

Preventing the Use of Unenforceable Provisions in Residential Leases

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NOTES

PREVENTING THE USE OF UNENFORCEABLE PROVISIONS IN RESIDENTIAL LEASES

In recent years, many jurisdictions have declared certain residential lease provisions void as against public policy. Even though these clauses have no legal effect, landlords continue to include them in their leases. The reason is simple—a clause with no legal effect can still have tremendous practical effect if the tenant believes that it is binding. The tenant who looks to his lease to ascertain his rights could be deceived into foregoing valid claims or defenses against his landlord. This Note proposes legislation ensuring disclosure, on the face of residential leases, of tenants' legal rights. Tenant awareness can stem the abuses that result from the continued use of unenforceable lease provisions.

I

THE CONTINUED USE OF INVALID LEASE PROVISIONS

Tenants deserve protection from grossly unfair and one-sided lease provisions. Some commentators have recommended that courts apply the doctrine of unconscionability to such clauses in residential leases.¹ Indeed, several courts have done so.² The problem, however, transcends the case-by-case approach of unconscionability—even if the court strikes a provision from one lease, similar provisions in other leases remain untouched.³

¹ See Note, *Exculpatory Clauses in Standard Form Leases: A Need for Direct Judicial Action*, 28 U. PITT. L. REV. 85, 95-97 (1966); 6 IND. L. REV. 108, 117 (1972); 47 WASH. L. REV. 750, 755 (1972).

² See *Harwood v. Lincoln Square Apts. Section 5, Inc.*, 78 Misc. 2d 1097, 359 N.Y.S.2d 387 (Civ. Ct. N.Y. 1974); *Seabrook v. Commuter Hous. Co.*, 72 Misc. 2d 6, 338 N.Y.S.2d 67 (Civ. Ct. N.Y. 1972), *aff'd on other grounds*, 79 Misc. 2d 168, 363 N.Y.S.2d 566 (Sup. Ct. 1973); *cf. Weaver v. American Oil Co.*, 257 Ind. 458, 276 N.E.2d 144 (1971) (commercial lease).

³ See Berger, *Hard Leases Make Bad Law*, 74 COLUM. L. REV. 791, 816-17 (1974); Garrity, *Redesigning Landlord-Tenant Concepts for an Urban Society*, 46 J. URB. L. 695, 708 (1968); Kirby, *Contract Law and the Form Lease: Can Contract Law Provide the Answer?*, 71 NW. U. L. REV. 204, 224, 226 (1976). Kirby emphasizes that the doctrine of unconscionability is "merely a stop-gap measure designed to remedy the most pressing abuses" and not a comprehensive answer to the problems of the form lease. *Id.* at 224. In addition, the application of the unconscionability provision of the Uniform Commercial Code (U.C.C. § 2-302) to residen-

Legislatures and courts in many jurisdictions have responded by declaring certain residential lease provisions invalid per se. These lawmakers and judges recognize that, although a residential lease is an agreement between private parties, certain types of clauses—among them exculpatory clauses,⁴ waivers of statutory rights,⁵ confession of judgment clauses,⁶ provisions requiring a

tial leases has been severely criticized as contrary to legislative intent. See Berger, *supra*, at 811.

⁴ See *Tenants Council v. DeFranceaux*, 305 F. Supp. 560 (D.D.C. 1969); *Feldman v. Stein Bldg. & Lumber Co.*, 6 Mich. App. 180, 148 N.W.2d 544, *appeal denied*, 379 Mich. 761 (1967); *Papakalos v. Shaka*, 91 N.H. 265, 18 A.2d 377 (1941); *Kuzmiak v. Brookchester, Inc.*, 33 N.J. Super. 575, 111 A.2d 425 (1955); ALASKA STAT. § 34.03.040(a)(3) (1975); ARIZ. REV. STAT. ANN. § 33-1315(A)(3) (1974); CAL. CIV. CODE § 1668 (West 1973), *construed in* *Hanna v. Lederman*, 223 Cal. App. 2d 786, 36 Cal. Rptr. 150 (1963); CONN. GEN. STAT. § 47a-4(a)(3) (1979); DEL. CODE ANN. tit. 25, § 5515 (1974); FLA. STAT. ANN. § 83.47(1)(b) (West Supp. 1978); HAW. REV. STAT. § 521-33 (1976); ILL. REV. STAT. ch. 80, § 91 (1975); 1978 Iowa Acts, ch. 1172, § 11(1)(d); KAN. STAT. § 58-2547(a)(4) (1976) (common areas excepted); KY. REV. STAT. ANN. § 383.570(1)(d) (Baldwin Supp. 1978); MD. REAL PROP. CODE ANN. § 8-105 (1974) (limited to common areas); MASS. ANN. LAWS ch. 186, § 15 (Michie/Law. Co-op 1969) (limited to common areas); MONT. CODE ANN. § 70-24-202(3) (1978); NEB. REV. STAT. § 76-1415(1)(d) (1976); NEV. REV. STAT. § 118A.220(I)(d) (1977); N.Y. GEN. OBLIG. LAW § 5-321 (McKinney 1978); OHIO REV. CODE ANN. § 5321.13(D) (Page Supp. 1978); OKLA. STAT. ANN. tit. 41, § 113(A)(4) (West Supp. 1978); OR. REV. STAT. § 91.745(1)(c) (1977); TENN. CODE ANN. § 64-2813(a)(2) (1976); VA. CODE § 55-248.9(a)(4) (Supp. 1978); WASH. REV. CODE ANN. § 59.18.230(2)(d) (Supp. 1977).

⁵ See *Tenants Council v. DeFranceaux*, 305 F. Supp. 560 (D.D.C. 1969); ALASKA STAT. § 34.03.040(a)(1) (1975); ARIZ. REV. STAT. ANN. § 33-1315(A)(1) (1974); CAL. CIV. CODE §§ 1942.1, 1953 (West Supp. 1978); COLO. REV. STAT. § 38-12-103(7) (1973); CONN. GEN. STAT. § 47a-4(a)(1) (1978); FLA. STAT. ANN. § 83.47(1)(a) (West Supp. 1978); HAW. REV. STAT. § 521-31(a) (1976); 1978 Iowa Acts, ch. 1172, § 11(1)(a); KAN. STAT. § 58-2547(a)(1) (1976); KY. REV. STAT. ANN. § 383.570(1)(a) (Baldwin Supp. 1978); MD. REAL PROP. CODE ANN. § 8-208(a)(2) (Supp. 1978); MASS. ANN. LAWS ch. 186, §§ 14-21 (Michie/Law. Co-op Supp. 1978); MINN. STAT. ANN. § 566.32 (West Supp. 1978); MONT. CODE ANN. § 70-24-202(1) (1978); NEB. REV. STAT. § 76-1415(I)(a) (1976); NEV. REV. STAT. § 118A.220(1)(a) (1977); N.J. STAT. ANN. § 46:8-36 (West Supp. 1978); N.M. STAT. ANN. § 70-7-16 (Supp. 1975); OHIO REV. CODE ANN. § 5321.13(A) (Page Supp. 1978); OKLA. STAT. ANN. tit. 41, § 113(A)(1) (West Supp. 1978); OR. REV. STAT. § 91.745(1)(a) (1977); TENN. CODE ANN. § 64-2811(a) (1976); TEX. REV. CIV. STAT. ANN. art. 5236e, § 7 (Vernon Supp. 1978); VA. CODE § 55-248.9(a)(1) (Supp. 1978); WASH. REV. CODE ANN. § 59.18.230(2)(b) (Supp. 1977).

⁶ ALASKA STAT. § 34.03.040(a)(2) (1975); CONN. GEN. STAT. § 47a-4(a)(2) (1979); DEL. CODE ANN. tit. 25, § 6104 (1974); HAW. REV. STAT. § 521-34 (1976); 1978 Iowa Acts, ch. 1172, § 11(1)(b); KAN. STAT. § 58-2547(a)(2) (1976); KY. REV. STAT. ANN. § 383.570(I)(b) (Baldwin Supp. 1978); MD. REAL PROP. CODE ANN. § 8-208(a)(1) (Supp. 1978); MONT. CODE ANN. § 70-24-202(2) (1978); NEB. REV. STAT. § 76-1415(1)(b) (1976); NEV. REV. STAT. § 118A.220(1)(b) (1977); OHIO REV. CODE ANN. § 5321.13(B) (Page Supp. 1978); OKLA. STAT. ANN. tit. 41, § 113(A)(2) (West Supp. 1978); OR. REV. STAT. § 91.745(1)(b) (1977); TENN. CODE ANN. § 64-2813(a)(1) (1976); VA. CODE § 55-248.9(a)(2) (Supp. 1978); WASH. REV. CODE ANN. § 59.18.230(2)(b) (Supp. 1977).

tenant to pay the landlord's attorney's fees in any judicial action arising under the lease,⁷ and waivers of the right to a jury trial⁸—are so contrary to established public policy that they cannot be upheld under any circumstances.

Notwithstanding the unenforceability of such clauses, landlords continue to use form leases containing them. Studies have shown that traditional form leases are "outdated and seldom revised" despite the many recent developments in landlord-tenant law.⁹ Form leases in New York, for instance, continue to include exculpatory clauses and jury trial waivers even though state law provides that these types of provisions are unenforceable when used in a rental agreement.¹⁰ Similarly, six years after the Illinois legislature invalidated exculpatory provisions in leases, the Chicago Real Estate Board form lease still contained such a clause.¹¹ The Real Estate Board continued to use the form lease despite many protests and its own admission of the clause's invalidity.¹² Indeed, a landlord in the business of renting residential dwelling units is likely to know of changes in landlord-tenant law.¹³ Unfortunately, a tenant is not.

⁷ See ALASKA STAT. § 34.03.040(a)(4) (1975); ARIZ. REV. STAT. ANN. § 33-1315(A)(2) (1974); CONN. GEN. STAT. § 47a-4(a)(7) (1978) (lease cannot bind tenant to pay landlord's attorney's fees in excess of 15% of any judgment against tenant); DEL. CODE ANN. tit. 25, § 6102 (1974); 1978 Iowa Acts, ch. 1172, § 11(1)(c); KAN. STAT. § 58-2547(a)(3) (1976); KY. REV. STAT. ANN. § 383.570(1)(c) (Baldwin Supp. 1978); NEB. REV. STAT. § 76-1415(1)(c) (1976); NEV. REV. STAT. § 118A.220(1)(c) (1977); OHIO REV. CODE ANN. § 5321.13(C) (Page Supp. 1978); OKLA. STAT. ANN. tit. 41, § 113(A)(3) (West Supp. 1978); VA. CODE § 55-248.9(a)(3) (Supp. 1978); WASH. REV. CODE ANN. § 59.18.230(2)(c) (Supp. 1977).

⁸ MD. REAL PROP. CODE ANN. § 8-208(a)(4) (Supp. 1978); MASS. ANN. LAWS ch. 186, § 15F (Michie/Law. Co-op Supp. 1978); N.Y. REAL PROP. LAW § 259-c (McKinney 1968).

⁹ See Bentley, *An Alternative Residential Lease*, 74 COLUM. L. REV. 836, 837 (1974); Berger, *supra* note 3, at 791.

¹⁰ Bentley, *supra* note 9, at 852. Although Bentley's study is nearly five years old, its finding that leases in New York contain unenforceable provisions remains valid. For example, an examination of the form lease used by one large apartment complex in Ithaca, New York, reveals the presence of both an exculpatory clause and a jury trial waiver. (Copy of lease on file at the Cornell Law Review).

¹¹ See *Hearings on Landlord-Tenant Law Before the Interim Comm. on Judiciary of the Cal. Assembly* 8-9 (Oct. 1972) (Statement of Julian Levi, Reporter/Draftsman, Uniform Residential Landlord and Tenant Act) [hereinafter cited as *California Hearings*]; P. MARTIN, *THE ILL-HOUSED, CASES AND MATERIALS ON TENANTS' RIGHTS IN PRIVATE AND PUBLIC HOUSING* 1069 (1971); Groll, *The Uniform Lease: A Necessity for Effective Reform*, 5 VAL. L. REV. 81, 89 (1970).

¹² See *California Hearings*, *supra* note 11, at 9 (testimony of Julian Levi, Reporter/Draftsman, Uniform Residential Landlord and Tenant Act).

¹³ See Clocksin, *Consumer Problems in the Landlord-Tenant Relationship*, 9 REAL PROP. PROB. & TR. J. 572, 572 (1974). Landlords, of course, are not a homogeneous lot. Dugald Gillies of the California Real Estate Association has testified:

Tenants continue to sign such leases because they do not know that certain provisions are unenforceable. Moreover, even those tenants aware of the law often have no real choice.¹⁴ The disparity in bargaining power that almost always exists between the parties to a residential lease is a "universally recognized problem."¹⁵ Form leases are presented to tenants on a take-it-or-leave-it basis.¹⁶ One study has shown that tenants are aware of their inferior bargaining power and are consequently reluctant to even ask for better lease terms.¹⁷ In addition, the tight housing market in most areas limits the ability of tenants to shop around;¹⁸ they will generally encounter virtually identical lease terms elsewhere.¹⁹ These lease terms, of course, reflect the interests of

The best information we can get indicates about 50 percent of all the rental housing in this state is provided by what you have to call "mama and papa" operations. These are a man and his wife, who own one or two of the units. . . . These people do not have the sophistication that one might expect of the big landlord. The other 50 percent of the housing is provided in this state, either by larger owners or by persons who place their property in the hands of professional property management.

California Hearings, supra note 11, at 17. It is safe to assume that "big" landlords are aware of changes in the law. One goal of any reform legislation should be to ensure that all landlords are informed of recent changes in landlord-tenant law. As Bentley notes, traditional form leases misinform landlords as well as tenants. *See Bentley, supra* note 9, at 837.

¹⁴ As one court has said, it is not "a meaningful answer to say that tenants have the right to negotiate for better terms in their leases. The blunt fact is that most people cannot rent apartments in our urban society without signing form leases that are simply grotesque in their one-sidedness." *Morbeth Realty Corp. v. Velez*, 73 Misc.2d 996, 1000, 343 N.Y.S.2d 406, 411 (Civ. Ct. N.Y. 1973).

¹⁵ Mueller, *Residential Tenants and Their Leases: An Empirical Study*, 69 MICH. L. REV. 247, 247 (1970). *See Berger, supra* note 3, at 791; Clocksin, *supra* note 13, at 572.

¹⁶ *See Simmons v. Columbus Venetian Stevens Bldgs., Inc.*, 20 Ill. App. 2d 1, 31-33, 155 N.E.2d 372, 386-87 (1958); Clocksin, *supra* note 13, at 572.

¹⁷ *See Mueller, supra* note 15, at 264-70, 276-77. In his study of 100 tenants and their leases in Ann Arbor, Michigan, Mueller found that 43 tenants believed they were in too weak a bargaining position to obtain any concessions from the landlord, and 35 thought any such request would be immediately denied. *Id.* at 268. Mueller noted that "bargaining power is, in part, a function of the extent of one's knowledge of the particular subject matter that is being negotiated." *Id.* at 269. He found that many tenants had little understanding of landlord-tenant law and the effect of even simple lease terms. *See* note 22 and accompanying text *infra*. Mueller did discover that a small minority of his sample population of tenants were relatively sophisticated bargainers. He suggests that "persons accustomed to the process of negotiation as part of their occupational activities are inclined to transfer these bargaining skills to their private affairs." Mueller, *supra* note 15, at 268. Professionals and salesmen made up most of Mueller's small group of "bargainers." *Id.*

¹⁸ *See Clocksin, supra* note 13, at 572.

¹⁹ *See Note, Landlord-Tenant Reform: Arizona's Version of the Uniform Act*, 16 ARIZ. L. REV. 79, 91 (1974).

the party who proffers the form lease. After a survey of form leases from sixteen cities around the United States, Professor Curtis Berger concluded:

Only two leases . . . fairly presented *any* of the lease elements, and even these leases had somewhat or strongly pro-landlord bias in other elements. . . .

. . . The leases almost all treat the residential tenant as a latter-day serf. One sees a near-pathological concern with tenant duties and landlord remedies Much of the remaining text seeks to immunize landlord against the claims of his tenant.²⁰

Use of unenforceable lease provisions may deprive the tenant of his rights. If a dispute arises with his landlord, the tenant will likely examine his lease to determine his rights.²¹ Many tenants cannot comprehend even simple lease clauses.²² In addition, tenants seldom have legal counsel²³ and receive little information concerning recent changes in the law.²⁴ Consequently, many tenants give credence to lease provisions even if they are unenforceable.²⁵ Moreover, a landlord can use such a clause as a "lever to extract performance from or prevent action by [a] tenant,"²⁶ or even to deter a tenant from seeking counsel.²⁷ This *in terrorem*

²⁰ Berger, *supra* note 3, at 835 (footnote omitted) (emphasis added).

²¹ See MODEL RESIDENTIAL LANDLORD-TENANT CODE 20 (Tent. Draft 1969) [hereinafter cited as MODEL CODE].

²² In Mueller's survey of well-educated tenants, only 50% understood the meaning and effect of simple lease terms. See Mueller, *supra* note 15, at 276. Only 33% of the tenants correctly answered a question designed to test their comprehension of a sample clause which combined "a tenant's repair obligation with a clause exculpating the landlord from damages to the tenant's person or property." *Id.* at 261-62.

²³ A study of cases filed and tried in the Landlord-Tenant Division of the Common Pleas Court in Detroit found that only 7.3% of the tenants were represented by counsel. See Mosier & Soble, *Modern Legislation, Metropolitan Court, Miniscule Results: A Study of Detroit's Landlord-Tenant Court*, 7 U. MICH. J. L. REF. 8, 35 n.70 (1973). The study also found that 49.2% of the landlords were represented by counsel. *Id.*

²⁴ See Kirby, *supra* note 3, at 233.

²⁵ See Moran, *Proposed Statutory Alterations of the Landlord-Tenant Relationship for the State of Illinois*, 19 DEPAUL L. REV. 752, 768 (1970). See generally E. JARMEL, LEGAL REPRESENTATION OF THE POOR 315 (1968); Groll, *supra* note 11, at 89; Kirby, *supra* note 3, at 233. Bentley notes that a form lease that includes unenforceable lease provisions does not "inform the parties accurately of their rights and duties, [and it] discourages the majority of tenants from pursuing rights otherwise granted them by law." Bentley, *supra* note 9, at 857. See MODEL CODE, *supra* note 21, at 20.

²⁶ Note, *supra* note 19, at 95-96.

²⁷ See Moran, *supra* note 25, at 768.

effect of invalid lease provisions has been recognized by authorities in landlord-tenant law.²⁸ In an empirical study of residential tenants and their leases in Ann Arbor, Michigan, Warren Mueller noted that "the tenant, who may not be acquainted with the practice of legal draftsmen or shrewd . . . lessors of inserting clauses in leases purely for their persuasive or *in terrorem* effect, finds it difficult to see any logic in filling a lease form with *legally* worthless verbiage."²⁹

II

RESPONSES TO THE PROBLEM

A. *Application of State Consumer Protection Statutes to Residential Leases*

In *Commonwealth v. Monumental Properties, Inc.*,³⁰ the Pennsylvania Supreme Court held that the leasing of residential housing is within the purview of the Pennsylvania Unfair Trade Practices and Consumer Protection Law.³¹ The Commonwealth had charged twenty-five landlords and four distributors of form leases with violations of that law, alleging that the defendants' form leases contained unfair and deceptive provisions and failed to inform tenants of their statutory rights.³² Appealing from a dis-

²⁸ See e.g., MODEL CODE, *supra* note 21, at 19; Moran, *supra* note 25, at 768; Mueller, *supra* note 15, at 274. Professor Levi has testified:

Despite the protest of the Chicago Bar Association, for years the Chicago Real Estate Board put [an unenforceable exculpatory] provision in their leases. . . . [Their] argument was, "It isn't valid so what is the difference". Now that's the kind of a convenient answer that we as practical people know doesn't mean anything. What do you think happens when an injury occurs or damage occurs and the insurance adjuster comes out and talks to the tenant? And I'm not talking about the poor tenant at all. And he says to the tenant, "you waived your rights;" and he shows him the lease. You think the average tenant in that kind of a case has legal advice? Of course, he doesn't; and he is taken advantage of.

California Hearings, *supra* note 11, at 8-9. Once a tenant receives legal advice, an unenforceable provision loses its *in terrorem* effect, but its inclusion in a duly executed lease undoubtedly deters tenants from even seeking counsel. See Moran, *supra* note 25, at 768.

²⁹ Mueller, *supra* note 15, at 274 (emphasis in original). Mueller went on to note: "Three tenants . . . [of the many in the study who assumed that the fine-print terms were enforceable] added comments to their answers expressing surprise that a provision could be other than 'valid and enforceable' if it appeared in an executed lease." *Id.* at 277 n.120.

³⁰ 459 Pa. 450, 329 A.2d 812 (1974).

³¹ PA. STAT. ANN. tit. 73, §§ 201-1 to -9 (Purdon Supp. 1978).

³² These provisions included exculpatory clauses, waivers of statutory rights, and confession of judgment provisions. 459 Pa. at 455, 329 A.2d at 814.

missal of the complaint,³³ the Commonwealth argued that the leasing of residential housing is a sale or distribution of property under the definition of trade or commerce set forth in the statute.³⁴ Broadly construing the words "sale [of] . . . any property,"³⁵ the supreme court agreed:

Functionally viewed, the modern apartment dweller is a consumer of housing services. The contemporary leasing of residences envisions one person (landlord) exchanging for periodic payments of money (rent) a bundle of goods and services, rights and obligations. . . .

The purchaser of this bundle (tenant) is as much a consumer as is the purchaser of an automobile, household appliance, or any other consumer good.³⁶

The application of state consumer protection laws to residential leases is unlikely to halt the continued use of unenforceable lease provisions. Although *Monumental Properties* is consistent with the underlying policies of consumer protection legislation,³⁷ the Pennsylvania court's interpretation of "sale [of] . . . any property"³⁸ undoubtedly went beyond what the legislature had intended. Although most states have statutes similar to the Pennsylvania Unfair Trade Practices and Consumer Protection Law, only one other court has adopted the *Monumental Properties* approach.³⁹ But even if such statutes could be stretched to cover rental agreements, some of them do not authorize private rights of action.⁴⁰ In these states, tenants must rely on the government

³³ The lower court dismissed the Commonwealth's complaint because, *inter alia*, the leasing of residential housing did not fall within the scope of the consumer protection law. *Commonwealth v. Monumental Props., Inc.*, 10 Pa. Commw. Ct. 596, 314 A.2d 333 (1973), *rev'd* 459 Pa. 450, 329 A.2d 812 (1974).

³⁴ "Trade or commerce" is defined as "the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situate, and includes any trade or commerce directly or indirectly affecting the people of this Commonwealth." PA. STAT. ANN. tit. 73, § 201-2(3) (Purdon Supp. 1978).

³⁵ *Id.*

³⁶ 459 Pa. at 467-68, 329 A.2d at 820-21. The court also found substantial common-law authority for the proposition that the leasing of property is the same as a sale of the premises. *Id.* at 470-72, 329 A.2d at 822-23. The court drew additional support from the broad interpretation given the Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (1976). 459 Pa. at 473, 329 A.2d at 823.

³⁷ See 44 U. CIN. L. REV. 405, 411 (1975).

³⁸ See notes 34-36 and accompanying text *supra*.

³⁹ See *Love v. Pressley*, 34 N.C. App. 503, 239 S.E.2d 574 (1977), *cert. denied*, 294 N.C. 441, 241 S.E.2d 843 (1978).

⁴⁰ As of late 1973, 13 of the 44 states which had enacted statutes based on the Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (1976) did not allow private actions by consum-

to enforce their rights. Other, and more pressing, concerns make it unlikely that state attorneys general will devote much time and effort to curbing abuses in this area.⁴¹

One state has recently amended its consumer protection statute to eliminate these problems. The Texas Deceptive Trade Practices-Consumer Protection Act⁴² now includes leased real property within its definition of "goods".⁴³ The Act prohibits landlords from representing that a lease confers rights, remedies, or obligations prohibited by law.⁴⁴ Tenants adversely affected by such representations have a cause of action under the Act.⁴⁵ The statute provides for the award of treble damages, injunctive relief, and reasonable attorney's fees in direct actions by tenants against landlords.⁴⁶

Although the Texas statute goes a long way toward preventing deceptive practices by landlords, it does not furnish a means for alerting tenants to their rights under the statute. If a tenant relies on his lease to determine his rights,⁴⁷ he still has no notice that certain provisions are unenforceable. The statute encourages tenant initiative by providing powerful remedies, but remedies alone cannot solve the basic problem of informing tenants who are unaware of their rights and are without counsel.

B. *Statutory Form Leases*

Several commentators have suggested the enactment of a statutory form lease to prevent landlords from including unenforceable provisions in residential leases.⁴⁸ This approach

ers. See [1973-1974 Transfer Binder] 2 CONSUMERISM (CCH) 494. At the time of the *Monumental Properties* decisions, Pennsylvania did not allow consumers to initiate private actions; it now permits such suits. See PA. STAT. ANN. tit. 73, § 201-9.2 (Purdon Supp. 1978).

⁴¹ See 44 U. CIN. L. REV. 405, 407 (1975); 21 VILL. L. REV. 131, 139 (1975).

⁴² TEX. BUS. & COM. CODE ANN. §§ 17.41-.63 (Vernon Supp. 1978).

⁴³ See *id.* § 17.45(1).

⁴⁴ See *id.* §§ 17.45(1), .46. Section 17.46(b)(12) provides that "[t]he term 'false, misleading, or deceptive acts or practices' includes . . . representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law." Moreover, § 17.42 expressly prohibits waivers of rights set out in the Act.

⁴⁵ See *id.* § 17.50(a)(1). See Comment, *Texas Landlord-Tenant Law and the Deceptive Trade Practices Act—Affirmative Remedies for the Tenant*, 8 ST. MARY'S L.J. 807, 815 (1977).

⁴⁶ See TEX. BUS. & COM. CODE ANN. § 17.50(b) (Vernon Supp. 1978).

⁴⁷ See note 21 and accompanying text *supra*.

⁴⁸ Groll, for example, has proposed legislation that would require all residential leases to contain certain mandatory provisions. See Groll, *supra* note 11, at 92-93. He believes that such an enactment best achieves the goal of promoting tenant awareness of their "rights

finds ample precedent in legislation regulating adhesion contracts in the insurance and consumer credit fields.⁴⁹ A statutory form lease is not a feasible solution, however, because it severely limits the parties' ability to enter into a lease suited to their particular needs. As Allen Bentley recognizes:

Unlike insurance contracts, which are in essence nothing more than packages of legal rights predicated upon defined contingencies, leases serve, or should serve, to set the framework for an ongoing relationship between landlord and tenant. This framework may vary with the location and nature of the rented premises and the objectives of the parties.⁵⁰

Because it is unlikely that a statutory form lease could accommodate all residential lessors and lessees,⁵¹ legislatures should hesitate to limit the parties' flexibility.⁵² Pressure from interest

and obligations." *Id.* at 89, 94. Bentley believes, with some reservations, that a statutory form lease may be necessary to eliminate the abuses resulting from the continued use of traditional form leases. Bentley, *supra* note 9, at 879-80. He fears that because of the housing shortage and the unreliability of lower courts in enforcing legislative intent, "statutory invalidation of lease terms may prove unavailing to alter the pervasive pattern of traditional form leases." *Id.* at 879. Kirby believes that the problem with unfair form leases "is not that the form is a form, but that it is promulgated by parties on one side of the transaction and reflects their needs." Kirby, *supra* note 3, at 237. He maintains that enactment of a statutory form lease "would equalize the tenant's positions vis-à-vis the landlord" as well as provide "a much needed measure of consistency and certainty in landlord-tenant law." *Id.* at 235-36. See Garrity, *supra* note 3, at 717-18.

⁴⁹ "Precedent for such an approach can be found in statutes that meticulously regulate adhesion contracts in other areas, such as insurance, where bargaining over fine-print forms has been ineffective and protection of the public has been found necessary." Bentley, *supra* note 9, at 879-80. Garrity finds support for this approach in the retail installment sales acts. See Garrity, *supra* note 3, at 718.

⁵⁰ Bentley, *supra* note 9, at 880.

⁵¹ See Mueller, *supra* note 15, at 277. But see Groll, *supra* note 11, at 93-94. Groll does not believe that a statutory lease would necessarily lead to inflexibility; his proposal would leave the parties free to bargain on matters not covered by the statutory lease. *Id.* at 93. He also recommends the enactment of separate form leases for multi-unit and single-unit premises. See *id.* at 94. Residential rental units, however, do not break down into two distinct categories. For instance, multi-unit buildings range from luxury apartments on Park Avenue to low-income housing for the elderly to substandard housing in blighted urban areas. Similarly, single-unit premises may be leased as a year-round residence, on a seasonal basis, or to a number of unrelated individuals (*e.g.*, students). If a statutory form lease is so specific and detailed that it must be adapted to multi-unit and single-unit premises, then additional lease categories will undoubtedly be necessary.

⁵² But see Kirby, *supra* note 3, at 236. Kirby maintains that statutory form leases cannot destroy freedom of contract because there is not any now. He cites the fact that more than 98% of all residential leases in Chicago are form leases. *Id.*

groups would compound drafting difficulties.⁵³ A statutory form lease might be as "inequitable and unworkable" as any traditional form lease.⁵⁴

C. Mandatory Administrative Approval of Leases

Another possible solution to the problem of continued use of unenforceable lease clauses is the creation of an administrative agency with regulatory authority over residential leases.⁵⁵ A major task of this agency would be to excise from leases all provisions that the legislature or courts had declared unenforceable. Landlords using leases that had not received administrative approval would be subject to strict penalties.⁵⁶

Although this approach avoids the inflexibility of a statutory form lease, it presents problems of its own. Administrative review is expensive. The state must fund and staff the administrative agency and landlords will probably incur expenses seeking approval for proposed lease forms.⁵⁷ Nor does added expense ensure success. Wisconsin has established the Real Estate Examining Board,⁵⁸ which has incidental regulatory authority over leases. Real estate brokers may use only board-approved lease forms.⁵⁹

⁵³ Landlords possess political power disproportionate to their number. See Bentley, *supra* note 9, at 880. Bentley cites the enactment of vacancy decontrol in New York (see 1971 N.Y. Laws ch. 371-372) as an example of legislative action that has favored landlords. Bentley, *supra* note 9, at 880 n.250. Vacancy decontrol terminated rent controls of apartments becoming vacant after the effective date of the decontrol legislation (see 1971 N.Y. Laws, ch. 371, § 6), and restricted New York City's authority to extend rent controls and to impose stricter controls on units already covered (see *id.*, ch. 372, § 1).

⁵⁴ Bentley, *supra* note 9, at 880.

⁵⁵ See Garrity, *supra* note 3, at 717; Mueller, *supra* note 15, at 277.

⁵⁶ Moran suggests that fines ranging from \$100 to \$500 would be adequate to enforce such a regulatory scheme. See Moran, *supra* note 25, at 770 n.58.

⁵⁷ A landlord who leases a wide variety of residential housing, e.g., houses, multi-unit dwellings, furnished and unfurnished apartments, will need a number of different lease forms. Furthermore, it is probable that landlords will employ counsel in order to receive agency approval of the most favorable leases possible.

⁵⁸ WIS. STAT. ANN. § 452.01-20 (West 1974 & Supp. 1978).

⁵⁹ WIS. AD. CODE § REB 7.01(2) (1972). Current regulations do not expressly extend to residential leases (see *id.* § REB 7.01(3)), but they permit review of forms approved under superseded regulations (see *id.*). Those regulations did extend to leases. See WIS. AD. CODE § REB 5.04 (1960) (repealed 1972). The Real Estate Examining Board has continued to regulate residential leases. Telephone conversation with Walter Eglsaer, Attorney, Wisconsin Real Estate Examining Board (Feb. 2, 1979).

Nevertheless, a study of six approved lease forms has revealed provisions that are invalid per se in Wisconsin.⁶⁰ And, as the commentator noted, board approval magnifies a landlord's bargaining power because he "can point out that the lease is an approved form, implying that it represents what the state has determined to be an equitable legal relationship."⁶¹

D. *The Uniform Residential Landlord and Tenant Act*

The Uniform Residential Landlord and Tenant Act (URLTA), currently in effect in thirteen states,⁶² prohibits the use in rental agreements of four types of lease provisions.⁶³ Knowing violations expose landlords to tenant suits for actual damages and penalties.⁶⁴ The URLTA further encourages tenants to act as "private attorneys-general"⁶⁵ by permitting recovery of reasonable attorney's fees.⁶⁶ An American Bar Association subcommittee has criticized the penalty provisions as unnecessary because an unenforceable lease provision theoretically cannot injure a ten-

⁶⁰ See Note, *Standard Form Leases in Wisconsin*, 1966 Wis. L. REV. 583, 592.

⁶¹ *Id.*

⁶² The URLTA is currently in force, often in modified form, in: Alaska, Arizona, Florida, Hawaii, Iowa, Kansas, Kentucky, Montana, Nebraska, New Mexico, Oregon, Tennessee, and Virginia. See 7A U.L.A. 17 (Supp. 1979).

⁶³ Section 1.403(a) states:

A rental agreement may not provide that the tenant:

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

⁶⁴ Section 1.403(b) states:

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

⁶⁵ Cf. MODEL CODE, *supra* note 21, at § 3-502 note (tenant to receive one-half of fine assessed against landlord in order to foster private attorneys general).

⁶⁶ See UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 1.403(b), *quoted in* note 64 *supra*.

ant.⁶⁷ The drafters, however, anticipated tenant reliance on invalid provisions,⁶⁸ and provided punitive damages to discourage their continued use.⁶⁹

Although the URLTA solution depends on tenant initiative, the drafters did not ensure tenant awareness of its provisions. Tenants are little more likely to know of the remedies supplied by the URLTA than they are of the invalidity of certain lease provisions.⁷⁰ As a result, the URLTA will not deter landlords from continuing to use such provisions.⁷¹ The small risk of liability for limited punitive damages and attorney's fees will probably not offset the benefits that are gained by the inclusion of invalid terms in leases.⁷²

III

A PROPOSED SOLUTION

More effective legislation is needed to combat the continued use of unenforceable lease provisions. The statute must be based on deterrence—it should impose criminal penalties and award judgments in excess of actual damages. At the same time, the statute should punish only deliberate violations of the law⁷³—the goal is to eradicate unenforceable lease clauses, not to enrich tenants at the expense of landlords. Further, the statute must allow

⁶⁷ See SUBCOMM. ON THE MODEL LANDLORD-TENANT ACT OF THE ABA COMM. ON LEASES, REPORT ON THE PROPOSED UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT (1973), reprinted in 8 REAL PROP., PROB. & TR. J. 104, 108 (1973).

⁶⁸ The comment to § 1.403 notes that "[s]uch provisions, even though unenforceable at law may nevertheless prejudice and injure the rights and interests of the uninformed tenant who may, for example, surrender or waive rights in settlement of an enforceable claim against the landlord for damages arising from the landlord's negligence." See *California Hearings*, *supra* note 11, at 9 (testimony of Julian Levi, Reporter/Draftsman, Uniform Residential Landlord and Tenant Act). For discussion of the effect of unenforceable provisions on tenants' rights, see notes 21-29 and accompanying text *supra*.

⁶⁹ See Note, *supra* note 19, at 96. Cf. MODEL CODE, *supra* note 21, at § 3-501 (criminal sanctions).

⁷⁰ See Berger, *supra* note 3, at 819.

⁷¹ The awarding of attorney's fees may encourage legal aid and consumer law clinics to search for illegal lease clauses. It is unlikely, however, that this will happen to any significant degree. Legal aid clinics generally do not have the manpower or resources to search for illegal clauses on a large scale. Furthermore, many areas are not served by such clinics. To the extent that clinic enforcement is effective, it will not be abrogated by the legislation proposed in this Note. The proposed legislation is set out at text accompanying notes 79-82 *infra*.

⁷² For discussion of the benefits that landlords gain by continuing to use unenforceable provisions, see notes 21-29 and accompanying text *supra*.

⁷³ Although the URLTA reaches only deliberate violations (see note 64 *supra*), some reform proposals have advocated the imposition of absolute liability. The Model Residential Landlord-Tenant Code, for example, makes any use of confession of judgment clauses

the parties to enter into a rental agreement suited to their particular needs⁷⁴—compliance should not be unduly restrictive or expensive.

The statute should rely on tenant initiative for its enforcement. Landlords have not voluntarily removed unenforceable lease provisions,⁷⁵ and state enforcement is generally ineffective.⁷⁶ As the drafters of the Model Residential Landlord-Tenant Code pointed out, "[t]he single party most interested in enforcing a landlord's social obligations is the tenant most directly affected."⁷⁷ Before tenants can take the initiative, however, they must have simple and effective notice of their statutory rights.⁷⁸

The following proposed legislation incorporates provisions of the URLTA, but could easily be modified for use in any state that has proscribed certain lease provisions.

PART I · REGULATION OF AGREEMENTS AND PRACTICES

Section 1.101 Prohibited Lease Provisions⁷⁹

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

- (1) agrees to waive or forego rights or remedies under the laws of this State;

in leases a misdemeanor punishable by a fine of up to \$200. See MODEL CODE, *supra* note 21, at §§ 3-404, 3-501. Similarly, Moran would penalize any landlord who includes a prohibited provision in a rental agreement. See Moran, *supra* note 25, at 770. A scienter requirement is important, however, to protect the "mom and pop" landlords, who are not likely to know about recent changes in the law. See note 13 *supra*.

⁷⁴ See notes 50-52 and accompanying text *supra*. As Mueller notes, a "conflict exists between the desire to have leases appropriate to individual situations and the desire to avoid emasculating ameliorative measures to the extent that the tenant's plight would be scarcely relieved." Mueller, *supra* note 15, at 277. A workable solution must address this problem.

⁷⁵ See notes 9-12 and accompanying text *supra*.

⁷⁶ See note 41 and accompanying text *supra*.

⁷⁷ MODEL CODE, *supra* note 21, at § 3-502 note.

⁷⁸ Groll maintains that one of the problems with reform legislation such as the Model Residential Landlord-Tenant Code is that it does not provide "the element of communication," *i.e.*, notice to tenants of their rights. See Groll, *supra* note 11, at 89 & n.26. The URLTA suffers from this defect as well. See notes 70-72 and accompanying text *supra*. See generally Berger, *supra* note 3, at 820-21. In addition, for such notice to be effective, it must be in language that the average tenant can understand. See generally N.Y. GEN. OBLIG. LAW § 5-701(b) (McKinney 1978) ("[E]very written agreement . . . for the lease of space to be occupied for residential purposes . . . must be: (1) Written in non-technical language and in a clear and coherent manner using words with common and every day meanings . . .")

⁷⁹ This section is substantially the same as § 1.403(a) of the URLTA. Section 1.403(a) is set out in note 63 *supra*.

- (2) authorizes any person to confess judgment on a claim arising out of the rental agreement;
- (3) agrees to pay the landlord's attorney's fees; or
- (4) agrees to the exculpation or limitation of any liability of the landlord arising under the laws of this State or to indemnify the landlord for that liability or the costs connected therewith.

(b) A provision prohibited by subsection (a) included in a residential rental agreement is unenforceable.

Section 1.102 Disclosure to the Tenant

(a) A residential rental agreement must contain the following notice to the tenant:

NOTICE TO TENANT

1. Your lease cannot require you to give up any rights that you have under the laws of this State.
2. Your lease cannot require you to plead guilty to a court action brought by your landlord. You have the right to be heard in any action brought against you.
3. Your lease cannot require you to pay your landlord's attorney's fees.
4. Your lease cannot forbid you to sue your landlord. Your lease cannot excuse your landlord from any liabilities arising under the laws of this State.

(b) The notice required by subsection (a):

- (1) must be conspicuously placed within the lease;
- (2) must be printed on a yellow background which contrasts with the color of the lease paper; and
- (3) must be printed in black letters which are not less than the equivalent of 10 point type or .075 inch computer type.⁸⁰

OFFICIAL COMMENT

Section 1.102 contemplates the use of a yellow sticker to inform the tenant, in nontechnical language, of lease provisions prohibited by law. Landlords could purchase these stickers at legal stationery stores and affix them to leases. As the law changes, the stickers can be updated accordingly.

⁸⁰ The type-size requirements are similar to those required under the regulations incident to the Truth in Lending Act, 15 U.S.C. §§ 1601-1667e (1976). See 12 C.F.R. § 226.6 (1978).

PART II REMEDIES AND PENALTIES

Section 2.101 Civil Liability

(a) Except as otherwise provided in this section, a landlord who uses a rental agreement containing prohibited provisions or who fails to comply with the disclosure requirements of section 1.102 is liable to the tenant in an amount equal to the sum of:

- (1) the tenant's actual damages;
- (2) three months' periodic rent; and
- (3) the tenant's reasonable attorney's fees.

(b) A landlord shall not be liable for a violation under this section if the landlord shows by a preponderance of the evidence that the violation was not intentional and resulted from bona fide error.⁸¹

Section 2.102 Criminal Liability⁸²

A landlord is guilty of a misdemeanor and upon conviction may be sentenced to pay a fine not exceeding \$500 if he wilfully and knowingly fails to comply with the disclosure requirements of section 1.102.

Ample precedent for this proposed statute comes from recent consumer credit legislation.⁸³ There is evidence that the disclosure requirements of such legislation have been effective in increasing consumer knowledge about the true cost of credit.⁸⁴

⁸¹ This sentence derives from the Truth in Lending Act, 15 U.S.C. § 1640(c) (1976) and Uniform Consumer Credit Code § 5.203(3).

⁸² This section derives from Uniform Consumer Credit Code § 5.302.

⁸³ Regulation Z incident to the Truth in Lending Act, 15 U.S.C. §§ 1601-1667e (1976), for example, requires that, whenever a transaction is rescindable, "the creditor shall give notice of that fact to the customer." 12 C.F.R. § 226.9(b) (1978). The creditor must furnish "two copies of the notice . . . one of which may be used by the consumer to cancel the transaction." *Id.* Similarly, regulations incident to the Fair Credit Billing Act, 15 U.S.C. §§ 1666-1666j (1976), require creditors to make a semiannual disclosure of creditor responsibilities and customer rights to each account with an outstanding balance or with a financial charge imposed. *See* 12 C.F.R. § 226.7(d) (1978).

⁸⁴ *See* Garwood, *A Look at Truth in Lending—Five Years After*, 14 SANTA CLARA LAW. 491 (1974). Garwood cites as evidence of the effectiveness of the Truth-in-Lending-Act disclosure requirements: (1) the "increase in competitive 'annual percentage rate' advertising among banks" (*id.* at 501-02), (2) the fact that the standard 18% charge for revolving credit accounts "now seems to be a well known middle-class household fact" (*id.* at 502), and (3) a survey by the Federal Reserve Board indicating an increase in consumer awareness of the cost of credit (*id.* at 501). Garwood also maintains that increased "challenge[s] to the validity of confession of judgment clauses" have probably been a side effect of Truth-in-Lending's disclosure and rescission provisions. *Id.* at 503. *See generally* Garwood, *Truth-in-Lending After Two Years*, 89 BANKING L.J. 3 (1972). *But see* Note, *The Impact of Truth in Lending on Automobile Financing—An Empirical Study*, 4 U. CAL. D. L. REV. 179, 204 (1971)

Disclosure legislation in landlord-tenant law should be equally effective in increasing the parties' awareness of their statutory rights in a lease transaction.⁸⁵ Unlike consumer credit legislation, however, the proposed statute is neither complex nor difficult to comply with.

CONCLUSION

The acute imbalance of power in landlord-tenant relations has spurred courts and legislatures to invalidate certain residential lease provisions. Landlords have undercut these efforts by continuing to include unenforceable clauses in leases. Attempts to solve this problem have been wide of the mark. Statutory form leases go too far—they confine the parties within too restrictive a framework. Statutory provisions that permit tenants to recover punitive damages do not go far enough—they fail to alert tenants to their rights. A workable solution must combine notice with deterrence. The statute proposed in this Note ensures that tenants will be aware of unenforceable lease provisions and penalizes the deliberate use of such provisions. At the same time, it preserves the parties' flexibility to tailor a rental agreement to their objectives and the nature of the premises. In addition, compliance with the statute will be easy and inexpensive. The proposed enactment shares the objectives of consumer credit legislation, and the consumer of credit is no more in need of such protection than is the consumer of rental housing.

Kurt E. Olafsen

(although "beneficial to many, [Truth in Lending] has not yet reached the vast majority of the credit using public").

⁸⁵ Landlords as well as tenants may be ignorant of recent changes in landlord-tenant law. See note 13 *supra*. Many landlords might remove unenforceable provisions from leases if made aware of their invalidity.

One state has passed legislation establishing disclosure requirements in the landlord-tenant context. The New Jersey Truth-in-Renting Act, N.J. STAT. ANN. §§ 46:8-43 to -49 (West Supp. 1978) requires the Department of Community Affairs to prepare a statement of the rights and obligations of landlords and tenants. *Id.* § 46:8-45. Landlords must distribute this statement to their tenants as well as post copies in a location "prominent and accessible" to the tenants. *Id.* § 46:8-46. This legislation does not deal directly with the problem discussed in this Note, and it leaves wide discretion to an administrative agency as to the coverage of the statement. Nevertheless, it does provide precedent for the imposition of disclosure requirements in landlord-tenant relations.