the problem of deteriorating and dilapidated housing which now exists.

Exculpatory Clauses in the Lease

The DTPA proscription against unconscionable acts may also provide a remedy for the problem of landlord-oriented lease agreements and the inequities they inflict upon the tenant. Many of the lease agreements currently used in Texas and other states include a myriad of clauses exculpating the landlord from liability for personal injuries and negligence, as well as express provisions imposing requirements on the tenant to repair future defects and pay attorneys' fees and costs of litigation in the event the lease is breached.⁷⁴

69. *Id.* § 17.53(a).

70. See generally Comment, *The Texas Consumer Class Action*, 16 S. TEX. L.J. 111, 112-13 (1974).

71. Although preserving existing housing by restoration is a desired goal of housing codes, a danger exists that the owner of the building may decide to demolish the building altogether, thereby adding more stress to an already tight housing situation and further diminishing the consumer's bargaining position in a seller's market. See San Antonio, Tex., Ordinance 32,308, § 2(a), (c) (May 14, 1964) (whether a building's decayed portions are greater or less than 50% determines when a building should be repaired or demolished).

72. TEX. BUS. & COMM. CODE ANN. § 17.51(b)(4) (Supp. 1976-1977).

73. Some states' statutes specifically provide for appointment of receivers and payment of rent into court. *E.g.*, MO. ANN. STAT. §§ 441.570-.590 (Vernon Supp. 1977) (statute providing for receivership of dilapidated housing); N.Y. MULT. DWELL. LAW § 309(5) (McKinney 1974) (receivership statute). The DTPA provision is not so narrowly drawn and is not restricted to rent. See TEX. BUS. & COMM. CODE ANN. §§ 17.50(b)(4), .51(b)(4) (Supp. 1976-1977).

74. See, *e.g.*, *Weaver v. American Oil Co.*, 276 N.E.2d 144, 149 (Ind. 1971)

Texas has historically upheld the absolute validity of exculpatory clauses.⁷⁵ In 1973, however, the Texas Supreme Court recognized an exception to the rule by holding that exculpatory clauses are not absolutely recognized and will be considered void "[w]here one party is at such disadvantage in bargaining power that he is practically compelled to submit to the stipulation."⁷⁶

Although exculpatory clauses are generally upheld on the theory of freedom of contract,⁷⁷ courts tend to take a dim view of such provisions and construe them strictly against the landlord and in favor of the tenant. Despite the general rule upholding exculpatory clauses, a substantial number of jurisdictions recognize certain situations in which an exculpatory clause operates contrary to public policy and is therefore void.⁷⁸ The Supreme Court of Indiana stated that had an exculpatory lease clause been placed in a contract for the sale of goods it would have been considered an unconscionable contract under section 2-302 of the UCC.⁷⁹ Since the DTPA places leases of real property in the same position as a "sale of goods," it could be argued that the inclusion of an exculpatory clause in a standard-form lease is an unconscionable act under subsection 17.50(a)(3).⁸⁰ While the UCC provision merely allows the court to refuse enforcement of the exculpatory section, the DTPA could provide an offensive tool to prevent or punish its inclusion or enforcement in a standard-form lease.⁸¹ DTPA remedies could conceivably result in the alteration of standard-form lease agreements, relieve the burden of their effect, and provide greater equality

(dissenting opinion) (good example of onerous exculpatory clause in lease); Berger, *Hard Leases Make Bad Law*, 74 COLUM. L. REV. 791, 809-13, 821 n.122 (1974) (examination of form leases from 16 cities); Texas Apartment Ass'n Official State Form 71A (rev. Aug. 1976) (does not contain all types of clauses mentioned).

75. *Mitchell's, Inc. v. Friedman*, 303 S.W.2d 775, 779 (Tex. 1957).

76. *Crowell v. Housing Auth.*, 495 S.W.2d 887, 889 (Tex. 1973) (court considered fact that defendant was public entity); see *Kay v. Cain*, 154 F.2d 305, 306 (D.C. Cir. 1946); *Strauch v. Charles Apartments Co.*, 273 N.E.2d 19, 23 (Ill. App. Ct. 1971).

77. *Mitterlehner v. Mercantile Nat'l Bank*, 378 S.W.2d 137, 140 (Tex. Civ. App.—Dallas 1964, writ ref'd n.r.e.); *Fidelity Union Life Ins. Co. v. Fine*, 120 S.W.2d 138, 139 (Tex. Civ. App.—Waco 1938, writ dismissed).

78. *Tenants Council v. DeFranceaux*, 305 F. Supp. 560, 562-63 (D.D.C. 1969) (landlord liable for injury in building's swimming pool notwithstanding exculpatory clause); *McCutcheon v. United Homes Corp.*, 486 P.2d 1093, 1096 (Wash. 1971) (en banc) (residential lessor could not exculpate himself from liability for injury resulting from his own negligence). Maryland and Massachusetts have typical statutes that make exculpatory clauses void. MD. REAL PROP. CODE ANN. § 8-105 (1974); MASS. ANN. LAWS ch. 186, § 15 (Michie/Law. Co-op Supp. 1976).

79. *Weaver v. American Oil Co.*, 276 N.E.2d 144, 146 (Ind. 1971) (dicta); see *Franklin Fire Ins. Co. v. Noll*, 58 N.E.2d 947, 949 (Ind. Ct. App. 1945) (exculpatory clause could be void as unconscionable under appropriate circumstances); *Seabrook v. Commuter Hous. Co.*, 338 N.Y.S.2d 67, 69-70 (Civ. Ct. N.Y. 1972) (applying UCC 2-302 to a lease agreement).

80. TEX. BUS. & COMM. CODE ANN. § 17.50(a)(3) (Supp. 1976-1977).

81. An unequal bargaining position is still required in order for an exculpatory provision to be unconscionable as against public policy. *Crowell v. Housing Auth.*, 495 S.W.2d 887, 889 (Tex. 1973).

in the written contract between landlord and tenant.⁸² Since the DTPA expressly prohibits waiver of its enumerated rights,⁸³ the landlord will not be able to contract away a tenant's right to this remedy. Exculpatory clauses have long been forced on unsuspecting and unwilling tenants who have had no real ability to bargain over the terms of the lease; now, DTPA subsection 17.50(a)(3) will provide the tenant a formerly unavailable method for policing inequities.

Breach of Warranty

The DTPA provides for a suit by either an individual consumer or class of consumers where there has been a "[f]ailure by any person to comply with an express or implied warranty."⁸⁴ Express warranties within the landlord-tenant relationship may be evinced by either oral or written representations within the lease agreement itself. The breach of such warranties has previously been actionable by the use of traditional contract remedies. The use of the DTPA would merely provide an opportunity for larger judgments; it would not provide any new remedy. The breach of an *implied* warranty of fitness for intended use (habitability), however, would create a new cause of action not previously available.⁸⁵ The only warranty currently implied in a lease agreement is that the lessee's possession will not be disturbed during the rental term.⁸⁶ If the landlord should wrongfully evict the tenant or if the tenant successfully proves a constructive eviction, it would appear that he may maintain an action under subsection 17.50(a)(2) for breach of the warranty of quiet enjoyment. The alleged constructive eviction must, of course, be linked directly to either the landlord's neglect or his intentional act in order for the breach of warranty to bring him under the DTPA.⁸⁷ Since under the Act a breach of warranty through constructive eviction could be used as an affirmative action for treble damages instead of merely a defense to a suit for rent, recognition of this action would finally make constructive eviction an effective tenant remedy.

82. The use of these sections, which provide for restraining orders, is necessary to force the alteration of the lease agreements and to preclude enforcement of exculpatory provisions. TEX. BUS. & COMM. CODE ANN. §§ 17.47, .48 (Supp. 1976-1977).

83. *Id.* § 17.42.

84. *Id.* § 17.50(a)(2).

85. The Texas courts have consistently rejected an implied warranty of habitability in lease agreements. *Lynch v. Ortlieb & Co.*, 70 Tex. 727, 731, 8 S.W. 515, 516 (1888); *Angelo v. Deutser*, 30 S.W.2d 707, 710 (Tex. Civ. App.—Beaumont 1930, writ ref'd).

86. *Thurman v. Trim*, 433 P.2d 367, 370 (Kan. 1967); *L-M-S, Inc. v. Blackwell*, 149 Tex. 348, 353-54, 233 S.W.2d 286, 289 (1950); see Annot., 41 A.L.R.2d 1414, 1420-23 (1955).

87. See Note 24 *supra* and accompanying text for requirements of constructive eviction. See also Note, *The Indigent Tenant and the Doctrine of Constructive Eviction*, 1968 WASH. U.L.Q. 461.

Warranty for Goods Purchased for a Particular Purpose

Another warranty which might be applicable in a residential lease agreement is the warranty for goods purchased for a particular purpose.⁸⁸ Although the origin of this warranty did not anticipate a lease agreement as a sale of goods, considering the DTPA's concept of the lease⁸⁹ and the warranty's recognition by both pre-Code Texas law and the UCC,⁹⁰ it is probable that a breach of this warranty would be actionable under the DTPA.⁹¹ Under this concept a landlord who rents property unfit for human habitation would be subject to a suit under subsection 17.50(a)(2) for breach of warranty. The standards which a landlord must breach are usually expressed in local housing codes,⁹² but one jurisdiction has even implied a lease warranty equal to those standards where the agreement is entered into while housing codes are in effect.⁹³

Implied Warranty of Habitability

Perhaps the best argument for implying a warranty of habitability in Texas lease agreements is the reasoning in *Humber v. Morton*⁹⁴ indicating disfavor of caveat emptor and implying a warranty of fitness in the sale of new housing. The court reasoned that as caveat emptor was no longer recognized to be a viable concept, there was no support or reason for maintaining such a harsh and unjust rule where the purchaser was obviously at a disadvantage in determining both concealed and latent defects.⁹⁵ The court implied a warranty that the new house complied with local building codes in the area in which the structure was located, saying that "[w]here, as here, a home is the subject of sale, there are implied warranties that the home was built in

88. *Four States Grocery Co. v. Gray*, 97 S.W.2d 355, 359-60 (Tex. Civ. App.—Fort Worth 1936, no writ); *Fulwiler v. Lawrence*, 7 S.W.2d 636, 637 (Tex. Civ. App.—Eastland 1928, no writ); see *Norvell-Wilder Hardware Co. v. McCamey*, 290 S.W. 772, 773 (Tex. Civ. App.—Eastland 1926, writ dismissed) (where particular purpose of purchased goods is known to seller at time of sale, warranty of soundness and suitability will be implied). See generally Anderson, *The Uniform Commercial Code and the Deceptive Trade Practices Act*, 7 ST. MARY'S L.J. 725, 726-28 (1976).

89. The legislature's inclusion of lease agreements in the DTPA implies a recognition of the lease as primarily contractual in nature. TEX. BUS. & COMM. CODE ANN. § 17.45(1) (Supp. 1976-1977).

90. *Id.* § 2.315 (Tex. UCC 1968); cases cited note 88 *supra*.

91. See *Lemle v. Breeden*, 462 P.2d 470, 474 (Hawaii 1969) (rationale of extending warranty to lease); Skillern, *Implied Warranties in Leases: The Need for Change*, 44 DEN. L.J. 387, 396-97 (1967).

92. The standards are usually measured by housing code criteria. *E.g.*, *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1081-82 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); *Kanelos v. Kettler*, 406 F.2d 951, 956 (D.C. Cir. 1968); *Brown v. Southall Realty Co.*, 237 A.2d 834, 836-37 (D.C. 1968); *King v. Moorehead*, 495 S.W.2d 65, 72-73 (Mo. Ct. App. 1973).

93. *Brown v. Southall Realty Co.*, 237 A.2d 834, 836-37 (D.C. 1968).

94. 426 S.W.2d 554 (Tex. 1968).

95. *Id.* at 561.

workmanlike manner and is suitable for habitation.'"⁹⁶ It appears that this reasoning would also be applicable to the modern residential lease. Considering the court's express belief that the law should be based on what is right and not upon ancient distinctions inapplicable to contemporary society,⁹⁷ it seems that a court today could make a reasonable analogy to the current lease problems and imply a warranty of habitability in residential lease agreements. The modern breach of warranty concept concerning a sale of goods comes essentially from the Uniform Commercial Code sections 2-313 through 2-315, which create express and implied warranties of fitness for the ordinary purpose for which such goods are used.⁹⁸ The legislature's intentional classification of the lease of real property as a sale for the purposes of the DTPA compels the courts to recognize that the vendor-landlord also makes some warranty of fitness in the lease of his property. The analogy to the UCC should itself be strong enough to imply a warranty of habitability in a lease where an action is brought under the DTPA. Once the implied warranty of habitability is made applicable to lease agreements by the Texas courts, the DTPA will provide an effective and viable remedy for the chronic problem of dilapidated housing and the recalcitrant landlord.⁹⁹

TENANT PROTECTIONS—THE UNIFORM RESIDENTIAL LANDLORD-TENANT ACT

The recognition of social and legal realities in the law of landlord-tenant relations has led to the drafting of a uniform law which incorporates most of the recent legal developments in the landlord-tenant relationship. Beneath this reform package lies an altered concept of the landlord-tenant relationship, which bases the correlative rights of the parties on contract principles rather than on the archaic property concepts held over from feudal law. The Uniform Residential Landlord Tenant Act¹⁰⁰ (URLTA) has been adopted with some variations in thirteen states¹⁰¹ and has been introduced

96. *Id.* at 559. The court, in citing *Schipper v. Levitt & Sons, Inc.*, 207 A.2d 314 (N.J. 1965), approved the imposition of an implied obligation of reasonable workmanship and habitability upon the builder-vendor which survives delivery of the deed. 426 S.W.2d at 559.

97. 426 S.W.2d at 560.

98. TEX. BUS. & COMM. CODE ANN. §§ 2.313-315 (Tex. UCC 1968).

99. See generally Line, *Implied Warranties of Habitability and Fitness for Intended Use in Urban Residential Leases*, 26 BAYLOR L. REV. 161, 164-72 (1974) (other theories for imposing implied warranties to urban residential leases).

100. THE UNIFORM RESIDENTIAL LANDLORD & TENANT ACT [hereinafter referred to as URLTA] was approved and recommended for enactment by the National Conference of Commissioners on Uniform State Laws at their annual conference held on August 10, 1972. It was endorsed by the American Bar Association in February of 1974 and, after several changes to strengthen tenant remedies, was given the support of the National Tenant's Organization. See Strum, *Proposed Uniform Residential Landlord and Tenant Act: A Departure From Traditional Concepts*, 8 REAL PROP. PROB. & TR. J. 495 (1973).

101. ALASKA STAT. §§ 34.03.010-380 (1975 & Cum. Supp. 1976); ARIZ. REV. STAT.

as legislation in ten others.¹⁰² The URLTA was drafted with the dual purpose of expanding tenants' rights while providing remedies aimed at achieving decent housing.¹⁰³ In order to provide remedies for housing defects as well as redress for violations of tenant rights, the Act establishes tools for use in rehabilitating and sustaining existing housing inventories. The basic provisions of the URLTA and other tenant remedies will be discussed to illustrate the direction in which Texas law might be developed in order to preserve housing supplies as well as protect tenants from financial harm.

Basic Provisions of URLTA

The URLTA includes within its provisions a recognition of the warranty of habitability. This provision obligates the landlord to maintain the unit in a safe and habitable condition at all times and to comply with applicable housing codes.¹⁰⁴ The remedy under the URLTA for breach of the warranty of habitability includes the right to terminate the tenancy, sue for damages, or seek injunctive relief.¹⁰⁵ The Act also provides that landlords and tenants can enter into separate maintenance agreements if done in good faith.¹⁰⁶

Repair and Deduct

The repair and deduct provision of the URLTA allows a tenant to repair or have repaired minor defects impairing habitability and to set off costs against the next month's rent.¹⁰⁷ Twenty states have provided for this

§§ 33-1301 to -1981 (1974 & Supp. 1976-1977); DEL. CODE tit. 25, §§ 5100-6707 (1974); FLA. STAT. ANN. §§ 83.40-.63 (West Supp. 1977); HAW. REV. STAT. §§ 521-1 to -76 (Supp. 1975) (adopted before final approval of URLTA and therefore differs substantially); KY. REV. STAT. §§ 383.505-.715 (Supp. 1976); NEB. REV. STAT. §§ 76-1449 to -2401 (Supp. 1976); N.M. STAT. ANN. §§ 70-7-1 to -7-51 (Supp. 1975); OHIO REV. CODE ANN. §§ 5321.01-.19 (Baldwin Supp. 1975); OR. REV. STAT. §§ 91.700-.895 (1975); VA. CODE §§ 55-248.2-.40 (Supp. 1976); WASH. REV. CODE ANN. §§ 59.18.010-.900 (Supp. 1976) (URLTA substantially reworded).

102. Blumberg & Robbins, *Beyond URLTA: A Program For Achieving Real Tenant Goals*, 11 HARV. C.R.-C.L. L. REV. 1, 4 n.7 (1976). Those states are California, Connecticut, Idaho, Illinois, Indiana, North Carolina, Pennsylvania, Rhode Island, Vermont, and Wisconsin.

103. URLTA § 1.102(b)(1), (2).

104. *Id.* § 2.104.

105. *Id.* § 4.101(a) (breach must materially affect health and safety; also, various notice requirements are included); *id.* § 4.101(b) (permitting injunction for noncompliance with rental agreement or § 2.104).

106. *Id.* § 2.104(c), (d)(1).

107. Although providing an excellent tool to maintain existing housing in reasonable condition, this remedy may be hazardous for the tenant who must justify the repaired defect as one affecting habitability. See *Marini v. Ireland*, 265 A.2d 526, 535 (N.J. 1970) (requiring notice to landlord and a reasonable time to repair before tenant could repair); *Academy Spires, Inc. v. Brown*, 268 A.2d 556, 559 (N.J. Essex County Ct. 1970) (distinguishing vital facilities from amenities).

remedy by statute or judicial decision.¹⁰⁸ The URLTA provides that a tenant may expend and deduct one hundred dollars or one-half the monthly rent, whichever is greater, in order to correct violations of the housing code.¹⁰⁹ Texas has recognized the right of a tenant to repair and deduct where the landlord, after notice, has breached an express agreement to repair.¹¹⁰ This particular remedy is limited in scope by the amount one can deduct, the frequency of its use, and the requirement of notice in some statutes.¹¹¹ Despite its limitations, repair and deduct is still more effective than implied warranties or rent abatement in providing habitable housing since actual repair is accomplished.

Equitable Treatment for the Tenant

The URLTA also provides for numerous "fair treatment" provisions, which protect tenants from landlords' retaliatory actions in response to enumerated tenant activities such as the assertion of one's rights under the statute. The Act protects tenants for one year from increased rents, decreased services, or suits for possession (eviction).¹¹² The landlord's traditional remedy of distraint for rent is abolished, landlord liens are deemed unenforceable,¹¹³ and utility shut-offs are strictly prohibited.¹¹⁴

EXPANSION OF TENANT'S RIGHTS

Although URLTA's combination of rights and remedies is nearer the goal of equitable treatment for the tenant, problems still exist concerning the

108. Those states providing for the remedy by statute include: *Alaska* - ALASKA STAT. § 34.03.180 (1975); *California* - CAL. CIV. CODE § 1942 (Deering 1972); *Delaware* - DEL. CODE tit. 25, §§ 5306-5307 (1974); *Hawaii* - HAW. REV. STAT. § 521-64 (Supp. 1975); *Kentucky* - KY. REV. STAT. § 383.635 (Supp. 1976); *Louisiana* - LA. CIV. CODE ANN. arts. 2693-2694 (West 1972); *Massachusetts* - MASS. ANN. LAWS ch. 111, § 127L (Michie/Law. Co-op 1975 & Supp. 1976); *Montana* - MONT. REV. CODES ANN. § 42-202 (Supp. 1974); *Nebraska* - NEB. REV. STAT. § 76-1427 (Supp. 1974) (essential services only); *North Dakota* - N.D. CENT. CODE § 47-16-13 (1960); *Ohio* - OHIO REV. CODE ANN. § 5321 (Baldwin Supp. 1975); *Oklahoma* - OKLA. STAT. ANN. tit. 41, § 32 (West 1951); *Oregon* - OR. REV. STAT. § 91.805(3) (1975) (essential services only); *South Dakota* - S.D. COMPILED LAWS ANN. § 43-32-9 (1976); *Virginia* - VA. CODE § 32-64 (1973) (toilet facilities only); *Washington* - WASH. REV. CODE ANN. § 59.18.100 (Supp. 1976). Those states providing the remedy by judicial decision include: *Colorado* - *Shanahan v. Collins*, 539 P.2d 1261, 1263 (Colo. 1975) (en banc); *Georgia* - *Abrams v. Joel*, 134 S.E.2d 480 (Ga. Ct. App. 1963); *New Jersey* - *Marini v. Ireland*, 265 A.2d 526, 535 (N.J. 1970).

109. URLTA § 4.103.

110. *McCrorry Corp. v. Nacol*, 428 S.W.2d 414, 416 (Tex. Civ. App.—Beaumont 1968, writ ref'd n.r.e.).

111. See Blumberg & Robbins, *Beyond URLTA: A Program For Achieving Real Tenant Goals*, 11 HARV. C.R.-C.L. L. REV. 1, 12-13 (1976).

112. URLTA § 5.101(a), (b) (raises presumption of retaliation if rent raised within one year).

113. See *id.* § 4.107.

114. *Id.* § 4.104. Texas provides a similar prohibition by statute. TEX. REV. CIV. STAT. ANN. art. 5236c, § 1 (Supp. 1976-1977).

preservation of housing supplies with which neither URLTA nor state legislation adequately deal. In order to allow certain tenants a right to a decent standard of housing, some new legal remedies for the repair of existing housing are needed. Where traditional approaches to the problem have failed, the mechanisms of receivership, retroactive rent abatement, specific performance of the warranty of habitability, and tenant organization may succeed in rehabilitating and preserving present housing facilities.

Receivership

Receivership allows the court to appoint a receiver to collect rents from deteriorating or dilapidated housing and apply the proceeds to repairs. The statutes differ to some extent in the thirteen states which have adopted receivership remedies.¹¹⁵ Most statutes provide that the local agency in charge of housing code enforcement may bring an action to request a receiver, but a few states allow tenant suits as well.¹¹⁶ After repairs have been made¹¹⁷ and expenses paid, control of the building is returned to the owner.¹¹⁸

Specific Performance of the Warranty of Habitability

Specific performance of the warranty of habitability is a contractual remedy, which is subject to the normal preconditions required for equitable relief. The availability of this remedy will depend primarily upon the adequacy of the available legal remedies and the burden of supervision placed upon the court should it decree specific performance.¹¹⁹ Although specific perform-

115. The state statutes adopting receivership include: CONN. GEN. STAT. ANN. § 19-347b (West Supp. 1977); ILL. ANN. STAT. ch. 24, § 11-31-2 (Smith-Hurd Supp. 1976-1977); IND. CODE ANN. § 18-5-5-1 (Burns 1974); MASS. ANN. LAWS ch. 111, § 127H(b), (d) (Michie/Law. Co-op Supp. 1976); MICH. COMP. LAWS § 125.535 (MICH. STAT. ANN. § 5.2891(15) (Callaghan 1976)); MINN. STAT. ANN. § 566.29 (West Supp. 1977); MO. ANN. STAT. § 441-570 to -590 (Vernon Supp. 1977); N.J. STAT. ANN. § 2A:42-85 to -97 (West Supp. 1976-1977); N.Y. MULT. DWELL. LAW § 309(5) (McKinney 1974); OHIO REV. CODE ANN. § 5321.07 (Baldwin Supp. 1975); R.I. GEN. LAWS §§ 45-24.2-2 to -11 (1971 & Supp. 1974); WIS. STAT. ANN. § 823.22 (West Pamp. Supp. 1976).

116. *E.g.*, MASS. ANN. LAWS ch. 111, § 127H(b), (d) (Michie/Law. Co-op Supp. 1976); MINN. STAT. ANN. §§ 566.20(1), .25(c), .29 (West Supp. 1977); WIS. STAT. ANN. § 823.22 (West Pamp. Supp. 1976).

117. Repairs are not always possible because the amount of rent generated by the building is often not sufficient to finance the necessary repairs. *See generally* Comment, *The New York City Housing Receivership and Community Management Programs*, 3 FORDHAM URB. L.J. 637 (1975).

118. This type of statute has been held constitutional as a valid exercise of the police power. *Community Renewal Foundation, Inc. v. Chicago Title & Trust Co.*, 255 N.E.2d 908, 912 (Ill. 1970); *In re Department of Bldgs.*, 251 N.Y.S.2d 441, 446 (1964), *noted in* 63 MICH. L. REV. 1304 (1965).

119. *See* 4 J. POMEROY, A TREATISE IN EQUITY JURISPRUDENCE § 1405b, at 1045-49

ance of the warranty of habitability may be difficult to obtain, its use as a possible tenant remedy would implement the public policy of improving housing as well as providing redress for the tenant's injury without the need for direct monetary compensation. The addition of specific performance to the warranty of habitability would complete its purpose of providing decent, habitable housing.¹²⁰

Retroactive Rent Abatement

Another remedy based on the implied warranty of habitability is an affirmative action for retroactive rent abatement based on continuing breach of the warranty, which gives rise to contractual damages. Under this theory of recovery, the tenant may recover rent already paid which could legally have been withheld. Breach of the warranty of habitability constitutes a partial failure of consideration and creates a cause of action for damages.¹²¹ In the majority of opinions recognizing an action for retroactive rent abatement,¹²² damages have been held to accrue from the time of breach¹²³ and the recovery awarded was the difference between contract value and actual value after the breach in addition to consequential damages.¹²⁴ This action may be brought after the lease period is over so that the tenant need not risk retaliation while still under the landlord's control.¹²⁵ The measure of recovery in this action is limited to a fair rent for the quality of housing received. Retroactive rent abatement is still far from being generally accepted, but its use by the courts could effectively coerce landlords into maintaining housing rather than face endless and costly suits for retroactive rent abatement.

(5th ed. 1941); 11 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS, § 1422A, at 760-70 (3d ed. 1968).

120. See Blumberg & Robbins, *Beyond URLTA: A Program For Achieving Real Tenant Goals*, 11 HARV. C.R.-C.L. L. REV. 1, 26 (1976) (contains detailed discussion of this proposed remedy).

121. This is assuming that the warranty of habitability and the duty to pay rent are mutually dependent covenants under the contract theory of lease agreements. See, e.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1082-83 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970); *Green v. Superior Court*, 111 Cal. Rptr. 704, 708-12 (1974) (en banc).

122. See, e.g., *Lemle v. Breeden*, 462 P.2d 470, 475 (Hawaii 1969); *Mease v. Fox*, 200 N.W.2d 791, 797 (Iowa 1972); *McKenna v. Begin*, 325 N.E.2d 587, 590 (Mass. App. 1975); *Berzito v. Gambino*, 308 A.2d 17, 21 (N.J. 1973).

123. *McKenna v. Begin*, 325 N.E.2d 587, 591 (Mass. App. 1975) (requiring notice to landlord of breach).

124. E.g., *Mease v. Fox*, 200 N.W.2d 791, 797 (Iowa 1972); *McKenna v. Begin*, 325 N.E.2d 587, 590 (Mass. App. 1975); *Berzito v. Gambino*, 308 A.2d 17, 22 (N.J. 1973).

125. A question of waiver arises in this situation, but it has been held that a fear of retaliation by the landlord and an acute shortage of alternative housing will negate any inference of waiver. See *Berzito v. Gambino*, 308 A.2d 17, 19, 24 (N.J. 1973). Also, ignorance of the right to withhold payment of rent will not be deemed a waiver. See *id.* at 24.

CONCLUSION

The law of landlord-tenant relations has long been burdened with the concepts of feudal tenure and the resultant interpretation of each party's rights and duties under a lease agreement. Although the logical basis for the property-conveyance concept of the lease has long since disappeared,¹²⁶ Texas courts continue to follow its edict. The Supreme Court of Texas expressed its approval of altering established legal principles in appropriate circumstances by stating that:

'The law should be based on current concepts of what is right and just and the judiciary should be alert to the never ending need for keeping its common law principles abreast of the times. Ancient distinctions which make no sense in today's society and tend to discredit the law should be readily rejected'¹²⁷

In 1975 the Texas Legislature responded to the problem by providing an amendment to the Deceptive Trade Practices-Consumer Protection Act placing the sale and lease of real property in the class of actions to which the Act applies.¹²⁸ The legislature's actions, though not a direct statement of intent, illustrate the movement toward change in the landlord-tenant concept from that of a conveyance to that of a contract for the sale or lease of goods. Although it is still too early to tell what effect the Act's broad remedies will have, it will be within the courts' discretion to determine how important each section is and how actively it will be applied. Should the courts elect to recognize the logical applications of unconscionability, breach of warranty, and misrepresentation to a landlord's acts and to pertinent lease provisions, the DTPA could indeed become the significant remedial tool that the legislature intended it to be. The courts, however, could limit the provisions of the DTPA to remedy only enumerated acts and thereby fail to address the broad injustices inherent in the present view of the landlord-tenant relationship.¹²⁹

When interpreting broad, new statutory provisions, judicial philosophy and background frequently determine whether the statute is applied actively or with restraint. At this stage of the Act's development there is a need for novel litigation regarding its application to leases of real property. Only

126. *Lemle v. Breeden*, 462 P.2d 470, 473 (Hawaii 1969) stating that:

[I]n an urban society where the vast majority of tenants do not reap the rent directly from the land, but bargain primarily for the right to enjoy the premises for living purposes, often signing standardized leases as in this case, common law conceptions of a lease and the tenant's liability for rent are no longer viable.

Id. at 473.

127. *Humber v. Morton*, 426 S.W.2d 554, 560 (Tex. 1968), quoting *Schipper v. Levitt & Sons*, 207 A.2d 314 (N.J. 1965).

128. TEX. BUS. & COMM. CODE ANN. § 17.45(1) (Supp. 1976-1977).

129. This limited interpretation of the DTPA does not seem likely given the express provisions of § 17.46(a) and § 17.46 (c).

through the judicial process may the Act's scope be truly determined, thereby affording the legislature an opportunity to provide the laws necessary to carry out its original intent. Perhaps only a complete codification of this state's landlord-tenant law incorporating those reforms applicable to the Texas experience will settle the issue and provide a workable, predictable set of laws upon which both landlord and tenant can rely.