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A Lawyer's Guide to the South Carolina Residential Landlord and Tenant Act

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A LAWYER'S GUIDE TO THE SOUTH CAROLINA RESIDENTIAL LANDLORD AND TENANT ACT

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I. OVERVIEW

At common law, a curious blending of principles from both contract and property law governs the landlord and tenant relationship. While a lease is a contract, it is also an agreement for the transfer of an estate. South Carolina traditionally has preserved a distinction between the property law and contractual relationships of the landlord and tenant and has treated the tenant's rental obligation as one arising solely out of the conveyance of the estate, independent from performance by the landlord of other contractual obligations contained within the lease agreement.[1]

The South Carolina Residential Landlord and Tenant Act (RLTA),[2] which governs most residential rental agreements entered into or renewed on or after July 8, 1986, alters this traditional relationship. The RLTA shifts residential South Carolina

1. *See* Rowland & Sons, Inc. v. Bock, 150 S.C. 490, 148 S.E. 549 (1929)(landlord breach of agreement to alter does not permit tenant to vacate); Williams v. Salmond, 79 S.C. 459, 460, 61 S.E. 79, 79 (1908)("Any obligation to put the property in repair . . . must be imposed by some contract apart from the mere lease of the land for a given term."); Ripley v. Wightman, 15 S.C.L. (4 McCord) 447 (1828); *see also* Mallard v. Duke, 131 S.C. 175, 126 S.E. 525 (1925). *But cf.* Burkhalter v. Townsend, 139 S.C. 324, 138 S.E. 34 (1927)(contract duty to mitigate imposed upon landlord in action for rent). A detailed analysis of the relationship between contract and property law in the landlord and tenant relationship may be found in Chase & Taylor, *Landlord and Tenant: A Study in Property and Contract*, 30 VILL. L. REV. 571 (1985) and the articles cited therein. *See generally* I AM. LAW OF PROPERTY 202-05 (A. Casner ed. 1952).

2. S.C. CODE ANN. §§ 27-40-10 to -940 (Law. Co-op. Supp. 1987).

landlord and tenant law significantly from the treatment of certain obligations as duties arising solely from a conveyance of property toward the treatment of all obligations, including those imposed by statute, as duties arising from a bilateral contract. The most apparent result of this shift in orientation is that under the RLTA, for the first time in South Carolina, a tenant's duty to pay rent is not dependent solely upon receiving possession of the premises; it is conditioned also upon continued performance by the landlord of statutory and contractual obligations to maintain the premises.[3]

The RLTA also should remove from South Carolina residential landlord and tenant law the last vestiges of *interesse termini*, a peculiar common-law doctrine that distinguishes between creation of the contractual and property law relationships and holds that the landlord and tenant relationship cannot exist until the tenant actually enters the premises.[4] Furthermore, the RLTA imposes an obligation characteristic of contract law to act in good faith[5] and clarifies the landlord's duty arising out of contract law to mitigate damages, even for breach of the traditional property law obligation to pay rent.[6]

The RLTA is modeled after, but deviates substantially from, the Uniform Residential Landlord and Tenant Act.[7] Its express purpose is "to simplify, clarify, modernize and revise" South Carolina landlord and tenant law and "to encourage landlords and tenants to maintain and improve the quality of housing."[8] Included among the changes enacted are the adoption of limited restraints on retaliatory eviction and other retaliatory actions by a landlord,[9] a change in the status of a hold-over ten-

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3. *See infra* notes 96-119 and accompanying text.

4. *See infra* notes 45-51 and accompanying text.

5. S.C. CODE ANN. § 27-40-220 (Law. Co-op. Supp. 1987).

6. *See infra* notes 227-34 and accompanying text.

7. 7B U.L.A. 427 (1972). A bill based upon the Uniform Residential Landlord and Tenant Act was introduced in the South Carolina House of Representatives in March 1981, *see* I 1981 H.R.J. 1092 and H.R. 2539, 104th Gen'l Assembly, 1st Sess. (1981), but never was reported out of committee. Another bill, introduced in February 1983, also failed to reach the floor of the House. *See* I 1983 H.R.J. 1116 and H.R. 2518, 105th Gen'l Assembly, 1st Sess. (1983). The bill ultimately adopted was introduced in January 1985 as H.R. 2119. It was approved by the House in May 1985, amended by the Senate in February 1986, and ratified by both houses as amended in March 1986.

8. S.C. CODE ANN. § 27-40-20(b) (Law. Co-op. Supp. 1987).

9. *See infra* notes 256-75 and accompanying text.

ant from a tenant-at-will to a tenant for a new term,[10] and, arguably, a significant, although perhaps unintended, broadening of the landlord's exposure to tort claims by a tenant who suffers personal injury on the leased premises.[11]

The purpose of this Article is to review the RLTA and the many new concepts it incorporates into the landlord and tenant relationship under South Carolina law. Following this overview and a brief description of the coverage of the RLTA in Part II, Part III considers the extent of agreement necessary to create a landlord and tenant relationship under the RLTA, the expressed and implied terms of that agreement, and the tenant's right to demand actual possession. Part IV focuses upon the duties, rights, and remedies that exist during the landlord and tenant relationship, including the rights of either party to terminate or seek damages in particular circumstances. The relationship of the parties after either party exercises a right to terminate, or upon abandonment or expiration of the rental agreement, is described in Part V. In Part VI, certain procedural rules included in the RLTA are discussed. In the course of this review, particular attention is given to ambiguous provisions of the RLTA, for which additional clarification appears appropriate to satisfy the stated goals of the legislature in its enactment.

II. COVERAGE OF THE SOUTH CAROLINA RLTA

The RLTA governs all rights and obligations of parties to any "rental agreement" for a "dwelling unit" located in South Carolina.[12] The term "rental agreement" is defined broadly in the RLTA to include "all agreements, written or oral, . . . embodying the terms and conditions concerning the use and occupancy of a dwelling unit and premises."[13] A "dwelling unit" includes any "structure or the part of a structure that is used as a home, residence, or sleeping place by one person who maintains a household or by two or more persons who maintain a common

10. *See infra* notes 252-55 and accompanying text.

11. *See infra* notes 139-52 and accompanying text.

12. S.C. CODE ANN. § 27-40-110 (Law. Co-op. Supp. 1987).

13. *Id.* § 27-40-210(12). The limitation that rental agreements must concern the occupancy, as well as the use, of a dwelling unit excludes easements and profits from the coverage of the RLTA.

household."[14] Thus, any agreement concerning the use and occupancy of a premises, including a mobile home,[15] as a sleeping place by a person maintaining a household on the premises will be governed by the RLTA, unless one of eight specific exceptions under section 27-40-120 applies.[16]

Prior common-law and statutory principles of landlord and tenant law continue to govern all tenancies not specifically included within the scope of the RLTA. A threshold determination regarding the nature of use of the premises is, therefore, necessary to determine whether the RLTA will apply. If the premises are to be used as a dwelling unit, as defined under the RLTA, and if the use is not of a type specifically excluded from coverage of the RLTA, then the appropriate analysis under the RLTA is mandatory, and the RLTA displaces the traditional South Carolina rules regarding the creation and existence of a tenancy.

III. CREATION OF THE LANDLORD AND TENANT RELATIONSHIP

Two distinctions exist between the RLTA and prior law regarding the creation of the landlord and tenant relationship. First, the RLTA provides new principles for determining the existence and terms of a contractual relationship between the parties. Second, in residential situations, the RLTA eliminates the common-law requirement of an actual entry prior to recognition of the tenancy.

A. Formation and Contents of the Rental Agreement

The RLTA applies only to those tenancies created by a written or oral rental agreement between the landlord and tenant.[17] A sufficient rental agreement apparently needs only to

14. *Id.* § 27-40-210(3).

15. *Id.*

16. Residences not subject to the RLTA include certain institutional residences such as at hospitals and educational institutions, occupancy under contracts of sale for the dwelling unit, transient occupancy of hotels and similar rooms, occupancy by an employee conditioned upon employment in and about the premises, occupancy by the owner of a condominium or the holder of a proprietary lease in a cooperative, occupancy of premises used primarily for agricultural purposes, and occupancy of premises governed by the Vacation Time Sharing Plan Act. *Id.* § 27-40-120.

17. *See* §§ 27-40-110, -210(12).

identify the dwelling unit and provide, in some manner, for its use and occupancy by a tenant.[18] The parties may expressly agree to additional provisions of the rental agreement, or provisions may be supplied by the RLTA or by a writing signed by only one party if the other party has partially performed in the manner specified by the RLTA.[19]

Even terms once considered "essential" to a valid lease now may be implied. If rent is not expressly agreed upon, the rental agreement does not fail. Instead, the RLTA will imply a rental amount equal to the fair market rental value of the premises.[20] Terms for payment of rent also are supplied by the RLTA if not expressly set forth in the rental agreement.[21] Importantly, in the absence of a definite lease term, the RLTA provides for the creation of a month-to-month tenancy in nearly all cases.[22]

Under prior South Carolina law, the relationship of landlord and tenant is recognized only when there exists evidence of both contract and property law relationships. Some form of agreement between the parties typically reflects the contractual nature of the landlord and tenant relationship. The tenant's entry and possession are fundamental characteristics of the property law relationship.[23]

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18. *See id.*

19. The provisions of a written rental agreement may be enforceable for a term of not more than one year despite the failure of one party to sign and deliver the instrument. If the landlord accepts rent without reservation, a rental agreement signed and delivered only by the tenant is enforceable as if fully executed and delivered. Similarly, if the tenant accepts possession and pays rent without reservation, a rental agreement signed only by the landlord and delivered is enforceable. *Id.* § 27-40-320.

20. *Id.* § 27-40-310(b).

21. *Id.* § 27-40-310(c).

22. *Id.* § 27-40-310(d). The only exception is that a roomer who pays weekly rent is deemed to have a week-to-week tenancy in the absence of other express agreement. *Id.* The definition under § 27-40-210(13) of a roomer, as distinguished from other tenants, is unclear. Several states have adopted language more clearly defining a roomer as a person who occupies a dwelling unit that lacks a major bathroom or kitchen facility and who shares such a facility, defined as a bathtub or shower, toilet, refrigerator, stove, or kitchen sink, with other occupants. *See* Ky. Rev. Stat. § 383.545 (Supp. 1986); Nev. Rev. Stat. § 76-1410(12) (1986). Such a formulation is also a reasonable interpretation of South Carolina's definition.

23. Although there is authority that a tenancy may exist in the absence of a valid, express lease, if there has been actual entry and occupation, Columbia Ry., Gas & Elec. Co. v. Jones, 119 S.C. 480, 112 S.E. 267 (1922), the common law has required some form of agreement or consent to create the tenancy. Stewart-Jones Co. v. Shehan, 127 S.C. 451, 457, 121 S.E. 374, 376 (1924). *But see* S.C. CODE ANN. § 27-33-10(3) (Law. Co-op. 1976) (defining a tenant at will as a person occupying real estate without an agreement).

The necessary extent of the contractual relationship under prior South Carolina law, however, is uncertain. An agreement containing the "essential terms" of a lease is evidence of a tenancy when the lessee has made actual entry onto the premises[24] or is evidence of a lessor and lessee relationship prior to such entry by the lessee.[25] Courts have described the essential terms as a grant of possession and exclusive use of the premises, a definite rental amount, and a certain term.[26] An agreement merely transferring the "right to the possession and control" of land, however, also has been deemed sufficient evidence of the creation of a tenancy.[27] Indeed, even an agreement that is insufficient to constitute a valid lease may be a sufficient basis for a tenancy when followed by actual entry. The insufficiency of the agreement as a technical lease is no obstacle to a tenancy, because "entry and occupation under an invalid or defective lease will create the relation of the landlord and tenant."[28]

To distinguish the occupation of a tenant from that of a mere trespasser, each of these cases contemplates some form of consent. Confusion abounds, however, regarding the form that consent must take. Consent need not be in the form of a valid lease, which creates a contractual relationship of lessor and lessee[29] prior to entry. An agreement that is not a valid lease may be sufficient to form the contractual relationship necessary to support the creation of a tenancy following entry.

Thus, even in the absence of certain express terms that may be essential to a *lease*, which would create a contractual relationship of lessor and lessee prior to entry, sufficient contractual agreement still may exist to create a tenancy at the time of entry. For example, a landlord and tenant relationship may exist without an express contractual agreement regarding rent, which is an essential term of a lease. "If the relation of landlord and

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24. B-L-S Construction Co. v. St. Stephen Knitwear, Inc., 276 S.C. 612, 281 S.E.2d 129 (1981).

25. Wilcox v. Bostick, 57 S.C. 151, 35 S.E. 496 (1900).

26. *B-L-S Construction*, 276 S.C. 612,.281 S.E.2d 129; *Columbia Ry., Gas & Elec. Co.*, 119 S.C. 480, 112 S.E. 267.

27. Rakestraw v. Floyd, 54 S.C. 288, 32 S.E. 419 (1899). For further discussion of methods of creating a tenancy in South Carolina, see Spitz, *Is It Time to Reform Landlord Remedies in South Carolina?*, 34 S.C.L. REV. 787 (1983).

28. *Columbia Ry., Gas & Elec. Co.*, 119 S.C. at 491, 112 S.E. at 271.

29. For a discussion of differences between a lessee and a tenant, see *infra* notes 45-46 and accompanying text.

tenant existed between the plaintiff and the defendant, the law would imply an agreement to pay a reasonable compensation for the use of the property, in the absence of an express agreement to that effect."[30] Such distinction under prior law between a technical lease and other forms of consent that may sustain a tenancy have lent uncertainty to this area of the law. In contrast, the RLTA focuses primarily upon the intended purpose of an agreement to govern use or occupancy of a premises, rather than upon the technical inclusion of particular provisions. The RLTA thereby diminishes the uncertainty that may remain at common law regarding the existence of a sufficient contractual relationship to create the landlord and tenant relationship.

The RLTA also may subject a tenant to additional rules and regulations adopted by the landlord pursuant to section 27-40-520, which become part of the rental agreement by operation of section 27-40-210(12).[31] Such rules and regulations are not required to be physically attached to the rental agreement, but such a practice is advisable since the rules and regulations are enforceable only if the tenant "has notice of them at the time he enters into the rental agreement, or when they are adopted."[32]

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30. The South Carolina Terminal Co. v. South Carolina and Georgia RR Co., 52 S.C. 1, 21, 29 S.E. 565, 573 (1898).

31. The rules and regulations are enforceable only if:

(1) their purpose is to promote the convenience, safety, or welfare of the tenants in the premises, preserve the landlord's property from abusive use, or make a fair distribution of services and facilities held out for the tenants generally;

(2) they are reasonably related to the purpose for which they are adopted;

(3) they apply to all tenants in the premises in a fair manner;

(4) they are sufficiently explicit in their prohibition, direction, or limitation of the tenant's conduct to fairly inform him of what he must or must not do to comply;

(5) they are not for the purpose of evading the obligations of the landlord;

(6) the tenant has notice of them at the time he enters into the rental agreement, or when they are adopted.

S.C. CODE ANN. § 27-40-520(a) (Law. Co-op. Supp. 1987).

32. *Id.* In addition to giving notice of rules and regulations under § 27-40-520, a landlord is required to make several other disclosures prior to or at the time of entry into the rental agreement. If a landlord rents five or more adjoining dwelling units and calculates security deposits in different manners for different tenants, he must provide the standards for calculating security deposits to each prospective tenant before the rental agreement is reached. The landlord may provide this information directly or he may conspicuously post it on the premises or at the place at which rent is paid. The landlord may not be able to retain the full amount of the security deposit for damages incurred on the premises during the tenancy if he fails to provide the required information prior to

The landlord may adopt such rules and regulations after the rental agreement is entered into, but if they substantially modify the tenant's bargain, he must give notice to the tenant at the time of their adoption of a right to object. The regulations are unenforceable against any tenant who objects in writing to the landlord within thirty days after the regulations are adopted.[33]

This latter provision reverses the approach of the Uniform Residential Landlord and Tenant Act, which makes regulations enacted after entry into the rental agreement unenforceable unless the tenant expressly consents to them.[34] The South Carolina RLTA, instead, provides that the regulations are automatically enforceable unless the tenant expressly objects to the regulations within thirty days. Moreover, the thirty-day period runs from the date of the promulgation of the regulations, not from the date on which the tenant receives notice.

The RLTA provides that notice of the regulations and of the right to object must be given "upon adoption" of the regulations, but does not make clear the meaning of the term "upon adoption." If interpreted literally to mean that notice must be given on the day of promulgation, then a potential pitfall awaits the unwary landlord who delays notice for even a day. If the provision is interpreted instead to mean that the landlord may give notice within a reasonable time after promulgation, then the tenant effectively receives less than thirty days in which to object since the objection period runs from the date of promulgation, not notice. A practical interpretation may be to deem the date of delivery of the notice as the date of promulgation, thereby protecting both parties from unintended consequences.

Also left unresolved by the RLTA approach is the status of the rules and regulations during the thirty-day period prior to receipt of an objection. The statute does not expressly stay the effective date of regulations adopted pursuant to section 27-40-520 until the thirty-day period has expired. If the statute were

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entry into the rental agreement. *Id.* § 27-40-410(c).

Every landlord or person authorized to enter into a rental agreement on his behalf is required to disclose in writing the name and address of an owner or an agent of an owner authorized to receive service of process or other notices or demands. The information should be provided upon entry into the rental agreement and must be kept current throughout the term of the lease. *Id.* § 27-40-420.

33. *Id.* § 27-40-520(b).

34. UNIF. RESIDENTIAL LANDLORD AND TENANT ACT § 3.102(b), 7B U.L.A. 475 (1972).

interpreted, however, as permitting the regulations to take effect immediately upon promulgation, then the bargain of the rental agreement could be modified unilaterally by the landlord for the period prior to the tenant's objection. Thus, the better rule is that regulations adopted pursuant to section 27-40-520 do not take effect until the tenant consents to their enforcement or the thirty-day period for objection has expired.

In addition to supplying key provisions of the rental agreement not otherwise agreed upon by the parties, the RLTA may prohibit the enforcement of certain provisions that are included in an express agreement. A provision of a rental agreement or of a settlement between the parties may be deemed unconscionable when made. The court may refuse to enforce the unconscionable provision or may limit its application to avoid an unconscionable result. If the rental agreement is unconscionable in its entirety, the court may refuse to enforce any part of the rental agreement.[35]

Certain other provisions benefiting the landlord not only are unenforceable, but may give rise to actual and punitive damages against the landlord. Such prohibited provisions include any agreement by the tenant in the rental agreement to waive rights or remedies under the RLTA, to permit a confession of judgment on any claim arising out of the rental agreement, or to limit any liability of the landlord arising under law.[36]

To further discourage a landlord from even attempting to take advantage of a tenant who may not be aware of his legal right to challenge such provisions, the Uniform Residential Landlord and Tenant Act permits a tenant to recover actual

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35. S.C. CODE ANN. § 27-40-230 (Law. Co-op. Supp. 1987). Determining what constitutes an unconscionable lease provision is difficult in South Carolina. The court of appeals defined unconscionability under the Uniform Commercial Code in connection with a lease of personal property as "including the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms which are so oppressive that no reasonable person would make them and no fair and honest person would accept them." Jones Leasing, Inc. v. Gene Phillips & Assocs., 282 S.C. 327, 331, 318 S.E.2d 31, 33 (Ct. App. 1984). In a dissent to Litchfield Co. of S.C. v. Kiriakides, 290 S.C. 221, 349 S.E.2d 344 (Ct. App. 1986), Judge Gardner suggested that a finding of unconscionability under a commercial real estate lease depends upon a consideration of "all the circumstances of the case." *Id.* at 230, 349 S.E.2d at 350.

36. S.C. CODE ANN. § 27-40-330 (Law. Co-op. Supp. 1987). This section does not invalidate bona fide liquidated damages provisions for loss of rent from a tenant's early termination of a lease. *Id.* § 27-40-330(c).

damages, plus a statutory measure of punitive damages and attorney's fees, if the landlord deliberately includes any such provision in the rental agreement with knowledge that it is prohibited.[37] The South Carolina RLTA enacts an analogous provision for damages. However, the South Carolina provision is imprecise and subject to several interpretations.

Unlike the uniform version, the RLTA creates different penalties depending upon whether the inclusion of a provision known to be prohibited was deliberate or malicious.[38] A deliberate act seems to include all intentional acts, and distinctions between intentional and malicious acts are not unfamiliar. Indeed, South Carolina cases previously addressing the right to punitive damages have distinguished between intentional and malicious actions, noting that " '[o]ne may intentionally do an act which proves to be unlawful without the slightest design to do a wrong to anyone.' "[39]

However, it may be difficult in the context of section 27-40-330(b) to discern the difference between such situations in the absence of a more precise definition of deliberate and malicious acts. The landlord's liability, whether he acts deliberately or maliciously, arises only if he knows the provision to be unenforceable.[40] Under section 27-40-240(a)(3), a person knows a fact only if he has actual knowledge of it.[41] The difficult question then arises over whether a person who has actual knowledge that a provision is unenforceable can ever deliberately include that provision without also having some "design to do a wrong." For example, a landlord would have no apparent reason intentionally to include a confession of judgment, knowing it to be unenforceable, unless he had some "design to do a wrong."[42]

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37. UNIF. RESIDENTIAL LANDLORD AND TENANT ACT § 1.403(b), 7B U.L.A. 450 (1985).

38. S.C. CODE ANN. § 27-40-330(b) (Law. Co-op. Supp. 1987).

39. Cox v. Coleman, 189 S.C. 218, 200 S.E. 762 (1939) (quoting Kibler & S. Ry., 62 S.C. 252, 40 S.E. 556 (1901)). A malicious act, however, likely must be deliberate in every case. *See* Eaves v. Broad River Elec. Coop., Inc., 277 S.C. 475, 289 S.E.2d 414 (1982) (for purposes of malicious prosecution action, "Malice is defined as 'the deliberate intentional doing of a wrongful act without just cause or excuse.' ") (quoting Margolis v. Telech, 239 S.C. 232, 122 S.E.2d 417 (1961)).

40. S.C. CODE ANN. § 27-40-330(b) (Law. Co-op. Supp. 1987).

41. *Id.* § 27-40-240(a).

42. Arguably, a landlord could act without malice if he deliberately includes a provision, but has no intent to enforce the provision. Such a distinction, however, appears unnecessary if the remainder of § 27-40-330(b) is intended to limit a landlord's exposure

More significantly, section 27-40-330(b) imposes liability upon landlords who deliberately include an unenforceable provision in a rental agreement only if the landlord also "attempts to exercise the rights created by the agreement."[43] The apparent purpose of this proviso, which does not appear in the uniform version, is to limit the landlord's exposure to situations in which the landlord not only includes a prohibited provision in the rental agreement, but also actually attempts to enforce that prohibited provision.

A literal interpretation of the proviso as enacted, however, suggests a far different result. When a prohibited provision is deliberately included in the agreement, the RLTA, if literally interpreted, would impose liability upon the exercise of *any* rights created by *any* part of the rental agreement. Indeed, since unenforceable provisions presumably create no rights of the landlord under the rental agreement, there is a certain absence of precision, if not logic, in any other interpretation that would limit an attempt "to exercise the rights created by the agreement" to mean merely an attempt to enforce a prohibited provision.

Nevertheless, only this latter, more narrow, interpretation limits the landlord's exposure in a manner that gives any logical effect to the statutory language. Thus, it seems more probable that the legislative intent of section 27-40-330(b) was to limit exposure for damages to cases in which a landlord deliberately or maliciously includes and also attempts to enforce prohibited sections of the rental agreement.[44]

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only to situations in which enforcement of the provision is attempted.

43. S.C. CODE ANN. § 27-40-330(b) (Law. Co-op. Supp. 1987).

44. Despite the apparent similarity of purpose of the next sentence of § 27-40-330(b), which provides for damages upon the malicious use of a prohibited provision, the language of that sentence differs from the prior sentence. Malicious use of a rental agreement with a prohibited provision gives rise to a claim for damages if the landlord "attempts to exercise the rights *created thereby*." *Id.* § 27-40-330(b)(emphasis added). Although the language again is subject to a broader interpretation and, if given a narrow reading would suggest an illogical premise that rights arise from unenforceable provisions, the language adopted appears more clearly intended to be narrowly construed to refer only to the attempted enforcement of a prohibited provision. Although the difference in language in these sentences might be viewed as an indication of a different legislative intent, the RLTA does not indicate that the difference is other than inadvertent.

B. *Creation and Enforcement of the Right to Possession*

1. *The Right to Actual Possession*

The existence of a valid lease contract does not necessarily mean that a tenancy exists at common law. In South Carolina, a distinction has remained at common law between the mere contractual relationship of a lessor and lessee and the relationship of a landlord and tenant which incorporates property law principles as well. The term "lessee" has been used to describe a party who has only a contractual right in a lease, but has not yet acquired any estate in the premises. Under the common-law doctrine of *interesse termini*, as applied in South Carolina, only after entry into possession is a lessee regarded as a tenant with a recognizable estate at property law. Until such entry, the lessee has been said to hold only an *interesse termini*.[45]

Although an *interesse termini* may arise at common law whenever a lease provides for commencement of the term at a later date, the distinction between an *interesse termini* and a true tenancy is particularly significant when the date for commencement of the lease term has arrived, but the lessee has not yet taken or received possession. Under South Carolina common law the remedy of a lessee against a lessor who refuses to provide possession at the commencement of the term is limited to the contractual remedy of damages. "[I]n an action by the lessee to recover possession of the lessor, the lessee must allege an entry under the lease; otherwise, having no estate in the land, he cannot compel the owner in possession to deliver him the possession."[46]

The effect in South Carolina of *interesse termini* upon a lessor's right to collect rent from a lessee during the period after the date for commencement, but prior to the lessee taking possession, is less clear.[47] In *Simon v. Kirkpatrick*,[48] the court invoked *interesse termini* in such a situation, but did not limit the lessor to a contract remedy for damages alone as would have

45. Simon v. Kirkpatrick, 141 S.C. 251, 139 S.E. 614 (1927); *see also* Note, *Is Interesse Termini Necessary?*, 18 COLUM. L. REV. 595 (1918); I AM. LAW OF PROPERTY 220-21 (A. Casner ed. 1952).

46. Wilcox v. Bostick, 57 S.C. 151, 154-55, 35 S.E. 496, 497 (1900).

47. *See* Spitz, *supra* note 27, at 813-15.

48. 141 S.C. 251, 139 S.E. 614 (1927).

been appropriate under a strict application of the doctrine.

The many peculiarities of *interesse termini* have been eliminated from residential landlord and tenant situations by the RLTA. The RLTA discards the common-law distinction between a lessee and a tenant and extends the property law right of possession to tenants who have never entered the premises. Adopting the terminology of the Uniform Residential Landlord and Tenant Act, the South Carolina RLTA avoids nearly all reference to the terms "lessor" or "lessee." A "lessor" is now included expressly within the definition of a landlord for purposes of the RLTA.[49] A lessor at common law, therefore, would now be subject to all of the rights, duties and liabilities of a landlord under the RLTA, regardless of whether the tenant (the lessee at common law) has taken actual possession.

Similarly, a tenant for purposes of the RLTA includes any "person *entitled under a rental agreement to occupy* a dwelling unit to the exclusion of others."[50] Thus, a tenant is not only a person who has made an actual entry, but also is a person with only a contractual entitlement to occupy the leased premises.

Accordingly, the residential tenant who is denied actual possession prior to entry is no longer limited to a single remedy for contract damages. If the landlord fails to deliver actual possession of the dwelling unit at the commencement of the term, a tenant under a rental agreement subject to the RLTA may "demand performance of the rental agreement" and may maintain an action for possession against the landlord or any other person wrongfully in possession.[51]

2. *The Tenant's Right to Collect Damages*

In addition to the action for possession under section 27-40-620, a tenant may recover actual damages either from the landlord in certain circumstances or from any other person wrongfully in possession of the premises at the start of the rental term.[52] To the extent that a tenant may recover damages from a

49. S.C. CODE ANN. § 27-40-210(6) (Law. Co-op. Supp. 1987).

50. *Id.* § 27-40-210(15) (emphasis added).

51. *Id.* § 27-40-620(a)(2).

52. *Id.* If failure to deliver possession is wilful and not in good faith, the RLTA exacts a punitive measure of damages equal to the greater of three months' rent or twice the actual damages, plus reasonable attorney's fees. *Id* § 27-40-620(b).

landlord for the landlord's failure to deliver actual possession due to the holding over of a prior tenant, the RLTA adopts a position similar to the so-called "English Rule," which recognizes a landlord's implied covenant to deliver actual possession.

The traditional rationale for the English Rule requiring that a landlord deliver actual possession was summarized by the Nebraska Supreme Court in 1907. A tenant, the court concluded, would not

> have entered into the lease if he had known at the time that he could not obtain possession on the [commencement date], but that he would be compelled to begin a lawsuit. . . . It is unreasonable to suppose that a man would knowingly contract for a lawsuit, or take the chance of one.[53]

The Nebraska court noted further that the landlord is in the best position to know whether a prior tenant intends to hold over and that the facts necessary to sustain an ejectment action are within the landlord's knowledge, thereby justifying the burden upon him to obtain actual possession for the new tenant.[54]

The RLTA, however, departs from the English Rule in one critical respect. Under section 27-40-620(a)(2), if the landlord has made "reasonable efforts to obtain possession of the premises," the landlord is not liable for damages, even though he is unable to deliver possession because of a holdover by a previous tenant without his consent. The purpose of this exception to protect landlords acting in good faith is similar to the purpose of section 6.2 of the *Restatement (Second) of Property*. The *Restatement* also adopts a form of the English Rule, but with the proviso that liability is limited to only those situations in which the landlord "does not act promptly to remove the person and does not in fact remove him within a reasonable period of time."[55]

By requiring that the landlord remove the holdover tenant, the *Restatement* preserves the essence of the English Rule, which is to ensure that the tenant is able to gain actual possession under the lease from the landlord. Under the South Carolina RLTA, on the other hand, if the landlord's effort to remove

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53. Herpolsheimer v. Christopher, 76 Neb. 352, 354, 111 N.W. 359, 360 (1907).
54. *Id.*
55. RESTATEMENT (SECOND) OF PROPERTY (LANDLORD & TENANT) § 6.2 (1977).

the holdover tenant is reasonable but unsuccessful, the new tenant is left without actual possession and with only a lawsuit for possession and damages against the holdover tenant. This result more nearly compares with that of the "American Rule," which requires only that a landlord give a legal right to possession, but not actual possession,[56] an approach rejected by the drafters of the Uniform Residential Landlord and Tenant Act[57] and seemingly rejected in South Carolina by the first sentence of section 27-40-620(a)(2).

The extent to which the exception is allowed to swallow the general rule of section 27-40-620(a)(2) depends upon the interpretation South Carolina courts will give to a "reasonable effort." The RLTA makes no attempt to define a reasonable effort,[58] but several possibilities exist.

First, a reasonable effort may be deemed to require the commencement of formal eviction proceedings against a tenant when other, lesser efforts have not been successful within a reasonable period of time. The practical effect of this approach would be to construe section 27-40-620(a)(2) in a manner that closely resembles the *Restatement* position. Adjudication of the ejectment action either would enable the landlord to provide actual possession to the new tenant within a reasonable time or would determine that the landlord is unable to provide the legal right to possession, subjecting him to damages for breach of contract. Moreover, the commencement of an ejectment proceeding would provide the court and interested parties with a definitive and easily proven standard of reasonability.

However, the RLTA does not require expressly that the landlord commence a proceeding for ejectment. Thus, a reasonable effort could be deemed instead to require only some lesser, unspecified action short of formal ejectment by the landlord. This approach, however, would provide the court with no definitive standard by which to judge reasonability of effort. This interpretation arguably is less desirable, given the RLTA's stated

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56. Under the so-called American Rule, "it is not the duty of the landlord, when the demised premises are wrongfully held by a third person, to take the necessary steps to put his lessee into possession." Gardner v. Keteltas, 3 Hill 330, 333 (N.Y. Sup. Ct. 1842).

57. UNIF. RESIDENTIAL LANDLORD AND TENANT ACT § 4.102, 7B U.L.A. 481 (1972).

58. The only express obligation of the landlord relevant to defining a reasonable effort is the obligation to act in good faith as required by S.C. CODE ANN. § 27-40-220 (Law. Co-op. Supp. 1987).

objective of simplifying and clarifying the law. Furthermore, if an unsuccessful effort by the landlord to remove the holdover tenant is deemed reasonable, then the policy underlying the English Rule as adopted in the first sentence of section 27-40-620(a)(2), which requires that the landlord provide actual possession, apparently would be compromised by the practical effect of the second sentence.

3. Abatement of Rent; Right to Terminate Prior To Possession

As an alternative to seeking possession and damages upon a failure by the landlord to deliver possession, a tenant may terminate the rental agreement "upon at least five days' written notice" to the landlord.[59] The inclusion of a notice period suggests that the landlord has a right to cure during that five-day period. A literal reading of the RLTA, however, again forces the opposite conclusion. The right of the tenant to terminate arises upon the landlord's failure "to deliver possession . . . as provided in § 27-40-430."[60] Section 27-40-430, in turn, requires the delivery of possession at "the commencement of the term."[61] Accordingly, the tenant's right to terminate, if literally applied, appears to become absolute upon any failure by the landlord, no matter how slight, to deliver possession on the commencement date of the lease. Under such a literal interpretation, the landlord would have no right to cure. That interpretation, however, is not preferable because it would render essentially meaningless the five-day notice period provided.

Regardless of the remedy selected by the tenant, the obligation to pay rent abates in all cases until actual possession is tendered by the landlord.[62]

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59. *Id.* § 27-40-620(a)(1). The five-day period, similar to all time periods provided by the RLTA, is calculated by excluding the first day and including the last. If the last day falls on a Sunday, the period is extended to include the following Monday. *See id.* § 27-40-240(d) (applying S.C. CODE ANN. § 15-1-20 (Law. Co-op. 1976)(repealed 1985)). Whether this method of calculation was altered by the adoption of S.C.R. Civ. P. 6, which replaced § 15-1-20, is unclear since Rule 6 existed at the time of passage of the RLTA but was not mentioned therein.

60. S.C. CODE ANN. § 27-40-620(a)(1) (Law. Co-op. Supp. 1987).

61. *Id.* § 27-40-430.

62. *Id.* § 27-40-620(a).

IV. RIGHTS AND OBLIGATIONS ARISING OUT OF THE LANDLORD AND TENANT RELATIONSHIP

The traditional property law relationship between the landlord and tenant imposes upon the landlord only the duty to provide the tenant with at least a legal right to possession of the premises during the term. The tenant has a reciprocal duty to pay rent during the term for so long as the legal right to possession remains undisturbed.[63]

Any additional rights and obligations between the parties at common law depend solely upon the provisions of the contract or lease. A tenant's only remedy for the landlord's breach of a contractual obligation short of a constructive eviction is an action in contract for damages.[64] Insofar as the property law obligations are viewed at common law in South Carolina as separate and distinct from the contractual obligations, unless the landlord expressly agrees otherwise, the tenant's obligation to pay rent is not dependent upon the landlord's performance of any contractual duty. Thus, the duty to pay rent under prior law is essentially absolute once the landlord tenders the legal right to possession.

The RLTA makes two fundamental changes to the obligations arising out of the landlord and tenant relationship. First, it imposes statutory duties of maintenance upon both the landlord[65] and tenant[66] in addition to traditional property or con-

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63. *See* Boston Hous. Auth. v. Hemingway, 363 Mass. 184, 293 N.E.2d 831 (1973); R. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT 109 (1980). The property law theory of constructive eviction significantly modified the common-law duty to pay rent. If a landlord's failure to maintain the premises in a usable condition disturbs the tenant's possession, then constructive eviction entitles the tenant to vacate and cease paying rent. *See* Jaffe-Spindler Co. v. Genesco, Inc., 747 F.2d 253 (4th Cir. 1984) (applying South Carolina law); Thomas v. Hancock, 271 S.C. 273, 246 S.E.2d 604 (1978).

64. Rowland & Sons, Inc. v. Bock, 150 S.C. 490, 493, 148 S.E. 549, 550 (1929); *see also* Young v. Morrisey, 285 S.C. 236, 239, 329 S.E.2d 426, 428 (1985).

65. *See* S.C. CODE ANN. § 27-40-440 (Law. Co-op. Supp. 1987); *infra* notes 70-97, 124-27 and accompanying text. If a landlord conveys the premises during the tenancy to a bona fide purchaser, he is relieved of liability under the rental agreement and the RLTA for events occurring after he gives written notice of the conveyance to the tenant, except with regard to the security deposit. If the deposit is transferred to the buyer and the tenant is notified of the buyer's liability, then the landlord is relieved of any liability to retain or account for the deposit. A manager is relieved of liability, for events occurring after he gives written notice to the tenant of the termination of his management. S.C. CODE ANN. § 27-40-450 (Law. Co-op. Supp. 1987).

66. *See id.* § 27-40-440; *infra* notes 153-64 and accompanying text.

tract obligations; it creates certain rights and obligations regarding landlord access to the dwelling unit;[67] and it expressly limits the tenant's use of the dwelling unit.[68] Second, the RLTA statutorily links the tenant's obligation to pay rent to the landlord's continued compliance with contractual and statutory obligations,[69] thereby eliminating the fundamental distinction that exists at common law between the property and contractual relationships.

A. The Duty to Maintain the Premises

1. Landlord Obligation to Maintain Habitability and Code Compliance

The RLTA adopts the approach of the Uniform Residential Landlord and Tenant Act, which imposes duties upon the landlord to maintain the basic structure and systems of the dwelling unit as well as the common areas.[70] The tenant is obligated, in turn, to keep the dwelling unit safe and clean and to use the systems in a reasonable manner.[71] The nature of these obligations and, in particular, the remedies provided for their breach signify a substantial departure from the landlord and tenant relationship under prior law.

The RLTA imposes upon the landlord a duty to the tenant to comply with all applicable building and housing codes that materially affect health and safety.[72] Furthermore, the landlord

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67. *See* S.C. CODE ANN. § 27-40-530 (Law. Co-op. Supp. 1987); *see infra* notes 204-15 and accompanying text.

68. *See* S.C. CODE ANN. § 27-40-510(7) to -540 (Law. Co-op. Supp. 1987); *see also infra* notes 216-26 and accompanying text.

69. *See infra* notes 96-119 and accompanying text.

70. The landlord's statutory maintenance obligations during the term of the rental agreement are set forth in S.C. CODE ANN. § 27-40-440 (Law. Co-op. Supp. 1987). Section 27-40-430 requires that the landlord also comply with § 27-40-440 at the time the premises are delivered to the tenant. If he fails to comply, the tenant may refuse to enter and may assert any of the remedies under § 27-40-620 for the landlord's failure to provide possession. If the tenant does enter, he still may assert the remedies for breach of § 27-40-440 as discussed in notes 98-138 and accompanying text.

71. *See infra* notes 157-62 and accompanying text.

72. S.C. CODE ANN. § 27-40-440(a)(1)(Law. Co-op. Supp. 1987). Building and housing codes are defined as "any law, ordinance, or governmental regulation concerning fitness for habitation, or the construction, maintenance, operation, occupancy, use, or appearance of any premise, or dwelling unit." *Id.* § 27-40-210(2).

is required to make all repairs necessary to keep the premises in a habitable condition.[73] Common areas must be kept in a reasonably safe condition and, if there are more than four dwelling units on a single premises, the common areas also must be kept reasonably clean.[74]

In addition to these general obligations, the RLTA specifically requires that the landlord provide and maintain in good and safe working order any appliances or facilities necessary to provide hot and cold running water and heat. But if the building is not required by law to be equipped for that purpose or if the generation of hot water or heat is "by an installation within the exclusive control of the tenant and supplied by a direct public utility connection," the landlord is relieved of this obligation.[75] Other systems or appliances supplied by the landlord must be maintained in reasonably good and safe working order, and these specifically include sanitary plumbing or sewer services, electricity, gas, air conditioning, and elevators.[76]

South Carolina has refused at common law to recognize any similar implied warranty of fitness and habitability in leases.[77] Thus, a tenant not subject to the RLTA "takes leased premises, in the absence of an express warranty, or of fraud or misrepresentation, in the condition and quality in which they are."[78] The landlord at common law has no duty to make repairs necessary to keep safe the leased premises, other than the common areas that remain in the control of the landlord.[79]

The historical rationale for not imposing such duties of maintenance and repair upon the landlord lies in the traditional property law concept of a lease as a sale of the premises for a

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73. *Id.* § 27-40-440(a)(2).

74. *Id.* § 27-40-440(a)(3).

75. *Id.* § 27-40-440(a)(4),(5); *see also infra* note 123.

76. *Id.* § 27-40-440(a)(5). This section does not require specifically that a landlord provide air conditioning. If air conditioning is supplied, however, it must be maintained in reasonably good and safe working order. *See* Howard v. Simon, 18 Ohio App. 3d 14, 480 N.E.2d 99 (1984). In the rental agreement the landlord may exclude specific appliances, other than those necessary to provide essential services, from the coverage of § 27-40-440(a)(5).

77. Young v. Morrisey, 285 S.C. 236, 329 S.E.2d 426 (1985); Holmes v. Rosner, 289 S.C. 287, 346 S.E.2d 37 (Ct. App. 1986).

78. *Young*, 285 S.C. at 241, 329 S.E.2d at 429.

79. Edwards, Inc. v. Arlen Realty & Dev. Corp., 466 F. Supp. 505, 510 n.5 (D.S.C. 1978); *see* Timmons v. Williams Wood Prod. Corp., 164 S.C. 361, 162 S.E. 329 (1932).

term. Under that approach, "the landlord was considered to have surrendered both possession and control and he was not permitted to enter the premises without the consent of the tenant."[80] It followed that the landlord had no duty to repair the premises once the tenant had possession.[81]

The harshness of the property law rule of *caveat emptor* as applied to leases was diminished by recognition of the doctrine of constructive eviction, which may relieve a tenant of rental obligations if the premises fall into such disrepair as to constitute an interference with the tenant's right to possession.[82] Contract law, however, provided the basis for the first complete abrogation of *caveat emptor* with judicial recognition of an implied warranty of habitability in Wisconsin in 1961. Relying upon a perceived change in legislative policy evidenced by the adoption of housing and building codes, the Wisconsin court in *Pines v. Perssion*[83] declared the old property law rule obsolete and imposed upon the landlord a duty to deliver the premises "in a condition reasonably and decently fit for occupation when the lease term commenced."[84]

In *Javins v. First National Realty Corp.*[85] the District of Columbia imposed upon the landlord a duty of repair by requiring compliance with the housing code not merely at the commencement of the tenancy, but throughout the term. Since *Javins*, most states have adopted an implied warranty either judicially or legislatively.[86] Jurisdictions differ, however, in their definitions of habitability. Some states, following the lead of *Pines* and *Javins*, continue to rely upon the local housing code regulations in defining a warranty against latent defects.[87] Others have established that the warranty and housing regula-

80. Note, *Personal Injuries to the Tenant; The Landlord's Liability in Tort Therefor*, 10 S.C.L.Q. 307 (1958).

81. *Id.*

82. *See supra* note 63.

83. 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

84. *Id.* at 596, 111 N.W.2d at 413.

85. 428 F.2d 1071 (D.C. Cir. 1970).

86. A list of jurisdictions adopting an implied warranty of habitability as of 1984 can be found in Mallor, *The Implied Warranty of Habitability and the "Non-Merchant" Landlord*, 22 DUQ. L. REV. 637 (1984).

87. *See, e.g.*, Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972); Morbeth Realty Corp. v. Velez, 73 Misc. 2d 996, 343 N.Y.S.2d 406 (N.Y. Civ. Ct. 1973).

tions are not coextensive.[88]

The RLTA adopts the latter approach, treating compliance with housing regulations and habitability as separate but related concepts. Under the RLTA, a landlord must comply at a minimum with applicable codes materially affecting health and safety.[89] A separate provision, however, requires that the property be kept in a habitable condition.[90] This provision suggests that habitability may extend beyond minimum health and safety code compliance, but, in the absence of a more specific statutory definition, the exact parameters of habitability are left for judicial determination.[91]

The landlord and tenant of a single family residence may agree in writing to shift to the tenant the duty to perform under section 27-40-440(a)(5), as well as the duty to perform other specific repairs, maintenance tasks, alterations and remodeling. The agreement must be entered into "in good faith and not for the purpose of evading the obligations of the landlord."[92] The landlord and tenant of a dwelling unit other than a single family residence also may agree that the tenant will perform certain specified repairs, maintenance tasks, alterations, or remodeling, but only if the agreement is entered into in good faith and not for the purpose of evading the obligations of the landlord, the agreement does not affect the obligations of the landlord to other tenants on the premises, and the work is not necessary to cure

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88. *See, e.g.*, Mease v. Fox, 200 N.W.2d 791, 797 (Iowa 1972); Boston Hous. Auth. v. Hemingway, 363 Mass. 184, 200 n.16, 293 N.E.2d 831, 844 n.16 (1973); Berzito v. Gambino, 63 N.J. 460, 470, 308 A.2d 17, 22 (1973).

89. S.C. CODE ANN. § 27-40-440(a)(1), (b) (Law. Co-op. Supp. 1987).

90. *Id.* § 27-40-440(a)(2).

91. Other states recognizing an implied warranty of habitability either judicially or by statute have considered various factors in addition to housing code compliance as indicative of habitability. Hawaii has left the determination of habitability to be made on a case-by-case basis with "both the seriousness of the claimed defect and the length of time for which it persists" as relevant factors. Lemle v. Breeden, 51 Haw. 426, 436, 462 P.2d 470, 476 (1969). Likewise, Iowa courts have listed seven relevant factors in addition to code compliance, including the nature of the defect, the age of the structure, and the amount of rent paid. *Mease*, 200 N.W.2d at 797. Some states, such as Florida, in its version of the Uniform Residential Landlord and Tenant Act, require specific minimal conditions in place of a general requirement of habitability, including the absence of vermin, removal of garbage, provision of heat in winter, and provision of running water or hot water. FLA. STAT. ANN. § 83.51(2)(a) (West Supp. 1986); *see* WASH. REV. CODE ANN. § 59.18.060 (Supp. 1986).

92. S.C. CODE ANN. § 27-40-440(c) (Law. Co-op. Supp. 1987).

noncompliance with applicable codes as required under section 27-40-440(a)(1).[93]

The requirement that a landlord may not shift the burden of performance for the purpose of evading his obligations is an enigma. Any shift of a statutory duty may be interpreted as being for the proscribed purpose of evading statutory obligations. The National Conference of Commissioners on Uniform State Laws included identical language in the uniform version of the act as approved in 1972, and the language appears in the law of a number of states that adopted the uniform version shortly thereafter. The uniform version, however, was amended to delete the words "and not for the purpose of evading the obligations of the landlord."[94] By not following the amended version of the uniform act, South Carolina has introduced uncertainty regarding when an attempt to shift duties will be enforced. At best, the statutory language may be interpreted loosely to require only that the landlord act in good faith.[95] Even that inter-

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93. *Id.* § 27-40-440(d). In the case of a single-family dwelling unit, the RLTA expressly permits the landlord to shift to the tenant by contract the duties imposed under § 27-40-440(a)(5), as well as other specified duties to repair. The absence of a similar expressed reference in § 27-40-440(d) to the duties imposed by subsection (a)(5) leaves room for an argument that the drafters did not intend for the landlord to shift those statutory duties to the tenant other than in the single-family residence situation. On the other hand, by expressly restricting the power of the landlord to shift the burden of repairs necessary to comply with § 27-40-440(a)(1), § 27-40-440(d)(2) suggests by negative inference that the landlord may shift to the tenant duties imposed by other paragraphs of § 27-40-440(a). *See generally* Davis, *URLTA, Kansas, and the Common Law*, 21 U. KAN. L. REV. 387, 408-09 (1973).

94. Following publication of a critique of the original version of the Uniform Residential Landlord and Tenant Act by a subcommittee of the American Bar Association, see *Proposed Uniform Residential Landlord and Tenant Act*, 8 REAL PROP. PROB. & TR. J. 104 (1973), amendments were approved to facilitate endorsement of the Act in 1974 by the American Bar Association. *See* Report of Vice President, Proceedings of the National Conference of Commissioners on Uniform State Laws Special Committee on Uniform Landlord Tenant Relationship Act, 1974 HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 177. The text of the amendments is published in *The Uniform Residential Landlord and Tenant Act: Some Suggestions for Improvement*, 9 REAL PROP. PROB. & TR. J. 402, 410 (1974). Both Iowa, which adopted the uniform version most recently prior to South Carolina, and Rhode Island, which has since adopted the uniform version, used the amended language, omitting any reference to evasion of obligations. *See* IOWA CODE ANN. § 562A.15(2) & (3)(a) (West Supp. 1987); R.I. GEN. LAWS § 34-18-22 (Supp. 1987).

95. In commenting on similar language in the Nebraska Residential Landlord and Tenant Act, Professor Kalish concluded that "any shift in obligation will be made for the purpose of evading the obligation. The word 'evading' connotes, however, the shift of obligation unfairly or in bad faith, and the statute ought to be construed in this way."

pretation, however, seems inadequate since a similar requirement already is imposed elsewhere by the RLTA.

In drafting section 27-40-440(d), pertaining to units other than single family residences, the legislature omitted a requirement in the uniform version that the agreement shifting the burden be in writing and separate from the rental agreement. However, given the requirement of a writing with regard to assumption of repairs by a tenant of a single family residence, such a writing also should be prepared in other cases as a matter of good practice.

2. *Tenant Remedies for Breach by Landlord of Obligations to Maintain*

A significant aspect of the development of the implied warranty of habitability is that the covenant to pay rent and the warranty of habitability are mutually dependent. Thus, in states recognizing the warranty, the tenant's duty to pay rent no longer is independent of other covenants as under traditional property law principles, but is conditioned upon the landlord's continued compliance with duties imposed under the warranty.[96] The RLTA fully embraces the mutual dependency of covenants, establishing that a tenant's obligations under a rental agreement are dependent upon not only the landlord's compliance with statutory obligations, but also upon the landlord's material compliance with express contractual obligations. A noncompliance by the landlord may create several options for the tenant.

First, if a breach is material to the rental agreement or violates section 27-40-440 in a manner that materially affects health and safety, the tenant may terminate the rental agreement if timely repairs are not made by the landlord.[97] Second, if

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Kalish, *The Nebraska Residential Landlord and Tenant Act*, 54 NEB. L. REV. 603, 645 (1975). The American Bar Association subcommittee studying the uniform version in 1973 observed that "it is far from clear as to which sort of work can actually be performed by the tenant" under the provisions permitting the parties to shift obligations. *Proposed Uniform Residential Landlord and Tenant Act*, *supra* note 94, at 112.

96. *See* Pines v. Perssion, 14 Wis. 2d 590, 596, 111 N.W.2d 409, 413 (1961).

97. S.C. CODE ANN. § 27-40-610(a)(Law. Co-op. Supp. 1987). However, a tenant may not terminate under this section if the condition was caused by the deliberate or negligent act or omission of the tenant, a family member of the tenant, or other person allowed on the premises by the tenant. *Id.* § 27-40-610(a)(2). By implication, termination may be an available remedy even if the conditions are caused by one of these persons, so

the breach does not enable a tenant to terminate, or if the tenant elects not to terminate, then the tenant may bring an action to recover damages or seek injunctive relief.[98] The RLTA also appears to permit a tenant to bring an action for damages in addition to termination, but the omission from the RLTA of a provision included in the uniform version clarifying the cumulative nature of the remedies casts some doubt upon that interpretation.[99] Third, a tenant who does not terminate the rental agreement may withhold rent during the period of noncompliance and wait for the landlord to initiate an action for possession or for rent. The tenant then may assert the landlord's noncompliance as a defense or counterclaim to that action.[100] Finally, alternative remedies exist if the landlord's noncompliance concerns an essential service as defined under the RLTA.[101]

(*a*) *Termination.* The general tenant remedies provision[102] of the RLTA permits a tenant to terminate the rental agreement if the landlord does not properly cure a breach of any obligation under section 27-40-440 that materially affects health and safety or the physical condition of the premises. A material breach by the landlord of any additional contractual obligation under the rental agreement that is not cured in a timely manner also permits the tenant to terminate under section 27-40-610. The tenant may commence the statutory cure period by delivering written notice to the landlord that the rental agreement will terminate on a specified date, not less than fourteen days later, if specified breaches are not remedied.[103] If the identified breach affects health and safety, the rental agreement terminates on the date specified in the notice, unless the landlord adequately rem-

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long as his actions are not deliberate or negligent. *See* S. Andrews, Landlord Obligations and Tenant Remedies 10 (June 21, 1986)(Continuing Legal Education Seminar).

98. S.C. CODE ANN. § 27-40-610(b)(Law. Co-op. Supp. 1987). No provision expressly prohibits a tenant from seeking damages if the landlord's noncompliance is caused by the tenant's own deliberate or negligent acts. However, no likelihood of a windfall to the tenant seems to exist in such a situation, since the landlord presumably could then recover damages of an equal or greater amount for the tenant's breach of § 27-40-510(6).

99. *See infra* Part IV(A)(2)(b).

100. S.C. CODE ANN. § 27-40-640 (Law. Co-op. Supp. 1987); *see also infra* notes 111-19 and accompanying text.

101. S.C. CODE ANN. § 27-40-630 (Law. Co-op. Supp. 1987).

102. *Id.* § 27-40-610; *see also infra* notes 174-85 and accompanying text regarding tenant's separate remedies for fire and casualty damage.

103. S.C. CODE ANN. § 27-40-610(a)(Law. Co-op. Supp. 1987).

edies the breach within fourteen days.[104] If the breach does not affect health and safety, the remedy must be commenced within fourteen days and completed within that time if possible. If the remedy of such a breach not affecting health and safety cannot be completed within that fourteen-day period, it must be "pursued in good faith to completion within a reasonable time" in order to prevent termination.[105]

The "materiality" standard, which appears in several contexts in connection with the obligations and remedies of the parties, lends itself to imprecision.[106] The materiality requirements prevent the tenant from terminating the rental agreement for mere technical breaches by the landlord.[107] One commentator suggests that the standard used to determine whether a breach materially affects health and safety should be the same standard used to determine whether a breach renders the premises uninhabitable.[108] The perceived advantage of enunciating such a definition of materiality, rather than relying upon a case-by-case

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104. *Id.* § 27-40-610(a)(1)(i). The requirement that a landlord need only "adequately" remedy a breach to forestall termination suggests that a full remedy is not required. It may not necessarily follow, however, that, because less than a full remedy is required, incomplete repairs by the landlord are sufficient. For example, if electrical wiring does not conform to a code and presents a material safety hazard, the landlord may be required to repair the wiring fully to prevent termination. The repairs, however, may not constitute the tenant's full legal remedy. The landlord also may be subject to a tenant's claim for damages resulting from the breach of the duty to maintain. To the extent that the landlord has not paid damages to the tenant, a full remedy may not have been effected by the repairs. Nevertheless, completion of the repair work removes the tenant's need to terminate to avoid the safety hazard and, thus, should be an adequate remedy to forestall termination. Arguably, the adequacy requirement contemplates this kind of situation and is not intended to be used to justify incomplete repairs.

105. *Id.* § 27-40-610(a)(1)(ii). The statutory language reads "if such remedy . . . cannot be remedied within fourteen days." Presumably the drafters intended to say "if such remedy cannot be *completed* within fourteen days." Given the imprecision associated with determining a reasonable passage of time in a particular situation, a tenant in this position may find it advisable to seek a judicial determination of his rights prior to attempting to terminate and vacating.

106. *See id.* §§ 27-40-440(a) (landlord must comply with codes materially affecting health and safety), 27-40-510(1) (tenant must comply with codes materially affecting health and safety), 27-40-610 (remedy for material noncompliance by landlord with rental agreement or noncompliance with RLTA materially affecting health and safety), and 27-40-710 (remedy for noncompliance with RLTA by tenant materially affecting health and safety).

107. *But see id.* § 27-40-710 (permitting landlord to terminate for *any* uncured breach of the rental agreement).

108. Comment, *Interpreting the Attorneys' Fees and Materiality Provisions of the Iowa Uniform Residential Landlord and Tenant Act*, 65 IOWA L. REV. 1074 (1980).

development, is a reduction of the uncertainty inherent in the case-by-case approach that forces landlords and tenants to predict whether a breach will be found to be of sufficient magnitude to entitle the tenant to terminate. While such certainty is generally a desirable objective of the RLTA, determining the materiality of a breach solely by its effect upon habitability would substantively alter the availability of the termination remedy.

Assuming that a purpose of the termination remedy is, at least, to permit a tenant to seek safer or more habitable conditions when necessary, any act or omission of the landlord rendering the premises uninhabitable under section 27-40-440(a)(2) or rendering common areas unsafe under section 27-40-440(a)(3) would seem, indeed, to justify the finding of a material effect upon health and safety or the physical condition of the premises. The habitability standard, however, may not in all circumstances provide a sufficiently comprehensive definition of materiality for applying the termination remedy.

For example, the landlord's noncompliance with applicable codes under section 27-40-440(a)(1) should by definition materially affect either health and safety and should entitle the tenant to terminate after the proper cure period expires. Such noncompliance, however, may not necessarily render the premises uninhabitable. Section 27-40-440(b) recognizes that the duty of the landlord to comply with all applicable building and housing codes materially affecting health and safety under subsection (a)(1) may exceed the duty to maintain the premises in a habitable condition under subsection (a)(2). Thus, the legislature has determined that materiality is not necessarily coextensive with habitability in considering the effect upon health and safety of a noncompliance under section 27-40-440.

Likewise, the effect upon habitability is an inadequate measure of the materiality of a breach of the rental agreement. While a breach rendering the premises uninhabitable may indeed be viewed as material, other breaches may be equally material to the tenant. For instance, a landlord may breach an express covenant to install air conditioning after the start of the lease. The tenant may consider the breach material, but it is unlikely that such a breach would be deemed to render the prem-

ises uninhabitable.[109]

The most appropriate method for determining the materiality of such a breach depends upon the primary function assigned to the RLTA. If the objective of the statute were narrowly construed as being limited to the establishment of a minimum acceptable quality level for rental housing, then it might be appropriate to judge the materiality of a breach simply by its effect upon habitability. Under this view, a tenant would have a right to terminate the rental agreement only when the breach would render the premises below the minimally acceptable statutory standard of habitability. If the objective of the statute is more broadly construed, however, to establish the predominance of the contractual nature of the landlord and tenant relationship, then it is appropriate to judge the materiality of a breach by its effect upon the essential agreements of the contracting parties.

The latter view better comports with the expressed scope of section 27-40-610, which does not limit the termination remedy solely to breaches of section 27-40-440(a)(2). Such a limitation of the remedy to breaches of section 27-40-440(a)(2) would be appropriate if the effect upon habitability were intended to be the sole standard of materiality. Rather, the materiality of a breach of the rental agreement should depend upon whether the breach defeats an essential expectation of the parties. Under this view, the failure of a landlord to comply with an express covenant to provide air conditioning, for example, might reach the essence of the rental agreement and constitute a material breach, at least if the air conditioning is not provided during the summer months. Similarly, whether noncompliance with an applicable code has a material effect on health and safety may depend upon the facts of a case, such as the seriousness of any potential illness or injury, the likelihood of its occurrence, the immediacy of the risk, or any combination of these or other relevant factors.

(*b*) *Damages.* The materiality of a breach is not a factor in an action by a tenant for damages under section 27-40-610(b). The tenant may recover actual damages and obtain injunctive relief for any noncompliance by the landlord with the terms of either the rental agreement or section 27-40-440. This remedy is the traditional contract remedy for the landlord's breach of the

109. *But see* Park Hill Terrace Assocs. v. Glennon, 146 N.J. Super. 271, 369 A.2d 938(1977).

rental agreement, applied equally to a breach of the additional statutory obligations imposed by the RLTA.

The absence in the RLTA of any express requirement that a tenant elect between the remedies of termination and damages suggests that the remedies should be cumulative in nature. This result would be consistent with section 4.101(b) of the Uniform Residential Landlord and Tenant Act upon which section 27-40-610(b) is based. The legislature, however, did not include in the RLTA a section equivalent to section 4.101(c) of the uniform version which clarifies that the remedies are cumulative. Landlords may argue that the omission is indicative of a legislative intent not to make the remedies cumulative. While such a view is plausible, the better view would seem to be that the legislature intended merely to delete an explanatory section of the uniform act and not to require that the tenant elect between remedies, especially given the direction of section 27-40-50(a) that remedies "must be so administered that an aggrieved party may recover appropriate damages."[110]

(c) *Withholding Rent.* Both of the remedies set forth in section 27-40-610 have shortcomings for the typical residential tenant. Termination requires that the tenant seek immediate housing elsewhere, and an action to recover damages requires that the tenant incur the time and cost of a legal proceeding. Moreover, to some extent, both remedies existed under prior law.[111] Thus, perhaps the most beneficial aspect to the tenant of the RLTA's treatment of the landlord's maintenance obligations and the tenant's rental obligation as mutually dependent covenants is the implicit creation of a right of the tenant to withhold rent in an appropriate amount until a breach is cured.

Section 27-40-640 permits a tenant to raise the landlord's noncompliance, if any, with the rental agreement or the provisions of the RLTA as a defense or counterclaim in an action by the landlord for rent or possession. Thus, the tenant implicitly may withhold rent in the amount of any monetary damages suffered from such a breach by the landlord without having to initi-

110. S.C. CODE ANN. § 27-40-50(a)(Law. Co-op. Supp. 1987).

111. The RLTA substantially expands the right of a tenant to terminate the rental agreement. But at common law, if a constructive eviction occurred, the tenant could vacate and terminate. A tenant also, of course, has an action at common law for damages arising from breach of contract.

ate legal proceedings.

This course of action by the tenant, however, is subject to an important limitation. If the landlord is alleged not to have complied with his duties to maintain the premises under the rental agreement or under section 27-40-440, the tenant may assert this noncompliance as a defense or counterclaim only if the landlord received proper notice of the alleged violation before the rent was due.[112] The landlord must have actual knowledge or reason to know that the violation[113] exists or he must receive notice of the violation at least fourteen days before rent is due, unless the landlord violates a provision of essential services. The tenant's notice of an essential services violation must be calculated to give the landlord a reasonable opportunity to make emergency repairs before the rent is due.

If the landlord does not have sufficient notice, the tenant will be deemed to have waived noncompliance as a defense and, therefore, may not withhold the rent under section 27-40-640. If the tenant does withhold rent under these circumstances and is held to have asserted a defense or counterclaim other than in good faith in a subsequent action for possession or rent, the landlord may recover attorney's fees.[114]

Once the landlord commences an action for possession and a rule to show cause has been issued, the tenant is required to pay to the landlord any accrued rent, plus rent that becomes due after the issuance of a rule to show cause or to vacate. The tenant then may pursue a counterclaim against the landlord to recover any damages allegedly incurred as a result of the landlord's breach. The tenant must pay all amounts allegedly owed for the period prior to issuance of the rule, except for periods the tenant was not in possession of the dwelling unit.[115] However, if the tenant alleges a violation by the landlord of the rental agreement or of the RLTA, then the amount of rent due after the rule is not the contract rental amount, but the fair

112. S.C. CODE ANN. § 27-40-640(b) (Law. Co-op. Supp. 1987). Notice is defined in § 27-40-240(a).

113. The RLTA requires notice under § 27-40-640(b)(1) only for violations of § 27-40-440. However, since subsection (b) also generally applies to violations of maintenance obligations under the rental agreement, the legislature probably intended to include those violations as well under subsection (b)(1); the omission appears inadvertent.

114. S.C. CODE ANN. § 27-40-640(a) (Law. Co-op. Supp. 1987).

115. *Id.* § 27-40-790.

market rental value of the premises at the time of the hearing.[116]

Unlike the uniform version which provides for payment into the court,[117] the RLTA contemplates payment directly to the landlord. Failure to pay the required amounts will result in the issuance of a warrant of ejectment.[118] On the other hand, if the landlord alleges that the tenant owes more rent than is actually due as determined at the hearing, judgment must be entered for the tenant if he has complied with section 27-40-790.[119]

3. *A Landlord's Obligation to Maintain Essential Services and Tenant Remedies for Breach Thereof*

In addition to the general obligations of the landlord to maintain the dwelling unit in accordance with appropriate codes and in a habitable condition, section 27-40-440(a)(4) and (5) imposes obligations upon the landlord to provide and maintain particular services.[120] The RLTA further delineates certain of these services as "essential services" and provides alternative remedies to the tenant if the landlord wrongfully fails to provide or wilfully diminishes an essential service.[121]

Unlike the Uniform Residential Landlord and Tenant Act, under which any service can be deemed essential on the facts of a particular case,[122] the South Carolina RLTA limits the number of services that are treated as essential. The essential services are:

> sanitary plumbing or sewer services; electricity; gas, where it is used for heat, hot water, or cooking; running water, and reasonable amounts of hot water and heat, except where the building that includes the dwelling unit is not required by law

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116. *Id.* § 27-40-790(a). Fair market rental value is defined in § 27-40-210(4).

117. UNIF. RESIDENTIAL LANDLORD AND TENANT ACT § 4.105, 7B U.L.A. 485 (1972).

118. S.C. CODE ANN. § 27-40-790(c) (Law Co-op. Supp. 1987).

119. *Id.* § 27-40-790(d).

120. *Id.* § 27-40-440(a)(4), (5).

121. *Id.* § 27-40-210(17).

122. *See* Austin v. Danford, 62 Or. App. 242, 660 P.2d 698, *modified on other grounds*, 63 Or. App. 334, 663 P.2d 802 (1983). The uniform version does not separately define an essential service. However, reference is made throughout to "heat, running water, hot water, electric, gas, or other essential service," which indicates that the services specified are only examples of essential services and not an exclusive listing. UNIF. RESIDENTIAL LANDLORD AND TENANT ACT §§ 4.104(a), 4.107, 4.207, 7B U.L.A. 483-98 (1985).

> to be equipped for that purpose, or the dwelling unit is so constructed that heat or hot water is generated by an installation within the exclusive control of the tenant and supplied by a direct public utility connection.[123]

The RLTA expressly requires that the landlord provide running water at all times, as well as reasonable amounts of hot water and heat, subject to the same limitations as are set forth in the definition of an essential service.[124] The RLTA does not expressly require the landlord to provide other electrical and gas services, beyond the amount needed to supply heat and hot water, and sanitation service, although these services are defined as essential in nature. The landlord, however, may need to provide each of these services to comply with either applicable government codes, standards of habitability, or the rental agreement.

To the extent that any provision of either the RLTA or the rental agreement requires the landlord to provide an essential service, he must also maintain the facilities and appliances in a reasonably good and safe working condition necessary to provide that service.[125] If the landlord negligently or wilfully breaches that obligation to provide the service, the tenant may elect, in lieu of the general remedies under section 27-40-610, to procure reasonable amounts of the essential service and deduct the actual and reasonable cost of the procurements from future rent.[126]

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123. S.C. CODE ANN. § 27-40-210(17) (Law. Co-op. Supp. 1987). The first exception of hot water and heat from the definition of an essential service, when the dwelling unit is not required by law to be equipped for that purpose, is ambiguous. The New Mexico Supreme Court, interpreting a similar provision in that state's law construed the exception as "placing the burden upon the owner to show that a law exists which exempts him from providing reasonable heat for the resident." T.W.I.W., Inc. v. Rhudy, 96 N.M. 354, 357, 630 P.2d 753, 756 (1981)(rejecting argument that tenant must show existence of law requiring heat); *see also* Lovell, *The Iowa Uniform Residential Landlord and Tenant Act and the Iowa Mobile Home Parks Residential Landlord and Tenant Act*, 31 DRAKE L. REV. 253, 321-322 (1981). The second part of the exception, which pertains to situations in which the installation is in the tenant's control, has been described as "the typical arrangement in the single-family residence rental. The exception would appear to absolve the landlord from all liability should, for instance, the gas company fail to provide gas necessary to run the tenant's furnace." *Id.* at 322.

124. S.C. CODE ANN. § 27-40-440(a)(4) (Law. Co-op. Supp. 1987).

125. *Id.* § 27-40-440 (a)(5).

126. *Id.* § 27-40-630. In the alternative, a tenant may elect to sue under this section to recover damages, measured by the difference between the contract rental price and the fair market rental value without the essential service, plus attorney's fees. *Id.* § 27-

If the landlord wilfully interrupts or causes the interruption of an essential service, the tenant also may elect to terminate and seek punitive damages from the landlord under section 27-40-660.[127]

One apparent objective of the procure and deduct remedy provided under section 27-40-630 is to provide the tenant with a means to obtain promptly certain services legislatively deemed essential to residential habitation. The tenant, however, may use the remedy only if certain procedural steps and substantive conditions are satisfied. To procure and deduct under section 27-40-630, the tenant, before procuring the services needed, must give written notice to the landlord of the breach[128] and wait a reasonable time thereafter for the landlord to act.[129] If the landlord fails to act, the tenant then may procure the service, but he may deduct the cost of the services procured only if the landlord was at least negligent in failing to provide the essential services.[130] Moreover, the right to procure services does not give a tenant the right to make repairs to the premises and deduct the cost.[131] Thus, in effect the RLTA permits a tenant to procure services only on a temporary basis but not to make repairs, such as to a furnace or hot water heater, that may be necessary to procure the services permanently.

The theoretical basis for imposing a prohibition under the RLTA against a tenant making repairs and deducting the cost is not clear. At common law, a landlord had no duty to repair areas under the control of the tenant absent an express covenant to do so. It followed that, in the absence of such a covenant, a tenant should not be allowed to circumvent the purpose of that rule by accomplishing the repairs himself and charging the cost to the

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40-630(a)(2).

127. *Id.* § 27-40-660.

128. *Id.* § 27-40-630(a).

129. *Id.* § 27-40-630(d). The Uniform Residential Landlord and Tenant Act has no similar requirement that the tenant wait for a reasonable time before acting, although it does require prior notice to the landlord. The tenant has no right under the RLTA to procure and deduct the cost of essential services if the tenant, a member of the tenant's family, or other person allowed on the premises by the tenant causes the condition by a negligent or deliberate act or omission.

130. *Id.* § 27-40-630(a).

131. *Id.* § 27-40-630(c). Also, any mechanic's lien arising from unlawful repairs is unenforceable. *Id.*

landlord.[132] The RLTA, however, abolishes the common-law premise upon which the no repair and deduct rule was based. A landlord now has an affirmative duty imposed by law under section 27-40-440 to maintain the premises, including the maintenance of certain essential services, during the term of the rental agreement.

The prohibition set forth in section 27-40-630(c) against repairing and deducting does protect a landlord from a tenant making extensive repairs, such as the installation of a new furnace, without the approval of the landlord and then charging the costs of those repairs against future rent. Rather than refusing to recognize the repair and deduct remedy altogether, the Uniform Residential Landlord and Tenant Act addresses this concern by placing a very modest limit on the amount that may be deducted by the tenant.[133] South Carolina, however, permits no such deduction.[134] Unfortunately, the result of this apparent attempt to compromise between the interests of the landlord and of the tenant by permitting some procurement, but no repair, of services provides little comfort to either party, as illustrated by several simple but not uncommon examples.

Consider the situation, for instance, in which an elderly tenant awakens on a subfreezing morning to find that there is no heat in the dwelling unit. Although a life-threatening situation may exist, to take advantage of section 27-40-630, the tenant first must deliver written notice to the landlord and then wait a reasonable time for the landlord to restore the heat. If the landlord fails to act, the tenant may obtain heat from another source, such as by purchasing a space heater. But the tenant cannot be assured that he will be able to deduct the cost of that

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132. *See* Cantrell v. Fowler, 32 S.C. 589 (1890). The status of the right to repair and deduct at common law is less certain when a landlord's express covenant to repair is breached. *See* Bruton, *Landlord and Tenant in South Carolina*, 1 S.C.L.Q. 119, 126, 127 n.8 (1948). This right never has been expressly recognized in South Carolina in that circumstance, but its existence has been suggested by dicta in *Cantrell*, 32 S.C. at 590 and in Timmons v. Williams Wood Prod. Corp., 164 S.C. 361, 162 S.E. 329 (1932). To the extent that § 27-40-630(c) simply clarifies that the RLTA does not create a right to repair and deduct, arguably it does not preclude the recognition of such a right at common law. *See* S.C. CODE ANN. § 27-40-30 (Law. Co-op. Supp. 1987) ("Unless displaced by the provisions of this chapter, the principles of law and equity . . . shall supplement the provisions of this chapter.").

133. UNIF. RESIDENTIAL LANDLORD AND TENANT ACT § 4.103, 7B U.L.A. 481 (1985).

134. S.C. CODE ANN. § 27-40-630(c) (Law. Co-op. Supp. 1987).

heater absent a legal determination that the landlord has been at least negligent in failing to provide heat. In this instance, the burdens imposed by section 27-40-630 fall primarily upon the tenant and appear to contradict both the expressed general purpose of the RLTA—to simplify landlord and tenant law—and the specific purpose of section 27-40-630—to permit a tenant to obtain essential services quickly when needed.

The effort to limit the exposure of landlords under section 27-40-630, however, may have undesired negative effects on their interests. For example, a blockage in a sewer line leading from the premises may cause raw sewage to overflow into several dwelling units on the premises. Even if the landlord fails to respond within a reasonable time after written notification of the problem, the tenants apparently cannot contract with a sewer cleaner to have the blockage removed in a relatively simple and inexpensive manner and then deduct that cost from their rent. Such a treatment would be a nondeductible repair rather than a procurement. Each tenant, however, might contract for the delivery and use of a portable toilet facility, possibly with the right to deduct the cost of that facility from future rent.[135] As a result, the ultimate cost to the landlord could be substantially increased, and each tenant still would be forced, if he elected not to terminate, to live with the uncorrected problem of overflowing sewage in the dwelling units.

While section 27-40-630 provides a remedy for the landlord's negligent failure to provide essential services at any time, even at the commencement of the term, section 27-40-660 applies only if the landlord initially provides service but later wilfully interrupts or causes the interruption of an essential service.[136] The tenant then may terminate the rental agreement and recover damages equal to the greater of three months rent or twice the actual damages, plus reasonable attorney's fees.[137] This section may be construed to provide punitive damages only if the rental agreement is terminated pursuant to section 27-40-

135. As in the previous example, the tenants would not be assured of their right to deduct this cost without both knowing the cause of the blockage and making a legal determination that the landlord had been at least negligent.

136. A wilful act is defined as an attempt intentionally to avoid obligations under the rental agreement or the RLTA. S.C. CODE ANN. § 27-40-210(16) (Law. Co-op. Supp. 1987).

137. *Id.* § 27-40-660.

660. However, the comment to the Uniform Residential Landlord and Tenant Act section 4.101, from which South Carolina derived section 27-40-630, indicates that the section 27-40-660 remedy should be construed as an additional remedy to the section 27-40-630 remedies. Since procurement and termination are essentially inconsistent remedies not likely to be jointly utilized, this comment to the uniform act suggests that in the event of a wilful interruption of services a tenant should be able to procure services under section 27-40-630 and recover double damages under section 27-40-660, even if there is no termination of the rental agreement.[138]

4. The Effect of Maintenance Obligations upon the Tort Liability of Landlord for Personal Injuries to Tenants on the Premises

Landlords generally have enjoyed broad protection under South Carolina law against tort claims for personal injuries suffered by a tenant on the leased premises, other than in areas under the direct control of the landlord. The RLTA does not expressly purport to alter the common-law limitations on tort liability. By its creation of statutory obligations upon the landlord to maintain the dwelling unit during the tenancy, however, the RLTA arguably does provide a new basis for extending the tort liability of a landlord well beyond prior limitations.

The South Carolina Supreme Court consistently has refused to broaden tort liability of a landlord for injuries to a tenant except in a few select circumstances. As recently as 1985 the court reaffirmed the general rule that, even when the landlord expressly has covenanted to repair, "a failure to make repairs will give rise merely to a right of action for breach of contract under which damages are not recoverable for personal injuries sustained by reason of the defective condition of the premises."[139]

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138. See Davis, *supra* note 93, at 414.

139. Young v. Morrisey, 285 S.C. 236, 239, 329 S.E.2d 426, 428 (1985); *see also* Bruton, *supra* note 132, at 124. Landlords have been held liable for injuries resulting from their negligent performance of work once they have undertaken the work. *See* Conner v. Farmers & Merchants Bank, 243 S.C. 132, 132 S.E.2d 385 (1963). They also have been held liable for injuries incurred on a part of the premises remaining within the landlord's control. *See* cases cited *infra* note 144.

The fundamental premise of this rule has been that "the relationship of landlord and tenant, of itself alone, imposes no duty upon the former to repair"[140] the leased premises and that any obligation to repair " 'must be[] imposed by some contract apart from the mere lease of the land.' "[141] Given the premise under prior law that any duty to repair must be contractual, the court has rejected an action in tort on the grounds "that actionable negligence is the neglect to perform a legal duty, as distinguished from the failure to perform a mere contractual duty."[142] Recovery for personal injuries under a contract theory also has been rejected on the rationale that these injuries are too remote "to have been within contemplation of the contracting parties when the contract was entered into."[143]

This rule, however, does not necessarily preclude the recognition of tort liability for injuries caused by the breach of a legal obligation imposed by the RLTA. The fundamental premise under prior law that any duty to repair must be contractual in origin no longer is valid in the residential situation because the landlord must maintain the dwelling unit according to section 27-40-440. The question raised by the enactment of the RLTA is whether in South Carolina, as a result of the imposition of these legal obligations, a tenant may assert an action in tort against the landlord for injuries resulting from the breach of such obligations.

A landlord is liable at common law to a tenant injured as a proximate result of the landlord's negligence when the injury occurs on a part of the premises within the landlord's management and control.[144] The distinction drawn by the court between that situation and situations in which tort liability has been rejected is that, "[b]ecause possession and control are reserved unto the lessor, the law implies an obligation, creates a legal duty, to keep the same in repair, and to operate it properly."[145] This language suggests that possession and control are significant only insofar

140. Timmons v. Williams Wood Prod. Corp., 164 S.C. 361, 366, 162 S.E. 329, 330 (1932).

141. *Id.* (quoting Williams v. Salmond, 79 S.C. 459, 460, 61 S.E. 79, 79 (1908)).

142. Sheppard v. Nienow, 254 S.C. 44, 49, 173 S.E.2d 343, 345 (1970).

143. *Timmons*, 164 S.C. at 370, 162 S.E. at 332.

144. *See* Binnicker v. Adden, 204 S.C. 487, 30 S.E.2d 142 (1944); *Timmons*, 164 S.C. 361, 162 S.E. 329; Medlock v. McAlister, 120 S.C. 65, 112 S.E. 436 (1922).

145. *Timmons*, 164 S.C. at 374, 162 S.E. at 33.

as they give rise to a legal duty on the part of the landlord to repair; the existence of that legal duty is actually determinative of tort liability.

The significance to a landlord's tort liability of the existence of a legal duty to repair is underscored by dicta in the leading South Carolina case *Timmons v. Williams Wood Products Corp.*[146] Reviewing the exceptions at common law to the general rule against landlord tort liability, the court concluded that "with rare exceptions, all of the cases which permit recovery for personal injuries to the tenant, or to a member of his family, are bottomed" upon one of six factors, the first of which is "breach of a statutory duty."[147] Thus, it would appear that a tenant might properly assert the breach of a statutory duty under section 27-40-440 as the basis for tort recovery against his landlord, regardless of whether the landlord has possession and control of the defective portion of the premises.

Despite a common-law tradition of protecting landlords from tort liability similar to that in South Carolina, the Ohio Supreme Court held that tort liability does arise from the landlord's breach of a provision in the Ohio residential landlord and tenant act[148] similar to section 27-40-440 of the South Carolina RLTA. In *Shroades v. Rental Homes, Inc.*[149] the Ohio court held that a landlord's violation of the obligation to maintain the dwelling unit in a habitable condition is negligence per se. This ruling overturned an earlier decision of that court[150] which had refused to recognize such a tort remedy in the absence of clear legislative direction to do so.

Like the Ohio statute, the RLTA creates specific statutory duties of the landlord intended to protect the tenant from unhealthy and unsafe conditions. Even in the absence of an expressed legislative intent to provide a remedy in tort for a breach of those duties, the imposition of the duties arguably has removed the "underpinnings of the common law rules" protect-

146. 164 S.C. 361, 162 S.E. 329 (1932).

147. *Id.* at 374, 162 S.E. at 333.

148. OHIO REV. CODE ANN. § 5321.04(A) (Anderson 1981).

149. 68 Ohio St. 2d 20, 427 N.E.2d 774 (1981).

150. The court overturned its earlier decision in Thrash v. Hill, 63 Ohio St. 2d 178, 407 N.E.2d 495 (1980), in which the court had refused to recognize any extension of tort liability beyond the common-law principles.

ing landlords from tort liability to the tenant.[151] Moreover, recognition of tort liability based upon a breach of the statutory warranty of habitability would be consistent with the recent implied recognition by the South Carolina Court of Appeals in *Holmes v. Rosner*[152] of an action for personal injury arising from a landlord's breach of an express warranty of habitability.

5. *Tenant Obligations to Maintain Premises*

(a) *Under Prior Law.* Few South Carolina decisions prior to the RLTA have addressed the condition in which the tenant is obligated to return the leased premises at the end of the term. To the extent that the issue has been considered, it generally has been in an agrarian setting and has been expressed in terms of the tenant's duty not to commit voluntary waste by removing timber or other natural resources belonging to the holder of the reversionary interest.[153] Although prior South Carolina law has not expressly defined the tenant's legal duty to repair or maintain an urban, residential premises, that duty logically would be predicated upon the same obligation to avoid waste.

Application of principles regarding waste in the urban, residential setting suggests that a tenant is not required under prior law to repair damage incurred as a result of ordinary wear and tear during the tenancy.

> Whether particular acts or omissions constitute waste depends on matters of fact, including: the nature, purpose, and duration of the tenancy; the character of the property; whether the acts complained of are related to the use and enjoyment of the property; whether the use is reasonable in the circum-

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151. *Id.* at 184, 407 N.E.2d at 499 (Sweeney, J. dissenting). If tort liability is based solely on a theory of negligence per se arising from a breach of the landlord's statutory obligations to the tenant, an interesting question remains whether that liability extends also to claims made by family or guests of the tenant.

152. 289 S.C. 287, 346 S.E.2d 37 (Ct. App. 1986).

153. *See* Dial v. Gardner, 104 S.C. 456, 89 S.E. 396 (1916) (landlord has claim against tenant in possession for injuries to land affecting reversion); Roberts v. Jones, 71 S.C. 404, 51 S.E. 240 (1905) (removal of manure belonging to landlord is waste); Lewis v. Virginia-Carolina Chem. Co., 69 S.C. 364, 48 S.E. 280 (1904) (tenants liable for cut timber); Wingard v. Lee, 287 S.C. 57, 336 S.E.2d 498 (Ct. App. 1985) (cutting of timber held not to be waste on facts); *see also* City Council v. Moorhead, 31 S.C.L.(2 Rich.) 430 (1846) (agreement by tenant to return premises in same order as when received imposes upon tenant a contractual duty to repair even usual wear and tear and decay).

> stances; and whether the acts complained of are reasonably necessary to effectuate such use.[154]

On the other hand, the duty to avoid waste in South Carolina includes the duty to avoid permissive as well as voluntary waste. "Waste may be committed by acts *or omissions* which tend to the lasting destruction, deterioration, or material alteration of the freehold and the improvements thereto or which diminish the permanent value of the inheritance."[155] A tenant, thus, may have a duty at common law in South Carolina to make whatever minor repairs may be necessary to prevent a greater permanent harm from occurring.

(*b*) *Under the RLTA.* The RLTA shifts to the landlord certain affirmative duties to repair the premises and clarifies the extent to which a residential tenant remains responsible for maintenance of the leased premises.[156] The maintenance duties imposed upon the tenant are, for the most part, complementary to duties imposed upon the landlord under section 27-40-440. As the landlord has a duty to the tenant to comply with applicable government codes, the tenant now is obligated to comply with all duties primarily imposed upon tenants by applicable building and housing codes materially affecting health and safety.[157] Complementing the landlord's duty to keep common areas safe is the tenant's duty to keep the dwelling unit and other parts of the premises used by the tenant reasonably safe and clean.[158]

The tenant also is responsible for keeping all plumbing fixtures clean[159] and for using in a reasonable manner all facilities and appliances supplied by the landlord.[160] The tenant must remove trash from the dwelling unit in a reasonably clean manner[161] and may not deliberately or negligently destroy, deface, damage, or remove a part of the premises or knowingly permit

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154. *Wingard*, 287 S.C. at 60, 336 S.E.2d at 500.

155. *Id.* (emphasis added).

156. *See* S.C. CODE ANN. § 27-40-510 (Law. Co-op. Supp. 1987).

157. *Id.* § 27-40-510(1).

158. *Id.* § 27-40-510(2). The landlord has an analogous obligation to keep common areas reasonably clean only if five or more dwelling units are on the premises. *Id.* § 27-40-440(a)(3).

159. *Id.* § 27-40-510(4).

160. *Id.* § 27-40-510(5).

161. *Id.* § 27-40-510(3).

another to do so.[162] This latter obligation thereby incorporates into the RLTA the common-law prohibition against voluntary waste by the tenant.

In addition to these express statutory obligations, section 27-40-510 obligates the tenant to comply with the provisions of the rental agreement,[163] including any rules and regulations imposed by the landlord pursuant to section 27-40-520.[164] Thus, the RLTA, in effect, incorporates into section 27-40-510 by reference all the provisions of the rental agreement and the rules and regulations, including any maintenance obligations imposed by agreement upon the tenant and any assumption by the tenant of repair obligations normally imposed upon the landlord under section 27-40-440.

6. *Landlord Remedies for Breach by Tenant of Obligations to Maintain*

(*a*) *Termination.* In contrast to the limitation placed upon the tenant's termination remedy for a landlord's breach of the rental agreement, no express materiality standard is imposed on a tenant's breach of the rental agreement. Any noncompliance by the tenant under the rental agreement permits the landlord to terminate the agreement, if the noncompliance is not cured within the statutory period.[165]

The landlord's termination remedy under section 27-40-710 also is available if the tenant fails to comply with any obligation under section 27-40-510 in a manner that materially affects health and safety or the physical condition of the property.[166] The absence of a materiality standard regarding a breach of the rental agreement, however, may provide the landlord with an opportunity to circumvent the requirement that statutory noncompliance must have a material effect for the landlord to terminate. By incorporating the section 27-40-510 duties into the rental agreement, the landlord can make any noncompliance with the statutory obligations a breach of the rental agreement,

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162. *Id.* § 27-40-510(6).

163. Although § 27-40-510(8) requires compliance with the "lease," the term "rental agreement" should have been used for consistency with the rest of the RLTA.

164. S.C. CODE ANN. § 27-40-510(8) (Law. Co-op. Supp. 1987).

165. *Id.* § 27-40-710(a).

166. *Id.*

regardless of the effect upon health and safety or physical condition of the premises. That breach of the rental agreement, if not timely cured, would be sufficient to permit termination without inquiry into the issue of materiality.

The termination procedure under section 27-40-710, requiring that the landlord notify the tenant in writing of specific noncompliances and provide the tenant with fourteen days to cure or begin to cure the noncompliances, parallels the procedure for termination available to the tenant under section 27-40-610. The landlord, however, may have a second termination remedy under section 27-40-720(b) in certain emergency situations. If a tenant's noncompliance with section 27-40-510 materially affects health and safety and cannot be remedied by repair, replacement of a damaged item, or cleaning, then in the case of an emergency the landlord may terminate without giving fourteen days notice if the tenant fails to cure the noncompliance "as promptly as conditions require."[167] Although section 27-40-720 on its face applies only to a noncompliance with section 27-40-510, all of the terms of the rental agreement are incorporated by reference into that section through section 27-40-510(8).

(*b*) *Self-help.* If the tenant fails to remedy his noncompliance with maintenance obligations in a timely manner, the landlord is permitted in certain circumstances to undertake the repairs himself[168] and recover their cost in an action against the tenant for damages. If a noncompliance with section 27-40-510[169] materially affects health and safety and can be remedied by repair, replacement of a damaged item, or cleaning, the landlord may be permitted to enter and have the work performed in a workmanlike manner. This remedy is available only if the landlord first provides notice to the tenant of the breach and requests that it be remedied. If the tenant then fails to comply within fourteen days or, in the case of an emergency, as quickly

167. *Id.* § 27-40-720(b). This section further provides that if a noncompliance occurs in a nonemergency situation, the landlord may terminate if the tenant does not cure the noncompliance within 14 days after written notice from the landlord specifying the breach. Because this provision provides relief already available under § 27-40-710(a), its purpose is not readily apparent.

168. *Id.* § 27-40-720(a).

169. Included again is any noncompliance with the rental agreement as incorporated through § 27-40-510(8).

as conditions require, the landlord may act.[170]

The self-help remedy is in addition to any other remedies available to the landlord.[171] Thus, the landlord still may elect to terminate the rental agreement,[172] and he may bring an action to recover actual damages incurred as a result of the tenant's failure to comply.[173] Such damages should include the cost of the repairs undertaken by the landlord.

(*c*) *Damages.* The landlord retains under section 27-40-710(c) the right to recover actual damages and to obtain injunctive relief for any noncompliance with the rental agreement or section 27-40-510. The remedy is similar to that provided to tenants under section 27-40-610(c), including a provision for the award of attorney's fees if noncompliance by the tenant is wilful.

The cumulative nature of the landlord's remedy for damages, however, is more certain than the tenant's remedy. Section 27-40-750 establishes that following termination and an action for possession the tenant retains a separate claim for actual damages for breach of the rental agreement. The RLTA does not expressly state whether he also retains a separate claim for damages arising from a breach of statutory obligations. A landlord, therefore, is well-advised to incorporate the terms of section 27-40-510 into the rental agreement to ensure that he can recover all actual damages in addition to termination.

B. The Rental Obligation

1. Abatement of Rent Following Destruction of Premises

The RLTA expands upon and clarifies the tenant's right to terminate the rental agreement or to continue it at a reduced rent if normal use and occupancy of the dwelling unit is substantially impaired by fire or casualty. The tenant may vacate the premises immediately and terminate the rental agreement as

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170. *Id.* § 27-40-720(a).

171. *Id.*

172. A question to be resolved is whether the landlord can terminate under § 27-40-710 if, in an emergency situation, he exercises his power under § 27-40-720(a) and repairs the defect prior to expiration of 14 days. Section 27-40-710 provides that the tenant must have 14 days to cure before the landlord can terminate; it makes no exception for emergency situations.

173. *See* S.C. CODE ANN. § 27-40-710(c) (Law. Co-op. Supp. 1987).

of the date of vacating if he notifies the landlord in writing within seven days thereafter of his intent to terminate.[174]

If continued occupancy is lawful, the tenant may elect to vacate only that part of the premises rendered unusable. If the tenant vacates only a portion of the premises, future rent is reduced in proportion to the diminution in fair market rental value.[175] In other words, if the casualty or fire reduces the fair market rental value of the premises by twenty-five percent, the rent owed under the rental agreement will be reduced by that same percentage.

At early common law, strict adherence to the property law concept of a lease as a conveyance resulted in a tenant's being held liable for rent even after the destruction of the premises by fire or other casualty.[176] South Carolina, however, has long interpreted the common law to reach a result more consistent with modern expectations. As early as 1792, the court held that a tenant was not required to pay for the time he was denied enjoyment of the leased premises by the casualties of war.[177] In 1828, in *Ripley v. Wightman*,[178] the court considered English common-law decisions that were cited for the proposition that a tenant bears the cost of premises destroyed by a storm. The court concluded that, although the tenant was required to pay rent because of principles of independent covenants, he was not barred by those decisions from recovering damages incurred.[179]

The Supreme Court of South Carolina extensively considered the issue again in 1871 in *Coogan v. Parker*.[180] The court stated the general rule in South Carolina as derived from the earlier cases that when there is "a substantial destruction of the subject-matter [of a lease] . . . by an act of God, or of public enemies, tahe tenant may elect to rescind, and on surrendering all benefit thereunder shall be discharged from the payment of rent."[181] Thus, the destruction of a building by an act of God or a public enemy could give rise to termination of the lease if the

174. *Id.* § 27-40-650(a)(1).
175. *Id.* § 27-40-650(a)(2).
176. *See* R. SCHOSHINSKI, *supra* note 63, at 660.
177. Bayly v. Lawrence, 1 S.C.L.(1 Bay) 499 (1792).
178. 15 S.C.L.(4 McCord) 447 (1828).
179. *Id.* at 450.
180. 2 S.C. 255 (1871).
181. *Id.* at 259.

building "were the main element of the consideration on which the agreement to pay rent was based."[182] Dictum in *Coogan*, however, suggested that the doctrine of termination may not extend under South Carolina common law to the destruction of the leased premises by fire, unless the parties agree differently by contract.[183]

The RLTA clarifies the tenant's rights in three situations. First, if the dwelling unit is partially destroyed and the tenant gives timely notice, the rental agreement is terminated. Second, if the dwelling unit is partially destroyed and the tenant does not give timely notice of an intent to terminate, the rental obligation continues at a reduced rate. Third, if the dwelling unit is totally destroyed and the tenant gives timely notice, the rental agreement is terminated. Section 27-40-650, however, does not expressly address a fourth situation in which the premises are totally destroyed, but the tenant fails to give notice of an intent to terminate within seven days.

In the absence of an agreement between the parties, the result in the fourth situation depends upon whether section 27-40-650 is interpreted to condition the right to terminate upon the tenant giving notice within seven days. If timely notice were construed as a condition precedent to any termination under section 27-40-650, the remedy in the absence of notice after the premises are totally destroyed would depend upon whether that section is intended to provide the only remedies available to the tenant in the event of a fire or casualty. If so, the tenant apparently would have no remedy and would remain liable for the entire rental obligation, absent a breach by the landlord of some other obligation under the RLTA or rental agreement.[184] Thus, the tenant who failed to terminate within seven days might pay more for a premises totally destroyed by casualty than for a premises only partially destroyed. Moreover, he might be required to pay more than would have been required at common law, a result apparently not intended by the inclusion of section

182. *See id.* at 275.

183. *See id.* at 265.

184. Rent could not be abated under § 27-40-650(a)(2) in the event of total destruction since continued lawful occupancy would not be possible. A question might be raised regarding whether the landlord's repair obligations include reconstruction of substantially destroyed premises. If so, a refusal by the landlord to repair might then allow the tenant to terminate under § 27-40-610 instead.

27-40-650.

If section 27-40-650 is not exclusive and if the RLTA is interpreted not to provide any remedy in the absence of timely notice, then common-law principles should continue to govern the tenant's obligations in the fourth situation.[185] If at common law the tenant were required to continue to pay full rent, however, an incongruous result again would be reached: the tenant would have to pay more rent if the premises were totally destroyed, than under the RLTA if the premises were only partially destroyed. If, on the other hand, the tenant were allowed to terminate at common law even though he had not given the notice to terminate required by the RLTA, the seven-day notice provision under the RLTA would be rendered meaningless when the premises were totally destroyed.

These results suggest that the purpose of the RLTA to modernize landlord and tenant law is best served by construing section 27-40-650 to provide a remedy in all situations. Under this interpretation, when continued occupancy of a dwelling unit would be unlawful after a fire or other casualty, a failure by the tenant to notify the landlord within seven days of his intent to terminate would not foreclose the right to terminate under section 27-40-650. Rather, the failure to give timely notice would merely prevent the tenant from taking advantage of the provision that the termination is retroactive to the date of vacating. Thus, if the tenant did not provide timely notice, he would have a remedy of termination under the RLTA, but would remain liable for full rent for the period up to the date of the actual notification. Only under this approach does the RLTA fully achieve the apparent intent of section 27-40-650 to protect a tenant from bearing the risk of the premises being destroyed.

2. Landlord Remedies for Tenant Breach of Rental Obligation

If the tenant fails to pay rent when due and if the breach is not cured in a timely manner, the landlord may terminate the rental agreement under section 27-40-710(b), commence an action for damages under section 27-40-710(c), or both. The land-

185. *See* S.C. CODE ANN. § 27-40-30 (Law. Co-op. Supp. 1987).

lord also retains under the RLTA the power to collect rent by distraint procedures available under existing statutory law.[186] In an action for possession following termination or in a proceeding for rent or for distraint, the tenant may raise any defenses to payment available under the RLTA or rental agreement.[187]

Under prior South Carolina law, a residential landlord could commence an action for possession upon any failure by the tenant to pay rent when due.[188] The RLTA invokes a five-day grace period, permitting termination of the rental agreement and commencement of an action for possession only if the rent remains unpaid five days after the due date.[189] To terminate a rental agreement for nonpayment of rent, the landlord also must give the tenant prior written notice of nonpayment and of the landlord's intent to terminate if the rent is not paid within the grace period.[190]

Section 27-40-710(b) leaves ambiguous the time within which the landlord must provide notice. By merely requiring notice prior to termination, one interpretation is that the RLTA permits landlords to provide notice immediately prior to such termination. It seems more likely, however, that the intent of the RLTA is to require notice at the beginning of the grace period, as does the Uniform Residential Landlord and Tenant Act.[191]

This ambiguity may prove unimportant in practice because additional provisions of section 27-40-710(b) require a landlord to give such notice only once during the term of a rental agreement and, more importantly, permit him to satisfy the notice requirement by including it in conspicuous language in the written rental agreement. The entire notice provision under the RLTA approach, therefore, may prove to be of little practical benefit to tenants.

A second remedy of the landlord is an action for damages under section 27-40-710(c). If nonpayment of rent is found not to have been in good faith, the landlord may recover attorney's

186. *Id.* § 27-40-740(b).
187. *Id.* § § 27-40-640(a), -740(b).
188. S.C. CODE ANN. § 27-37-10(a) (Law. Co-op. 1977).
189. S.C. CODE ANN. § 27-40-710(b) (Law. Co-op. Supp. 1987).
190. *Id.*
191. UNIF. RESIDENTIAL LANDLORD AND TENANT ACT § 4.201(b), 7B U.L.A. 492 (1972).

fees in addition to actual damages.[192] A landlord may bring an action under this section at any time prior to or following termination,[193] and, because distraint is available only to recover rent, this action is particularly appropriate when actual damages in addition to unpaid rent are sought.

The third remedy arising under the RLTA for the tenant's failure to pay rent is the right of the landlord to enforce collection by distraint and sale of the tenant's property.[194] Although the remedy has been criticized for various reasons[195] and is abolished by the Uniform Residential Landlord and Tenant Act,[196] the South Carolina version retains the landlord's authority to use the procedures set forth in sections 27-39-210 to -360.

The RLTA does clarify the applicability of the general exemption statute[197] to distraint proceedings in residential tenancies. Under prior law, only personal clothing, food, bedding, and cooking utensils of the tenant were expressly exempt from distraint.[198] The court of appeals recently indicated, without deciding, that the general exemption statute might not supplement these exemptions.[199] Under the RLTA, however, the tenant may claim the exemptions of section 15-41-200 in a distraint proceeding,[200] including exemptions of not more than $2500 in aggregate value of household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments, of not more than $500 in jewelry, and of not more than $1200 in one motor vehicle.[201]

Except for this modification and the recognition of additional tenant defenses under the RLTA and rental agreement, the RLTA incorporates intact the prior law of distraint. Thus,

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192. S.C. CODE ANN. § 27-40-710(c) (Law. Co-op. Supp. 1987).

193. *See id.* § 27-40-750.

194. *Id.* § 27-40-740(b).

195. See authorities cited in Spitz, *supra* note 27, at 816.

196. UNIF. RESIDENTIAL LANDLORD AND TENANT ACT § 4.205(b), 7B U.L.A. 497 (1985).

197. S.C. CODE ANN. § 15-41-200 (Law. Co-op. Supp. 1987).

198. S.C. CODE ANN. § 27-39-230 (Law. Co-op. 1977).

199. *See* Howard v. Bibbs, 287 S.C. 636, 639 n.1, 340 S.E.2d 566, 568 n.1 (Ct. App. 1986); 1983 Op. S.C. Att'y Gen. 161.

200. S.C. CODE ANN. § 27-40-740(b) (Law. Co-op. Supp. 1987). By making the exemptions under § 15-41-200 available to a tenant, the RLTA appears to supplement, not replace, the exemptions under § 27-39-230. Thus, if the latter are more favorable to the tenant, such as when clothing and bedding exceed a value of $2500, he may continue to assert them.

201. *Id.* § 15-41-200.

the remedy should be available whenever the relationship of landlord and tenant exists, the rent is in arrears and of a sum certain, and the landlord's claim is for rent only.[202] Problems under the prior law in the procedures and enforcement of the remedy, however, also remain. These problems include uncertainty regarding the extent of the sheriff's power to enter the premises forcibly if necessary to distrain the personal property of the tenant and the constitutionality of the statutory requirement that a tenant post a double bond in order to prevent a sale of the distrained property.[203]

C. The Landlord's Right of Access to the Dwelling Unit

Common-law treatment of a lease as a conveyance gave a landlord no right of access during the term of the tenancy.[204] Although this basic rule may survive, the formulation of the landlord's right of access under the RLTA subjects the rule to a broad range of exceptions intended to permit a landlord to protect his interest in the property and to fulfill his modern obligations of repair. The landlord now may gain access to the dwelling unit when permitted by the RLTA or by court order, when accompanied by a law enforcement officer at a reasonable time to serve process in ejectment proceedings, or following abandonment or surrender of the dwelling unit by the tenant.[205]

A landlord may enter the dwelling unit at any time with the consent of the tenant. The tenant may not unreasonably withhold consent under the RLTA if the landlord gives twenty-four hours notice of his intent to enter at a reasonable time to inspect the premises, make repairs or improvements, provide services, or show the dwelling unit to workmen or to persons with a prospective or actual interest in the dwelling unit.[206]

The tenant's consent is not required for entry in an emergency, which is defined to include a prospective change in

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202. *See* Frady v. Smith, 247 S.C. 353, 147 S.E.2d 412 (1966); Burnett v. Boukedes, 240 S.C. 144, 125 S.E.2d 10 (1962); Fidelity Trust & Mort. Co. v. Davis, 158 S.C. 400, 155 S.E. 622 (1930).

203. For a more complete analysis of the distraint remedy in South Carolina and of the problems it presents, see Spitz, *supra* note 27, at 815-26.

204. *See* Note, *supra* note 80, at 307.

205. S.C. CODE ANN. § 27-40-530 (Law. Co-op. Supp. 1987).

206. *Id.* § 27-40-530(a).

weather that poses a likelihood of danger to the property.[207] If the written rental agreement conspicuously permits the landlord to enter for regularly scheduled services and he gives prior notice of his intent to enter, he may enter without the tenant's consent to perform those services between the hours of 9 a.m. and 6 p.m.[208] If the tenant requests that services be provided and the landlord gives prior notice of his intent to enter, he may do so for that purpose between the hours of 8 a.m. and 8 p.m.[209]

The landlord may exercise his right to enter under section 27-40-720 without the tenant's consent to repair defects caused by the tenant's noncompliance that the tenant has not repaired. Except in an emergency, however, in which case the landlord has immediate access under section 27-40-530(b)(1), a landlord exercising the right to enter under section 27-40-720 may be subject to the restriction of section 27-40-530(c) that he give twenty-four hours notice and enter only at a reasonable time.

The application of subsection 27-40-530(c) to entry under section 27-40-720 is not entirely clear. Section 27-40-530 contemplates two separate sources of a right to access. A right may arise under section 27-40-530(a) or (b), as limited by subsection (c), or the right may arise elsewhere and be cross-referenced within section 27-40-530(d). The question is whether the restrictions imposed by subsection (c) also apply to limit the rights cross-referenced in subsection (d).

Subsection (c) ostensibly applies "except in cases under item (b) above,"[210] suggesting, perhaps, a broader application than merely to cases of entry by consent under subsection (a). Application of the notice requirements to the exercise of all access rights enumerated in subsection (d), on the other hand, would seem to require, for instance, that a landlord provide twenty-four hours notice of his intent to enter to serve process in an ejectment action. This unusual result suggests that some clarification of the applicability of the notice requirement under section 27-40-530(c) is needed.

The landlord may terminate the rental agreement or obtain

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207. *Id.* § 27-40-530(b)(1). A landlord may enter the dwelling unit, for instance, if entry is necessary to secure plumbing against a sudden freeze.

208. *Id.* § 27-40-530(b)(2).

209. *Id.* § 27-40-530(b)(3).

210. *Id.* § 27-40-530(c).

injunctive relief to compel access if the tenant refuses to permit lawful access.[211] In addition, the landlord may recover actual damages and attorney's fees.[212] The inclusion of injunctive relief indicates that, when consent is required for entry and the tenant refuses, the landlord may not resort to self-help, but must seek judicial relief before entering, even if the consent is withheld unreasonably.

The landlord, on the other hand, may not abuse the right of access or use it to harass the tenant.[213] If the landlord enters unlawfully, repeatedly enters lawfully but unreasonably, or repeatedly demands lawful entry to the extent that the tenant is harassed unreasonably, then the tenant may seek injunctive relief or terminate the rental agreement.[214] In addition, the tenant may recover actual damages and attorney's fees.[215]

D. Permitted Uses of the Dwelling Unit

The RLTA sets forth three express restrictions upon the use of a dwelling unit by the tenant. First, the dwelling unit must be used only as a dwelling unit, unless otherwise agreed.[216] This statutory restriction reverses the rule of construction applied under prior law that "in the absence of an exclusion of other purposes, a lease for a specific purpose will be regarded as permissive instead of restrictive and does not limit the use of the premises by the lessee to such purposes."[217] Second, the dwelling unit may not be used for any illegal purpose,[218] which codifies an implied condition of a tenancy recognized in some states at common law.[219]

The RLTA does not specify a remedy for breach of either of these two use restrictions. In the absence of a specific statutory

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211. *Id.* § 27-40-780(a).
212. *Id.*
213. *Id.* § 27-40-530(c).
214. *Id.* § 27-40-780(b).
215. *Id.*
216. *Id.* § 27-40-540.
217. Chassereau v. Stuckey, 288 S.C. 368, 370, 342 S.E.2d 623, 624 (Ct. App. 1986). The position adopted under the RLTA has been described as "consistent with the normal expectations of the parties in the modern residential environment." Kalish, *supra* note 95, at 669.
218. S.C. CODE ANN. § 27-40-540 (Law. Co-op. Supp. 1987).
219. *See, e.g.*, Saad v. Hatfield, 258 Ky. 525, 80 S.W.2d 583 (1935).

remedy, the courts must fashion an appropriate remedy that will give effect to the obligation imposed. Damages or injunctive relief appear to be particularly appropriate remedies in this situation. Whether termination of the rental agreement by the landlord also should be permitted is more troublesome. Injunctive relief without a right of termination may sufficiently protect the landlord's interests. Moreover, although the remedy of termination frequently is available for breach under the RLTA, it is not universal and is not available, for instance, upon most breaches of the tenant's analogous obligation under the RLTA not to use the premises in a manner that disturbs other tenants.

The third restriction on a tenant's use is the obligation under section 27-40-510(7) not to disturb the other tenant's peaceful enjoyment of the premises. For a breach of that obligation, a landlord may seek damages and injunctive relief under section 27-40-710(c). The landlord might also terminate the rental agreement under section 27-40-710(a) if such a breach materially affects health and safety or the physical condition of the premises and is not cured in a timely manner. But, as a practical matter, any disturbance having that effect would likely violate other subsections of section 27-40-510, and this overlap eliminates the need to rely solely upon subsection (7) as a ground for termination.

The obligation imposed under section 27-40-510(7) runs only to the landlord and not to other tenants who may be disturbed by the offending tenant. A tenant, therefore, has no right under the RLTA to enjoin directly another tenant for disturbing the peaceful enjoyment of the premises. Nor does a tenant have any explicit claim under the RLTA against his landlord for failure of the landlord to control another tenant. A tenant, however, is not necessarily without any remedy against a landlord who fails to enforce section 27-40-510(7) against another tenant.

At common law, the mere existence of a landlord and tenant relationship generally did not create a landlord's duty to a tenant to control the conduct of other tenants.[220] Courts, however, have recognized the landlord's implied covenant of quiet enjoyment to each tenant.[221] Relying upon that covenant, some juris-

220. *See* Blackett v. Olanoff, 371 Mass. 714, 717, 358 N.E.2d 817, 819 (1977); R. SCHOSHINSKI, *supra* note 63, at 104.

221. *See, e.g.*, Gardner v. Jones, 464 So. 2d 1144 (Miss. 1985); Andrews & Knowles

dictions have held that, if a landlord has the power from any source to control a disorderly tenant, a failure to exercise that control may constitute a breach of his implied covenant of quiet enjoyment to the other tenants, and this breach may result in constructive eviction of these other tenants.[222] A statutory grant of authority to evict a disorderly tenant has given rise to a finding of a landlord's requisite control to support a defense of constructive eviction.[223]

South Carolina common law implicitly has recognized a covenant of quiet enjoyment by adoption of the defense of constructive eviction in other circumstances.[224] To the extent that such a covenant is not inconsistent with the provisions of the RLTA, it should survive and supplement the landlord's obligations imposed by the RLTA and the express terms of the rental agreement.[225] Indeed, such a covenant seems consistent with the apparent purpose of section 27-40-510(7) to ensure peaceful enjoyment of the premises.

With continued recognition of the covenant of quiet enjoyment as an implied term of the rental agreement, the statutory grant of power to the landlord to control a disorderly tenant may be sufficient to create a right of action by another tenant against the landlord. Relying upon common-law principles recognized in other jurisdictions, a South Carolina tenant sufficiently disturbed by another tenant may be able to assert the remedies provided in section 27-40-610 against the landlord on the grounds that the landlord's failure to exercise his power under the RLTA to control the disturbance constitutes a breach of his implied obligations under the rental agreement.[226]

Produce Co. v. Currin, 243 N.C. 131, 90 S.E.2d 228 (1955); Atlantic Richfield Co. v. Beasley, 215 Va. 348, 210 S.E.2d 151 (1974).

222. *See* Blackett v. Olanoff, 371 Mass. 714, 358 N.E.2d 817 (1977); Eskanos & Supperstein v. Irwin, 637 P.2d 403 (Colo. Ct. App. 1981); Gottdiener v. Mailhot, 179 N.J. Super. 286, 431 A.2d 851 (1981).

223. *Gottdeiner*, 179 N.J. Super. at 292, 431 A.2d at 854.

224. *See* Thomas v. Hancock, 271 S.C. 273, 275, 246 S.E.2d 604, 605 (1978) ("a *constructive eviction* results from an intentional act or omission of the landlord . . . that deprives the tenant of possession *or substantially interferes with his beneficial use or enjoyment of the leased premises.*") (emphasis added).

225. *See* S.C. CODE ANN. § 27-40-30 (Law. Co-op. Supp. 1987) ("Unless displaced by the provisions of this chapter, the principles of law and equity, including the law relating to . . . real property . . . shall supplement the provisions of this chapter.").

226. *See* Kalish, *supra* note 95, at 657-58.

E. Landlord's Duty to Mitigate and Right to Terminate Upon Tenant's Abandonment of Possession During the Term of the Rental Agreement

Upon a tenant's abandonment of possession of the dwelling unit during the term of the rental agreement, a landlord has two options. He may attempt to mitigate damages by making a reasonable effort to relet the dwelling unit at fair value, or he may terminate the rental agreement as of the date he receives notice of the abandonment.[227]

If the landlord elects the first option, the tenant's obligation to pay rent continues until the earlier of the expiration of the term or the reletting of the premises. In this situation, if the rental agreement provides for a month-to-month or week-to-week tenancy, the term of the rental agreement after abandonment is for only a single month or week period, and the tenancy is not renewed automatically.[228]

Failure to pursue the first option automatically causes termination of the rental agreement as of the date the landlord receives notice of abandonment. Similarly, acceptance of the abandonment as a surrender terminates the rental agreement as of the date of such notice.[229] If the landlord elects immediate termination, the tenant's obligation to pay rent ceases at that time, leaving the landlord with only a breach of contract action for actual damages. Moreover, the landlord remains subject to the general duty to mitigate if he intends to seek recovery of damages.[230] On the other hand, under the first option, the landlord may bring an action either for actual damages or for rent accrued after abandonment but prior to reletting.

The landlord's express duty under the RLTA to mitigate damages retains the rule set forth in earlier South Carolina cases[231] that a landlord may not remain idle following an abandonment and continue to demand rent for the remainder of the term. The RLTA also makes clear that a mere abandonment without some form of consent or acceptance by the landlord is

227. S.C. CODE ANN. § 27-40-730(b) (Law. Co-op. Supp. 1987).
228. *Id.*
229. *Id.*
230. *See id.* § 27-40-50(a).
231. *See* United States Rubber Co. v. White Tire Co., 231 S.C. 84, 97 S.E.2d 403 (1956); Burkhalter v. Townsend, 139 S.C. 324, 138 S.E. 34 (1927).

not an automatic termination of the rental agreement.[232] The RLTA's treatment of every reletting as a termination, however, modifies prior law that a landlord could relet the premises for the original tenant's account without terminating the first landlord and tenant relationship.[233] In practice, though, the significance of this change likely will be slight.[234]

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232. Section 27-35-150 provides that "[w]hen a tenant abandons premises . . . the landlord may enter and take possession thereof . . . and the term of a tenant abandoning premises . . . shall be deemed ended by such abandonment." S.C. CODE ANN. § 27-35-150 (Law. Co-op. 1977). The result in Surety Realty Corp. v. Asmer, 249 S.C. 114, 153 S.E.2d 125 (1967), suggests, without directly deciding, that this language of § 27-35-150 should not be interpreted to mean that a lease automatically is terminated when the tenant vacates. Rather, the landlord then has an option to terminate, exercisable only by some consent or acceptance on the landlord's part. *See also* Bruton, *supra* note 132, at 135. That interpretation of § 27-35-150 would be consistent with both the *Restatement* view and the approach adopted under the RLTA.

233. The prior rule in South Carolina, as stated in *Surety*, 249 S.C. at 119, 153 S.E.2d at 128, has been that, upon abandonment and default by the tenant, if the landlord re-entered and relet the premises "for his own purposes," the lease was terminated. However, a landlord could accept the keys to leased premises that had been vacated "so as to be able to rent the premises for the account of the lessee." *Id.* Acceptance of the keys under those circumstances would not terminate the lease or release the tenant from his rental obligation. Implicit in the recognition that a landlord may relet the premises "for the account of the lessee" is the principle that reletting under those circumstances does not terminate the original tenant's rental obligation.

234. Under prior law, the landlord did not have a right to double recovery, since rent paid by the new tenant was applied to the account of the original tenant. The landlord's advantage of reletting on the account of the original tenant was that, since the original lease was not terminated, the original tenant remained at least secondarily liable for rent. If the second tenant also defaulted, the landlord retained a claim for rent against the original tenant, who was treated in essence as a sublessor for the duration of the original term. Of course, the landlord also retained a contract action against the original tenant for damages arising from breach.

The action for rent became especially important if the landlord had pursued an action for damages against the first tenant prior to the second default. Res judicata prevented the landlord from recovery in a second contract action against the first tenant. The landlord, however, still could pursue a property law claim for rent that had become due after the date of the first action. The RLTA precludes this option since any reletting terminates the rental agreement. Given the short term of most residential rental agreements, however, the likelihood of a second tenant abandoning during the original term is small. Also, because of the short term, a single action for the initial breach usually will provide the landlord with recovery sufficient to make a second action unnecessary.

V. RIGHTS UPON CESSATION OF LANDLORD AND TENANT RELATIONSHIP

A. *Landlord Rights and Obligations Following Abandonment, Termination, or Expiration of the Rental Agreement*

1. The Right to Recover Possession

A landlord may recover possession of the dwelling unit from a tenant[235] only upon the tenant's abandonment of possession or following termination or expiration of the rental agreement.[236] If the tenant does not relinquish possession voluntarily following termination or expiration of the rental agreement, the landlord may commence an action in ejectment under sections 27-37-10 to -160,[237] subject to any defenses raised by the tenant pursuant to the RLTA.[238]

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235. S.C. CODE ANN. § 27-40-770(c) (Law. Co-op. Supp. 1987) authorizes an action against a tenant who remains in possession after termination or expiration of a rental agreement. Section 27-40-430 permits a landlord also to recover possession and damages from "any person wrongfully in possession." *Id.* § 27-40-430. The comment to the UNIF. RESIDENTIAL LANDLORD AND TENANT ACT § 2.103, 7B U.L.A. 429 (1972) which is identical to § 27-40-430, interprets this language as permitting a landlord to proceed against a squatter. Thus, the existence of a landlord and tenant relationship between the parties may not always be required in order for an owner to assert rights against another person under the RLTA.

236. S.C. CODE ANN. § 27-40-760 (Law. Co-op. Supp. 1987). The RLTA retains the language of S.C. CODE ANN. § 27-35-150 (Law. Co-op. 1976) which defines abandonment to include the "unexplained absence of a tenant from a dwelling unit for a period of fifteen days after default in the payment of rent." S.C. CODE ANN. § 27-40-730(a) (Law. Co-op. Supp. 1987). A "default" was not interpreted under prior law, but may have included any failure to pay rent when due. The RLTA's use of that term, however, is more problematic. For a further discussion of that point, see *infra* text accompanying notes 272-75.

An event set forth in the rental agreement or the exercise of a statutory right to terminate held by either party may cause termination. The landlord has the option to terminate in appropriate circumstances under S.C. CODE ANN. §§ 27-40-710, -720(b), -730, and -780(a) (Law. Co-op. Supp. 1987). The tenant may terminate in appropriate circumstances under §§ 27-40-610, -620, -650, -660, and -780(b). For further discussion of the availability of the termination remedy, see Part IV of this Article. Section 27-40-760 also permits the landlord to recover possession upon a surrender. That proviso, however, adds little, since either an abandonment or termination likely will accompany every surrender, and either one already provides sufficient grounds to recover possession.

237. S.C. CODE ANN. § 27-40-770(c) (Law. Co-op. Supp. 1987).

238. For example, a tenant may defend under § 27-40-910 on the grounds that the landlord refused to renew in retaliation for protected conduct of the tenant. *See infra* notes 270-75 and accompanying text.

As under prior law,[239] if the landlord unlawfully removes or excludes the tenant at any other time, he is liable to the tenant for damages. The RLTA awards punitive damages in each instance, but limits the measure of damages by providing that the total recovery may equal the greater of three months' periodic rent or double actual damages, plus attorney's fees. In addition, the unlawfully removed or excluded tenant may recover possession of the dwelling unit or terminate the rental agreement.[240]

Prior to passage of the RLTA the Attorney General took the position that, without first obtaining a writ of possession, a sheriff or constable had no authority to make a forcible entry to enforce a writ of ejectment.[241] With the adoption of the RLTA, the legislature amended the ejectment statute explicitly to permit a deputy sheriff, but not a constable, to use the least destructive force necessary to enter a premises to execute a writ of ejectment. Forcible entry is authorized only if the deputy sheriff or constable first has given a copy of the writ to the occupants and given them an opportunity to vacate voluntarily or if the premises appear unoccupied.[242]

2. *The Holdover Tenant*

(a) *Actions for Possession and Damages Against the Holdover Tenant.* If a tenant fails to relinquish possession upon termination or expiration of the rental agreement, the only remedy the RLTA provides for recovery of possession is the action in ejectment.[243] The statute does not authorize a landlord to recover possession by self-help.[244] In addition, if a new tenant has

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239. *See* S.C. CODE ANN. § 27-37-140 (Law. Co-op 1976); Williams v. Columbia Mills Co., 100 S.C. 363, 85 S.E. 160 (1915) (interpreting CIVIL CODE 1912, § 3509, the predecessor to § 27-37-140).

240. S.C. CODE ANN. § 27-40-660 (Law. Co-op. Supp. 1987).

241. *See* 1979 Op. S.C. Att'y Gen. 13.

242. S.C. CODE ANN. § 27-37-160 (Law. Co-op. Supp. 1987).

243. Although § 27-40-760 does provide that a landlord "may not recover or take possession . . . by action *or otherwise* . . . except in case of abandonment, surrender, termination, or as permitted," that section is limiting in nature and does not expressly authorize the use of methods other than the ejectment action to recover possession following abandonment or termination. *Id.* § 27-40-760 (emphasis added).

244. The landlord's only right of self-help in connection with the recovery of possession is the right to enter, remove, and dispose of a small amount of personal property that remains after the tenant has vacated. *See infra* notes 276-81 and accompanying text.

entered into a rental agreement with the landlord for possession of that dwelling unit, the new tenant also may assert an action for possession against the holdover tenant after the start of the new term.[245]

The new tenant may be entitled to recover from the holdover tenant any actual damages incurred as a result of the failure to relinquish possession.[246] If the holdover tenant acts neither wilfully nor in bad faith, however, the landlord may not have a claim for damages unless the holdover violates an express provision of the rental agreement that the tenant will vacate at the end of the term.[247] If the failure to vacate is wilful and not in good faith, both the landlord and the new tenant may recover actual and punitive damages, so long as the total recovery of each does not exceed the greater of three months' periodic rent or twice the actual damages. Reasonable attorney's fees are also recoverable.[248] Unlike other damages provisions of the RLTA, punitive damages, while available, are not mandated upon the finding of a wilful, bad faith holdover. For residential tenancies, this remedy replaces a prior statutory scheme[249] that imposed a penalty of double the rental value whenever the tenant held over for at least three months after a demand for possession.

If the failure to vacate is not wilful but is not in good faith, the landlord may recover attorney's fees, but is not expressly en-

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245. S.C. CODE ANN. § 27-40-620(a)(2) (Law. Co-op. Supp. 1987). For a discussion of the new tenant's remedy, if any, against the landlord in this situation, see *supra* notes 52-62 and accompanying text.

246. *Id.*

247. Section 27-40-770, which contains specific remedies against a holdover tenant, permits an action for possession, but specifies that the landlord may pursue an action for damages only if the holdover tenant acts wilfully or in bad faith. *Id.* § 27-40-770. Section 27-40-430 is of no help to the landlord since it merely incorporates by reference that same damages provision. A landlord's claim for damages in the absence of wilfulness or bad faith by the holdover tenant, then, must rest upon the general damages remedy under § 27-40-710(c). If the holdover had violated some express provision of the rental agreement by not relinquishing possession, the issue arises whether the general damages remedy can provide relief when such relief is not provided under another, more specific section regarding holdovers.

248. For the new tenant's remedy, see *id.* § 27-40-620(b). For the landlord's remedy, see *id.* § 27-40-770(c). If the new tenant seeks recovery of three months rent, the RLTA may refer either to the amount of rent paid by the holdover or to the amount agreed to be paid by the new tenant. To the extent this section puts the new tenant in the shoes of the landlord as against the holdover, however, the logical measure would be the rent paid by the holdover.

249. *See* S.C. CODE ANN. § 27-35-170 (Law. Co-op. 1976).

titled to recover any other damages under section 27-40-770(c). Section 27-40-220(a)(2), however, allows a new tenant who is unable to take possession because of the holdover to recover actual damages without a showing that the holdover is wilful. No provision is made, however, for the new tenant's recovery of attorney's fees.

The RLTA does not expressly provide in section 27-40-770 that a landlord may recover from the holdover a reasonable rental value of the dwelling unit following termination of the rental agreement but prior to recovery of possession by the landlord. The landlord, however, should remain entitled as under prior law[250] to recover a reasonable rental value for the period of the holdover's occupation. The Oregon courts have interpreted Oregon statutes similar to sections 27-40-770(c) and 27-40-310(b) and (c) as providing the landlord with a right to receive a reasonable rent during the period of the holdover, even if no new term is created.[251]

(*b*) *Creation of a New Term.* Under the RLTA, the landlord's consent to the tenant's continued occupancy after termination of the rental agreement creates a new tenancy.[252] Unless otherwise agreed by the parties, the new tenancy will be a periodic tenancy from month-to-month (or week-to-week in the case of a roomer who pays weekly rent).[253] That the old rental agreement provided for a different term should not alone be sufficient to alter this result. On the other hand, nothing prevents the parties from agreeing that, in the event of a holdover, the landlord may consent to the creation of a new term binding the tenant for a different length.

The question remains whether other provisions of the expired or terminated rental agreement will apply during the new tenancy. Under prior statutory law in South Carolina, a tenant who remained on the premises after a lease terminated was

250. *See* Lund v. Gray Line Water Tours, Inc., 277 S.C. 447, 289 S.E.2d 404 (1982).

251. *See* Fitzpatrick v. Robbins, 51 Or. App. 597, 626 P.2d 910 (1981) (interpreting OR. REV. STAT. §§ 91.855(3), 91.740(3), (4) (1984)); *see also* Kalish, *supra* note 95, at 676 (reaching conclusion that under similar Nebraska law the landlord may "bring an action for restitution and damages"). This result also is consistent with S.C. CODE ANN. §§ 27-37-150 and 27-40-790 (Law. Co-op. Supp. 1987), which require the payment of rent during the period of an ejectment proceeding.

252. S.C. CODE ANN. § 27-40-770(c) (Law. Co-op. Supp. 1987).

253. *Id.* (applying *id.* § 27-40-310(d)).

treated as a tenant-at-will under section 27-33-10. Thus, the parties were not bound by the terms of the prior lease and the tenant was liable for "reasonable" rent during the tenancy-at-will.[254]

Section 27-33-10 changed the common-law rule that, if a tenant held over with consent, a new term would be created and the provisions of the expired lease applied.[255] Conflicting arguments may be made regarding whether the RLTA was intended to restore, at least in part, the common-law result. On the one hand, by providing expressly under section 27-40-310(d) for implication of a new term by law, the RLTA arguably rejects the common-law approach that the old agreement controls. It would follow that, in the absence of a new agreement for rent, section 27-40-310(b) should apply, requiring the tenant to pay fair market rental value.

On the other hand, section 27-40-770 of the RLTA expressly provides only that section 27-40-310(d) controls the *term* of the new tenancy. This express reference only to subsection (d) may be interpreted to mean that other provisions of section 27-40-310 implying rent at a fair-market rental value are not intended to apply to the new tenancy. It would follow that the provisions of the old rental agreement, except those governing the term of the tenancy, may continue to control.

3. *Limits on Retaliatory Action by Landlord*

(*a*) *Retaliatory Action for Possession.* The RLTA restricts the landlord's right to eject a tenant in retaliation for certain complaints made by the tenant regarding the condition of the premises. With some exceptions, a landlord may not bring a retaliatory action for possession once a tenant complains either to an appropriate governmental agency about a code violation materially affecting health and safety or to the landlord about any violation by the landlord of his obligations under the RLTA.[256]

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254. Townsend v. Singleton, 257 S.C. 1, 183 S.E.2d 893 (1971).

255. *See id.* at 8, 183 S.E.2d at 896.

256. A retaliatory rental increase to an amount in excess of fair market value or a retaliatory decrease in essential services also is proscribed under the RLTA. As when there is a retaliatory action for possession, the tenant may terminate or recover damages from the landlord. By implication, rent may be increased for any reason, including retaliation, up to the fair market rental value. If the landlord rents five or more adjoining

The statutory defense of retaliatory eviction is derived from similar statutory[257] and judicial[258] determinations dating from the 1960s that allowing the eviction of a tenant after the tenant has complained of certain violations to either proper governmental authorities or the landlord does not further public policy. In the leading case of *Edwards v. Habib*[259] the United States Court of Appeals for the District of Columbia Circuit found that adoption of a municipal housing code altered the traditional landlord and tenant relationship, limiting a landlord's power to evict a tenant in these circumstances. Concluding that effective enforcement of housing and building codes depends upon reports of substandard conditions by the public, the court determined that the prospect of a retaliatory eviction discouraged these reports and thereby hindered code enforcement. Accordingly, "[w]hile the landlord may evict for any legal reason or for no reason at all," he may not "evict in retaliation for his tenant's report of housing code violations to the authorities."[260]

Whether an attempted eviction is retaliatory is a question of fact.[261] In *Robinson v. Diamond Housing Corp.*[262] the court established a common-law presumption of retaliatory intent in the District of Columbia whenever an "unexplained eviction" follows an action for rent in which the tenant successfully asserted a defense based upon substantial noncompliance with applicable housing codes. The Uniform Residential Landlord and Tenant Act incorporates the retaliatory eviction defense, including a presumption of retaliatory motive if the threatened eviction occurs within one year of a protected complaint by the tenant.[263]

Unlike the uniform provision, however, the RLTA does not include any presumption or guidance indicating when conduct is retaliatory. Nor does the RLTA indicate which party bears the

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dwelling units on the premises, he may uniformly increase the rent even beyond fair market value without a presumption of retaliation. The lack of a presumption, however, apparently does not preclude a finding that the increase nevertheless was retaliatory. S.C. CODE ANN. § 27-40-910 (Law. Co-op. Supp. 1987).

257. *See* ILL. ANN. STAT. ch. 80, para. 71 (Smith-Hurd 1981) (effective July 15, 1963).

258. *See, e.g.*, Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968).

259. *Id.*

260. *Id.* at 699.

261. *See id.* at 702; Robinson v. Diamond Hous. Corp., 463 F.2d 853, 864 (D.C. Cir. 1972).

262. 463 F.2d 853 (D.C. Cir. 1972).

263. UNIF. RESIDENTIAL LANDLORD AND TENANT ACT, § 5.01, 7B U.L.A. 503 (1972).

burden of proof.[264] If, similar to the *Restatement* position, the tenant bears the burden of proving the existence of a subjective retaliatory motive of the landlord, it may be difficult for the tenant, without the benefit of any presumption, to assert successfully a defense under section 27-40-910. Attempting and failing to prove retaliatory intent heightens the tenant's risk of liability under section 27-40-910(b), which provides that if the defense is raised without merit the landlord may recover attorney's fees.[265]

Despite the provisions against retaliatory eviction after a tenant's complaint, the landlord may assert an action for possession in these situations: if a code violation results from the negligence of the tenant or someone on the premises with his permission, if the tenant materially fails to comply with sections 27-40-710 or 27-40-720, or if compliance with housing codes would require changes effectively denying the tenant the use of the dwelling unit.[266] The RLTA, however, expressly provides that, while the landlord may recover possession in the listed circumstances, he nevertheless may remain liable for damages if his primary motivation for the action for possession is retaliatory.[267] By expressly reserving the tenant's right to recover damages, the RLTA appears to contemplate that a tenant may recover damages from the landlord for retaliatory conduct, even if the tenant

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264. In S.C. CODE ANN. § 27-40-910(e) (Law. Co-op. Supp. 1987), which addresses a retaliatory rental increase, the RLTA provides that a certain action does not create a presumption of retaliation. By negative inference, that statement might be construed to suggest that a presumption otherwise exists. But, there is no other expression to that effect in the RLTA. The *Restatement* defines retaliatory action to include only action "primarily motivated" by the tenant's protected conduct. RESTATEMENT (SECOND) OF PROPERTY (LANDLORD & TENANT) § 14.8 (1977). Comment f to § 14.8 places the initial burden upon the tenant to establish that the landlord's action "was discriminatory and followed at the first opportunity" after the protected conduct of the tenant. Factors suggested in comment f as indicative of a lack of retaliatory motivation include (a) a showing by the landlord that his was a reasonable exercise of business judgment; (b) a good faith desire by the landlord to dispose of the property free of tenancies; (c) a good faith desire by the landlord to use the property in a different manner; and (d) a lack of financial ability to repair accompanied by a good faith desire not to continue to lease to any tenant.

265. If the defense is raised in bad faith, defined by implication in S.C. CODE ANN. § 27-40-210(5) (Law. Co-op. Supp. 1987) as conduct without honesty in fact, the landlord may recover the greater of three months' rent or treble actual damages. This recovery is in lieu of damages recoverable against a holdover under § 27-40-770 (erroneously referred to as § 27-40-760 in the Code).

266. *Id.* § 27-40-910(c).

267. *Id.* § 27-40-910(h).

caused the violation about which he complained or if the tenant failed to perform his own obligations under the RLTA.

When a prohibited retaliatory action for possession is instituted, the tenant is entitled to terminate the rental agreement under section 27-40-660 and seek damages under section 27-40-660 or 27-40-910(h).[268] Within ten days after service of the Rule to Vacate or Show Cause, however, the tenant must notify the landlord of his intent to defend on the basis of retaliation.[269] The clear implication is that in the absence of such notice the defense of retaliation will be waived.

(*b*) *Retaliatory Refusal to Renew at Expiration.* Under the RLTA, a landlord's refusal to renew a rental agreement also may be deemed retaliatory following a tenant's complaint to the landlord of any violation of the RLTA or a complaint to an appropriate governmental agency of a code violation materially affecting health and safety.[270] Such retaliatory conduct could subject the landlord to liability for damages under section 27-40-910(h) and delay the landlord's right to recover possession for seventy-five days,[271] which presumably commence on the date of expiration.

This restriction on the landlord's right to recover possession arises only if the landlord has notice of the violation and of the tenant's complaint prior to expiration of the rental agreement and "if the tenant is not in default as to payment of rent."[272] The concept of default in the RLTA, however, is undefined and ambiguous. The term appears elsewhere in the RLTA only in section 27-40-730 which incorporates the terminology of a prior statute. Several possible interpretations exist.

First, default could be construed to be any failure by the tenant to pay rent on the date provided in the rental agreement.

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268. *See id.* § 27-40-910(b), (h). Section 27-40-660 permits the tenant to terminate and provides for damages equal to the greater of three months' rent or twice actual damages. Section 27-40-910(h) provides for damages up to the greater of three months' rent or treble actual damages. Both provide reasonable attorney's fees. Given the larger potential award under § 27-40-910(h), a plaintiff probably would seek actual damages under that provision. If actual damages are minimal, the tenant may prefer to pursue an award of three months' rent under § 27-40-660, since § 27-40-910(h) could provide no greater award, but would permit a lesser award.

269. *Id.* § 27-40-910(f).

270. *Id.* § 27-40-910(g).

271. *Id.*

272. *Id.*

Such an interpretation, however, would disregard the tenant's right to withhold rent and to assert the landlord's noncompliance as a defense to any action for possession. Second, default could be limited to a failure to pay rent when due, but only if the tenant waives the right to withhold payment. Finally, default could mean the tenant's failure to pay rent pursuant to section 27-40-790 when the landlord brings an action for possession.

This final interpretation best serves the interests of both parties and the intent of the RLTA. By providing that the seventy-five day delay in recovery of possession by the landlord will be imposed only if the tenant proves the violation alleged, the RLTA appears to contemplate that the landlord will commence an action for possession immediately upon expiration of the rental agreement,[273] at which time the defense of retaliation will be raised. The RLTA requires the tenant to pay any accrued rent when the action is commenced,[274] which adequately protects the landlord, while preserving the tenant's rights to withhold rent prior to the filing of the action. So long as the tenant complies with the obligation to pay accrued rent when the action for possession is filed, no sufficient policy reason supports denying him the opportunity to assert the retaliatory defense.[275]

4. *Landlord's Right to Dispose of Personalty Remaining in Dwelling Unit*

If the tenant continues to live in the dwelling unit after the end of the rental agreement, the landlord may regain possession through an action for ejectment.[276] Similarly, if the tenant no longer lives in the dwelling unit, but has left personal property on the premises, the general rule is that the landlord may remove that personalty only through ejectment procedures.[277]

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273. If the landlord does not bring the action immediately, he risks a finding that he has consented to a new term under § 27-40-770(c), thereby possibly delaying his recovery of possession.

274. *See id.* § 27-40-790; *supra* notes 115-19 and accompanying text.

275. This interpretation, more than the alternatives, follows the recognition by the *Restatement* that "a tenant may not be in default under a lease when he fails to pay the rent because such action on the tenant's part may be justified." RESTATEMENT (SECOND) OF PROPERTY (LANDLORD & TENANT) § 14.8 comment e (1977).

276. *See supra* notes 243-44 and accompanying text.

277. S.C. CODE ANN. § 27-40-730(d) (Law. Co-op. Supp. 1987).

That general rule, however, is subject to one exception. If the fair market value of personalty left on the premises does not exceed $500, the landlord has a right of self-help when circumstances indicate that the tenant does not intend to return to the dwelling unit.[278] The landlord may remove and dispose of such personalty if the rental agreement has ended, and the tenant has removed a substantial portion of his property or voluntarily and permanently terminated the utilities.[279]

Prior to the end of the rental agreement, the landlord also may exercise self-help under section 27-40-730 to remove and dispose of personalty not in excess of $500, after the tenant abandons the dwelling unit. Section 27-40-730, however, is subject to two different interpretations. Self-help may be available upon abandonment during the term only if the further conditions of section 27-40-730(c) are satisfied, requiring removal of a substantial portion of the property or termination of utilities. On the other hand, the language of subsection 27-40-730(c) can be read to impose further conditions upon the self-help remedy only at the end of the term, and not upon abandonment of the premises before the end of the term.

As a practical matter, since the self-help remedy is available only when the total value of the property remaining does not exceed $500, in most instances when the remedy is available, a substantial portion of the tenant's property likely will have been removed, thereby satisfying the further conditions of subsection (c). If that is not the case, however, the mere act of abandonment should be sufficient evidence of a tenant's intent not to return to justify self-help, without requiring an additional act by the tenant such as the termination of utilities. Indeed, this interpretation is consistent with the RLTA's treatment of an abandonment alone as a sufficient basis upon which to allow the landlord to re-let the entire dwelling unit.

In exercising the self-help remedy, the landlord is authorized expressly to use force, if necessary, to gain entry into the dwelling unit.[280] If the tenant later proves the property disposed of has a fair market value in excess of $500, the landlord is not liable to the tenant for any damages unless he was grossly

278. *Id.* § 27-40-730(c).
279. *Id.*
280. *Id.*

negligent.[281]

B. Tenant's Right to Recover Security Deposits or Prepaid Rent

A residential landlord still may require in the rental agreement that a tenant post a security deposit. The South Carolina RLTA, unlike the uniform version,[282] imposes no limit on the amount of security that may be demanded. If the rental agreement is terminated under section 27-40-620(a) because the landlord fails to deliver possession at the commencement of the term, then all of the security deposit must be returned to the tenant.[283] Otherwise, at the end of the term the landlord may apply security deposit to the payment of accrued rent or to damages for the tenant's noncompliance with section 27-40-510.[284]

If the security deposit is applied to payment of rent or damages, the landlord must give written notice to the tenant, itemizing each deduction. Notice of the deductions and payment of the balance of the deposit are required within thirty days after the later of the date of termination, delivery of possession, or the tenant's demand that the deposit be returned.[285] If the tenant does not give the landlord written notice of the tenant's new address, and the landlord has no actual knowledge or reason to know the tenant's address, the landlord may fulfill his obligation by mailing the written notice and the balance of the deposit to

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281. *Id.* § 27-40-730(e).

282. UNIF. RESIDENTIAL LANDLORD AND TENANT ACT § 2.101(a), 7B U.L.A. 453 (1972) (suggests limiting security deposits to not more than one month periodic rent).

283. S.C. CODE ANN. § 27-40-620(a)(1) (Law. Co-op. Supp. 1987).

284. *Id.* § 27-40-410(a). Since § 27-40-510(8) incorporates by reference the terms of the rental agreement and rules and regulations, the security deposit may be applied to damages for essentially any breach by the tenant. *But see* § 27-40-410(c); *supra* note 32 (limiting landlord's right to retain a portion of security deposit in certain situations).

285. S.C. CODE ANN. § 27-40-410(a) (Law. Co-op. Supp. 1987). To commence the 30-day period at the earliest possible time, the tenant should demand a return of the deposit at the time that the rental agreement ends or possession is returned. Section 27-40-240 sets forth the requirements for the form of the notice the landlord must give. A tenant receives notice only when it is delivered in hand to him, or mailed by registered or certified mail.

If the original landlord conveys the premises during the term of the rental agreement, he remains liable for the security deposit unless the deposit is transferred to the new owner and the tenant is notified in writing of that transfer within a reasonable time. Once the deposit is transferred and proper notice is given to the tenant, the new owner becomes subject to § 27-40-410. *Id.* § 27-40-450(a).

the tenant's last known address.[286]

Having established the landlord's obligation to the tenant to account for the security deposit upon termination, the RLTA fails to provide any express remedy for noncompliance with that obligation. The legislative history of section 27-40-410, however, suggests that this omission was unintentional.

Section 2.101 of the Uniform Residential Landlord and Tenant Act, from which section 27-40-410 is derived, provides a remedy for the landlord's failure to return or account for both the security deposit and prepaid rent. Similar language appeared in section 18 of House Bill 2119 when the legislation was introduced in South Carolina.[287]

The House Labor, Commerce and Industry Committee did not alter that language, but proposed an amendment to section 18, which was adopted, deleting its original paragraph (a).[288] When the remaining paragraphs of section 18 were relettered to reflect the Committee amendment, a cross reference that was then contained in paragraph (b), referring to the landlord's obligation to account for the security deposit, was incorrectly relettered. As a result, the cross reference to security deposits made little sense. That mistake, however, was not corrected and remained in the bill as finally approved by the House and sent to the Senate.[289]

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286. *Id.* § 27-40-410(a).

287. As introduced on January 10, 1985, H.R. 2119 provided in relevant part as follows:

Section 18. Security Deposits; Prepaid Rent.

. . .

(c) If the landlord fails to comply with subsection (b) [current subsection (a)] regarding security deposits or if he fails to return any prepaid rent required to be paid to the tenants under this act, the tenant may recover the property and money in an amount equal to three times the amount wrongfully withheld and reasonable attorney's fees.

H.R. 2199, 106th Gen'l Assembly, 1st Sess. (1985).

288. House of Representatives Committee on Labor, Commerce and Industry, Report on H.R. 2119 (April 4, 1985).

289. *See* II 1985 H.R.J. 3564, 106th Gen'l Assembly, 1st Sess. As approved by the House of Representatives, H.R. 2119 read, in relevant part, as follows:

Section 18. Security Deposits: Prepaid Rent.

. . .

(b) If the landlord fails to comply with subsection (c) regarding security deposits or if he fails to return any prepaid rent required to be paid to the tenants under this act, the tenant may recover the property and money in an amount equal to three times the amount wrongfully withheld and reasonable

The reference to security deposits in paragraph (b) was deleted entirely by the Senate.[290] It is clear that the Senate intended to remove the nonsensical reference to security deposits as contained in the House version. It is far less certain, however, that the Senate, having imposed the obligations under paragraph (a), intended to leave the tenant without any remedy to enforce those obligations.

To give any enforceable effect to section 27-40-410(a), the remedy set forth in section 27-40-410(b) for failure to return prepaid rent must be applied equally to a failure to account properly for the security deposit as it was in the initial draft of the legislation. Under that interpretation, if the landlord did not provide timely written notice and payment of any balance of the deposit held, the tenant would be entitled to recover any property held as security and damages in an amount equal to triple the amount wrongfully withheld, plus attorneys' fees. The availability of that remedy, however, remains uncertain until the courts or the legislature clarify the section.

VI. JURISDICTION, SERVICE, AND UNDERTAKING ON APPEAL

The magistrate courts and circuit courts have concurrent original subject matter jurisdiction over claims arising under the RLTA. Although the jurisdictional section of the RLTA refers only to jurisdiction over landlords,[291] section 27-33-40 previously conferred concurrent subject matter jurisdiction over landlord and tenant matters. To the extent that the prior law is consistent with the RLTA, it should continue to apply,[292] permitting either court to exercise jurisdiction regardless of which party initiates the action.

The tenant may gain personal jurisdiction over the landlord by any traditional method or by substituted service of process under section 27-40-130(b). A nonresident landlord or a corporate landlord not authorized to do business in South Carolina

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attorney's fees.

H.R. 2119, 106th Gen'l Assembly, 1st Sess. (1985). The cross-reference within subsection (b) should have been to subsection (a), rather than (c). There is no indication that the mistake was other than clerical.

290. I 1986 S.J. 457, 106th Gen'l Assembly, 2d Sess.

291. S.C. CODE ANN. § 27-40-130 (Law. Co-op. Supp. 1987).

292. *See id.* § 27-40-30.

may designate an agent for service who must be a resident or a corporation authorized to do business in the state. The designation must be in writing and filed with the Secretary of State.[293]

If no agent is appointed or service on the agent cannot be made, service may be to the Secretary of State. Such substituted service is effective only if the plaintiff mails a copy to the landlord at his last reasonably ascertainable address by certified or registered mail, with a return receipt. An affidavit of compliance must be filed with the court on or before the return day of the process.[294]

In addition to concurrent original jurisdiction, the circuit court has appellate jurisdiction over matters decided in the magistrate's court.[295] If the magistrate's court has entered a judgment for ejectment, the tenant is entitled to a stay of execution of the judgment if he signs an undertaking[296] that he will pay rent as determined by the magistrate as it becomes due. The stay may be signed by a magistrate, clerk, or circuit judge.[297]

If the tenant thereafter fails to make any payment of rent within five days of the due date under the terms of the undertaking, the stay automatically is dissolved, the appeal is dismissed insofar as it pertains to issues of possession, and, upon application of the landlord to the clerk, a warrant of ejectment will be issued.[298] Similar requirements apply to any appeal to the supreme court from a decision of the circuit court.[299]

VII. CONCLUSION

The RLTA incorporates into South Carolina law many of the changes in the landlord and tenant relationship made in other parts of the nation over the past several decades. By em-

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293. *Id.* § 27-40-130.

294. *Id.* The RLTA contains no similar provision for substituted service upon a tenant.

295. S.C. CODE ANN. § 14-5-340 (Law. Co-op. 1976); *see* Vacation Time of Hilton Head Island, Inc. v. Kiwi Corp., 280 S.C. 232, 312 S.E.2d 20 (Ct. App. 1984) (appellate jurisdiction over ejectment cases not limited by § 23-33-40).

296. The undertaking must be substantially in the form set forth in S.C. CODE ANN. § 27-40-800 (Law. Co-op. Supp. 1987).

297. *Id.* § 27-40-800. If the undertaking is signed by the tenant, the court has no discretion to deny the stay.

298. *Id.* § 27-40-800(c), (e).

299. *Id.* § 27-40-800(f).

phasizing the contractual nature of the landlord and tenant relationship and imposing a number of statutory obligations upon both parties, the RLTA fundamentally alters the nature of the residential landlord and tenant relationship in this state.

History will tell whether the practical effect of the RLTA upon dealings between residential landlords and tenants is revolutionary. But the legislative recognition of various public policies underlying the RLTA, especially the policy of encouraging the landlord to provide at least minimal levels of service and maintenance, will at least inevitably hasten the evolution of that relationship.

Ultimately, the compatibility of such policies with the economic realities of the market place will dictate the direction of that evolution. The purpose of this review is not to enter the policy debate on either side, but merely to examine the law as currently enacted, to offer interpretations of its ambiguities, and to suggest areas in which additional clarification may be appropriate to achieve the stated purpose of the RLTA, which is to simplify and modernize the law of landlord and tenant.