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THE RESIDENTIAL TENANT'S SECURITY DEPOSIT— A PROTECTED INTEREST WORTH LITIGATING

CLAUDE M. MCQUARRIE, III

*It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field.*¹

A recurrent but little noticed or publicized problem in landlord-tenant relations has been the requirement that the tenant deposit with the landlord at the inception of the lease a sum of money in addition to the prescribed rent. Often called a security deposit, the administration of this sum is a frequent source of dissatisfaction for tenants. Too often the resolution of consequent disputes is determined by the party in possession of the money, the landlord. While the relatively small amounts involved may be minor to some, for others the amounts are significant, and the costs of appropriate legal action in terms of time and money are prohibitive.

Texas has two statutes that directly bear on security deposit controversies.² While these statutes constitute a laudable effort to remedy the problems which exist, they are by no means perfect. An analysis of the policy considerations and method underlying the laws reveals that amendments could be made which would both strengthen the statutes' effectiveness and more readily accomplish the purposes for which they were enacted.

GENERAL BACKGROUND

The primary function of the tenant's security deposit, or as it is sometimes called, his "damage deposit," is to ensure the tenant's faithful performance of all the terms and covenants of the lease.³ The most common arrangement allows the landlord at the end of the lease term to retain that part of the security deposit which represents the value of the damages sustained as a result of the tenant's having failed to perform one or more of the lease covenants. Depending on the construction of the lease, however, other uses may be made of a deposit.⁴ Some leases provide that the deposit constitutes advance rent,⁵ while others provide that the deposit will serve as liquidated

1. H.R. CONF. REP. NO. 1142, 63d Cong., 2d Sess. 19 (1914).

2. TEX. BUS. & COMM. CODE ANN. §§ 17.41-.63 (Supp. 1976-1977); TEX. REV. CIV. STAT. ANN. art. 5236e (Supp. 1976-1977).

3. 2 R. POWELL, THE LAW OF REAL PROPERTY ¶ 231[2], at 273 (1976).

4. *Id.* at 273-76.

5. *Id.* at 274.

damages should the tenant fail to perform.⁶ In all cases the desired effect of the security deposit is the creation of an incentive to the tenant to fulfill his obligations under the lease, with the return of the entire deposit upon complete performance ideally being the reward.

The rights and duties of the landlord and tenant with respect to the security deposit are generally fixed by the terms of the lease. In the past, common law principles of contract have determined disputes over the return of security deposits,⁷ although in recent years the content and construction of leases have been increasingly regulated by statutes. Illustrative of the common law approach is the decision in *Orgain v. Butler*,⁸ rendered before Texas had enacted any statutes governing security deposits. In *Orgain* the tenants, seeking refund of their security deposits, pleaded conversion,⁹ but the court allowed recovery on the contractual theory that the tenants had performed their obligations under the lease and were therefore entitled to performance by the landlord.¹⁰ In general, the landlord is entitled to retain the deposit until the tenant has made all payments and discharged all other lease obligations secured by the deposit.¹¹

The relationship created by the transfer of possession of the security deposit is one that, while a matter of importance in the event of the landlord's insolvency,¹² is often not addressed and infrequently agreed upon. The three most common categories given recognition are debtor-creditor, pledgor-pledgee, and trustee-beneficiary.¹³ This question has on occasion been settled by statute,¹⁴ but more frequently the matter has been left to the courts.¹⁵ The relationship most favorable to the lessor is generally regarded

6. *Id.* at 273. Liquidated damages provisions are becoming increasingly rare because landlords realize their damages may exceed in value the amount of the deposit and, significantly, because some courts have refused to recognize such clauses. See *Roberts v. Dehn*, 416 S.W.2d 851, 853-55 (Tex. Civ. App.—Dallas 1967, no writ); 2 R. POWELL, *THE LAW OF REAL PROPERTY* ¶ 231[2], at 273-74 n.8 (1976).

7. See *In re Inwood Hardware Corp.*, 101 F. Supp. 6, 7 (N.D. Tex. 1951); *Christianson v. Mincoff*, 164 P.2d 344, 347-48 (Mont. 1945); *Orgain v. Butler*, 478 S.W.2d 610, 613 (Tex. Civ. App.—Austin 1972, no writ).

8. 478 S.W.2d 610 (Tex. Civ. App.—Austin 1972, no writ).

9. *Id.* at 612.

10. *Id.* at 613.

11. See *id.* at 615; *Commagere v. Anderson*, 417 S.W.2d 875, 879 (Tex. Civ. App.—Dallas 1967, no writ).

12. 2 R. POWELL, *THE LAW OF REAL PROPERTY* ¶ 231[2], at 273 (1976).

13. *Id.*; Harris, *A Reveille to Lessees*, 15 S. CAL. L. REV. 412, 413, 416, 421 (1942). The article by Harris contains an excellent discussion of each type of relationship, pointing out the relative advantages and disadvantages of each and comparing the three.

14. N.J. STAT. ANN. § 46:8-19 (West Supp. 1976-1977) (trustee-beneficiary); N.Y. GEN. OBLIG. LAW § 7-103 (McKinney Supp. 1976-1977) (trustee-beneficiary).

15. *E.g.*, *In re Morrison-Barnhart Motors, Inc.*, 142 F. Supp. 845, 846 (N.D. Ohio 1956); *Cummings v. Freehold Trust Co.*, 191 A. 782, 783 (N.J. Ct. Err. & App. 1937); *Mendelson-Silverman, Inc. v. Malco Trading Corp.*, 260 N.Y.S. 881, 882 (Sup. Ct. 1932).

to be debtor-creditor,¹⁶ while trustee-beneficiary is generally the most advantageous to the tenant.¹⁷

Generally the landlord holds the security deposit subject to very few constraints. Unless prohibited by statute or by the terms of the lease, a landlord may commingle a security deposit with his own funds.¹⁸ A recent trend, however, has been to limit the landlord's use of security deposits by regulatory legislation requiring the landlord in certain instances to place the security deposit in a separate account,¹⁹ an interest-bearing account,²⁰ or simply to pay interest on the deposit directly to the tenant.²¹ In accordance with the terms of the lease, the landlord is generally entitled to make deductions from the security deposit at the lease's termination to pay for any damages to the premises beyond the usually undefined "normal wear and tear" and for any unpaid rents.

Abuse by both parties may take many forms. A tenant may cause damage necessitating repairs costing more than the amount of the deposit. In such instances, if the security deposit serves as liquidated damages, the landlord must bear the added expense of the repairs. Even without a liquidated damages clause the landlord still would be faced with the expense and trouble of instituting suit for waste or breach of contract.²² Landlord abuse usually takes three forms: (1) requiring an excessively large amount as a deposit, (2) making excessive deductions from deposits for unspecified or vaguely defined damages, and (3) failing to return the deposit upon termination.²³ Tenants have been especially vulnerable to excessive deductions and withholding of their deposits because of the prohibitive expense of litigation and the inconvenience involved, particularly when they have moved to a distant location.

In 1972 the National Conference of Commissioners on Uniform State Laws approved the Uniform Residential Landlord and Tenant Act²⁴ (URLTA).

16. Harris, *A Reveille to Lessees*, 15 S. CAL. L. REV. 412, 413 (1942).

17. *See id.* at 421-23, 425.

18. *See United States Rubber Co. v. White Tire Co.*, 97 S.E.2d 403, 410 (S.C. 1956).

19. *E.g.*, FLA. STAT. ANN. § 83.49 (West Supp. 1977); MICH. COMP. LAWS § 554.604(1) (MICH. STAT. ANN. § 26.1138(4)(1) (Callaghan Supp. 1976)); N.Y. GEN. OBLIG. LAW § 7-103 (McKinney Supp. 1976-1977).

20. N.J. STAT. ANN. § 46:8-19 (West Supp. 1976-1977).

21. *E.g.*, FLA. STAT. ANN. § 83.49(2) (West Supp. 1977); N.M. STAT. ANN. § 70-7-18 A.(1) (Supp. 1975); N.Y. GEN. OBLIG. LAW § 7-103 (McKinney Supp. 1976-1977).

22. Courts often ignore liquidated damages provisions, allowing the landlord to recover actual damages in addition to the deposit. *Roberts v. Dehn*, 416 S.W.2d 851, 854-55 (Tex. Civ. App.—Dallas 1967, no writ); *Smith v. Navarro*, 69 S.W.2d 794, 795 (Tex. Civ. App.—Beaumont 1934, no writ).

23. Blumberg & Robbins, *Beyond URLTA: A Program for Achieving Real Tenant Goals*, 11 HARV. C.R.-C.L. L. REV. 1, 18-19 n.93 (1976).

24. UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT [hereinafter cited as URLTA].

The Act contains several provisions that apply to security deposits and reduce the possibility for abuse, but those provisions by no means eliminate all potential for abuse. The measures include a prohibition against a tenant's waiver of the rights given him by the Act²⁵ and a prohibition against the landlord's using in the lease any provisions prohibited by the Act.²⁶ To enforce the prohibition against the landlord's inclusion of an illegal provision, the Act provides for punitive damages and attorneys' fees.²⁷ Other provisions include a limitation on the amount a landlord may demand as a security deposit;²⁸ written itemization by the landlord of damages which justify deductions;²⁹ limitation on the time within which a landlord must refund the deposit or deliver the itemization and balance, if any;³⁰ and in the event of the landlord's noncompliance, actual and punitive damages as well as attorneys' fees.³¹ Notably absent from URLTA's provisions are a ban on the landlord's commingling of the security deposit with his own funds and a requirement that the landlord pay to the tenant interest on the sum.

The persistence of consumer-oriented legislators and organizations has resulted in a widespread recognition of the need for security deposit legislation, and most jurisdictions in the country now have such laws.³² They vary widely in their scope and available remedies,³³ yet they represent a very real change in governmental attitudes toward landlord-tenant relations.

THE TEXAS SECURITY DEPOSIT STATUTE

In 1973 the Texas Legislature enacted article 5236e, the first security deposit statute in the history of the state.³⁴ The avowed purpose and scope

25. *Id.* § 1.403(a)(1).

26. *Id.* § 1.403(b).

27. *Id.* § 1.403(b).

28. *Id.* § 2.101(a).

29. *Id.* § 2.101(b).

30. *Id.* § 2.101(b).

31. *Id.* § 2.101(c).

32. *E.g.*, COLO. REV. STAT. §§ 38-12-101 to -103 (1973); FLA. STAT. ANN. § 83.49 (West Supp. 1977); MICH. COMP. LAWS §§ 554.601-.616 (MICH. STAT. ANN. §§ 26.1138(1)-(16) (Callaghan Supp. 1976)); N.Y. GEN. OBLIG. LAW §§ 7-103, -105, -107 (McKinney Supp. 1976-1977); TEX. REV. CIV. STAT. ANN. art. 5236e (Supp. 1976-1977); *see* Blumberg & Robbins, *Beyond URLTA: A Program for Achieving Real Tenant Goals*, 11 HARV. C.R.-C.L. L. REV. 1, 19 n.95 (1976).

33. *Compare* N.M. STAT. ANN. § 70-7-18 (Supp. 1975), with PA. STAT. ANN. tit. 68, §§ 250.511a-.512 (Purdon Supp. 1976-1977), and TEX. REV. CIV. STAT. ANN. art. 5236e (Supp. 1976-1977).

34. TEX. REV. CIV. STAT. ANN. art. 5236e (Supp. 1976-1977). Some credit for the bill's passage is claimed by the Texas Apartment Association [hereinafter referred to as the TAA], a state-wide, nonprofit trade organization whose membership consists primarily of apartment owners, property management companies, and vendors of apartment industry goods and services. Interview with Clemence Clay, Executive Assistant to the Executive Director of the San Antonio Apartment Association, in San Antonio, Nov. 16, 1976.

of the Act was to establish the "rights, duties, and remedies of residential landlords and tenants in regard to tenants' security deposits."³⁵ The detail in which these rights, duties, and remedies are set out compares favorably in scope and depth with similar statutes of other jurisdictions.³⁶

Definitions

The first section of article 5236e is devoted to definitions, of which three are particularly noteworthy. The first defines "security deposit" and contains two important points.³⁷ First, it limits a security deposit to "any advance or deposit of money, the primary function of which is to secure full or partial performance of a rental agreement for a residential premises."³⁸ Second, the exclusion of advance rentals³⁹ clarifies the intended distinction between a sum of money intended to secure full and complete performance of the agreement and a sum which serves as consideration for the agreement itself.

The only reported appellate case to date involving article 5236e turned on the issue of whether the disputed sum qualified as a security deposit. In *Holmes v. Canlen Management Corp.*⁴⁰ the tenant attempted to recover a sum paid pursuant to a clause in the lease that identified the sum as a "non-refundable painting and cleaning fee." In affirming the trial court's summary judgment for the landlord, the El Paso Court of Civil Appeals held that "[t]he money was either an advance payment of rent or a consideration for the execution of the lease."⁴¹ In rejecting the tenant's argument that the lease's language effectively established a security deposit, the court's interpretation of the statute was a strict one.⁴² Nevertheless, latitude for interpre-

35. Tex. Laws 1973, ch. 433, at 1182 (Title of Act).

36. How well its provisions, in spite of their detail, protect tenants' security deposits as compared to other similar statutes is another matter. Compare COLO. REV. STAT. § 38-12-101 to -103 (1973), with FLA. STAT. ANN. § 83.49 (West Supp. 1977), and TEX. REV. CIV. STAT. ANN. art. 5236e (Supp. 1976-1977).

37. TEX. REV. CIV. STAT. ANN. art. 5236e, § 1(1) (Supp. 1976-1977).

38. *Id.* Obviously excluded from the outset are security deposits incident to leases of commercial property. Further, it would appear that a pledge of any chattel other than money as security for the performance of a lease agreement would fall outside the statute.

39. *Id.*

40. 542 S.W.2d 199 (Tex. Civ. App.—El Paso 1976, no writ).

41. *Id.* at 202.

42. *Id.* at 201-02. In his affidavit in opposition to the landlord's motion for summary judgment, the tenant urged that regardless of the lease's description of the sum, its primary function was to secure full or part performance of the lease. *Id.* at 200. While the facts of the *Holmes* case are unclear, it may be argued that where a lease requires both a nonrefundable sum to be retained for cleaning and that the tenant surrender the premises in a clean condition, the nonrefundable sum in effect secures performance and therefore meets the definition of TEX. REV. CIV. STAT. ANN. art. 5236e, § 1(1) (Supp. 1976-1977). Two such terms in the same lease would at least have to be viewed as inconsistent with each other. The Oregon statute specifically excludes "clearly designated" nonrefundable fees from the meaning of "security deposit." OR. REV. STAT. § 91.760(1) (1975).

tation depending upon the facts in each case is afforded by the use of the descriptive term "primary function" in the statutory definition.⁴³

Additional interpretative problems may be presented by other provisions in standard-form security deposit agreements⁴⁴ and related standard-form leases.⁴⁵ One example is the insertion of a covenant requiring the tenant to thoroughly clean the apartment,⁴⁶ combined with a provision allowing the landlord to retain a specified sum as a "fixed cleaning charge" to "be deducted in any event for special cleaning which must be done commercially or by owner's employees."⁴⁷ In effect, the security deposit agreement would place the label "fixed cleaning charge" on the nonrefundable fee of *Holmes* and on what, in the form, is a part of the tenant's "security deposit." It is arguable that the portion automatically deducted from the sum entitled "security deposit" is nevertheless a security deposit within the meaning of article 5236e since it is a sum of money intended to secure performance of a portion of the rental agreement, specifically the agreement to thoroughly clean the apartment.⁴⁸

The fixed cleaning charge deduction could also be applied, in a practical sense, to deterioration resulting from normal wear and tear, notwithstanding the "special cleaning" language used in some standard-form lease agreements.⁴⁹ A provision of article 5236e⁵⁰ suggests, however, that the legislature intended that a landlord be allowed to retain a portion of the security deposit only upon his showing that, insofar as the physical condition of the premises is concerned, damages *beyond* normal wear and tear exist. Another

43. TEX. REV. CIV. STAT. ANN. art. 5236e, § 1(1) (Supp. 1976-1977).

44. For a representative standard form, see Texas Apartment Association Official State Form 71B (rev. Aug. 1976) [hereinafter referred to as the TAA Security Deposit Agreement Form]. The form is provided to TAA members for their optional use in lease agreements.

45. For a representative standard-form lease, see Texas Apartment Association Official State Form 71A (rev. Aug. 1976) [hereinafter referred to as the TAA Rental Agreement Form]. Like the TAA Security Deposit Agreement Form, the Rental Agreement Form is provided to TAA members for their optional use in lease agreements. Paragraph 4 of the Rental Agreement Form incorporates the Security Deposit Agreement Form as a part of the total lease agreement.

46. TAA Security Deposit Agreement Form, *supra* note 44, ¶ 6.

47. *Id.* ¶ 8.

48. In construing ambiguous leases drafted by landlords, courts usually construe them most strongly against the landlord. See *Orgain v. Butler*, 478 S.W.2d 610, 615 (Tex. Civ. App.—Austin 1972, no writ).

49. In the case of the TAA standard forms, this conclusion is suggested by the language that "[t]his charge does not relieve resident from the cleaning provisions of paragraphs 6 and 7 above," which allow deductions for cleaning of such items as "carpets, draperies, furniture, walls, etc., soiled beyond reasonable wear." In other words, if the tenant fails to clean the apartment thoroughly, as is required by ¶ 6, and deductions are taken pursuant to ¶ 7 for violations thereof, deductions under ¶ 8 for "special cleaning" can be little else but a charge for what remains: normal wear and tear. TAA Security Deposit Agreement Form, *supra* note 44, ¶ 8.

50. TEX. REV. CIV. STAT. ANN. art. 5236e, § 3(a) (Supp. 1976-1977).

provision states that the requirement of such a showing may not be waived.⁵¹ Through the use of a fixed cleaning charge, the purpose of the statute may thus be frustrated by the landlord's doing indirectly what he is prohibited from doing directly.

The fixed cleaning charge deduction may not be a direct violation of the statute under the reasoning of *Holmes* because arguably it does not secure any performance of the tenant's lease obligations and because the freedom of contract principle should permit the parties to formulate their own agreement. At a minimum, however, the use of such a provision by a landlord in a preprinted, standard-form lease appears to be a convenient circumvention of the legislature's intent. Instead of an unscrupulous landlord's having to risk legal retaliation for his wrongful retention of all or a part of his tenants' security deposits, all he need do now is require a "fixed cleaning charge," which, under the reasoning in *Holmes*, would be labeled either consideration for the agreement or advance rent for unspecified "special cleaning."⁵² Further, a fixed cleaning charge may be deducted without regard to whether special cleaning is actually needed or performed, thus providing the landlord with the opportunity of turning it into a windfall. Such a situation would appear again to violate the intent of article 5236e: that deductions from security deposits serve only as compensation to the landlord for repairs and cleaning beyond normal wear and tear. An additional bonus for the landlord is that he need no longer haggle with the tenant over the reasonableness of deductions; the tenant is now contractually bound to forfeit that part of his security deposit which is specified by the lease as deductible in any event.

The term next defined in article 5236e is "landlord."⁵³ The provision is significant to the consumer in that not only is the owner included in the term but so is any legal entity shown on the lease as a managing or leasing agent. Any difficulty that a tenant may formerly have encountered when told by the manager that he would have to deal with the owner is eliminated by this definition. Further, any disputes between the owner and managing agent over liability for a violation of article 5236e are precluded from becoming a problem for the tenant since either may be asserted to be the landlord.

The final definition of significance is that of "normal wear and tear."⁵⁴ By using a negative definition, however, the statute only narrows what can be a vague and difficult subject. The key word used is "deterioration," but what that term includes is open to interpretation. It could be argued that any

51. *Id.* § 7.

52. See *Holmes v. Canlen Management Corp.*, 542 S.W.2d 199, 202 (Tex. Civ. App.—El Paso 1976, no writ).

53. TEX. REV. CIV. STAT. ANN. art. 5236e, § 1(2) (Supp. 1976-1977).

54. *Id.* § 1(6).

moderate accumulation of dirt, marks on walls, and splattered grease on kitchen walls, for example, is deterioration which occurs through the reasonable, intended use of the premises. On the contrary, it may be contended that "deterioration" does not involve simple household dirt. A Missouri court held that deterioration, as applied to a commodity, required the following:

a constitutional hurt or impairment, involving some degeneration in the substance of the thing The mere soiling . . . resulting in a purely superficial hurt or impairment removable by the simple process of cleansing, cannot be said to be a deterioration of the commodity within the ordinary and generally accepted meaning of that term.⁵⁵

In contrast, a Texas court held that the word "deteriorate" was "sometimes used as a synonym for the word 'decline'" in describing market value.⁵⁶

Obligations of the Landlord and Tenant During the Tenancy

The landlord's obligations with respect to a security deposit during tenancy are contained in subsection 2(b).⁵⁷ More safeguards are omitted from this section than are included in it, since the only requirement is that the landlord keep accurate records. He is not prohibited from commingling the security deposit with his own funds, nor is he required to pay interest on the sum to the tenant during or upon termination of the tenancy.⁵⁸ The danger of exposure of the tenant's funds to the landlord's creditors is alleviated by the second part of the subsection, which places "[t]he tenant's claim to the security deposit . . . prior to any creditor of the landlord, excluding a trustee in bankruptcy."⁵⁹

The statute also outlines certain duties of the tenant that condition the landlord's duty to refund the deposit. Section 6 requires the tenant to leave a written forwarding address with the landlord.⁶⁰ Failure to do so does not result in a forfeiture of the deposit, but the duties of the landlord regarding refund do not arise until the forwarding address is made available to the landlord.⁶¹ A further provision of the statute prohibits the tenant's withholding

55. *Rosen-Reichardt Brokerage Co. v. London Assurance Corp.*, 264 S.W. 433, 436 (Mo. Ct. App. 1924).

56. *Laxson v. Scarborough*, 221 S.W. 1029, 1030 (Tex. Civ. App.—San Antonio 1920, writ ref'd).

57. TEX. REV. CIV. STAT. ANN. art. 5236e, § 2(b) (Supp. 1976-1977).

58. In this regard, the statute is much more favorable to the landlord than the statutes of some other jurisdictions. See, e.g., FLA. STAT. ANN. § 83.49 (West Supp. 1977); MICH. COMP. LAWS § 554.604(1) (MICH. STAT. ANN. § 26.1138(4)(1) (Callaghan Supp. 1976)); N.Y. GEN. OBLIG. LAW § 7-103 (McKinney Supp. 1976-1977).

59. TEX. REV. CIV. STAT. ANN. art. 5236e, § 2(b) (Supp. 1976-1977). The corresponding Oregon statute expressly includes a trustee in bankruptcy in the category of those whose claims are subordinate to that of the tenant. OR. REV. STAT. § 91.760(2) (1975).

60. TEX. REV. CIV. STAT. ANN. art. 5236e, § 6(a) (Supp. 1976-1977).

61. *Id.*

payment of rent under a claim that the security deposit may serve in lieu thereof, and it imposes a treble damage provision for such a violation.⁶²

Additional duties are placed on the tenant by the statute. He must give any advance notice of surrender required by the lease agreement, so long as that requirement is underlined or conspicuously printed in the lease agreement.⁶³ In a subtle way, subsection 3(a) permits the landlord to place any other duties he may wish on the tenant. It allows deductions for "charges for which the tenant is legally liable under the rental agreement or as a result of breaching the rental agreement."⁶⁴ In a practical sense, therefore, the statute allows performance of each of the lease provisions to become a condition to the tenant's right to obtain a refund of his deposit. This result is not unreasonable so long as all the lease provisions are themselves reasonable. While the statute is silent concerning the possibility of unreasonable provisions and their effect on the landlord's obligation to refund the tenant's security deposit, charges must nevertheless be reasonable.⁶⁵

Landlord's Obligations After Termination of the Tenancy

The landlord has two basic duties with regard to the tenant's deposit upon the termination of the tenancy. First, he must refund the deposit within thirty days after the tenant has surrendered the premises.⁶⁶ In the event of a deduction from the deposit, the second duty arises. Instead of being required to refund the full amount, the landlord need only refund the balance, but in lieu of the deducted portion "a written description and itemized list of all deductions" must accompany the refund.⁶⁷ While subsection 3(a) does not expressly state that the thirty-day requirement also applies to the itemization, a reading of subsection 4(c) confirms such an inference.⁶⁸ In the event of a dispute over the reasonableness of damages or charges, the burden of proof is placed on the landlord.⁶⁹

The statute's provisions as to permissible deductions are, perhaps of necessity, general in nature. Deductions may not be made for normal wear and tear,⁷⁰ and for this reason the construction of "normal wear and tear" becomes important. Whether the need for a repainting of the interior constitutes normal wear and tear may depend upon the length of the tenancy.

62. *Id.* § 6(b).

63. *Id.* § 2(a).

64. *Id.* § 3(a).

65. *Id.* § 3(a).

66. *Id.* § 2(a).

67. *Id.* § 3(a).

68. Compare *id.* § 3(a), with *id.* § 4(c).

69. *Id.* § 3(a).

70. *Id.* § 3(a).

Interpretation is more difficult, however, in the realm of cleaning. If a carpet needs shampooing, a floor needs scrubbing, or a dirty oven needs scouring, whether a lease may allow deductions therefor or whether a landlord may make such deductions in the absence of such a provision is questionable. If such conditions are "deterioration which occurs, based upon the use for which the rental unit is intended," they constitute normal wear and tear⁷¹ and are therefore unavailable to the landlord to justify deductions.⁷² Any attempt to provide in the lease for deductions from the security deposit for normal wear and tear is voided by section 7.⁷³

Interpretation of cleaning requirements in lease agreements can be a source of confusion to both landlords and tenants. In a monthly trade publication of a Texas Apartment Association (TAA) affiliate organization, readers were advised that cleaning fees resulting from normal wear and tear could not ordinarily be deducted from security deposits.⁷⁴ Assuming that the cost of cleaning is included in the rental (because it results from normal wear and tear), and since a lease provision purporting to waive any right under article 5236e is void, the language of the typical security deposit agreement form could be seriously misleading, if not altogether unenforceable. In the TAA Security Deposit Agreement Form,⁷⁵ for example, paragraph 6 requires "the apartment . . . be cleaned thoroughly," and in accordance with the landlord's move-out cleaning instructions, if provided.⁷⁶ Paragraph 7 then

71. *Id.* § 1(6).

72. *Id.* § 3(a).

73. *Id.* § 7.

74. THE APARTMENT NEWS, June 1976, at 16, where it is stated:

A common misconception of apartment managers is the thinking that the resident must return the apartment in such condition that it can be immediately re-rented. If you rented an auto you would not be expected to wash the car in the driveway of the rental agency, before returning it to the check-in counter. The cost of washing and servicing the auto is included in your rental fee. The same should be true of the apartment rental.

Ordinarily, cleaning fees may not be deducted from security deposits.

75. In pertinent part, it reads:

The deposit(s) will be refunded only after each and all of the following conditions have been met

6. **CLEANING REQUIREMENTS:** The apartment, including furniture and kitchen appliances, must be cleaned thoroughly. **MOVE-OUT CLEANING INSTRUCTIONS** (if provided) shall be followed.

DEDUCTIONS FROM TOTAL SECURITY DEPOSITS

7. **FAILURE TO CLEAN.** If resident fails to clean in accordance with the above paragraph, reasonable charges to complete such cleaning shall be deducted, including charges for cleaning carpets, draperies, furniture, walls, etc., soiled beyond reasonable wear.

8. **FIXED CLEANING CHARGE.** The following charge will be deducted in any event for special cleaning which must be done commercially or by owner's employees: \$_____. This is applicable only if owner has a fixed cleaning charge. This charge does not relieve resident from the cleaning provisions of paragraphs 6 and 7 above.

TAA Security Deposit Agreement Form, *supra* note 44, ¶¶ 6-8.

76. *Id.* ¶ 6.

allows deductions for noncompliance with paragraph 6, adding the description "soiled beyond reasonable wear."⁷⁷ Requiring one to clean an apartment, including such kitchen appliances as a refrigerator and an oven, "thoroughly" (and in accordance with what the move-out cleaning instructions may require) yet only to the extent that it is "soiled beyond reasonable wear" is inconsistent. The net effect of such language could mislead the tenant into believing that he must surrender the premises in a "thoroughly cleaned" condition or else suffer the deduction of charges therefor, in addition to the fixed cleaning charges, if any, for "special cleaning." A broader perspective of the matter shows that the owner, attempting to keep rents low enough to maintain a satisfactory occupancy rate, is able to cut overall costs by having his outgoing tenants, either through their labor or their security deposits, assist him in reconditioning the apartments. Owners would quickly point out abuses by some former tenants necessitating repairs and refurbishment at a cost exceeding the security deposit, but such a protest would be tantamount to justifying a policy requiring all tenants to pay for the sins of a few. Of course, such a policy relieves the landlord of the time and expense of pursuing the proper legal remedies on occasions when abuses do occur.

The uncertainty and resulting ambiguity in security deposit clauses could be eliminated by a judicial construction of the "normal wear and tear" definition found in subsection 1(6). It is important to remember that one of a consumer's interests is knowing how much he is paying and what he is paying for. Some landlords' response to an interpretation that cleaning charges may not be deducted from security deposits undoubtedly would be to raise rents.⁷⁸ At least then the consumer-tenant would be able to more realistically compare prices and goods. The counterargument is that the assumed higher rents would penalize those who would rather clean their apartments than pay the higher rates.

The primary provision authorizing deductions is in subsection 3(a), which allows them for "damages and charges for which the tenant is legally liable under the rental agreement."⁷⁹ Presumably this provision codifies the concept that the function of a security deposit is to secure the covenants to which the tenant agrees in the lease. In that connection the tenant is well-advised to read all documents before signing any of them so that he will know in advance what those covenants are. Therein lies another problem, however, because few laymen possess sufficient knowledge to understand fully the legal

77. *Id.* ¶ 7.

78. See Campbell, *Congratulations Survivors!*, THE APARTMENT NEWS, Sept. 1976, at 12, 13. Mr. Campbell, himself an apartment owner, wrote:

Watch consumerism, it will grow. The problems that you face will get worse. It is going to cost you money and if you don't add it to your rents it is going to come straight out of your pocket. It is a hassle and will continue to be a hassle.

Id. at 13.

79. TEX. REV. CIV. STAT. ANN. art. 5236e, § 3(a) (Supp. 1976-1977).

effect of a lengthy and finely-printed legal document containing technical and unfamiliar terms and cross references to other paragraphs. Neither does the average tenant wish to pay for the services of an attorney merely to review a lease. Even worse, written leases today usually are preprinted, nonnegotiable forms that the tenant knows in advance he must sign in order to acquire adequate housing. Leases may also acquire the nature of adhesion contracts during periods of housing shortages, when landlords' bargaining positions are strengthened by the knowledge that they need not bargain or negotiate.⁸⁰

Remedies for the Landlord's Noncompliance

Section 4 of the statute prescribes the tenant's remedies for the landlord's noncompliance with the duties imposed by the statute. Subsection (a) allows damages treble the amount of any portion of a deposit wrongfully and in bad faith withheld plus a one hundred dollar penalty and attorneys' fees.⁸¹ Subsection (b) provides that a landlord's bad faith failure to furnish the "written description and itemized list of damages and charges" required by section 3 forfeits the landlord's right to withhold any portion of the deposit and to sue the tenant for damages to the premises.⁸² In a tenant's suit to recover all or a part of a deposit deducted without itemization of the charges by the landlord, the landlord's liability is reduced to the amount withheld plus payment of the tenant's attorneys' fees.⁸³ Subsection (c) emphasizes that the landlord must have acted in bad faith before the tenant may recover any of the prescribed penalties.⁸⁴ A presumption that the landlord acted in bad faith arises when he has failed to comply within thirty days, thus partially easing the tenant's burden of proof.⁸⁵ One may only assume that the statutory language "within 30 days" means within thirty days of the tenant's surrender of the premises, which is the explicit requirement of subsection 2(a).⁸⁶ It

80. An excellent account of an extensive research effort concerning the problems and deleterious effects attendant to the usage of the standard-form lease is found in Mueller, *Residential Tenants and Their Leases: An Empirical Study*, 69 MICH. L. REV. 247 (1970). The year 1976 was predicted to be the worst year for the apartment construction industry since 1962, yet nationwide occupancy rates were high even in traditionally soft and heavily overbuilt areas. THE APARTMENT NEWS, Aug. 1976, at 11. Occupancy rates in San Antonio, currently subject to strong market demand, are increasing and recently ranged from 92 to 95%. Dennis, *The State of Our Industry*, THE APARTMENT NEWS, Aug. 1976, at 17. The national vice-president of the National Apartment Association suggests caution regarding the near term and mild optimism for the long term recovery and growth of the multifamily housing industry. Rein, *A Premature Postmortem*, THE APARTMENT NEWS, Sept. 1976, at 14. See also *Commonwealth v. Monumental Properties, Inc.*, 329 A.2d 812, 825 (Pa. 1974).

81. TEX. REV. CIV. STAT. ANN. art. 5236e, § 4(a) (Supp. 1976-1977).

82. *Id.* § 4(b).

83. *Id.* § 4(b).

84. *Id.* § 4(c).

85. *Id.* § 4(c).

86. *Id.* § 2(a).

may be argued, however, that the passage of the thirty days required to establish a prima facie case of bad faith is in addition to the thirty-day period in which the landlord is required to refund the deposit or to furnish the description of damages and charges. That argument would be based on the reasoning that something more than a mere failure to perform a duty is required to establish that such a failure resulted from bad faith. The "something more" would be the additional thirty-day period for that failure to run, perhaps in the face of a demand or protest by the tenant, which would alert the landlord to his failure to comply.⁸⁷ While the former interpretation is probably correct, the ambiguity nonetheless may not properly be ignored.⁸⁸

The strong remedies afforded the tenant by section 4 are an attempt to deter abuses by landlords. Tenants, however, should not be lulled into the complacent expectation of an automatic award of all the prescribed damages; the statute is likely to be construed as permitting the court's award of the damages rather than requiring it. The Austin Court of Civil Appeals in *Mallory v. Custer*⁸⁹ construed the damages provision of the Deceptive Trade Practices—Consumer Protection Act⁹⁰ (DTPA) as being only permissive, not mandatory,⁹¹ and the language of section 4 of article 5236e is no more indicative of a mandatory award than is the language of the DTPA.⁹² Article 5236e could be strengthened, therefore, by the addition of a provision that would expressly remove any discretion in this area.

Other Provisions

Section 5 protects the tenant's security deposit in the event the owner's interest in the premises ceases. Upon the occurrence of such an event, the new owner assumes the old owner's liability with respect to the tenant's security deposit on the date title is acquired.⁹³ Curiously, real estate mortgage lienholders who acquire title at foreclosure are exempted from this provi-

87. It is not suggested here that a demand or protest is even impliedly required by the statute.

88. The corresponding Pennsylvania statute is worded so that there is no requirement of showing bad faith, and the landlord's liability (double the amount wrongfully withheld) arises after 30 days from the date of termination or surrender and acceptance of the premises. PA. STAT. ANN. tit. 68, § 250.512(c) (Purdon Supp. 1976-1977). The corresponding New Mexico statute does not require a showing of bad faith, and the landlord's liability (the amount of the deposit due the tenant plus attorneys' fees and court costs) arises 30 days after the termination of the tenancy. N.M. STAT. ANN. §§ 70-7-18C, -18D (Supp. 1975).

89. 537 S.W.2d 141 (Tex. Civ. App.—Austin 1976, no writ).

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

91. *Mallory v. Custer*, 537 S.W.2d 141, 143 (Tex. Civ. App.—Austin 1976, no writ).

92. Compare TEX. BUS. & COMM. CODE ANN. § 17.50(b) (Supp. 1976-1977), with TEX. REV. CIV. STAT. ANN. art. 5236e, § 4 (Supp. 1976-1977).

93. TEX. REV. CIV. STAT. ANN. art. 5236e, § 5(a) (Supp. 1976-1977).

sion.⁹⁴ Because foreclosures on rental property have been common in recent years,⁹⁵ it appears that if a tenant desires to protect himself from an unfair loss of his security deposit, he must assure himself of the soundness of the owner's financial position prior to his entering into a rental agreement. Not only would such an act be impractical, if indeed at all possible, but even the most thorough investigation could not guarantee the safety of the deposit.⁹⁶ Subsection 5(b) provides that the former "owner remains liable for security deposits received by the owner" until the new owner notifies the tenant in a subscribed writing, which acknowledges the receipt and amount of the deposit, that the new owner is responsible for the deposit.⁹⁷ This section protects most of the tenant's interests, but the lienholder's exemption creates an unwarranted gap in the tenant's protection.⁹⁸

Two additional sections of article 5236e significantly affect the landlord's and tenant's rights regarding the security deposit. Section 8 preserves for both parties all rights pursuant to "contract, statute, or common law which are consistent with the provisions of" the Act.⁹⁹ Section 7 declares void and unenforceable any provision of a rental agreement purporting to exempt either party "from any liability or duty imposed by" the Act "or which purports to waive the rights and liabilities granted under" the Act.¹⁰⁰ While section 7 provides a remedy to the tenant who is at least as knowledgeable as his landlord, the uninformed tenant remains vulnerable. Moreover, the section fails to embody any deterrent to the landlord who, with his usual superior knowledge of the law and the aid of legal counsel in drafting his standard-form lease, might attempt to take advantage of the uninformed tenant. In a comment following a section of the URLTA that prohibits the inclusion of

94. *Id.*

95. Foreclosure and bankruptcy are said to have played a "heavy role" not only in the San Antonio multifamily dwelling market but also in the national market. Fuhrmann, *Property Management, the Future*, THE APARTMENT NEWS, Sept. 1976, at 35.

96. The argument that a contrary provision would unfairly encumber the lienholder's interest and result in even tighter mortgage money is only another way of stating that the tenant should be required to bear one of the landlord's costs of doing business. The lienholder's risk of loss should be borne financially by the party creating that risk, the borrowing landlord, through higher lending rates, if necessary, rather than by the innocent tenant. Another solution would be to require the landlord, before he further encumbers the property, to deposit with the lienholder an amount similar to the total of anticipated security deposits. Put simply, a creditor (the tenant) should not have to absorb a bad debt (owed by the landlord) when the loan (security deposit) was involuntary because of its being a part of an adhesion contract. A comparison of the corresponding Oregon statute, OR. REV. STAT. § 91.760(2) (1975), with TEX. REV. CIV. STAT. ANN. art. 5236e, §§ 2(b), 5(a) (Supp. 1976-1977), indicates that the Oregon tenant's security deposit is not jeopardized in this manner as is that of a Texas tenant.

97. TEX. REV. CIV. STAT. ANN. art. 5236e, § 5(b) (Supp. 1976-1977).

98. URLTA § 2.101(e) would fill this gap by providing that: "The holder of the landlord's interest in the premises at the time of the termination of the tenancy is bound by this section."

99. TEX. REV. CIV. STAT. ANN. art. 5236e, § 8 (Supp. 1976-1977).

100. *Id.* § 7.

certain provisions in rental agreements,¹⁰¹ the National Conference of Commissioners on Uniform State Laws said:

Rental agreements are often executed on forms provided by landlords, and some contain adhesion clauses the use of which is prohibited by this section. . . . Such provisions, even though unenforceable at law may nevertheless prejudice and injure the rights and interests of the uninformed tenant who may, for example, surrender or waive rights in settlement of an enforceable claim against the landlord for damages¹⁰²

That section allows the tenant to recover as actual damages an amount of up to three months' rent and attorneys' fees in the event of a landlord's deliberate use of "a rental agreement containing provisions known by him to be prohibited."¹⁰³ Until such a provision is included in article 5236e, deception and abuse by unscrupulous landlords may be expected to continue undeterred by the present "threat" of unenforceability.¹⁰⁴

ARTICLE 5236e: FINISHING THE TASK

The foregoing discussion to varying degrees suggests possible amendments to several parts of article 5236e. Those suggestions, along with several ancillary proposals, are summarized here.

The definition of "security deposit" should include a provision which would expressly exclude any nonrefundable fee agreed upon by the parties.¹⁰⁵ Such a measure would help to avoid the confusion which results from part of a "security deposit" being nonrefundable.

The definition of "normal wear and tear" should be expanded to include conditions of accumulated dirt, spillage, and surface deterioration such as marks on walls, so long as such conditions do not result from unreasonable causes such as negligence, accident, carelessness, or abuse by the tenant. Such a specific provision would significantly curtail landlord abuse and more clearly define the parties' rights and liabilities. Further, it would reduce the

101. Among the provisions prohibited is any agreement which waives any rights or remedies provided for by the Act. URLTA § 1.403(a)(1).

102. *Id.* § 1.403, Comment.

103. *Id.* § 1.403(b).

104. The Commissioners' comment may be directly in point for the tenant who is party to the present TAA Rental Agreement Form. At the end of ¶ 15 is the following provision:

If resident prevails in any suit against owner for bad faith detention of security deposit (after lawful deductions), owner shall be liable for court costs and reasonable attorneys fees, such amount to bear 10% interest from due date.

TAA Rental Agreement Form, *supra* note 45, ¶ 15. The voiding by § 7 of article 5236e of this waiver of the tenant's right to the damages which are provided by subsection 4(a) of the article apparently has not deterred what may be attempts to mislead uninformed tenants as to their statutory rights.

105. The Oregon statute provides a simple example of such a definition. OR. REV. STAT. § 91.760(1) (1975).

opportunity available to the landlord to confuse or mislead the tenant by use of a preprinted security agreement form.¹⁰⁶

A provision should be added to prohibit a landlord from inserting any clauses in the lease that would affect any other "deposits" or other refundable fees such as the often used "pet deposit." The provision should allow, however, for upward adjustment of the amount of security deposits for reasonable considerations such as potential damage to the premises beyond normal wear and tear by pets. The purpose of such a provision would be to ensure that all sums placed in deposit with the landlord are governed by article 5236e.

The inclusion of nonrefundable fees in a lease agreement should be either banned altogether or properly regulated to enable the consumer to know the amount and object of his payments. The freedom of contract principle is outweighed by the policy consideration of fair dealing.¹⁰⁷ If not banned, appropriate regulation of nonrefundable fees should include several provisions. First, implementing clauses in leases should not be contained in the security deposit agreement. This would make clear the distinction between the "nonrefundable fee" and the "security deposit" and would place the nonrefundable fee in its proper perspective, avoiding the confusion resulting from part of the "security deposit" being nonrefundable. Additionally, implementing clauses should be conspicuous in contrast to the many other lines of fine print. Further, payment of nonrefundable fees should be allowed only upon a termination of the lease and only when such termination does not result from the landlord's default. This requirement is justified because the money is not to be used by the landlord, if at all, until the apartment has been vacated. As with all other covenants, its performance would be secured by the security deposit. Finally, otherwise permissible deductions from the security deposit for any charges of the same nature as those intended to be covered by the nonrefundable fee should be allowed only to the extent that they exceed the nonrefundable fee. This would preclude double recovery by the landlord.

The amount of security deposit that a landlord may demand should be limited. A reasonable figure is that suggested by URLTA, one month's rent.¹⁰⁸ Permissible adjustments for special circumstances would not be included in this figure.

A landlord should be barred from commingling the tenant's security deposit with his own funds. Such sums should be required to be deposited in a separate account in a regulated financial institution, with the tenant

106. See text accompanying notes 54-56 & 70-77 *supra*.

107. See text accompanying notes 44-52 *supra*.

108. URLTA § 2.101(a). See also N.J. STAT. ANN. § 46:8-21.2 (West Supp. 1976-1977) (1-1/2 month's rent); N.M. STAT. ANN. § 70-7-18A(2) (Supp. 1975) ("reasonable," but not in excess of one month's rent if lease term less than one year).

being notified of the institution's name and the account number. Many other states have indicated by similar enactments¹⁰⁹ that landlords' complaints of excessive burden are either exaggerated or without merit. Interest should be paid to tenants to the extent that such interest exceeds the reasonable administrative expenses.¹¹⁰

Subsection 5(a) should be amended to remove the exclusion of real estate mortgage lienholders from the category of new owners who are liable to the tenant for the deposit upon their acquisition of title to the premises. There is no acceptable justification for jeopardizing the tenant's deposit in such a manner.¹¹¹

The uncertainty surrounding the time allowed for the landlord to furnish the written description and itemized list of damages and charges should be eliminated. This could be accomplished by adding the same language which establishes a thirty-day requirement in subsection 2(a) to the first sentence of subsection 3(a).¹¹²

The punitive awards allowed by section 4 and subsection 6(b) should be made mandatory rather than allowed to be construed as permissive by reticent judges.¹¹³ To deter landlords from vaguely couching their reasons for making deductions, the damages under subsection 4(b) should be identical to those under subsection 4(a). Otherwise, landlords may escape the punitive damages simply by providing an insufficient list of deductions.

The ambiguity surrounding the establishment of bad faith by prima facie evidence of failure to perform "within 30 days" should be eliminated. Both phrases "within 30 days" in subsection 4(c) should be followed by the phrase used in subsection 2(a), "after the tenant surrenders the premises."¹¹⁴

Section 7, which voids any attempted waiver of rights or liabilities, should be strengthened to have a deterrent impact in addition to its present curative effect. The curative measures presently afforded by section 7 are of little protection to the uninformed and unwitting tenant, who may easily be confused or deceived by long, complicated, preprinted lease forms. A provi-

109. *E.g.*, FLA. STAT. ANN. § 83.49 (West Supp. 1977); MICH. COMP. LAWS § 554.604 (MICH. STAT. ANN. § 26.1138(4) (Callaghan Supp. (1976))); N.J. STAT. ANN. § 46:8-19 (West Supp. 1976-1977).

110. Several states allow the landlord to retain part of the interest as compensation for administrative expenses. *E.g.*, FLA. STAT. ANN. § 83.49 (West Supp. 1977); N.J. STAT. ANN. § 46:8-19 (West Supp. 1976-1977); PA. STAT. ANN. tit. 68, § 250.511b(b) (Purdon Supp. 1976-1977).

111. Such an amendment would bring the Texas statute into conformity with the URLTA provision. *See* URLTA § 2.101(e). For detailed discussion see note 96 & text accompanying notes 93-98 *supra*.

112. *See* text accompanying notes 67 & 68 *supra*.

113. *See* text accompanying notes 89-92 *supra*.

114. *See* text accompanying notes 85-88 *supra*.

sion such as URLTA subsection 1.403(b) would accomplish the desired result.¹¹⁵

Many legal problems that face the tenant regarding his security deposit are not embraced by article 5236e. The statute does afford substantial protection to the tenant's rights, but the need for supplemental legislation is evident. Such amendments may unfortunately be long in coming because it is difficult for unorganized tenants to compete effectively with well-organized and influential lobby groups. What the tenant or his attorney might do about security deposit problems not encompassed by article 5236e during the period until the needed amendments are enacted requires examination of another recent law.

THE DECEPTIVE TRADE PRACTICES-CONSUMER PROTECTION ACT

The Deceptive Trade Practices-Consumer Protection Act¹¹⁶ as amended in 1975 protects persons who lease real property for use.¹¹⁷ The starting point for understanding the protection that the DTPA affords a tenant's security deposit is the federal statute from which it is derived.¹¹⁸ Regarding what acts come within the purview of the DTPA, the Texas Legislature expressly declared its intent "that in construing . . . this section the courts to the extent possible will be guided by . . . the interpretations given by the Federal Trade Commission and federal courts to [the federal statute]."¹¹⁹ Further, the construction and application section of the DTPA illustrates the Act's broad scope.¹²⁰

Justification for Applicability to Residential Tenant's Security Deposit

It is entirely consonant with the underlying purposes of the DTPA that the Act apply to residential security deposit agreements. The problems which face the average tenant in the marketplace today are much the same as those

115. See URLTA § 1.403(b). For detailed discussion see text accompanying notes 100-104 *supra*.

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

117. *Id.* §§ 17.44, .45(1)-(4).

118. 15 U.S.C. § 45(a)(1) (Supp. V 1975). That statute states that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." *Id.*

119. TEX. BUS. & COMM. CODE ANN. § 17.46(c) (Supp. 1976-1977). See also *Wesware, Inc. v. State*, 488 S.W.2d 844, 847-48 (Tex. Civ. App.—Austin 1972, no writ) (construing prior deceptive trade practices act).

120. TEX. BUS. & COMM. CODE ANN. § 17.44 (Supp. 1976-1977) reads: "This subchapter shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty and to provide efficient and economical procedures to secure such protection."

faced by any other consumer. Rarely is there an equality of bargaining power between the prospective tenant and landlord. Standard-form leases, which the tenant knows are not susceptible to modification,¹²¹ are usually drafted by knowledgeable attorneys in favor of the landlord's interests whenever the law would otherwise leave room for negotiation. Adhesion clauses and unconscionable provisions often result, but the unwitting tenant, realizing he has little choice, submits by signing the usually long and complicated forms. Moreover, when the consumer-tenant has a problem for which there is a legal remedy, two disadvantages frequently impair his ability to obtain relief. First, he is usually uninformed or misinformed as to his rights and does not assert them; second, even if he were knowledgeable enough to assert them, traditional remedies are often ineffective because of the prohibitive cost involved in pursuing an action until relief is ultimately achieved. The DTPA, therefore, may be used to obtain sufficient relief in a broader range of factual situations through its punitive damages and injunctive relief provisions. As a result, it can make worthwhile an action against a landlord when article 5236e would provide insufficient relief or no relief whatsoever.

Provisions Protective of Security Deposits

The protections offered by the DTPA begin with subsections 17.46(a) and (b)(12). Those subsections together declare unlawful all "[f]alse, misleading, or deceptive acts or practices in the conduct of any trade or commerce"¹²² including but not limited to the representation "that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law."¹²³ This combination of sections seems to encompass at least one of the problems cited earlier for which there appeared to be an insufficient remedy. As an example, a provision misleading the tenant concerning his rights or purporting to waive the tenant's rights under article 5236e¹²⁴ may fall within the DTPA because it constitutes a representation that the "agreement confers or involves rights, remedies, or obligations . . . which are prohibited by law" or because it is confusing or mis-

121. Paragraph 21 of the TAA Rental Agreement Form, *supra* note 45, provides space for special provisions. However, it has been fairly well-established that tenants rarely attempt to negotiate their leases. Mueller, *Residential Tenants and Their Leases: An Empirical Study*, 69 MICH. L. REV. 247, 264-70 (1970). In the Mueller study, only eight of 100 carefully selected tenants had ever asked for alteration of the security deposit term in their leases. *Id.* at 251-52, 288. Of their 13 requests, eight were completely refused, one resulted in a slight modification, and four resulted in a radical alteration or elimination of the term. *Id.* at 288.

122. TEX. BUS. & COMM. CODE ANN. § 17.46(a) (Supp. 1976-1977).

123. *Id.* § 17.46(b)(12).

124. An example would be a provision that attempts to limit a landlord's liability for bad faith detention of a security deposit to court costs and attorneys' fees, thereby attempting to exclude the other, nonwaivable damages available under article 5236e. See note 104 *supra*.

leading to the tenant.¹²⁵ Should other acts or practices by landlords become prohibited under any future amendments to article 5236e, it is probable that the potential protection of this section will be expanded.

Another protection for the consumer-tenant's security deposit is the prohibition against unconscionable actions¹²⁶ or any "unconscionable action or course of action by any person."¹²⁷ Although proving unconscionability no doubt will be a task of unpredictable difficulty because of the latitude of the courts' discretion in this area, these provisions may provide remedies where no other remedy is available. In a recent decision involving landlord-tenant relations, although not concerning security deposits, the Texas Supreme Court voided a lease clause that exempted the landlord from any liability for damage to the person or property of the tenant or his family resulting from any cause whatever.¹²⁸ The court's reasoning was that the clause was contrary to public policy because it resulted from the inequality of the parties' bargaining power.¹²⁹ Recognizing that terms of lease agreements are often dictated by the landlord, the court acknowledged that a prospective tenant has no choice but to accept them if he and his family wish to enjoy satisfactory housing accommodations.¹³⁰ The court said that "[t]he exculpatory agreement will be declared void, however, where one party is at such disadvantage in bargaining power that he is practically compelled to submit to the stipula-

125. TEX. BUS. & COMM. CODE ANN. § 17.46(b)(12) (Supp. 1976-1977). As previously discussed, article 5236e provides for damages in the amount of \$100 plus three times the amount wrongfully withheld and reasonable attorneys' fees in the event of a bad faith detention by the landlord. TEX. REV. CIV. STAT. ANN. art. 5336e, § 4(a) (Supp. 1976-1977). Additionally, article 5236e voids, although does not expressly prohibit, any lease provision purporting to waive this liability. *Id.* § 7. Relief is made available by TEX. BUS. & COMM. CODE ANN. § 17.50(a)(1) (Supp. 1976-1977).

The Pennsylvania Supreme Court has acknowledged that the use of certain standard-form leases might violate a catchall clause of the Pennsylvania Unfair Trade Practices and Consumer Protection Law, which prohibits "any other fraudulent conduct which creates a likelihood of confusion or misunderstanding." *Commonwealth v. Monumental Properties, Inc.*, 329 A.2d 812, 826-28 (Pa. 1974), *citing* PA. STAT. ANN. tit. 73, § 201-2(4)(xiii) (Purdon 1971). In *Monumental Properties*, the State argued that the landlords' failure to disclose in their leases the existence of statutory remedies available to the tenants violated the consumer protection law because such a failure constituted an unfair or misleading practice. The lower court's ruling that the law did not require disclosure was reversed by the supreme court, whose opinion implied that such a failure, if misleading or confusing to the tenant, would be a violation. *Commonwealth v. Monumental Properties, Inc.*, 329 A.2d 812, 829-30 (Pa. 1974). It could be strongly argued that a provision which attempts to fix liability below the nonwaivable statutory relief goes beyond a mere omission of disclosure, that it represents an affirmative attempt to confuse or mislead the tenant as to his rights, and that it is therefore actionable under §§ 17.47 and 17.50 of the DTPA. For an example of such a provision, see TAA Rental Agreement Form, *supra* note 45, ¶ 15, *quoted in* note 104 *supra*.

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

127. *Id.* § 17.50(a)(3).

128. *Crowell v. Housing Auth.*, 495 S.W.2d 887, 888 (Tex. 1973).

129. *Id.* at 889.

130. *Id.* at 889.

tion."¹³¹ The case indicates, therefore, the supreme court's sensitivity to the problem of unequal bargaining power confronting many tenants today. It might therefore be argued that an excessive "fixed cleaning charge" or security deposit, regardless of whether in violation of article 5236e, is unconscionable and therefore actionable under the DTPA.¹³²

A more indirect protection accrues to the consumer-tenant under the provisions of section 17.47 of the DTPA. That section permits the Consumer Protection Division of the Attorney General's Office to bring suit to enjoin the use of any act or practice which is declared unlawful by the DTPA.¹³³ It must first be determined, however, that such proceedings would be in the public interest before such intervention may occur.¹³⁴ It is possible, therefore, that if sufficient pressure were applied by public-interest groups, the widespread use of leases that violate the prohibitions of the DTPA and employ proscribed or unconscionable practices could be curtailed. Such a result has been partially achieved in at least one other jurisdiction having both a landlord-tenant law and a consumer protection law.¹³⁵

Relief Available

The relief that the DTPA provides is contained in subsection 17.50(b), and it considerably exceeds the relief granted by article 5236e.¹³⁶ Under the DTPA the tenant may obtain restitution of the affected property,¹³⁷ three times the actual damages,¹³⁸ attorneys' fees,¹³⁹ court costs,¹⁴⁰ injunctive relief,¹⁴¹ and whatever other relief the court may deem proper.¹⁴² Indirect relief is afforded by the civil penalties, which may be imposed by the court when the Consumer Protection Division prevails in its action.¹⁴³

131. *Id.* at 889.

132. Unconscionability was also one of the grounds for a suit brought under the Pennsylvania Unfair Trade Practices and Consumer Protection Law by the Pennsylvania attorney general against 25 landlords. The alleged violations included the use of standard, preprinted form leases containing provisions allegedly illegal, unconscionable, and unconstitutional. These allegations were held not to have stated a cause of action, however, since it had not been shown that the provisions complained of were unenforceable in all circumstances. *Commonwealth v. Monumental Properties, Inc.*, 329 A.2d 812, 828-29 (Pa. 1974).

133. TEX. BUS. & COMM. CODE ANN. § 17.47(a) (Supp. 1976-1977).

134. *Id.*

135. *Commonwealth v. Monumental Properties, Inc.*, 329 A.2d 812 (Pa. 1974). See notes 125 & 132 *supra*.

136. Compare TEX. BUS. & COMM. CODE ANN. § 17.50(b) (Supp. 1976-1977), with TEX. REV. CIV. STAT. ANN. art. 5236e, § 4 (Supp. 1976-1977).

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

138. *Id.* § 17.50(b)(1).

139. *Id.* § 17.50(b)(1).

140. *Id.* § 17.50(b)(1).

141. *Id.* § 17.50(b)(2).

142. *Id.* § 17.50(b)(4).

143. *Id.* § 17.47(c)-(e). Evidentiary burdens in such actions are eased by the

Strengthening the Act

Three minor improvements could be made to the DTPA that would make its protections of a tenant's security deposit more thorough. First, "unconscionable actions"¹⁴⁴ should be expressly declared unlawful as are "false, misleading, or deceptive acts or practices" in subsection 17.46(a).¹⁴⁵ Some unconscionable actions, while perhaps making available consumer remedies under subsection 17.50(a), are unconscionable not because they are false, misleading, or deceptive, but because they result in contracts of adhesion. Such practices, if simply "unconscionable," should be declared unlawful.

A second matter is the wording of subsection 17.46(b)(12). As it is presently written, it makes unlawful any representations that an agreement confers rights or obligations that are prohibited by law. A defendant to an action brought under this section may contend that section 7 of article 5236e merely *voids* any attempt to waive rights or obligations established elsewhere in the statute and that it *prohibits* nothing. That argument, if successful, might defeat a security deposit action brought under subsection 17.46(b)(12) of the DTPA and would thereby seriously undermine the DTPA's legitimate deterrent effect. That argument could be precluded, however, by amending the appropriate clause in subsection 17.46(b)(12) to read "or which are prohibited *or made unenforceable* by law."¹⁴⁶

Finally, the underlying purposes of the DTPA would be better fulfilled if subsection 17.50(b) were amended to make all damages listed therein mandatory.¹⁴⁷ Without the assurance of obtaining those damages, the wronged tenant will find prosecuting a suit for a small amount unworthy of his time and expense. This was one of the obstacles that the DTPA was intended to overcome. The other justification for this amendment is that it would give forceful effect to the deterrent power of the statute. It is obvious that landlords will continue to mislead their tenants as to their rights and obligations until pressure is brought to bear on them by the courts.¹⁴⁸ To deny

provisions for civil investigative demands, further indirectly aiding the consumer-tenant. *Id.* § 17.61.

144. *Id.* §§ 17.44, .50(a)(3).

145. *Id.* § 17.46(a).

146. *Id.* § 17.46(b)(12) (proposed language italicized).

147. See text accompanying notes 89-92 *supra*. By comparing the language of § 17.50(c) ("the court may award") to that of § 17.50(b) ("each consumer . . . may obtain"), it may be argued that the legislature's intent was that damages under § 17.50(b) are mandatory, while those under § 17.50(c) are permissive and that the only discretion regarding relief under § 17.50(b) is that which is provided by § 17.50(b)(4) ("any other relief which the court deems proper"). *Id.* § 17.50(b), (c). It is arguable, however, that the language of § 17.50(a) ("consumer may maintain") militates against this construction. *Id.* § 17.50(a).

148. Paragraphs 6 through 8 of the TAA Security Deposit Agreement Form, *supra* note 44, *quoted in* note 75 *supra*, and the purported limitation of liability in ¶ 15 of the

the damages provided for by the section would be to deprive the DTPA of much of its efficacy in the entire field of consumer protection.

ARTICLE 5236e AND THE DTPA COMPARED

The remedies available under the DTPA are made supplementary to the remedies available under article 5236e by DTPA section 17.43.¹⁴⁹ The section would expressly defeat the argument that the more specific article 5236e should preclude an action concerning a security deposit brought under the DTPA. The greater relief available under the DTPA and the more general nature of its prohibitions favor alternative pleading. The fact that the DTPA contains no express "bad faith" requirement as a prerequisite to punitive relief must also be considered. While bad faith is perhaps characteristic of the acts and practices encompassed by the DTPA and thus perhaps an implied requirement, the distinction could appear in the tenant's burden of proof.

To illustrate briefly the difference in relief offered by the two statutes, a few examples are useful. One abuse already cited is the inclusion in a residential lease of a clause containing a purported waiver of the tenant's rights to damages beyond actual injury, court costs, and attorneys' fees in the event of a wrongful detention of the security deposit. Article 5236e would void that waiver and make all remedies of section 4 of that article available to the tenant if the landlord were to retain the deposit in bad faith.¹⁵⁰ By contrast, the DTPA would not only void the waiver, but might also penalize the landlord's retention of the deposit with all the sanctions made available by that Act, some of which would not be dependent on a bad faith detention of the deposit.¹⁵¹ Thus, the DTPA provides not only additional relief to the tenant but also a possible deterrent to, and injunctive relief against, a landlord's unscrupulous conduct. The cost to the landlord of attempting to mislead the tenant as to his statutory rights or to deprive him of such rights could be increased significantly under the DTPA.

Another common abuse occurs where a landlord, when returning to the former tenant the balance of his security deposit, gives such a vague, general list of deductions that it is impossible for the tenant to ascertain whether the deductions were legitimate. In an action under article 5236e the maximum relief available would be a refund of the amount deducted plus attorneys' fees.¹⁵² An action under the DTPA—should the landlord's conduct prove to be misleading, deceptive, false, or unconscionable—would again provide

TAA Rental Agreement Form, *supra* note 45, *quoted in* note 104 *supra*, are two examples of provisions that may be confusing and misleading.

149. TEX. BUS. & COMM. CODE ANN. § 17.43 (Supp. 1976-1977).

150. TEX. REV. CIV. STAT. ANN. art. 5236e, §§ 4, 7 (Supp. 1976-1977).

151. TEX. BUS. & COMM. CODE ANN. §§ 17.46, .47, .50 (Supp. 1976-1977).

152. TEX. REV. CIV. STAT. ANN. art. 5236e, § 4(b) (Supp. 1976-1977).

the wider range of relief made available by subsection 17.50(b) of that Act.¹⁵³

The possibility of the tenant's abuse should not be overlooked. If a tenant, after his security deposit has been rightfully retained by a landlord, were to bring a harassment suit under both statutes against the landlord for its refund, the landlord would have no affirmative remedy available under article 5236e. Under the DTPA, however, specific relief would be provided.¹⁵⁴ In this respect, the DTPA more broadly protects the landlord's legitimate interests.

A final distinction is illustrated by the situation in which an owner retains, under a fraudulent claim of right, a security deposit given pursuant to a lease of a retail store. Article 5236e would be completely inapplicable since it applies only to residential leases,¹⁵⁵ while the DTPA has no such restriction.¹⁵⁶

CONCLUSION

The Texas Legislature took a very important step in enacting the residential security deposit law, article 5236e. Informed tenants are now significantly less vulnerable to the traditional forms of landlord abuse in this area. The 1973 Act, however, must be viewed as only the first step toward the eventual achievement of adequate security deposit protection. That the sums at stake in each individual case are relatively small does not obviate the need for thorough and comprehensive protection.

During the interim, however, tenants and their attorneys may properly look to the DTPA to fill many of the gaps that exist in article 5236e. The broader scope of conduct encompassed by the DTPA and the more liberal relief provided make it a potentially excellent tool for the effective administration of justice in security deposit disputes. Together, article 5236e and the DTPA ensure protection of the security deposit of the informed Texas residential tenant under most circumstances.

153. TEX. BUS. & COMM. CODE ANN. § 17.50 (Supp. 1976-1977).

154. *Id.* § 17.50(c) (allows court to award reasonable attorneys' fees and court costs).

155. TEX. REV. CIV. STAT. ANN. art. 5236e, §§ 1(1), (5) (Supp. 1976-1977).

156. TEX. BUS. & COMM. CODE ANN. §§ 17.45(1), (3)-(6), 17.46(a) (Supp. 1976-1977).