Mercer Law Review

Volume 28
Number 1 *Annual Survey of Georgia Law*

Article 22

12-1976

New Act Is a Step Toward Landlord-Tenant Equality in Georgia

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New Act Is a Step Toward Landlord-Tenant Equality in Georgia

Beginning in the fall of 1975, members of the 1976 session of the General Assembly spent many hours negotiating and finally passing what appears to be a landmark law for Georgia tenants. Although there is no comparison to the extensive changes proposed by the Uniform Residential Landlord Tenant Act,[1] Senate Bill 472 as it passed in 1976 does mark a new beginning toward equalizing the landlord-tenant relationship and eliminates at least some of the obstacles encountered by tenants seeking remedies for substandard housing conditions.

This article first will outline the more significant aspects of landlord-tenant law as it has existed before 1976 and second will explain the provisions of the new act and its potential impact on tenants' rights and remedies in Georgia.

I. Historical Background

Historically, tenants have been a particularly disadvantaged segment of the population. The rigors of the common law and, more recently, housing shortages, inadequately enforced housing codes, and case law weighted heavily in favor of the landlord have put tenants—especially uneducated and low-income tenants—in a weak position from which to assert their right to safe, decent, sanitary housing.

Under the common law, a tenancy for less than five years was considered personal property and therefore was subject to the doctrine of caveat emptor[2]—or more logically, caveat lessee.[3] According to this theory, a tenant

1. The Uniform Residential Landlord and Tenant Act (hereinafter referred to as URLTA) is a model statute drafted in 1972 by the National Conference of Commissioners on Uniform State Laws. For an excellent discussion of the Act, see Blumberg and Robbins, *Beyond URLTA: A Program for Achieving Real Tenant Goals*, 11 Harv. Civil Rights - Civil Liberties L. Rev. 1 (Winter, 1976). The authors cite the following states as having enacted URLTA in some form: Alaska— Alaska Stat. §§34.03.010 through 34.03.080 (1974); Arizona— Ariz. Rev. Stat. Ann. §§33-1301 to 33-1381 (1974); Delaware— Del. Code Ann. tit. 25, §5100 *et seq.* (1974); Florida— Fla. Stat. Ann. §§83.40 through 83.73 (Supp.1975-76); Hawaii— Hawaii Rev. Stat. §§521-1 to 521-76 (Supp. 1974); Kentucky— Ky. Rev. Stat. Ann. §§383-505 to 383-715 (Supp. 1974); Nebraska— Neb. Rev. Stat. §§76-1401 to 76-1449 (Supp. 1974); Ohio— Ohio Rev. Code Ann. §§5321.01 to 5321.19 (Page 1974); Oregon— Ore. Rev. Stat. §§91.700 to 91.865 (1974); Virginia—Va. Code Ann. §§55-248.2 to 248.40 (Supp. 1975); Washington—Wash. Rev. Code Ann. §§59.18.010 to 59.18.900 (Supp. 1974). Blumberg and Robbins at 3-4. For a discussion of the Florida version, see Williams and Phillips, *Florida Residential Landlord and Tenant Act*, 1 Fla. St. U. L. Rev. 555 (1973).

2. Caveat emptor, or "buyer beware," is actually more applicable to the sale of realty. *See* Bearman, *Caveat Emptor in Sale of Realty—Recent Assaults Upon the Rule*, 14 Vand. L. Rev. 541 (1961). However, the doctrine has also been used since the early days of common law in the area of landlord-tenant law. 1 American Law of Property, §3.45 (1952).

was forced to take the leased premises "as is." A landlord was under no obligation to lease the premises in a livable condition, since there has been no legally recognized implied warranty of habitability since the 12th Century.[4] A lease was considered to be a conveyance of an interest in land rather than a contract; therefore, once the landlord had conveyed the premises, his obligations were performed.[5] Even if a landlord expressly agreed to assume the duty of repair, a tenant had only the remedy of suing for damages in an action for breach of contract, because the landlord's covenant to repair was independent of the tenant's covenant to pay rent. The common law never recognized the respective duties as being mutually dependent, as they would have been under a contract theory, so a tenant was never in a position to force a landlord to specifically perform his promise to repair.[6]

In 1863, the Georgia legislature began to move away from the common law when it shifted the duty to repair to the landlord.[7] In this transfer of obligations the legislature implicitly rejuvenated the doctrine of implied warranty of habitability, as the Georgia Supreme Court observed in 1900: "Under the law of this State, it is presumed that the premises leased are in a condition suitable for the purposes for which they were rented."[8] Neither the case itself nor the doctrine it articulated have been expressly overruled. Indeed, the court of appeals reaffirmed the existence of the implied warranty in 1965.[9] However, there is a separate line of cases that also emanates from the supreme court and holds that there is no absolute duty on a landlord to rent a dwelling free from latent defects.[10]

The confusion—indeed, direct conflict—in the law is indicative of landlord-tenant law generally in Georgia. What the legislature hath given, the judiciary hath taken away. A glaring example stems from the statutory duty to repair. In 1912, the court of appeals authorized lease agreements that waived the obligation to repair,[11] so where written leases were used, exculpatory clauses flourished.[12] The waiver provisions not only have un-

3. *See, e.g.*, Love, *Landlord's Liability for Defective Premises: Caveat Lessee, Negligence, or Strict Liability*, 1975 WIS. L. REV. 19.

4. 2 F. POLLOCK & F. MAITLAND, HISTORY OF ENGLISH LAW 106 (1952).

5. *Id.*

6. *Id.*

7. CIVIL CODE §2266 (1863), now codified as GA. CODE ANN. §61-111 (1966), provides: "The Landlord must keep the premises in repair, and shall be liable for all substantial improvements placed upon them by consent."

8. Stack v. Harris, 111 Ga. 149, 150, 36 S.E. 615, 616 (1900).

9. Grimes v. Gano, 111 Ga. App. 543, 142 S.E.2d 413 (1965).

10. Elijah A. Brown Co. v. Wilson, 191 Ga. 750, 13 S.E.2d 779 (1941); Bazemore v. Burnet, 117 Ga. App. 849, 161 S.E.2d 924 (1968); Jordan v. Lieberson, 71 Ga. App. 83, 30 S.E.2d 117 (1944).

11. Heriot v. Conerat, 12 Ga. App. 203, 76 S.E. 1066 (1912). For an interesting discussion of the history and evolution of exculpatory clauses, see Rehberg, *Exculpatory Clauses in Leases*, 15 GA. B. J. 389 (No. 4, May, 1953).

12. One such clause provides: "Landlord shall not be required to make repairs to the said

dermined the clear legislative intent behind Georgia Code §61-111, but they also have been the death-knell to tenants in both affirmative and defensive cases.[13] The same problem has existed with regard to a landlord's liability for damages sustained by a tenant because of the landlord's failure to repair.[14] Most standard-form dwelling leases contained an "assumption of risk" clause holding the landlord harmless for any damages to person or property.[15] As recently as 1975, the court of appeals held that a lease provison waiving a landlord's liability for his own negligence was not in violation of any public policy.[16]

Other judicially sanctioned exceptions to the landlord's duty to repair were the patent-defect[17] or "implied waiver"[18] doctrine and the latent-defect[19] doctrine. Under the patent-defect doctrine, a tenant waived his right to have repaired any patent defects existing at the inception of the lease, unless the landlord had expressly agreed to have them repaired.[20]

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premises during the term of this agreement and Tenant agrees that as the Landlord has entirely parted with possession of the premises Landlord shall not be in any way responsible for any defective or dangerous condition of the premises unless the Tenant shall give to the Landlord at least ten days notice in writing of such defective or dangerous condition of or on the premises and such writing shall contain in detail the repairs necessary to remedy said defective or dangerous condition. It is understood and agreed that the Landlord or Landlord's agent in their discretion may make repairs to said premises and such repairs by Landlord or Landlord's agent shall not be held to be a waiver of this clause in the contract or to impose any legal duty on the Landlord to make same."

13. Kersh v. Manis Wholesale Co., 135 Ga. App. 943, 219 S.E.2d 604 (1975); Carter v. Noe, 118 Ga. App. 298, 163 S.E.2d 348 (1968); Plaza Hotel Co. v. Fine Products Corp., 87 Ga. App. 460, 74 S.E.2d 372 (1953).

14. GA. CODE ANN. §61-112 (1966) provides: "The landlord, having fully parted with possession and right of possession, is not responsible to third persons for damages resulting from the negligence or illegal use of the premises by the tenant; but he is responsible to others for damages arising from defective construction or for damages from failure to keep the premises in repair."

15. One such clause provides: "The Tenant covenants that he has examined the rental premises at the time of the delivery of possession hereunder and that the same are in good repair and tenantable condition, with no defects, structural or otherwise therein. Tenant expressly relieves the Landlord from and assumes all risk of liability for damage or injury of any kind whatsoever to person or property sustained by the Tenant, his family, or any occupant of said rented premises. The Tenant further indemnifies the Landlord against loss or damage as the result of any injury to any invitee, occupant of licensee due to any cause whatsoever during this tenancy."

16. Carlton v. Hoskins, 134 Ga. App. 558, 215 S.E.2d 321 (1975).

17. "A patent defect is a defect which could be discovered by inspection." Washburn Storage Co. v. General Motors Corp., 90 Ga. App. 380, 384, 83 S.E.2d 26, 29 (1954). It is a defect "which is plainly visible or which can be discovered by such an inspection as would be made in the exercise of ordinary care and prudence." BLACK'S LAW DICTIONARY (Rev. 4th. ed. 1968).

18. Williams v. Jones, 26 Ga. App. 558, 106 S.E. 616 (1921).

19. "A latent defect is one which could not have been discovered by inspection." Washburn Storage Co. v. General Motors Corp., 90 Ga. App. 380, 384, 83 S.E.2d 26, 29 (1954).

20. Desverges v. Marchant, 18 Ga. App. 248, 89 S.E. 221 (1916); Waddell v. Wofford Oil

The rationale behind the doctrine was that the defects were obvious to the tenant when he moved in, so, unless he objected, he was deemed to have taken the premises "as is"[21]—a not-so-subtle return to the common-law doctrine of caveat emptor. Similarly, a landlord had no duty to repair a latent defect unless he had actual or constructive notice that the defect existed.[22] Only if the landlord failed to repair within a reasonable time after notice was given would he incur any liability for damages due to his negligence.[23] A landlord who had parted with all possession, including the right to re-enter and inspect, had no obligation whatsoever to repair.[24]

These rules may seem reasonable enough. But when coupled with exculpatory clauses, they allowed landlords to avoid their obligations and subsequent liabilities expressly mandated in the Code. This is not to say that most landlords or real estate agents actually took advantage of these legal loopholes; but the opportunity has existed and has been used. Landlord-tenant law in Georgia, at least prior to 1976, has presumed that tenants have an equal bargaining position with landlords. However, even literate middle-income tenants are at a disadvantage when they are confronted with standard-form contracts,[25] ignorance of legal procedures and remedies, housing shortages,[26] and economic limitations. The impact of these elements is devastating to the poor and the uneducated, a substantial portion of Georgia's population.[27] Thus, even if a tenant hasn't already signed away his rights in the lease, he is ill-equipped to demand them from his landlord.

There are certain remedies that tenants traditionally have had. One was to repair the defect and deduct the cost from the rent owed.[28] However, the tenant must have notified the landlord of his intention to do the work so that the landlord has a chance to do the repairs himself. The tenant also must not have been the cause of the disrepair.[29] There were practical problems with the self-help remedy, however: (1) a tenant has had to have

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Co., 84 Ga. App. 617, 66 S.E.2d 806 (1951); Maxwell Bros. of Athens, Inc. v. Deupree Co., 129 Ga. App. 254, 199 S.E.2d 403 (1973).

21. McGee v. Hardacre, 27 Ga. App. 106, 107 S.E. 563 (1921).

22. Godard v. Peavy, 32 Ga. App. 121, 122 S.E. 634 (1924); Turner v. Dempsey, 36 Ga. App. 44, 135 S.E. 220 (1926); Bazemore v. Burnet, 117 Ga. App. 849, 161 S.E.2d 924 (1968).

23. Stack v. Harris, 111 Ga. 149, 36 S.E. 615 (1900); Duncan v. Platshek, 36 Ga. App. 100, 135 S.E. 508 (1926); Cormack v. Oglethorpe Co., 114 Ga. App. 512, 151 S.E.2d 799 (1966).

24. GA. CODE ANN. §61-112 (1966). City of Dalton v. Anderson, 72 Ga. App. 109, 33 S.E.2d 118 (1945).

25. *See, e.g.*, Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529 (Jan. 1971); Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943).

26. *See, e.g.*, PRESIDENT'S COMMITTEE ON URBAN HOUSING, A DECENT HOME 96 (1968); GEORGIA DEP'T OF HUMAN RESOURCES, 1972 HOUSING GOAL REPORT FOR GEORGIA (Jan. 1973).

27. Lewis & Co. v. Chisholm, 68 Ga. 40 (1881); Dougherty v. Taylor & Norton Co., 5 Ga. App. 773, 63 S.E. 928 (1909).

28. John v. Gibson, 60 Ga. App. 585, 4 S.E.2d 480 (1939).

29. White v. Montgomery, 58 Ga. 204 (1877).

either a large enough income to absorb the initial cost of the repairs or a large enough rental payment from which to deduct the expense; (2) the tenant has run the risk of being dispossessed for non-payment if the landlord refused to accept the reduced amount; (3) if a court were unwilling to accept the tenant's defense, the tenant has been subject to double liability for the rent and the cost of repair.

A second alternative has been to file an action for constructive eviction.[30] The tenant has had to show forced abandonment from all or part of the premises due to the landlord's failure to repair.[31] A tenant could not claim that the premises were uninhabitable and yet continue to live there.[32] So a tenant has had to vacate, find another place to live, and then file affirmatively to recover damages. For a tenant desiring a suitable place to live, an action based on a constructive-eviction theory provides little solace.

A third option has been to file an affirmative action in tort for damages. The court of appeals recently held that a tenant could recover punitive damages if he was able to prove that a landlord acted in wilful and wanton disregard of his obligation to repair, "in violation of laws and ordinances which amount to breach of [a] duty imposed by law independent of the landlord-tenant relationship."[33] This at least gets the tenant to the jury and away from the traditional bar of summary judgment.[34] However, the gross-negligence strategy itself has been employed to circumvent the barriers to tenant relief. Proving that a landlord has been malicious seems an unfair burden to place on a tenant trying to obtain a decent place to live. Yet this has been necessary because of judicial decisions handed down over the last one hundred years.

II. The New Act: Farewell to the Common Law

In an effort to rectify the unequal positions of landlords and tenants, the 1976 legislature passed Senate Bill 472, amending title 61 of the Georgia Code. The act was the result of a series of negotiations and compromises between the Apartment Owners and Managers Association, the Home-

30. Clark v. Sapp, 47 Ga. App. 91, 169 S.E. 692 (1933).

31. Magnolia Whse. v. Morton Realty, 102 Ga. App. 697, 117 S.E.2d 552 (1961).

32. Morris v. Jones, 128 Ga. App. 847, 19 S.E.2d 326 (1973).

33. Kaplan v. Sanders, 136 Ga. App. 902, 903, 222 S.E.2d 630, 632 (1975). The supreme court, affirming in part and reversing in part, disapproved the implication, made by the court of appeals, that a tenant could receive punitive damages solely because the landlord failed to perform his duty to make repairs. To collect punitive damages requires evidence of "wilful misconduct, malice, fraud, wantonness, or oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences." Violation of §61-111 or a local housing code will not "per se authorize the imposition of punitive damages." Rather, violation of the duties imposed by these codes will, upon proof of damages and causality, authorize the imposition of ordinary damages. Kaplan v. Sanders, Civil Action No. 30851, Supreme Court of Georgia, June 23, 1976.

34. *See, e.g.*, Kaplan v. Sanders, 136 Ga. App. 902, 903, 222 S.E.2d 630 (1975).

builders Association, the Georgia Public Interest Research Group (GPIRG), tenant representatives, and members of the House Land Use Subcommittee.[35] After several revisions, the act finally emerged in its present form[36] under the co-sponsorship of Senators Reynolds, Riley, Broun and Langford.[37]

The only provisions of title 61 left untouched by the 1976 amendments are chapter 61-1 except §61-102, chapter 61-2 relating to landlord's liens, and chapter 61-5 relating to croppers. All other code sections are either directly or indirectly affected.

The code section most affected by the act is §61-102. In its original form, the statute provided: "Contracts creating the relation of landlord and tenant for any time not exceeding one year may be by parol, and if made for a greater time shall have the effect of a tenancy at will."[38] While the purpose of §61-102 was to comply with the Statute of Frauds[39] and at the same time save lease agreements void under the Statute of Frauds, the section conflicted with Code §61-104. That section codifies the common-law definition of a tenancy at will as a tenancy with no fixed termination date.[40] By deleting the last clause of §61-102,[41] the 1976 act leaves a tenancy at will to the requirements of §§61-104 and 61-105. The change is significant only in that §61-105 is the sole provision in title 61 imposing specific notice requirements on termination of a tenancy.[42] All other tenancies are governed by the contractual agreements entered into by the landlord and the tenant. By clarifying what tenancies are created by the various types of lease agreements, the revision should facilitate analysis of the rights and obligations incurred by a specific contract.

The most significant change in landlord-tenant law brought about by the new act is the prohibition against certain exculpatory clauses. Under

35. Information supplied by Georgia Public Interest Research Group, Atlanta, Georgia.

36. Ga. Laws, 1976, p. 1372.

37. Senator Steve Reynolds of the 48th Senatorial District; Senator John R. Riley of the 1st District; Senator Paul C. Broun of the 46th District, and Senator J. Beverly Langford of the 51st District.

38. GA. CODE ANN. §61-102 (1966).

39. GA. CODE ANN. §20-401 (1965) provides:

> To make the following obligations binding on the promisor, the promise must be in writing, signed by the party to be charged therewith, or some person by him lawfully authorized, viz:
>
> . . . .
>
> 4. Any contract for sale of lands or any interest in, or concerning them.
>
> 5. Any agreement . . . that is not to be performed within one year from the making thereof.

40. GA. CODE ANN. §61-104 (1966): "Where no time is specified for the termination of the tenancy, the law construes it to be a tenancy at will."

41. GA. CODE ANN. §61-102(a) (Supp. 1976) now reads: "Contracts creating the relation of landlord and tenant for any time not exceeding one year may be by parol."

42. GA. CODE ANN. §61-105 (1966) provides: "Sixty days' notice is necessary from the landlord to terminate a tenancy at will. Thirty days' notice is necessary from the tenant."

Code §61-102(b),[43] neither the landlord nor the tenant may waive, assign or avoid the rights, responsibilities or remedies contained in any of the following provisions:

1. Code §§61-111 and 61-112;
2. Ordinances adopted pursuant to §18 of the Urban Redevelopment Act (*i.e.*, certain local housing codes);
3. Chapters 61-3 and 61-4, relating to eviction and distress warrant proceedings;
4. Chapter 61-6, relating to the new security deposit requirements;
5. Provisions of the Civil Practice Act not specifically superseded by Senate Bill 472.

An analysis of each of these provisions follows.

A. Waiver of Duty to Repair Prohibited

The most frequently abused provisions of title 61 have been Code §§61-111[44] and 61-112.[45] By using exculpatory clauses, a landlord has been able to avoid his duty to repair and to shift to the tenant liability for damages. By making a waiver of these obligations a violation of public policy and therefore null and void, Code §§61-102(b)(1) and (2) remove many of the legal obstacles previously encountered by tenants.

First of all, the patent-defect doctrine[46] should no longer be viable, because of the absolute duty to repair now imposed on the landlord. Precluding the tenant from waiving any remedies under the two Code sections should mean that any "implied waiver" of the right to have the landlord repair patent defects existing at the time of the lease would no longer be judicially recognized. This view would be in accord with the requirement

43. GA. CODE ANN. §61-102(b) (Supp. 1976) provides:

A landlord or tenant may not waive, assign, transfer, or otherwise avoid in any contract, lease, license agreement, or similar agreement, oral or written, for the use or rental of real property as a dwelling-place any of the rights, duties, or remedies contained in the following provisions of law, as now or hereafter amended:

(1) Section 61-111, relating to duties of a landlord as to repairs and improvements.

(2) Section 61-112, relating to the liability of a landlord for failure to repair.

(3) Ordinances adopted pursuant to section 69-1118 of the Urban Redevelopment Law [Ga. Laws, 1955, p. 354].

(4) Chapter 61-3, relating to proceedings against tenants holding over.

(5) Chapter 61-4, relating to distress warrants.

(6) Chapter 61-6, relating to security deposits.

(7) Any applicable provision of the Georgia Civil Practice Act (Title 81A) not superseded by this Title.

44. See text accompanying notes 11-24, *supra*.

45. See note 14, *supra*.

46. See text accompanying notes 15-19, *supra*.

that a landlord have actual or constructive notice of existing defects to become liable for repairs. If a defect is obvious to a tenant, it should be obvious to the owner or his agent, who has the responsibility to see that the premises are in a suitable condition.[47] The act does not appear to have affected the latent-defect doctrine[48] except to make it obligatory upon the landlord to inspect and repair any defects of which he has notice, both before and during the tenancy. Such duties may no longer be avoided by using an exculpatory clause.

In addition to removing some of the barriers of the patent- and latent-defect doctrines, the act makes feasible certain affirmative actions. First, since the provisions of Code §§61-111 and 61-112 may not be waived, it could be argued that they would be implied in any future landlord-tenant contracts;[49] if a landlord failed to repair, a tenant could maintain an action for breach of an implied contract. Second, if a tenant sustained any damages as a consequence of the landlord's failure to repair, an action in tort could be filed[50] for breach of a statutory duty imposed independently of the landlord-tenant relationship.[51] The legislature has established, as the public policy of Georgia, that a landlord must keep his premises in good repair; a violation of this would be negligence per se. Since the simple negligence of the landlord can no longer be waived,[52] it no longer seems necessary to force a tenant to prove gross negligence. In any event, the affirmative

47. Grimes v. Gano, 111 Ga. App. 543, 142 S.E.2d 413 (1965).

48. See text accompanying notes 19-24, *supra*.

49. The general rule under Georgia law is that "laws which exist at the time and place of the making of a contract enter into and form part of it." Dorsey v. Clements, 202 Ga. 820, 824, 44 S.E.2d 783, 787 (1947), *quoted in* McKie v. McKie, 213 Ga. 582, 583, 100 S.E.2d 580, 583 (1957).

50. *See* GA. CODE ANN. §105-101 (1968).

51. Such an action could be maintained under either GA. CODE ANN. §105-103 or §105-104 (1968). Section 105-103 provides: "When the law requires one to do an act for the benefit of another, or to forbear the doing of that which may injure another, though no action be given in express terms, upon the accrual of damage the injured party may recover." Section 105-104 provides: "Private duties may arise from statute or flow from relations created by contract, express or implied. The violation of any such specific duty, accompanied with damage, shall give a right of action." See Altz v. Lieberson, 233 N.Y. 16, 134 N.E. 703 (1922), where Judge Cardozo, writing for the court, held that a right of action vested in a tenant injured by the landlord's breach of duty to repair as required by the local housing code. The opinion stated: "We may be sure that the framers of this statute, when regulating tenement life, had uppermost in thought the care of those who are unable to care for themselves. The Legislature must have known that unless repairs in the rooms of the poor were made by the landlord, they would not be made by any one. The duty imposed became commensurate with the need. The right to seek redress is not limited to the city or its officers. The right extends to all whom there was a purpose to protect." 233 N.Y. at ___, 134 N.E. at 704. *Accord*: Whetzel v. Jess Fisher Management Co., 282 F.2d 943 (D.C. Cir. 1960); Kanelos v. Kettler, 406 F.2d 951 (D.C. Cir. 1968); *see also* Kaplan v. Sanders, 136 Ga. App. 902, 222 S.E.2d 630 (1975), discussed *supra*, notes 33-34 and accompanying text.

52. The act therefore replaces that part of Carlton v. Hoskins, 134 Ga. App. 558, 215 S.E.2d 321 (1975), affirming the right of a landlord to waive liability for his negligent acts.

obligation of the landlord to keep his rental properties in repair may no longer be abrogated.

B. *Waiver of Local Housing Codes Prohibited*

In 1955, the legislature gave municipalities the authority to enact ordinances requiring "the repair, closing or demolition of dwellings or other structures intended for human habitation which are, as defined in such ordinance, unfit for human habitation or which may imperil the health, safety or morals of the occupants thereof or of surrounding areas."[53] The purpose of the act was to enable local governments to enact housing codes so they could qualify for urban-renewal funds from the federal government.[54] Code §61-102(b)(3) now prohibits the waiver of any provisions of a local housing code "adopted pursuant to . . . the Urban Redevelopment Law." Although 141 cities in Georgia had adopted a housing code by February 1976,[55] it is unknown how many were adopted "pursuant to" the Redevelopment Law. Since the amendment to §61-102 is specifically limited to those housing codes, tenants living in areas not covered by such a code would be precluded from the benefits of §61-102.[56] At least for tenants covered by the new Code section, there are enforceable remedies. Since provisions of the housing code are non-waivable, they too would be implied into every lease agreement entered into after July 1, 1976. So a landlord seems to have an obligation to rent dwellings free from any violations of the local code; violation would subject him to penalties.[57] A tenant has always had the remedy of reporting code violations to local housing inspectiors, but raising the obligations to a statutory duty gives tenants judicial remedies that have previously been denied.

Certainly one of the most important remedies is based on the implied warranty of habitability. Support for the doctrine can be found not only in Georgia case law[58] but also in the legislative and judicial enactments of at least 29 other states and the District of Columbia.[59] The doctrine was first stated by the Wisconsin Supreme Court in 1961:

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53. GA. CODE ANN. §69-1118 (1967) (§18 of the Urban Redevelopment Law, Ga. Laws, 1955, p. 354).

54. Housing Act of 1954, §303, 68 Stat. 623, as amended, 42 U.S.C.A. §1451(c) (Supp. 1976).

55. GEORGIA MUNICIPAL ASSOCIATION YEARBOOK Questionnaire (February, 1976).

56. *See* URLTA §2.104; FLA. STAT. ANN. §83.51 (Supp. 1975-76).

57. The Macon Housing Code, for example, provides for a $300 fine for each day a house remains in violation.

58. See notes 8-9, *supra*, and accompanying text.

59. Alaska—ALASKA STAT. §§34.03.100, 34.03.160, 34.03.180 (1974); Arizona— ARIZ. REV. STAT. ANN. §§33-1324 and 33-1361 (1974); California— CAL. CIV. CODE §§1941, 1942 (WEST, 1974); Green v. Superior Court, 10 Cal.3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974); CONNECTICUT— CONN. GEN. STAT. ANN. §§47-24 *et seq.* (1960); Delaware— DEL. CODE ANN. tit. 25, §5303 (1974); District of Columbia— Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); Florida—FLA. STAT. ANN. §§83.51, 83.56 (1973);

> The legislature had made a policy judgment—that it is socially (and politically) desirable to impose these duties on a property owner—which has rendered the old common law obsolete. To follow the old rule of no implied warranty of habitability in leases would, in our opinion, be inconsistent with the current legislative policy concerning housing standards.[60]

Other courts have borrowed from contract and products liability theories to find support for the implied warranty. The most notable case was *Javins v. First National Realty Corp.*,[61] where the court stated:

> In a lease contract, a tenant seeks to purchase from his landlord shelter for a specified period of time. The landlord sells housing as a commercial businessman and has much greater opportunity, incentive and capacity to inspect and maintain the condition of his building. Moreover, the tenant must rely upon the skill and bona fides of his landlord at least as much as a car buyer must rely upon the car manufacturer. In dealing with major problems, such as heating, plumbing, electrical or structural defects, the tenant's position corresponds precisely with the ordinary consumer "who cannot be expected to have the knowledge or capacity or even the opportunity to make adequate inspection of mechanical instrumentalities, like automobiles, and to decide for himself whether they are reasonably fit for the designed purpose." . . . Since a lease contract specifies a particular period of time during which the tenant has a right to use his apartment for shelter, he may legitimately expect that the apartment will be fit for habitation for the time period for which it is rented.[62]

The value of finding an implied warranty of habitability in the provisions of §61-102(b) is two-fold. First, contract principles would make such a covenant mutually dependent on the tenant's obligation to pay rent; there-

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Hawaii— HAWAII REV. STAT. §521-42 (Supp. 1974); Illinois— Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972); Iowa—Mease v. Fox, 200 N.W. 2d 791 (Iowa 1972); Kansas— Steele v. Latimer, 214 Kan. 329, 521 P.2d 304 (1974); Kentucky— KY. REV. STAT. ANN. §§383.595, 383.625 (Supp. 1974); Louisiana— Wilson v. Hearn, 150 S.2d 911 (La. 1963); Maine— ME. REV. STAT. ANN. tit. 14 §6021 (Supp. 1974); Maryland— MD. REAL PROP. CODE ANN. §8-211 (Cum. Supp. 1975); Massachusetts— MASS. GEN. LAWS ANN. ch. 239, §8A (Supp. 1974); Boston Housing Authority v. Hemingway, 293 N.E.2d 831 (Mass. 1973); Michigan— MICH. COMP. LAWS ANN. §554.139 (Supp. 1974); Minnesota— MINN. STAT. §504.18 (1974); Missouri—King v. Moorehead, 495 S.W.2d 65 (Mo. 1973); Nebraska— NEB. REV. STAT. §§71-1419, 76-1425 *et seq.* (Cum. Supp. 1974); New Hampshire — Kline v. Burns, 111 N.H. 87, 276 A.2d 248 (1971); New Jersey — Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970); New York — N.Y. REAL PROP. LAW §235-b (1975); Ohio— OHIO REV. CODE ANN. §§5321.04, 5321.07 (Page Supp. 1974); Oregon— ORE. REV. STAT. §§91.770, 91.800-815 (1974); Pennsylvania— Commonwealth v. Monumental Properties, Inc., 329 A.2d 812 (Pa. 1974); Virginia — VA. CODE ANN. §§55-248.13, 55-248.25 (Cum. Supp. 1975); Washington— WASH. REV. CODE ANN. §59.18.060 (Supp. 1974); Wisconsin — Pines v. Perssion, 14 Wis. 2d 590, 111 N.W. 2d 409 (1961). (Statutes cited in Blumberg and Robbins, *Beyond URLTA: A Program for Achieving Real Tenant Goals*, 11 HARV. CIVIL RIGHTS-CIVIL LIBERTIES LAW REV. 12-13 (Winter, 1976).

60. Pines v. Perssion, 14 Wis.2d 590, 596, 111 N.W.2d 409, 412 (1961).

61. 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

62. *Id.* at 1079.

fore, a tenant either would have an affirmative right to sue for damages for breach or could use the breach as a basis for withholding rent. Recognition of this theory would also provide a defense to an eviction proceeding for nonpayment.[63] Second, a tenant would have a right to specifically enforce the implied warranty,[64] thus giving the one remedy heretofore absent in Georgia law: a judicial decree ordering that repairs be done.[65]

If a house in a substandard condition is rented, the non-waivability of housing-code provisions would make available to the tenant the defense of illegal contract. This remedy was first introduced in the landmark case of *Brown v. Southall Realty*,[66] which held a rental agreement void as an illegal contract. It appeared that

> the violations known by appellee to be existing on the leasehold at the time of the signing of the lease agreement were of a nature to make the "habitation" unsafe and unsanitary. Neither had the premises been maintained or repaired to the degree contemplated by the regulations, i.e. "designed to make a premises . . . healthy and safe." The lease contract was, therefore, entered into a violation of the Housing Regulations requiring that they be safe and sanitary and that they be properly maintained.[67]

Under Georgia Code §20-504, "A contract which is against the public policy of the law cannot be enforced." Section 61-102(b)(1) establishes the public policy that a landlord must maintain his rental dwellings and in some cases meet the standards of the local housing code; so a rental agreement for housing in violation of the local ordinance should be illegal. Where the housing code specifically provides that "a landlord may not lease nor a tenant occupy" a substandard dwelling unit, the landlord could maintain that both parties were in pari delicto and that the tenant therefore could not raise the ordinance as a defense to eviction proceedings.[68] However, the courts deciding this issue have held that the parties would be placed in status quo: no rent would be awarded the landlord, and no damages would be awarded the tenant.[69] An illegal-contract defense alleges the unenforceability of the entire contract, and the implied-warranty-of-habitability defense alleges enforceability; because they contradict each

63. *Id.* at 1082.

64. *Id.*, n. 61.

65. *See* Borochoff Properties, Inc. v. Creative Printing Enterprises, Inc., 233 Ga. 279, 210 S.E.2d 809 (1974), holding that a tenant may not be granted specific performance of a lease agreement provision requiring that the landlord keep the roof in good repair, as he had an adequate remedy at law.

66. 237 A.2d 834 (D.C.App. 1968). *See also* Hinson v. Delis, 102 Cal. Rptr. 661, 26 Cal. App.3d 62 (1972); Glyco v. Schultz, 289 N.E.2d 919 (Mun. Ct. Sylvania Co., Ohio 1972); King v. Moorehead, 495 S.W.2d 65 (Mo. 1973); Mease v. Fox, 200 N.W. 2d 791 (Iowa, 1972).

67. 237 A.2d at 836 (D.C.App. 1968).

68. Shephard v. Lerner, 182 Cal. App.2d 746, 6 Cal. Rptr. 433 (1960); King v. Moorehead, 495 S.W.2d 65 (Mo.1973).

69. Brown v. Southall Realty, 237 A.2d 834 (D.C.App.1968).

other, a tenant might be precluded from arguing both theories.[70] The significance of §61-102(b), however, lies in the availability of both remedies to tenants.[71]

C. *Waiver of Requirements of Code Chapters 61-3 and 61-4 Prohibited*

Chapters 61-3 and 61-4 of the Georgia Code detail the procedures that must be followed in eviction and distress warrant actions. Since July 1, 1976, none of the obligations imposed by these statutes may be waived by parties to a lease agreement.

The most significant provisions of Chapter 61-3, governing dispossessory actions against tenants holding over, are in Code §§61-301, 61-302 and 61-303. Under §61-301, a landlord must demand possession of the dwelling unit before any legal action may be taken. Only after that demand has been made and the tenant has refused to vacate may the landlord obtain a dispossessory warrant. Section 61-302 provides that a tenant is entitled to a summons informing him of the pending action and ordering him to appear and answer. As amended, the section requires that the tenant answer within seven days from the date of actual service.[72] This amendment replaces the prior time limit of "not less than five nor more than twenty days from the date of actual service." If a tenant fails to answer by the seventh day, "the tenant may reopen the default as a matter of right by making an answer within seven (7) days after the date of the default. . . ."[73] The summons must state the last possible date on which the tenant may reopen the default. Only after the tenant has failed to answer or open the default may the court issue a writ of possession and a judgment for all rents due. The effect of this is to reduce from 35 days to 14 days the time that a tenant may remain in possession beyond the term of the tenancy.[74]

In answering an eviction summons, a tenant may raise any legal or equitable defense or counterclaim.[75] A tenant already possessed this right

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

71. GA. CODE ANN. §§61-102(b)(4) and 61-102(b)(5) (Supp. 1976).

72. GA. CODE ANN. §61-302(b) (Supp. 1976) provides in part: "The summons served on the defendant pursuant to subsection (a) shall command and require the tenant to answer either orally or in writing within seven (7) days from the date of actual service unless the seventh day is a Saturday, Sunday or legal holiday in which case, the answer may be made on the next day which is not a Saturday, Sunday or legal holiday."

73. GA. CODE ANN. §61-303 (Supp. 1976).

74. GA. CODE ANN. §61-303 (Supp. 1976) is a result of Byrd v. S.H. McGuire Realty Co., 125 Ga. App. 297, 187 S.E.2d 339 (1972), which held that the provisions of §55 of the Civil Practice Act, GA. CODE ANN. §81A-155 (1972), controlled in an eviction proceeding, thereby giving a tenant 15 days in which to open a default judgment. Thus, where a tenant had 20 days in which to answer a summons, plus the 15 days under *Byrd*, the tenant could remain in possession for 35 days. The amendment to §61-303 was an effort to reduce this time.

75. GA. CODE ANN. §61-303(b) (Supp. 1976).

under the Civil Practice Act,[76] but the legislature made it a non-waivable right by including it within the scope of §61-102(b).[77]

That the landlord need not appear on the date of the tenant's answer[78] marks the non-evidentiary nature of the hearing. Once an answer to the eviction summons is made, the case is to be set for trial.[79] If it appears that the trial will take longer than 30 days, the tenant must pay all rent alleged to be owed into the registry of the court.[80] As long as he continues to pay accrued rent into court, the tenant may remain in possession of the premises pending final judgment.[81]

D. Attorney Fees

A common clause in standard-form lease agreements provides that the tenant will pay the landlord's attorney fee if the landlord is forced to take legal action against the tenant.[82] A lease may still contain such a clause, but now the lease also must state that the landlord will pay the tenant's attorney fees if the landlord breaches the rental agreement.[83] A clause failing to provide for both situations will be void. Therefore, a lease entered into after July 1, 1976 must either be silent on the issue of attorney fees or have a provision allowing the costs of both parties. An interesting side-effect of this new section may be to increase the number of private attorneys willing to represent low-income tenants — at least those tenants whose lease agreement contains a provision for attorney fees. In the past, most such cases have been handled by Legal Services, since the tenants have been unable to bear the cost of litigation. However, with lease agreements that make no provision for fees, the status quo probably will endure.

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76. GA. CODE ANN. §81A-108(a) (Supp. 1976).

77. GA. CODE ANN. §61-102(b)(4) (Supp. 1976).

78. GA. CODE ANN. §61-302(b) (Supp. 1976).

79. GA. CODE ANN. §61-303. If the answer has been filed in a Justice of the Peace Court, it is automatically removed to a court of record.

80. GA. CODE ANN. §61-304 (Supp. 1976). The irony of this section is that in an eviction proceeding for non-payment, a tenant rarely has the money to pay into court; if he had it, he probably would have paid it to the landlord in the first place. Under §61-309, tender of rent plus the cost of the dispossessory warrant constitutes a complete defense to the action, although a landlord is required to accept such tender only once in any 12-month period. The effect of §61-304, therefore, is to preclude a tenant in this situation from raising any defenses he might have had to the action.

81. GA. CODE ANN. §61-303 (Supp. 1976).

82. A typical clause states: "The Tenant agrees to pay 15 per cent attorney's fees on any part of said rental that may be collected by suit or by an attorney after the same has become due."

83. GA. CODE ANN. §61-102(c) (Supp. 1976). The section provides in full: "A provision for the payment of the attorney's fees of the landlord by the tenant upon breach of a rental agreement by the tenant contained in a contract, lease, license agreement, or similar agreement, oral or written, for the use or rental of real property as a dwelling-place shall be void unless the provision also provides for the payment of the attorney's fees by the landlord upon breach of the rental agreement by the landlord."

E. Disclosure of Ownership

Another amendment to §61-102 requires that a tenant be informed in writing, by the time the tenancy begins, of the name and address of "(a) the owner of record of the premises or a person authorized to act for and on behalf of the owner for the purpose of service of process and receiving and receipting for demands and notice, and (b) the person authorized to manage the premises."[84] The landlord must, within 30 days after any change, inform each tenant in writing or post a notice of the change in a conspicuous place. If an agent fails to comply with the disclosure requirements, he shall be deemed an agent of the owner for (1) service of process, notices and demands; (2) performance of the landlord's obligations under title 61; and (3) expending or making available for the performance of such obligations, all rent collected from the premises.[85]

The effect of §61-102.1 will be to facilitate not only service on absentee landlords but also the determination of the individual liable for failure to perform the landlord's statutory duty to repair. Since some standard-form leases used by real estate agents have contained a "non-liability of agent" clause,[86] there should be substantial compliance with the disclosure requirements on their part.

F. Security Devices

In response to recent judicial decisions stating that a landlord may be held liable for failure to provide adequate security where there is a foreseeable harm to his tenants,[87] the legislature has authorized local governments to enact ordinances requiring the installation of security devices.[88] The

84. GA. CODE ANN. §61-102.1 (Supp. 1976) states: "Disclosure may be made by the landlord, agent, or any other person authorized to enter into a rental agreement on behalf of a landlord."

85. Since the code section states that a "failure to comply with both (a) and (b)" will invoke the agency sanction, a question arises of the effect of non-compliance with *either* (a) or (b). Would a real estate agent still be held as legal agent for the landlord if he complied with one provision but not the other? This question will have to be settled by the courts.

86. A typical clause provides: "The Tenant agrees that this Contract is solely with the landlord and not with the Agent of the Landlord, and that said Agent shall not be liable in any way in and about said property to Tenant, his family, any occupant of said rented premises, or any invitee or licensee while on said property."

87. Warner v. Arnold, 133 Ga. App. 174, 210 S.E.2d 350 (1974); Smith v. General Apartment Company, 133 Ga. App. 927, 213 S.E.2d 74 (1975); *See also* Kline v. 1500 Massachusetts Ave. Apartment Corp., 439 F.2d 477 (D.C.Cir.1970); Ramsay v. Morrissette, 252 A.2d 509 (D.C.App. 1969).

88. GA. CODE ANN. §61-102.2 (Supp. 1976) provides:

> (a) Municipalities and counties may establish by local ordinance minimum security standards, not in conflict with applicable fire codes, to prevent the unauthorized entry of premises occupied by a tenant as a dwelling-place and require landlords to comply with such standards.
>
> (b) This section shall be cumulative to and shall not prohibit the enactment of

ordinances may be made mandatory on landlords, and penalties for compliance may be levied.

In the past, landlords have been subject to the general rule that a private person does not have a duty to protect another from a criminal attack by a third person.[89] However, as the U.S. Court of Appeals for the District of Columbia Circuit noted: "The rationale of this very broad general rule falters when it is applied to the conditions of modern day urban apartment living. . . . The landlord is no insurer of his tenant's safety, but he certainly is no bystander."[90] The court recognized that the landlord, because he has control over the common areas of a dwelling unit, "is the only party who has the *power* to make the necessary repairs or to provide the necessary protection."[91] Therefore, "where . . . the landlord has notice of repeated criminal assaults and robberies, has notice that these crimes occurred in the portion of the premises exclusively within his control, has every reason to expect like crimes to happen again, and has the exclusive power to take preventive action, it does not seem unfair to place upon the landlord a duty to take those steps which are within his power to minimize the predictable risk to his tenants."[92]

The benefits of an ordinance requiring security devices accrue to both the landlord and the tenant. The tenant is assured protection, and, in the event of a break-in, the landlord would be protected by his compliance with the law. Since a landlord is responsible for exercising only "reasonable care,"[93] compliance with such an ordinance should be a sufficient defense in any tort action. Installing security devices would also reduce insurance premiums, and that, in turn, would lower the tenant's rent.

G. Security Deposits

The most comprehensive section of the 1976 act is the amendment concerning security deposits. Code Chapter 61-6 was added to detail the proce-

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other general and local laws, rules and regulations of State or local agencies, and local ordinances on this subject.

89. Kline v. 1500 Massachusetts Ave. Apartment Corp., 439 F.2d 477 (D.C. Cir. 1970). "Judicial reluctance to tamper with the traditional common law concept of the landlord-tenant relationship; the notion that the act of a third person in committing an intentional tort or crime is a superseding cause of the harm to another resulting therefrom; the oftentimes difficult problem of determining foreseeability of criminal acts; the vagueness of the standard which the landlord must meet; the economic consequences of the imposition of the duty; and conflict with the public policy allocating the duty of protecting citizens from criminal acts to the government rather than the private sector." *Id.* at 481.

90. *Id.*

91. *Id.* (emphasis in original).

92. *Id.* In Smith v. General Apartment Co., 133 Ga. App. 927, 213 S.E.2d 74 (1975), female tenants had been assaulted by a man possessing a master key to the apartment complex. The manager was aware of the situation but failed to change the locks. The court found sufficient evidence of negligence to deny summary judgment and remand for a jury trial.

93. Warner v. Arnold, 133 Ga. App. 174, 210 S.E.2d 350 (1974).

dures a landlord and tenant must follow whenever a lease agreement calls for payment of a security deposit. Specifically exempted from all the provisions of the chapter except §61-605 are "a natural person, his or her spouse and minor children" who collectively own and manage ten or fewer rental units.[94] However, if the units are managed by a third person, the chapter applies.

The act defines a security deposit as:

> money or any other form of security given after July 1, 1976, by a tenant to a landlord to be held by the landlord on behalf of a tenant by virtue of a residential rental agreement including, but not limited to, damage deposits, advance rent deposits, and pet deposits. The term "security deposit" does not include earnest money or pet fees which are not to be returned to the tenant under the terms of the residential rental agreement.[95]

A landlord must either place the deposit in an escrow account[96] or post a security bond with the clerk of the superior court in the county where the dwelling unit is located.[97] The security bond may be for the amount of the

94. GA. CODE ANN. §61-607 provides in full: "The provisions for Sections 61-602, 61-603, 61-604, and 61-606 shall not apply to rental units which are owned by a natural person if said natural person, his or her spouse and minor children collectively own ten or fewer rental units; except that this exemption does not apply to units for which management, including rent collection, is performed by third persons, natural or otherwise, for a fee."

95. GA. CODE ANN. §61-601(a) (Supp. 1976). Section 61-601(b) defines residential rental agreements as "a contract, lease or license agreement for the rental or use of real property as a dwelling-place."

96. GA. CODE ANN. §61-602 (Supp. 1976) provides in full: "Except as provided in Section 61-603, whenever a security deposit is held by a landlord or his agent on behalf of a tenant, such security deposit shall be deposited in an escrow account used only for that purpose, in any bank or lending institution subject to regulation by the State of Georgia or any agency of the United States government. Such security deposit shall be held in trust for the tenant by the landlord or his agent, except as provided in Section 61-605. Tenants shall be informed in writing of the location and account number of the escrow account required by this Section."

97. GA. CODE ANN. §61-603 provides in full: "As an alternative to the requirement that security deposits be placed in escrow, as provided in Section 61-602, the landlord may post and maintain an effective surety bond with the clerk of the superior court in the county in which the dwelling unit is located in a total amount of the security deposits he holds on behalf of the tenants, or $50,000, whichever is less, executed by the landlord as principal and a surety company authorized and licensed to do business in the State as surety. The surety may withdraw from the bond by giving 30 days written notice by registered mail to the clerk of the superior court in the county in which the principal's dwelling unit is located, provided such withdrawal shall not release said surety from any liability existing hereunder at the time of the effective date of said withdrawal. The bond shall be conditioned upon the faithful compliance of the landlord with the provisions of Section 61-605, including the return of security deposits in the event of bankruptcy of landlord or foreclosure of the premises, and shall run to the benefit of any tenant injured by the landlord's violation of the provisions of Section 61-605. Said Superior Court Clerk shall receive a fee of five dollars for filing and recording said surety bond and shall also receive a fee of five dollars for cancelling said surety bond. Said Superior Court Clerks shall not be held personally liable should said surety bond prove invalid."

deposits the landlord has collected, or for $50,000, whichever is less. If the landlord places the deposit in an escrow account, he must notify the tenant in writing of the location and the account number.

Inspection Prior to Occupancy

Before tendering a security deposit, the tenant must be given a list of any existing damage to the premises.[98] The tenant may then inspect the dwelling to ascertain the accuracy of the list. If the tenant agrees with the list, both parties sign it, and the list becomes conclusive evidence of any existing damage except latent defects. A tenant who refuses to sign the list must state in writing the specific items to which he dissents. A tenant who fails to sign either statement is precluded from recovering the security deposit or any other damages.[99] However, this rule applies only if the listings contained written notice of the tenant's duty to sign one or other of the statements.

Inspection After Termination of Occupancy

Within three business days after the tenant has vacated, the landlord must inspect the premises and compile a list of any damage done by the tenant.[100] The tenant has five days from his termination date to inspect. Both parties must sign the final damage list for it to be conclusive evidence of its accuracy. Again, if the tenant disagrees with the contents of the list, he must sign a specific statement detailing the items to which he dissents. Failure to do so invokes the same sanctions governing the initial inspection lists.[101]

Once the tenant has signed a statement of dissent, he is entitled to file an action to recover that portion of the deposit which he believes to have been wrongfully withheld.[102] His claim must be limited to only those items detailed in his statement of dissent.[103]

Return of the Security Deposit

Within one month from the termination date, the landlord must return the full deposit to the tenant.[104] If the landlord retains any portion, he must

98. GA. CODE ANN. §61-604(a) (Supp. 1976).
99. GA. CODE ANN. §61-604(c) (Supp. 1976).
100. GA. CODE ANN. §61-604(b) (Supp. 1976).
101. GA. CODE ANN. §61-604(c) (Supp. 1976).
102. GA. CODE ANN. §61-605(b) (Supp. 1976) provides: "In any court action in which there is a determination that neither the landlord nor tenant under the provisions of this Chapter is entitled to all or a portion of a security deposit, the jury in a jury case and the judge in all other cases shall determine what would be an equitable disposition of the security deposit, and the judge shall order the security deposit paid in accordance with such disposition."
103. GA. CODE ANN. §61-604(c) (Supp. 1976).
104. GA. CODE ANN. §61-605(a) (Supp. 1976).

provide the tenant with a written statement of his reasons for so doing and with a list of damage claimed to have been done by the tenant. A landlord may not retain any amount for normal wear and tear,[105] but he may retain the deposit to cover nonpayment of rent, fees for late payment, abandonment, nonpayment of utility charges, costs of any repair work contracted for by the tenant, unpaid pet fees, or actual damages caused by the tenant's breach. However, the landlord must have attempted to minimize any actual damage claimed. The landlord is required to mail any payment or statement to the last known address of the tenant. If the letter is returned and the landlord is unable to locate the tenant after using reasonable effort, he may claim the payment after 90 days from the date it was first mailed.

Enforcement and Remedies

To retain any portion of the security deposit, the landlord must have deposited the money in an escrow account or posted a security bond.[106] He also must have provided the tenant with both the initial and the final damage listings. Failure to provide both statements leads to forfeiture of all rights to withhold any portion of the deposit or to bring suit against the tenant for damages.[107]

A landlord found to have improperly withheld a portion of the deposit may be held liable to the tenant for triple the amount plus reasonable attorney fees.[108] However, if the landlord is able to prove by a preponderance of the evidence that the withholding was not intentional and resulted from a bona fide error, he may be held liable for only that amount erroneously withheld.

The provisions in Chapter 61-6 are subject to the prohibitions against exculpatory clauses.[109]

F. False Statements

As a final amendment to title 61, the legislature provided that criminal penalties will be imposed on anyone who knowingly makes a false state-

105. "No security deposit shall be retained to cover ordinary wear and tear which occurred as a result of the use of the premises for the purpose for which the premises were intended, without negligence, carelessness, accident, or abuse of the premises by the tenant or members of his household, or their invitees or guests." GA. CODE ANN. §61-605(a) (Supp. 1976).

106. GA. CODE ANN. §61-606(a) (Supp. 1976) provides in full: "A landlord shall not be entitled to retain any portion of a security deposit if the security deposit was not deposited in an escrow account in accordance with Section 61-602 or a surety bond was not posted in accordance with Section 61-603 and if the initial and final damage listings required by Section 61-604 are not made and provided to the tenant."

107. GA. CODE ANN. §61-606(b) (Supp. 1976).

108. GA. CODE ANN. §61-606(c) (Supp. 1976).

109. GA. CODE ANN. §61-102(b)(6) (Supp. 1976). See note 43, *supra*, and accompanying text.

ment in either an affidavit for a dispossessory warrant or an answer to an eviction summons.[110] Violation of this provision constitutes a misdemeanor.

III. Conclusion

It is apparent that the new landlord-tenant act goes a long way in removing Georgia from the confines of the common law. By prohibiting exculpatory clauses in rental contracts, the legislature has made it the public policy of Georgia that landlords shall keep their rental units in repair and shall be liable for their failure to do so. Tenant remedies in tort and contract, especially those of implied warranty of habitability and illegal contract, seem far more feasible under the new law than before. Certainly a tenant has more bargaining power, and a landlord is now accountable to both the tenant and the public for the condition of the premises he rents. Where security deposits are required, a tenant now has the legal right to inspect a unit and record his objections in case litigation becomes necessary. At least a tenant has some assurance that a deposit will be returned to him if he keeps the premises in good condition. All these provisions place tenants in a more equitable position and should mean better housing conditions for Georgians in the future.

Certain obstacles to full landlord-tenant equality still exist, however. A tenant still runs the risk of eviction for pursuing any legal action, even if it be simply reporting housing-code violations to city officials. A statute prohibiting such retaliatory measures[111] would remove any impediment to seeking legal redress.

To let all tenants in Georgia receive the benefits of the new act, Code §61-102(b) should be amended to make it apply to all housing, health, and sanitation codes rather than just to those enacted pursuant to the Urban Redevelopment Law.

Legislative recognition of the doctrines of implied warranty of habitability and illegal contract would encourage compliance with such codes and would guarantee that rental dwellings in Georgia meet at least a minimum standard. Recognition of receiverships, which allow a tenant to pay his rent to a third person, who is made responsible for repairs, would provide a safe alternative to the risks of repair-and-deduct.

These remedies are just a few that could be provided, but they would provide an excellent second step following what was done by the 1976

110. Ga. Code Ann. §61-9905 provides in full: "A person to whom a lawful oath or affirmation has been administered or who executes a document knowing that it purports to be a statement of a lawful oath or affirmation commits a misdemeanor when such person, while under such oath or affirmation, knowingly and willingly makes a false statement in an affidavit signed pursuant to section 61-301 or in an answer filed pursuant to section 61-302. Upon conviction thereof, such person shall be punished as for a misdemeanor."

111. See, *e.g.*, URLTA §5.101.

legislature. The new act reflects a concern for Georgians forced to live in substandard, and often subhuman, conditions. It is a progressive movement that should be continued.

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