

RESEARCH MEMORANDUM

To: Members of the URLTA Drafting Committee

From: Alice Noble-Allgire, Reporter

Date: February 12, 2012

Re: 50 State Survey of the Warranty of Habitability

This memo discusses the current status of legislation and case law regarding the implied warranty of habitability. The memo begins with a brief history of the development of warranty law in Part I. Part II focuses on the substantive requirements of the warranty in the various states, while Part III examines the remedies for breach. The memo concludes with a list of issues the drafting committee may want to consider with respect to potential modifications of the existing URLTA provisions regarding the warranty of habitability.

I. HISTORICAL DEVELOPMENT OF THE IMPLIED WARRANTY OF HABITABILITY

At early common law, leases were governed almost exclusively under principles of property law as a conveyance of land. Thus, courts applied the general principle of *caveat lessee*, which meant that (1) the landlord's primary responsibility was to provide the tenant with the legal right to possession and to not interfere with that possession during the term of the lease; and (2) the tenant assumed responsibility for the condition of the premises during the tenancy, except in those cases where the landlord expressly contracted to bear responsibility (and in a limited number of other special circumstances).¹

Caveat lessee held sway until the late 19th and early 20th centuries, when urban populations boomed, causing a severe shortage in rental housing that left many tenants paying exorbitant rents for property with unsafe and unsanitary conditions. Legislatures began to respond to these slum conditions by enacting housing codes that established minimum health and safety standards. The courts subsequently used these codes – as well as the trend toward viewing leases as contracts as well as conveyances – as the basis for modifying the common law rule of *caveat lessee* to find an implied warranty of habitability in residential leases. As explained by the Pennsylvania Supreme Court:

¹ Among these exceptions, the landlord retained responsibility: for maintaining common areas under the landlord's control; under a short-term lease for the rental of furnished premises; for ensuring the premises were fit for their intended purposes if the parties had entered into a lease for a building under construction; and for failure to disclose latent defects of which the landlord knows or should have known and which the tenant could not be expected to notice by inspection. See *Teller v. McCoy*, 253 S.E.2d 114, 119 (W. Va. 1978); *Mease v. Fox*, 200 N.W.2d 791 (Iowa 1972).

“When American city dwellers both rich and poor, seek ‘shelter today, they seek a well known package of goods and services a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance.’ ” . . .

[W]e affirm the Superior Court's holding that a lease is in the nature of a contract and is to be controlled by principles of contract law. The covenants and warranties in the lease are mutually dependent; the tenant's obligation to pay rent and the landlord's obligation imposed by the implied warranty of habitability to provide and maintain habitable premises are, therefore, dependent and a material breach of one of these obligations will relieve the obligation of the other so long as the breach continues.²

State legislatures also embraced the implied warranty, led in large part by the promulgation of the Uniform Residential Landlord and Tenant Act (URLTA) in 1972. Today, every state except Arkansas³ recognizes the implied warranty. Twenty-two states have adopted the implied warranty through statutes based on the URLTA⁴ and twenty-three states have statutes that are not based on URLTA.⁵ Four states and the District of Columbia recognize the implied warranty as a matter of common law.⁶

² *Pugh v. Holmes*, 405 A.2d 897, 902 (Pa. 1979) (quoting *Commonwealth v. Monumental Props., Inc.*, 329 A.2d 812, 820-21 (Pa. 1974).

³ See ARK. CODE § 18-17-601 (requiring the tenant to comply with obligations imposed by applicable housing codes and keep dwelling unit safe and reasonably clean, but imposing no obligations on landlords).

⁴ See ALA. CODE § 35-9A-204; ALASKA STAT. § 34.03.100; ARIZ. REV. STAT. § 33-1324; CONN. GEN. STAT. § 47A-7; DEL. CODE TIT. 25, § 5305; FLA. STAT. § 83.51; HAW. REV. STAT. § 521-42; IOWA CODE § 562A.15; KAN. STAT. § 58-2553; KY. REV. STAT. § 383.595; MONT. CODE § 70-24-303; NEB. REV. STAT. § 76-1419; N.M. STAT. § 47-8-20; N.C. GEN. STAT. § 42-42; N.D. CENT. CODE § 47-16-13.1; OHIO REV. CODE § 5321.04; OKLA. STAT. TIT. 41, § 118; R.I. GEN. LAWS § 34-18-22; S.C. CODE § 27-40-440; TENN. CODE § 66-28-304; VA. CODE § 55-248.13; W. VA. CODE § 37-6-30.

⁵ See CAL CIV. CODE §§ 1941, 1941.1; COLO. REV. STAT. §§ 38-12-503, 38-12-505; GA. CODE § 44-7-13 (landlord must keep premises “in repair”); IDAHO CODE § 6-320; IND. CODE § 32-31-8-5; LA. CIV. CODE art. 2696 (landlord warrants premises is suitable for “the purpose for which it was leased” and “vices or defects that prevent its use for that purpose”); ME. REV. STAT. tit. 14, § 6021; MD. CODE ANN., REAL PROP. § 8-211; MICH. COMP. LAWS § 554.139; MINN. STAT. § 504B.161; MISS. CODE § 89-8-23; NEV. REV. STAT. § 118A.290; N.H. REV. STAT. § 48-A:14; N.J. STAT. § 2A:42-88; N.Y. REAL PROP. LAW § 235-b; OR. REV. STAT. § 90.320; S.D. CODIFIED LAWS § 43-32-8; TEX. PROP. CODE § 92.052; UTAH CODE §§ 57-22-3, 57-22-4; VT. STAT. tit. 9, § 4457; WASH. REV. CODE § 59.18.060; WIS. STAT. § 704.07; WYO. STAT. §§ 1-21-1202, 1-21-1203.

⁶ See *Javins v. First Nat. Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970); *Glasoe v. Trinkle*, 479 N.E.2d 915, 919 (Ill. 1985) *Boston Hous. Auth. v. Hemingway*, 293 N.E.2d 831 (Mass. 1973); *King v. Moorehead*, 495 S.W.2d 65 (Mo. Ct. App. 1973); *Pugh v. Holmes*, 405 A.2d 897 (Pa. 1979). Some of these jurisdictions have statutes that provide limited remedies, such as a tenant’s right to repair and deduct, but the statutes do not appear to have superseded the implied warranty under common law. See 765 ILL. COMP. STAT. § 742/5 (repair and deduct provision); MASS. GEN. LAWS ANN. ch. 186, § 14 (West) (provides remedies for landlord’s breach of duties “required by law or by the express or implied terms of any contract or lease”); MO. ANN. STAT. § 441.234 (West)(repair and deduct provision); 35 PA. STAT. ANN. § 1700-1 (West) (provides for rent abatement if a public agency declares the premises unfit).

In light of this history, jurisdictions have differed with respect to a number of key issues regarding the scope of the warranty, including the types of housing units covered by the warranty, the conditions that constitute a breach of the warranty, whether tenants may be permitted to waive the warranty, and what remedies are available. These issues are discussed in further detail in the following sections.

II. SUBSTANTIVE REQUIREMENTS

A. Scope of the Warranty

In jurisdictions that based the implied warranty upon the existence of a housing code, early decisions typically limited the implied warranty to residential units that were subject to the code.⁷ Most jurisdictions today have followed the lead of the URLTA in applying the warranty to virtually all residential leases.⁸ A handful of states have added provisions, however, to make it clear whether manufactured homes or mobile homes are covered by all or part of the statute.⁹ Several states also provide that some provisions of the warranty statute apply only if the property contains a certain number of dwelling units or is not a single-family dwelling.¹⁰

⁷ See, e.g., *Jack Spring Inc. v. Little*, 280 N.E.2d 208 (Ill. 1972) (finding implied warranty based upon housing code). The Illinois Supreme Court later expanded the warranty to include all residential housing regardless of the existence of a housing code. *Glasoe v. Trinkle*, 479 N.E.2d 915, 919 (Ill. 1985) (noting that tenants in areas without building codes have the same legitimate expectations as those in areas with building codes).

⁸ ULTRA § 1.201 provides that the act it is intended to cover virtually all rental agreements for “a dwelling unit located within this state.” The Act contains exceptions only for uses that fall outside the typical residential lease, such as (1) residence at an institution, public or private, if incidental to detention or the provision of medical, geriatric, educational, counseling, religious, or similar service; (2) occupancy under a contract of sale of a dwelling unit or the property of which it is a part, if the occupant is the purchaser or a person who succeeds to his interest; (3) occupancy by a member of a fraternal or social organization in the portion of a structure operated for the benefit of the organization; (4) transient occupancy in a hotel, or motel [or lodgings [subject to cite state transient lodgings or room occupancy excise tax act]]; (5) occupancy by an employee of a landlord whose right to occupancy is conditional upon employment in and about the premises; (6) occupancy by an owner of a condominium unit or a holder of a proprietary lease in a cooperative; and (7) occupancy under a rental agreement covering premises used by the occupant primarily for agricultural purposes.

⁹ Connecticut and Massachusetts, for example, expressly include manufactured/mobile homes in their provision regarding the landlord’s obligation to provide essential services. CONN. GEN. STAT. ANN. § 47a-13 (West); MASS. GEN. LAWS ANN. ch. 186, § 14 (West). Florida and Oregon generally exclude such dwellings. FLA. STAT. ANN. § 83.51 (warranty provisions to not apply to a mobile home owned by a tenant); OR. REV. STAT. ANN. § 90.365 (West) (“Any provisions of this section that reasonably apply only to a structure that is used as a home, residence or sleeping place does not apply to a manufactured dwelling, recreational vehicle or floating home if the tenant owns the manufactured dwelling, recreational vehicle or floating home and rents the space.”).

¹⁰ See FLA. STAT. § 83.51 (sections (a)(3), (a)(4), and (a)(6) do not apply to single-family home or duplex); HAW. REV. STAT. § 521-42 (sections (a)(3), (a)(5), and (a)(6) do not apply to single-family home); KAN. STAT. § 58-2553 (section (c) does not apply to premises with more than four dwelling units); MONT. CODE § 70-24-303 (sections (c) and (d) only apply to one-, two-, and three-family residences); OHIO REV. CODE § 5321.04 (section (a)(5) only applies to premises with more than four dwelling units); OKLA. STAT. TIT. 41, § 118 (sections (a)(3) and (a)(6) do not apply to single-family residences; section (a)(5) does not apply to one- or two-family residences); S.C. CODE § 27-

Some statutes provide further limitations on when the warranty is applicable to particular tenants. The URLTA, for example, makes it clear that the remedies are not available to a tenant who was responsible for the conditions that gave rise to the warranty claim.¹¹ Although the URLTA (and most statutes based upon the URLTA) include this provision in the remedies section of the statute, a number of states have inserted the language into the section setting forth the landlord's substantive obligations.¹² In addition, at least eight states condition a tenant's right to relief upon a showing that the tenant was not delinquent in the rent at the time the tenant gave notice of the conditions giving rise to a warranty claim.¹³ The URLTA does not have a comparable provision regarding tenants delinquent in their rent.

B. Habitability Standards

Because the implied warranty of habitability grew out of the existence of housing codes, some jurisdictions initially recognized a breach of warranty only where there had been a violation of the housing code.¹⁴ Other jurisdictions, however, embraced a general test of habitability, which focused on conditions relating to health and safety even in the absence of a housing code or breach of a housing code.

40-440 (section (a)(3) only applies to premises with more than four dwelling units); TENN. CODE § 66-28-304 (section (a)(5) only applies to premises with more than four units); VA. CODE § 55-248.13 (sections (a)(3) and (a)(5) only apply to premises with two or more dwelling units); W. VA. CODE § 37-6-30 (same).

¹¹URLTA §§ 4.101(3), 4.103(b), 4.104(d).

¹² See ALA. CODE § 35-9A-204; CONN. GEN. STAT. § 47A-7; FLA. STAT. § 83.51.

¹³ See, e.g., DEL. CODE ANN. tit. 25, § 5307 (c) ("A tenant who is otherwise delinquent in the payment of rent may not take advantage of the remedies provided in this section."); MASS. GEN. LAWS ANN. ch. 239, § 8A (West) (tenant not be entitled to relief unless landlord "knew of such conditions before the tenant or occupant was in arrears in his rent"); MO. ANN. STAT. § 441.234 (West)(repair and deduct provision "shall apply only to a tenant who has lawfully resided on the rental premises for six consecutive months, has paid all rent and charges due the landlord during that time, and did not during that time receive any written notice from the landlord of any violation of any lease provision or house rule, which violation was not subsequently cured"); NEV. REV. STAT. ANN. § 118A.380 (West) (tenant's right to withhold rent "do not arise unless the tenant is current in the payment of rent at the time of giving written notice" to landlord); N.H. REV. STAT. ANN. § 540:13-d (to counterclaim for abatement of rent, tenant must prove that "while not in arrears in rent, he provided notice of the violation" to the landlord); TEX. PROP. CODE ANN. § 92.056 (West) (landlord liable provided that "tenant was not delinquent in the payment of rent at the time any notice required by this subsection was given"); W. VA. CODE § 37-6-30 ("None of the provisions of this section shall be deemed to require the landlord to make repairs when the tenant is in arrears in payment of rent."); WYO. STAT. ANN. § 1-21-1203 (West) ("[i]f the renter is current on all payments required by the rental agreement").

¹⁴ See, e.g., *Jack Spring Inc. v. Little*, 280 N.E.2d 208 (Ill. 1972).

Among the five jurisdictions that still recognize the implied warranty as a matter of common law, four appear to use a general test of habitability¹⁵ while one, the District of Columbia, appears to still focus on the housing code.¹⁶ Where the warranty has been established by statute, there is wide variation among the states, as discussed in greater detail below using the basic provisions in the URLTA as a point of comparison.

1. The URLTA

The URLTA contains a comprehensive list of habitability standards that not only require compliance with applicable housing codes, but also embrace a general test of habitability and include a number of additional specific duties. Section 2.104(a) provides that a landlord shall:

(1) comply with the requirements of applicable building and housing codes materially affecting health and safety;

(2) make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition;

(3) keep all common areas of the premises in a clean and safe condition;

(4) maintain in good and safe working order and condition all electrical, plumbing, sanitary, heating, ventilating, air-conditioning, and other facilities and appliances, including elevators, supplied or required to be supplied by him;

(5) provide and maintain appropriate receptacles and conveniences for the removal of ashes, garbage, rubbish, and other waste incidental to the occupancy of the dwelling unit and arrange for their removal; and

(6) supply running water and reasonable amounts of hot water at all times and reasonable heat [between [October 1] and [May 1]] except where the building that includes the dwelling unit is not required by law to be equipped for that purpose, or the

¹⁵ See *Glase*, 479 N.E.2d at 919 (Ill. 1985) (“We . . . hold that the implied warranty of habitability applies to all leases of residential real estate regardless of the existence of housing or building codes.”); *Hemingway*, 293 N.E.2d at 843 (“[W]e hold that in a rental of any premises for dwelling purposes . . . there is an implied warranty that the premises are fit for human occupation. This means that at the inception of the rental there are no latent (or patent) defects in facilities vital to the use of the premises for residential purposes. . . .”); *Detling v. Edelbrock*, 671 S.W.2d 265, 270 (Mo. 1984) (holding that the landlord warrants “that the dwelling is habitable and fit for living at the inception of the [lease] and that it will remain so during the entire term” and “that he will provide facilities and service vital to the life, health and safety of the tenant and to the use of the premises for residential purposes”)(quoting *King v. Moorehead*, 495 S.W.2d 65 (Mo. Ct. App. 1973); *Pugh*, 405 A.2d at 906 (“Appellant would require that a determination of breach of the implied warranty be dependent upon proof of violations of the local housing codes. We decline to accept this argument as it would unnecessarily restrict the determination of breach.”) (Pa. 1979).

¹⁶ See *Javins*, 428 F.2d at 1072-73 (“We . . . hold that a warranty of habitability, measured by the standards set out in the Housing Regulations for the District of Columbia, is implied by operation of law into leases . . .”).

dwelling unit is so constructed that heat or hot water is generated by an installation within the exclusive control of the tenant and supplied by a direct public utility connection.¹⁷

Subsection (b) of 2.104 provides that if the duty imposed by paragraph (a)(1) to comply with applicable housing codes is greater than any duty imposed by the other paragraphs of that section, the landlord's duty is determined by the housing code.¹⁸

2. Current status of existing legislation

Twenty-two states have enacted statutes based upon URLTA.¹⁹ Most are substantially the same as the URLTA, but several states have removed one or more of the obligations placed on landlords or placed different emphasis on their priority. With respect to the general standard of habitability, for example, Alaska and Oklahoma have omitted paragraph (1), which requires landlord compliance with housing codes.²⁰ Conversely, Kansas removed paragraph (2)'s reference to the general test of fitness and habitability and relies instead on just a list of obligations for the landlord.²¹

Among URLTA-based statutes, Florida's is unusual because it uses only one general standard that is stated in the alternative. It requires the landlord to (a) comply with the requirements of applicable building, housing, and health codes; *or* (b) comply with minimum standards set forth in the statute when there is no housing code.²² These statutory minimums require the landlord to "maintain the roofs, windows, screens, doors, floors, steps, porches, exterior walls, foundations, and all other structural components in good repair and capable of resisting normal forces and loads and the plumbing in reasonable working condition."²³ Similar to the URLTA, the statute then goes on to provide for additional duties, such as providing for trash removal and clean and safe common areas, but a landlord's noncompliance with these additional duties does not provide a defense to a landlord's action for possession for nonpayment of rent.

¹⁷URLTA § 2.104(a).

¹⁸URLTA § 2.104(b).

¹⁹ See ALA. CODE § 35-9A-204; ALASKA STAT. § 34.03.100; ARIZ. REV. STAT. § 33-1324; CONN. GEN. STAT. § 47A-7; DEL. CODE TIT. 25, § 5305; FLA. STAT. § 83.51; HAW. REV. STAT. § 521-42; IOWA CODE § 562A.15; KAN. STAT. § 58-2553; KY. REV. STAT. § 383.595; MONT. CODE § 70-24-303; NEB. REV. STAT. § 76-1419; N.M. STAT. § 47-8-20; N.C. GEN. STAT. § 42-42; N.D. CENT. CODE § 47-16-13.1; OHIO REV. CODE § 5321.04; OKLA. STAT. TIT. 41, § 118; R.I. GEN. LAWS § 34-18-22; S.C. CODE § 27-40-440; TENN. CODE § 66-28-304; VA. CODE § 55-248.13; W. VA. CODE § 37-6-30.

²⁰ See ALASKA STAT. § 34.03.100; OKLA. STAT. TIT. 41, § 118.

²¹KAN. STAT. § 58-2553.

²²FLA. STAT. § 83.51.

²³*Id.*

Among other minor changes that URLTA states have made, six jurisdictions²⁴ have removed subsection (b), which provides that a landlord's duties are determined by a housing code if those duties are greater than those imposed by any other section of section 2.104(a). [The drafting committee might consider whether subsection (b) is necessary.] In addition, Florida and Kentucky removed paragraph (5)'s requirement that the landlord provide for waste removal.²⁵ Tennessee removed paragraphs (4) and (6) regarding the provision of utilities, water, heat, and other essential services, but appears to include these obligations in its remedy provisions.²⁶

Although twenty-three states have enacted implied warranty of habitability statutes that are not modeled after section 2.104 of the URLTA,²⁷ many of the statutes contain analogous provisions. Seven have statutes similar to the URLTA in that they require a residential landlord to both maintain the premises in a habitable condition and comply with all applicable housing codes.²⁸ Three other states have a specific list of obligations for a landlord in addition to compliance with housing codes.²⁹ On the other hand, seven other states only require the landlord to keep the premises in a habitable condition,³⁰ while three others simply give the landlord a list of specific obligations with which to comply.³¹ Finally, three states impose on landlords an

²⁴ See ALASKA STAT. § 34.03.100; DEL. CODE TIT. 25, § 5305; HAW. REV. STAT. § 521-42; N.C. GEN. STAT. § 42-42; OHIO REV. CODE § 5321.04; OKLA. STAT. TIT. 41, § 118.

²⁵ FLA. STAT. § 83.51; KY. REV. STAT. § 383.595.

²⁶ TENN. CODE § 66-28-502 (providing remedies for landlord's failure to supply essential services, which "means utility services, including gas, heat, electricity, and any other obligations imposed upon the landlord which materially affect the health and safety of the tenant").

²⁷ See CAL CIV. CODE §§ 1941, 1941.1; COLO. REV. STAT. §§ 38-12-503, 38-12-505; GA. CODE § 44-7-13 (landlord must keep premises "in repair"); IDAHO CODE § 6-320; IND. CODE § 32-31-8-5; LA. CIV. CODE art. 2696 (landlord warrants premises is suitable for "the purpose for which it was leased" and "vices or defects that prevent its use for that purpose"); ME. REV. STAT. tit. 14, § 6021; MD. CODE ANN., REAL PROP. § 8-211; MICH. COMP. LAWS § 554.139; MINN. STAT. § 504B.161; MISS. CODE § 89-8-23; NEV. REV. STAT. § 118A.290; N.H. REV. STAT. § 48-A:14; N.J. STAT. § 2A:42-88; N.Y. REAL PROP. LAW § 235-b; OR. REV. STAT. § 90.320; S.D. CODIFIED LAWS § 43-32-8; TEX. PROP. CODE § 92.052; UTAH CODE §§ 57-22-3, 57-22-4; VT. STAT. tit. 9, § 4457; WASH. REV. CODE § 59.18.060; WIS. STAT. § 704.07; WYO. STAT. §§ 1-21-1202, 1-21-1203.

²⁸ See IND. CODE § 32-31-8-5; MINN. STAT. § 504B.161; NEV. REV. STAT. § 118A.290; N.J. STAT. § 2A:42-88; UTAH CODE §§ 57-22-3, 57-22-4; VT. STAT. tit. 9, § 4457; WASH. REV. CODE § 59.18.060.

²⁹ See CAL CIV. CODE §§ 1941, 1941.1; MISS. CODE § 89-8-23; WIS. STAT. § 704.07.

³⁰ See COLO. REV. STAT. §§ 38-12-503, 38-12-505; ME. REV. STAT. tit. 14, § 6021; N.Y. REAL PROP. LAW § 235-b; OR. REV. STAT. § 90.320; S.D. CODIFIED LAWS § 43-32-8; WYO. STAT. §§ 1-21-1202, 1-21-1203; compare LA. CIV. CODE art. 2696 (landlord warrants premises is suitable for "the purpose for which it was leased" and "vices or defects that prevent its use for that purpose").

³¹ See IDAHO CODE § 6-320; MD. CODE ANN., REAL PROP. § 8-211; N.H. REV. STAT. § 48-A:14 (only if particular municipality has not adopted housing code).

obligation to repair that does not seem to require quite as much as a habitability standard would.³²

A number of states have enacted substantive requirements that go beyond the list provided in the URLTA.³³ With respect to structural elements, for example, at least five states explicitly require the roof and exterior walls of the premises to be waterproof.³⁴ At least seven other warranty statutes require the landlord to provide smoke detectors, carbon monoxide

³² See GA. CODE § 44-7-13 (landlord must keep premises “in repair”); MICH. COMP. LAWS § 554.139 (landlord must comply with safety laws and keep premises in “reasonable repair”); TEX. PROP. CODE § 92.052 (landlord must repair condition affecting the “physical health of safety of an ordinary tenant”).

³³ California, Colorado, and New Hampshire’s statutes contain the most detailed lists of characteristics that create conditions affecting habitability.

Colorado’s list includes: (a) Waterproofing and weather protection of roof and exterior walls maintained in good working order, including unbroken windows and doors; (b) Plumbing or gas facilities that conformed to applicable law in effect at the time of installation and that are maintained in good working order; (c) Running water and reasonable amounts of hot water at all times furnished to appropriate fixtures and connected to a sewage disposal system approved under applicable law; (d) Functioning heating facilities that conformed to applicable law at the time of installation and that are maintained in good working order; (e) Electrical lighting, with wiring and electrical equipment that conformed to applicable law at the time of installation, maintained in good working order; (f) Common areas and areas under the control of the landlord that are kept reasonably clean, sanitary, and free from all accumulations of debris, filth, rubbish, and garbage and that have appropriate extermination in response to the infestation of rodents or vermin; (g) Appropriate extermination in response to the infestation of rodents or vermin throughout a residential premises; (h) An adequate number of appropriate exterior receptacles for garbage and rubbish, in good repair; (i) Floors, stairways, and railings maintained in good repair; (j) Locks on all exterior doors and locks or security devices on windows designed to be opened that are maintained in good working order; or (k) Compliance with all applicable building, housing, and health codes, which, if violated, would constitute a condition that is dangerous or hazardous to a tenant's life, health, or safety. COLO. REV. STAT. § 38-12-505. California’s list is virtually identical to Colorado’s (a) through (i), but also includes: A locking mail receptacle for each residential unit in a residential hotel. CAL CIV. CODE § 1941.1.

New Hampshire’s list of uninhabitable conditions includes: I. The premises are infested by insects and rodents where the landlord is not conducting a periodic inspection and eradication program; II. There is defective internal plumbing or a back-up of sewage caused by a faulty septic or sewage system; III. There are exposed wires, improper connectors, defective switches or outlets or other conditions which create a danger of electrical shock or fire; IV. The roof or walls leak consistently; V. The plaster is falling or has fallen from the walls or ceilings; VI. The floors, walls or ceilings contain substantial holes that seriously reduce their function or render them dangerous to the inhabitants; VII. The porches, stairs or railings are not structurally sound; VIII. There is an accumulation of garbage or rubbish in common areas resulting from the failure of the landlord to remove or provide a sufficient number of receptacles for storage prior to removal unless the tenant has agreed to be responsible for removal under the rental agreement and the landlord has removed all garbage at the beginning of the tenancy; IX. There is an inadequate supply of water or whatever equipment that is available to heat water is not properly operating; X. There are leaks in any gas lines or leaks or defective pilot lights in any appliances furnished by the landlord; or XI. The premises do not have heating facilities that are properly installed, safely maintained and in good working condition, or are not capable of safely and adequately heating all habitable rooms, bathrooms and toilet rooms located therein, to a temperature of at least an average of 65 degrees F.; or, when the landlord supplies heat in consideration for the rent, the premises are not actually maintained at a minimum average room temperature of 65 degrees F. in all habitable rooms. N.H. REV. STAT. § 48-A:14.

³⁴ See, e.g., CAL CIV. CODE § 1941.1; COLO. REV. STAT. ANN. § 38-12-505; IDAHO CODE ANN. § 6-320; NEV. REV. STAT. ANN. § 118A.290; OR. REV. STAT. § 90.320.

detectors, or both.³⁵ At least six states require landlords to provide and maintain adequate locks for the premises.³⁶ At least three states require landlords to take action if the premises is or has been used in activities related to illegal drugs,³⁷ and one requires landlords to take steps to prevent the growth of mold.³⁸

C. Waiver

Jurisdictions are divided with respect to the parties' ability to waive the warranty of habitability. Some jurisdictions have prohibited waiver of the implied warranty, finding that waiver would undermine the public policy of ensuring that rental housing meets health and safety standards. Other jurisdictions have permitted waiver, at least to some degree, as a matter of freedom of contract.

1. The URLTA

The URLTA generally provides that a lease may not provide for a waiver of the rights and remedies available under the Act, which would include the warranty of habitability provisions.³⁹ There is a limited exception, however, permitting tenants to waive some of the specifically enumerated duties set forth in Section 2.104(a). The extent of these waiver rights depends upon whether the property is a single-family residence or multi-unit dwelling.

For single family residences, Section 2.104(c) of the URLTA provides:

(c) The landlord and tenant of a single family residence may agree in writing that the tenant perform the landlord's duties specified in paragraphs (5) and (6) [relating to waste removal the supply of water, hot water, and heat] . . . and also specified repairs,

³⁵ Alaska, Montana, North Carolina and Oregon explicitly require landlords to provide both smoke and carbon monoxide detectors for any leased premises. ALASKA STAT. § 34.03.100; MONT. CODE § 70-24-303; N.C. GEN. STAT. § 42-42; OR. REV. STAT. § 90.320. Idaho and Washington require only smoke detectors, while Florida only requires a landlord to provide smoke detectors in single-family homes and duplexes. IDAHO CODE § 6-320; WASH. REV. CODE § 59.18.060; FLA. STAT. § 83.51.

³⁶ ALASKA STAT. § 34.03.100 (only if requested by tenant); COLO. REV. STAT. § 38-12-505; FLA. STAT. § 83.51 (does not apply to single-family home or duplex); N.C. GEN. STAT. § 42-42; OR. REV. STAT. § 90.320; WASH. REV. CODE § 59.18.060. Florida limits this provision to dwellings other than a single-family home or duplex. FLA. STAT. § 83.51.

³⁷ MONT. CODE § 70-24-303 (landlord may not knowingly allow tenant to manufacture or produce dangerous drugs); OHIO REV. CODE § 5321.04 (landlord must commence action to evict tenant if he or she has knowledge or reasonable belief that tenant or person with tenant's consent engaged in a violation involving controlled substances); OKLA. STAT. TIT. 41, § 118 (Landlord must disclose information to prospective tenant if premises was previously used to manufacture methamphetamine).

³⁸ VA. CODE § 55-248.13.

³⁹ See URLTA § 1.403.

maintenance tasks, alterations, and remodeling, but only if the transaction is entered into in good faith.⁴⁰

For all other dwelling units, Section 2.104(d) provides the parties may agree only that the tenant is to perform specified repairs, maintenance tasks, alterations, or remodeling. Moreover, this right is available only if

(1) the agreement of the parties is entered into in good faith and is set forth in a separate writing signed by the parties and supported by adequate consideration;

(2) the work is not necessary to cure noncompliance with subsection (a)(1) of this section; and

(3) the agreement does not diminish or affect the obligation of the landlord to other tenants in the premises.⁴¹

In addition, Section 2.104(e) provides that a landlord may not condition his obligations or performance of a lease on the performance of the agreement made pursuant to section 2.104(d).⁴²

2. Current status of existing legislation and case law

Although about half of the states have enacted statutes based upon the URLTA, there are some variations among the waiver provisions in those states. Three states, for example, have omitted both Sections 2.104(c) and 2.104(d),⁴³ while five other states have removed one of the sections and altered the other to apply to all leases, regardless of whether the premises is a single-family dwelling or contains multiple units.⁴⁴ Although Alaska, Iowa, Nebraska, and New Mexico have retained the majority of section 2.104(d) in their own habitability statutes, they have removed section 2.104(d)(2), which prohibits agreements between the landlord and tenant requiring the tenant to perform repairs necessary to cure housing code violations.⁴⁵ North Dakota retained section 2.104(d)(2), but amended it to prohibit only agreements requiring tenants to provide for trash receptacles and their removal.⁴⁶ Finally, thirteen states have removed section 2.104(e), which prohibits a landlord from conditioning his obligations under a lease on

⁴⁰URLTA § 2.104(c).

⁴¹ URLTA § 2.104(d).

⁴² URLTA § 2.104(e).

⁴³ N.C. GEN. STAT. § 42-42; OHIO REV. CODE § 5321.04; W. VA. CODE § 37-6-30.

⁴⁴ See DEL. CODE TIT. 25, § 5305; HAW. REV. STAT. § 521-42; OKLA. STAT. TIT. 41, § 118; R.I. GEN. LAWS § 34-18-22; TENN. CODE § 66-28-304.

⁴⁵ ALASKA STAT. § 34.03.100; IOWA CODE § 562A.15; NEB. REV. STAT. § 76-1419; N.M. STAT. § 47-8-20.

⁴⁶ N.D. CENT. CODE § 47-16-13.1.

the tenant's obligations under an agreement to make certain repairs.⁴⁷ At least eleven states have added language, however, stating that an agreement between a landlord and tenant requiring the tenant to make certain repairs cannot be entered into for the purpose of evading the obligations of the landlord.⁴⁸

Among the non-URLTA jurisdictions, states are divided as to whether, and to what extent, waivers are allowed. Eight states allow the warranty of habitability to be waived by a tenant,⁴⁹ while eight other states expressly prohibit such a waiver.⁵⁰ In addition, five states have adopted a measure similar to those in Sections 2.104(c) and (d) of URLTA.⁵¹ Idaho and New Hampshire have no language in their statutory codes about the permissibility of waiving the implied warranty of habitability.

Of the five jurisdictions with a common law warranty of habitability, four do not allow a tenant to waive the protections of the implied warranty of habitability.⁵² Illinois, on the other hand, does appear to allow for such a waiver.⁵³

⁴⁷ See ARIZ. REV. STAT. § 33-1324; CONN. GEN. STAT. § 47A-7; DEL. CODE TIT. 25, § 5305; HAW. REV. STAT. § 521-42; KY. REV. STAT. § 383.595; NEB. REV. STAT. § 76-1419; N.C. GEN. STAT. § 42-42; OHIO REV. CODE § 5321.04; OKLA. STAT. TIT. 41, § 118; R.I. GEN. LAWS § 34-18-22; S.C. CODE § 27-40-440; VA. CODE § 55-248.13; W. VA. CODE § 37-6-30.

⁴⁸ See ALASKA STAT. § 34.03.100; ARIZ. REV. STAT. § 33-1324; DEL. CODE TIT. 25, § 5305; HAW. REV. STAT. § 521-42; KAN. STAT. § 58-2553; KY. REV. STAT. § 383.595; MONT. CODE § 70-24-303; NEB. REV. STAT. § 76-1419; N.M. STAT. § 47-8-20; S.C. CODE § 27-40-440; TENN. CODE § 66-28-304.

⁴⁹ See LA. CIV. CODE art. 2699; ME. REV. STAT. tit. 14, § 6021; MICH. COMP. LAWS § 554.139 (waiver only permissible if lease term is at least one year); MISS. CODE § 89-8-23; TEX. PROP. CODE § 92.006(d) (landlord and tenant may only agree for tenant to make repairs at tenant's expense if landlord owns only one rental dwelling); UTAH CODE § 57-22-3; WASH. REV. CODE § 59.18.360 (waiver must be agreement separate from lease and may not violate public policy); WYO. STAT. § 1-21-1202.

⁵⁰ See COLO. REV. STAT. § 38-12-503; GA. CODE § 44-7-13; IND. CODE § 32-31-8-4; MD. CODE ANN., REAL PROP. § 8-211(b) (public policy of Maryland that those who allow dangerous conditions in leased premises be sanctioned); N.J. STAT. § 2A:42-96; N.Y. REAL PROP. LAW § 235-b; VT. STAT. tit. 9, § 4457; WIS. STAT. § 704.07.

⁵¹ See CAL CIV. CODE §§ 1942.1; MINN. STAT. § 504B.161; NEV. REV. STAT. § 118A.290; OR. REV. STAT. § 90.320; S.D. CODIFIED LAWS § 43-32-8.

⁵² See *Javins*, 428 F.2d at 1081-82 (“The duties imposed by the Housing Regulations may not be waived or shifted by agreement if the Regulations specifically place the duty upon the lessor.”); *Hemingway*, 293 N.E.2d at 843 (“Th[e implied] warranty [of habitability] ... cannot be waived by any provision in the lease or rental agreement.”); *King*, 495 S.W.2d at 77 (“Agreements violating municipal ordinances are illegal to the same extent as agreements violating enactments of the legislature.”); *Fair v. Negley*, 390 A.2d 240, 243 (Pa. Super. 1978) (“[W]e hold that a waiver of the implied warranty of habitability does violate the public policy sought to be achieved by the warranty and that, therefore, the warranty may not be waived.”).

⁵³ See *Jack Spring*, 280 N.E.2d at 217 (finding error in the trial's court decision to strike the defendant's affirmative defense based on a waiver provision in the lease agreement).

III. REMEDIES

Because the warranty of habitability developed under principles of contract law, courts and legislatures naturally have afforded tenants a range of basic contract remedies for a landlord's breach of the warranty.⁵⁴ As discussed in further detail below, these options typically include termination of the lease (rescission), rent abatement (damages), various repair options, and specific performance. There is considerable variation, however, with respect to some of these options. Jurisdictions also vary with respect to their willingness to allow tenants to recover tort damages. These differences are discussed below and highlighted in Exhibit C (Warranty of Habitability chart).

A. Contract Remedies

Article IV of the URLTA has five contracts-based remedies that are potentially applicable to claims for breach of the implied warranty:

Termination for material breaches affecting health and safety. Section 4.101 permits a tenant to terminate a lease (and obtain a return of the recoverable security deposit and prepaid rent) for the landlord's noncompliance with the warranty provisions in Section 2.104 "materially affecting health and safety[.]" In addition to termination, the tenant may recover "injunctive relief" and "actual damages." If landlord's noncompliance is "willful," the tenant also may recover reasonable attorney's fees. The right to terminate is conditioned, however, upon the tenant's provision of written notice to the landlord with an opportunity to cure the defect. The section also provides that the right is not available if the condition was caused by the tenant, a member of his family, or a person on the premises with the tenant's consent.

Repair and deduct for minor defects: Section 4.103 permits a tenant to repair a minor defect at the landlord's expense and deduct the actual costs from his rent. This remedy is limited

⁵⁴ See, e.g., *Pugh v. Holmes*, 405 A.2d 897, 908 (Pa. 1979); *Mease v. Fox*, 200 N.W.2d 791, 796 (Iowa 1972); *Lemle v. Breeden*, 462 P.2d 470 (Haw. 1969). As an illustration, the Restatement (Second) of Property – Landlord and Tenant § 10.2 (1977) provides:

[A]bsent a valid agreement as to the measure of damages, damages may include one or more of the following items as may be appropriate so long as no double recovery is involved: (1) if the tenant is entitled to terminate the lease and does so, the fair market value of the lease on the date he terminates the lease; (2) the loss sustained by the tenant due to reasonable expenditures made by the tenant before the landlord's default which the landlord at the time the lease was made could reasonably have foreseen would be made by the tenant ;(3) if the tenant is entitled to terminate the lease and does so, reasonable relocation costs; (4) if the lease is not terminated, reasonable additional costs of substituted premises incurred by the tenant as a result of the landlord's default while the default continues; (5) if the use of the leased property contemplated by the parties is for business purposes, loss of anticipated business profits proven to a reasonable degree of certainty, which resulted from the landlord's default, and which the landlord at the time the lease was made could reasonably have foreseen would be caused by the default ;(6) if the tenant eliminates the default, the reasonable costs incurred by the tenant in eliminating the default; and (7) interest on the amount recovered at the legal rate for the period appropriate under the circumstances.

to repairs for which “the reasonable cost of compliance is less than [\$100], or an amount equal to [one-half] the periodic rent, whichever amount is greater.” It sets a standard for repairs (“the tenant may cause the work to be done in a workmanlike manner”) and requires evidence of the costs (“an itemized statement”). As with termination, the right to this relief is conditioned upon the tenant’s provision of written notice to the landlord with an opportunity to cure the defect (unless the conditions create a case of emergency) and is not available if the condition was caused by the tenant, a member of his family, or a person on the premises with the tenant’s consent.

Damages (rent abatement?) and other relief for failure to supply essential services:

Section 4.104 specifies three remedies available when the landlord “willfully or negligently fails to supply heat, running water, hot water, electric, gas, or other essential service[.]” These include a repair and deduct option when “reasonable and appropriate . . . to secure reasonable amounts of heat, hot water, running water, electric, gas, and other essential service[.]” (This provision does not specify any limit on the costs, other than they are “reasonable.”) Alternatively, the tenant may recover “damages based upon the diminution in the fair rental value of the dwelling unit” or “procure reasonable substitute housing during the period of the landlord’s noncompliance, in which case the tenant is excused from paying rent” for that period. In the latter case, the tenant may also recover the “actual and reasonable cost or fair and reasonable value of the substitute housing not in excess of an amount equal to the periodic rent[.]”⁵⁵ In addition to using one of those three remedies, the tenant may recover reasonable attorney’s fees. Section 4.107 also includes a punitive damages remedy if the landlord “willfully diminishes” these essential services, providing that the tenant may recover three times the actual damages or three months’ rent, whichever is greater, plus attorney fees.

If a tenant pursues one of the remedies under Section 4.104, he may not proceed under Section 4.101 or Section 4.103 as to that breach. Also, consistent with the limitations in the preceding sections, the rights of the tenant under Section 4.104 “do not arise until he has given notice to the landlord or if the condition was caused by the deliberate or negligent act or omission of the tenant, a member of his family, or other person on the premises with his consent.”

Use of implied warranty as defense to landlord’s action for possession or rent. Section 4.105 provides that “[i]n an action for possession based upon nonpayment of the rent or in an action for rent when the tenant is in possession, the tenant may [counterclaim] for any amount he may recover under the rental agreement or this Act.” If the tenant is in possession of the premises, the court may order the tenant to “pay into court all or part of the rent accrued and thereafter accruing,” after which time the court “shall determine the amount due to each party.” Although this provision does not expressly authorize a tenant to remain in possession and

⁵⁵ This would seem to permit the tenant to recover the full amount of substitute housing (up to the contract rent) while also being excused from paying rent. If so, this measure of damages would overcompensate the tenant. It probably should be altered to allow recovery only for any excess the tenant has to pay above the amount of the contract rent. *See, e.g.*, ARIZ. REV. STAT. ANN. § 33-1364(A)(3).

withhold rent for a breach of the implied warranty of habitability, the section seems to impliedly authorize that relief.

Although about half of the states have enacted statutes based upon the URLTA, there is substantial variation in the provisions of those statutes. Further variation occurs in states that have statutes not based on the URLTA. As discussed below, the remedies afforded by most statutes fall into several major categories that mirror the URLTA provisions: termination for a material breach, rent abatement or damages for tenants who remain in possession, repair and deduct for minor defects, and specific performance/injunctive relief. States vary, however, with respect to whether and when each of these remedies are available. Jurisdictions also vary with respect to recovery of consequential damages, punitive damages, and attorney fees.

1. Termination/Rescission

Courts generally have treated a material breach of the warranty of habitability as a constructive eviction, allowing the tenant to terminate the lease without further liability for rent.⁵⁶ As one court explained, “[b]reach of contract ‘so substantial as to defeat the very object of the contract,’ . . . permits the injured party to rescind the contract.”⁵⁷ Similarly, most warranty statutes expressly allow for termination by the tenant upon material breach of the warranty of habitability.⁵⁸ Conversely, one statute permits *the landlord* to terminate the lease in lieu of

⁵⁶ See, e.g., *Kolb v. DeVille I Properties, LLC*, 326 S.W.3d 896 (Mo. Ct. App. W.D. 2010); *Kostuck v. Brown*, 684 N.E.2d 573, 575 (Ind. Ct. App. 1997); *Drew v. Pullen*, 412 A.2d 1331 (N.J. App. Div. 1980); *Teller v. McCoy*, 253 S.E.2d 114, 126 (W. Va. 1978); *Boston Hous. Auth. v. Hemingway*, 293 N.E.2d 831, 844 (Mass. 1973); *Mease v. Fox*, 200 N.W.2d 791, 797 (Iowa 1972); *Lemle v. Breeden*, 462 P.2d 470 (Haw. 1969); *Pines v. Perssion*, 111 NW2d 409 (Wis. 1961).

⁵⁷ *Teller v. McCoy*, 253 S.E.2d 114, 126 (W. Va. 1978).

⁵⁸ These include Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Iowa, Kansas, Kentucky, Maryland, Mississippi, Montana, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, Wisconsin, and Wyoming. ALA. CODE § 35-9A-401; ALASKA STAT. ANN. § 34.03.160; ARIZ. REV. STAT. ANN. § 33-1361; CAL. CIV. CODE § 1942; COLO. REV. STAT. ANN. § 38-12-507; CONN. GEN. STAT. ANN. § 47a-12; DEL. CODE ANN. TIT. 25, § 5306; FLA. STAT. ANN. § 83.56; HAW. REV. STAT. § 521-63; IOWA CODE ANN. § 562A.21; KAN. STAT. ANN. § 58-2559; KY. REV. STAT. ANN. § 383.625; MD. CODE ANN., REAL PROP. § 8-211; MISS. CODE ANN. § 89-8-13; MONT. CODE ANN. § 70-24-406; NEB. REV. STAT. § 76-1425; NEV. REV. STAT. ANN. § 118A.355; N.M. STAT. ANN. § 47-8-27.1; N.D. CENT. CODE ANN. § 47-16-13; OHIO REV. CODE ANN. § 5321.07; OKLA. STAT. ANN. TIT. 41, § 121; OR. REV. STAT. ANN. § 90.360; R.I. GEN. LAWS ANN. § 34-18-28; S.C. CODE ANN. § 27-40-610; S.D. CODIFIED LAWS § 43-32-9; TENN. CODE ANN. § 66-28-501; TEX. PROP. CODE ANN. § 92.056; UTAH CODE ANN. § 57-22-6; VT. STAT. ANN. TIT. 9, § 4458; VA. CODE ANN. § 55-248.21; WASH. REV. CODE ANN. § 59.18.090; WIS. STAT. ANN. § 704.07; WYO. STAT. ANN. § 1-21-1206.

A few states, however, appear to lack a statutory provision or judicial guidance regarding the right to terminate: Arkansas, Georgia, Idaho, Louisiana, Maine, Michigan, Minnesota, New Hampshire, New York, North Carolina, West Virginia.

making repairs “if the costs of repairs exceeds an amount which would be reasonable in light of the rent charged, the nature of the rental property or rental agreement.”⁵⁹

More than half of the jurisdictions also recognize the tenant’s right to recover damages from the landlord in addition to terminating the lease. Many statutes, including those based upon the URLTA, do not specify how these damages are calculated; they simply provide for “damages” or “actual damages,” leaving it largely to the courts to determine what damages are recoverable. Some of the types of damages that courts have found recoverable include:

* The diminished value of the premises between the time the tenant provides notice of the conditions and the termination date.⁶⁰

* The tenant’s lost “benefit of the bargain” for the remaining term of the unexpired lease. Courts recognizing this remedy have measured damages by the difference between the fair rental value of the premises if they had been as warranted and the contract rent.⁶¹ By definition, this remedy comes into play only if the tenant had an advantageous lease – one in which the tenant had bargained for a contract rent that was lower than the fair rental value of the property.

* The expenses involved in acquiring different housing. Thus, one court permitted recovery of “the excess amount the lessee has to pay for comparable space over the term of the original lease, plus any special damages (such as moving costs).”⁶² Another court, however, rejected a claim for damages based upon the cost of alternative housing, stating that because the tenants had elected to abandon the property, their exclusive remedy was to be relieved of any further obligation under the lease.⁶³

⁵⁹ WYO. STAT. ANN. § 1-21-1203 (West). The statute provides that if the landlord intends to terminate the rental agreement, he shall provide written notice and give the tenant sufficient time to find substitute housing. *Id.*

⁶⁰ *See, e.g.*, COLO. REV. STAT. ANN. § 38-12-507; UTAH CODE ANN. § 57-22-6; WASH. REV. CODE ANN. §§ 59.18.090, 59.18.110.

⁶¹ *See, e.g.*, *Kolb v. DeVille I Properties, LLC*, 326 S.W.3d 896 (Mo. Ct. App. W.D. 2010); *Boston Hous. Auth. v. Hemingway*, 293 N.E.2d 831, 844 (Mass. 1973); *Mease v. Fox*, 200 N.W.2d 791, 797 (Iowa 1972); *Lemle v. Breeden*, 462 P.2d 470 (Haw. 1969); *Pines v. Perssion*, 111 NW2d 409 (Wis. 1961).

⁶² *Shorter v. Neapolitan*, 902 N.E.2d 1061, 1068 (Ohio App. Ct. 2008); *see also* DEL. CODE ANN. tit. 25, § 5306 (West)(tenant may recover the greater of: (1) The difference between rent payable under the rental agreement and all expenses necessary to obtain equivalent substitute housing for the remainder of the rental term; or (2) An amount equal to 1 month's rent and the security deposit.).

⁶³ *Kostuck v. Brown*, 684 N.E.2d 573, 575 (Ind. Ct. App. 1997) (stating that under the doctrine of election of remedies, a party ordinarily may not pursue a remedy based upon a theory involving the repudiation of a transaction in addition to a remedy based upon a theory affirming that same transaction).

2. Rent abatement (damages when tenant remains in possession)

As an alternative to termination of the lease, most jurisdictions permit the tenant to remain in possession of the premises with an abatement of rent for breach of the warranty of habitability. Thus, the tenant may withhold rent and use this remedy as a defense to the landlord's suit for nonpayment.⁶⁴ Alternatively, if the tenant has paid the rent in full, the tenant may use the formula to file a claim for damages against the landlord. About one-third of the estates follow the URLTA's approach in permitting this relief only when the landlord has willfully or negligently failed to provide an essential service.⁶⁵

The jurisdictions also vary with respect to two major issues regarding abatement. First, with respect to rent withholding, some states may require (or permit) the tenant to pay the rent into the court or a private escrow until the conditions giving rise to the warranty claim have been resolved. Second, the states have adopted several different formulas for determining how much rent is to be abated. Each of these issues is discussed in turn.

a. Rent sequestration

Section 4.105 of the URLTA provides that a tenant may defend against an action for nonpayment of rent with a counterclaim for amounts recoverable under the Act, which would include the abatement in rent. The Act provides, however, that the court "from time to time may order the tenant to pay into court all or part of the rent accrued and thereafter accruing, and shall determine the amount due to each party."⁶⁶

Ten states have adopted the URLTA provision substantially in its original form.⁶⁷ One additional state has expanded on the URLTA provision with much more detailed escrow procedures.⁶⁸ Another provides that the court may order the payments into court upon request by the landlord or tenant,⁶⁹ and another provides that the court may order the tenant to pay rent

⁶⁴Only a few statutes expressly recognize the right to withhold rent. *See, e.g.*, DEL. CODE ANN. tit. 25, § 5308 (West); NEV. REV. STAT. ANN. § 118A.355 (West); S.D. CODIFIED LAWS § 43-32-9; VT. STAT. ANN. tit. 9, § 4458 (West). The URLTA *impliedly* recognizes this right in Section 4.105, which allows the tenant to bring a counterclaim based upon breach of the warranty in any action for possession based upon nonpayment of the rent.

⁶⁵*See* ALA. CODE § 35-9A-404, ALASKA STAT. ANN. § 34.03.180 (West), ARIZ. REV. STAT. ANN. § 33-1364; DEL. CODE ANN. TIT. 25, § 5308 (West); IOWA CODE ANN. § 562A.23 (West); KY. REV. STAT. ANN. § 383.640 (West); MONT. CODE ANN. § 70-24-408; NEB. REV. STAT. § 76-1427; NEV. REV. STAT. ANN. § 118A.380 (West); OKLA. STAT. ANN. TIT. 41, § 121 (West); OR. REV. STAT. ANN. § 90.365 (West); R.I. GEN. LAWS ANN. § 34-18-31 (West); S.C. CODE ANN. § 27-40-630; TENN. CODE ANN. § 66-28-502 (West); VA. CODE ANN. § 55-248.23 (West).

⁶⁶URLTA § 4.105(a).

⁶⁷Alabama, Alaska, Arizona, Colorado, Connecticut, Iowa, Kansas, Montana, Nebraska, and Rhode Island.

⁶⁸Virginia.

⁶⁹Oregon.

directly to the landlord.⁷⁰ Conversely, four states that otherwise have enacted the URLTA omitted this provision from their statutes.⁷¹

Nine states that have non-URLTA provisions also include some form of rent sequestration in their statutes. Four are similar to the URLTA in permitting the court to order an escrow or allowing the tenant to initiate an escrow.⁷² The other five are mandatory, requiring the court to order an escrow or providing that a tenant must escrow the funds to avoid eviction.⁷³

The URLTA simply requires the court to distribute the escrowed rent as between the landlord and tenant. Other states, however, go further to permit the court to order the use of escrowed funds to be used to remedy the condition that gave rise to the rent abatement claim.⁷⁴

b. Rent abatement/damages formulas

Unfortunately, many statutes lack specific guidance on how rent abatement damages are to be calculated. About a dozen statutes simply state that the tenant may recover “damages” or “actual damages,” which leaves it to the courts to determine how such damages should be calculated.⁷⁵ A substantial number of states, particularly those following the URLTA, provide a bit more guidance, in providing for recovery of damages “based upon diminution in the fair

⁷⁰South Carolina.

⁷¹Kentucky, New Mexico, Oklahoma, and Tennessee.

⁷²MD. CODE ANN., REAL PROP. § 8-211 (tenant may initiate); MASS. GEN. LAWS ANN. CH. 239, § 8A (West)(court may require); MINN. STAT. § 504B.385 (court may order or tenant may deposit); OHIO REV. CODE ANN. § 5321.07 (tenant may initiate).

⁷³NEV. REV. STAT. ANN. § 118A.355 (tenant must escrow to avoid eviction); N.H. REV. STAT. ANN. § 540-13-d (court shall require); N.J. STAT. ANN. § 2A:42-92 (West) (court shall direct that rents be deposited with court clerk); S.D. CODIFIED LAWS § 43-32-9 (requiring tenant to deposit withheld rent in a bank account); WASH. REV. CODE ANN. § 59.18.090 (tenant may pay rent to landlord or to a person/institution authorized to maintain escrow accounts).

⁷⁴*See, e.g.*, CONN. GEN. STAT. ANN. § 47a-14h(g); MD. CODE ANN., REAL PROP. § 8-211; MASS. GEN. LAWS ANN. CH. 239, § 8A; N.J. STAT. ANN. § 2A:42-92, S.D. CODIFIED LAWS § 43-32-9; VA. CODE ANN. § 55-248.27.

⁷⁵California, Connecticut, Georgia, Idaho, Indiana, Iowa, Kansas, New Hampshire, New York, North Dakota, Ohio, Utah, Vermont, Wyoming.

rental value of the dwelling unit.”⁷⁶ However, while this standard is more precise than “actual damages,” it still leaves some ambiguity as how the diminished value is to be determined.

Most courts that have addressed the rent abatement issue use one of three models of calculation:

- The benefit of the bargain approach – the difference between the fair rental value of the property if it had been as warranted versus the fair rental value in its actual, defective condition (“as is”).
- The fair market value approach – the difference between the *contract rent* and the fair rental value in its actual, defective condition (“as is”).
- A percentage reduction approach – a reduction in the contract rent by a percentage corresponding to the relative reduction in the use/habitability of the leased premises because of the breach of the warranty of habitability.

There is considerable overlap, however, in the ways that courts have applied these approaches. An analysis of the perceived benefits and detriments of each approach is provided below, along with examples of how the approaches have been applied in practice.

Benefit of the bargain. A majority of states appear to favor the benefit of the bargain approach by statute or common law.⁷⁷ The perceived advantage of this approach is its goal of

⁷⁶URLTA § 4.104. Other statutory references that have been unclear include: FLA. STAT. ANN. § 83.56 (West)(“an amount in proportion to the loss of rental value caused by the noncompliance.”); MD. CODE ANN., REAL PROP. § 8-211 (“fair and equitable to represent the existence of the conditions and defects”); MINN. STAT. § 504B.425 (“the extent to which any uncorrected violations impair the residential tenants’ use and enjoyment of the property”); TEX. PROP. CODE ANN. § 92.0563 (West)(“in proportion to the reduced rental value”); WIS. STAT. ANN. § 704.07 (“to the extent the tenant is deprived of the full normal use of the premises”).

Maine’s statute is one of only a few that provides a detailed explanation of how to calculate damages, but its explanation is ambiguous. It states that the tenant is entitled to a rebate based upon the “rent paid in excess of the value of use and occupancy [of the property in its unrepaired condition].” ME. REV. STAT. tit. 14, § 6021. Reference to the agreed rent is consistent with the fair market value formula. But the statute further states that “[i]n making this determination, there shall be a rebuttable presumption that the rental amount equals the fair value of the dwelling unit free from any condition rendering it unfit for human habitation.” This presumption would appear to relate to the fair rental value of the premises in its warranted condition, which is consistent with the benefit of the bargain approach.

⁷⁷ California, Colorado, District of Columbia, Indiana, Iowa, Kansas, Massachusetts, Nebraska, New York, North Carolina, Ohio, Oregon, Texas, Vermont, Washington, and West Virginia appear to use the benefit of the bargain approach. *Green v. Superior Court*, 517 P.2d 1168, 1183 (Cal. 1974); *Bedell v. Los Zapatistas, Inc.*, 805 P.2s 1198 (constructive eviction case); *Cooks v. Fowler*, 455 F.2d 1281, 1282 n.5 (D.C. Cir. 1971); *Kostuck v. Brown*, 684 N.E.2d 573 (Ind. Ct. App. 1997); *Estate of Vazquez v. Hepner*, 564 N.W.2d 426 (Iowa 1997); *Love v. Monarch Apts.*, 771 P.2d 79 (Kan. Ct. App. 1989); *Boston Hous. Auth. v. Hemingway*, 293 N.E.2d 831, 845 (Mass. 1973); *Master Labs. v. Chesnut*, 154 Neb. 749, 755, 49 N.W.2d 693, 697 (Neb. 1951); *Park West Mgmt. Corp. v. Mitchell*, 391 N.E.2d 1288, 1295 (N.Y. 1979); *Cardwell v. Henry*, 549 S.E.2d 587 (N.C. Ct. App. 2001) (but limiting damages to no more than contract rent); *Weingarden v. Eagle Ridge Condominiums*, 653 N.E.2d 759, 763 (Ohio Mun. Ct. 1995); *Lane v. Kelley*, 57 Or. App. 197, 201, 643 P.2d 1375, 1377 (1982); *Waldon v. Williams*, 760 S.W.2d

preserving the tenant's bargain by comparing the fair rental value of the property in its defective condition against the fair rental value of the property if it had been as warranted. Although one court has criticized this approach for overcompensating the tenant,⁷⁸ the biggest problem with the approach is in its application: how does a court calculate fair rental value?

By case law or statute, a handful of states have defined "fair rental value" somewhat generically as the amount that a reasonable and willing tenant would pay to a landlord in an arms-length transaction.⁷⁹ Other states have expanded upon this concept by looking at actual rents in the open market. Thus, fair rental value "means rent which is of comparable value with that of other rental properties of similar size and condition within the contiguous neighborhood."⁸⁰

Based upon these definitions, one could expect that evidence of fair rental value typically would come from "some type of market survey, statistical evidence, or expert testimony from

833, 834 (Tex. Ct. App. 1988); *Lian v. Stalick*, 25 P.3d 467 (Wash. Ct. App. 2001); *Hilder v. St. Peter*, 478 A.2d 202 (Vt. 1984); *Teller v. McCoy*, 253 SE2d 114 (W.Va. 1978); compare RESTATEMENT (SECOND) OF PROPERTY, LANDLORD & TENANT § 11.1 (1977) ("the rent is abated to the amount of that proportion of the rent which the fair rental value after the event giving the right to abate bears to the fair rental value before the event").

⁷⁸ A North Carolina appellate court observed that this formula would allow a tenant to recover damages "in excess of the total amount of rent paid, which could result in a landlord paying a tenant for leasing the property." *Von Pettis Realty, Inc. v. McCoy*, 519 S.E.2d 546, 548-49 (N.C. Ct. App. 1999). The court also opined that the formula "does not account for any benefit received by the tenant for use of the property in its unwarranted condition." *Id.*

⁷⁹ See KY. REV. STAT. ANN. § 411.510 (West) ("'Fair rental value' means the price a lessee who is willing but not compelled to lease would pay and a lessor who is willing but not compelled to lease would accept."); S.C. CODE ANN. § 27-40-210 ("'fair-market rental value' means the actual periodic rental payment for comparable rental property to which a willing landlord and a willing tenant would agree"); *In re Jay*, 308 B.R. 251, 288 n. 11 (Bankr.N.D.Tex.2003) ("Fair rental value means what a reasonable and willing tenant would pay for the property."); *Vermont Mut. Ins. Co. v. Petit*, 613 F. Supp. 2d 154, 159 (D. Mass. 2009) (in insurance context, "fair rental value" most closely corresponds to "fair market value," the "highest price which a hypothetical willing buyer would pay to a hypothetical willing seller in an assumed free and open market"); *Razavi v. Comm'r*, 74 F.3d 125, 127 (6th Cir.1996) (in tax context, fair rental value "reflects the amount at which property would change hands between a willing lessee and a willing lessor, neither being under any compulsion to enter into the transaction and both having reasonable knowledge of the relevant facts"); *United States v. 1735 N. Lynn St.*, 676 F.Supp. 693, 706 (E.D.Va.1987) (in takings context, fair rental value means "the rental price in cash, or its equivalent, that the leasehold would have brought at the time of taking, if then offered for rent in the open market, in competition with other similar properties at or near the location of the property taken, with a reasonable time allowed to find a tenant); see also IRS Pub. 17 (2011): *Your Federal Income Tax*, <http://www.irs.gov/publications/p17/ch03.html> (fair rental value "is the amount you could reasonably expect to receive from a stranger for the same kind of lodging. . . . In some cases, fair rental value may be equal to the rent paid.").

⁸⁰ R.I. GEN. LAWS ANN. § 34-18-11 (West); ALASKA STAT. ANN. § 34.03.360 (West) ("'[F]air rental value' means the average rental rate in the community for available dwelling units of similar size and features."); *Collinsville Co. v. Cecere*, SPH 831021145 498, 1983 WL 208447 (Conn. Super. Ct. Dec. 22, 1983) (fair rental value is determined from "evidence of what the premises will rent for in the open market"); see also *Malani v. Clapp*, 56 Haw. 507, 516, 542 P.2d 1265, 1271 (1975) (fair rental value is determined by "proof of what the premises would rent for on the open market, or by evidence of other facts from which the fair rental value of the property may be determined").

realtors or appraisers familiar with the local rental market.”⁸¹ But courts have identified two problems in determining fair rental value in this way. First, “it is questionable whether there is ‘market’ rental value of premises known to be substantially in violation of housing codes and thus illegal[.]”⁸² Second, “[t]he cost of obtaining such evidence or testimony would simply be prohibitive to many litigants, especially low-income tenants.”⁸³

Courts using the benefit of the bargain approach (as well as the fair market value approach) have attempted to address these evidentiary issues in several ways. For example, with respect to the fair rental value of the property in its warranted or habitable condition, courts have eliminated the need for expert testimony by applying a rebuttable presumption that the contract rent represents the fair value of the premises in good condition.⁸⁴

Courts also have demonstrated flexibility in determining the fair rental value of the property in its defective condition. In lieu of requiring expert testimony, several courts have permitted the parties to provide their own opinions regarding the rental value of the property. As one court explained, “[s]ince both sides will ordinarily be intimately familiar with the conditions of the premises both before and after the breach, they are competent to give their opinion as to the diminution in value occasioned by the breach.”⁸⁵ Other courts have permitted a calculation of

⁸¹ *Pugh v. Holmes*, 405 A.2d 897, 909 (Pa. 1979); see also S.C. CODE ANN. § 27-40-210 (“In determining the fair-market rental value, the court may consider appraisals offered by the tenant, landlord, realty experts, licensed appraisers, and other relevant evidence”); *Cotton v. Stanley*, 358 S.E.2d 692, 695 (N.C. Ct. App. 1987) (“Direct evidence of fair rental value is an opinion of what the premises would rent for on the open market from either an expert or a witness qualified by familiarity with the specific piece of property.”); *Cazares v. Ortiz*, 168 Cal. Rptr. 108 (Cal. App. Dep’t Super Ct. 1980) (“market rental value can properly be testified to only by experts who qualify by experience and the performance of market studies”).

⁸² *Cazares v. Ortiz*, 168 Cal. Rptr. at 110.

⁸³ *Pugh v. Holmes*, 405 A.2d 897, 909 (Pa. 1979) (quoting Moskowitz, *The Implied Warranty of Habitability: A New Doctrine Raising New Issues*, 62 Calif. L. Rev. 1444, 1467-68 (1974)); see also *Teller v. McCoy*, 253 S.E.2d 114 (W.Va. 1978) (“the need for expert testimony under this approach could serve to deny the intended relief from a large number of low and middle income tenants who could not afford to litigate”).

⁸⁴ *Weingarden v. Eagle Ridge Condominiums*, 653 N.E.2d 759, 763 (Ohio Mun. Ct. 1995) (“The rent amount is presumptive evidence of the rental value of the premises as repaired, but it is not conclusive.”); *Hilder v. St. Peter*, 144 Vt. 150, 478 A.2d 202 (1984) (court may look to the agreed-upon rent as evidence of the fair market value of the premises in warranted condition); *Teller v. McCoy*, 253 S.E.2d 114 (W.Va. 1978) (agreed rent is evidence); *Bernstein v. Fernandez*, 649 A.2d 1064, 1072 (D.C. 1991) (agreed rent is evidence of value in good condition); see also ME. REV. STAT. tit. 14, § 6021 (“there shall be a rebuttable presumption that the rental amount equals the fair value of the dwelling unit free from any condition rendering it unfit for human habitation”); CONN. GEN. STAT. § 47a-26b (“The last agreed-upon rent shall be prima facie evidence of the fair rental value of the premises. The party claiming a different amount shall have the burden of proving that the last agreed-upon rent is not the fair rental value.”).

⁸⁵ *Park West Mgmt. Corp. v. Mitchell*, 391 N.E.2d 1288, 1295 (N.Y. 1979); see also *Weingarden v. Eagle Ridge Condominiums*, 653 N.E.2d 759, 764 (Ohio Mun. 1995) (lessee of real property is competent to give opinion testimony as to the rental value of the leased premises; the weight of such testimony is to be determined by the trier of fact); *Glasoe v. Trinkle*, 479 N.E.2d 915, 921-22 (Ill. 1985) (endorsing *Park West* approach); *Roeder v. Nolan*,

the “as is” fair rental value based solely upon the parties’ testimony regarding the condition of the premises⁸⁶ or have stated generically that expert testimony is not required.⁸⁷

As a result, while courts in many cases purport to use a benefit of the bargain or fair market value approach, their actual calculation of rent abatement has resembled the percentage reduction formula. An Ohio court, for example, concluded that the value of a three-story dwelling was reduced by one-third because the basement (one of three stories) was unusable.⁸⁸ Other courts have measured fair rental value in percentage terms, either in their definition of

321 N.W.2d 1, 5 (Iowa 1982) (“as a co-owner of the leasehold, Roeder is competent to testify to the fair rental value per month . . . of the house as it was”).

⁸⁶ See, e.g., *Edgemont Corp. v. Audet*, 656 N.Y.S.2d 85, 87 (N.Y. App. Term 1996) (“Proof of the existence, extent and duration of the condition is sufficient to put the court in a position to determine damages.”); *Bernstein v. Fernandez*, 649 A.2d 1064, 1072 (D.C. 1991) (“Expert testimony or other evidence of the market value of an apartment in such condition was not necessary; evidence of the problems themselves was enough.”); *Cotton v. Stanley*, 358 S.E.2d 692, 695 (N.C. App. 1987) (proof of dilapidated conditions sufficient to provide indirect evidence of fair rental value); *Birkenhead v. Coombs*, 465 A.2d 244, 246 (Vt. 1983) (where evidence was presented of condition of the premises, task of determining damages was within the discretion of the factfinder); *Cooks v. Fowler*, 455 F.2d 1281, 1282-83 (D.C. Cir. 1971)(proof of physical condition of premises).

⁸⁷ *Birkenhead v. Coombs*, 465 A.2d 244, 246 (Vt. 1983) (“in residential lease disputes involving a breach of the implied warranty of habitability, public policy militates against requiring expert testimony” concerning the value of the defect); *Steinberg v. Carreras*, 344 N.Y.S.2d 136, 144 (Civ. Ct. 1973) (observing that “[t]he economic realities of proceedings involving residential tenants make it unlikely that such testimony would be readily available to tenants in the usual case” and “I seriously doubt that statistical information about the value of apartments operated in violation of law is available in a form that permits meaningful expert testimony”); N.Y. REAL PROP. LAW § 235-b (McKinney) (in determining damages under the statutory warranty, “the court . . . need not require any expert testimony”).

It is not always clear, however, what evidence short of expert testimony will suffice. Based upon evidence that the tenants were denied hot water for 12 days and heat for about four weeks during the winter, Judge Sandler determined in the *Steinberg* case that a “one week setoff against the rent for each of these tenants would fairly approximate the damage suffered.” *Steinberg*, 344 N.Y.S.2d at 144. The decision was reversed on appeal, however, with a one-sentence declaration that “there was a lack of adequate proof of the reduced value of the apartments as a result of the landlord’s failure to supply heat.” *Steinberg v. Carreras*, 357 N.Y.S.2d 369, 370 (N.Y. App. Term 1974); see also *Kekllas v. Saddy*, 389 N.Y.S.2d 756, 759 (N.Y. Dist. Ct. 1976) (“although the tenant’s proof need not be by expert witnesses . . . [a]ny award of an abatement of rent, without testimony by the tenants or any witness, professional or otherwise, would be purely conjecture and is speculative”).

⁸⁸ *Weingarden v. Eagle Ridge Condominiums*, 653 N.E.2d 759, 763 (Ohio Mun. 1995).

how fair rental value is calculated⁸⁹ or in simply stating their conclusions on a percentage basis without providing any analysis of how that percentage was calculated.⁹⁰

In short, while the majority of courts purport to use the benefit of the bargain approach, they have not been as exacting as one might expect regarding the proof required for calculating the fair rental value of the premises in its defective condition. In fact, some actually may be employing a percentage reduction approach instead.

Fair market value. A half dozen jurisdictions appear to have adopted the fair market value approach as a variation of the benefit of the bargain approach. The fair market value approach measures damages as the difference between the *contract rent* and the fair rental value of the property in its actual, defective condition. One state has codified the approach in its statute,⁹¹ while the others have adopted the approach by case law.⁹²

⁸⁹ An Oregon court, for example, concluded that the tenant failed to provide sufficient evidence to satisfy the benefit of the bargain formula because there was “no evidence as to the amount *or the percentage by which the rental value of the residence was reduced* by the habitability defects.” *Lane v. Kelley*, 643 P.2d 1375, 1377 n.1 (Ore. Ct. App. 1982) (emphasis added). More specifically, the court found “[t]here was no evidence as to the size of the residence, its overall character and condition or the relationship of the part rendered uninhabitable to the balance of the house.” *Id.* Similarly, a court in New York stated that its role, in determining damages, was “to determine the value of the services of which the tenants were deprived and the extent and duration of the deprivation in relation to the worth of the entire apartment, and form a practical judgment as to the amount by which the value of the apartment had been reduced.” *Whitehouse Estates, Inc. v. Thomson*, 386 N.Y.S.2d 733, 734 (N.Y. Civ. Ct. 1976) (quoting *Steinberg v. Carreras*, 344 N.Y.S.2d 136, 144 (Civ. Ct. 1973)); compare *Park West Mgmt. Corp. v. Mitchell*, 391 N.E.2d 1288, 1295 (N.Y. 1979) (“In ascertaining damages, the finder of fact must weigh the severity of the violation and duration of the conditions giving rise to the breach as well as the effectiveness of steps taken by the landlord to abate those conditions.”); *Glase v. Trinkle*, 107 Ill. 2d 1, 16, 479 N.E.2d 915, 921 (Ill. 1985) (same; quoting *Park West*); *Birkenhead v. Coombs*, 143 Vt. 167, 172-73, 465 A.2d 244, 246 (1983) (“finder of fact must weigh both the severity and duration of those conditions which led to the breach, as well as any remedial steps taken by the landlord to abate the conditions”).

⁹⁰ See *Jefferson House Assocs., LLC v. Boyle*, 800 N.Y.S.2d 348 (N.Y. Just. Ct. 2005) (concluding that tenant was entitled to a 50% abatement of her rent for six months and a 20% abatement thereafter); *Deese v. Gray*, 445 N.Y.S.2d 364, 365 (N.Y. Co. Ct. 1981) (finding that fair market value of the rented premises was 50% of the agreed rate of \$250.00 per month or \$125.00 per month); *Timber Ridge Town House v. Dietz*, 338 A.2d 21, 25 (N.J. Sup. Ch. Div. 1975) (“From observing the conditions the court feels at least 15% of the general livability of the premises is affected”); *Morbeth Realty Corp. v. Rosenshine*, 323 N.Y.S.2d 363, 366 (N.Y. Civ. Ct. 1971) (finding that numerous violations amounted to a 20% reduction); *Cooks v. Fowler*, 455 F.2d 1281, 1282-83 (D.C. Cir. 1971) (concluding that defects diminished value of premises by one-third); compare *Kolb v. DeVille I Properties, LLC*, 326 S.W.3d 896, 903 (Mo. Ct. App. 2010) (circuit court found that the apartment with the bedbug infestation had no value, entitling the tenants to damages in the amount of 100 percent of the rent that they actually paid).

⁹¹ MASS. GEN. LAWS ANN. ch. 239, § 8A (West).

⁹² Courts in Missouri, New Hampshire, New Jersey, New York, and Wisconsin have used the fair market value approach. *Kolb v. DeVille I Properties, LLC*, 326 S.W.3d 896 (Mo. Ct. App. W.D. 2010); *King v. Moorehead*, 495 S.W.2d 65 (Mo. Ct. App. 1973); *Adams v. Woodlands of Nashua*, 864 A.2d 322 (N.H. 2005); *Berzito v. Gambino*, 308 A.2d 17, 22 (N.J. 1973) (“tenant will be charged only with the reasonable rental value of the property in its imperfect condition during his period of occupancy”); *Kekllas v. Saddy*, 389 N.Y.S.2d 756, 759 (N.Y. Dist. Ct. 1976); *Pines v. Perssion*, 14 Wis. 2d 590, 596-97, 111 N.W.2d 409, 413 (1961) (“Since there was a failure of

Similar to the benefit of the bargain approach, the fair market value formula is subject to the challenges of determining the fair rental value of the property in its defective condition. An additional complaint, however, is that the fair market value approach would undermine the purposes of the warranty of habitability by allowing a landlord to rent substandard housing without liability so long as the landlord set the rent at an amount that reflected the fair rental value in the unwarranted condition.⁹³

Percentage reduction. Courts in about seven states have adopted the percentage reduction approach, either as its sole method of determining rent abatement⁹⁴ or as an acceptable alternative to one of the other approaches.⁹⁵ Five other jurisdictions appear to have adopted the approach by statute.⁹⁶

There is some confusion, however, as to exactly what this test measures. Some courts have framed the analysis solely in terms of physicality, focusing on the degree to which the defective conditions have affected the tenant's "use" or "use and enjoyment" of the premises⁹⁷ (e.g., a percentage reduction in the usable space). In a subtle but significant variation of this test,

consideration, respondents are absolved from any liability for rent under the lease and their only liability is for the reasonable rental value of the premises during the time of actual occupancy.”)

⁹³ *Von Pettis Realty, Inc. v. McKoy*, 519 S.E.2d 546, 548 (N.C. 1999); see also Ben H. Logan III and John J. Sable, *The Great Green Hope: The Implied Warranty of Habitability in Practice*, 28 Stan. L. Rev. 729 (1976) (“the landlord will have no incentive to improve the premises so long as the contract rent is no greater than the fair rental value of the unit in its actual condition”).

⁹⁴ Courts in Pennsylvania and Utah have adopted this approach. *Pugh v. Holmes*, 405 A.2d 897, 909-10 (Pa. 1979); *Wade v. Jobe*, 818 P.2d 1006, 1013 (Utah 1991).

⁹⁵ Courts in California, Illinois, Massachusetts, New Jersey, and Ohio have endorsed the use of this approach along with other approaches. *Green v. Superior Court*, 517 P.2d 1168, 1183 n.24 (Cal. 1974); *Glasoe v. Trinkle*, 479 N.E.2d 915, 921 (Ill. 1985); *McKenna v. Begin*, 362 N.E.2d 548, 552 (Mass. 1977); *Acad. Spires, Inc. v. Brown*, 268 A.2d 556, 561 (N.J. Dist. Ct. 1970); *Smith v. Padgett*, 32 Ohio St. 3d 344, 346-47, 513 N.E.2d 737, 739-40 (1987).

⁹⁶ Statutes in Florida, Maryland, Minnesota, Texas and Wisconsin could be construed to codify this approach. FLA. STAT. ANN. § 83.56 (West) (“an amount in proportion to the loss of rental value caused by the noncompliance.”); MD. CODE ANN., REAL PROP. § 8-211 (“fair and equitable to represent the existence of the conditions and defects”); MINN. STAT. § 504B.425 (“the extent to which any uncorrected violations impair the residential tenants’ use and enjoyment of the property”); TEX. PROP. CODE ANN. § 92.0563 (West) (“in proportion to the reduced rental value”); WIS. STAT. ANN. § 704.07 (“to the extent the tenant is deprived of the full normal use of the premises”).

On a variation of this approach, two other states award damages as a fixed percentage of the rent. DEL. CODE ANN. TIT. 25, § 5306 (two-thirds of the rent per diem); N.M. STAT. ANN. § 47-8-27.1 (one-third rent per day).

⁹⁷ *Green*, 517 P.2d 1168 at 1183 n.24 (“percentage corresponding to the relative reduction of use of the leased premises”); *Acad. Spires*, 268 A.2d 556 at 561 (“percentage reduction in use”); *Wade*, 818 P.2d at 1013 (“percentage by which the tenant's use and enjoyment of the premises has been reduced”); MINN. STAT. ANN. § 504B.425(e) (“extent to which any uncorrected violations impair the residential tenants' use and enjoyment of the property”); WIS. STAT. ANN. § 704.07(4) (“extent the tenant is deprived of the full normal use of the premises.”); *Smith*, 513 N.E.2d at 739-40 (“percentage reduction of a tenant's use of the leased premises”).

other courts focus on the degree to which the defect affected the “*value of the use and enjoyment of the premises.*”⁹⁸

Among the perceived benefits of this approach are that it would “generally obviate the need for expert testimony and reduce the cost and complexity of enforcing the warranty of habitability”⁹⁹ because the reduction in use and enjoyment is “within the capabilities of the layman.”¹⁰⁰ The Supreme Court of Pennsylvania also opined that this approach “better achieves the goal of returning the injured party . . . to the position he would have been in if performance had been rendered as warranted.”¹⁰¹ As the court explained:

The tenant bargains for habitable premises and the rental price reflects the value placed on those premises by the parties. Therefore, where the premises are rendered uninhabitable, in whole or in part, the contract price (fixed by the lease) is to be reduced by the percentage which reflects the diminution in use for the intended purpose.¹⁰²

One of the obvious drawbacks to this approach, however, is the subjective nature of the determination. As one court explained: “The ‘percentage reduction in use’ approach is indefinite and uncertain in that the defects do not impair an easily discernible fraction of the premises and different types of defects, although of the same degree of seriousness, do not impair the usability of the premises uniformly.”¹⁰³ Courts favoring this approach, however, have asserted that this determination “is no more difficult than valuing loss of consortium or emotional distress, which courts do every day just as if they know what they are doing.”¹⁰⁴

Another concern with the percentage reduction approach is the potential to penalize a landlord who has set the rent at a price that already reflects the defects in the property. That

⁹⁸ *McKenna*, 362 N.E.2d at 552 (“percentage reflecting the diminution in the value of the use and enjoyment of the leased premises”); *Pugh*, 405 A.2d 897 at 909-10 (same, quoting *McKenna*); *Glasoe v. Trinkle*, 479 N.E.2d at 921 (“diminution in the value and enjoyment of the premises”).

⁹⁹ *Wade*, 818 P.2d at 1013.

¹⁰⁰ *Pugh*, 405 A.2d 897 at 909.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Glasoe*, 479 N.E.2d at 921.

¹⁰⁴ *Cazares v. Ortiz*, 168 Cal. Rptr. 108, 111 (Cal. App. Dep’t Super. Ct. 1980). “The trial court can consider the area affected, the amount of time the occupant is exposed to it, the degree of discomfort the defect imposes, the quality of the defect as health threatening or just intermittently annoying, the extent to which such a defect causes tenants to find the premises uninhabitable and leave, et cetera and make a considered estimate as to the percentage reduction of habitability.” *Id.*

landlord would be “faced with a bludgeon of even lower rents” if the court applied a percentage reduction formula against the contract rent.¹⁰⁵

Finally, at the bottom line, it is difficult to discern how the percentage reduction approach differs from the other two approaches as they have been applied by the courts. As indicated earlier, a number of courts have relied upon percentage calculations in determining the “fair rental value” of the leased property in its defective condition. Those calculations seem virtually indistinguishable from a “percentage reduction” in the “value of the use and enjoyment of the premises.” In short, while the three approaches may appear to differ in theory, they have been applied in substantially the same manner.

3. Repair and Deduct

Slightly more than half of the states have enacted statutory provisions that allow a tenant to use self-help to make repairs to secure essential services that the landlord has failed to supply. Several others recognize this right by common law. There is significant variation among the states regarding the terms of this remedy, even among states that have enacted the URLTA.

a. URLTA provisions

The URLTA has two “repair and deduct” provisions. Section 4.103 covers minor defects, allowing the tenant to “cause the work to be done in a workmanlike manner” if the landlord fails to comply within 14 days after written notice from the tenant.¹⁰⁶ After submitting an itemized statement, the tenant may deduct “the actual and reasonable cost or the fair and reasonable value of the work” up to [\$100] or [half of one month’s] periodic rent.¹⁰⁷

Section 4.104(a)(1) permits a tenant to use self-help when the landlord has willfully or negligently failed to supply essential services (heat, hot water, electric, gas, etc.). It provides that the tenant may give written notice to the landlord (no time period is specified) and take “reasonable and appropriate measures to secure reasonable amounts” of such services and deduct the “actual and reasonable cost” from the rent.¹⁰⁸ Both repair provisions bar a tenant from using this option if the condition was caused by the deliberate or negligent act or omission of the tenant, a member of his family, or any other person on the premises with the landlord’s consent.

¹⁰⁵*Id.*

¹⁰⁶URLTA § 4.103.

¹⁰⁷The “\$ 100” and “half of one month’s periodic rent” terms are bracketed in the URLTA in recognition of the likelihood that states will differ on the appropriate amount.

¹⁰⁸URLTA §4.104.

b. States with URLTA-based statutes

Eight states have enacted both sections of the URLTA largely in their original form,¹⁰⁹ but six others have enacted only URLTA's section 4.104 provision regarding procurement of essential services.¹¹⁰ Four states have omitted both of these provisions from their URLTA-based statutes.¹¹¹ Even among states that generally follow one or both of the URLTA provisions, there is significant variation with respect to some terms, such as the length of notice required, the maximum amount deductible, who can make repairs, and what evidence must be provided to the landlord to substantiate the cost of the repairs. These variations are can be easily compared on Exhibit C2 (the chart of "Repair and Deduct" statutes).

c. Other states with statutory provisions (or common law)

Sixteen states have non-URLTA statutes that provide a "repair and deduct" option.¹¹² In addition, at least three other states have recognized a repair and deduct remedy through judicial rulings.¹¹³ One court, however, declined to recognize the remedy.¹¹⁴ As indicated on the "Repair and Deduct" chart, these statutes and court decisions vary widely in their details, although many touch on the same issues addressed in the URLTA.

There are several provisions that states have added to their statutes that the drafting committee may want to consider. Eight states, for example, have included a limit on the number

¹⁰⁹ Arizona, Kentucky, Massachusetts, Montana, Nevada, Oklahoma, Oregon, Rhode Island. ARIZ. REV. STAT. ANN. §§ 33-1363, 33-1364; KY. REV. STAT. ANN. §§ 383.635, 383.640; MASS. GEN. LAWS ANN. ch. 111, § 127L; MONT. CODE ANN. § 70-24-408; NEV. REV. STAT. ANN. §§ 118A.360, 380 (borrows from URLTA); OKLA. STAT. ANN. tit. 41, § 121; OR. REV. STAT. ANN. §§ 90.365, 90.368; R.I. GEN. LAWS ANN. § 34-18-30 (West).

¹¹⁰ Alaska, Connecticut, Iowa, Nebraska, South Carolina, and Tennessee. ALASKA STAT. ANN. § 34.03.180; CONN. GEN. STAT. ANN. § 47a-13; IOWA CODE ANN. § 562A.23; NEB. REV. STAT. § 76-1427; S.C. CODE ANN. § 27-40-630; TENN. CODE ANN. § 66-28-502.

¹¹¹ Alabama, Kansas, New Mexico, and Virginia.

¹¹² California, Delaware, Hawaii, Illinois, Louisiana Maine, Minnesota, Mississippi, Missouri, North Dakota, Ohio, South Dakota, Texas, Utah, Vermont, and Washington. CAL. CIV. CODE § 1942; DEL. CODE ANN. tit. 25, § 5307; HAW. REV. STAT. § 521-64 (West); 765 ILL. COMP. STAT. § 742/5; LA. CIV. CODE ANN. art. 2694; ME. REV. STAT. tit. 14, § 6026; MINN. STAT. § 504B.425; MISS. CODE ANN. § 89-8-15; MO. ANN. STAT. § 441.234; N.D. CENT. CODE ANN. § 47-16-13; OHIO REV. CODE ANN. § 5321.07; S.D. CODIFIED LAWS § 43-32-9; TEX. PROP. CODE ANN. § 92.0561; UTAH CODE ANN. § 57-22-6; VT. STAT. ANN. tit. 9, § 4459 (West); WASH. REV. CODE ANN. § 59.18.100 (West).

¹¹³ *Marini v. Ireland*, 265 A.2d 526 (N.J. 1970); *Jangla Realty Co. v. Gravagna*, 447 N.Y.S.2d 338 (Civ. Ct. 1981); *Pugh v. Holmes*, 405 A.2d 897 (Pa. 1979).

¹¹⁴ *Teller v. McCoy*, 253 S.E.2d 114 (W. Va. 1978).

of times that the repair and deduct option may be utilized.¹¹⁵ Five states provide that the option is not available if the landlord has been unable to remedy the condition because the tenant denied the landlord access to the premises if the circumstances were otherwise beyond the landlord's control.¹¹⁶ At least two states have provided that where the repairs are made to multi-unit dwellings, the tenant must give notice to the other tenants in the building.¹¹⁷ Two other states have addressed the situation in which the tenant's repairs cause injury or damage.¹¹⁸ Finally, one state made it clear that the landlord can temporarily curtail services when necessary to make repairs.¹¹⁹

4. Substitute Housing

As an alternative to rent abatement or securing their own services, Section 4.104 of the URLTA gives tenants the option of procuring "reasonable substitute housing" during the period in which a landlord fails to provide essential services. Eleven states with URLTA-based statutes

¹¹⁵ California, Hawaii, Mississippi, Missouri, Nevada, Oregon, Texas and Washington. CAL. CIV. CODE § 1942 (remedy not more than twice in any 12-month period); HAW. REV. STAT. § 521-64 (total costs "chargeable to the landlord's expense during each six-month period shall not exceed an amount equal to three months' rent"); MISS. CODE. ANN. § 89-8-15 (remedy not available if tenant has exercised it in the last six months); MO. ANN. STAT. § 441.234 ("tenant may not deduct in the aggregate more than the amount of one month's rent during any twelve-month period"); NEV. REV. STAT. ANN. §§ 118A.360 (landlord's liability limited to \$100 or one month's periodic rent within any 12-month period); OR. REV. STAT. ANN. § 90.368 (remedy not available if tenant "has previously used the remedy provided by this section for the same occurrence of the defect"); TEX. PROP. CODE ANN. § 92.0561 (remedy may be used "as often as necessary so long as the total repairs and deductions in any one month do not exceed one month's rent or \$500, whichever is greater"); WASH. REV. CODE ANN. § 59.18.100 (total costs of repairs deducted in any twelve-month period under this subsection shall not exceed two month's rent).

¹¹⁶ Maine, Massachusetts, Nebraska, Oregon, and Washington. ME. REV. STAT. tit. 14, § 6026 (remedy not available where the landlord is unreasonably denied access, nor where extreme weather conditions prevent the landlord from making the repair); MASS. GEN. LAWS ANN. ch. 111, § 127L A (tenant may not invoke the protection of this section if he has unreasonably denied the owner access to the dwelling unit and thereby prevented the owner from making necessary repairs); NEB. REV. STAT. § 76-1427 (section "not intended to cover circumstances beyond the landlord's control"); OR. REV. STAT. ANN. §§ 90.365, 90.368 (remedy not available if "tenant has prevented the landlord from making the repair"); WASH. REV. CODE ANN. § § 59.18.070, 59.18.090 (West)(alters notice period "if completion is delayed due to circumstances beyond the landlord's control, including the unavailability of financing").

¹¹⁷ HAW. REV. STAT. § 521-64 (West) ("Before correcting a condition affecting facilities shared by more than one dwelling unit, the tenant shall notify all other tenants sharing such facilities of the tenant's plans, and shall so arrange the work as to create the least practicable inconvenience to the other tenants."); MISS. CODE. ANN. § 89-8-15 (same).

¹¹⁸ ME. REV. STAT. tit. 14, § 6026 ("Whenever repairs are undertaken by or on behalf of the tenant, the landlord shall be held free from liability for injury to that tenant or other persons injured thereby."); WASH. REV. CODE ANN. § 59.18.100 (West) ("landlord whose property is damaged because of repairs performed in a negligent manner may recover the actual damages in an action against the tenant").

¹¹⁹ ARIZ. REV. STAT. ANN. § 33-1364 ("A landlord shall not terminate utility services . . . except as necessary to make needed repairs.").

have included this provision largely in its original form.¹²⁰ Four non-URLTA states have added similar provisions to their statutes.¹²¹ Conversely, five states have omitted this provision from their URLTA-based statutes.¹²²

Section 4.104(a) of URLTA excuses the tenant from paying rent for the period in which substitute housing is secured. At the same time, Section 4.104(b) provides that the tenant “may recover the actual and reasonable cost or fair and reasonable value of the substitute housing not in excess of an amount equal to the periodic rent[.]” The drafting committee should consider whether this is an appropriate result because it would seem to permit the tenant to recover the full amount of substitute housing (up to the contract rent) while also being excused from paying rent. If so, this measure of damages would overcompensate the tenant. While three URLTA-based statutes have adopted this language,¹²³ the majority have modified the provision to allow recovery only for any excess the tenant has to pay above the amount of the contract rent.¹²⁴

¹²⁰ALASKA STAT. ANN. § 34.03.180; ARIZ. REV. STAT. ANN. § 33-1364; CONN. GEN. STAT. ANN. § 47a-13; KY. REV. STAT. ANN. § 383.640; MONT. CODE ANN. § 70-24-408; NEB. REV. STAT. § 76-1427; OKLA. STAT. ANN. tit. 41, § 121; OR. REV. STAT. ANN. § 90.365 ; R.I. GEN. LAWS ANN. § 34-18-31; TENN. CODE ANN. § 66-28-502; VA. CODE ANN. § 55-248.23.

¹²¹See COLO. REV. STAT. § 38-12-503 (allowing a landlord to move a tenant into a new dwelling unit if the tenant’s current unit is uninhabitable, so long as the landlord pays the tenant’s moving costs); DEL. CODE ANN. tit. 25, §§ 5306, 5308 (West) (permitting tenant to secure substitute housing and recover damages representing the difference between rent payable under the rental agreement and all expenses necessary to obtain equivalent substitute housing for the remainder of the rental term); NEV. REV. STAT. ANN. § 118A.380 (tenant may procure comparable housing; “the rent for the original premises fully abates during this period” and tenant “may recover the actual and reasonable cost of that other housing which is in excess of the amount of rent which is abated”); ME. REV. STAT. tit. 14, § 6021(4)(C)(court may authorize tenant to temporarily vacate the dwelling unit, without paying rent to landlord, if the unit must be vacant during necessary repairs).

¹²²Alabama, Iowa, Kansas, New Mexico, and South Carolina.

¹²³NEB. REV. STAT. § 76-1427; R.I. GEN. LAWS ANN. § 34-18-31; TENN. CODE ANN. § 66-28-502.

¹²⁴Four states follow the URLTA in excusing the tenant from paying rent during the time the tenant is in substitute housing, but these states omitted the URLTA provision allowing the tenant to also recover for the costs of the substitute housing. KY. REV. STAT. ANN. § 383.640; MONT. CODE ANN. § 70-24-408; OKLA. STAT. ANN. tit. 41, § 121; VA. CODE ANN. § 55-248.23.

The remaining four states allow recovery the “excess” costs of the substitute housing. ALASKA STAT. ANN. § 34.03.180 (the tenant is excused from paying rent and may recover “the amount by which the actual and reasonable cost [of substitute housing] exceeds rent”); ARIZ. REV. STAT. ANN. § 33-1364 (tenant excused from paying rent and “if the periodic cost of such substitute housing exceeds the amount of the periodic rent, upon delivery by tenant of proof of payment for such substitute housing, tenant may recover from landlord such excess costs up to an amount not to exceed twenty-five per cent of the periodic rent which has been excused”); CONN. GEN. STAT. ANN. § 47a-13 (tenant excused from paying rent and “may recover the actual costs of such substitute housing, but in no event shall the tenant recover more than an amount equal to the amount of rent abated under this subsection”); OR. REV. STAT. ANN. § 90.365 (tenant excused from paying rent and may recover “the actual and reasonable cost or fair and reasonable value of comparable substitute housing in excess of the rent for the dwelling unit”).

Oregon’s statute defines comparable substitute housing as “a quality that is similar to or less than the quality of the dwelling unit with regard to basic elements including cooking and refrigeration services and, if

5. Other Consequential damages

Jurisdictions have reached differing conclusions as to whether tenants may recover consequential damages. Courts in a handful of states have declined to award consequential damages, particularly when such damages are not expressly provided under a statutory warranty.¹²⁵ One state's statute expressly prohibits the recovery of consequential damages for breach of the warranty of habitability¹²⁶ and another prohibits such recovery if the conditions were beyond the landlord's control.¹²⁷ At least ten jurisdictions, however, have permitted recovery of consequential damages, either by statute¹²⁸ or common law.¹²⁹

Where consequential damages are allowed, courts have applied general principles of contract law to determine whether particular types of damages are recoverable. Among the types of consequential damages that courts have allowed include increased utility bills;¹³⁰ reasonable out-of-pocket costs to repair the defect;¹³¹ and the cost of replacement heaters, child care, and other expenses necessitated by lack of heat and hot water in premises.¹³² The extent to which

warranted, upon consideration of factors such as location in the same area as the dwelling unit, the availability of substitute housing in the area and the expense relative to the range of choices for substitute housing in the area." OR. REV. STAT. ANN. § 90.365. The statute further provides that a tenant may choose substitute housing of relatively greater quality, but the tenant's damages shall be limited to the cost or value of comparable substitute housing. *Id.*

¹²⁵See *Wendt v. Barnum*, 2007 Mass. App. Div. 93, 2007 WL 1783870 (2007) (rejecting tenant's claim for reimbursement of repairs under implied warranty of habitability); *Chui v. City of Portland*, 788 A.2d 183 (Me. 2002) (asserting, without explanation, that consequential damages not recoverable under statutory warranty); *303 Beverly Group, L.L.C. v. Alster*, 735 N.Y.S.2d 908 (N.Y. App. Term 2001) (consequential damages not recoverable under statutory warranty); *Johnson v. Scandia Associates, Inc.*, 717 N.E.2d 24 (Ind. 1999) (consequential damages not recoverable for implied warranty of habitability, but would be available where warranty of habitability is express).

¹²⁶ME. REV. STAT. tit. 14, § 6021.

¹²⁷NEB. REV. STAT. § 76-1425.

¹²⁸IND. CODE ANN. § 32-31-8-6 (West); MASS. GEN. LAWS ANN. ch. 186, § 14 (West); NEB. REV. STAT. § 76-1425 (expressly prohibits consequential damages for circumstances beyond landlord's control, which implies such damages are recoverable otherwise).

¹²⁹*Von Pettis Realty, Inc. v. McKoy*, 135 N.C. App. 206, 519 S.E.2d 546 (1999) (under statutory warranty that did not specify measure of damages); *Estate of Vazquez v. Hepner*, 564 N.W.2d 426 (Iowa 1997) (common law implied warranty); *Creekside Apartments v. Poteat*, 116 N.C. App. 26, 446 S.E.2d 826 (1994) (statutory warranty); *Light v. Sheets*, 804 P.2d 1197 (Ore. Ct. App. 1991) (common law implied warranty); *Love v. Monarch Apartments*, 771 P.2d 79, 83 (Kan. Ct. App. 1989) (statutory warranty that did not specify damages); *Detling v. Edelbrock*, 671 S.W.2d 265 (Mo. 1984) (common law implied warranty); *Pugh v. Holmes*, 384 A.2d 1234, 1241 (Pa. 1978) (common law implied warranty).

¹³⁰*Fair v. Negley*, 390 A.2d 240, 242-43 (Pa. Super. Ct. 1978).

¹³¹*Poncz v. Loftin*, 607 N.E.2d 765 (Mass. App. Ct. 1993).

¹³²*In re Clark*, 96 B.R. 569 (Bankr. E.D. Pa. 1989).

courts have allowed recovery for tort-based claims, such as annoyance and inconvenience, emotional distress, damage to personal property, and personal injuries is discussed in Part III below.

6. Punitive damages

Jurisdictions also diverge on whether punitive damages are recoverable. A handful of courts have rejected claims for punitive damages, either because the implied warranty of habitability was essentially a contracts claim for which punitive damages are unavailable¹³³ or because punitive damages generally are not recoverable in that jurisdiction unless expressly provided for by statute.¹³⁴ Most statutes are silent on the issue, but it is worthy of note that at least three states that enacted the URLTA have omitted the punitive damages provisions of the Act.¹³⁵

Twenty-one jurisdictions permit recovery of some form of punitive damages in appropriate cases of fraud, intentional, malicious, or wilful and wanton conduct.¹³⁶ Twenty states have express provisions in their statutes. Sixteen of those statutes follow the approach in Section 4.107 of the URLTA of awarding some multiple of the rent or the tenant's damages as a penalty.¹³⁷ Of the remaining states, two provide for specific dollar amounts¹³⁸ and the other two

¹³³ *Bernstein v. Fernandez*, 649 A.2d 1064, 1074 (D.C. 1991); *Miller v. C.W. Myers Trading Post, Inc.*, 355 S.E.2d 189, 195 (N.C. Ct. App. 1987); compare *Harris v. Soley*, 756 A.2d 499, 507 (Me. 2000) (punitive damages are not available for a mere breach of contract, but “the existence of a separate tort may support a punitive damage award”).

¹³⁴ *Ganheart v. Executive House Apts.*, 671 So. 2d 525, 529 (La. Ct. App. 1996).

¹³⁵ IOWA CODE ANN. § 562A.23 (West); OKLA. STAT. ANN. TIT. 41, § 121 (West); VA. CODE ANN. § 55-248.23 (West).

¹³⁶ Alabama, Alaska, Arizona, Connecticut, Idaho, Kansas, Kentucky, Massachusetts, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, and Vermont.

¹³⁷ ALA. CODE § 35-9A-407 (treble rent); ALASKA STAT. ANN. § 34.03.210 (West)(1.5 times damages); ARIZ. REV. STAT. ANN. § 33-1367 (double rent or damages); CONN. GEN. STAT. ANN. § 47a-13 (double rent); IDAHO CODE ANN. § 6-317 (treble actual damages); KAN. STAT. ANN. § 58-2563 (1.5 times rent or damages); KY. REV. STAT. ANN. § 383.655 (West) (treble rent); MASS. GEN. LAWS ANN. ch. 186, § 14 (West)(greater of actual and consequential damages or treble rent and possible criminal penalty); MONT. CODE ANN. § 70-24-411 (treble rent or damages); NEB. REV. STAT. § 76-1430 (treble rent); N.H. REV. STAT. ANN. §§ 540-A:4, 358-A:10 (at least double but not more than treble actual damages or \$1000); N.M. STAT. ANN. § 47-8-48 (double rent); OR. REV. STAT. ANN. § 90.375 (West) (double rent or actual damages); R.I. GEN. LAWS ANN. § 34-18-34 (West) (treble rent or actual damages); S.C. CODE ANN. § 27-40-660 (treble rent or double actual damages); S.D. CODIFIED LAWS § 43-32-6 (double rent).

¹³⁸ NEV. REV. STAT. ANN. § 118A.390 (West) (up to \$2,500); TEX. PROP. CODE ANN. § 92.0563 (West) (one month's rent plus \$500).

simply provided that punitive damages are recoverable.¹³⁹ One state has allowed punitive damages by common law.¹⁴⁰

7. Attorney Fees

Jurisdictions differ as to whether attorney fees are recoverable for breach of the warranty of habitability. More than half of the states permit tenants to recover attorney fees from landlords under statutory warranty provisions.¹⁴¹ Reciprocally, some statutes would permit the landlord to recover attorney fees if the tenant's claim for rent withholding was without merit.¹⁴² One court also held that landlords may claim fees after successfully defending against a tenant's warranty claim where there is an attorney fee provision in the lease.¹⁴³

Some jurisdictions allow recovery of attorney fees only if the landlord's conduct is willful or unreasonable.¹⁴⁴ And a handful of jurisdictions permit recovery only if the lease had an attorney fee provision.¹⁴⁵ In cases where attorneys fees have not been recoverable directly under

¹³⁹ N.Y. REAL PROP. LAW § 235-a (McKinney); TENN. CODE ANN. § 66-28-504 (West).

¹⁴⁰ *Hilder v. St. Peter*, 478 A.2d 202 (Vt. 1984).

¹⁴¹ ALA. CODE § 35-9A-401; ARIZ. REV. STAT. ANN. § 33-1364; CAL. CIV. CODE § 1942.4 (West); COLO. REV. STAT. ANN. § 38-12-507 (West) (if allowed by lease); CONN. GEN. STAT. ANN. § 47a-13 (West); FLA. STAT. ANN. § 83.48 (West); IDAHO CODE ANN. § 6-324 (West); IND. CODE ANN. § 32-31-8-6 (West); IOWA CODE ANN. § 562A.21 (West); KY. REV. STAT. ANN. § 383.640 (West); MASS. GEN. LAWS ANN. ch. 186, § 14 (West); MINN. STAT. § 504B.425 (not to exceed \$500); MONT. CODE ANN. § 70-24-442; NEB. REV. STAT. § 76-1425; N.H. REV. STAT. ANN. § 540-A:4 (West); N.M. STAT. ANN. § 47-8-48 (West); N.D. CENT. CODE ANN. § 47-16-13.6 (West); OKLA. STAT. ANN. TIT. 41, § 105 (West); OR. REV. STAT. ANN. § 90.255 (West); R.I. GEN. LAWS ANN. § 34-18-28 (West); S.C. CODE ANN. § 27-40-610; TENN. CODE ANN. § 66-28-501 (West); TEX. PROP. CODE ANN. § 92.005 (West); UTAH CODE ANN. § 57-22-6 (West); VT. STAT. ANN. TIT. 9, § 4458 (West); VA. CODE ANN. § 55-248.26 (West); WASH. REV. CODE ANN. § 59.18.115 (West) (if lease provides to either party).

¹⁴² At least six states have enacted the URLTA's provision allowing a landlord to recover attorney fees if the tenant's claim "is without merit and not raised in good faith[.]" ALA. CODE § 35-9A-405; IOWA CODE ANN. § 562A.24; KY. REV. STAT. ANN. § 383.645 (West); NEB. REV. STAT. § 76-1428; R.I. GEN. LAWS ANN. § 34-18-32; S.C. CODE ANN. § 27-40-640. Three other states have similar provisions: DEL. CODE ANN. TIT. 25, § 5306 (for wrongful rent withholding under the statute); N.H. REV. STAT. ANN. § 540-A:4(X) (for frivolous claim by tenant); VA. CODE ANN. § 55-248.25 (if tenant has raised a defense in bad faith or has caused the violation or has unreasonably refused entry to the landlord for the purpose of correcting the condition).

¹⁴³ *Thenbe v. Ansonia Assocs.*, 640 N.Y.S.2d 552 (N.Y. App. Div. 1996) (under attorney fee provision in the lease).

¹⁴⁴ Arizona, Connecticut, Iowa, Massachusetts, Nebraska, New Hampshire, Rhode Island, Virginia.

¹⁴⁵ COLO. REV. STAT. ANN. § 38-12-507 (West) (if the lease contains a provision "for either party in an action related to the rental agreement to obtain attorney fees and costs"); N.Y. MCKINNEY'S REAL PROPERTY LAW § 234 (providing that where lease permits one party to recover attorney fees for actions to enforce the contract, the same right is available to the other party); WASH. REV. CODE § 4.84.330 (where lease specifically provides for attorney's fees to enforce the provisions of the lease, "the prevailing party, whether he is the party specified in the contract or lease or not, shall be entitled to reasonable attorney's fees"); *Fairchild v. Park*, 109 Cal. Rptr. 2d 442, 445-46 (Cal. App. Ct.

a warranty of habitability claim, tenants have successfully obtained these fees by combining a warranty of habitability claim with a related cause of action, such as tort claims or under a consumer fraud or unfair trade or deceptive practices act.¹⁴⁶

8. Injunctive Relief

Thirty-three states expressly permit the tenant to obtain injunctive relief or specific performance for the landlord's breach of the warranty of habitability. Twenty states have adopted or generally follow Section 4.101 of the URLTA, which simply provides that a tenant "may obtain injunctive relief" for a material noncompliance with the Act's warranty provisions.¹⁴⁷ Although the URLTA does not provide any further guidance with respect to this remedy, seven other jurisdictions expand on the URLTA language, making it clear that the

2001) (breach of the warranty of habitability is "an action on the contract that authorizes the recovery of fees pursuant to an attorney fee provision in the rental agreement" (quoting 9 Miller & Starr, Cal. Real Estate (2001 supp.) § 30:17)); *Tulley v. Sheldon*, 982 A.2d 954, 957 (N.H. 2009); *Permanent Mission of Republic of Estonia to the United Nations v. Thompson*, 477 F. Supp. 2d 615 (S.D. N.Y. 2007); *Brickler v. Myers Const., Inc.*, 92 Wash. App. 269, 275, 966 P.2d 335, 338 (Wash. Ct. App. 1998); *Tower Mgmt., Inc. v. Henry*, 687 S.W.2d 564, 565 (Mo. Ct. App. 1984); compare *Wendt v. Barnum*, 2007 Mass. App. Div. 93 (Dist. Ct. 2007) (breach of the common law implied warranty of habitability does not entitle plaintiff to attorney fees in the absence of an attorney fee provision in the lease).

¹⁴⁶ See, e.g., *Dean v. Hill*, 171 N.C. App. 479, 486, 615 S.E.2d 699, 703 (N.C. Ct. App. 2005) (renting home in uninhabitable condition allowed recovery under unfair or deceptive trade practices act); *In re Clark*, 96 B.R. 569, 581-82 (Bankr. E.D. Pa. 1989) (deceptive practices statute); *49 Prospect St. Tenants Ass'n v. Sheva Gardens, Inc.*, 547 A.2d 1134 (N.J. App. Div. 1988) (consumer fraud act); *Wolfberg v. Hunter*, 432 N.E.2d 467 (Mass. 1982) (unfair or deceptive practices statute); *Dorgan v. Loukas*, 473 N.E.2d 1151, 1153 (Mass. Ct. App. 1985) (consumer protection law).

Other jurisdictions, however, have declined to allow recovery under consumer or trade statutes for uninhabitability claims. See *Detling v. Edelbrock*, 671 S.W.2d 265, 272 (Mo. 1984) (rejecting claims under Merchandising Practices Act); *Carlie v. Morgan*, 922 P.2d 1, 6 (Utah 1996) (Consumer Sales Practices Act does not provide a remedy for uninhabitable condition of apartment).

¹⁴⁷ Alabama, Alaska, Arizona, Colorado, Indiana, Iowa, Kansas, Kentucky, Montana, Nebraska, New Mexico, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, Virginia. ALA. CODE § 35-9A-401; ALASKA STAT. ANN. § 34.03.160; ARIZ. REV. STAT. ANN. § 33-1361; COLO. REV. STAT. ANN. § 38-12-507; IND. CODE ANN. § 32-31-8-6; IOWA CODE ANN. § 562A.21; KAN. STAT. ANN. § 58-2559; KY. REV. STAT. ANN. § 383.625; MONT. CODE ANN. § 70-24-406; NEB. REV. STAT. § 76-1425; N.M. STAT. ANN. § 47-8-27.1; OR. REV. STAT. ANN. § 90.360; R.I. GEN. LAWS ANN. § 34-18-28; S.C. CODE ANN. § 27-40-610; S.D. CODIFIED LAWS § 43-32-6; TENN. CODE ANN. § 66-28-501; VT. STAT. ANN. tit. 9, § 4458; VA. CODE ANN. § 55-248.21; compare MASS. GEN. LAWS ANN. ch. 186, § 14 (West) (courts shall have jurisdiction in equity to restrain violations); N.H. REV. STAT. ANN. § 540-A:4 (court may enter order prohibiting the defendant from continuing the activity or activities).

injunctive relief may include a court order for the landlord to correct the conditions.¹⁴⁸ Six other states use “specific performance” terminology.¹⁴⁹

B. Tort Remedies

Only one state expressly provides for tort remedies in its warranty of habitability statute.¹⁵⁰ Two others expressly state that their warranty statutes are not intended to alter existing tort law.¹⁵¹ The URLTA does not expressly provide for tort remedies, but the comment to Section 4.101 states: “Remedies available to the tenant pursuant to Section 4.101 are not exclusive (see Section 1.103).”

Courts have reached varying conclusions as to whether the URLTA – or other warranty statutes like it – would allow recovery of tort damages. Focusing on the lease as a contract, some courts have concluded that contract remedies are the only relief available for breach of the warranty.¹⁵² A substantial number of jurisdictions, however, have permitted the recovery of tort

¹⁴⁸ Maine, Maryland, Minnesota, Nevada, Ohio, Texas, and Wyoming. ME. REV. STAT. tit. 14, § 6021; MD. CODE ANN., REAL PROP. § 8-211; MINN. STAT. § 504B.425; NEV. REV. STAT. ANN. § 118A.390; OHIO REV. CODE ANN. § 5321.07; TEX. PROP. CODE ANN. § 92.0563; WYO. STAT. ANN. § 1-21-1206.

¹⁴⁹ California, Connecticut, Idaho, New York, Pennsylvania and the District of Columbia. CAL. CIV. CODE § 1942.4; CONN. GEN. STAT. ANN. § 47a-14h; IDAHO CODE ANN. § 6-320; *Pugh v. Holmes*, 405 A.2d 897 (Pa. 1979); *Javins v. First Nat. Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970); compare *Mahlmann v. Yelverton*, 439 N.Y.S.2d 568, 571 (Civ. Ct. 1980) (court declined to allow claim for tort damages, but noted legislative intent to allow the full range of contract remedies, including specific performance).

¹⁵⁰ MASS. GEN. LAWS ANN. CH. 186, § 19 (West) (“The tenant or any person rightfully on said premises injured as a result of the failure to correct said unsafe condition within a reasonable time shall have a right of action in tort against the landlord or lessor for damages.”). It is possible that tort damages also are recoverable under the Texas statute. It provides that tenants may recover “actual damages.” The statute does not specify what constitutes actual damages, but provides that tenants may also recover “court costs and attorney's fees, excluding any attorney's fees for a cause of action for damages relating to a personal injury.” TEX. PROP. CODE ANN. § 92.0563 (West). The latter provision could be construed to imply that personal injury damages are recoverable in a warranty action.

¹⁵¹ MINN. STAT. ANN. § 504B.161 (“Nothing in this section shall be construed to alter the liability of the landlord or licensor of residential premises for injury to third parties.”); NEB. REV. STAT. § 76-1419 (“The obligations imposed by this section are not intended to change existing tort law in the state.”).

¹⁵² Courts in Connecticut, Illinois, Indiana, Iowa, Kentucky, New York, Oklahoma, Pennsylvania, and Virginia have allowed only contract damages. *Bourke v. Stamford Hosp.*, 696 A.2d 1072 (Conn. Super. Ct. 1996); *Abram v. Litman*, 150 N.E.2d 370, 373 (Ill. App. Ct. 1986) (rejecting personal injury claims under implied warranty of habitability); *Schuman v. Kobets*, 760 N.E.2d 682, 685 (Ind. Ct. App. 2002); *Estate of Vazquez v. Hepner*, 564 N.W.2d 426 (Iowa 1997); *Jaimes v. Thompson*, 318 S.W.3d 118, 120 (Ky. Ct. App. 2010); *Alexander v. Westminster Presbyterian Church*, 719 N.Y.S.2d 457, 460 (N.Y. Sup. Ct. 2000) (statutory provision limited to economic loss; does not provide for damages resulting from personal injury); *Kirchner v. Chattanooga Choo Choo*, 10 F.3d 737, 739 (10th Cir. 1993) (interpreting Oklahoma statute) *McIntyre ex rel. Howard v. Philadelphia Hous. Auth.*, 816 A.2d 1204, 1209 (Pa. Commw. Ct. 2003); *Isbell v. Commercial Inv. Associates, Inc.*, 273 Va. 605, 614, 644 S.E.2d 72, 76 (2007) (interpreting URLTA statute); see also Restatement (Second) of Property – Landlord and Tenant § 10.2 (1977) (listing contract damages).

damages – either as a remedy for the breach of warranty itself or by using the breach of warranty as the basis for a negligence claim¹⁵³ or under other tort-based law.¹⁵⁴ Similarly, the Restatement (Second) of Property has taken the position that breach of the implied warranty of habitability constitutes negligence per se.¹⁵⁵

¹⁵³ Alaska, Delaware, Florida, Georgia, Hawaii, Indiana, Louisiana, Mississippi, Montana, New Jersey, Ohio, Oregon, Pennsylvania, South Carolina, Washington, West Virginia, Wisconsin, and Wyoming allow some form of tort damages for the breach of the warranty of habitability. See *Newton v. Magill*, 872 P.2d 1213, 1216-18 (Alaska 1994) (“it would be inconsistent with a landlord's continuing duty to repair premises imposed under the URLTA to exempt from tort liability a landlord who fails in this duty”); *New Haverford P'ship v. Stroot*, 772 A.2d 792 (Del. 2001) (negligence per se based upon landlord-tenant statute); *Mansur v. Eubanks*, 401 So.2d 1328 (Fla.1981)(landlord's duty of care in negligence action “corresponds to” statutory warranty); *Thompson v. Crownover*, 381 S.E.2d 283, 284–85 (Ga. 1989)(statutory warranty); *Boudreau v. Gen. Elec. Co.*, 625 P.2d 384, 390 (Haw. 1981) (implied warranty of habitability extends to personal injuries); *Old Town Dev. Co. v. Langford*, 349 N.E.2d 744, 762 (Ind. Ct. App.1976)(breach of implied warranty of habitability includes personal injury damages under traditional negligence principles); *Gennings v. Newton*, 567 So. 2d 637, 642 (La. Ct. App. 1990) (“A tenant is entitled to damages for uninhabitable premises, including mental anguish, anxiety, and worry.”); *Sample v. Haga*, 824 So. 2d 627 (Miss. Ct. App. 2001) (implied warranty of habitability allows for tort remedies); *Willden v. Neumann*, 189 P.3d 610, 613 (Mont. 2008) (statutory warranty is negligence per se); *Dwyer v. Skyline Apartments, Inc.*, 123 N.J.Super. 48, 301 A.2d 463 (1973) (landlord-tenant statute created a duty for negligence claim); *Sikora v. Wenzel*, 727 N.E.2d 1277, 1282 (Ohio 2006) (violation of statute is negligence per se); *Humbert v. Sellars*, 708 P.2d 344 (Ore. 1985) (landlord may be held liable in tort for breach of statutory warranty); *In re Clark*, 96 B.R. 569, 579 (Bankr. E.D. Pa. 1989) (allowing annoyance and inconvenience for breach of implied warranty); *Watson v. Sellers*, 385 S.E.2d 369, 373 (S.C. Ct. App. 1989) (URLTA creates cause of action in tort); *Hilder v. St. Peter*, 478 A.2d 202 (Vt. 1984) (annoyance/discomfort under implied warranty); *Tucker v. Hayford*, 75 P.3d 980 (Wash. App. Ct. 2003)(URLTA allows recovery of personal injuries); *Teller v. McCoy*, 162 W.Va. 367, 253 S.E.2d 114 (1978) (annoyance and inconvenience for breach of implied warranty); *Antwaun A. ex rel. Muwonge v. Heritage Mut. Ins. Co.*, 596 N.W.2d 456 (Wis. 1999) (tenant may recover for personal injuries under implied warranty); *Merrill v. Jansma*, 86 P.3d 270, 287 (Wyo. 2004)(statutory warranty establishes duty for personal injury claim).

¹⁵⁴ Arizona, California, Idaho, Maine, Massachusetts, Missouri, Nevada, New Hampshire, New York, Tennessee, Utah, and Vermont have permitted recovery of damages under negligence or other tort theories. See *Thomas v. Goudreault*, 786 P.2d 1010 (Ariz. Ct.App.1989) (URLTA not exclusive remedy); *Stoiber v. Honeychuck*, 162 Cal. Rptr. 194, 198 (Cal. Ct. App. 1980) (statutory warranty not exclusive remedy); *Stephens v. Stearns*, 678 P.2d 41 (Idaho 1984) (common law negligence but supported by statutory warranty of habitability); *Nichols v. Marsden*, 483 A.2d 341, 343 (Me. 1984) (liability under common law exceptions to caveat lessee rule); *Orsono v. Simone*, 779 N.E.2d 645 (Mass. 2002); *Detling v. Edelbrock*, 671 S.W.2d 265, 272 (Mo. 1984) (act is cumulative of other remedies); *Turpel v. Sayles*, 692 P.2d 1290 (Nev. 1985) (holding landlord to ordinary negligence standards); *Sargent v. Ross*, 308 A.2d 528 (N.H. 1973) (“A landlord must act as a reasonable person under all of the circumstances including the likelihood of injury to others, the probable seriousness of such injuries, and the burden of reducing or avoiding the risk.”); *Curry v. New York City Housing Authority*, 77 A.D.2d 534, 430 N.Y.S.2d 305 (1980)(“landlords owe a duty of ‘reasonable care’ under the circumstances”); *Wilcox v. Hines*, 46 S.W. 297, 299 (Tenn. 1898) (landlord has “ordinary case of liability for personal misfeasance, which runs through all the relations of individuals to each other”); *Stephenson v. Warner*, 581 P.2d 567 (Utah 1978) (“landlord is bound by the usual standard of exercising ordinary prudence and care to see that premises he leases are reasonably safe and suitable for intended uses”); *Favreau v. Miller*, 591 A.2d 68, 73 (Vt. 1991) (common law negligence).

¹⁵⁵ Restatement (Second) of Property § 17.6 (1977) states:

A landlord is subject to liability for physical harm caused to the tenant and others upon the leased property with the consent of the tenant or his subtenant by a dangerous condition existing before or arising after the tenant has taken possession, if he has failed to exercise reasonable care to repair

This divergence of views is not surprising given that warranty law is a hybrid of contract and tort theories.¹⁵⁶ Although it is commonly viewed as a contracts doctrine today, its origins lie in the tort law of deceit.¹⁵⁷ Thus, there is a “fine, albeit distinguishable, line between a cause of action based on negligence and one based on breach of an implied warranty”¹⁵⁸

Under a negligence theory, the landlord has a duty, based on common law or statute, to remedy defective lead-based hazards and fails to use reasonable care to do so. Under a warranty theory, the landlord has an obligation to ensure that the premises are fit for human habitation at the inception of the tenancy and fails to fulfill this obligation regarding defective lead-based hazards. “As a consequence, liability for negligence and for breach of warranty turn out to be virtually the same: the former for failure to use reasonable care to cure a known (or constructively known) defect, and the latter for *breach of a covenant not to permit a known (or constructively known) defect*.”¹⁵⁹

The hybrid nature of a warranty claim is reflected in the Uniform Commercial Code, which recognizes that breach of a warranty gives rise not only to the typical contract damages – the difference between “the value of the goods accepted and the value they would have had if they had been as warranted” – but also to incidental or consequential damages that include “injury to person or property proximately resulting from any breach of warranty.”¹⁶⁰

the condition and the existence of the condition is in violation of: (1) an implied warranty of habitability; or (2) a duty created by statute or administrative regulation.

The comment to this section states that violation of a statutory duty would constitute negligence per se and that breach of the common law implied warranty of habitability should be treated analogously. *Id.* cmt. a.

¹⁵⁶ Prosser described warranty law as “a freak hybrid born of the illicit intercourse of tort and contract.” William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 Yale L.J. 1099, 1126 (1960).

¹⁵⁷ *Id.*

¹⁵⁸ *Lovick v. Nigro*, 1997 WL 112806 (Conn. Super. Ct. 1997).

¹⁵⁹ *Id.* (quoting *George Wash. Univ. v. Weintraub*, 458 A.2d 43, 52 (D.C.App.1983, Ferren, J. dissenting)).

¹⁶⁰ U.C.C. §§ 2-715(2)(b)(sales), 2A-520(2)(b)(leases).

Personal injury¹⁶¹ and damage to personal property¹⁶² are among the common types of tort damages that courts have found recoverable for habitability-based claims. A few courts have also permitted recovery for emotional distress, discomfort and annoyance, and “deprivation and humiliation.”¹⁶³ As one court explained, “discomfort and annoyance are the common injuries caused by each breach and hence the true nature of the general damages the tenant is claiming.”¹⁶⁴ At least two jurisdictions, however, have enacted statutes that expressly prohibit the recovery of damages for mental suffering.¹⁶⁵

Interestingly, while Vermont has allowed recovery for annoyance or emotional damages as a matter of contract law, the Vermont Supreme Court declined to extend the warranty to personal injuries.¹⁶⁶ In that court’s view, tort doctrine provides the more appropriate standards for determining the duties and liabilities of the parties.

Where a tenant leases substandard premises, she ought recover from the landlord her excess rental payments, her consequential damages for “annoyance and discomfort” and,

¹⁶¹ See, e.g., *Boudreau v. Gen. Elec. Co.*, 625 P.2d 384, 390 (Hawaii 1981)(injuries from washer-dryer explosion); *Edie v. Gray*, 121 P.3d 516, 520 (Mont. 2005) (injuries from improperly lighted stairwell); *Shroades v. Rental Homes, Inc.*, 427 N.E.2d 774, 778 (Ohio 1981) (injuries from collapsed stair); *Humbert v. Sellars*, 708 P.2d 344 (Ore. 1985) (slip and fall on wet patio); *Lian v. Stalick*, 25 P.3d 467 (Wash. Ct. App. 2001) (injuries from defective steps).

¹⁶² See, e.g., *Fairchild v. Park*, 109 Cal. Rptr. 2d 442 (Cal. App. Ct. 2001) (personal property lost in fire recovered under implied warranty of habitability); *Stone v. Linden Real Estate, Inc.*, 210 P.3d 866, 871 (Okla. 2009) (statutory remedies are not tenant’s exclusive remedies for personal property damage claim). *But see Elkman v. Southgate Owners Corp.*, 233 A.D.2d 104, 649 N.Y.S.2d 138 (1st Dep’t 1996) (loss or diminution in the value of personal property is not recoverable for a breach of the implied warranty of habitability).

¹⁶³ Courts in Arizona, California, Louisiana, Massachusetts, Pennsylvania, Vermont and West Virginia have indicated they would allow recovery for these types of damages. See *Thomas v. Goudreault*, 786 P.2d 1010, 1017 (Ariz. Ct. App. 1989) (“the types of harm protected under the Act provide a basis for tort recovery for mental distress caused by the breach”); *Stoiber v. Honeychuck*, 162 Cal.Rptr. 194 (Cal. App. Ct. 1980); *Gennings v. Newton*, 567 So. 2d 637, 642 (La. Ct. App. 1990) (damages for “mental anguish, anxiety, and worry”); *Simon v. Solomon*, 431 N.E.2d 556 (Mass. 1982)(reckless infliction of emotional distress for outrageous omission to act when water and sewage from an adjoining area flooded their apartment approximately thirty times); *In re Clark*, 96 B.R. 569, 577 (Bankr. E.D. Pa. 1989)(damages for “deprivation and humiliation”); *Hilder v. St. Peter*, 478 A.2d 202 (Vt. 1984) (“damages for tenant’s discomfort and annoyance”); *Teller v. McCoy*, 253 S.E.2d 114 (W.Va. 1978) (damages “for annoyance and inconvenience proven to have resulted from the breach”).

¹⁶⁴ *Stoiber*, 162 Cal. Rptr. at 199 (quoting M. Moskowitz, *The Implied Warranty of Habitability: A New Doctrine Raising New Issues*, 62 Cal.L.Rev. 1444, 1470–71 (1974)); see also *Teller*, 253 S.E.2d at 129:

The typical residential tenant rents a dwelling for shelter, not profit. When the warranty is breached, he loses, instead, such intangibles as the ability to take a bath or use hot water as frequently as he would like, he may be forced to worry about the health of his children endangered by rats, roaches, or other undesirable pests, or he may be denied the use of certain rooms in the apartment because there is odor, severe water leakage, or no heat.

¹⁶⁵ UTAH CODE ANN. § 57-22-6; WYO. STAT. ANN. § 1-21-1203.

¹⁶⁶ *Favreau v. Miller*, 591 A.2d 68, 73 (Vermont 1991).

in certain instances, punitive damages. . . . But where the tenant seeks a damage award for her personal injuries, other questions arise: What caused the injuries? Were they the result of the landlord's breach? Did they flow from the tenant's own carelessness? The law of negligence is best suited to answer these questions and has developed rules for their accommodation.¹⁶⁷

A recent law review article challenged this analysis. Professor Lonegrass acknowledged that “[t]he strongest reason for relegating claims for consequential losses to tort is the policy-based preference against imposing strict liability on landlords.”¹⁶⁸ Nevertheless, she asserted that imposing liability based upon fault “is not entirely foreign to American contract law.”¹⁶⁹

Moreover, Professor Lonegrass noted “a number of anomalies” that result from a strict bifurcation of personal injury and property damage claims from contract claims for economic harm. First, as noted above, traditional contract damages fail to compensate for the tenant’s intangible losses, such as discomfort and worry over dangers. Second, she asserted that “the complete removal of claims for consequential losses from the realm of contract has unintended consequences.”¹⁷⁰

One example cited in the article relates to a tenant’s ability to bring a “retaliatory eviction” claim against a landlord who has sought retribution against a tenant who has asserted his rights under the warranty of habitability.¹⁰⁰ Professor Lonegrass noted that retaliatory eviction remedies “may be available only when the aggrieved tenant has brought a contract-based warranty claim, and not in connection with a tort-based claim”; as a result, “tenants who are physically injured or suffer property damage as a result of a defect in the premises are anomalously less protected than those who suffer mere inconvenience and out-of-pocket expenses associated with repairs.”¹⁷¹

CONCLUSION

The URLTA was at the forefront of a wave of legislation recognizing a warranty of habitability in residential leases and remains a relevant resource today. The drafting committee should consider, however, whether modifications are desirable to bring the Act up to date with

¹⁶⁷*Id.* at 73.

¹⁶⁸Melissa T. Lonegrass, *Convergence in Contort: Landlord Liability for Defective Premises in Comparative Perspective*, 85 Tul. L. Rev. 413, 432 (2010).

¹⁶⁹*Id.* (citing Eric A. Posner, *Fault in Contract Law*, 107 Mich. L. Rev. 1431 (2009), which catalogs “fault-like notions,” such as good faith and best efforts, materiality of a breach, and terms that are implied to ensure that obligations are reasonable rather than absolute).

¹⁷⁰*Id.* at 432.

¹⁷¹*Id.* at 432-33 (citing *Helfrich v. Valdez Motor Corp.*, 207 P.3d 552 (Alaska 2009), which rejected a retaliatory eviction claim because the plaintiff’s claim was brought in tort, rather than under the implied warranty of habitability).

the continued progress in this area. More specifically, the committee should consider the following issues:

1. Whether the substantive standards of Section 2.104 should be modified
 - a. Is there any desire to add, delete, or modify items included in the list of landlord obligations, such as:
 - removing subsection (1)(b) as unnecessary duplication of (1)(a)'s implicit requirements?
 - combining the waiver provisions in Section 2.104(c) and (d) into one paragraph that applies to all types of dwellings?
 - adding some of the additional requirements that other states have imposed, such as working locks, smoke/carbon monoxide detectors, and prevention of mold or other tenants' use of their premises for drug use/manufacture?
 - b. Is there any desire to restructure the provisions, as some states have done?
2. Whether modifications of the remedies provisions are desirable?
 - a. Should Section 4.101 be amended to clarify whether additional damages may be recovered in addition to terminating the lease and, if so, how are they calculated?
 - b. Should Section 4.101 be amended to provide further guidance on what injunctive relief is available (in addition to terminating the lease)?
 - c. Should Section 4.103's repair and deduct remedy be modified:
 - to bring the \$100 limit up to today's dollar value (or removed)?
 - to limit the number a times a tenant may employ "repair and deduct"
 - to prohibit "repair and deduct" if the tenant has denied the landlord access to the premises?
 - to allocate liability for damages/injuries caused by tenant repairs?
 - d. Should Section 4.104 be amended to provide express guidance on how damages should be calculated?
 - What formula is preferred for determining rent abatement/damages if the tenant remains in possession?
 - If a fair market value approach is used, is expert testimony required to establish fair market value?

- e. Should Section 4.104's compensation for substitute housing be amended to limit recovery to any *excess* above the amount of the contract rent?
 - f. Should Sections 4.104 and/or 4.105 be amended to explicitly require a tenant to make rent payments into an escrow account until a court determines whether a landlord's breach was material?
 - g. Should Sections 4.101 and 4.104 be amended to clarify whether other consequential damages are recoverable?
 - h. Should the Act provide further clarification regarding the availability of tort remedies?
 - i. Is there any desire to modify the provisions regarding recovery of attorney fees?
3. Whether to modify the scope of the warranty provisions (or the Act in general)
- a. Should the warranties govern manufactured/mobile homes?
 - b. Should the URLTA prohibit a tenant from enforcing warranty remedies if delinquent in rent or in violation of other lease obligations?