MEMORANDUM

TO: SCOPE AND PROGRAM COMMITTEE

FROM: SHELDON F. KURTZ, CHAIR OF THE STUDY COMMITTEE

SUBJECT: FINAL REPORT

DATE: MAY 18, 2011

INTRODUCTION AND FINAL RECOMMENDATION

Last summer, the Joint Editorial Board on Uniform Real Property Acts recommended to the Scope and Program Committee that a Study Committee be formed to consider whether it would be advisable to create a drafting committee to revise the Uniform Residential Landlord and Tenant Act. ("URLTA"). The JEB's recommendation primarily focused on the need to revise the law to address significant legal issues arising in connection with tenant security deposits and to allow victims of domestic violence to terminate a lease, primarily because these were two issues not addressed in URLTA. *See*, Memorandum dated June 1, 2010, from R. Wilson Freyermuth, Executive Director of the JEB, attached.

Upon consideration of that recommendation, the Scope and Program committee recommended that a study committee be created and charged to consider other possible issues that might appropriately be considered in drafting a revision of URLTA should the study committee recommend any revision at all.

Following that recommendation, a Study Committee was organized. The members of the Study Committee are: Sheldon Kurtz, Chair, William Barrett, Jack Davies, Lynn Foster, William Hillman, Edward Lowry, Reed Martineau, Robert McCurley, Janice Pauls, Patrick Randolph, and Ken Takayama. Barry Hawkins is the Division Chair and Larry Ruth is the Scope and Program Liaison. In addition John Sebert, Kieran Marion, Katie Robinson, and R. Wilson Freyermuth are observers.

Although not all of the Study Committee was able to meet for our first telephonic meeting on October 29, most of them attended. At that meeting a decision was made to create a subcommittee of the Study Committee to develop recommendations for the Study Committee. The subcommittee held two subsequent telephonic conferences, and the entire Study Committee again met telephonically, on November 10 and 17, 2010. In addition, the chair met with the JEB for Real Property Acts to bring them up to speed on the project to date. Following those meetings a meeting was held in Washington DC to which a number of stakeholders were invited. A summary of that meeting, prepared by John Sebert, is attached.

The Study Committee again met telephonically on May 11, 2011. Commissioners, Kurtz, Barrett, Davies, Foster, Lowry, Martineau, Pauls, Takayama, Hawkins, and Ruth attended this meeting. In addition, John Sebert, Kieran Marion, and Katie Robinson from the conference and nine observers were in attendance. Prior to the meeting the participants reviewed a draft of this report, as well as the report relating to the meeting of the stakeholders.

The Study Committee discussed whether to recommend the formation of a drafting committee, and, if so, whether a drafting committee should be charged with undertaking a comprehensive or targeted revision of ULTRA. Only one of the observers (but none of the commissioners) favored doing nothing at all. Arguments in favor of revision centered around two points. First, over the course of those forty years there has been substantial but non-uniform activity in the states relating to the law affecting the landlord-tenant relationship. For example, there are multiple versions of the implied warranty of habitability and three to four methods by which damages for breach of the warranty are calculated. Furthermore, as suggested by the following sections of this report, there are a good number of areas, which might profitably be addressed by a drafting committee when considering revisions many of which are not currently addressed in URLTA. Second, ULTRA was adopted nearly forty years ago, and the conference has an obligation to periodically review and update its product to address the current landscape in which laws operate.

As a consensus to recommend a drafting committee to consider revisions to URLTA began to build, the discussion gravitated to a discussion of whether any revision should be comprehensive or targeted to a few specific areas. Some thought that a more modest revision targeted to specific issues might be better from an enactability standpoint; others disagreed and thought that a targeted project would find limited acceptance in many states that had existing legislation addressing areas targeted in the revision. Additionally, a more comprehensive revision would provide states with the opportunity to do a like review of their existing laws and dispose them to a revised ULTRA should their laws be found wanting. And, a comprehensive revision could also find support among groups that might not otherwise have an interest in topics covered by a more targeted revision. Additionally, given the wide range of issues suggested in this report that might be the subject of a revised act, it was unlikely that the Study Committee could rationalize support for some issues to the exclusion of others.

While it was observed that in the real property area the conference does not necessarily have the same enactment success as it does with products in the commercial or business law areas, ULC products in the real estate area, even when not wholly adopted, serve as persuasive models for legislatures to use when considering more piecemeal approaches to enactments in the real property area.[1]

[1] It should also be noted that while ULTRA was only adopted in just under half the states, that act was promulgated when the implied warranty reflected in that act had not yet been

Following these discussions, the members of the Study Committee *unanimously* agreed to recommend to the conference that a drafting committee be formed to comprehensively revise the Uniform Residential Landlord and Tenant Act. The Study Committee also recommends that the drafting committee have the ability to amend, revise, expand, and, of course, even delete any of the issues affecting the landlord-tenant relationship discussed below following the brief history and summary of URLTA.

HISTORY AND SUMMARY OF URLTA

URLTA was promulgated by NCCUSL in 1972 at its annual meeting in San Francisco. To date, twenty-one states have adopted URLTA in whole or in some modified form. URLTA (1972) was innovative in at least two important respects: First, its provisions conceptualized the residential lease as a contract rather than as a conveyance; second, it codified the then nascent implied warranty of habitability.[2]

Although URLTA was not intended to be comprehensive, it addressed a number of important issues, often adopting positions contrary to the established common law rules applicable to the landlord-tenant relationship. These include: (1) changing the common-law rule that a tenant's entry into possession under an unsigned lease creates a periodic tenancy to a rule that could result in a lease for a term of no more than one year); (2) requiring landlords to deliver actual possession to the tenant on the first day of the lease rather than the mere right to possession, thus rejecting the so-called "American rule," (3) obligating the landlord to keep the premises habitable and providing tenants new remedies for the landlord's breach that did not require the tenant to vacate the premises, such as damages and repair and deduct; and (4) protecting tenants against a landlord's retaliatory conduct.

The following sections of URLTA's table of contents provide a cryptic overview of the substantive areas covered by that Act:

ARTICLE I
GENERAL PROVISIONS AND DEFINITIONS
. . .
PART III
GENERAL DEFINITIONS AND PRINCIPLES OF INTERPRETATION: NOTICE

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widely accepted. Thus, ULTRA represented a radical and controversial departure from existing law. Today, on the other hand, nearly all states have the warranty, albeit in a non-uniform way, and thus, including provisions dealing with the warranty in any proposed revision would not be a catalyst for creating opposition to other improvements in the law that might be included in a revision.

[2] *See* Javins v. First Nat'l Realty Corp., 428 F. 2d 1071 (D.C. Cir. 1970).

4.107. Tenant's Remedies for Landlord's Unlawful Ouster, Exclusion, or Diminution of Service

PART II
LANDLORD REMEDIES

4.201. Noncompliance with Rental Agreement; Failure to Pay Rent
4.202. Failure to Maintain
4.203. Remedies for Absence, Nonuse and Abandonment
4.204. Waiver of Landlord's Right to Terminate
4.205. Landlord Liens; Distress for Rent
4.206. Remedy after Termination
4.207. Recovery of Possession Limited

PART III
PERIODIC TENANCY; HOLDOVER; ABUSE OF ACCESS

4.301. Periodic Tenancy; Holdover Remedies
4.302. Landlord and Tenant Remedies for Abuse of Access

ARTICLE V
RETALIATORY CONDUCT

5.101. Retaliatory Conduct Prohibited

While URLTA was not adopted in a majority of states, its provisions have influenced the development of laws in many non-enacting states.

Following the appointment of the Study Committee, students at The University of Iowa College of Law have been reviewing landlord–tenant law in all 50 states and the District of Columbia. Their review—coupled with a great number of suggestions from the members of the Study Committee, other commissioners whose views were solicited by email and stakeholders-- has identified a number of issues that the Study Committee believes should be addressed in any revision of URLTA.

ISSUES THAT COULD BE ADDRESSED OR REVISITED IN A REVISION OF ULTRA:

1. **Definitions:** Compared with other ULC products, products, URLTA is light on definitions. There are a number of instances where definitions or even separate sections added to the act or modified from the current act would be advisable. For example, the current ULTRA definition of landlord includes "sublessors." Thus, in a short-term sublease, sublessors appear to have duties thrust upon them that may be inappropriate. But, if imposing such duties upon sublessors is

appropriate from a policy perspective (and it may not be), then why should the definition of landlord exclude assignors. This suggests that the definition of "landlord" needs a careful review.

The concept of "ordinary wear and tear" is a key phrase used in many leases, but the phrase is not defined or used in the act. A uniform understanding of this important phrase would be beneficial to both landlords and tenants because of a tenant's potential liability for damages when the lease terminates, particularly if a revised act expands upon the rights of landlord and tenants in security deposits. Many states have definitions of "ordinary wear and tear" or "normal wear and tear."[3] These statutory provisions generally provide that ordinary wear and tear is "deterioration that occurs, based upon the use for which the rental unit is intended,"[4] and is not the result of "negligence, carelessness, accident, abuse, or intentional damage"[5] to the premises by the tenant, the tenant's guest or invitee, or by someone on the premises with the tenant's consent.[6] Some of these definitions also contain a clause that explicitly excludes uncleanliness from the definition of ordinary wear and tear.[7]

Another potential definition to include in URLTA is "transient housing." Several states have either encountered litigation regarding the precise meaning of this phrase or have enacted a statutory definition of this term in their landlord–tenant act. Existing state definitions focus on the following factors: (1) whether the housing is the primary residence of the individual;[8] (2) whether the rent is paid on "less than a weekly basis;"[9] and (3) whether the tenancy is held for less than thirty days.[10]

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[3] See, e.g., n. 3, *infra.* Hawaii has a slightly different formulation of ordinary wear and tear than other states with definitions. *See* HAW. REV. STAT. ANN. § 521-8 (West 2010) ("[D]eterioration or depreciation in value by ordinary and reasonable use but does not include items that are missing from the dwelling unit.").

[4] N.M. STAT. ANN. § 47-8-3(j) (West 2010); *see also* COLO. REV. STAT. ANN. § 38-12-102(1) (West 2010); ME. REV. STAT. ANN. tit. 14, § 6031(1) (2009).

[5] N.M. STAT. ANN. § 47-8-3(j); *see also* COLO. REV. STAT. ANN. § 38-12-102(1) (omitting "intentional"); ME. REV. STAT. ANN. tit. 14, § 6031(1) (same); NEV. REV. STAT. ANN. § 118A.110 (West 2010) (omitting "intentional" and "accident").

[6] *See* N.M. STAT. ANN. § 47-8-3(j) (including in its definition "any other person in the dwelling unit or on the premises with the resident's consent"); COLO. REV. STAT. ANN. § 38-12-102(1) (including "invitees or guests").

[7] *See* N.M. STAT. ANN. § 47-8-3(j) ("[H]owever, uncleanliness does not constitute normal wear and tear."); ME. REV. STAT. ANN. tit. 14, § 6031(1) ("The term 'normal wear and tear' does not include sums or labor expended by the landlord in removing from the rental unit articles abandoned by the tenant such as trash.").

[8] *See* CONN. GEN. STAT. ANN. § 47a-2(c) (West 2010).

[9] *See* N.M. STAT. ANN. § 47-8-3(V).

[10] *See* COLO. REV. STAT. ANN. § 38-12-511(d) (transient occupancy in a hotel or motel that lasts less than thirty days.

Other possible definitions that could be include in a revised act are: "common areas" and "fair rental value," and the list goes on and on.[11] And, although no reason to create a drafting committee, the current act needs updating to conform to current conference definitions relating to "person," "state," "record," "sign," etc.

2. **Scope of Housing Units Act:** ULTRA does not apply to residential leases involving: (1) residence at an institution, public or private, if incidental to detention or the provision of medical, geriatric, educational, counseling, religious, or similar service;[12] (2) occupancy under a contract of sale of a dwelling unit or the property of which it is a part, if the occupant is the purchaser or a person who succeeds to his interest; (3) occupancy by a member of a fraternal or social organization in the portion of a structure operated for the benefit of the organization; (4) transient occupancy in a hotel, or motel [or lodgings [subject to cite state transient lodgings or room occupancy excise tax act]]; (5) occupancy by an employee of a landlord whose right to occupancy is conditional upon employment in and about the premises;(6) occupancy by an owner of a condominium unit or a holder of a proprietary lease in a cooperative; or (7) occupancy under a rental agreement covering premises used by the occupant primarily for agricultural purposes**.**

   Several commentators have suggested that the Act's reach should expand to certain groups that are presently excluded, like renters of vacant land at mobile home parks. But, with one exception, the consensus of the Study Committee was the current exclusions should remain, largely because expanding the coverage increased the potential for politically significant opposition. The one exception was to suggest that ULTRA's reach be extended to University housing, which competes directly with rentals in the private market place. This expansion of scope might be broadened to include housing that hospitals provide for residents.

   Additionally, while not an expansion on the current scope of the Act, it may be beneficial to clarify what is meant by "occupancy by an employee of a landlord whose right to occupancy is conditional upon employment in and about the premises." Particularly, the Study Committee recommends that a drafting committee clarify whether "employee" includes independent contractors.[13] The Study Committee also recommends that any drafting committee review the exclusions to consider whether an employee becomes a tenant, and thus gains

[11] Other examples of possible additional definitions include: rules and regulations, abandonment, unconscionable, lease, willful, prepaid rent, and sublessor.
[12] It is unclear how assisted living facilities and similar arrangements fit into this definition.
[13] *See* COLO. REV. STAT. ANN. § 38-12-511(e) ("Occupancy by an employee *or independent contractor*." (emphasis added)).

the protections of the Act, if the landlord terminates the employee's employment but allows the tenant to remain on the premises.[14]

Finally, at least one state includes a statutory provision that allows landlords and tenants to opt for the Act to govern their landlord–tenant relationship, even if it would not otherwise. This statute specifically provides that "the landlord may specifically provide for the applicability of the provisions of this chapter in the rental agreement."[15] Inclusion of such a provision is advisable to permit landlords and tenants to reap the mutual benefits of the act without having to develop leases that incorporate the act's provisions.

3. **Mitigation**: Section 1-1-5(a) of ULTRA requires "an aggrieved party" to mitigate damages. The Act, however, provides little guidance regarding what steps a landlord should take to mitigate where the tenant has wrongfully abandoned the premises, and the landlord has other premises in the landlord's "vacant stock" that are waiting to be rented. In dealing with prospective renters, for example, must the landlord act in ways that encourage the rental of the premises wrongfully abandoned by the tenant, or can the landlord give a preference to the renting of the other units in the landlord's inventory, or is the landlord required to merely act with some sort of neutrality with respect to all the units now available for rent? Both landlords and tenants could benefit from statutory clarification of the duty to mitigate.

Other states have addressed these issues. For example, in Alabama and Maine, the duty to mitigate does not take priority over the landlord's right to rent other vacant units.[16] In Maryland, the landlord does not have an obligation to show the vacated unit in preference to other available units,[17] while in New Jersey, the landlord cannot give preference to other open units and has to treat the apartment in question as if it was one of his vacant stock.[18]

Similarly, the Act is silent regarding who bears the burden of proof on whether mitigation has occurred.[19] Some states allocate the burden of proof to

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[14] *See* VA. CODE ANN. § 55-248.5(A)(5) (West 2010) ("Occupancy by an employee of a landlord whose right to occupancy is conditioned upon employment in and about the premises *or an ex-employee whose occupancy continues less than sixty days*." (emphasis added)).
[15] *Id.* § 55-248.5(B).
[16] ALA. CODE § 35-9A-105(a) (West 2010); ME. REV. STAT. ANN. tit. 14, § 6010-A (2009).
[17] MD. CODE ANN.,REAL PROP. § 8-207 (West 2010).
[18] Sommer v. Kridel, 378 A.2d 767, 772-73 (N.J. 1977).
[19] New Jersey and Utah require the landlord to demonstrate that he was diligent in mitigating damages; while Rhode Island allocates the burden of proof to the tenant. *Sommer, note 18 at* 773. *Cf.* Reid v. Mut. of Omaha Inc., 776 P.2d 896, 907 (Utah 1989); Riley v. St. Germain, 723 A.2d 1120, 1123 (R.I. 1999).

the landlord requiring her to demonstrate diligence, while others put the burden on the tenant.[20]

Related to the issue of the mitigation is the obligation, if any, of a landlord to provide a tenant with alternative housing if the tenant needs to vacate the premises to allow the landlord to meet its obligations relating to the repair of the premises. States use different approaches to addressing this issue. For example, in Virginia, the landlord has discretion to require the tenant to relocate for no longer than thirty days to complete nonemergency repair at no expense or cost to the tenant.[21] Similarly, in Maine, the court can authorize the tenant to vacate and suspend any rent charges incurred during such period, however, the landlord is not responsible for the cost of a tenant's alternative housing.[22] On the other hand, in Nevada, if the landlord fails to maintain a fit and habitable unit, the tenant can choose to relocate and abate the rent for the original premises, but the tenant can only recover the relocation costs that exceed the abated rent.[23]

4. **Distinguishing between landlords**: Generally, ULTRA applies to all landlords regardless of the number of units the landlord has for rents. Some believe there are instances in which small landlords or landlords occupying a portion of the rental unit should be exempt from certain provisions of the Act. For example, should the rules relating to the treatment of security deposits be different for landlords that have five or fewer rented units; should the implied warranty apply to a landlord who rents out a room in the home in which the landlord also resides?

   Numerous states have already amended their codes to differentiate between certain types of landlords. For instance, Georgia provides certain exemptions to natural persons—landlords who own ten or fewer rental units.[24] Maine exempts landlord-occupied structures that contain five or less dwellings from the security deposit chapter.[25] Alaska has established different rules for landlords in undeveloped rural areas.[26]

5. **Grace periods for payment of rent and late fees for late payment of rent:** URLTA is silent regarding grace periods for the payment of rent, whereas some

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[20] New Jersey and Utah require the landlord to demonstrate that she was diligent in mitigating damages; while Rhode Island allocates the burden of proof to the tenant. *See,* Reid v. Mut. of Omaha Inc., 776 P.2d 896, 907 (Utah 1989); Riley v. St. Germain, 723 A.2d 1120, 1123 (R.I. 1999).
[21] VA. CODE ANN. § 55-248.18(B).
[22] ME. REV. STAT. ANN. tit. 14, § 6021(4)(C).
[23] NEV. REV. STAT. § 118A.380(1)(d) (West 2011).
[24] GA. CODE ANN. § 44-7-36 (West 2010).
[25] ME. REV. STAT. ANN. tit. 14, § 6037(2)
[26] *See, e.g.*, ALASKA STAT. ANN. § 34.03.100(b) (West 2011).

state laws mandate that a grace period be provided.[27] Should URLTA be revised to require a grace period for the payment of rent in a residential lease? URLTA is also silent regarding fees that can be charged for late payment of rent. Should this issue be addressed? Some have expressed the concern that landlords bill tenants for a fee when the lease is silent on the landlord's right to do so.[28] Others have raised concerns about the excessiveness of the fee and have asked whether a revised act should include some limitation on the amount of a late fee, such as a percentage of rent.[29] Here there may be an appropriate analogy to laws limiting the amount credit card companies can charge as late fees. While not all commissioners or observers agree, a drafting committee should at least consider the advisability of addressing some of these economic issues. It should be noted that at the Stakeholders Meeting a number of participants said that they thought that any provisions on grace periods and late fees would likely be controversial.

6. **Assignment and subletting:** The Study Committee believes that landlords are free to prohibit assignments and sublets and that, when allowing them, they should be able to disapprove of the assignee or subtenant for legitimate reasons.[30] On the other hand, existing law on the consequences to the tenant who assigns or sublets should be re-examined to re-evaluate whether the common law rules should continue to apply to transfers of leasehold in the residential setting. For example, if a landlord consents to an assignment but does not expressly reserve its right to hold the assignor liable for rent, should the assignor have a continuing obligation to pay rent (or at least an obligation to pay rent if the assignee defaults) because the assignor remains in privity of contract with the landlord? Also, under the common law, a subtenant is not legally obligated to pay rent to the landlord, but only to the subtenant absent an express agreement to the contrary. Again, does this rule make sense in the residential setting? Arguably, this makes less sense in a residential lease than a commercial lease. Although two states have statutes providing that the assignor would generally be liable, those statutes differ as to what the assignor must do in order

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[27] Maine, for example, mandates a grace period of 15 days. ME. REV. STAT. ANN. tit. 14, § 6028.

[28] For example, Minnesota does not authorize the landlord to charge late fees unless the parties have agreed in writing that such a fee may be imposed. MINN. STAT. ANN. § 504B.177(a) (West 2010).

[29] Numerous states have imposed a limitation on the amount of late fees the landlord can collect. However, the percentages vary among the states. ME. REV. STAT. ANN. tit. 14, § 6028 (five percent); MD. CODE ANN., REAL PROP. § 8-401(b)(1)(iii) (West 2010) (same); MINN. STAT. ANN. § 504B.177(a) (West 2010) (eight percent).

[30] Some states have adopted a reasonableness requirement for the landlord's withholding of consent. *See e.g.*, ALASKA STAT. § 34.03.060; HAW. REV. STAT. § 516-63 (West 2010); N.Y. REAL PROP. LAW § 226-b (McKinney 2010). However, the Massachusetts Supreme Court has refused to impose such a requirement absent statutory authority, leaving it as an issue of public policy for the legislature to address. Slavin v. Rent Control Bd. of Brookline, 548 N.E.2d 1226, 1228 (Mass. 1990) (limiting holding to "a residential lease in a municipality governed by a rent-control law"). The court noted that "a majority of jurisdictions subscribe to the rule that a lease provision requiring the landlord's consent to an assignment or sublease permits the landlord to refuse arbitrarily or unreasonably." *Id.*

[31] Shouldn't the landlord retain that responsibility even though the landlord is neither in privity of estate nor contract with the sublessee? Some states have already held so, but there is no uniform law to address this issue and many states have no cases either.[32]

7. **Security Deposits:** A number of issues have been raised about security deposits as discussed in the JEB memo of June 1, 2010. One matter not addressed in that memo is "pet deposits," including pet deposits for service animals.

States have enacted laws relating to pet deposits that fall into one of two categories: (1) laws allowing for and regulating pet deposits and (2) laws dealing with disabled tenants and their pets. In the first category, states have generally allowed landlords to demand a higher deposit from tenants with pets than would normally be allowed under statutory guidelines. However, state law is divided as to what the limit on this deposit should be. At least one state leaves the issue open and provides no statutory limit,[33] while other states have adopted an express limitation based on the amount of rent.[34] This is an issue that should be addressed by uniform law.

As for statutes dealing with disabled tenants, the laws of several states provide that a landlord may not interfere with that tenant's right to have a pet[35] or service animal.[36] With respect to pet deposits, states are divided as to a statutory limit on what the landlord may demand. Some laws simply require that the deposit be reasonable.[37] Other states' laws are silent on the issue.[38] However,

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[31] Arguably, if the answer to this question is no, then the best way to remedy this issue is by excluding "sublessor" from the definition of "landlord."

[32] Florida seems to have addressed this issue by excluding "sublessor" from its statutory definition of "landlord." FLA. STAT. § 83.43(3) (2010).

[33] ALA. CODE § 35-9A-201 (2010) (providing only that security deposits cannot be in excess of one month's rent, except for pets).

[34] *See* KAN. STAT. ANN. § 58-2550(a) (2009) ("[I]f the rental agreement permits the tenant to keep or maintain pets in the dwelling unit, the landlord may demand and receive an additional security deposit not to exceed 1/2 of one month's rent."). *See also* Reilly v. Weiss, 966 A.2d 500, 504 (N.J Super. A.D. 2009) (holding that the statutory limit of one and one-half month's rent for security deposits includes pet deposits as part of a security deposit, and such a limit on the total deposit cannot be waived).

[35] *See* MINN. STAT. ANN. § 504B.261 (West 2010) (providing that a disabled tenant of a multiunit building, who receives a subsidy for rent, is entitled to two birds, a cat, or a dog, with limitations).

[36] *See, e.g.*, UTAH CODE ANN. § 62A-5b-104(1)(a)–(c) (West 2010).

[37] *Compare* MINN. STAT. ANN. § 504B.261 (deposit must be in an amount "reasonable to cover damage likely to be caused by the animal"), *with* UTAH CODE ANN. § 62A-5b-104(1)(b) (deposit must be reasonable and based on what the landlord "would charge" as a similar deposit to a person for potential wear and tear).

such laws can still be read to at least carry an implicit reasonableness limit on deposit charges for service animals, as anything unreasonable would likely be held as discrimination based on that disability. Nevertheless, this division of authority exemplifies the need for uniform law on the issue.

At the Stakeholders Meeting, a number of participants suggested that any mandatory regulation of security deposits would likely be controversial, with landlord and tenant groups having differing views. Some argued for provisions in the act that provide clear procedural rules concerning security deposits, such as by when must a landlord inspect the premises, give notice to the tenant, and return the security deposit if the landlord cannot demonstrate that there has been damage to the premises; and does the landlord hold the security deposit in trust for the tenant and must the landlord pay interest on the security deposit? Others thought it might be useful to address a few specific issues, such as what those holding a security deposit should do when a lender forecloses on the property.

8. Applications to Rent:

Some landlords collect application fees from prospective tenants. The Study Committee believes that the collection of these fees could provide a potential for abuse if they are excessive, unrelated to the costs of accepting applications, or used as a source of income by landlords who have little or no likelihood of having available units when the fee is collected. The Study Committee appears to be divided on whether this is a matter that should be considered by a drafting committee or whether it is a matter best left to other law, such as consumer protection laws.

Some states do address application fees in their landlord–tenant laws. For example, California fixes the amount of application fees at $30 per applicant and prohibits the landlord from charging the applicant if the landlord does not have a vacant unit available at the time of application or within a reasonable time.[39] Virginia allows landlords to charge applicants up to $50 in addition to actual expenses incurred by the landlord.[40] Maryland prohibits landlords from charging any fee, other than the security deposit, that exceeds $25.[41]

Commentators have raised other issues about the application process. These include the extent to which landlords must notify prospective tenants of the

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[38] *See* NEV. REV. STAT. § 118.105(1)–(2) (West 2010); WASH. REV. CODE § 49.60.224(1)–(2) (West 2010).
[39] CAL. CIV. CODE § 1950.6 (West 2010).
[40] VA. CODE ANN. § 55-248.4 (West 2010).
[41] MD. CODE ANN., REAL PROP. § 8-213 (West 2010).

renting criteria and whether landlords must keep personal and financial information acquired about prospective tenant confidential. Additionally, these privacy concerns similarly exist with respect to information landlords acquire about tenants during the term of the tenancy.

Some states have addressed the confidentiality concerns by statute. For example, Virginia prohibits landlords or managers from revealing tenants' or prospective tenants' confidential information to a third party unless the tenant has given a written consent or circumstances trigger other exceptions listed in the statute.[42]

At the Stakeholders Meeting there was no consensus. Some argued that legislation should provide some regulation of applications to rent, such as prohibiting a landlord from collecting an application fee when the landlord knows it does not have sufficient vacancies to rent to the particular applicant. Others thought that it would not be appropriate to cover in the RLTA a matter that arises before the landlord/tenant relationship is established, and that matters such as this should be left to other relevant state law, such as law related to fraud or consumer protection.

9. **Premature lease terminations:** The creation of this Study Committee was, in part, prompted by the JEB recommendation to allow tenants who have been the subject of domestic abuse to terminate a lease prior to the end of the term. The ability to terminate the lease for this and other reasons is primarily of concern (although not exclusively of concern) to tenants for either a term of years or a year-to-year tenancy, as tenants with a month-to-month tenancy can terminate the lease by giving one month's notice.

   The state statutes addressing this issue have provisions that not only allow the tenant to terminate the lease early following an incident of domestic abuse, but also: (1) protect the tenant from eviction, retaliation, or other discriminatory conduct by the landlord; (2) permit the tenant to change his or her locks; and (3) protect the confidentiality of the information the tenant gives to the landlord in the course of exercising his or her rights under this section.

   Existing state statutes vary with regard to their scope. Some statutes are limited to permitting lease termination following domestic abuse only;[43] other statutes are much broader and include termination following sexual assault and

[42] VA. CODE ANN. § 55-248.9:1.
[43] *See* N.Y. REAL PROP. LAW § 227-c (McKinney 2010).

stalking, in addition to domestic violence.[44] A second way these statutes differ in scope is that at least one state excludes public housing from the application of the statute.[45]

A tenant's statutory right to terminate his or her lease following an incident of domestic abuse comes in three different forms: (1) termination by court order;[46] (2) termination by notice to the landlord;[47] and (3) as an affirmative defense against a claim brought by the landlord in court.[48] Regardless of the form of the statutory provision, all of these provisions address the requirements for termination and the effect of the termination for the tenant and co-tenants.

The requirements provided in the various state statutory provisions vary widely from state-to-state. Generally, however, most statutory provisions require the tenant to send written notice to the landlord along with some evidence that the tenant is a victim of domestic abuse. The notice commonly requires the tenant to state that relocation is necessary to avoid some imminent threat of violence and to give a date of termination.[49] Most states require the tenant to give the landlord at least thirty days' notice;[50] however, the required notice period can be as high as forty-five days[51] and as low as three days.[52] The evidence of abuse permitted may be limited solely to a protection or restraining order,[53] or may include a number of eligible forms of proof, such as a police report, medical documentation, or documentation from a certified domestic-violence specialist or social worker.[54] In addition to the required proof, the tenant is generally required to make his or her request for termination within either sixty or ninety days from the date of the incident,[55] or anytime during which the order of protection is in effect.[56]

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[44] *See* CAL. CIV. CODE § 1946.7; N.C. GEN. STAT. ANN. § 42-40(4) (West 2010). Illinois has an even broader scope than most states. *See* 765 ILL. COMP. STAT. ANN. 750/10 (West 2011) (definition of sexual violence).
[45] 765 ILL. COMP. STAT. ANN. 750/35.
[46] *See* N.Y. REAL PROP. LAW § 227-c.
[47] *See* COLO. REV. STAT. ANN. § 38-12-402(2)(a) (West 2010); IND. CODE ANN. § 32-31-9-12 (West 2010); N.J. STAT. ANN. § 46:8-9.6 (West 2010).
[48] *See* 765 ILL. COMP. STAT. 750/15.
[49] *See* MINN. STAT. ANN. § 504B.206(1)(a) (West 2010). In at least one state, a tenant who attempts to terminate his or her lease based upon a false report will be liable to the landlord for treble the landlord's damages. ARIZ. REV. STAT. ANN. § 33-1318(H) (2010).
[50] *See* N.C. GEN. STAT. ANN. § 42-45.1(a) (West 2010); IND. CODE ANN. § 32-31-9-12(b); N.J. STAT. ANN. § 46:8-9.7(a).
[51] *See* UTAH CODE ANN. § 57-22-5.1(4)(c) (West 2010).
[52] *See* 765 ILL. COMP. STAT. 750/15(a)(2).
[53] *See* N.Y. REAL PROP. LAW § 227-c(1) (McKinney 2010); WASH. REV. CODE § 59.18.575(1)(b) (West 2010).
[54] *See* N.J. STAT. ANN. § 46:8-9.6; CAL. CIV. CODE § 1946.7(b) (West 2010) (requiring either a protective or restraining order, or a police report).
[55] CAL. CIV. CODE § 1946.7(c) (60 days); COLO. REV. STAT. ANN. § 38-12-402(2)(a) (West 2010) (same); WASH. REV. CODE § 59.18.575(b).
[56] N.Y. REAL PROP. LAW § 227-c(2)(a).

Under these statutes, once a tenant terminates his or her lease, the tenant is no longer responsible for the remaining rent due under the lease or any penalties for terminating the lease early. In most states, the tenant will still be responsible for paying at least the rent as prorated to the date of termination.[57] However, if the tenant has not yet moved into the apartment, the tenant will not be required to pay any rent if the tenant notifies the landlord fourteen days before the occupancy is set to begin.[58] Further, depending on the state, a co-tenant's tenancy, including a perpetrator–tenant who is excluded by court order from the premises, will either continue or cease with the termination.[59] Interestingly, in at least one state, the perpetrator, whether a tenant or not, may be civilly liable to the landlord for losses the landlord suffered as a result of the termination.[60]

The statutory provisions protecting the tenant from discrimination based upon the tenant's status as a victim of domestic abuse or following an incident of domestic abuse also come in a variety of forms. First, some statutes simply prohibit the landlord from evicting a tenant who calls the police in response to an incident of domestic abuse or other conduct.[61] Another version of the statute provides that the "landlord shall not terminate a tenancy, fail to renew a tenancy, refuse to enter into a rental agreement, or otherwise retaliate in the rental of a dwelling based" on either: (1) the tenant's status as a victim of domestic abuse, sexual assault, or stalking; or (2) the tenant or applicant's act of terminating the rental agreement in accordance with these statutes.[62] Finally, at least one state statute allows a landlord to evict a tenant if the domestic abuse occurs on the premises and either: (1) the tenant fails to provide the landlord with proof that the tenant is a victim of domestic abuse; or (2) the tenant fails to notify the landlord that he or she has allowed the perpetrator to return to the premises in violation of a protective order.[63]

Many of the states also have provisions relating to the right of tenants to compel a change of locks and to preserve the confidentiality of information.

A drafting committee could consider whether to revise ULTRA to allow victims of domestic abuse to terminate leases. This change is the one change that had the near unanimous support of the stakeholders.

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[57] *See* N.J. STAT. ANN. § 46:8-9.7; IND. CODE ANN. § 32-31-9-12(d) (West 2010); N.C. GEN. STAT. ANN. § 42-45.1(b) (West 2010).
[58] *See* N.C. GEN. STAT. ANN. § 42-45.1; IND. CODE ANN. § 32-31-9-12(d).
[59] *See* CAL. CIV. CODE § 1946.7(f) (tenancy continues); N.C. GEN. STAT. ANN. § 42-45.1(c) (same); N.J. STAT. ANN. § 46:8-9.7(c) (tenancy terminates); ARIZ. REV. STAT. ANN. § 33-1318(J) (2010) (same).
[60] *See* ARIZ. REV. STAT. ANN. § 33-1318(I).
[61] *See* MINN. STAT. ANN. § 504B.205(2)(a)(2) (West 2010); COLO. REV. STAT. ANN. § 38-12-402(1) (West 2010).
[62] N.C. GEN. STAT. ANN. § 42-42.2; *see also* WASH. REV. CODE § 59.18.580(1) (West 2010).
[63] *See* VA. CODE ANN. § 55-248.31(D) (West 2010).

There may be additional instances in which tenants should be allowed to terminate a lease prior to the end of the term as well. These include tenants who must move to an assisted-living facility or a nursing home and tenants called into military service (if the federal law is not considered sufficient).

A few states have provisions that allow senior citizens, but rarely other persons, to terminate their leases early when they are no longer capable of living on their own.[64] Additionally, some statutory provisions permit senior citizens to terminate their lease when they become eligible for housing in a senior-citizen community[65] or when they are moving into the residence of a family member.[66] These statutory provisions generally address the requirements for the notice to the landlord, including some sort of proof of the need to terminate the lease and the amount of notice the tenant must give to the landlord.[67]

In states with statutory provisions beyond the existing federal laws applicable to military personnel, a military service member wish to terminate his or her tenancy early must give notice and independent proof of the necessity to relocate, such as by producing military orders, to the landlord.[68] The state provisions permitting service members to terminate their leases early are generally limited to the situations where the service member: (1) receives permanent change orders that require relocation thirty-five miles or more away; (2) receives temporary change orders that will last more than three months and will require relocation thirty-five miles or more away; (3) is discharged from active duty; (4) is ordered or eligible to live on base and thus would lose the allowance for housing; and (5) will be deployed for more than ninety days.[69] At least one state also allows a deceased service member's family members to terminate their lease following the death of their family member.[70]

In some cases leases restrict the occupancy of rented premises to the tenant and members of the tenant's immediate family. What consequence should follow if the tenant needs a non-related care-giving companion to move into the rental

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[64] *See* MICH. COMP. LAWS ANN. § 554.601a(1)(b) (West 2010) (permitting termination of the lease when "[t]he tenant becomes incapable during the lease term of living independently, as certified by a physician in a notarized statement"); NEV. REV. STAT. § 118A.340(1) (2010) (limited to persons sixty years and older); N.J. STAT. ANN. § 46:8-9.2 (limited to persons sixty-two years and older); N.Y. REAL PROP. LAW § 227-a(1) (McKinney 2010) (same).

[65] *See* MICH. COMP. LAWS ANN. § 554.601a(1)(a).

[66] *See* N.Y. REAL PROP. LAW § 227-a.

[67] *See* NEV. REV. STAT. § 118A.340; N.J. STAT. ANN. § 46:8-9.2; N.Y. REAL PROP. LAW § 227-a.

[68] *See* GA. CODE ANN. § 4-7-22(d) (West 2010); N.C. GEN. STAT. ANN. § 42-45(a) (2010).

[69] *See* GA. CODE ANN. § 4-7-22(b). The distance the statute requires the service member to move is greater for some statutes. *See, e.g.*, N.C. GEN. STAT. ANN. § 42-45(a) (fifty miles).

[70] *See* GA. CODE ANN. § 4-7-22(d).

unit? Arguably the restriction relating to family members should not apply, or the tenant should be able to terminate the lease. With the aging of America, issues relating to the rights of seniors become increasingly important.

URLTA does not address two related issues: (1) termination of a lease by the tenant's death; and (2) the right of a surviving spouse (or perhaps other occupants) to continue the lease after the tenant's death. Generally, a tenant's death does not terminate a lease,[71] and there may in fact be good reasons for the tenant's estate to continue the lease for at least some time. But at some point, there may be a need to terminate the lease. There may also be a need to allow the spouse to remain in the rental unit even though the spouse is not the tenant.[72]

The states statutes addressing termination at the tenant's death have a number of provisions in common. These provisions deal with the following issues: (1) the types of terminable leases; (2) a notice requirement; and (3) waiver of the right of termination. With respect to what types of leases are terminable at death, states are sharply divided with positions ranging from applicability to all leases to no leases other than tenancies-at-will.[73] States statutes concerning notice requirements are more consistent, which typically provide that the lease will terminate two months after the landlord receives notice.[74] At least two states address whether the right to termination can be waived in the lease, with one state answering affirmatively and the other in the negative.[75]

Finally, the drafting committee should consider whether a tenant should be permitted to terminate a lease when the premises become unsafe due to criminal activity. Instead of giving a tenant the right to terminate, the laws of several states try to solve this problem by emphasizing termination of the lease of the tenant engaged in criminal activity.[76] Nevertheless, Wisconsin allows for termination by the tenant if the tenant or a child of the tenant faces an imminent

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[71] *See, e.g.*, S.D. CODIFIED LAWS § 43-32-23 (West 2010) (providing that leases are not terminable upon death of the tenant except with tenancies-at-will).

[72] See also a related discussion under the section on abandonment, below.

[73] *See, e.g.*, MINN. STAT. ANN § 504B.265 (2010) (providing that all leases are terminable other than a tenancy-at will); N.J. STAT. ANN. § 46:8-9.1 (2010) (providing that only leases for a term of one or more years are terminable); S.D. CODIFIED LAWS § 43-32-23 (2010) (providing that only tenancy-at-will leases are terminable); WISC. STAT. ANN. § 704.165 (2010) (providing that all leases are terminable at death).

[74] MINN. STAT. ANN § 504B.265 (two months after written notice, terminable by either landlord or tenant's estate); WISC. STAT. ANN. § 704.165 (2010) (60 days after landlord receives notice or becomes aware of tenant's death). *See also* N.J. STAT. ANN. § 46:8-9.1 (2010) (40 days after written notice).

[75] MINN. STAT. ANN § 504B.265 (providing that any attempted waiver of the right of termination shall be void and unenforceable); N.J. STAT. ANN. § 46:8-9.1 ("The provisions of this act shall not apply to any lease the terms whereof shall explicitly provide otherwise.").

[76] *See, e.g.*, N.C. GEN. STAT. ANN. §§ 42-59–76 (West 2010) (recognizing that residents' rights of peaceful, safe, and quiet enjoyment of their homes are often jeopardized by criminal activity of others, but only providing remedies aimed at removing the criminal tenants instead of allowing other residents to terminate).

threat of serious physical harm from another while remaining on the premises, so long as the tenant provides notice to the landlord with a certified copy of certain documents, e.g., a protective order, criminal complaint alleging sexual misconduct, etc.[77] A narrower statute from another state allows for termination only when the tenant has been threatened with a deadly weapon by another tenant, who is consequently arrested, and the landlord has failed to file an unlawful detainer action against the malfeasant tenant.[78] Similarly, there is a right to terminate when the landlord threatens the tenant with a deadly weapon.[79] At least one other state has a law providing that every lease includes an implied covenant between landlord and tenant that neither will allow criminal activity on the premises, but only provides a remedy for breach for the landlord, not the tenant.[80]

Any discussion of premises made unsafe due to criminal activity should address the question of whether a tenant can terminate a lease because a registered sex offender has moved into the building. A recent New York case has held that the tenant could terminate; otherwise the tenant would have to exercise constant vigilance to protect his three children, who would destroy his peaceful and quiet enjoyment of the premises expressly covenanted by the lease.[81] The court recommended legislative action to allow tenants to cancel their leases when a sex offender moves into their building. At least one other state allows landlords, but not tenants, to terminate a tenant's lease when the tenant allows a registered sex offender to occupy a residence that is located within a thousand feet of a school, pre-school, or daycare center.[82] A final consideration should be whether landlords who are registered sex offenders themselves should be able to knowingly rent to tenants with children, where the landlord resides in that same building.[83]

10. **Warranty of habitability:** As earlier noted, one of the major innovations of URLTA was the codification of the warranty of habitability. This innovation may have been one of the reasons ULTRA was not universally or broadly adopted, as the implied warranty for much of the 1970s was quite controversial. Now it has near universal acceptance.

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[77] WISC. STAT. ANN. § 704.16.
[78] WASH. REV. CODE ANN. § 59.18.352 (West 2010). For a statute allowing a tenant to terminate the lease of the offending tenant but not his/her own lease, *see Id.* § 59.18.510(1)–(4) (providing that where the criminal activity of a tenant is gang-related, any person residing within a one-block radius may demand the landlord commence an unlawful detainer action against the offending tenant).
[79] *Id.* § 59.18.354.
[80] MINN. STAT. ANN. § 504B.171.
[81] Knudsen v. Lax, 842 N.Y.S.2d 341, 350 (Jefferson County Ct. 2007).
[82] OHIO REV. CODE ANN. § 5321.051 (2010).
[83] At least one state has already prohibited such leases. *See* 720 ILL. COMP. STAT. 5/11-9.4 (2010).

Since URLTA was promulgated, courts and legislatures have addressed the scope of the warranty and the remedies tenants can obtain for a landlord's breach. This activity has led to a significant lack of uniformity among the states. For example, what is the appropriate measure of damages for breach of the warranty? States disagree over whether a tenant can recover benefit-of-the-bargain damages.[84] States also disagree over the proper measure of damages. Some states measure damages by reference to the property's fair rental value,[85] though the laws are often silent on how to ascertain fair market value.[86] Other states abate the amount of rent owed by the diminution of the tenant's use of the premises.[87] There is also disparate treatment of other associated issues, such as the repair-and-deduct remedy, and rent sequestration during the pendency of suits between the landlord and the tenant, as well as availability of tort damages to the tenant.[88]

The drafting committee should review the developments in the implied warranty since URLTA's initial drafting almost forty years ago and hopefully develop a set of uniform laws that could apply to all the issues arising from the warranty. At the Stakeholders Meeting there was consensus that this would be very useful. Needless to say, any reexamination of this warranty—which goes to the heart of the residential landlord–tenant relationship—must be extremely sensitive to the varying interests of landlords and tenants.

11. **Abandonment of Personal Property:** When a tenant vacates the property (or dies) leaving behind personal property in the rental premises, what are the

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[84] North Carolina and Iowa allow consequential damages alleged and proved. *See* Miller v. C.W. Myers Trading Post, Inc., 355 S.E.2d 189, 194 (N.C. Ct. App. 1987); IOWA CODE ANN. § 554.2715(1)–(2) (West 2010).

[85] Among others, Washington and Missouri adopted this approach. *Cf.* WASH. REV. CODE § 59.18.110(1)(b) (West 2010); King v. Moorehead, 495 S.W.2d 65, 76 (Mo. Ct. App. 1973).

[86] North Carolina determines damages by calculating the difference between the fair rental value of the property in a warranted condition and its unwarranted condition, provided that the damages do not exceed the total amount of rent. Cardwell v. Henry, 549 S.E.2d 587, 588–89 (N.C. Ct. App. 2001). On the other hand, Iowa allows tenants to recover incidental and consequential damages in addition to the damages equal to the difference between fair rental value of warranted and unwarranted premises. IOWA CODE ANN. § 554.2715(1)–(2).

[87] These measures are adopted in Utah and New Jersey. *See* Wade v. Jobe, 818 P.2d 1006, 1012–13 (Utah 1991), *abrogated on other grounds by* UTAH CODE ANN. §§ 13-11-1 to -23 (West 2010); Acad. Spires, Inc. v. Brown, 268 A.2d 556, 561–62 (N.J. Dist. Ct. 1970).

[88] Mississippi, Wyoming, Delaware, Georgia, Massachusetts, and Montana allow some form of tort damages for the breach of habitability and negligent maintenance of the leased premises. *See* Joiner v. Haley, 777 So.2d 50, 51–52 (Miss. Ct. App. 2000); Merrill v. Jansma, 86 P.3d 270, 287 (Wyo. 2004); New Haverford P'ship v. Stroot, 772 A.2d 792 (Del. 2001); Thompson v. Crownover, 381 S.E.2d 283, 284–85 (Ga. 1989); Young v. Garwacki, 402 N.E.2d 1045, 1049 (Mass. 1980); Willden v. Neumann, 189 P.3d 610, 613 (Mont. 2008).
Connecticut, Virginia, and Kentucky allow damages only for the breach of contract. Bourke v. Stamford Hosp. 696 A.2d 1072 (Conn. Super. Ct. 1996); Deem v. Charles E. Smith Mgmt., Inc. 799 F.2d 944, 945–46 (4th Cir. 1986); Jaimes v. Thompson, 318 S.W.3d 118, 120 (Ky. Ct. App. 2010).

landlord's obligations to take possession of that property? And, what must the landlord do, if anything, to preserve it? Can the landlord sell the property and apply the proceeds to any unpaid rents? None of these issues are currently addressed by URLTA, but are addressed by the laws of many states.

The statutes addressing these issues vary significantly in substance but do have some commonalities. For example, many states require the landlord to hold the property and take reasonable care in the handling or storing of it.[89] However, some states do not impose such a duty of care[90] and at least one state expressly provides that the landlord has no duty at all with respect to abandoned property.[91] States also differ greatly on the period of time the landlord must hold the property[92] and where it can be held.[93] Although most states allow the landlord to sell the property after a period of time, states are divided on how the landlord can apply the proceeds. Some states allow the landlord to apply proceeds to any debt owed by the tenant;[94] other states only allow the landlord to apply the proceeds to the costs of the sale and storage.[95]

As for deceased tenants, the law is also split. However, most state laws provide a more elaborate procedural requirement before the property is treated as abandoned. At least one state simply treats the tenant's property as abandoned where there is no next of kin.[96] More common is a statute allowing a landlord to request a "contact person" to receive the property, and if that option is not available, the property is essentially treated as abandoned.[97] Virginia law simply provides more time for an authorized person to claim the property than would otherwise be available under its abandonment statute.[98]

A drafting committee should examine these issues and others surrounding the tenant's vacation of the property, in light of the divergence in state law, and there was consensus at the Stakeholders meeting that this would be useful

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[89] *See, e.g.*, ARIZ. REV. STAT. ANN. § 33-1370(D)–(G) (2010); MONT. CODE ANN. § 70-24-430 (2010).
[90] *See, e.g.*, VA. CODE ANN. § 55-248.38:1–2 (West 2010) (landlord has no duty of reasonable care and is not liable for risk of loss of the property); N.M. STAT. ANN. § 47-8-34.1 (West 2010) (no duty of reasonable care).
[91] ALA. CODE § 35-9A-423(d) (West 2010).
[92] *Compare* VA. CODE ANN. § 55-248.38:1–2 (West 2010) (must hold for 24 hours after termination), *with* MINN. STAT. ANN. § 504B.271 (West 2010) (must hold for 28 days after receiving notice of abandonment). *See also* ARIZ. REV. STAT. ANN. §§ 33-1370(D)–(G) (must hold for 10 days after abandonment).
[93] *See* ARIZ. REV. STAT. ANN. §§ 33-1370(D)–(G) (must first try to store property in the dwelling unit); ME. REV. STAT. ANN. tit. 14, § 6013 (2010) (must place property in storage); N.C. GEN. STAT. ANN. § 42-25.9(g) (West 2010) (may move the property for storage).
[94] UTAH CODE ANN. § 78B-6-816(2) (West 2010).
[95] WISC. STAT. ANN. § 704.05 (West 2010).
[96] *See* MD. CODE ANN., REAL PROP. § 8-405 (West 2010).
[97] *See, e.g.*, N.M. STAT. ANN. § 47-8-34.2 (West 2010); OKLA. STAT. ANN. tit. 41, § 130.1 (West 2010).
[98] VA. CODE ANN. § 55-248.38:3 (West 2010) (treating property as abandoned after 30 days).

12. **Foreclosures:** Federal law, due to expire in the near future, provides some protection for tenants against quick termination of leases when the rental property is foreclosed.[99] Generally, tenants are protected for at least ninety days following foreclosure should the buyer at the foreclosure sale wish to terminate the tenancy. *The Study Committee believes that some protection of tenants is appropriate where the rental building has been foreclosed upon and recommends that a drafting committee consider this issue. At the Stakeholders Meeting, however, L.H. Wilson said that banks would very much prefer extension of existing federal legislation on this topic and would be concerned if state legislation addressed the topic.*

13. **Acceptance of rent not a waiver of claims against the tenant:** Should a landlord's acceptance of rent from a tenant constitute a waiver of claims the landlord otherwise has against the tenant for tenant's failure to comply with the terms of the lease? At least one state clarifies the law to the effect that acceptance of the re*nt is not a waiver if the landlord explicitly notifies the tenant that acceptance does not constitute waiver.*[100] *A related issue is whether a tenant's acceptance of the landlord's return of his or her security deposit works to waive the tenant's claims for wrongful eviction or for other claims either under the Act or the lease agreement.*[101] *The Study Committee recommends that any drafting committee consider these issues as well.*

14. **Landlord's right to inspect premises:** It is fairly common for written leases to allow landlords the right to enter and inspect a tenant's premises after providing the tenant reasonable notice.[102] Inspection might be necessary to allow a landlord to inspect for infestations or leakages, by way of example. Likewise many written leases provide that during specified hours, a landlord may enter to make repairs. This type of lease clause avoids a tenant's claim that the landlord's entry for these purposes is an actual eviction allowing the tenant to terminate the lease. The drafting committee should consider this type of provision in a new act, at least as default law.

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[99] Protecting Tenants at Foreclosure Act of 2009, 12 U.S.C.A. §§ 5201, 5220 (West 2011) (scheduled to expire on December 31, 2014).

[100] In Virginia, provided the landlord has given a written notice to the tenant that the rent will be accepted with reservation, the landlord may accept full payment of rent maintaining claims against the tenant. VA. CODE ANN. § 55-248.34:1. In addition, in Minnesota, the parties may agree in writing that the partial payment of rent may be applied to the balance due but does not waive the landlord's action to recover possession for nonpayment of rent. MINN. STAT. ANN. § 504B.291(1)(b) (West 2010).

[101] *See* Horne v. TGM Assocs., L.P., No. 1070766, 2010 WL 3290983, at *7 (Ala. Aug. 20, 2010) ("[T]he mere fact that the plaintiffs accepted the return of their security deposits and moved out of their apartments does not necessarily mean that they voluntarily terminated their leases.").

[102] ME. REV. STAT. ANN. tit. 14, § 6025 (2009); MINN. STAT. ANN. § 504B.211; N.M. STAT. ANN. § 47-8-24 (West 2010); VA. CODE ANN. § 55-248.18(A).

15. **Ability to award attorney fees:** Many states have enacted statutes with respect to the award of attorney fees in two categories: (1) to the prevailing party in an action arising out of the lease agreement; and (2) to the prevailing party where the lease provides that the tenant is to pay the landlord's attorney fees. In the first category, several states allow the prevailing party to be awarded reasonable attorney's fees. There is a division of law on the issue, as one group of states has laws providing that the prevailing party "shall" be awarded fees,[103] while the other group's laws provide that the prevailing party "may" be awarded fees.[104]

    As for lease provisions providing that the tenant shall pay the landlord's attorney's fees in certain circumstances, such as a breach of the lease by the tenant, state laws again generally fall into one of two groups. The first group's laws provide that in such cases, the court will read into the lease an identical provision in favor of the tenant and against the landlord.[105] The second group's laws provide that the provision will be void without a similar provision against the landlord.[106] Although there was no consensus that any revision should address the issue of attorney fees, the drafting committee should consider addressing these types of provisions.

16. **Retaliatory eviction:** URLTA contains a section specifying when a tenant may defend against an eviction on the theory that the landlord's eviction was in retaliation of a tenant's otherwise lawful activities, which may need some clarification. For example, states with similar statutory provisions have clarified either by statute or through litigation that the landlord must have knowledge of the tenant's protected action in order for the tenant to succeed on a claim of retaliatory eviction.[107] Additionally, there is a lack of consensus on whether the tenant must prove that the retaliatory basis for the eviction was the sole basis for eviction[108] or whether it is sufficient that the retaliatory basis was the predominant basis for the eviction.[109]

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[103] *See* IDAHO CODE ANN. § 6-324; N.M. STAT. ANN. § 47-8-48; OKLA. STAT. ANN. tit. 41, § 105 (West 2010).
[104] *See* IOWA CODE § 562A.12 (2010); MD. CODE ANN., REAL PROP. §§ 8-203, 206, 208.1, 208.2, 215 (West 2010) (listing the types of actions where the tenant would be awarded fees).
[105] *See* MINN. STAT. ANN. § 504B.172; N.Y. REAL PROP. LAW § 234 (McKinney 2010).
[106] *See* ARIZ. REV. STAT. ANN. § 33-1315 (2010); GA. CODE ANN. § 47-7-2(c) (West 2010).
[107] *See, e.g.*, VA. CODE ANN. § 55-248.39(A) ("[A] landlord may not retaliate by increasing rent or decreasing serices or by bringing or threatening to bring an action for possession or by causing a termination of the rental agreement . . . after he has knowledge that . . . ."); Leeth v. J & J Props., No. 2090758, 2010 WL 4371355, at *4 (Ala. Civ. App. Nov. 5, 2010).
[108] *See* Am. Mgmt. Consultant, LLC. v. Carter, 915 N.E.2d 411, 426 (Ill. App. Ct. 2009); Patterson v. Dykins, No. HDSP-148040, 2008 WL 5050635, at *3 (Conn. Super. Ct. Nov. 10, 2008) (holding that the defense of retaliatory eviction failed where it was not the sole basis for the eviction).
[109] MASS. GEN. LAW ANN. ch. 186, § 18 (West 2010); VA. CODE ANN. § 55-248.39(D); Bldg. Monitoring Sys., Inc. v. Paxton, 905 P.2d 1215, 1216–18 (Utah 1995).

In addition to these issues, many states have expanded upon the tenant activities, which are protected under this section. For example, some states protect a tenant who: (1) testifies against the landlord in court;[110] (2) institutes, defends, or prevails in a lawsuit against the landlord relating to the tenancy;[111] (3) makes a fair housing complaint;[112] (4) requests repairs that do not amount to a breach of the warranty of habitability;[113] (5) exercises his or her rights under the lease agreement;[114] (6) exercises his or her rights under the domestic abuse provisions;[115] or (7) refuses to agree to the landlord's imposition of an additional rule or regulation after the tenancy has begun.[116] Additionally, some states have also expanded the situations when the landlord may lawfully seek eviction or increase the rent, despite a retaliatory motive to when: (1) the tenancy was terminated for cause;[117] (2) the rent increase applied uniformly to all tenants;[118] and (3) the rent increase was supported by reasonable grounds.[119]

CONCLUSION

With respect to many of the foregoing issues, state law is either nonexistent or in conflict. The Study Committee therefore believes that there is a need for greater uniformity in the law with respect to issues affecting the landlord-tenant relationship. While landlords, as a class, do not necessarily move across state lines (although there are many large landlords with holdings in multiple states), tenants, as a class, often do, particularly in such a mobile society as we have in the United States.

At this stage the Study Committee perceives no changes to URLTA that would require changes in federal law or regulations.

The Study Committee recognizes that there are many interest groups with a stake in landlord–tenant law. Any drafting committee hoping to create a successful product must consult these groups and draw them into the drafting process. The staff of the conference has compiled a possible list of observers. The list is long and, of course, many of the potential observers suggested are not likely to want to participate. A small sample includes: AARP, ABA Commission of Domestic Violence, the ABA relevant sections, some

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[110] *See* N.M. STAT. ANN. § 47-8-39(6) (West 2010); VA. CODE ANN. § 55-248.39(A)(iv).
[111] *See* NEV. REV. STAT. ANN. § 118A.510(1)(e) (West 2010); N.M. STAT. ANN. § 47-8-39(5).
[112] *See* ME. REV. STAT. ANN. tit. 14, § 6001(3)(e) (2009); N.M. STAT. ANN. § 47-8-39(4).
[113] *See* CONN. GEN. STAT. ANN. § 47a-20(3) (West 2010). *But see* Casa Blanca Mobile Home Park v. Hill, 963 P.2d 542, 546–47 (N.M. Ct. App. 1998) (holding that New Mexico Uniform Owner–Resident Relations Act ("UORRA") did not protect tenant from retaliatory acts after tenant complained about noisy neighbors).
[114] *See* ME. REV. STAT. ANN. tit. 14, § 6001(3)(c); N.C. GEN. STAT. ANN. § 42-37.1(4) (West 2010).
[115] *See* IND. CODE ANN. § 32-31-9-8(a) (West 2010).
[116] *See* NEV. REV. STAT. ANN. § 118A.510(1)(f).
[117] *See* NEV. REV. STAT. ANN. § 118A.510(3)(b).
[118] NEV. REV. STAT. ANN. § 118A.510(3)(d).
[119] WASH. REV. CODE. ANN. § 59.18.250 (West 2010).

representatives of colleges and universities; the American College of Real Estate Lawyers, American Tenants Association, Battered Women's Justice Project, Institute of Real Estate Management, JEB Real Property Acts, National Affordable Housing Managements Association, National Apartment Association, National Association of Residential Property Managers, National Center on Domestic and Sexual Violence, National Coalition Against Domestic Violence, National Network to End Domestic Violence, National Property Management Association, US DOB-Violence Against Women Office, American Apartment Owners Association, National Association of Independent Landlords, Building Owners and Managers Association International, National Tenant Network, National Alliance of HUD Tenants, National Low Income Housing Coalition, and groups representing legal services.

As to the issue of enactability, the predominant view is that the comprehensive revision that it recommends would be as enactable, if not more so, than a more targeted revision. While, as earlier noted, the conference's real estate projects historically have not been as widely adopted as products in other areas, no one suggested that a revised ULTRA would be any the less successful than the 1972 version.

In summary, the Study Committee recommends that a drafting committee be formed to undertake a comprehensive revision of ULTRA which revision could address any or all of the issues discussed in this report or such other issues as the drafting committee deems appropriate.

Respectfully submitted:

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