# Notes

## Landlord-Tenant Reform: Arizona's Version of the Uniform Act

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In 1973 the Arizona legislature effected major reforms in landlord-tenant law by enacting the *Arizona Residential Landlord and Tenant Act*[1] [ARLTA]. The ARLTA, which radically altered many of the basic principles which have long governed the rental of dwelling units in Arizona, is a product of recent efforts by legal scholars to bring about broad legislative reform of landlord-tenant law. This movement had its inception in a tentative draft of the *Model Residential Landlord-Tenant Code*[2] [*Model Code*] which was intended to be a proposal for reform and a vehicle for further discussion of landlord-tenant problems.[3] The *Model Code*, in turn, provided a basis for the *Uniform Residential Landlord and Tenant Act*[4] [*Uniform Act*] promulgated by the National Commissioners on Uniform State Laws on August 10, 1972. On January 22, 1973 the *Uniform Act* was introduced in the Arizona legislature[5] and later enacted, in a modified form as the ARLTA.

This Note is intended to aid the members of the legal commu-

1. ARIZ. REV. STAT. ANN. §§ 33-1301 to -1381 (Supp. 1973).
2. *See* J. LEVI, P. HABLUTZEL, L. ROSENBERG, J. WHITE, *General Introduction*, AMERICAN BAR FOUNDATION, MODEL RESIDENTIAL LANDLORD-TENANT CODE 5 (Tent. Draft, 1969) [hereinafter cited as *General Introduction to* MODEL CODE].
3. *Id.* at 2.
4. Subcommittee on the Model Landlord Tenant Act, ABA Committee on Leases, *Proposed Uniform Residential Landlord and Tenant Act*, 8 REAL PROP., PROB. & TR. J. 104, 104 n.2 (1973) [hereinafter cited as ABA, *Proposed Uniform Act*]. The UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT [hereinafter cited as UNIFORM ACT] was approved by the House of Delegates of the ABA at its 1974 midyear meeting, Houston, Texas, Feb. 4-5, 1974.
5. S.B. 1096, 31st Ariz. Legis., 1st Reg. Sess. (1973).

nity in the interpretation and application of the ARLTA. The scope of this discussion is limited to identification and analysis of those provisions which effect major changes in Arizona law[6] and discussion of several points on which the ARLTA varies from the *Uniform Act* and *Model Code*. In those instances where the ARLTA is ambiguous or contains conflicting provisions, an attempt has been made to point out alternative interpretations and develop those most consonant with the purpose of the Act.

The ARLTA was enacted to "simplify, clarify, modernize and revise the law governing the rental of dwelling units and the rights and obligations of landlord and tenant."[7] Its principal purpose is to encourage both the landlord and tenant to maintain and improve the quality of Arizona's rental housing. Essential to this purpose is the Act's requirement that the parties observe a standard of good faith[8] which requires honesty in fact in all transactions.[9] In interpreting and implementing the ARLTA, continued awareness of the good faith requirement is essential if the Act's purpose is to be fulfilled.

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6. The Act changes both prior common law and statutory law only with regard to *residential* tenancies in Arizona. Other landlord-tenant relationships will continue to be governed by existing Arizona case law and statutes. *See* ARIZ. REV. STAT. ANN. §§ 33-301 to -381 (1956), *as amended*, (Supp. 1973). Throughout this Note reference is made to changes the Act affects in common law rules. Whenever possible, existing Arizona case law has been cited as illustrative of the common law rule. However, in the absence of any reported Arizona decisions, the general common law rule is used, as set forth in cases from other jurisdictions. Arizona has adopted the common law by statute. *Id.* § 1-201 (1956).

7. *Id.* § 33-1302 (Supp. 1973).

8. *Id.* § 33-1311. The good faith obligation is adopted from a similar provision in the UNIFORM COMMERCIAL CODE [UCC]. *See* UNIFORM ACT § 1.302, Comment. Although the good faith provision was taken from the General Provisions of the UCC, UNIFORM COMMERCIAL CODE § 1-203, the Sales Article of the UCC also contains a special good faith obligation. *Id.* § 2-103(1)(b). The doctrine of good faith did not originate with the UCC, but dates back to early Roman law. Eisenberg, *Good Faith Under the Uniform Commercial Code—A New Look at an Old Problem*, 54 MARQ. L. REV. 1, 8-10 (1971).

Good faith may be placed into issue by either party, either as a part of plaintiff's prima facie case, *cf.* Ralston v. Mathew, 173 Kan. 550, 250 P.2d 841 (1952), or by the defendant as an affirmative defense. *Cf.* American Home Improvement, Inc. v. MacIver, 105 N.H. 435, 201 A.2d 886 (1964). The issue is generally a question of fact for the jury. *See* Chenoweth v. Financial Indem. Co., 13 Ariz. App. 313, 315, 476 P.2d 519, 521 (1970); Pernet v. Peabody Eng'r Corp., 20 App. Div. 2d 781, 248 N.Y.S.2d 132 (1964). It may, however, be ruled upon as a matter of law. *See* Estate of Chayka, 47 Wis. 2d 102, 176 N.W.2d 561 (1970). The requirement of good faith may be imposed on all phases of a transaction, from negotiation through termination and remedial action. *See* Summers, *"Good Faith" in General Contract Law and the Sales Provision of the Uniform Commercial Code*, 54 VA. L. REV. 195, 220-52 (1968).

9. ARIZ. REV. STAT. ANN. § 33-1310(4) (Supp. 1973).

## I. THE ARLTA: SCOPE AND JURISDICTION

This section defines the scope of the ARLTA and reviews the specific exclusions which the Act provides. Attention is focused on exemptions for institutional residency, transient residency and public housing. Additionally, several significant jurisdictional considerations are discussed. Of particular importance are the Act's provisions which require a disclosure of the identity of the landlord and which provide for in personam jurisdiction over absentee landlords.

### A. *The Scope of the ARLTA*

The ARLTA is intended to apply to the rental of dwelling units,[10] which are defined as any structure or part of a structure "used as a home, residence, or sleeping place" by one or more persons.[11] The

10. *Id.* § 33-1304. Agreements for the rental of other types of property continue to be governed by the landlord and tenant statutes previously in existence. *See id.* §§ 33-301 to -362 (1956), *as amended*, (Supp. 1973).

11. *Id.* § 33-1310(3) (Supp. 1973). Although the rental of a mobile home is

Act's applicability, however, does not extend to residential arrangements that are incidental to some other principal purpose.[12] Residency contingent on employment as a manager or custodian[13] and occupancy by a member of a social or fraternal organization in property operated by the organization[14] are specifically exempted.[15] Also excepted from the operation of the Act are public and private institutions where the principal purpose of residency is detention or obtaining medical, educational, counseling or religious services.[16]

While the institutional residency exclusion delineates specific exemptions, it is unclear whether other institutions which provide "similar services"[17] to those specifically exempted[18] are also excluded. The *Uniform Act* contains a clause which exempts institutions providing other "similar services" from the applicability of that act; however, this clause is not contained in the ARLTA.[19] Arguably, this omission in the ARLTA can be interpreted as being intended to limit the exclusion to those specifically enumerated. Such a narrow interpretation, however, does not appear to be consistent with the Act's principal focus—residential property. When an institutional residency is involved, the applicability of the Act should be determined by the principal purpose of the relationship. When that purpose is something other than the mere rental of residential property, a consistent application of the ARLTA requires that the residency be excluded.

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included within this definition, the rental of a mobile home lot is specifically excluded. *Id.*

12. *See id.* § 33-1308(1). *See also* UNIFORM ACT § 1.202, Comment.

13. ARIZ. REV. STAT. ANN. § 33-1308(5) (Supp. 1973). Other residential arrangements, such as residency in a company town or in a migrant labor camp, although conditioned upon employment should not be excluded from the ARLTA. Including these arrangements within the scope of the ARLTA appears to be consistent with the general purposes of the Act. Residency conditioned upon employment, although incidental to that employment, is simply a form of compensation. Consequently, the employer is in the same position as any other landlord, the only difference being the form of the consideration he receives in exchange for the use of the dwelling unit.

14. *Id.* § 33-1308(3).

15. While occupancy pursuant to a contract of sale is excluded from the Act, *id.* § 33-1308(2), occupancy pursuant to an option to purchase is not. *See* UNIFORM ACT § 1.202, Comment. Since the option is only a right to purchase, the holder of the option has no proprietary interest in the premises. *See* Tang v. Avitable, 76 Ariz. 346, 264 P.2d 835 (1953); 1 S. WILLISTON, TREATISE ON THE LAW OF CONTRACTS § 61A (3rd ed. 1957). The Act also excludes an owner occupied condominium and proprietary leases in a cooperative unit. ARIZ. REV. STAT. ANN. § 33-1308(6) (Supp. 1973).

16. ARIZ. REV. STAT. ANN. § 33-1308(1) (Supp. 1973).

17. Other "similar services" simply refers to services which are akin to medical, educational, counseling or religious services but which do not fit clearly within one of these categories. Geriatric institutions and nonmedical therapeutic centers, such as health spas, are illustrative of institutions providing "similar services."

18. The practical effect of a limited interpretation which does not include other institutions would probably be slight, since a large percentage of institutional residencies can be brought within the specific exclusions.

19. *Compare* UNIFORM ACT § 1.202(1), *with* ARIZ. REV. STAT. ANN. § 33-1308(1) (Supp. 1973). The ARLTA does not contain an exclusion for geriatric institutions which is in the *Uniform Act*. *Compare* UNIFORM ACT § 1.202(1), *with* ARIZ. REV. STAT. ANN. § 33-1308(1) (Supp. 1973).

The ARLTA also provides an exclusion for transient occupancy in a hotel, motel or recreational lodging.[20] Due to the large number of winter visitors who reside in Arizona, this transient residency exclusion is of considerable importance. To come within this exclusion a residential arrangement must satisfy two requirements: the residency must be in a hotel, motel or recreational lodging and the occupancy must be transient.[21] Although these requirements might appear unambiguous, their application to specific cases may prove troublesome. The *Uniform Act* recommends that the status of the dwelling unit be identified by reference to a transient or room occupancy tax.[22] Although such a state-wide tax once existed in Arizona, it now is imposed on all leased real property[23] with no distinction being made based upon the type of facility. Alternatively, municipal and county ordinances could provide a useful means for properly classifying the facility.[24] In the absence of any such enactments, however, the controlling criterion should be whether a dwelling unit is being held open to the public for lodging on a short-term, generally day-to-day basis.[25] If the facility is not deemed to be a hotel, motel or recreational lodging, the exclusion will be inapplicable. If the dwelling is deemed to be within one of the excluded categories, however, the nature of the particular occupancy in question must then be determined to be transient before the exclusion will apply. While residence in a hotel, motel or recreational lodge raises a presumption that the guest is a transient[26] such residency may be, in certain instances, permanent or semi-permanent.[27] If no clear basis for categorization of the occupancy is available, the issue will necessarily be resolved by an evalua-

20. ARIZ. REV. STAT. ANN. § 33-1308(4) (Supp. 1973). Permanent roomers and boarders are within the scope of the Act. *See* UNIFORM ACT § 2.202, Comment.

21. An attempt to avoid the application of the Act, through a lease provision or other artificial means establishing a transient residency, will be ineffective. *See* ARIZ. REV. STAT. ANN. § 33-1308 (Supp. 1973).

22. UNIFORM ACT § 1.202, Comment. UTAH CODE ANN. § 59-15-4(f) (Supp. 1973), for example, provides for a room tax in hotels and motels.

23. *See* ARIZ. REV. STAT. ANN. § 42-1314 (Supp. 1973).

24. Local zoning, revenue and licensing requirements that define and identify such facilities should be persuasive evidence in the determination of the type of facility. For example, PIMA COUNTY, ARIZ., ZONING ORDINANCE § 436 (1953) defines a hotel as any building containing six or more guest rooms and which is open to the public for occupancy by transient guests. The *Tucson City Code* provides an alternative means for the classification of the premises in that all hotels and motels are required to maintain guest registers. TUCSON, ARIZ., CITY CODE § 11-26 (1965). Additionally, all operators of premises that cater to transient residency are required to pay a special tax, *id.* § 19-29(2), and to register with the city's director of finance. *Id.* § 19-29(3).

25. *See* Haff v. Adams, 6 Ariz. 395, 59 P. 111 (1899). *See generally* Ambassador Athletic Club v. Utah State Tax Comm'n, 27 Utah 2d 377, 496 P.2d 883 (1972).

26. *See* Fay v. Pacific Improvement Co., 93 Cal. 253, 26 P. 1099 (1892).

27. *See* Haff v. Adams, 6 Ariz. 395, 59 P. 111 (1899). Local ordinances defining transiency may be useful in making this determination. For example, the *Tucson City Code* provides that residency in a hotel, motel or other lodging facility which is for a period of less than 30 days is transient. TUCSON, ARIZ., CITY CODE § 19-29(1)(d) (1965).

tion of each case in the light of factors tending to establish either a permanent or a transient relationship.[28]

Finally, the ARLTA also specifically excludes from the effect of its provisions the operation and occupancy of state and federal public housing programs.[29] The justification for excluding the public housing tenant from the protection enjoyed by tenants in privately owned property is dubious. It cannot be presumed that when the government acts as a landlord, the tenant is not in need of the protection provided by the ARLTA. To the contrary, the plight of the public housing tenant is often worse than that of his counterpart in private housing.[30] The vagaries of local administrative practices and the high demand for limited public housing facilities places these tenants in a particularly difficult position.[31] Additionally, no effective means are available through which the tenant can compel federal or state agencies to remedy deficient conditions.[32] Since the underlying purposes of the ARLTA and public housing legislation seem to be substantially similar,[33] it appears inconsistent that those persons sought to be served by one are to be excluded from the benefits of the other. Both the *Uniform Act* and the *Model Code* specifically included public housing within their scope,[34] as did the original bill presented to the Arizona legislature.[35] Several states which recently have enacted landlord-tenant legislation modeled after the *Uniform Act* have not excluded pub-

28. The principal body of law relating to this issue is in the area of bailments, where a distinction is made in the duty of care owed by an inkeeper to the property of a guest as opposed to that owed to a boarder. *See* Haff v. Adams, 6 Ariz. 395, 401, 59 P. 111, 112 (1899). A transient or guest is free to come and go, usually on a day-to-day basis, and has no definite period of occupancy. Smith v. Dorchester Hotel Co., 145 Wash. 344, 346, 259 P. 1085, 1086 (1927). In contrast, a boarder contracts for a stay of specified duration. *Id.* at 346, 259 P. at 1086. Another relevant factor is whether the occupancy is such as to make the premises the resident's home or abode for a period of time. *Id.* at 347, 259 P. at 1086.

29. ARIZ. REV. STAT. ANN. § 33-1308(7) (Supp. 1973). The exempt state programs are those instituted pursuant to the public housing laws. *Id.* §§ 36-1401 to -1491 (1956), *as amended*, (Supp. 1973). Federal programs have been instituted pursuant to the *Housing Act of 1937* and subsequent legislation. 42 U.S.C. 1401 *et seq.* (1970), *as amended*, (Supp. 1971) (Supp. II 1972).

Although state landlord-tenant laws are not applicable to federally owned projects, they are applicable to state and municipally owned housing, including federally assisted programs, *see* Walton v. City of Phoenix, 69 Ariz. 26, 208 P.2d 309 (1949); Note, *Remedies for Tenants in Substandard Public Housing*, 68 COLUM. L. REV. 561, 570 (1968). Therefore, rentals in state or municipally owned public housing projects are generally governed by the common law or state statutes. *See* Walton v. City of Phoenix, 69 Ariz. 26, 208 P.2d 309 (1949).

30. *See generally* J. ROSE, LANDLORDS & TENANTS §§ 8.1-8.176 (1973).

31. *See generally* Note, *supra* note 29.

32. *Id.* at 568.

33. *Compare* ARIZ. REV. STAT. ANN. § 33-1302(2) (Supp. 1973), *with* ARIZ. REV. STAT. ANN. § 36-1402(A)(2) (1956).

34. *See* UNIFORM ACT § 1.202, Comment; MODEL RESIDENTIAL LANDLORD-TENANT CODE § 2-101, Comment (Tent. Draft, 1969) [hereinafter cited as MODEL CODE].

35. *See* S.B. 1096, 31st Ariz. Legis., 1st Reg. Sess. (1973).

lic housing,[36] and it is suggested that the Arizona legislature re-examine its position on this issue.

### B. *Jurisdiction Under the ARLTA*

The ARLTA provides that an agreement for the rental of any dwelling unit located in this state shall be governed by the Act.[37] This provision is based on the principle that the rental of dwelling units located within a state is a transaction of business which is subject to state regulation.[38] This policy, while in keeping with modern jurisdictional trends, constitutes a significant departure from traditional conflict of laws principles.[39] Its practical effect should be minimal, however, since residential rental agreements rarely are entered into outside the jurisdiction where the property is located.[40]

In order to insure that an aggrieved tenant knows against whom he should proceed in making demands, providing notice[41] or instituting legal action, the ARLTA requires that the landlord, or any person acting on his behalf in entering a rental agreement, must disclose to the tenant the name and address of the manager and the owner of the premises.[42] The required information must be given to the tenant, in writing, at the commencement of the term.[43] In lieu of disclosing his own name and address, the owner may provide the name and address of an agent who is authorized to act on his behalf.[44] The required information must be kept current, and it must be refurnished to the tenant upon demand.[45] If the required disclosures are not made, the party who entered into the rental agreement on the landlord's behalf is deemed to be the landlord's agent for the purpose of receiving notices, demand and service of process.[46] Thus, either a

36. *See* DEL. CODE ANN. tit. 25, § 5111 (Noncum. Supp. 1972); FLA. STAT. ANN. § 83.42 (Supp. 1974-75); HAWAII REV. STAT. § 521-7 (Supp. 1973); Ch. 207, § 4, [1973] SESS. LAWS OF WASH. 1ST EXTRA. SESS. 1580.

37. ARIZ. REV. STAT. ANN. § 33-1307 (Supp. 1973).

38. *See* MODEL CODE § 1-104, Comment.

39. *Compare* RESTATEMENT OF CONFLICT OF LAWS § 311 (1934), *with* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 188, 189, 311 & 189, comment *b* (1969).

40. MODEL CODE § 1-104, Comment.

41. For a delineation of what constitutes notice see ARIZ. REV. STAT. ANN. § 33-1313 (Supp. 1973).

42. *Id.* § 33-1322(A).

43. *Id.*

44. *Id.* The Act contains a special provision allowing a nonresident landlord to record his appointment of an in-state agent with the Secretary of State. The agent must be a resident of Arizona or a corporation authorized to do business in Arizona. The appointment must be filed in writing. *See id.* § 33-1309(B).

45. *Id.* § 33-1322(B). This requirement is also applicable to the landlord's successor in interest. *Id.*

46. *Id.* § 33-1322(C). In the event of noncompliance, the party entering into the rental agreement on the landlord's behalf becomes liable for performing the landlord's obligations under the Act and he may be required to expend or make available all rental funds collected.

The *Uniform Act* does not limit the creation of the statutory agency to the party

resident or a nonresident landlord may be effectively served through this statutorily created agency.

The potential impact of the disclosure requirement may be considerable. Any person entering into a rental agreement on behalf of the landlord incurs responsibility for performing the landlord's duties if he fails to disclose.[47] Additionally, service on the statutorily created agent, due to nondisclosure, increases the possibility that the landlord will never receive notice and, hence, have a default judgment entered against him. These consequences are easily avoided by a complete disclosure which forecloses the creation of a statutory agency and protects both the landlord and anyone acting on his behalf.

The ARLTA contains a jurisdictional provision which authorizes Arizona courts to exercise in personam jurisdiction over absentee landlords.[48] Although many states have statutes which confer in personam jurisdiction on the basis of ownership, use or possession of real property,[49] the Arizona long-arm statute does not contain such an explicit proviso.[50] For this reason, the Act's long-arm provision was desirable to eliminate any doubt as to the propriety of exercising in personam jurisdiction over an absentee landlord.[51]

The Act's jurisdictional provisions also provide additional means of effectuating service of process on nonresident landlords.[52] Service may be made on his designated in-state agent or the statutorily created

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who enters the rental agreement on behalf of the landlord. The *Uniform Act* clearly indicates that a party who collects rent on the landlord's behalf is also an agent in the absence of disclosure of the necessary information. *See* UNIFORM ACT § 2.102, Comment. This interpretation would allow the tenant to serve the person authorized to collect the rent even though that party did not enter into the rental agreement on behalf of the landlord.

47. ARIZ. REV. STAT. ANN. § 33-1322(C) (Supp. 1973).

48. *Id.* § 33-1309(A). The term landlord is defined in *id.* § 33-1310(5). An absentee owner is considered to be a landlord. *Id.*

49. *See* ME. REV. STAT. ANN. tit. 14, § 704, *as amended*, (Supp. 1973-74); MONT. R. CIV. P. 4(B)(1)(c); N.Y. CIV. PRAC. § 302(a)(4). Although the validity of such provisions has not been specifically ruled upon, they generally are regarded as valid. *See* N.Y. CIV. PRAC. § 302.25, Commentary C; MODEL CODE § 1-106, Comment; F. JAMES, CIVIL PROCEDURE § 12.10, at 649 (1965).

50. *See* ARIZ. R. CIV. P. 4(e)(2). The existing long-arm rule predicates jurisdiction upon "[causing] an event to occur in this state." *Id.* There are no reported Arizona cases in which personal jurisdiction has been exercised over a nonresident based merely upon the ownership of property in the state.

51. It is likely that Arizona's existing long-arm rule could have been construed to provide jurisdiction in this type of situation. *See* Phillips v. Anchor Hocking Glass Corp., 100 Ariz. 251, 413 P.2d 732 (1966); "Garnishment and the Validity of Quasi in Rem Jurisdiction," 14 ARIZ. L. REV. 409, 413-15 (1972). The Act's jurisdictional provision, however, precludes a contrary result that might be brought about by a more limited interpretation of the long-arm statute. *See* Molydenum Corp. of America v. Superior Court, 17 Ariz. App. 354, 498 P.2d 166 (1972), *noted in* "Personal Jurisdiction and Interstate Contract Transactions," 15 ARIZ. L. REV. 593, 595 (1973).

52. ARIZ. REV. STAT. ANN. § 33-1309(B) (Supp. 1973). It is important to note that the jurisdiction and service of process provisions of the Act apply to the resident landlord only if he fails to make the necessary disclosures. In all situations involving a resident landlord, process must be served personally on the landlord, his appointed agent or the statutorily created agent. *See* ARIZ. R. CIV. P. 4(d).

agent in accordance with existing state statutes.[53] If service cannot be made on the nonresident landlord's designated agent, however, or if no in-state agent has been appointed, personal jurisdiction over the nonresident landlord may be obtained by service upon the Secretary of State.[54] In addition to serving the Secretary of State, the plaintiff is required to send, by either certified or registered mail, a copy of the process and the pleadings to the defendant at his last reasonably ascertainable address.[55] If the disclosure requirements of the ARLTA have not been met, and if the last address of the defendant cannot be reasonably ascertained, service upon the Secretary of State is sufficient, and no mailing is required.[56] In either case, service is complete at the time of service upon the Secretary of State and the defendant must appear and answer within 30 days.[57] This represents a major procedural change from the existing rules that allow a defendant who is served by mail 60 days in which to present his answer.[58] The ARLTA also eliminates the requirement that the return receipt be filed with the court as proof of service.[59] The ARLTA merely requires the filing of an affidavit stating that the plaintiff has complied with the provisions of the Act.[60]

Two precautionary measures may be taken by the nonresident landlord to insure that he receives notice of any judicial proceedings. First, the landlord has the statutory right to appoint an in-state agent

53. *See* ARIZ. R. CIV. P. 4(d), which basically requires personal service or service upon a person of suitable age at the party's usual abode.

54. ARIZ. REV. STAT. ANN. § 33-1309(B) (Supp. 1973).

55. *Id.*

56. *Id.* The validity of substitute service of process has been upheld even when there has been no notice mailed to the defendant. This is true both where the defendant deliberately attempts to avoid service, *see* Merriott v. Whitsell, 251 Ark. 1031, 476 S.W.2d 230 (1972); Thomas Organ Co. v. Universal Music Co., 261 So. 2d 323 (La. App. 1972); Munice v. Westcraft Corp., 58 Wash. 2d 36, 360 P.2d 744 (1961), and where there is no evidence of such an attempt. *See* Dobkin v. Chapman, 21 N.Y.2d 490, 236 N.E.2d 451, 289 N.Y.S.2d 161 (1968). The validity of such service generally is based on an evaluation of factors such as the plaintiff's interest in obtaining relief, the state's interest in providing relief to its residents, the extent of the effort to locate the defendant and the availability of other means of protecting the defendant. *See* Louis, *Modern Statutory Approaches to Service of Process Outside the State—Comparing the North Carolina Rules of Civil Procedure with the Uniform Interstate and International Procedure Act*, 49 N.C.L. REV. 235 (1971); Note, *Civil Procedure—Constitutionality of Constructive Service of Process on Missing Defendants*, 48 N.C.L. REV. 616 (1970).

57. ARIZ. REV. STAT. ANN. § 33-1309(B) (Supp. 1973).

58. *See* ARIZ. R. CIV. P. 4(e)(2)(a).

59. ARIZ. REV. STAT. ANN. § 33-1309(B) (Supp. 1973). The Arizona nonresident motorist statute requires a return receipt when the defendant is served by mail. *See id.* §§ 28-502 to -503 (1956), *as amended*, (Supp. 1973). However, valid service does not require that there be proof that the defendant has actually received notice, but only that the means employed be reasonably calculated to inform the defendant of the action. *See* Milliken v. Meyer, 311 U.S. 457, 464 (1940); Wuchter v. Pizzutti, 276 U.S. 13, 24 (1928).

60. ARIZ. REV. STAT. ANN. § 33-1309(B) (Supp. 1973). If service is made only upon the Secretary of State due to the defendant's noncompliance with the disclosure requirements, this also must be set forth in the affidavit. *Id.*

upon whom process must be served if a complaint is filed.[61] Additionally, the landlord should provide his tenants with his own name and address in order to assure that service of process will be mailed to him in the event his appointed agent cannot be served.[62] The jurisdictional provisions of the Act require careful compliance by the landlord in order to avoid a default judgment, however, the Act's requirements are not overly burdensome, and they effectuate a valid policy by insuring that a responsible party may be brought before the court.

## II. THE RENTAL AGREEMENT

The ARLTA provides that the parties may include in a rental agreement any terms and conditions not prohibited by the Act or other rules of law.[63] In the absence of an express agreement between the parties, however, certain essential terms and conditions are provided by the Act. Initially, this section will review these statutorily provided terms. Then attention will be focused on the restrictions the Act places on the parties' right to insert certain terms in the rental agreement. Consideration will also be given to the Act's proscription of unconscionable conduct and of particular contractual terms, such as exculpatory clauses and provisions for waiver of rights.

### A. *Terms Provided by the ARLTA*

(1) *The Payment of Rent.* In the absence of a rental agreement, the Act specifies that a tenant shall pay the fair rental value for the use and occupancy of a dwelling unit.[64] This codifies the general common law rule that, in the absence of an agreement on the amount of rent to be paid,[65] the law will imply an agreement on the part of

61. *Id.* Unlike a similar Arizona statute for the appointment of a corporate agent, *id.* § 10-127 (Supp. 1973-74), the ARLTA does not contain protective procedures in case of the agent's resignation or change of address. In contrast, the corporate agent is required to keep the Secretary of State informed of any change of address. *Id.* The corporate agent's resignation is not effective for 30 days, and the Secretary of State must inform the corporation of the pending resignation. *Id.* The absentee landlord should include similar safeguards in an agency agreement, thereby reducing the possibility of not receiving notice due to the action of the agent.

62. *See id.* § 33-1309(B) (Supp. 1973).

63. *Id.* § 33-1314(A). The Act does not require that a rental agreement be in writing. If there is a written rental agreement, however, it must be fully executed by both the landlord and the tenant and all blank spaces must be completed. *Id.* § 33-1322(D).

64. *Id.* § 33-1314(B).

65. The terminology of the ARLTA is somewhat confusing. It specifies that "in absence of a rental agreement, the tenant shall pay as rent the fair rental value for the use and occupancy of the dwelling unit." *Id.* The Act defines "rental agreement" as "all agreements, written, oral or implied by law . . . embodying the terms and conditions concerning the use and occupancy of a dwelling unit and premises." *Id.* § 33-1310(11). A tenant is defined as "a person entitled under a *rental agreement* to occupy a dwelling unit . . . ." *Id.* § 33-1310(15) (emphasis added). Thus, according to the statutory definition, there could be no "tenant" without a "rental agreement,"

the tenant to pay a reasonable amount for his use of the premises unless circumstances indicate a contrary intent.[66] Thus, if the parties have not agreed on a rental amount, or if no evidence of such an agreement is produced, the court may establish a fair rental value for which the tenant will be liable.[67]

The ARLTA also provides that the rent is payable without demand or notice at the time and place agreed upon by the parties.[68] When the parties have failed to agree on a specific time, the Act prescribes that periodic rent is payable at the beginning of any term of 1 month or less. In all other cases, rent is payable in equal monthly installments at the beginning of each month.[69] This changes the common law rule that rent is neither due nor payable until the end of the rental period.[70] If the parties do not specify a place where rent is to be paid, the Act stipulates that rent is payable at the dwelling unit.[71] This codification of the common law rule[72] provides a permanent place for the payment of rent, and alleviates the possibility that a landlord, wishing to terminate the tenancy, will make himself intentionally "unavailable" when rent is due.[73] In such a situation it clearly would be an undue burden to require the tenant to seek out the landlord in order to pay rent.

Finally, the ARLTA provides that rent shall be apportionable

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either expressed or implied. And there should be no obligation to pay rent unless there is a rental agreement or at least an agreement implied by law because of the tenant's occupancy of the premises. What the legislature probably intended was that, in the absence of an agreement on the amount of rent to be paid, the tenant would pay the fair rental value. This is the wording used in section 1.401(b) of the *Uniform Act*, and is consonant with prior common law. The legislature's insertion of the term "rental agreement" seems unnecessarily confusing.

66. Carpenter v. United States, 84 U.S. (17 Wall.) 489 (1873); Bonfils v. Ledoux, 266 F. 507 (8th Cir. 1920); Rich v. Hughes, 9 Ariz. App. 518, 454 P.2d 188 (1969); Ross v. City of Long Beach, 24 Cal. 2d 258, 148 P.2d 649 (1944); *cf.* Hall v. Weatherford, 32 Ariz. 370, 259 P. 282 (1927).

67. Factors to be considered in determining the amount of rent include the rental rates of similar facilities, the cost and value of the property and the cost of maintaining the premises. *See* Union Pac. R.R. v. United States, 313 U.S. 450 (1941); Security Title Co. v. Hunt, 9 Utah 2d 67, 337 P.2d 718 (1959). *See also* Kress, Dunlap & Lane, Ltd. v. Downing, 193 F. Supp. 874 (D.V.I. 1961) (rent control statute); Hirsch v. Weiner, 116 Misc. 312, 190 N.Y.S. 111 (Sup. Ct. 1921) (rent control statute).

68. ARIZ. REV. STAT. ANN. § 33-1314(C) (Supp. 1973). Regardless of any private agreement between the parties, demand and notice are not necessary for the rent to be due. *Id.*

69. *Id.*

70. *See* Crommelin v. Thiess & Co., 31 Ala. 412 (1858); Webster v. Cook, 38 Cal. 423 (1869); Dixon *ex rel.* Brodrick v. Niccols, 39 Ill. 372 (1866); Wolf v. Merritt, 21 Wend. 336 (N.Y. 1839).

71. ARIZ. REV. STAT. ANN. § 33-1314(C) (Supp. 1973).

72. Burnes v. McCubbin, 3 Kan. 215 (1865); Fordyce v. Hathorn, 57 Mo. 120 (1874); Walter v. Dewey, 16 Johns 222 (N.Y. 1819). *But see* Thomasson v. Horton, 27 Ga. App. 27, 107 S.E. 363 (1921).

This rule was refined further in the case of rental of dwelling units, where it has been held that rent is payable at the *front* door of the house. McGlynn v. Moore, 25 Cal. 384 (1864); Van Rensselaer v. Jewett, 2 N.Y. 141 (1849); Johnston v. Hargrove, 81 Va. 118 (1885).

73. *See* House v. Lewis, 108 Neb. 257, 187 N.W. 784 (1922).

uniformly from day to day unless the parties agree otherwise.[74] Rent is treated as accruing on a day-to-day basis, as opposed to the common law rule that rent was not apportionable.[75] Thus, at common law, if rent was not due until the end of the period, no rent could be recovered by the landlord in the event of his early termination.[76] Conversely, if rent is payable in advance, the tenant could not recover any of his prepayment if there was an early termination.[77] Under the ARLTA, however, rent is payable only for the period the tenant occupies the premises. The Act's recognition of apportionability is of special importance to the tenant in light of the statutory presumption that rent is payable at the beginning of the rental period.[78]

(2) *Length of the Tenancy.* In the absence of a provision fixing the term of the rental agreement, the ARLTA provides that the tenancy is deemed to be from month to month, or in the case of a roomer who pays weekly rent, from week to week.[79] This changes the common law doctrine of periodic tenancies which presumed a tenancy at will when the parties entered into a lease of no stated duration and no periodic rent was paid.[80] Another common law principle which the ARLTA changes is the rule that where the parties entered into a lease of unspecified duration, and rent was paid on a periodic basis, a periodic tenancy was presumed,[81] with its duration being equal to the interval for which rent was paid.[82] The Act alters this method of determining the duration of periodic tenancies by treating all tenancies of indeterminate duration as being month to month, even though rent may be paid other than on a month-to-month basis.[83]

(3) *Notice of Termination.* The ARLTA provides that either the landlord or the tenant may terminate month-to-month tenancies by giving written notice at least 30 days prior to the periodic rental date specified in the notice.[84] Week-to-week tenancies may be termi-

74. ARIZ. REV. STAT. ANN. § 33-1314(C) (Supp. 1973).
75. Diepenbrock v. Luiz, 159 Cal. 716, 115 P. 743 (1911).
76. Willis v. Kronendonk, 58 Utah 592, 200 P. 1025 (1921).
77. Wells v. Blystad, 91 Colo. 346, 14 P.2d 1078 (1932).
78. ARIZ. REV. STAT. ANN. § 33-1314(C) (Supp. 1973).
79. *Id.* § 33-1314(D).
80. Holcomb v. Lorino, 124 Tex. 446, 79 S.W.2d 307 (1935). *See also* RESTATEMENT (SECOND) OF PROPERTY § 1.6, comment *b* (Tent. Draft No. 1, 1972).
81. Thompson v. Baxter, 107 Minn. 122, 119 N.W. 797 (1909).
82. RESTATEMENT (SECOND) OF PROPERTY § 1.5, comment *d* (Tent. Draft No. 1, 1972).
83. ARIZ. REV. STAT. ANN. § 33-1314(D) (Supp. 1973). An exception to this rule is made in the case of roomers who pay weekly rent. *Id.* In most cases, rent will be paid on a monthly basis because of the provisions of section 33-1314(C) which provides that "[u]nless otherwise agreed . . . periodic rent is payable at the beginning of any term of one month or less and otherwise in equal monthly installments at the beginning of each month."
84. *Id.* § 33-1375(B). The Act does not clarify what is meant by "the periodic rental date" specified in the notice. It appears that the "periodic rental date" is the date on which rent is due. Thus, the periodic rental date specified in the notice would

nated upon 10 days written notice.[85] Prior Arizona law required only 10 days notice to terminate month-to-month tenancies, except in cases of nonpayment of rent, where no notice was required.[86] Semi-monthly tenancies could be terminated with only 5 days notice,[87] and no provision was made for termination of week-to-week tenancies.

### B. *Provisions Prohibited by the ARLTA*

The rental agreement historically has been viewed as a private contract between the landlord and tenant which is of no concern to the public.[88] Under this traditional view, the landlord and tenant had an unrestricted right to bind themselves to any terms in a rental agreement.[89] Unfortunately, complete freedom to contract often results in unjust contracts when relative equality of bargaining power is not present. This is often the case in landlord-tenant dealings[90] where the housing supply is often inadequate and the landlord frequently has a greater familiarity with the law governing rentals. The widespread use of standard form leases further aggravates this disparity of bargaining power. "When such form leases are made . . . . [i]t can be safely assumed that . . . they are usually submitted as a matter of take-it-or-leave-it."[91] Even if a prospective tenant refuses to sign such a lease for one apartment, he is likely to be confronted with virtually identical leases elsewhere. Under these circumstances, if the prospective tenant desires to rent a dwelling unit, he is forced to accept tenancy on the landlord's terms. Recognizing the inequities inherent in such a situation, the ARLTA seeks to protect the tenant through a general proscription of all unconscionable dealings and by prohibiting specific contractual terms which are thought to be undesirable.

(1) *Unconscionability.* The prohibition of unconscionable conduct[92] extends beyond the rental agreement to include any unconscionable settlement that results in foregoing any claim or right au-

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be the first date on which possession would revert to the landlord. This construction is consistent with legislative materials which indicate that the provision is intended to provide 30 days notice. Materials received from the office of Senator Howard Baldwin, October 2, 1973, on file in the *Arizona Law Review* office.

85. ARIZ. REV. STAT. ANN. § 33-1375(A) (Supp. 1973).

86. *Id.* § 33-341 (1956).

87. *Id.*

88. *See* Merrill v. Gordon, 15 Ariz. 521, 531, 140 P. 496, 501 (1914); Weirick v. Hamm Realty Co., 179 Minn. 25, 228 N.W. 175 (1929).

89. Karam & Sons Mercantile Co. v. Serrano, 51 Ariz. 397, 407, 77 P.2d 447, 451 (1938).

90. *See generally* Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO. L.J. 519, 555-56 (1966).

91. Simmons v. Columbus Venetian Stevens Bldg., Inc., 20 Ill. App. 2d 1, 31, 155 N.E.2d 372, 386-87 (1958). *See also* Kesseler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943).

92. ARIZ. REV. STAT. ANN. § 33-1312(A)(1) (Supp. 1973).

thorized by the rental agreement or by the Act.[93] If the court finds that an agreement or settlement was unconscionable when made,[94] it has three alternatives.[95] It may either refuse to enforce the entire agreement or settlement, refuse to enforce only the unconscionable provision, or limit the application of the unconscionable provision to avoid an unconscionable result.[96] Although not expressly designated as such, the concept of unconscionability has been previously applied in Arizona,[97] and the Act's proscription of unconscionable conduct is in keeping with the modern statutory and judicial trend.[98]

The doctrine of unconscionability, rather than providing a clear rule or principle of law, tends to establish a general standard of fair conduct[99] somewhat analogous to the good faith requirement. While unconscionability is not susceptible to precise definition,[100] the *Uniform Act* establishes a basic test for unconscionable conduct. The test is whether the conditions of an agreement or settlement were so overtly one-sided, in light of the circumstances in existence when the agreement or settlement was made, as to be unconscionable.[101] While this test sets forth an overall imbalance in the agreement as a principal criterion, unconscionability may exist even where this im-

93. *Id.* § 33-1312(A)(2).

94. The determination of unconscionability is a question of law for the court to decide in light of the circumstances when the agreement or settlement was made. It is not dependent upon circumstances at the time of the contest or relative changes in the positions of the parties. *See* UNIFORM ACT § 1.303, Comment.

95. ARIZ. REV. STAT. ANN. § 33-1312(A) (Supp. 1973). Procedurally, the issue of unconscionability may be raised by either party or by the court sua sponte. *Id.* § 33-1312(B). When brought into issue, unconscionability is a question of law to be decided by the court, *id.* § 33-1312(A), after affording the parties the requisite opportunity to present evidence as to the purpose, setting and effect of the questioned provision or settlement. *Id.* § 33-1312(B). If the court determines a provision to be unconscionable, the ARLTA does not provide for damages or penalties, but merely allows the court sufficient discretion to avoid an unconscionable result. *Id.* § 33-1312(A).

96. *Id.*

97. *See* Hassenpflug v. Hart, 89 Ariz. 235, 360 P.2d 481 (1961); Marshal v. Patzman, 81 Ariz. 367, 306 P.2d 287 (1957); Shreeve v. Greer, 65 Ariz. 35, 173 P.2d 641 (1946).

The foregoing cases are illustrative of the indirect means used by courts, such as public policy or contract interpretation, in order to avoid unconscionable results. *See generally* RESTATEMENT (SECOND) OF CONTRACTS § 234, comment *a* (Tent. Draft Nos. 1-7, 1973); Terry & Fauvre, *The Unconscionability Offense*, 4 GA. L. REV. 469, 476-79 (1970).

98. *Compare* ARIZ. REV. STAT. ANN. § 44-2319 (1956), *with* UNIFORM COMMERCIAL CODE § 2-302, [and] UNIFORM CONSUMER CREDIT CODE § 1.107(4), [and] RESTATEMENT (SECOND) OF CONTRACTS § 234 (Tent. Draft Nos. 1-7, (1973).

99. Terry & Fauvre, *supra* note 97, at 491. *See* Spanogle, *Analyzing Unconscionability Problems*, 117 U. PA. L. REV. 931 (1969).

100. One commentator has noted that the absence of precise definition may be one of the greatest strengths of the doctrine of unconscionability. Boyd, *Representing Consumers—The Uniform Commercial Code and Beyond*, 9 ARIZ. L. REV. 372, 383 (1968).

101. *See* UNIFORM ACT § 1.303, Comment. An often cited "definition" of unconscionability is "a contract 'such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other.'" Hume v. United States, 132 U.S. 406, 415 (1889), *quoting* Earl of Chesterfield v. Janssen, 28 Eng. Rep. 82, 100 (Ch. 1750).

balance is not present.[102] The *Uniform Act* emphasizes the importance of an evaluation of the facts and circumstances of each case and indicates that generalities in the application of the doctrine of unconscionability are to be avoided.[103]

Additional insight into the meaning of the unconscionability provision can be obtained from the law which has developed around a similar provision in the *Uniform Commercial Code* [UCC].[104] The purpose of the unconscionability provision in the UCC is the prevention of oppression and unfair surprise.[105] Economic duress[106] and one-sidedness[107] may be considered oppressive, while deceptive forms,[108] limitations of remedies[109] and assent due to ignorance or carelessness[110] may constitute unfair surprise. Unconscionability can arise either in the pre-contract phase of the transaction or in the contract's substantive provisions.[111] Although elements of abuse in both phases generally are present in unconscionable contracts,[112] an imbalance in bargaining power, particularly when combined with exploitation of the poor, the elderly or the uneducated may alone provide the basis for a finding of unconscionability.[113] Similarly, a gross disparity in the value of the consideration exchanged may be found unconscionable.[114] While the foregoing factors must all be viewed in light of the specific circumstances of each case, they provide some indication of what may constitute proscribed conduct.[115]

(2) *Specific Prohibitions.* In addition to the general prohibi-

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102. *See* RESTATEMENT (SECOND) OF CONTRACTS § 234, comment *c* (Tent. Draft Nos. 1-7, 1973).
103. UNIFORM ACT § 1.303, Comment.
104. UNIFORM COMMERCIAL CODE § 2-302. The unconscionability provision of the *Uniform Act* was adopted from the UCC and the *Uniform Consumer Credit Code*. *See* UNIFORM ACT § 1.303, Comment.
105. UNIFORM COMMERCIAL CODE § 2-302, Comment 1.
106. *See In re* Elkins-Dell Mfg. Co., 253 F. Supp. 864 (E.D. Pa. 1966).
107. *See* Campbell Soup Co. v. Wentz, 172 F.2d 80 (3d Cir. 1948).
108. *See* Davenport, *Unconscionability and the Uniform Commercial Code*, 22 U. MIAMI L. REV. 121, 139-42 (1967).
109. *Id.* at 144-46.
110. *See* Hume v. United States, 132 U.S. 406 (1889).
111. *See generally* Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 757 (1969).
112. *See* Spanogle, *supra* note 99, at 950-51.
113. *See* Williams v. Walker-Thomas Furn. Co., 350 F.2d 445 (D.C. Cir. 1965); RESTATEMENT (SECOND) OF CONTRACTS § 234, comment *d* (Tent. Draft Nos. 1-7, 1973).
114. *See* American Home Improvement Inc. v. MacIver, 105 N.H. 435, 201 A.2d 886 (1964); Frostifresh Corp. v. Reynoso, 52 Misc. 2d 26, 274 N.Y.S.2d 757 (Nassau County Dist. Ct. 1966), *rev'd on other grounds*, 54 Misc. 2d 119, 281 N.Y.S.2d 964 (Sup. Ct. 1967). *See generally* Comment, *Unconscionable Sales Prices*, 20 MAINE L. REV. 159 (1968).
115. Although the actual effect of the unconscionability proscription in the ARLTA is uncertain, if experience with the UCC is an indication, the Act's prohibition of unconscionable dealings will not cause a significant increase in litigation. *See* Terry & Fauvre, *supra* note 97, at 495. Rather, the mere existence of the prohibition acts as a deterrent and restores balance to the bargaining process.

tion of unconscionable conduct, the ARLTA proscribes particular contract terms. These specific prohibitions are designed to effectuate public policy and prevent the parties from contractually avoiding the scheme of rights and duties imposed by the Act.[116] First, the ARLTA prohibits any provision whereby the tenant agrees to waive or forego any rights or remedies provided by the Act.[117] This prohibition is essential to achieving the Act's purpose and to apportioning the rights and obligations of the parties in an equitable and practical manner. If one could escape his statutory duties by contractually imposing them on another, the purpose of the Act would be easily defeated.[118] The ARLTA further provides that a tenant may not agree to pay the landlord's attorney's fees.[119] Such agreements commonly are found in form leases and are especially burdensome to low income tenants.[120] The Act does provide, however, that the parties may agree in writing to award attorney's fees to the prevailing party in the event of court action.[121] Such a provision is contrary to both the *Uniform Act*[122] and the *Model Code*[123] which classify agreements to pay attorney's fees as generally unenforceable.[124] This latter approach reflects the view that litigation should not be encouraged[125] and that a party should only

116. ARIZ. REV. STAT. ANN. § 33-1315 (Supp. 1973). Among the terms prohibited by the *Uniform Act* is any provision in the rental agreement whereby the tenant agrees to confession of judgment. This prohibition was deleted from the Arizona Act. Note, however, that the effectiveness of confession of judgment provisions was already limited by an existing Arizona statute. *See id.* § 44-143 (1956). *See also* D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 177 n.6 (1972). For purposes of clarity, however, the *Uniform Act* provision should have been retained in the ARLTA.

117. ARIZ. REV. STAT. ANN. § 33-1315(A)(1) (Supp. 1973).

118. It could be argued that such agreements would not be given effect by the courts, even in the absence of the Act's specific prohibition, because they would be in conflict with public policy as embodied in the statutory scheme of the ARLTA, and agreements to waive declarations of public policy are necessarily void. Elson Dev. Co. v. Arizona Sav. & Loan Ass'n, 99 Ariz. 217, 407 P.2d 930 (1965). *See also* Whipple v. Industrial Comm'n, 59 Ariz. 1, 121 P.2d 876 (1942). This principle has been relied on in prior Arizona cases holding that a party may not contractually waive the statute of limitations, Ross v. Ross, 96 Ariz. 249, 393 P.2d 933 (1964), or the time period allowed for the redemption of a mortgage. Elson Dev. Co. v. Arizona Sav. & Loan Ass'n, *supra*.

119. ARIZ. REV. STAT. ANN. § 33-1315(A)(2) (Supp. 1973). In Arizona it is a fundamental principle that attorney's fees are not recoverable in an action unless such recovery is provided for either by contract or by statute. Farm & Auto Supply v. Phoenix Fuel Co., 103 Ariz. 344, 422 P.2d 88 (1968); Commercial Standard Ins. Co. v. Cleveland, 86 Ariz. 288, 345 P.2d 210 (1959); Crosby v. Smith, 13 Ariz. App. 243, 475 P.2d 728 (1970). If a party claims attorney's fees, the burden is upon him to show that the agreement included a promise to pay attorney's fees. Farm & Auto Supply v. Phoenix Fuel Co., *supra*.

120. *See* Edot Realty Co. v. Levinson, 54 Misc. 2d 673, 283 N.Y.S.2d 232 (N.Y.C. Civ. Ct. 1967) (holding that a provision for payment of attorney's fees could not be enforced against low income tenants).

121. ARIZ. REV. STAT. ANN. § 33-1315(A)(2) (Supp. 1973).

122. UNIFORM ACT § 1.403(a)(3) & Comment.

123. MODEL CODE § 3-402.

124. Both the *Uniform Act* and the *Model Code* provide for recovery of attorney's fees only for specified violations of the respective statutes. *See* UNIFORM ACT § 1.403, Comment; MODEL CODE § 3-402, Commentary.

125. *General Introduction* to MODEL CODE, *supra* note 2, at 19.

bear the attorney's fees of another in order to effectuate a public policy.[126] Consideration should be given to amending this section so that it conforms with the language and policies of the *Uniform Act and Model Code.*

The ARLTA also prohibits exculpatory clauses[127] which purport to restrict the tenant's right to recover damages for injuries he suffers as a result of the landlord's negligence.[128] Similarly, indemnification provisions which require the tenant to assume the ultimate liability for injuries to third persons resulting from the landlord's negligence[129] are prohibited.[130] Although there already appears to have been some support in Arizona case law for prohibiting these clauses in rental agreements, the decisions are somewhat ambiguous,[131] and the express prohibition contained in the Act resolves the issue.

In addition to providing that any prohibited provision contained in a rental agreement is unenforceable,[132] the ARLTA allows a tenant to recover actual damages and up to 2 months rent if a landlord deliberately uses a rental agreement containing provisions known by him to be prohibited.[133] This penalty has been criticized as being unduly harsh, since an unenforceable provision cannot cause damage to the tenant.[134] In defense of the penalty, however, it can be argued that a tenant who is unaware of his rights may be strongly influenced by the mere presence of the provision in the lease agreement. An unscrupulous landlord could use a legally unenforceable clause as a lever

126. MODEL CODE § 3-402, Comment.
127. ARIZ. REV. STAT. ANN. § 33-1315(A)(3) (Supp. 1973).
128. *See* 15 S. WILLISTON, *supra* note 15, at §§ 1750-51. Exculpatory clauses generally have been attacked on the ground that they violate the public policy against a party being able to escape liability for his own negligence. Although there has been no consensus on the validity of exculpatory clauses in rental agreements, a growing number of courts have ruled such clauses, in the landlord-tenant context, invalid as contrary to public policy. *E.g.*, Tenant Council of Tiber Island-Carrollsburg Sq. v. De Franceaux, 305 F. Supp. 560 (D.D.C. 1969); Papakalos v. Shaka, 91 N.H. 265, 18 A.2d 377 (1941); McCutcheon v. United Homes Corp., 79 Wash. 2d 443, 486 P.2d 1093 (1971). *See also* Crowell v. Housing Auth., 495 S.W.2d 887 (Tex. 1973). *Contra*, Brady v. Glosson, 87 Ga. App. 476, 74 S.E.2d 253 (1953); Kirshenbaum v. General Outdoor Adv. Co., 258 N.Y. 489, 180 N.E. 245 (1932).
129. *See* Graver Tank & Mfg. Co. v. Fluor Corp., 4 Ariz. App. 476, 478, 421 P.2d 909, 911 (1966).
130. ARIZ. REV. STAT. ANN. § 33-1315(A)(3) (Supp. 1973).
131. In Apache Ry. v. Shumway, 62 Ariz. 359, 158 P.2d 142 (1945), the Supreme Court of Arizona invalidated an exculpatory clause in a case involving a common carrier. The *Shumway* case was later noted in Southwest Forest Indus., Inc. v. Westinghouse Elec. Corp., 422 F.2d 1013 (9th Cir. 1970), where the court, while purporting to apply Arizona law, upheld an exculpatory clause contained in a contract between two large corporations. While indemnity clauses, in general, have withstood attack in Arizona courts, there is dicta to the effect that landlord-tenant indemnification provisions are invalid. Graver Tank & Mfg. Co. v. Fluor Corp., 4 Ariz. App. 476, 478, 421 P.2d 909, 911 (1966); *cf.* "Bank Night Depositories and 'Sole Risk' Clauses," 15 ARIZ. L. REV. 593, 808, 815 (1973).
132. ARIZ. REV. STAT. ANN. § 33-1315(B) (Supp. 1973).
133. *Id.*
134. *See* ABA, *Proposed Uniform Act, supra* note 4, at 108.

to extract performance from or to prevent action by the tenant. Granting the tenant damages for deliberate use of prohibited provisions may thus be justified as reducing the possibility of such an occurrence.

One prohibition not contained in the *Uniform Act* was added by the Arizona legislature. This provision, taken from existing Arizona law,[135] prohibits discrimination against tenants with children.[136] The Act stipulates that anyone who either refuses to rent a dwelling unit because the prospective tenant has children or advertises a rental in connection with a restriction against children shall be punished by a fine of not less than $100 nor more than $500, imprisonment for 3 months in the county jail, or both. Similar statutes exist in five other states[137] and reflect a public policy favoring equality in housing for families with children.[138]

The statutes of two states contain modifications which may be worth considering for possible adoption in Arizona. A Massachusetts statute allows restrictions against children in dwellings containing three units or less, one of which is occupied by an elderly or infirm person.[139] In view of the large number of retired persons residing in Arizona, this may be a desirable modification to protect persons for whom the presence of children might constitute a hardship. A second variation on the Arizona law is contained in the Delaware statute. It does not provide criminal penalties for discrimination, but allows the tenant to recover reasonable damages including, but not limited to, reasonable expenditures for substitute housing.[140] This may be preferable to criminal penalties, which are of no immediate value to the affected tenant. The landlord is still punished under Delaware law, and the tenant, the victim of the discrimination, receives monetary compensation for his injury.

## III. THE LANDLORD'S SECURITY: LIENS AND SECURITY DEPOSITS

Liens and security deposits, an integral part of the rental relationship, are aimed at providing the landlord with some form of security to assure the tenant's performance of the lease.[141] While the concept of security is relatively simple, the intricacies of its various forms

135. *See* ARIZ. REV. STAT. ANN. § 33-303 (1956).
136. *Id.* § 33-1317 (Supp. 1973).
137. DEL. CODE ANN. tit. 25, § 6503 (Noncum. Supp. 1972); ILL. ANN. STAT. ch. 80, §§ 37-38 (Smith-Hurd 1966), *as amended*, (Smith-Hurd Supp. 1974); MASS. ANN. LAWS ch. 151B, § 4 (Supp. 1974); N.J. STAT. ANN. § 2A:170-92 (1971); N.Y. REAL PROP. LAW §§ 236-37 (McKinney 1968).
138. *See* Gilman v. Newark, 73 N.J. Super. 562, 180 A.2d 365 (1962).
139. MASS. ANN. LAWS ch. 151B, § 4 (Supp. 1974).
140. DEL. CODE ANN. tit. 25, § 6503(c) (Noncum. Supp. 1972).
141. *See* 2 R. POWELL, THE LAW OF REAL PROPERTY ¶ 231 [2] (1973).

and the relationships between the parties have resulted in extensive litigation.[142] Additionally, the basic nature of the security deposit renders it subject to abuse, and it has been a constant source of landlord-tenant friction.[143] This section will first review the landlord's lien and its abolition by the ARLTA. Then, after discussing the development of the various types of security deposits and the duties of the fund holder, changes effectuated in Arizona law by the ARLTA will be analyzed.

## A. *Liens*

At common law, the right of distraint provided security for the landlord.[144] Although often referred to as a lien,[145] distraint does not create an incumbrance on the property; rather it is the right to seize the personal property of a tenant who is in arrears.[146] Although a few states codified the right of distraint,[147] the majority replaced it with a statutorily created landlord's lien.[148] The statutory lien places an encumbrance on all of the tenant's property which is placed on the rented premises.[149] This provides greater protection for the landlord than the right of distraint since the lien attaches automatically at the commencement of the term and the landlord need not seize the property.

Security for the Arizona landlord previously has been available through both the common law right of distraint and a statutory lien on the tenant's personal property.[150] These forms of security for the landlord, however, are no longer available under the ARLTA. The Act abolishes the right of distraint and renders unenforceable any lien

142. *Id.*
143. *See* ABA, *Proposed Uniform Act, supra* note 4, at 110.
144. *See In re* Edmunds, 30 F. Supp. 934, 935 (M.D. Pa. 1940).
145. American Bar Association Committee on Leases, *Security Deposits and Guarantees*, 1 REAL PROP., PROB. & TR. J. 405, 406 (1966) [hereinafter cited as ABA, *Security Deposits*].
146. *See* Henderson v. Mayer, 225 U.S. 631, 637-38 (1912); Morgan v. Campbell, 89 U.S. (22 Wall.) 381, 390-91 (1874).
147. *See* ILL. ANN. STAT. ch. 80, § 16 (Smith-Hurd 1966); PA. STAT. ANN. tit. 68, § 250.302 (1965). The Pennsylvania statute has been held unconstitutional. *See* Gross v. Fox, 349 F. Supp. 1164 (E.D. Pa. 1972).
148. ABA, *Security Deposits, supra* note 145, at 406; *see, e.g.*, ARIZ. REV. STAT. ANN. § 33-362 (1956); FLA. STAT. ANN. § 83.08 (Supp. 1973); N.M. STAT. ANN. § 61-3-14 (1953).
These statutory liens generally are limited to securing only the payment of rent. As a result, landlords often design the written leases to contain more encompassing liens. *See* Niel v. Chrisman, 26 Ariz. 566, 572, 229 P. 92, 94 (1924). *See generally* ABA, *Security Deposits, supra* note 145, at 406-07. These liens protect the landlord from the tenant's breach of other covenants. *See* Niel v. Chrisman, *supra*.
149. ARIZ. REV. STAT. ANN. § 33-362 (1956), *as amended*, § 33-1372 (Supp. 1973).
150. *Id.* Mason Dry Goods Co. v. Ackel, 30 Ariz. 7, 243 P. 606 (1926); Murphey v. Brown, 21 Ariz. 268, 100 P. 801 (1909). There appear to be no reported Arizona cases on the landlord's use of the right of distraint. This may be due to the existence of the statutory lien.

or security interest that was not perfected before the Act became effective.[151]

## B. *Security Deposits Prior to the ARLTA*

In addition to the protection afforded by the right of distraint and statutory or contractual liens, landlords generally require that a fund be deposited to secure the tenant's fulfillment of his lease obligations. Although these funds commonly may be referred to as "security deposits," the actual wording of lease provisions segregates them into four distinct categories. These categories, all of which have been recognized by the Arizona courts, are: (1) true security deposit; (2) prepaid rent; (3) a bonus for the execution of the lease; and (4) liquidated damages.[152] Although these various types of funds are all aimed at protecting the landlord's interest,[153] the distinction between these categories is of considerable importance since disposition of the sum upon termination or default is dependent upon the category created by the parties. In ascertaining the type of fund involved, the courts look beyond nomenclature to the substance of the agreement and the intent of the parties.[154]

Where a fund is a deposit and is intended to secure the faithful performance of the lease covenants, it is considered a true security deposit.[155] Title does not vest in the landlord, although he is entitled to retain possession of the fund until the lessee has fulfilled his obli-

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151. ARIZ. REV. STAT. ANN. § 33-1372 (Supp. 1973).

152. *See* Loew v. Antonick, 82 Ariz. 204, 207, 310 P.2d 825, 827 (1956); 2 R. POWELL, *supra* note 141, at ¶ 231 [2]. Powell suggests that the various labels used to identify security deposits are mere attempts to allow the landlord to retain the entire deposit regardless of the amount of damages he has incurred.

153. *See* Loew v. Antonick, 82 Ariz. 204, 208-09, 310 P.2d 825, 828 (1956); ABA, *Security Deposits, supra* note 145, at 418. *See also* A-1 Garage v. Lange Inv. Co., 6 Cal. App. 2d 593, 596-97, 44 P.2d 681, 682, *cert. denied*, 296 U.S. 642 (1935); 1 J. RASCH, NEW YORK LANDLORD AND TENANT INCLUDING SUMMARY PROCEEDINGS § 380 (2d ed. 1971).

The fact that the Arizona landlord may not recover damages other than rent in a possessory action results in the security deposit being the principal means of protection for the landlord. *See* Baird, *A Study of Arizona Lease Terminations*, 9 ARIZ. L. REV. 189 (1967).

154. ABA, *Security Deposits, supra* note 145, at 418. *See* Loew v. Antonick, 82 Ariz. 204, 310 P.2d 825 (1956); Warming v. Shapiro, 118 Cal. App. 2d 72, 257 P.2d 74 (1953); Note, 45 YALE L.J. 537 (1936).

In determining the intent of the parties, courts often consider factors such as interest payments on the fund, reference to the fund as a deposit or as security and a conditional return of the fund upon the occurrence of an event. Loew v. Antonick, 82 Ariz. 204, 310 P.2d 825 (1956). *See* ABA, *Security Deposits, supra* note 145, at 420. Such provisions may be interpreted as an indication that an unconditional right to the deposit did not vest in the landlord, resulting in the fund being categorized as a true security deposit. *See In re* Frey, 26 F.2d 472 (E.D. Pa. 1928); Thompson v. Swiryn, 95 Cal. App. 2d 619, 213 P.2d 740 (1950); 2 R. POWELL, *supra* note 141, at ¶ 231 [2]; 1 J. RASCH, *supra* note 153, at § 384. *But see* Loew v. Antonick, 82 Ariz. 204, 310 P.2d 825 (1956).

155. *See* ABA, *Security Deposits, supra* note 145, at 418.

gations under the lease.[156] Upon termination or breach, the landlord may not automatically retain the entire fund; rather he may only deduct and retain the amount due him for rent or damages.[157] Any remaining portion of a true security deposit must be returned to the tenant. Should the fund be insufficient to cover the landlord's damages, he may maintain an action for any amount due him.[158]

Two similar categories, prepaid rent and the bonus, may be viewed as actual payments to the landlord. Prepaid rent is the payment in advance of rent which will not become due until later in the term.[159] In the case of a bonus, the advance payment is referred to as "consideration for the execution of the lease" and the lease agreement provides that the tenant will not be charged for the final period of the tenancy.[160] In both of these types of security arrangements, the fund or bonus passes to the landlord at the inception of the lease, and the entire sum may be retained if the tenant defaults, regardless of the amount of actual damages incurred.[161] In addition to retaining

156. *See* Cochise Hotel v. Douglas Hotel Operating Co., 83 Ariz. 40, 44, 316 P.2d 290, 292-93 (1957); Ace Realty v. Friedman, 106 Cal. App. 2d 805, 812-13, 236 P.2d 174, 178-79 (1951).

157. Loew v. Antonick, 82 Ariz. 204, 207, 310 P.2d 825, 827 (1956); Ace Realty v. Friedman, 106 Cal. App. 2d 805, 812-13, 236 P.2d 174, 178 (1951).

158. Perry v. Wilson Bros., 260 Mass. 519, 157 N.E. 570 (1927).

Distinct from the category of the fund, which establishes the landlord's and tenant's rights in the sum upon termination, is the relationship created by the parties determining the duty to care for and the right to use a true security deposit while it is in the landlord's possession. *See* 2 R. POWELL, *supra* note 141, ¶ 231 [2], at 277. While there exists considerable confusion concerning the exact relationship created, the courts consistently have classified it as being that of either debtor-creditor, pledgor-pledgee or trustee-beneficiary. *See* Colantuoni v. Balone, 95 N.J. Eq. 748, 123 A. 541 (1924); Mendelson-Silverman, Inc. v. Malco Trading Corp., 146 Misc. 215, 260 N.Y.S. 881 (Sup. Ct. 1932); Atlas v. Moritz, 217 App. Div. 38, 216 N.Y.S. 490 (1926). The debtor-creditor relationship is the most common because it allows the landlord full use of the funds, however, it has the disadvantage of providing only limited protection for the tenant's deposit. *See* 1 J. RASCH, *supra* note 153, at § 400. Several states follow a trust theory. *See* Atlas v. Moritz, *supra*; N.J. STAT. ANN. § 46:8-19 (Supp. 1974-75); PA. STAT. ANN. tit. 68, § 250.511a (Supp. 1974-75). This approach limits the landlord's use of the funds since he holds them in a fiduciary capacity, but it provides the tenant with a high degree of protection. Between these extremes lies the pledge relationship which allows the landlord to use the deposited funds, but not in a manner that jeopardizes the tenant's interest. *See* Harris, *A Reveille to Lessees*, 15 S. CAL. L. REV. 412, 416-21 (1942). The Arizona courts have not had occasion to rule upon the relationship created between the landlord and tenant, nor is there any indication of the position which the court might adopt. To date, the landlord and tenant have been free to establish the desired relationship.

159. *See* Loew v. Antonick, 82 Ariz. 204, 207, 310 P.2d 825, 827 (1956).

160. *See* J. GODDARD, CALIFORNIA LANDLORD AND TENANT LAW AND PROCEDURE 43 (4th ed. 1966); *cf.* Butt v. Bertola, 110 Cal. App. 2d 128, 242 P.2d 32 (1952).

161. *See* Loew v. Antonick, 82 Ariz. 204, 207, 310 P.2d 825, 827 (1956); Wilson v. Savon Stations, Inc., 15 Ariz. App. 136, 486 P.2d 816 (1971). But the landlord must account for any prepaid rent or bonus where he causes a wrongful termination of the tenancy. *See* Butt v. Bertola, 110 Cal. App. 2d 128, 137, 242 P.2d 32, 39 (1952).

Many courts exhibit a preference for interpreting ambiguously worded security provisions in a manner so as to avoid the tenant's forfeiture of his deposit. *See* ABA, *Security Deposits, supra* note 145, at 419. The Supreme Court of Arizona has not exhibited this preference. *See* Loew v. Antonick, 82 Ariz. 204, 310 P.2d 825 (1956).

the fund, the landlord may maintain an action for any additional damages he has sustained.[162]

The fourth category of security device is a provision for liquidated damages.[163] Such a provision is valid where the amount of damages may not be readily ascertained in advance and the amount set aside as the fund is not disproportionate to the potential damages.[164] When the provision is a valid liquidated damage clause, the landlord may retain the whole amount regardless of his actual damages;[165] however, he may not maintain an action for any additional damage he has suffered. The current status of provisions for liquidated damages in Arizona lease agreements is unclear. In one Arizona supreme court case[166] the lease provided that the advance rent should be forfeited as liquidated damages upon the tenant's default. The court upheld the liquidated damages provision without reservation. In passing upon a similar provision 4 years later,[167] however, the same court specifically declined to rule upon the validity of the liquidated damage provision. The later decision has been noted as a possible indication that liquidated damage provisions may be held void as a penalty and contrary to public policy.[168]

### C. *Security Deposits Under the ARLTA*

The ARLTA significantly changes the law governing security deposits. The Act defines security as "money or property given to assure payment or performance under the rental agreement."[169] While security deposits are generally in the form of cash, the ARLTA places no limitation on what may be used as security. Thus, anything which

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162. *See* A-1 Garage v. Lang Inv. Co., 6 Cal. App. 2d 593, 44 P.2d 681 (1935); Brooks v. Coppedge, 71 Idaho 166, 228 P.2d 248 (1951).

163. *See* Loew v. Antonick, 82 Ariz. 204, 310 P.2d 825 (1956); 2 R. POWELL, *supra* note 141, at ¶ 231 [2].

164. *See* Realworth Properties, Inc. v. Bachler, 33 Misc. 2d 39, 223 N.Y.S.2d 910 (Sup. Ct. 1962); *cf.* Sun Printing & Publishing Ass'n v. Moore, 183 U.S. 642, 672-73 (1902). A liquidated damage provision will be held invalid as a penalty where damages are easily determined, where the sum is grossly disproportionate to the potential damages or where the fund secures several covenants which are of varying importance. *See* ABA, *Security Deposits*, *supra* note 145, at 419.

165. Benjamin Franklin Thrift Stores v. Jared, 192 Wash. 252, 73 P.2d 525 (1937).

166. Grizzle v. Runbeck, 74 Ariz. 92, 244 P.2d 1160 (1952).

167. Loew v. Antonick, 82 Ariz. 204, 310 P.2d 825 (1956) (upholding a prepaid rent provision).

168. *See* Baird, *supra* note 153, at 206-07. Although, since *Loew*, the Arizona supreme court does not appear to have ruled on the validity of a liquidated damage provision in a lease, the court of appeals has upheld such a provision in a contract for the sale of real estate. O'Malley Inv. & Realty Co. v. Trimble, 5 Ariz. App. 10, 422 P.2d 740 (1967). Additionally, the UCC, as adopted by the Arizona legislature, allows liquidated damage clauses. ARIZ. REV. STAT. ANN. § 44-2397 (1956). This section limits liquidated damage provisions to those: (1) which are reasonable in amount in light of the anticipated damage; (2) where there exists difficulty of actual proof of loss; and (3) where an adequate remedy is not otherwise available.

169. ARIZ. REV. STAT. ANN. § 33-1310(13) (Supp. 1973).

is of value and acceptable to the parties may be used.[170]

The ARLTA limits the amount of security which a landlord may require to an amount equivalent to one and one-half months rent.[171] This limitation applies to "security, however denominated, including, but not limited to, prepaid rent."[172] Although the only form of security specifically mentioned is prepaid rent, the wording of this provision appears to include all the categories of security previously discussed. Such an interpretation is necessary if this provision is to act as an effective limitation on excessively large security deposits. Otherwise, the purpose of this section could be easily avoided through carefully worded lease provisions which allow the landlord to require a fund which is not subject to the Act's limitation. The definition of security provided by the Act, "money or property given to assure . . . performance,"[173] provides additional support for the conclusion that any funds which are provided to protect the landlord from the tenant's failure to fulfill his obligations come within the Act's definition of security.[174] Therefore, regardless of the label attached to a fund, if it is intended to assure performance of the rental agreement, it is security and should be subject to the amount limitation and to all other ARLTA provisions dealing with security deposits.

The Act requires the landlord to account for all funds which he retains from a security deposit.[175] After delivery of possession of the premises and a demand for the return of the security deposit by the tenant, the landlord is required to provide the tenant with an itemized list of any deductions and the remaining balance of the deposit within 14 days.[176] The landlord may deduct from the security deposit accrued rent and damages that are the result of the tenant's failure to comply with the provisions of the Act requiring the tenant to maintain the dwelling unit.[177] No other deductions from security deposits are

170. For a discussion of forms of security, other than cash see ABA, *Security Deposits, supra* note 145, at 409-10.

171. ARIZ. REV. STAT. ANN. § 33-1321(A) (Supp. 1973).

The Act contains no penalty if the landlord wrongfully demands excess security. *See id.* § 33-1321(C). It remains to be seen whether this provision will act as an effective deterrent absent a penalty provision and it may be desirable to amend this provision to provide some form of penalty. Alternatively, it seems reasonable that any excess security could be considered money which is wrongfully withheld and subject to the penalty provision of section 33-1321(C).

172. *Id.* § 33-1321(A).

173. *Id.* § 33-1310(13).

174. While the provisions of the Act appear to preclude the use of a "bonus" which is intended to be security for the protection of the landlord, a "true bonus" which is given solely in consideration for the execution of the lease should not be excluded since it would not fall within the Act's definition of security. *See id.*

175. *Id.* § 33-1321(C).

176. *Id.*

177. *Id.* The Act does not explicitly exempt the tenant from liability for ordinary wear and tear, as did the prior Arizona landlord-tenant statutes. *See id.* § 33-321 (1956), *as amended*, (Supp. 1973). Ordinary wear and tear is the depreciation which

authorized by the Act.[178]

If the landlord wrongfully withholds funds from a security deposit, the tenant may recover the amount wrongfully withheld plus a penalty equal to twice that amount.[179] While these penalties will undoubtedly discourage many abuses in excessive withholding, the impact and effectiveness may be minimal since the disputed amount will not normally warrant instituting legal proceedings. Moreover, the tenant must also bear the burden of proving that the items were wrongfully withheld.[180]

The ARLTA protects the tenant's interest in his security deposit in case of transfer of the landlord's interest in the premises. At the termination of the tenancy the holder of the landlord's interest is bound by the security provisions of the Act.[181] Additionally, the landlord remains personally liable to the tenant for any security due him, even after the transfer of his interest.[182] While this provision insures protection for the tenant, it may prove troublesome for land-

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the property undergoes from its ordinary use in daily living. *See* Tirrell v. Osborn, 55 A.2d 725, 727 (D.C. Mun. Ct. App. 1947). Since the Act imposes upon the tenant liability for damage which results from wilful or negligent conduct, ARIZ. REV. STAT. ANN. § 33-1341(6) (Supp. 1973), the tenant does not appear to be liable for ordinary wear and tear.

178. Since security is "given to assure payment or performance under a rental agreement," ARIZ. REV. STAT. ANN. § 13-1310(13) (Supp. 1973), there appears to be no justification for not allowing the landlord to deduct *all* legitimate damages from the security. For example, if the tenant abandons the premises and the landlord incurs expenses in releting those premises, he may deduct only those expenses allowed by the Act. Thus, the landlord could not deduct any realty commissions or advertising expenses which he incurs. Conceivably a landlord could be required to return a deposit and then commence proceedings to obtain the amount due him. The amount in controversy, however, often will be too small to justify the expenditure of time or money in an attempt to obtain the damages. This section of the ARLTA should be amended to allow the landlord to deduct from security deposits *all* damages resulting from the tenants breach of the lease.

179. *Id.* § 33-1321(D). It should be noted that the wording of this section arguably indicates that both a wrongful withholding of security *and* a violation of the requirement that a nonrefundable cleaning charge be so specified in writing must occur before the landlord is liable for a penalty. Such an interpretation of this section would totally defeat its purpose since it appears that each type of conduct is prohibited separately. Obviously, a violation of either provision should subject the landlord to the penalty. The section should be amended to specify that a violation of either provision provides a basis for penalizing the landlord.

Another problem area in this penalty provision is that the Act fails to define what is meant by the phrase "amount wrongfully withheld." For example, if the landlord fails to account for the security deposit within the 14-day period, the question arises whether the entire deposit is wrongfully withheld, due to the failure to account, or whether only the amount which the landlord was not actually entitled to deduct from security is wrongfully withheld. The former interpretation obviously provides greater incentive for the landlord to voluntarily comply with the provisions of the Act and seems to be more in keeping with the purpose of the penalty provision.

180. *See* Gangadean v. Bryne, 16 Ariz. App. 112, 491 P.2d 501 (1971).

181. ARIZ. REV. STAT. ANN. § 33-1321(F) (Supp. 1973). Generally the landlord remains liable to the tenant even after the transfer of his interest, although a minority of jurisdictions have held to be contrary. *See* 1 AMERICAN LAW OF PROPERTY § 3.73 (A.J. Casner ed. 1952).

182. ARIZ. REV. STAT. ANN. § 33-1325(A) (Supp. 1973).

lords in the conveyance of multiple-unit properties.[183] The conveying landlord can relieve himself of liability only by returning the deposit to the tenant and obtaining a release. This may be unacceptable to some purchasers since they would then be forced to re-collect security from the tenants.[184] Although neither the grantee nor the grantor can readily relieve themselves of liability to the tenant,[185] the parties to the conveyance should set forth clearly their respective obligations to each other with respect to the security deposits.

These security provisions of the ARLTA constitute a considerable change in Arizona law. Previously, landlords were under no duty to account for their deductions. In fact, depending on the categorization of the security, the tenant had no interest in the deposited fund and the landlord could retain the entire amount.[186] Additionally, the tenant now is protected from the financial burdens of excessive security deposits. Nevertheless, while the Act does much to eliminate many of the abuses involving security deposits, several potential problem areas remain.

The most troublesome area is the Act's exclusion of "a reasonable charge for redecorating or cleaning" from the definition of security.[187] Thus, the landlord may require such a charge in addition to his security of one and one-half months rent. If the cleaning or redecorating charge is non-refundable, the landlord must so specify in writing.[188] The exclusion of a reasonable redecorating or cleaning charge from the limitations placed on security is a change from the *Uniform Act*.[189] Under the ARLTA the only limitation on the amount that may be required for redecorating or cleaning is that it must be reason-

183. *See* Strum, *Proposed Uniform Residential Landlord and Tenant Act: A Departure from Traditional Concepts*, 8 REAL PROP., PROB. & TR. J. 495, 496-97 (1973).

Several states have statutory provisions which provide adequate protection for the tenant, but which do not place dual liability on the landlord and his transferee. Liability may be imposed simply on the transferee, with the landlord being required to transfer the deposits to him, or the landlord may retain the amount and remain liable to the tenant. *See* COLO. REV. STAT. ANN. §§ 58-1-28(4)-(5) (Supp. 1971); N.Y. GEN. OBLIG. LAW § 7-105 (McKinney Supp. 1973-74).

184. *See* Strum, *supra* note 183, at 496-97.

185. *See* ARIZ. REV. STAT. ANN. § 33-1315(A)(1) (Supp. 1973).

186. *See* text & notes 155-68 *supra*.

187. ARIZ. REV. STAT. ANN. § 33-1310(13) (Supp. 1973).

188. *Id.* § 33-1321(B). If a landlord takes a nonrefundable cleaning or redocorating charge without specifying in writing that it is nonrefundable, he may be subject to a penalty equal to twice the amount wrongfully withheld. *Id.* § 33-1321(D). The effectiveness of this provision is questionable. The landlord who is confronted with a charge that he violated this section would likely contend that the charge was designed to be refundable, but the cost of cleaning and redecorating exhausted the entire fund. Additionally, if the Act is construed not to require the landlord to itemize expenditure from this fund, it would be difficult to prove the falsity of his contention. See text & notes 194-98 *infra*.

189. *Compare* UNIFORM ACT § 1.301, *with* ARIZ. REV. STAT. ANN. § 33-1310(13) (Supp. 1973). The initial proposed version of the ARLTA, submitted as S.B. 1096, 31st Ariz. Legis., 1st Reg. Sess. (1973), did not exempt cleaning or redecorating charges from security.

able.[190] This can only be determined, however, in light of the permissible uses of the fund—cleaning or redecorating. Unfortunately, the Act does not define these terms, and their ambiguity renders this provision potentially subject to abuse. In attempting to identify what may consistute a reasonable charge, the following consideration may be helpful. Since the landlord may recover from the security deposit for any physical damage to the premises,[191] such damage expenses should be excluded from the cleaning or redecorating charge. To allow any item that properly is deductible from security to be considered in determining the amount of the redecorating or cleaning charge leads to the possibility of double recovery. The cleaning or redecorating charge should be limited to include only the normal costs which are incidental to a change of tenants. Both the landlord and tenant may avoid future problems by delineating clearly in the lease the expense items for which the charge is required. Discretion should be exercised in determining items and amounts to be included. A landlord attempting to use this provision to obtain additional security may be found in violation of the security limitations of the ARLTA.[192] Should the amount charged be found unreasonable, the excess could be considered security, thereby rendering the landlord guilty of requiring excess deposits. Any deliberate abuse of this provision would render the landlord guilty of a violation of the good faith provision of the Act, resulting in his being in a detrimental position should he be required to resort to judicial proceedings to enforce the rental agreement.[193]

The Arizona legislature's allowance of a cleaning or redecorating charge creates another problem. While the Act imposes an obligation upon the landlord to account for his deductions from security,[194] this requirement apparently is not applicable to the redecorating or cleaning charge since it is not part of security.[195] Thus, where a refundable cleaning charge is involved, the tenant may be unable to obtain an accounting for the funds withheld. The tenant's only remedy is to institute judicial proceedings and hope to obtain the desired information through the discovery process. The relatively small amounts usually in question, however, would seem to render this means of obtaining information impractical.[196] Additionally, the ten-

190. ARIZ. REV. STAT. ANN. § 33-1310(13) (Supp. 1973). Presumably, the reasonableness of a charge would depend on numerous factors, including: (1) whether the apartment is furnished; (2) the general condition and value of the premises; and (3) the length of the tenancy.
191. *See* text accompanying notes 177-78 *supra.*
192. *See* ARIZ. REV. STAT. ANN. § 33-1321(C) (Supp. 1973).
193. *Id.* § 33-1311.
194. *See* text accompanying notes 175-80 *supra.*
195. *See* ARIZ. REV. STAT. ANN. § 33-1321(C) (Supp. 1973).
196. *See* ABA, *Proposed Uniform Act, supra* note 4, at 110.

ant may have incurred this expense only to find that the amount was not wrongfully withheld. These problems thus create a situation conducive to the retention of excessive amounts from the cleaning charge. There appears to be little justification for not requiring the landlord to account for the deductions he retains. The landlord may gain a favorable position in the marketplace by representing the cleaning charge to be refundable. However, abuse by the landlord may result in the cleaning charge being nonrefundable in practice.

The cleaning and redecorating charge is a potential Pandora's box. The landlord and tenant are uninformed as to the allowable expenses, and the absence of any requirement for accounting for the funds renders the provision susceptible to abuse. The exemption for a cleaning charge is not found in many of the recently enacted statutes of other states.[197] To the contrary, some statutes specifically require that cleaning charges be included as security.[198] To avoid the pitfalls previously discussed,[199] the Arizona legislature should follow suit and include cleaning or redecorating charges as part of the security.

The greatest deficiency in the Arizona Act may be the absence of an effective means of insuring compliance by the landlord with the security deposit provisions. The statutes of many states place severe penalties upon the landlord who fails to account for his deductions, and some also require him to prove the validity of his deductions. Several statutes provide that the landlord forfeits the entire deposit or is liable for punitive damages for his failure to provide the tenant with a written statement of the deductions.[200] In contrast, the ARLTA provides only for a penalty equivalent to twice the amount wrongfully withheld[201] and the tenant must institute proceedings in which he bears the burden of proving that the amount was wrongfully withheld. The provisions of other jurisdictions provide a much stronger incentive for the landlord to comply with their statutory requirements and many jurisdictions require that the landlord bear the burden of proof as to the damages he deducts.[202] By comparison with some

197. CAL. CIV. CODE § 1950.5 (West Supp. 1974), *discussed in* Note, 22 HASTINGS L.J. 1373 (1971); COLO. REV. STAT. ANN. §§ 58-1-26 to -28 (Supp. 1971); FLA. STAT. ANN. § 83.49 (Supp. 1974-75); HAWAII REV. STAT. § 521-44 (Supp. 1973).

198. HAWAII REV. STAT. § 521-44(a)(2) (Supp. 1973). *See also* COLO. REV. STAT. ANN. § 58-1-28(3)(b) (Supp. 1971).

199. See text accompanying notes 187-96 *supra.*

200. COLO. REV. STAT. ANN. § 58-1-28(2) (Supp. 1971); DEL. CODE ANN. tit. 25, § 5511(e) (Noncum. Supp. 1972); HAWAII REV. STAT. § 521-44(c) (Supp. 1973); PA. STAT. ANN. tit. 68, §§ 250.512(b)-(c) (Supp. 1974-75).

201. ARIZ. REV. STAT. ANN. § 33-1321(D) (Supp. 1973).

202. COLO. REV. STAT. ANN. § 58-1-28(3)(b) (Supp. 1971); PA. STAT. ANN. tit. 68, § 250.512(c) (Supp. 1973-74). The Hawaii statute requires that the landlord include written substantiation of his deductions with the accounting provided to the tenant. HAWAII REV. STAT. § 521-44(c) (Supp. 1973).

other states, the Arizona provisions relating to the control of security deposits provide the landlord with relatively little incentive to comply, even if the tenant resorts to judicial proceedings in an attempt to obtain compliance.

Finally, the ARLTA fails to provide any protection for the tenant's deposit while it is in the possession of the landlord. The Act imposes no specific duty of care upon the landlord.[203] Many other jurisdictions provide the tenant with this protection by either creating a trust relationship[204] or by providing the tenant with some type of priority in case of the landlord's bankruptcy.[205] Additionally, many statutes require the landlord to maintain the deposits in a separate account.[206] Similar provisions in the ARLTA to protect the tenant's interest in the deposit seem desirable.

## IV. DUTIES AND REMEDIES UNDER THE ACT

The landlord-tenant relationship has long been strained by an inequitable distribution of duties between the parties.[207] Redistribution of these duties is not a simple task, however. An unbalanced shift of burdens to the landlord could cause a decrease in monetary return from rental property and discourage future private investment in rental housing. Proper reallocation of duties requires a fair and realistic balancing of the legitimate economic concerns of landlords, the interest of society in public health and welfare and the interest of tenants in obtaining decent dwelling units. The ARLTA attempts to more equitably distribute rights and duties and set forth viable remedies which can be resorted to by both landlords and tenants to enforce their rights. This section will discuss the duties imposed by the ARLTA and, in connection with the discussion of each duty, will consider the remedies made available in case of noncompliance.

### A. *Landlords' Duties and Tenants' Remedies*

(1) *Duty to Deliver Possession.* At common law, every rental agreement contained an implied covenant of quiet enjoyment guaran-

203. See note 158 *supra.* Since the landlord normally drafts the lease, he will be able to insure that the relationship created upon the deposit of the security fund will be that of debtor-creditor which will allow him unlimited use of the money, instead of a trust relationship with its accompanying fiduciary responsibilities.

204. *See* N.J. STAT. ANN. § 46:8-19 (Supp. 1974-75); N.Y. GEN. OBLIG. LAW § 7-101 (McKinney 1964).

205. HAWAII REV. STAT. § 521-44(b) (Supp. 1973). *See also* MD. CODE ANN. art. 21, § 8-213(e) (1973).

206. DEL. CODE ANN. tit. 25, § 5511(b) (Noncum. Supp. 1972); MD. ANN. CODE art. 21, § 8-213(e) (1973); PA. STAT. ANN. tit. 68, § 250.511a (Supp. 1974-75).

207. *See* Lesar, *The Landlord Tenant Relationship in Perspective,* 9 KAN. L. REV. 369 (1961).

teeing that neither the landlord nor anyone acting through him would interfere with the tenant's possession of the premises.[208] By this covenant, however, the landlord guaranteed the tenant's quiet possession only as against those who rightfully claimed under the landlord. The landlord warranted only that he had such title to the premises as would enable him to give the tenant the legal right to possession. It did not place a duty on the landlord to protect the lessee against those wrongfully in possession of the premises. If a trespasser was in possession, or if a former tenant wrongfully held over, the covenant of quiet enjoyment was inapplicable.

There has been a split of authority in this country on the question of whether the law will imply an additional duty on the part of the landlord to put the tenant into possession in such circumstances. One view, known as the American rule, only requires the landlord to deliver the legal right to possession; he is not under a legal obligation to ensure actual possession, however, when third persons wrongfully exclude the tenant.[209] This rule is based on the concept that the tenant has all the rights and duties of an owner during the term of the tenancy and has sufficient legal remedies to protect himself against those wrongfully in possession. The English rule, on the other hand, is based on the concept that a tenant enters into a rental agreement with the justifiable expectation of possession without engaging in a lawsuit to evict some third party.[210] This rule imposes upon the landlord a duty to deliver actual physical possession of the premises. If the tenant is prevented from obtaining possession by someone holding over, with or without the landlord's consent, the covenant of quiet enjoyment is violated.[211]

This latter view was followed in Arizona at common law,[212] and with the enactment of the ARLTA, the general concept of the English rule was codified. The Act requires the landlord to place the tenant

208. Gazzolo v. Chambers, 73 Ill. 75 (1874); Adair v. Bogle, 220 Iowa 238 (1866).

209. A minority of jurisdictions follow the American rule. *See, e.g.*, Rice v. Biltmore Apt. Co., 141 Md. 507, 119 A. 364 (1922); Snider v. Deban, 249 Mass. 59, 144 N.E. 69 (1924); Ward v. Hudson, 119 Miss. 171, 24 So. 2d 329 (1946); Teitelbaum v. Direct Realty Co., 172 Misc. 48, 13 N.Y.S.2d 886 (Sup. Ct. 1939); Hannan v. Dusch, 154 Va. 356, 153 S.E. 824 (1930).

210. *See* Hannan v. Dusch, 154 Va. 356, 153 S.E. 824 (1930).

211. The English rule is followed by a majority of jurisdictions. *See, e.g.*, King v. Reynolds, 67 Ala. 229 (1880); Dilly v. Paynsville Land Co., 173 Iowa 536, 155 N.W. 971 (1916); Barfield v. Damon, 56 N.M. 515, 245 P.2d 1032 (1952); Dieffenbach v. McIntyre, 208 Okla. 163, 254 P.2d 346 (1952); Whitfield v. Gay, 253 S.W.2d 54 (Tex. Civ. App. 1952). This is also the position taken in RESTATEMENT (SECOND) OF PROPERTY § 6.2 (Tent. Draft No. 1, 1973).

212. In Cheshire v. Thurston, 70 Ariz. 299, 219 P.2d 1043 (1950), the Supreme Court of Arizona adopted the English rule, stating that "in the absence of an express covenant there is an implied covenant on the part of the landlord to put his tenant in actual possession . . . ." *Id.* at 301, 219 P.2d at 1044.

in full possession at the beginning of the tenancy.[213] If he fails to deliver the required possession, rent abates during the period[214] and the tenant may terminate the rental agreement upon giving the landlord 5 days written notice.[215] Alternatively, the tenant may demand performance of the rental agreement and maintain an action for possession against the landlord or any other person wrongfully in possession.[216] If the tenant opts for the second alternative, he may recover damages for the injuries he sustained[217] and, if the failure to deliver possession was wilful and not in good faith, he also may recover up to 2 months rent or twice his actual damages, whichever is greater.[218] While this section of the Act generally conforms to prior Arizona law, it does expand the remedies available to the tenant if the landlord fails to deliver possession.

(2) *Duty to Maintain Fit Premises.* At early common law, a lease was considered a conveyance of an interest in land.[219] As the purchaser of an interest in land, the tenant not only assumed all the benefits and obligations of ownership but he was also subject to the doctrine of *caveat emptor.* In the absence of an express covenant to the contrary, a tenant took the property as he found it.[220] Adopting this approach the Supreme Court of Arizona stated that "in the absence of an agreement to the contrary the lessor is not obligated to make repairs upon demised premises or to keep them in repair during

213. ARIZ. REV. STAT. ANN. § 33-1323 (Supp. 1973).

214. *Id.* § 33-1362(A). In some jurisdictions this remedy was available under the landlord's implied covenant to put the tenant in possession. *See* Adrian v. Rabinowitz, 116 N.J.L. 586, 186 A. 29 (1936).

215. ARIZ. REV. STAT. ANN. § 33-1362(A)(1) (Supp. 1973). It is not clear whether the landlord may put the tenant into possession within the 5-day notice period and thus avoid termination of the rental agreement but it would seem fair to allow him to do so. *See* Little v. Hudgins, 117 Ark. 272, 174 S.W. 520 (1915); Sloan v. Hart, 150 N.C. 269, 63 S.E. 1037 (1909). Often the landlord is unable to anticipate problems with a holdover tenant until the day he is to deliver possession to the new tenant. The penalty for failure to deliver possession seems unnecessarily harsh unless the Act is interpreted as allowing the landlord to avoid termination by placing the tenant in possession during the 5-day notice period. With summary forcible entry and detainer proceedings available to the landlord, he should be able to deliver possession within a reasonable time. If possession is delivered in a matter of hours or days the tenant should not be allowed to subject the landlord to what amounts to a forfeiture simply because he may be dissatisfied with his bargain. *See* ABA, *Proposed Uniform Act, supra* note 4, at 111.

216. ARIZ. REV. STAT. ANN. § 33-1362(A)(2) (Supp. 1973). Under prior Arizona law the new tenant could maintain an action of forcible entry and detainer against a holdover tenant. *See* Cheshire v. Thurston, 70 Ariz. 299, 301, 219 P.2d 1043, 1044 (1950). *But cf.* Taylor v. Stanford, 100 Ariz. 346, 414 P.2d 727 (1966).

217. ARIZ. REV. STAT. ANN. § 33-1362(A)(2) (Supp. 1973).

218. *Id.* § 33-1362(C). Double damages are also available to the landlord seeking to recover possession from a holdover tenant who wilfully fails to deliver possession. *Id.*

219. 2 R. POWELL, *supra* note 141, at ¶ 221[1]. *See* Quinn & Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future,* 38 FORDHAM L. REV. 225 (1969).

220. 1 AMERICAN LAW OF PROPERTY § 3.45 (A.J. Casner ed. 1952).

the term of the lease."[221] If the tenant wished to protect himself against unfit premises, he could bargain with the landlord for an express warranty of habitability.[222] Even if the tenant was able to obtain an express covenant, however, it was considered independent of his covenant to pay rent.[223] The obligation to pay rent was considered to arise from the land itself regardless of the condition of the appurtenant buildings[224] and the covenant therefore remained in effect as long as the tenant remained in possession of the land. The tenant's only remedy in the event the landlord breached an expressed covenant to repair was to bring an independent action for breach of contract.[225]

Although these rules may have been suited to the needs of an agrarian society where the tenant was concerned primarily with using the land for farming and grazing, in modern times the situation has changed and the factual assumptions upon which the old rules were based are no longer valid. The tenant-farmer was in full control of the land and had the skills required to make the necessary repairs on the buildings. He neither expected nor invited landlord interference.[226] The contemporary urban tenant, on the other hand, is not seeking possession of land, but is interested instead in obtaining safe and clean living space. Often lacking the skills necessary to keep the leased premises in repair, today's tenant seeks a "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."[227]

Recognizing these common law rules as inadequate for today's society, courts have made piecemeal attempts at modifying the old rules and ameliorating their harsh results. For example, the doctrine of constructive eviction was developed for situations where the condi-

221. Friedman v. Le Noir, 73 Ariz. 333, 335, 241 P.2d 779, 780 (1952); *see* Grizzle v. Runbeck, 74 Ariz. 92, 244 P.2d 1160 (1952); *cf.* Marcos v. Texas Co., 75 Ariz. 45, 251 P.2d 647 (1952) (dictum). Prior to the passage of the ARLTA, the tenant of a house or apartment was required to "maintain the premises in as good condition as when he took possession, ordinary wear and tear excepted." ARIZ. REV. STAT. ANN. § 33-321 (1956).

222. *See* Comment, *Landlord and Tenant—Implied Warranty of Habitability—Demise of the Traditional Doctrine of Caveat Emptor*, 20 DEPAUL L. REV. 955, 971 (1970-71).

223. Lewis v. Chisholm, 68 Ga. 40, 46 (1881); Fowler v. Bott, 6 Mass. 63, 68 (1809). It has been suggested that this doctrine of independent covenants in a lease was an historical accident; that it developed before the contract principle of mutually dependent obligations was established. Lesar, *Landlord and Tenant Reform*, 35 N.Y.U.L. REV. 1279 (1960).

224. Quinn & Phillips, *supra* note 219, at 227-28.

225. *Id.* at 233-34.

226. F. GRAD, LEGAL REMEDIES FOR HOUSING CODE VIOLATIONS 110 (1968).

227. Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1074 (D.C. Cir. 1970).

tion of the premises rendered it unfit for habitation and the tenant was forced to vacate.[228] In addition, an exception to the doctrine of *caveat emptor* was developed in the case of short-term leases of furnished dwellings.[229] In this situation, because "an important part of what the hirer pays for is the opportunity to enjoy the premises without delay, and without the expense of preparing it for use,"[230] a warranty of fitness for immediate use has been implied. Other exceptions have been applied when a building is under construction at the time of the lease agreement[231] or defects exist which are known to the landlord but cannot be discovered by the tenant upon reasonable investigation.[232] But these exceptions are mere palliatives which fail to address the general problems created by the clash of an industrial society and outdated common law rules.

A growing recognition of the need for reappraisal of the common law principles governing maintenance of rental housing has been evidenced in recent years. The initial breakthrough came in 1961 when the Supreme Court of Wisconsin held that legislative enactment of building and health codes imposed an implied warranty of habitability on the landlord.[233] Although the court limited its holding to the landlord's duty to provide habitable premises at the beginning of the tenancy, the opinion clearly recognized the incompatibility of the common law rules with current housing conditions. A majority of courts considering the question have continued the trend begun in Wisconsin by rejecting the concept of *caveat emptor* and imposing a duty on the landlord to maintain the premises in a fit and habitable condition.[234]

228. *See* Schoshinski, *supra* note 90, at 528-29. Under the constructive eviction doctrine the tenant is discharged from his rent obligation as though he had been actually evicted. The usefulness of this remedy has been limited, however, by the requirement that the tenant must in fact vacate the premises before he may claim constructive eviction. *See* Coen v. Los Angeles, 70 Cal. App. 752, 234 P. 426 (1925). The Arizona courts, however, have created a limited exception to this requirement. In Johansen v. Arizona Hotel, Inc., 37 Ariz. 166, 291 P. 1005 (1930), the Supreme Court of Arizona stated that a tenant could claim constructive eviction without abandoning the premises when the landlord promised to make necessary repairs. The tenant could remain in possession, relying on the promise to repair, and then claim constructive eviction if the landlord failed to repair. *See also* Schoshinski, *supra* note 90, at 530-32.

229. Ingalls v. Hobbs, 156 Mass. 348, 31 N.E. 286 (1892). Although there are no reported Arizona cases adopting the "furnished dwelling" exception, in short-term residential leases the landlord has a duty to maintain the premises free from unreasonably dangerous instrumentalities that could potentially cause injury. Presson v. Mountain States Properties, Inc., 18 Ariz. App. 176, 501 P.2d 17 (1972).

230. Ingalls v. Hobbs, 156 Mass. 348, 31 N.E. 286 (1892).

231. 1 AMERICAN LAW OF PROPERTY § 3.45 (A.J. Casner ed. 1952).

232. *See generally* Note, *Landlord and Tenant: Defects Existing at the Time of the Lease*, 35 IND. L.J. 361 (1959-60).

233. Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

234. *See, e.g.*, Green v. Superior Court, 111 Cal. Rptr. 704, 517 P.2d 1168 (1974); Lemle v. Breeden, 51 Hawaii 426, 462 P.2d 470 (1969); Mease v. Fox, 200 N.W.2d 791 (Iowa 1972); King v. Moorehead, 495 S.W.2d 65 (Mo. 1973); Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970). *See also* RESTATEMENT (SECOND) OF PROPERTY §§ 5.1-5.4 (Tent. Draft No. 1, 1973). *Contra*, Thomas v. Roper, 162 Conn. 343, 294 A.2d 321 (1972); Teglo v. Porter, 65 Wash. 2d 772, 399 P.2d 519 (1965).

Section 33-1324 of the ARLTA borrowed heavily from these recent cases in establishing the landlord's statutory duty to maintain the premises. First, it requires the landlord to comply with "applicable building codes materially affecting health and safety."[235] By establishing code requirements as part of the landlord's duty to maintain the premises,[236] the Act aids enforcement of building codes[237] and provides courts with an easily ascertainable standard by which to judge a landlord's compliance with his statutory duties. Second, the Act imposes general duties upon the landlord to make repairs and do what is necessary to put and maintain the premises in a fit and habitable condition,[238] and to keep all common areas of the premises in a clean and safe condition.[239] The first of these two general duties is, in essence, a warranty of habitability. Although the Act specifically includes only building code compliance among the landlord's duties, the fitness and habitability requirement would seem to impliedly incorporate all other local health and safety ordinances.[240] The second duty extends the common law rule that a landlord has a responsibility to maintain common areas in a reasonably safe condition[241] by also re-

235. ARIZ. REV. STAT. ANN. § 33-1324(A)(1) (Supp. 1973). The *Uniform Act* requires that the landlord comply with applicable housing as well as building codes. UNIFORM ACT § 2.104(a)(1). Although this language was deleted by the Arizona legislature, compliance with housing codes would seem to be required by the landlord's general duty to maintain the premises in a fit and habitable conditions. *See* text & note 240 *infra*. *See generally* Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970); Pines v. Perssion, 14 Wis. 2d 290, 11 N.W.2d 409 (1961).

236. The language of the Arizona Act is unclear as to which duty prevails when the duty imposed by building code compliance is more stringent than the duty imposed by any other part of section 33-1324. Section 2.104(b) of the *Uniform Act* clearly provides that the greater duty shall govern.

> (b) If the duty imposed by paragraph (1) of subsection (a) [housing and building codes] is greater than any duty imposed by any other paragraph of that subsection, the landlord's duty shall be determined by reference to paragraph (1) of subsection (a).

The Arizona legislature, however, amended this part of the *Uniform Act* and the corresponding provision in the Arizona Act provides:

> If the duty imposed by subsection A, paragraph 1, is greater than any duty imposed by any other paragraph of this section, the landlord's duty shall be determined by reference to such paragraph.

ARIZ. REV. STAT. ANN. § 33-1324(B) (Supp. 1973). It is not clear to which paragraph "such paragraph" refers, and thus the language is open to the interpretation that the landlord is bound only by the lesser duty.

237. Breach of this duty gives the tenant a cause of action and a right to damages. ARIZ. REV. STAT. ANN. § 33-1361(B) (Supp. 1973). Commentators have generally agreed that such civil penalties are more effective in inducing code compliance than traditional criminal sanctions. *See* Gribetz & Grad, *Housing Code Enforcement: Sanctions and Remedies*, 66 COLUM. L. REV. 1254, 1281-90 (1966); Sax & Hiestand, *Slumlordism as a Tort*, 65 MICH. L. REV. 869, 875-89 (1967); *see generally* Schoshinski, *supra* note 90, at 523-38.

238. ARIZ. REV. STAT. ANN. § 33-1324(A)(2) (Supp. 1973).

239. *Id.* § 33-1324(A)(3).

240. *See* Friedman v. Le Noir, 73 Ariz. 333, 241 P.2d 779 (1952) (general covenant to maintain and keep the premises in good repair included repairs made compulsory by municipal ordinances).

241. *See, e.g.*, City of Fairbanks v. Schaible, 375 P.2d 201 (Alaska 1962); Harris v. Joffe, 28 Cal. 2d 418, 170 P.2d 454 (1946); Fincher v. Fox, 107 Ga. App. 695, 131 S.E.2d 651 (1963). Although no reported cases in Arizona have dealt with this issue

quiring that these areas be kept clean.[242]

Beyond the general duties already discussed, the Act expands and qualifies the "fit and habitable" standard by requiring the landlord to provide specific facilities and services. He must supply reasonable heat and air-conditioning where such units are provided and when required by seasonable weather conditions.[243] Electrical, plumbing and other facilities and appliances which he supplies must be maintained in good and safe working order.[244] The landlord must supply receptacles for the disposal of garbage and other waste and must arrange for their removal.[245] Finally, he must supply running water and reasonable amounts of hot water at all times.[246]

Contrary to the general rule prohibiting a tenant's waiver of rights or remedies,[247] the Act allows the parties to shift certain of these landlord obligations to the tenant. In the case of a single family dwelling unit, the parties may agree in writing that the tenant shall assume the landlord's duties with regard to removing waste, supplying water, heat, air-conditioning or cooling, and performing specified tasks, alterations and remodeling.[248] This agreement must be supported by adequate consideration and must be made in good faith and not for the purpose of evading the landlord's obligations. Under no circumstances, however, may the landlord's obligations to comply with applicable building codes and to maintain the premises in a fit and habitable condition be transferred to the tenant.[249]

In the case of dwelling units other than single family residences, the Act allows the parties to agree that the tenant shall perform specified repairs, maintenance tasks, alterations or remodeling as long as

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a duty recently has been imposed upon landlords to maintain the premises free from unreasonably dangerous instrumentalities. Presson v. Mountain States Properties, Inc., 18 Ariz. App. 176, 501 P.2d 17 (1972). There has been a recent development in the law that would extent the landlord's duty with respect to common areas, to impose liability upon the landlord for injuries to tenants caused by third parties in common areas. *See* Note, *Protection of Tenants: The Extent of the Landlord's Duty*, 1971 LAW & SOCIAL ORDER 612. Whether Arizona courts will adopt this approach in interpreting the statute is uncertain.

242. This obligation would seem to go to conditions not covered by the duty of habitability and fitness. *Cf.* Academy Spires, Inc. v. Brown, 111 N.J. Super. 477, 268 A.2d 556 (1970). The lack of paint might be an example of such a condition. *Cf.* Court Chambers Corp. v. Lichtman, 95 N.Y.S.2d 8 (N.Y. City Ct. 1950); CONN. GEN. STAT. ANN. § 47-24(c) (Supp. 1973).

243. ARIZ. REV. STAT. ANN. § 33-1324(A)(6) (Supp. 1973). A service need not be supplied by the landlord if the device generating the service is in the tenant's exclusive control and is powered by a direct public utility connection. *Id.* This exception would seem to include most single family dwelling units.

244. *Id.* § 33-1324(A)(4).

245. *Id.* § 33-1324(A)(5).

246. *Id.* § 33-1324(A)(6). The landlord need not supply running water where the building is not required by law to be equipped for these purposes. *Id.*

247. *Id.* § 33-1315(A)(1).

248. *Id.* § 33-1324(C).

249. *Id.*

the work is not necessary to cure the landlord's noncompliance with either the building code or his habitability obligations.[250] This agreement must be set forth in a separate writing, signed by the parties and supported by adequate consideration.[251] Moreover, in the case of single family residences, the agreement must be made in good faith and not for the purpose of evading the landlord's obligations. When a multiple family unit is involved, the Act also provides that the agreement may not diminish or affect the landlord's obligations to other tenants in the premises.[252]

If the landlord fails to fulfill his duty to maintain the premises, a tenant may terminate the rental agreement upon satisfying two requirements. He must first ascertain whether his health or safety have been *materially* affected by the landlord's conduct.[253] Granting that the same condition may materially affect health and safety in one situation but not in another, some relevant considerations to aid in making this determination would seem to be the seriousness of the condition and the duration of its existence.[254] After making this decision, the tenant must give the landlord written notice indicating when he intends to terminate[255] and specifying the acts or omissions constituting the landlord's breach. If the landlord does not remedy the breach within 10 days after receiving the tenant's notice, the rental agreement terminates upon the date specified in the notice. If there is a termination, the tenant must vacate the premises and the landlord must return all recoverable security.[256]

In addition to his right to terminate for breaches materially affecting health and safety, the Act provides that a tenant may obtain

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250. *Id.*

251. *Id.* § 33-1324(D). Section 2.104(e) of the *Uniform Act* prohibits a landlord from conditioning performance of any of his duties under the rental agreement on the tenant's performance of any separate agreements between the parties. This section of the *Uniform Act* has been criticized on the ground that it is unfair to require the landlord to continue providing services to a tenant when the tenant fails to perform his agreed tasks. ABA, *Proposed Uniform Act, supra* note 4, at 112. Apparently agreeing with this criticism, the Arizona legislature deleted this provision when the ARLTA was enacted.

252. ARIZ. REV. STAT. ANN. § 33-1324(D)(3) (Supp. 1973).

253. *Id.* § 33-1361(A). If the conditions complained of were caused by the deliberate or negligent acts of the tenant, his family or other persons on the premises with his consent, he may not terminate the rental agreement. *Id.*

254. *See* Lemle v. Breeden, 51 Hawaii 426, 462 P.2d 470 (1969); Lund v. MacArthur, 51 Hawaii 473, 462 P.2d 482 (1969). Other cases which have dealt with implied warranties of habitability may provide further guidelines, as these cases deal with the same general considerations of health and safety. For example, in Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961), the Supreme Court of Wisconsin held that generally filthy conditions along with faulty plumbing, heating, and wiring, rendered the rented premises unfit for occupancy and constituted violations of the implied warranty of habitability. *Id.* at 596, 111 N.W.2d at 413.

255. The landlord must receive the tenant's notice at least 20 days before the termination date indicated. ARIZ. REV. STAT. ANN. § 33-1361(A).

256. See text accompanying notes 175-79 *supra.*

injunctive relief and recover damages for *any* noncompliance by the landlord with either the rental agreement or his obligation to maintain the premises.[257] This raises the question of how the tenant's damages are to be measured. Cases dealing with implied warranties of habitability have used two different methods of measuring damages. One method is to determine the difference between the amount of rent provided for in the lease and the fair rental value of the premises with the unfit condition.[258] The more common measure of damages, however, is the difference between the fair market rental values of the premises with and without the breach.[259]

The tenant has yet another course of action if the landlord's failure to comply with his obligation to maintain the premises can be remedied for less than $150 or one-half the monthly rent, whichever is greater. In such a case the tenant may elect to have the condition repaired and deduct the cost from his rent.[260] In order to do so, however, he must first give written notice to the landlord of his intention to correct the condition at the landlord's expense. If the landlord fails to remedy the problem within 20 days after receiving the tenant's notice, or as soon as conditions require in case of an emergency, the tenant may have the work done by a licensed contractor. Then, after submitting an itemized statement of the costs and a waiver of lien to the landlord,[261] the tenant may deduct from his rent the actual and reasonable cost of the repairs up to the statutory limit of $150 or one-half the monthly rent, whichever is greater.[262]

Although the Act recognizes the usefulness of this self-help remedy,[263] it also acknowledges that the tenant should not have complete

257. ARIZ. REV. STAT. ANN. § 33-1361(B) (Supp. 1973).
258. Kline v. Burns, 111 N.H. 87, 276 A.2d 248 (1971).
259. Noble v. Tweedy, 90 Cal. App. 2d 738, 203 P.2d 778 (1949); Cochran v. Widra, 35 Ohio L. Abs. 608, 41 N.E.2d 875 (Ohio App. 1931). For example, suppose a tenant is paying $140 monthly rent for an apartment that has an actual rental value of $90 per month because of defective plumbing. If the fair market rental value of the apartment would be $160 with the defects remedied, the tenant's damages for the faulty plumbing would be $70, not $50. This is comparable to the general damages for breach of warranty in sales contracts, which are measured by the difference between the value of the goods received and the value of the goods as they were warranted. UNIFORM COMMERCIAL CODE § 2-714(2). Using this rule, the amount of rent actually paid by the tenant under the rental agreement would present some evidence of the fair market value but it would not be conclusive. Noble v. Tweedy, *supra;* Cochran v. Widra, *supra.*
260. ARIZ. REV. STAT. ANN. § 33-1363(A) (Supp. 1973).
261. The requirement that the tenant obtain a waiver of lien from the contractor is not in the *Uniform Act* but was added by the Arizona legislature. It is questionable whether most tenants will be aware that this requirement must be satisifed before they may deduct the cost of repair from the rent. A waiver of lien, however, may be essential for the protection of the landlord. A lien on improvements to premises used by a lessee is good against the lessor's interest in the leasehold when the lessee acts as the lessor's agent in ordering the material. *See* Bobo v. Lattimore, 12 Ariz. App. 137, 468 P.2d 404 (1970).
262. ARIZ. REV. STAT. ANN. § 33-1363(A) (Supp. 1973).
263. *Id.* § 33-1363. "Repair and deduct" remedies were recognized at common law

control over the landlord's property, and it thus places several limitations on the types of repairs that a tenant may make. First, the allowable repairs are limited by cost. The tenant may not elect the "repair and deduct" remedy if the reasonable cost of bringing the premises into compliance exceeds the statutory limit,[264] and he may not deduct more than that amount from his rent. This is a reasonable limitation, as the landlord probably would prefer to make the more expensive repairs himself. A second limitation is the requirement that the repairs be made by a licensed contractor.[265] This is a change from the *Uniform Act* which merely requires the work to be done in a workmanlike manner[266] and thus allows the tenant to do the work himself. The *Uniform Act* provision was criticized as being subject to abuse[267] and was wisely amended by the Arizona legislature.

There are several points on which the Arizona Act is vague with respect to the tenant's right to repair and deduct. One question arises if a tenant miscalculates the cost of the repair or receives a low estimate from the contractor. If the cost of the repairs actually exceeds the statutory limit, is the tenant foreclosed from exercising his statutory remedy, or may he deduct the amount allowed by the statute and pay the excess out of his own pocket? The more reasonable interpretation would seem to be that the tenant may deduct the statutory limit from his rent in those cases where the actual cost of the repairs exceeds the limit, as long as the reasonable cost for the repair is less than $150 or one-half of the monthly rent. Another question arises concerning a limit on the number of times a tenant may use the repair and deduct remedy. Although the ARLTA makes no express limitation, it would be reasonable to limit the tenant's exercise of this remedy to once a month, since the cost is deducted from the monthly rent.[268] Finally, there is a question whether the tenant may use this

for a breach of an express promise to repair and have been adopted recently in cases involving breach of an implied warranty of habitability. *See* Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970). *See also* Bell v. Tsintolas Realty Co., 430 F.2d 474 (D.C. Cir. 1970); RESTATEMENT (SECOND) OF PROPERTY § 5.4 (Tent. Draft No. 1, 1973); F. GRAD, *supra* note 226, at 14; McElhaney, *Retaliatory Evictions: Landlords, Tenants and the Law Reform*, 29 MD. L. REV. 193, 205-06 (1969). In addition, various statutory forms of the repair and deduct remedy have been adopted in several states. *See* CAL. CIV. CODE § 1942 (West Supp. 1974); DEL. CODE ANN. tit. 25 § 5306 (Noncum. Supp. 1972); HAWAII REV. STAT. § 521-64 (Supp. 1973); LA. CIV. CODE ANN. art. 2694 (West 1952); N.D. CENT. CODE § 47-16-13 (1960); OKLA. STAT. ANN. tit. 41 § 32 (1954).

264. $150 or one-half the monthly rent, whichever is greater. ARIZ. REV. STAT. ANN. § 33-1363(A) (Supp. 1973). By comparison, several state statutes limit the cost of repairs to 1 months rent. *See* CAL. CIV. CODE § 1942(a) (West Supp. 1974); MONT. REV. CODES ANN. § 42-202 (1961). *See generally* Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970); LA. CIV. CODE ANN. art. 2694 (West 1952).

265. ARIZ. REV. STAT. ANN. § 33-1363(A) (Supp. 1973).

266. UNIFORM ACT § 4.103(a).

267. ABA, *Proposed Uniform Act, supra* note 4, at 116-17.

268. Some states place more severe limitations on this remedy. In California, for

remedy to effect several repairs that, in the aggregate, cost less than $150 or one-half the monthly rent. To allow this would seem reasonable if it is accepted that the statutory deduction limit covers the entire month. This would also be a reasonable interpretation in light of the Act's avowed purpose of encouraging the improvement of housing quality.

A variation of tenant self-help is prescribed in section 33-1364. In the event the landlord deliberately or negligently fails to supply running water, hot water, heat (and air-conditioning or cooling where such units are installed and offered) or other essential services, the tenant has a choice of remedies.[269] He may obtain reasonable amounts of water, heat or other essential services and deduct their "actual reasonable cost" from the rent;[270] he may recover damages based upon diminution in the fair rental value of his dwelling unit;[271] or he may procure reasonable substitute housing during the landlord's noncompliance, in which case he is excused from paying rent during that period.[272] If the cost of substitute housing is greater than the amount of periodic rent the tenant had been paying, he may assess the landlord for that additional cost up to an amount equal to 25 percent of the normal periodic rent.[273] If the landlord's failure to furnish essential services is deliberate, the tenant is not limited to charging the landlord only for the excess, but may also recover that portion of the cost of substitute housing which is equal to the amount of the periodic rent he had been paying.[274]

The ARLTA places some limitations on a tenant's exercise of these self-help remedies. First, a tenant must give the landlord reasonable notice of the breach before his rights arise under this section.[275] Second, this section does not apply if the condition was caused by a deliberate or negligent act or omission of the tenant, a

example, a tenant may exercise his repair and deduct remedy only once in any 12 month period. CAL. CIV. CODE § 1942(a) (West Supp. 1974).

269. *But see* note 243 *supra.*

270. ARIZ. REV. STAT. ANN. § 33-1364(A)(1) (Supp. 1973). The Act does not require that the tenant submit an itemized statement of these expenses to the landlord before he may deduct the cost from his rent. Such a requirement is imposed in section 33-1363, dealing with repair and deduct situations, and to avoid abuse should be imposed in this situation as well.

271. *Id.* § 33-1364(A)(2).

272. *Id.* § 33-1364(A)(3).

273. In order to recover this excess cost from the landlord, the tenant must first deliver proof of payment for the substitute housing, presumably in the form of rental receipts. *Id.*

274. *Id.* § 33-1364(B).

275. *Id.* §§ 33-1364(A) & (D). Although section 4.104(a) of the *Uniform Act* requires the tenant to give written notice to the landlord, this requirement of writing was not enacted by the Arizona legislature. *But cf.* ARIZ. REV. STAT. ANN. § 33-1366 (A)(1) (Supp. 1973) (requiring the tenant to inform the landlord in writing of his intent to terminate the rental agreement).

member of his family or any other person on the premises with his consent.[276] Third, although the tenant may obtain substitute services, he does not have the right to repair the defect pursuant to section 33-1363.[277] Finally, if a tenant chooses to pursue any of the remedies provided in section 33-1364, he is precluded not only from terminating the rental agreement, but also from seeking either damages or an injunction under 33-1361.[278]

The substitute housing remedies set forth in section 33-1364 are available when the landlord merely fails to supply the specified services. If the landlord willfully and affirmatively acts to interrupt essential services, however, the Act allows the tenant to terminate the rental agreement and recover punitive damages equal to 2 months periodic rent or twice the actual damages sustained by him, whichever is greater.[279]

Apart from the remedies provided the tenant in case of noncompliance, consideration must also be given to the effect of a statutory duty to repair on the landlord's tort liability for injuries arising from defects in the premises. This question has been addressed in New Jersey, where statutes impose a duty on the landlord of a multiple-family dwelling to maintain all parts of the structure and equipment in good repair, including the area within the tenant's apartment.[280] A superior court in that state held that even though the defendant landlord had a statutory duty to repair plumbing and faucets in the tenant's apartment, he was not liable for injuries to the tenant caused by a latent defect in a faucet, which was neither known nor reasonably discoverable by the landlord.[281] Rejecting any application of strict liability to landlord-tenant relationships, the court stated that the landlord could not be held liable without negligence on his part and that negligence "in this context requires not only proof of the condition which caused the injury but that the condition was known or should have been known by the landlord prior to the occurrence, so that he had an opportunity to correct it."[282] The adoption of this view in Arizona would not significantly increase the parameters of potential landlord liability,

276. ARIZ. REV. STAT. ANN. § 33-1364(D) (Supp. 1973). It has been suggested that section 33-1364 applies when the condition is not caused by the fault of the landlord or the tenant but is caused, for example, by an Act of God. ABA, *Proposed Uniform Act, supra* note 4, at 117-18. This interpretation is questionable, however, since the section only provides that these remedies are available when the landlord "deliberately or negligently" fails to provide a service.

277. ARIZ. REV. STAT. ANN. § 33-1364(C) (Supp. 1973).

278. *Id.* The tenant may, however, recover for damages which accrued prior to his choosing to proceed under this section. *Id.*

279. *Id.* § 33-1367.

280. N.J. STAT. ANN. § 55:13A-7 (Supp. 1974-75).

281. Dwyer v. Skyline Apts., Inc., 123 N.J. 48, 301 A.2d 463 (1973).

282. *Id.* at 50, 301 A.2d at 465.

because, even before the passage of the ARLTA, landlords had a duty to act as reasonable men in maintaining their premises free from unreasonably dangerous conditions.[283]

(3) *Fire or Casualty Damage.* At common law, the landlord was not obligated to rebuild or repair leased premises that had been damaged or destroyed during the tenancy unless he expressly had covenanted to do so.[284] Further, the tenant was held to his express covenant to pay rent and had no right to terminate the lease, even though the leased premises had been damaged or destroyed.[285] The rationale behind this rule was that the tenant could be relieved of his obligation to pay rent only when the subject matter of the lease was destroyed. Since the land, rather than the buidings, was viewed as the subject matter of the lease, destruction of the buildings did not furnish the tenant with grounds for termination.[286] Because of its harshness, this common law rule was rejected by the courts in a minority of jurisdictions.[287] In many other jurisdictions, legislatures enacted statutes providing that, in the absence of an agreement to the contrary, the tenant could terminate a lease when the rented premises were destroyed or rendered uninhabitable by fire or other casualty without fault or negligence on the part of the tenant.[288] This was the statutory law in Arizona prior to the enactment of the ARLTA.[289]

The Act provides the tenant with two alternative remedies in the event the dwelling unit or premises are damaged or destroyed by fire or casualty to the extent that enjoyment of the dwelling unit is substantially impaired.[290] The tenant may immediately vacate the premises and notify the landlord in writing within 14 days thereafter of his intention to terminate the rental agreement.[291] In such a situation the

283. Presson v. Mountain States Properties, Inc., 18 Ariz. App. 176, 501 P.2d 17 (1972).

284. *See* Grizzle v. Runbeck, 74 Ariz. 92, 244 P.2d 1160 (1952); Friedman v. Le Noir, 73 Ariz. 333, 241 P.2d 779 (1952).

285. DeMund v. Oro Grande Consol. Mines, 56 Ariz. 458, 108 P.2d 770 (1941); Signal v. Wise, 114 Conn. 297, 158 A. 891 (1932); Fowler v. Botts, 6 Mass. 63 (1809).

286. Bowen v. Clemens, 161 Mich. 493, 126 N.W. 639 (1910); Baker v. Holtzapffell, 128 Eng. Rep. 244 (C.P. 1811).

287. Whitaker v. Hawley, 25 Kan. 674 (1881); Wattles v. South Omaha Ice & Coal Co., 50 Neb. 251, 69 N.W. 785 (1897).

288. *See, e.g.*, CONN. GEN. STAT. ANN. § 47-24 (1958); LA. CIV. CODE ANN. art. 2697 (West 1952); MICH. STAT. ANN. § 26.1121 (1970); MONT. REV. CODES ANN. § 42-109 (1961).

289. ARIZ. REV. STAT. ANN. § 33-343 (1956) was the applicable statute in Arizona and typified the statutes found in other jurisdictions.

290. *Id.* § 33-1366 (Supp. 1973).

291. *Id.* § 33-1366(A)(1). The *Model Code* § 2-208 provides that in the event the tenant fails to notify the landlord of his intent to terminate, he shall be liable only for rent accruing to the date of the landlord's *actual* knowledge of the tenant's vacation or impossibility of further occupancy. The landlord should not be allowed to hold the tenant liable for rent even though he knows that the premises have been destroyed and

landlord must return all security recoverable under section 33-1321.[292] Alternatively, if continued occupancy would not violate local ordinances, the tenant may choose to continue the tenancy and vacate only that part of the premises rendered unusable by the fire or casualty. If the tenant pursues the latter course of action, his liability for rent is reduced in proportion to the diminution in the fair rental value of the dwelling unit.[293] In the event of either termination or continued occupancy with a reduced rental rate, apportionment of the rent occurs as of the date the tenant vacates all or part of the dwelling unit.[294]

While generally consistent with the tenor of the old law concerning destruction of the premises, the new Act contains some important changes. First, although the previously applicable Arizona statute departed from common law principles in stating that a tenant could terminate the tenancy upon destruction of the premises, it also allowed the parties to agree otherwise.[295] As a result, leases often contained clauses obligating the tenant to pay rent, despite destruction of the premises.[296] Under the ARLTA, however, such an arrangement would be unenforceable in light of the express provision prohibiting a tenant from waiving or foregoing any of his rights or remedies under the Act.[297]

Second, the prior Arizona law and the new Act differ slightly on what property must be damaged and what degree of injury is necessary before the tenant may terminate the rental agreement. The old law, which is now applicable only to nonresidential tenancies, required the leased building to be destroyed or so injured as to be untenantable.[298] Under the Act, however, the tenant may vacate when the damage is such as to substantially impair the enjoyment of his dwelling unit.[299] That this requires less damage than is necessary to render the premises uninhabitable is suggested by the language of section 33-1366, which provides that the tenant may pursue his remedies even in those cases where parts of the dwelling unit are still habitable.[300] Additionally, prior law limited the remedy to cases where the rented unit is damaged. Under the new Act a tenant may be able to ter-

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the tenant has moved out. Modification of the ARLTA along the lines of the *Model Code* provision would avoid this inequitable situation.

292. ARIZ. REV. STAT. ANN. § 33-1366(B) (Supp. 1973). *See* text accompanying notes 175-79 *supra*.

293. ARIZ. REV. STAT. ANN. § 33-1366(A)(2) (Supp. 1973).

294. *Id.* § 33-1366(B).

295. *Id.* § 33-343 (1956).

296. For an example of a case in which an Arizona lessor drafted a clause with section 33-343 in mind, see Leonardi v. Furman, 83 Ariz. 61, 316 P.2d 487 (1957).

297. ARIZ. REV. STAT. ANN. § 33-1315(A)(1) (Supp. 1973).

298. *Id.* § 33-343 (1956).

299. *Id.* § 33-1366(A) (Supp. 1973).

300. *Id.*

minate not only in those cases where his own dwelling unit is damaged but also when the premises outside his dwelling unit are damaged.[301]

It should be noted that the tenant may not terminate the rental agreement in all cases of destruction or damage. Section 33-1366 is limited in its application to destruction or damage caused "by fire or casualty."[302] Casualty damage generally has been defined as injury resulting from an unknown cause or as the unusual effect of a known cause.[303] The word "casualty" is meant to convey the idea of sudden and unexpected loss and is thought of in terms of natural physical forces such as lightning, earthquakes or wind.[304] The concept of casualty damage does not embrace gradual and foreseeable losses resulting from factors such as age, decay or want of repair.[305] Although it most often has been thought of as injury resulting from forces ordinarily beyond human control,[306] it is now recognized that casualty losses can result from a sudden turn of events caused by human agency.[307] It is unsettled whether negligence can be a causative factor in casualty loss[308] although at common law, damages caused by a tenant's negligence have not been considered to be within the definition of casualty damages for purposes of relieving the tenant from his rental obligations when the premises have been destroyed.[309]

Most statutes relieving a tenant from liability for rent when the premises have been destroyed speak of destruction caused by fire or *other* casualty.[310] When such language is used, the fire referred to is deemed to be a casualty fire and not one caused by the tenant's own negligence.[311] The Arizona Act, however, does not use the phrase "fire or other casualty," but instead uses the phrase "fire or

301. *Id.* The Act defines "premises" as "a dwelling unit and the structure of which it is a part and existing facilities and appurtenances therein, including furniture and appliances where applicable, and grounds, areas and existing facilities held out for the use of tenants generally or whose use is promised to the tenant." *Id.* § 33-1310(9).

302. *Id.* § 33-1366(A)(2).

303. Chicago, St. L. & N.O.R.R. v. Pullman S. Car Co., 139 U.S. 79 (1891); Keenan v. Bowers, 91 F. Supp. 771 (E.D.S.C. 1950).

304. Welles v. Castles, 69 Mass. 323 (1855); Tays v. Ecker, 6 Tex. Civ. App. 188, 24 S.W. 954 (1894).

305. Bigelow v. Collamore, 59 Mass. 226 (1849).

306. *See* cases cited note 304 *supra.*

307. Keenan v. Bowers, 91 F. Supp. 771 (E.D.S.C. 1950).

308. *Compare* Cunningham v. Sanders Oil Corp., 121 Ga. App. 722, 175 S.E.2d 46 (1970), *with* McCarty v. New York & E.R.R., 30 Pa. 247 (1858).

309. *See* Stone Mountain Indus., Inc. v. Bennett, 112 Ga. App. 466, 145 S.E.2d 591 (1965).

310. *E.g.*, ARIZ. REV. STAT. ANN. § 33-343 (1956); CONN. GEN. STAT. ANN. § 47-24 (1960); MINN. STAT. ANN. § 504.05 (1947); TENN. CODE ANN. § 64-702 (1955).

311. Tyson v. Wiel, 169 Ala. 558, 53 So. 912 (1910); Stone Mountain Indus., Inc. v. Bennett, 112 Ga. App. 466, 145 S.E.2d 591 (1965). The statutes themselves uniformly deny relief when the destruction is the fault of the tenant. *See, e.g.*, ARIZ. REV. STAT. ANN. § 33-343 (1956); CONN. GEN. STAT. ANN. § 47-24 (1960); MONT. REV. CODES ANN. § 42-109 (1961); N.Y. REAL PROP. LAW § 227 (McKinney 1968).

casualty."[312] This language suggests that the word "fire" is not being used in the limited casualty sense but rather, that it is being used in a broad sense to include all fires caused in any manner other than by the tenant's arson.[313] Thus, the tenant may be able to terminate a tenancy or continue at a lower rental rate because of fire damage caused by his own negligence.[314] This would be an unfortunate result, for the tenant should not be allowed to benefit from his own carelessness.[315]

B. *Tenants' Duties and Landlords' Remedies*

(1) *Tenants' Maintenance Duties.* Under prior Arizona law, the landlord had no duty to keep the premises in repair.[316] The tenant, on the other hand, had a duty to "exercise diligence to maintain the premises in as good condition as when he took possession, ordinary wear and tear excepted."[317] As has been noted already, the ARLTA attempts to equalize this inequitable allocation of duties by apportioning them according to the respective abilities of the parties.[318] Recognizing the landlord's long-term interest in the premises, section 33-1324 imposes upon the landlord those maintenance and repair duties of a substantial and permanent nature. Similarly, in acknowledging that the tenant should behave as a reasonable occupant of the premises and maintain the premises in a good repair, section 33-1341 of the Act imposes upon the tenant those "housekeeping" duties that are best performed by the individual living in the unit.

In many respects, the duties imposed upon the tenant parallel those delegated to the landlord. The tenant is required to comply with building code provisions that are directed primarily at tenants and that materially affect health and safety.[319] He must keep that part of the premises that he occupies as clean and safe as the condition

312. ARIZ. REV. STAT. ANN. § 33-1366(A) (Supp. 1973).

313. *Cf.* General Acc. Fire & Life Assurance Corp v. Traders Furn. Co., 1 Ariz. App. 203, 401 P.2d 157 (1965). In this case the terms of a lease provided that the lessee was to return the premises in good condition and repair, except where damage was caused by fire. Holding that the lessee had no obligation to reimburse the lessor or his fire insurer for loss by fire caused by the lessee's negligence, the court said:

> Giving the ordinary meaning to the term "loss by fire" as used in relation to fire insurance policies such term includes damages resulting from fire caused by acts of God, accidents or negligence. To the ordinary man, the phrase "loss by fire" means just that—loss by fire caused in any manner other than by his own arson. *Id.*, at 208, 401 P.2d at 162.

314. Unlike other sections of the Act, *see* ARIZ. REV. STAT. ANN. § 33-1361(A)(2) (Supp. 1973), section 33-1366 does not expressly prohibit relief in those cases where damage or destruction is caused by the tenant's own negligence.

315. *See* Hinson v. Delis, 26 Cal. App. 3d 62, 102 Cal. Rptr. 661 (1972).

316. *See* text accompanying notes 219-25 *supra.*

317. ARIZ. REV. STAT. ANN. § 33-321 (1956).

318. See text accompanying notes 235-46 *supra.*

319. ARIZ. REV. STAT. ANN. § 33-1341(1) (Supp. 1973). See text & note 254 *supra.*

of the premises permits. In addition, the tenant has a duty to dispose of all rubbish and other waste material from his dwelling unit[320]; to keep all plumbing fixtures that are in the dwelling unit, or that he uses, as clean as their condition permits[321]; and to use all the landlord's facilities in a reasonable manner.[322] Consistent with the tenant's duty to maintain the premises, he may not deliberately or negligently damage or remove any part of the premises or knowingly permit anyone else to do so.[323]

Just as the tenant's maintenance duties correlate to those of the landlord, remedies for a breach of those duties are also similar. In those cases where the tenant's noncompliance with his duty to repair materially affects health and safety and can be remedied by cleaning, repairing, or replacing a damaged item, the Act provides a self-help remedy.[324] Before the landlord may exercise this right, he must first give the tenant 14 days written notice, specifying the breach and requesting that the tenant remedy it within that period of time. If the tenant fails to comply within the 14-day period, or as promptly as conditions require in case of emergency, the landlord may enter the dwelling unit and cause the work to be done in a workmanlike manner. The landlord must then submit an itemized bill for the work and treat it as rent due on the next rent date or, if the tenancy has been terminated, submit the bill for immediate payment.[325]

If the tenant fails to fulfill his duty to maintain the premises and that failure materially affects health and safety, the landlord may also terminate the rental agreement.[326] Written notice must first be delivered to the tenant specifying the acts and omissions constituting the breach and notifying the tenant that the rental agreement will terminate upon a date not less than 20 days after the tenant has received the notice. The termination is not effective if the tenant remedies the breach within the first 10 days of that period.[327] In addition to the right to terminate for breaches materially affecting health and safety, the landlord may recover damages, obtain injunctive relief or recover possession of the premises pursuant to an action in forcible

320. ARIZ. REV. STAT. ANN. § 33-1341(3) (Supp. 1973).
321. *Id.* § 33-1341(4).
322. *Id.* § 33-1341(5).
323. *Id.* § 33-1341(6). The tenant must also conduct himself, and require others on the premises with his permission to conduct themselves, in a manner that will not interfere with his neighbors' peaceful enjoyment of the premises. *Id.* § 33-1341(7).
324. *Id.* § 33-1369.
325. *Id.*
326. *Id.* § 33-1368(A). For a discussion of what conditions materially affect health and safety see text & note 254 *supra*.
327. ARIZ. REV. STAT. ANN. § 33-1368(A) (Supp. 1973). If the breach is not remedied within the 10-day period, the rental agreement terminates on the date specified in the notice. *Id.*

detainer for any noncompliance with the tenant's duty to maintain the premises.[328]

(2) *Duty to Allow Access.* Traditionally, the tenant has had an absolute right to the exclusive possession of the premises, even as against the landlord.[329] The parties could agree, however, to allow the landlord a right of access for reasonable inspections, and most leases contained a clause to that effect.[330] In addition, the landlord's right to enter the leased premises was sometimes implied where it was necessary to perform certain agreed services.[331] Recognizing these rules to be inadequate in view of the landlord's increased obligation to maintain the premises, the ARLTA seeks to ensure the landlord's right of access to the premises. This right is limited, however, to prevent its abuse and unnecessary infringement on the tenant's right to privacy and quiet enjoyment of the premises. The Act provides the landlord with a right to enter the dwelling unit to inspect the premises; to make necessary or agreed repairs, alterations or improvements; to supply necessary or agreed services; or to show the unit to prospective purchasers, tenants, mortgagees, workmen or contractors.[332] To limit possible infringement of the tenant's privacy, the Act requires that the landlord give at least 2 days notice of his intent to enter and then to do so only at reasonable times,[333] unless it is impractical to do so or there is an emergency. In case of emergency, the landlord's right to enter is absolute and he need not obtain the tenant's consent.[334] Since the emergency and impracticability exceptions seem susceptible to abuse, they should be narrowly interpreted.

In some circumstances it may be troublesome for the landlord to give separate notices prior to *each* entry. For example, in a large apartment complex, the landlord may want to carry out a program of periodic maintenance inspections and repairs, especially in light of the landlord's additional maintenance duties under the Act. This does not mean, however, that the landlord can ignore the notice requirement. In these situations a lease provision adequately describing the time and

328. *Id.* § 33-1368(C). Although the Act specifies that the landlord may have these remedies in the case of *any* noncompliance by the tenant, prior Arizona case law indicates that "trivial" breaches by a tenant should be ignored. Bolon v. Pennington, 6 Ariz. App. 308, 432 P.2d 274 (1967). *See generally* 2 R. POWELL, *supra* note 141, at ¶ 231 [3][a]; 1 H. TIFFANY, REAL PROPERTY § 203, at 335-36 (3rd ed. 1939); Baird, *supra* note 153, at 191.

329. MODEL CODE § 2-404, Commentary. *See* Genardini v. Kline, 19 Ariz. 558, 173 P. 882 (1918).

330. S. MCMICHAEL & P. O'KEEFE, LEASES 16 (5th ed. 1969).

331. MODEL CODE § 2-404, Commentary.

332. ARIZ. REV. STAT. ANN. § 33-1343 (Supp. 1973).

333. *Id.* § 33-1343(C). *See generally* CAL. HEALTH & SAFETY CODE § 17972 (West 1964) (allowing entry for housing code inspections between 8 a.m. and 6 p.m.).

334. ARIZ. REV. STAT. ANN. § 33-1343(B) (Supp. 1973).

place for such recurrent entries should be sufficient to provide notice to the tenant. Specificity would be essential, however, to ensure that the lease provision would not be invalidated as a blanket waiver of the tenant's right to notice.[335]

Aside from the rights of entry already discussed, the landlord may enter the premises only to enforce his self-help remedy,[336] in case of abandonment[337] or pursuant to a court order. If the landlord enters for any other purpose, or makes a lawful entry in an unreasonable manner, or harasses the tenant by means of repeated demands for entry, the tenant has two remedies. An injunction may be obtained to prevent the landlord's further unlawful or harassing behavior, or the tenant may terminate the rental agreement. In either case, he may recover actual damages in an amount equal to, but not less than, 1 month's rent.[338] If, on the other hand, the landlord's entry is lawful and the tenant refuses him access, the landlord may recover actual damages and obtain an injunction to compel access or terminate the rental agreement.[339]

(3) *Duty to Obey Rules and Regulations.* At common law, a landlord and tenant were able to include in a rental agreement any rules or regulations they deemed appropriate.[340] Rules and regulations promulgated after the rental agreement was executed were upheld if they were reasonable.[341] Under the Act, the landlord may still adopt rules and regulations concerning the tenant's use and occupancy of the premises,[342] but the purpose and scope of the adopted rules are limited. The rules or regulations may be adopted only to promote the convenience, safety or welfare of all the tenants; to prevent abuse of the landlord's property; or to make a fair distribution of the services and facilities available to the tenants.[343] A rule may not be pro-

335. *See id.* § 33-1315(A)(1).
336. *Id.* § 33-1369. *See* text accompanying notes 324-25 *supra.*
337. ARIZ. REV. STAT. ANN. § 33-1370 (Supp. 1973). An apparent excess of verbiage in § 33-1343(D) can be explained on the basis of mere legislative oversight. The subsection provides that:

> The landlord has no other right of access except by court order and as permitted by sections 33-1369 and 33-1370, or if the tenant has abandoned or surrendered the premises.

The *Uniform Act*'s counterpart to section 33-1370 originally contained a provision for the landlord's entry in case of a tenant's extended absence, in addition to re-entry in case of abandonment. UNIFORM ACT § 4.203(b). This provision was deleted by amendment in the Arizona legislature, but the cross-reference in section 33-1343(D) was not deleted.
338. ARIZ. REV. STAT. ANN. § 33-1376(B) (Supp. 1973).
339. *Id.* § 33-1376(A).
340. *See* 1 J. RASCH, *supra* note 153, at § 485.
341. Thousand Island Park Ass'n v. Tucher, 173 N.Y. 203, 65 N.E. 975 (1903). *See generally* Justice Court Mut. Housing Coop. v. Sandow, 50 Misc. 2d 541, 270 N.Y.S.2d 829 (1966); 1 J. RASCH, *supra* note 153, at § 486.
342. ARIZ. REV. STAT. ANN. § 33-1342 (Supp. 1973).
343. *Id.* § 33-1342(A)(1).

mulgated for the purpose of evading the landlord's obligations.[344]

Assuming the purpose of a rule or regulation is valid, it must meet several additional requirements to be enforceable. First, the rule or regulation must be reasonably related to the purpose for which it was adopted.[345] Second, it must apply fairly to all tenants.[346] Third, it must be sufficiently explicit to inform the tenant what he must or must not do in order to comply.[347] Finally, the tenant must receive notice of all existing rules and regulations when he enters into the rental agreement.[348]

With regard to the notice requirement, it can be persuasively argued that the landlord should include rules and regulations in the written rental agreement, if there is such an agreement, in order to ensure adequate notice. This is especially so since valid rules and regulations become a part of the rental agreement and may be enforced as such.[349] But inclusion in the written rental agreement is not required by the Act and the tenant is deemed to have constructive notice of the rules and regulations when, from all the facts and circumstances known to him, he has reason to know of their existence.[350]

A new rule or regulation adopted after the tenant has entered into the rental agreement may not work a substantial modification of the rental agreement, and the tenant must be given reasonable notice of its adoption before it may be enforced.[351] As in the preceding section, however, actual notice of the rules and regulations is not required to make them enforceable. All the landlord is required to do is to take steps reasonably calculated to inform the tenant of the rules, whether or not the tenant actually becomes aware of them. This could probably be satisfied in an apartment complex, for example, if the landlord posted a set of rules and regulations in a conspicuous place.[352]

Valid rules and regulations adopted pursuant to the requirements previously discussed become part of the rental agreement and accordingly are enforceable against the tenant.[353] Since the rules and regu-

344. *Id.* § 33-1342(A)(5).
345. *Id.* § 33-1342(A)(2).
346. *Id.* § 33-1342(A)(3).
347. *Id.* § 33-1342(A)(4).
348. *Id.* § 33-1342(A)(6).
349. *Id.* § 33-1310(11). *See* text accompanying notes 353-55 *infra.*
350. ARIZ. REV. STAT. ANN. § 33-1313(A) (Supp. 1973).
351. *Id.* § 33-1342(B).
352. Section 33-1313(B) of the Act provides that a person gives notice to another "by taking steps reasonably calculated to inform the other in ordinary course whether or not the other actually comes to know of it." Although it is not necessary that the tenant ever receive the notice, the landlord may take added precautions by delivering the notice in person or by mailing it to the tenant by registered or certified mail. If these steps are taken the tenant is deemed to have "received" notice. *Id.*
353. A rental agreement "means all agreements, written, oral or implied by law, *and*

lations are part of the rental agreement, their breach gives rise to the landlord's remedies under section 33-1368. For a material noncompliance with the rules or regulations that is not remedied within 14 days after the tenant receives notice of the noncompliance, the landlord may terminate the rental agreement.[354] In addition, the landlord may recover damages, obtain injunctive relief or recover possession of the premises pursuant to an action in forcible detainer.[355]

(4) *Duty to Pay Rent.* The Act defines rent as "payments to be made to the landlord in full consideration for the rented premises."[356] Although the obligation to pay rent is perhaps the tenant's paramount obligation, the duty is not dealt with extensively in the Act. The sole statutorily imposed obligation to pay rent is found in section 33-1314(B), which provides that in the absence of a rental agreement "the tenant shall pay as rent the fair rental value for the use and occupancy of the dwelling unit."[357]

The Act does place several restrictions on the right to receive rent, however, and ties the right directly to the duty to provide the tenant with a fit and habitable dwelling unit. For example, the duty to maintain the premises cannot be segregated from the right to receive rent through an instrument which assigns the rent to another.[358] In addition, rent abates if the landlord fails to put the tenant into actual possession.[359] If part of the premises are destroyed by fire or casualty, the tenant's rent is decreased by the diminution in value of the dwelling unit.[360] If the landlord fails to comply with certain statutory duties concerning habitability, the tenant may cause necessary repairs to be made and may deduct the cost from his rent.[361]

Failure of a tenant to pay rent when due gives rise to the landlord's right to terminate the rental agreement.[362] In order to exercise this right the landlord must provide the tenant with written notice of the nonpayment and indicate his intent to terminate the rental agreement not less than 7 days after notice is received. If the tenant fails to pay the rent within 7 days, the landlord may terminate the rental

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*valid rules and regulations adopted under section 33-1342* embodying the terms and conditions concerning the use and occupancy of a dwelling unit and premises." (emphasis added). *Id.* § 33-1310.

354. *Id.* § 33-1368(A).
355. *Id.* § 33-1368(C).
356. *Id.* § 33-1310(10).
357. *See generally* text accompanying notes 64-67 *supra.*
358. ARIZ. REV. STAT. ANN. § 33-1316 (Supp. 1973).
359. *Id.* § 33-1362(A). *See* text accompanying notes 213-18 *supra.*
360. ARIZ. REV. STAT. ANN. § 33-1366(A)(2) (Supp. 1973). *See* text accompanying notes 293-94 *supra.*
361. ARIZ. REV. STAT. ANN. § 33-1363(A) (Supp. 1973). *See* text accompanying notes 260-68 *supra.*
362. ARIZ. REV. STAT. ANN. § 33-1368(B) (Supp. 1973).

agreement[363] and initiate an action for possession.[364] However, the tenant may have the lease reinstated by tendering past due rent, court costs and the landlord's reasonable attorney's fees.[365]

Acceptance by the landlord of rent, or any part of the rent, with knowledge of a default by the tenant constitutes waiver of the landlord's right to terminate for that default.[366] This waiver is effective unless the parties agree, *after* the breach has occurred, that the landlord's acceptance of the rent will not constitute a waiver of his right to terminate.[367] The waiver cannot, therefore, be defeated by a preexisting lease clause. Commentary to the *Uniform Act* suggests that acceptance of rent does not operate as a waiver for a continuing breach.[368] This interpretation would represent a change from prior Arizona case law, which held that an acceptance of late rent operates as a continuing waiver of the terms of the lease governing rent payments and that notice must be provided to the tenant in order to reinstate the provisions of the lease.[369]

(5) *Abandonment.* Abandonment occurs when a tenant relinquishes possession of the rented premises and ceases to pay rent as it falls due. This situation may be viewed as a non-verbal offer by the tenant to surrender the remainder of his interest in the leasehold estate to the landlord. If the offer is accepted, then the rental agreement is terminated. In the absence of such an acceptance, the courts are divided on the question of whether a landlord should be required to minimize his loss by seeking a new tenant. Many jurisdictions have held that a landlord is under no obligation to attempt to relet the premises following an abandonment and may allow the premises to remain vacant and recover the rent agreed on in the lease from the abandoning tenant.[370] In other jurisdictions, however, courts have invoked the mitigation of damages doctrine[371] and required the landlord to use due diligence in seeking to reduce the tenant's liability.[372]

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363. *Id.*
364. *Id.* § 33-1368(C).
365. *Id.* § 33-1368(B).
366. *Id.* § 33-1371. Acceptance of rent is not the only means by which a landlord may waive his right to terminate. Acceptance of a tenant's performance that varies from the terms of the rental agreement or rules and regulations adopted thereunder will constitute a waiver of the landlord's right to terminate for that breach. *Id.*
367. *Id.*
368. UNIFORM ACT § 4.204, Comment.
369. *See* Chadwick v. Winn, 101 Ariz. 533, 421 P.2d 890 (1966); Butterfield v. Duquesne Mining Co., 66 Ariz. 29, 182 P.2d 102 (1947).
370. *E.g.*, Manley v. Kellar, 47 Del. 511, 94 A.2d 219 (1952); Love v. McDevitt, 114 Ga. App. 734, 152 S.E.2d 705 (1966); Jordon v. Nickell, 253 S.W.2d 237 (Ky. 1952); Eidelman v. Walker & Dunlop, Inc., 265 Md. 538, 290 A.2d 780 (1972); Gruman v. Investors Diversified Serv., 247 Minn. 502, 78 N.W.2d 377 (1956).
371. The basis for the contract principle of mitigation is not only to prevent personal loss and injustice, but to preserve the economic welfare of the community. C. MCCORMICK, DAMAGES § 33 (1935).
372. Vawter v. McKissick, 159 N.W.2d 538 (Iowa 1968); Gordon v. Consolidated

Before passage of the ARLTA, Arizona did not fit squarely in either group of jurisdictions. The Supreme Court of Arizona never has ruled directly on the landlord's obligations in case of abandonment, and the decisions of the lower appellate courts have been somewhat inconsistent. The first court of appeals pronouncement on the subject came in the form of dictum in *Camelback Land & Investment Co. v. Phoenix Entertainment Corp.*,[373] where the court stated:

> [O]rdinarily the lessor would have the right to hold the lessee liable for rents due for the balance of the term of the lease, *subject to the lessor's duty to attempt to mitigate damages to the credit of the lessee.*[374]

This language could have been interpreted as placing Arizona among those states requiring mitigation of damages in case of abandonment. Such an interpretation was rejected 4 years later, however, in *Riggs v. Murdock.*[375] In *Riggs* the court of appeals said that a landlord's claim for relief in abandonment cases is for rentals due under the lease, rather than for damages for breach of contract and, therefore, the doctrine of mitigation of damages should not be applied.[376] The *Camelback Land & Investment Co.* language was distinguished on the ground that the duty to mitigate in that case was imposed by a lease provision which required the landlord to "relet the same for the account of the tenant."[377]

Arizona law on mitigating damages in case of abandonment has been settled, however, by the ARLTA, at least insofar as residential tenancies are concerned. In addition to a general provision that an aggrieved party has a duty to mitigate damages,[378] the Act specifically sets forth the rights of the parties in case of abandonment. Under the Act, the landlord is obligated to make reasonable efforts to relet the abandoned premises at a fair rental value.[379] Failure to do so, or acceptance of the abandonment as a surrender, terminates the rental agreement as of the date the landlord has notice of the abandonment. If the landlord rents the unit before the expiration date of the prior rental agreement, that agreement is deemed to be terminated on the date the new tenancy begins.[380]

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Sun Ray, Inc., 195 Kan. 341, 404 P.2d 949 (1965); Fox v. Roethlisberger, 350 Mich. 1, 85 N.W.2d 73 (1957) (dictum); Wright v. Baumann, 239 Ore. 410, 398 P.2d 119 (1965); St. Regis Apt. Corp. v. Sweltzer, 32 Wis. 2d 426, 145 N.W.2d 711 (1966).

373. 2 Ariz. App. 250, 407 P.2d 791 (1965).
374. *Id.* at 254, 407 P.2d at 795 (emphasis added).
375. 10 Ariz. App. 248, 458 P.2d 115 (1969).
376. *Id.* at 252, 458 P.2d at 119.
377. *Id.*
378. ARIZ. REV. STAT. ANN. § 33-1305(A) (Supp. 1973).
379. *Id.* § 33-1370.
380. *Id.*

While the Act clarifies the landlord's duties with regard to mitigation, it leaves several problems involving abandonment unresolved. First, when the landlord finds the premises unoccupied, he is faced with the problem of determining whether the tenant has "abandoned" the unit. Mere nonuse of the premises does not in itself constitute abandonment. There must be an intent on the part of the tenant to relinquish all rights in the premises along with the act of vacating.[381] This requisite intent can be shown by words or conduct taken in light of all the circumstances.[382] The question of whether there has been an actual abandonment should be considered carefully by the landlord before he retakes possession. If it is later determined that there was no abandonment, the tenant can regain possession pursuant to a forcible entry and detainer action[383] and the landlord may be held liable for wrongful eviction.[384] The Act provides no guidelines for determining when there has been an abandonment. It might be suggested, therefore, that a provision be included in the lease to the effect that an unexplained absence for a designated period of time after some form of default shall be deemed to constitute an abandonment.[385]

Even if an abandonment is assumed to have occured, another problem arises concerning the Act's provision that the landlord must make reasonable efforts to relet the premises at a fair rental. If he is able to find a new tenant, the old rental agreement is terminated as of the date the new tenancy begins. The Act does not specify whether in such cases the landlord can recover damages from the abandoning tenant if the "reasonable" rental is less than that which the abandoning tenant was paying. Under prior law, the landlord could retake possession on the old tenant's behalf, relet the unit, and recover as damages any rental deficiencies incurred as a result of the reletting.[386] The ARLTA simply provides that the prior rental agreement is terminated in case of reletting. A more desirable alternative would seem to be the approach adopted in the *Model Code*, which provides that when the landlord relets the unit at a fair rental, the abandoning tenant may be held liable for the difference between the new rental amount and the rent agreed to in the prior rental agreement, plus a reasonable commission for the renting of the premises.[387] Under such an arrangement, the landlord would be required to miti-

381. Gangadean v. Erickson, 17 Ariz. App. 131, 133, 495 P.2d 1338, 1340 (1972).
382. *Id.*
383. *See id.* at 132-33, 495 P.2d at 1339-40.
384. *See* Saferian v. Baer, 105 Cal. App. 238, 243, 287 P. 142, 143 (1930).
385. *See* Joffe, *Remedies of California Landlord Upon Abandonment by Lessee*, 35 S. CAL. L. REV. 34, 36-37 (1961).
386. Baird, *supra* note 153, at 212-14.
387. MODEL CODE § 2-308(4)(b).

gate his damages, but the abandoning tenant would not completely escape liability for the landlord's decreased rental income.[388]

## V. RETALIATORY CONDUCT

The Act's redistribution of rights and duties between the landlord and tenant along with its expansion of available remedies has resulted in a body of law more in keeping with current needs than the medieval rules that formerly passed as landlord-tenant law. The effect of this progress toward achieving the Act's purpose of modernizing landlord-tenant law and improving the quality of housing will be severely limited, however, if a landlord is allowed to inhibit a tenant's exercise of his rights through actual or threatened reprisals.[389] Section 33-1391 of the Act, therefore, is aimed at shielding tenants from such reprisals. This discussion initially will explore the development of the principles underlying the Act's proscription of landlord retaliation. Then, after defining the scope of the Act's proscription, certain problem areas will be examined.

Periodic tenancies generally have been viewed as terminable at the election of either the landlord or the tenant simply by adhering to the statutory notice requirements.[390] Traditionally, a landlord was not required to assign any reason for terminating the tenancy, nor was he required to give any reason for bringing an action to evict a tenant who refused to vacate the premises.[391] Thus, in an action for possession, since the reason for terminating the lease was deemed to be irrelevant, the landlord had little difficulty obtaining swift court determination of the matter; the eviction order simply issued upon the landlord's showing compliance with the statutory notice requirements.[392]

Although courts and legislatures have been reluctant to interfere with the landlord's right to terminate a tenancy, the right has not been considered absolute. While the relationship of landlord and tenant is one involving primarily private contract and property rights, in many instances the public interest ultimately is involved. In those cases where the public interest predominates, the landlord's right to termi-

388. This does not mean, however, that the landlord could seek deliberately to rent the premises at a lower, albeit reasonable, price and then hold the prior tenant liable for the balance. Such action would seem to violate the Act's requirement of good faith in all landlord-tenant dealings. ARIZ. REV. STAT. ANN. § 33-1311 (Supp. 1973).

389. *See generally* Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968); Shoshinski, *supra* note 90.

390. Prior to the passage of the ARLTA, Arizona law provided for termination of month-to-month tenancies upon 10 days notice. ARIZ. REV. STAT. ANN. § 33-341(B) (1956).

391. LaChance v. Hoyt, 6 Conn. Cir. 207, 269 A.2d 303 (1969); Fowel v. Continental Life Ins. Co., 55 A.2d 205 (D.C. Ct. App. 1947); De Wolfe v. McAllister, 229 Mass. 410, 118 N.E. 885 (1918).

392. ARIZ. REV. STAT. ANN. §§ 12-1171 to -1181 (1956).

nate has been restricted. For example, courts have refused to order evictions sought in retaliation for a tenant's voting or registering to vote.[393] Another line of cases has upheld emergency rent control legislation as a restriction on the landlord's right to raise rent and terminate tenancies.[394] Finally, at least one court has recognized that a tenant may bring an action for abuse of process when eviction proceedings are used to coerce the tenant to pay rent in excess of the maximum allowable under rent control regulations.[395]

The greatest development of restrictions on retaliatory conduct has come within the last decade in a series of cases and statutes aimed at protecting a wide range of tenant activities.[396] The first case in this area was *Tarver v. G. & C. Construction Corp.*,[397] in which the tenants had informed the local health department of housing code violations existing on their premises. On the day the complaint was lodged, the landlord increased the tenants' rent from $35 to $150 per week. The tenants sought a preliminary injunction to prevent the landlord from evicting or taking other retaliatory action against them. The federal district court granted the injunction, noting that state court enforcement of an eviction brought in retaliation for a tenant's exercise of his first amendment rights would be unconstitutional as violative of the fourteenth amendment.[398]

Four years after *Tarver*, the United States Court of Appeals for the District of Columbia decided *Edwards v. Habib*,[399] in which a landlord sought to evict a tenant in retaliation for her complaints to the housing authorities of housing code violations. The tenant raised the defense of retaliation, arguing that she would be deprived of her freedom of speech and freedom to petition the government for redress of grievances if the court allowed the eviction. The court recognized the tenant's right to raise the defense of retaliatory motive, but in doing so the court chose not to rely on a constitutional argument. Rather, it based the decision on public policy and statutory interpretation.[400] Noting the passage of housing codes for the District of Columbia, the

393. *See* United States v. Bruce, 353 F.2d 474 (5th Cir. 1965); United States v. Beaty, 288 F.2d 653 (6th Cir. 1961).
394. *See* Block v. Hirsh, 256 U.S. 135 (1921).
395. Defnall v. Schoen, 73 Ga. App. 25, 35 S.E.2d 564 (1945).
396. *See* Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968) (reporting housing code violations); Hosey v. Club Van Cortlandt, 299 F. Supp. 501 (S.D.N.Y. 1969) (joining or organizing tenant unions).
397. No. 64-2945 (S.D.N.Y. Nov. 9, 1964) reprinted in E. JARMEL, CASES AND MATERIALS IN THE LEGAL REPRESENTATION OF THE POOR 487 (1971).
398. E. JARMEL, *supra* note 387, at 488-89. Requisite "state action" for fourteenth amendment purposes was found in the action of state courts and state judicial officers acting in their official capacities to enforce the eviction. *Id.* *But see* Mullarkey v. Borglum, 323 F. Supp. 1218 (S.D.N.Y. 1970).
399. 397 F.2d 687 (D.C. Cir. 1968).
400. *Id.* at 700-02.

court reasoned that Congressional policy behind the codes would be frustrated if tenants could be evicted in retaliation for reporting code violations.[401] Following this decision, other courts recognized the defense of retaliation,[402] either on a constitutional basis[403] or on grounds of public policy and statutory interpretation.[404] In addition, statutes have been enacted in a number of states prohibiting retaliatory conduct on the part of the landlord.[405]

Arizona joined this growing number of jurisdictions by enacting section 33-1381 of the ARLTA, which forbids landlord retaliation for any of the protected tenant activities,[406] whether that retaliation takes the form of rent increases, a decrease in services or bringing or threatening to bring an action for possession.[407] This range of prohibited retaliatory conduct is broader than that found in earlier cases and statutes, most of which were aimed at retaliatory *eviction* only, and failed to address the problem of other coercive devices at the landlord's disposal.[408] This protection against retaliatory eviction alone proved to be inadequate protection for the tenants. In light of serious housing

401. *Id.* at 701.

402. *But see* LaChance v. Hoyt, 6 Conn. Cir. 207, 269 A.2d 303 (1969); Motoda v. Donohoe, 1 Wash. App. 174, 459 P.2d 654 (1969).

403. *E.g.*, McQueen v. Druker, 438 F.2d 781 (1st Cir. 1971); Hosey v. Club Van Cortlandt, 299 F. Supp. 501 (S.D.N.Y. 1969); E. & E. Newman, Inc. v. Hallock, 116 N.J. Super. 220, 281 A.2d 544 (1971); Engler v. Capital Mgt. Corp., 112 N.J. Super. 445, 271 A.2d 615 (1970); State v. Field, 107 N.J. Super. 107, 257 A.2d 127 (1969); Church v. Allen Meadows Apts., 69 Misc. 2d 254, 329 N.Y.S.2d 148 (Sup. Ct. 1972).

404. *E.g.*, Robinson v. Diamond Housing Corp., 463 F.2d 853 (D.C. Cir. 1972); Schweiger v. Superior Court, 3 Cal. 3d 507, 476 P.2d 97, 90 Cal. Rptr. 729 (1970); F.W. Berens Sales Co. v. McKinney, 41 U.S.L.W. 2303 (D.C. Super. Ct. 1972); Alexander Hamilton Sav. & Loan Ass'n v. Whaley, 107 N.J. Super. 89, 257 A.2d 7 (Dist. Ct. 1969); Markese v. Cooper, 70 Misc. 2d 478, 333 N.Y.S.2d 63 (Monroe County Ct. 1972); Portnoy v. Hill, 57 Misc. 2d 1097, 294 N.Y.S.2d 278 (Binghamton City Ct. 1968); Dickhut v. Norton, 45 Wis. 2d 389, 173 N.W.2d 297 (1970).

405. CAL. CIV. CODE § 1942.5 (West Supp. 1974); CONN. GEN. STAT. ANN. § 19-375a (Supp. 1973); DEL. CODE ANN. tit. 25, § 5516 (Noncum. Supp. 1972); HAWAII REV. STAT. § 521-74 (Supp. 1973); ILL. ANN. STAT. ch. 80, § 71 (Smith-Hurd 1966); ME. REV. STAT. ANN. tit. 14, § 6001 (Supp. 1973-74); MASS. LAWS ANN. ch. 186, § 18, ch. 239, § 2A (Supp. 1974); MICH. STAT. ANN. § 27A.5720 (Supp. 1973); MINN. STAT. ANN. § 566.03 (Cum. Supp. 1973); N.H. REV. STAT. ANN. §§ 540:13-a, 13-b (Supp. 1973); N.J. STAT. ANN. §§ 2A: 42-10.10, to .12 (Supp. 1974-75); N.Y. UNCONSOL. LAWS §§ 8590, 8609 (McKinney Supp. 1973-74); R.I. LAWS ANN. §§ 34-20-10 to -11 (1970).

406. Section 33-1381 proscribes landlord retaliation for tenant complaints to proper governmental agencies concerning housing or building code violations that materially affect health and safety; tenant complaints to the landlord for his failure to maintain the premises as required by section 33-1324; tenant organization of, or participation in, a tenants' union or similar organization; or tenant complaints to governmental agencies charges with responsibility for enforcement of the wage-price stabilization act. [*Economic Stabilization Act of 1970*, Pub. L. No. 91-379, tit. II, 84 Stat. 799 *as amended by* Pub. L. No. 91-558, tit. II, § 201, 84 Stat. 1468; Pub. L. No. 92-8 § 2, 85 Stat. 743; Pub. L. No. 93-28, 87 Stat. 27.].

There is some question whether the tenant is protected against retaliation only for those acts specified in section 33-1381 or whether the courts may protect him from retaliation for other activities as well. *See generally* Note, *Retaliatory Evictions in California*, 46 S. CAL. L. REV. 118, 120-25 (1973).

407. ARIZ. REV. STAT. ANN. § 33-1381(A) (Supp. 1973).

408. *See generally* Note, *Retaliatory Eviction*, 18 HASTINGS L.J. 700, 704 (1971).

shortages,[409] landlords need not always resort to the ultimate weapon of eviction to intimidate tenants. For most tenants, the mere threat of eviction will be adequate to keep them from engaging in certain activities. Consequently, in order to effectively eliminate landlord intimidation, the Act makes unlawful those forms of landlord conduct that may have a chilling effect on lawful tenant conduct.

If the landlord unlawfully retaliates, the Act gives the tenant a defense in any action against him for possession.[410] In addition, the landlord's retaliatory conduct gives rise to a claim for relief by the tenant, who may terminate the rental agreement and recover damages in an amount equal to, but not more than, 2 months rent or twice the actual damages sustained by him, whichever is greater.[411]

In any action by a tenant against a landlord for retaliatory conduct or in any action for possession brought against a tenant, the Act presumes the landlord's conduct to have been retaliatory, if there is evidence of the tenant's complaint[412] within 6 months preceding the landlord's alleged act of retaliation.[413] The statutory presumption of a retaliatory motive is an important factor in the effectiveness of a ban on retaliatory conduct. It represents a departure from the accepted rule; most cases and statutes have imposed the burden of proving retaliatory motive on the tenant.[414] For example, in *Dickhut v. Norton*,[415] proof by a preponderance of the evidence that the landlord's actions were taken in retaliation was held insufficient. Instead, the court imposed upon the tenant the burden of showing by clear and convincing evidence that: (1) the conditions complained of actually violated the housing code; (2) that the landlord knew the tenant had reported the violation; and (3) that the landlord sought to terminate the tenancy for the sole purpose of retaliation.[416] In the face of such a strict burden of proof, the benefits of the retaliatory conduct defense became illusory.[417] The first case to recognize and deal with the inequities inherent in this situation was *Robinson v. Diamond*

409. *See* Schoshinski, *supra* note 90, at 519-21.
410. ARIZ. REV. STAT. ANN. § 33-1381(B) (Supp. 1973).
411. *Id.* §§ 33-1367, -1378(B).
412. This would include tenants' complaints to governmental agencies concerning code violations or violations of the wage-price stabilization act. It would also include complaints made to the landlord concerning the condition of the premises. *See* note 406 *supra*.
413. ARIZ. REV. STAT. ANN. § 33-1381(B) (Supp. 1973). This presumption does not arise, however, if the tenant made the complaint after notice of termination of the rental agreement. *Id.*
414. *See, e.g.*, Schweiger v. Superior Court, 3 Cal. 3d 507, 476 P.2d 97, 90 Cal. Rptr. 729 (1970); Dickhut v. Norton, 45 Wis. 2d 389, 173 N.W.2d 297 (1970); MINN. STAT. ANN. § 566.03 (Cum. Supp. 1973); R.I. GEN. LAWS ANN. § 34-20-10 (1970).
415. 45 Wis. 2d 389, 173 N.W.2d 297 (1970).
416. *Id.* at 399, 173 N.W.2d at 302.
417. *See generally* H.R. 257, 90th Cong., 2d Sess. 1250(a) (1967); MODEL CODE § 2-407.

*Housing Corp.*[418] There, the United States Court of Appeals for the District of Columbia stated that, where the circumstances surrounding an attempted eviction suggest a retaliatory motive, a rebuttable presumption of retaliation should arise.[419] The rebuttable presumption recognized in *Robinson* has been adopted, in various forms, by statute in a growing number of states.[420]

The landlord can escape the Act's presumption of retaliatory motive[421] by establishing that he was motivated by legitimate reasons.[422] Several legitimate motivational factors are suggested by case law and statutes in other states. For example, a landlord in good faith might want to recover possession of the property for his own immediate use and occupancy,[423] or he may need to raise rents because of substantial increases in property taxes or the cost of maintaining and operating the premises.[424] Even if the landlord can show the existence of legitimate reasons for his conduct, however, he will not overcome the presumption unless he can show that he was in fact motivated by those valid reasons. The mere existence of a legitimate reason for his actions will not relieve him of liability if he was *motivated* by an illegitimate reason. The Act is not entirely clear as to the landlord's liability when he is motivated by a combination of factors, so on this point it is profitable to examine the law in other states. In California, for example, the retaliatory eviction statute provides that the landlord is liable if an illegal retaliatory motive was the *dominant* reason for his actions.[425] New Jersey case law has gone even farther by adopting

418. 463 F.2d 853 (D.C. Cir. 1972).

419. *Id.* at 865.

420. *See, e.g.*, CAL. CIV. CODE § 1942.5 (West Supp. 1974); MASS. LAWS ANN. ch. 239, § 2A (Supp. 1974); N.H. REV. STAT. ANN. ch. 54:13-a to 13-c (Supp. 1973); N.J. REV. STAT. §§ 2A:42-10.10 to .12 (Supp. 1974-75). The constitutionality of the New Jersey statute has been upheld on the ground that there is a rational connection between the fact to be proved (tenant exercise of statutory rights) and the ultimate fact to be presumed (landlord retaliatory motive). State v. Field, 107 N.J. Super. 107, 257 A.2d 127 (1969).

421. Being established by statute, the Act's presumption is entitled to greater weight than those presumptions arising out of common law rules of evidence. *Cf.* Mitchell v. Emblade, 81 Ariz. 121, 301 P.2d 1032 (1956); Flores v. Tucson Gas, Elec. Light & Power Co., 54 Ariz. 460, 97 P.2d 206 (1939); Gaethje v. Gaethje, 7 Ariz. App. 544, 441 P.2d 579 (1968).

A judicially created presumption disappears on the introduction of evidence from which the nonexistence of the presumed fact could be found. In the case of a presumption created by the legislature, on the other hand, where a statute declares that proof of one fact is prima facie evidence of another, the latter fact may be found to exist even though there is evidence controverting it and no evidence in its support. M. UDALL, ARIZONA LAW OF EVIDENCE § 193 (1960).

422. *See* Robinson v. Diamond Housing Corp., 463 F.2d 853, 865 (D.C. Cir. 1972).

423. *See* CONN. GEN. STAT. ANN. § 19-375a(b)(2) (Supp. 1973). See Willis, *The Federal Housing and Rent Act of 1947*, 47 COLUM. L. REV. 1118, 1138-41 (1947) for a discussion of the treatment of this exception under wartime rent legislation.

424. CONN. GEN. STAT. ANN. § 19-375a(c)(2) (Supp. 1973). In this situation it would be appropriate to require the landlord to produce records to prove that the increase was an economic necessity. *See* Tarver v. G. & C. Const. Corp., No. 64-2945 (S.D.N.Y. Nov. 9, 1964), reprinted in E. JARMEL, *supra* note 397, at 487.

425. *See* CAL. CIV. CODE § 1942.5 (West Supp. 1974).

the rule that a landlord is guilty of retaliatory conduct if he even *considers* a tenant's protected activities in reaching a decision to evict, even though other legitimate factors may be present or even dominant.[426] Under the New Jersey rule, the landlord may overcome a presumption of retaliatory motive "only upon a showing . . . that the decision to evict was reached *independent of any consideration* of the activities of the tenants protected by the statute."[427] Whether a landlord may escape the Act's sanctions by showing that the dominant reason for his actions was a legitimate one, or whether he must comply with the strict New Jersey standards and prove that he was motivated solely by legitimate reasons is open to question. Under either standard, however, if the landlord can establish that his actions are free of any retaliatory taint, he may freely evict the tenant or raise the rent. The Act also provides that the landlord may maintain an action for possession, regardless of retaliatory motive, if the tenant is in default in rental payments[428] or the situation complained of was caused primarily by lack of reasonable care on the part of the tenant, members of his household, or other persons on the premises with his consent.[429]

## VI. PROCEDURE UNDER THE ACT

The ARLTA changed the substantive law governing landlord-tenant relations but failed to provide a procedural system for either the disposition of conflicts or the implementation of the rights it created. Rather, the new body of substantive landlord-tenant law was grafted onto the existing procedural structure, a structure that was created to deal with the old landlord-tenant law. This gives rise to two problems. First, there are conflicts between the rights created by the Act and current summary proceedings for possession. Second, the Act fails to provide the swift and inexpensive procedures needed in order to easily effectuate the rights of the parties. This section will examine these problems and offer possible solutions.

### A. *Forcible Entry and Detainer and the ARLTA*

As between the landlord and tenant a conflict over the right to possession of the dwelling unit may arise either when the landlord wrongfully dispossesses the tenant or when the tenant fails to vacate the premises upon the termination of the rental agreement. In either

426. *See* E. & E. Newman, Inc. v. Hallock, 116 N.J. Super. 220, 281 A.2d 544 (App. Div. 1971).
427. Silberg v. Lipscomb, 117 N.J. Super. 491, 496, 285 A.2d 86, 88 (1971) (emphasis added).
428. ARIZ. REV. STAT. ANN. § 33-1381(C)(2) (Supp. 1973).
429. *Id.* § 33-1381(C)(1).

situation the aggrieved party often seeks redress through an action in forcible entry and detainer.[430] This statutory action is intended to provide a speedy, summary proceeding for the purpose of obtaining possession of the premises.[431] The sole issue to be tried is the right of possession.[432] While the defendant may raise defenses on this issue, he previously has not had a right to plead set-offs, cross-claims or counterclaims.[433] Section 33-1365(A) of the Act, however, specifically authorizes the tenant to assert counterclaims whenever an action for possession is based on the nonpayment of rent. Thus, the provisions of the Act appear to be in direct conflict with the issue limitations of forcible entry and detainer procedures. Perhaps the most reasonable resolution of this problem is to consider the issue limitation on forcible entry and detainer proceedings to be repealed by implication. Although repeal by implication is not a favored means of statutory construction,[434] it is consistent with the general rule that the later in time prevails when statutes are in conflict.[435] The alternative interpretation would require that forcible entry and detainer proceedings be found inapplicable to residential landlord-tenant disputes[436] and the only action available for obtaining possession would be ejectment. This would completely abolish any type of summary proceeding for possession and is contrary to a specific provision of the ARLTA.[437] Although expanding the litigable issues in a forcible entry and detainer proceeding creates several problems, this appears preferable to the complete elimination of the proceedings.

Construing the ARLTA and the existing forcible entry and detainer statutes together is particularly troublesome due to the summary nature of the forcible entry and detainer proceedings, which results in a short period for trial preparation. When a forcible entry and detainer complaint is filed, the court issues a summons requiring the defendant to appear and file his answer within 6 days after the summons is issued.[438] The defendant may receive notice as little as 2 days befor the trial date.[439] While an appearance must be entered within

430. ARIZ. REV. STAT. ANN. §§ 12-1171 to -1183 (1956).
431. *See* Olds Bros. Lumber Co. v. Rushing, 64 Ariz. 199, 167 P.2d 394 (1946).
432. Gangadean v. Erickson, 17 Ariz. App. 131, 495 P.2d 1338 (1972).
433. *Id.* at 134, 495 P.2d at 1341. *See also* Olds Bros. Lumber Co. v. Rushing, 64 Ariz. 199, 167 P.2d 394 (1946).
434. State *ex rel.* Purcell v. Superior Court, 107 Ariz. 224, 485 P.2d 549 (1971).
435. Webb v. Dixon, 104 Ariz. 473, 455 P.2d 447 (1969); McCarthy v. State *ex rel.* Harless, 55 Ariz. 328, 101 P.2d 449 (1940).
436. The right to counterclaim provided in the ARLTA is limited to residential tenancies. Nonresidential tenancies will continue to be governed by existing Arizona statutes. *See* ARIZ. REV. STAT. ANN. § 33-381 (Supp. 1973).
437. The landlord may "recover possession of the premises pursuant to an action in forcible detainer for any noncompliance by the tenant with the rental agreement or section 33-1341." *Id.* § 33-1368.
438. *Id.* § 12-1175(A) (1956).
439. *Id.* § 12-1175(C).

this period, a party may obtain a short continuance upon the showing of good cause.[440] The principal issue is whether these time limitations unduly hamper the defendant in his attempts to obtain counsel, marshall evidence and prepare any counterclaims before trial and, if so, whether that is a denial of due process. The United States Supreme Court recently has held that time limitations in a forcible entry and detainer action do not necessarily violate due process.[441] In that case, however, the Court was confronted with a statute that limited the scope of the proceedings to the question of possession and proscribed the presentation of counterclaims.[442] "In those recurring cases where the tenant fails to pay rent or holds over after expiration of his tenancy and the issue in the ensuing litigation is *simply* whether he has paid or held over, we cannot declare that the . . . statute allows an unduly short time for trial preparation."[443] However, the situation is more complex when, as is the case in Arizona, the tenant is provided with a statutory right to assert counterclaims in any action for possession based on nonpayment of rent. In this situation, the scope of the proceedings is expanded to include issues other than that of the right to possession. Both the landlord and tenant are put at a disadvantage—the tenant because he is forced to prepare his counterclaims in a short period of time and the landlord because he has no time in which to prepare his reply to the counterclaims.

The procedure may be salvaged through the careful use of the continuance provision. The Arizona forcible entry and detainer statutes were taken from Texas statutes[444] that have been interpreted as allowing a waiver of the continuance limitation.[445] A similar interpretation of the Arizona statutes would allow the court to grant both parties a continuance to provide them an opportunity to adequately prepare their cases. Neither party should have strong objections since both stand to benefit. Additionally, the landlord incurs no risk through the delay since the court can order the rent to be paid into court.[446] While a workable procedure may be devised, the situation leaves much to be desired. The forcible entry and detainer procedures should be revised to allow the defendant an adequate period[447] in which to prepare his defenses and counterclaims. Additionally,

440. *Id.* § 12-1177(C). A 3 day postponement may be obtained in justice court and 10 days in superior court upon a showing of good cause. *Id.*
441. Lindsey v. Normet, 405 U.S. 56 (1972).
442. *Id.* at 65-66.
443. *Id.* at 64-65 (emphasis added).
444. *See* ARIZ. REV. STAT. ANN. § 12-1177 (1956), Historical Note. *See generally* TEXAS R. CIV. P. 745.
445. *See* Calhoun v. Kirkpatrick, 155 S.W. 686 (Tex. Civ. App. 1913).
446. *See* ARIZ. REV. STAT. ANN. § 33-1365(A) (Supp. 1973).
447. Seven to 10 days would seem reasonable while not causing excessive delay. *See* Ch. 207, § 38, 1973 SESS. LAWS OF WASH. 1ST EXTRA. SESS. 1580.

the plaintiff must be afforded a similar opportunity to prepare his reply.

B. *Inadequacy of ARLTA Procedures*

As with the *Uniform Act*, the greatest single inadequacy in the Arizona Act is the absence of a simple and speedy procedure through which an aggrieved party may obtain relief.[448] Although either party may maintain an action under the appropriate circumstances, normal judicial proceedings usually entail high costs and long delay. Additionally, the complexities of the proceedings often preclude a layman from effectively representing himself. Forcible entry and detainer proceedings, for example, afford speedy relief in disputes over possession. But they have a narrow purpose and often have been employed inequitably, resulting in injustice to the tenant.[449] The failure to effectuate service, the summary nature of the proceeding and the extremely high rate of default judgments all work to the detriment of the defendant, who is usually the tenant.[450] The absence of effective possessory proceedings is not the only problem. Where the amount in controversy is often small[451] and does not warrant the cost of litigation,[452] as in disputes over security deposits, there is a need for simple, inexpensive proceedings for damages.

Unfortunately, no simple solution is readily available. Several states, however, have adopted innovations which may be studied and adapted to meet Arizona's needs. One state, for example, has established a separate small claims proceeding for disputes involving security deposits.[453] Attorneys are barred from this proceeding,[454] and the court clerk is required to assist in the preparation of the necessary pleadings.[455] In other jurisidictions, forcible entry and detainer proceedings are being modified to include provisions for a special court hearing on the question of possession, with the remainder of the proceeding being adjudicated in the conventional manner.[456] Landlord-tenant arbitration also has been recognized as a beneficial procedural tool.[457] The reform in landlord-tenant rights has resulted in a vast

448. *See* ABA, *Proposed Uniform Act, supra* note 4, at 106.
449. *See generally* 1 J. RASCH, *supra* note 153, at §§ 5.1-5.50; Bruno, *New Jersey Landlord-Tenant Law: Proposals for Reform*, 1 RUTGERS-CAMDEN L.J. 299 (1969).
450. *See generally* Bruno, *supra* note 449.
451. *See* Daniels, *Judicial and Legislative Remedies for Substandard Housing: Landlord-Tenant Law Reform in the District of Columbia*, 59 GEO. L.J. 909, 950-51 (1971).
452. Although the cost of proceedings in small claims court may be minimal, the additional cost of lost wages also must be considered.
453. HAWAII REV. STAT. § 633-27 (Supp. 1973).
454. *Id.* § 633-28(b).
455. *Id.* § 633-28(a).
456. Ch. 207, § 38, 1973 SESS. LAWS OF WASH. 1ST EXTRA. SESS. 1580.
457. *Id.* § 32. Interestingly, it has been noted that the landlord and tenant often

increase in litigation in some jurisdictions.[458] As a result, it has been suggested that the only workable procedural innovation is the creation of an administrative agency to administer the housing codes and adjudicate disputes.[459] Although these procedural reforms raise many complex problems of their own, it is essential that the effectiveness of existing Arizona procedures be evaluated and that possible changes be considered.

## VII. CONCLUSION

This Note has been intended to identify, analyze and discuss the major changes in Arizona law effectuated by the ARLTA. It is hoped that this will provide a useful tool for the members of the Arizona legal community. While potential inequities and inadequacies have been examined, this criticism is not intended to detract from the many benefits and progressive aspects of the Act. As with any new legislation, problem areas remain. Of paramount importance is early clarification of the relationship of the ARLTA to existing legal procedures, particularly forcible entry and detainer. Despite its shortcomings, however, the ARLTA is a progressive piece of legislation which clarifies and modernizes an important area of the law and moves Arizona to the forefront in landlord-tenant reform.

come away from arbitration proceedings with a greater appreciation for one another's problems and an improved relationship. *See* Sembower, *Landlord-Tenant Arbitration*, 24 ARB. J. (n.s.) 35, 49 (1969).

458. *See* Greene, *A Proposal for the Establishment of a District of Columbia Landlord-Tenant Agency*, 38 D.C. BAR J. 25, 26 (1971).

459. *See generally id.*