UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 54 | Number 5 Article 5

6-1-1976

Landlord and Tenant -- Prohibition of Retaliatory Eviction in Landlord-Tenant Relations: A Study of Practice and Proposals

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COMMENTS

Landlord and Tenant—Prohibition of Retaliatory Eviction in Landlord-Tenant Relations: A Study of Practice and Proposals

On August 12, 1974, Mr. and Mrs. Leon Fulcher, mobile home owners, reported to the public health authorities that their sewage system was defective, causing backup and resulting in an unsanitary condition. The health department investigated and issued an order requiring the park owner to remedy the problem.[1] One day later the Fulchers were evicted by the park owner. It was undisputed that the motivating factor behind the eviction was the complaint filed with the health department.[2] The Consumer Protection Division of the North Carolina Attorney General's Office brought suit in superior court seeking first a temporary restraining order[3] and later a preliminary injunction.[4] Both motions were granted on the theory that the landlord's action constituted a retaliatory eviction which runs counter to public policy and, as such, violated the North Carolina Unfair and Deceptive Trade Practices statute.[5] The logical basis for this theory is simple. A man should not be punished for acting in the public interest and within his rights by reporting health code violations. Such logic has been adopted in an expanding minority[6] of states, either by common law[7] or

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1. Carteret County, N.C., Health Dep't Notice, Aug. 12, 1974.

2. Supplemental Memorandum of Law at 1-2, State v. Cleve, 74 CVS 852 (Carteret County Super. Ct. 1974).

3. Judge Copeland (now an Associate Justice on the North Carolina Supreme Court) granted this motion. State v. Cleve, 74 CVS 852 (Carteret County Super. Ct. 1974).

4. This motion was also granted. *Id.*

5. N.C. GEN. STAT. § 75-1.1 (1975).

6. For the orthodox majority view see Gabriel v. Borowy, 324 Mass. 231, 234, 85 N.E.2d 435, 438 (1949) where the court states that "[a] landlord could at common law terminate a tenancy at will for any purpose he might desire and the tenant could not question his motives or attack his reasons."

7. Edwards v. Habib, 397 F.2d 687, 699 (D.C. Cir. 1968); Schweiger v. Superior Ct., 3 Cal. 3d 507, 517, 476 P.2d 97, 103, 90 Cal. Rptr. 729, 735 (1970) (en banc); Watts v. Lyles, 1 POV. L. REP. ¶ 2325.194 (Mich. Cir. Ct. Comm'rs Ct. 1968); Engler v. Capitol Management Corp., 112 N.J. Super. 445, 447, 271 A.2d 615, 617 (App. Div. 1970); Portnoy v. Hill, 57 Misc. 2d 1097, —, 294 N.Y.S.2d 278, 281 (Binghampton City Ct. 1968); Dickhut v. Norton, 45 Wis. 2d 389, 399, 173 N.W.2d 297, 301-02 (1970). *See also* Wilkins v. Tibbets, 216 So. 2d 477, 479 (Fla. 1968) (Carroll, C.J., dissenting); Frampton v. Central Ind. Gas Co., 260 Ind. 249, 252-53, 297 N.E.2d 425, 428 (1973) (dictum).

by statute.[8] North Carolina is not among these. In the 1973-74 and 1975 sessions of the General Assembly, that body considered and rejected landlord-tenant acts which included prohibitions against retaliatory evictions.[9] Similarly the North Carolina appellate courts have failed to adopt this doctrine.[10] Nevertheless *State v. Cleve*[11] or a similar case will likely find its way to the North Carolina Supreme Court. New legislation dealing with landlord-tenant relations will probably be introduced in the next session of the General Assembly. The doctrine of retaliatory eviction will likely be accepted in North Carolina; the major questions concern the form it will take. This article will explore the reactions of other courts and legislatures to the problem and identify those measures that have most effectively satisfied the goals of the retaliatory eviction doctrine.

THEORY AND PURPOSE

Housing Code Reports

An understanding of the underlying philosophy and purpose of the doctrine is critical to any analysis of the "means." The trend toward allowing retaliatory eviction as a defense in eviction actions began[12] with the landmark decision in *Edwards v. Habib.*[13] In that case defendant reported sanitary code violations to the public health authorities. Over forty violations were found and the landlord was ordered to remedy them. The landlord, as required by law, gave the defendant thirty days notice to vacate. When the tenant refused, the landlord brought a suit for eviction which the tenant defended on the theory that the eviction was retaliatory in nature and, as such, against public policy. The court noted that the landlord had complied with all statutory requirements and that he was under no duty to assign a reason for his eviction. Nevertheless the court went on to say that "while the landlord may evict for any legal reason or for no reason at all, he is not, we hold, free to evict in retaliation for his tenant's report of housing code violations to the authorities. As a matter of statutory construction and for reasons

8. *See* note 22 *infra.*

9. H. 673, [1973] N.C. General Assembly, 2d Sess.; H. 598, [1975] N.C. General Assembly, 1st Sess.

10. Evans v. Rose, 12 N.C. App. 165, 182 S.E.2d 591 (1971).

11. 74 CVS 852 (Carteret County Super. Ct. 1974).

12. The first case which actually held for the tenant on the basis of retaliatory eviction was Watts v. Lyles, POV. L. REP. ¶ 2325.194 (Mich. Cir. Ct. Comm'r's Ct., 1968).

13. 397 F.2d 687 (D.C. Cir. 1968). Although this was a decision by a federal court, the court acted in the capacity of a state court for the District of Columbia.

of public policy, such an eviction cannot be permitted."[14] The court reasoned that housing codes indicate a legislative intent to provide safe and sanitary housing. It recognized the practical fact that effective implementation depends on private initiative in reporting violations.[15] Therefore the court felt that permitting retaliatory evictions would frustrate the effectiveness of the housing code.

Courts have generally followed this rationale in other slightly varied applications of the retaliatory eviction doctrine. In *Schweiger v. Superior Court*[16] the court found retaliatory eviction to be a defense to eviction in a situation varying from *Edwards* in that the statute[17] involved was one of self help for tenants rather than one concerning reported code violations.[18] Acknowledging *Edwards*, the court stated that while District of Columbia Circuit opinions are not controlling precedent, "the compulsion of persuasive reasoning is not circumscribed by jurisdictional boundaries."[19] This case exemplifies another important corollary of the doctrine, as it recognized "indirect" eviction. The landlord evicted the tenant by raising his rent to an artificially high level. When the tenant refused, paying only the previous rent less the cost of repairs which he had performed himself,[20] the landlord commenced an action in unlawful detainer in which judgment was granted. The Supreme Court of California reversed that judgment. Other courts have adopted this philosophy and disproportionate rent increases in retaliation are generally held to amount to eviction.[21]

Statutory provisions prohibiting eviction in retaliation for tenant complaints or tenant actions in response to deficiencies in the dwelling itself[22] appear to be enacted on a theory similar to that of *Edwards*.

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14. *Id.* at 699.

15. Substantial numbers of violations investigated by the agencies originate from tenant reports. *See* Note, *Retaliatory Evictions: A Study of Existing Law and Proposed Model Code*, 11 WM. & MARY L. REV. 537 n.3 (1969).

16. 3 Cal. 3d 507, 476 P.2d 97, 90 Cal. Rptr. 729 (1970).

17. CAL. CIV. CODE § 1942 (West Supp. 1975).

18. The court discusses this distinction and concludes that the self help statute requires even more protection. 3 Cal. 3d at 513, 476 P.2d at 100-01, 90 Cal. Rptr. at 732-33.

19. *Id.* at 513, 476 P.2d at 100, 90 Cal. Rptr. at 732.

20. Such a deduction is allowed by CAL. CIV. CODE § 1942 (West Supp. 1976).

21. *See, e.g.*, E. & E. Newman, Inc. v. Hallock, 116 N.J. Super. 220, 281 A.2d 544 (App. Div. 1971).

22. CAL. CIV. CODE § 1942.5 (West Supp. 1976); CONN. GEN. STAT. ANN. §§ 19-357a, 52-540a (Cum. Supp. 1976); DEL. CODE ANN. tit. 25, § 5516 (1974); ILL. ANN. STAT. ch. 80, § 71 (Smith-Hurd 1966); ME. REV. STAT. ANN. tit. 14, § 6001 (Cum. Supp. 1975); MD. REAL PROP. CODE ANN. § 8-208.1 (Cum. Supp. 1975); MASS. GEN. LAWS ANN. ch. 239, § 2A (1974); MICH. STAT. ANN. § 27A.5720 (Cum. Supp. 1975); MINN. STAT. ANN. § 566.03, subd. 2 (Cum. Supp. 1976); N.J. STAT. ANN. §§ 2A:42-

Although the statutes do not set out reasons for their adoption,[23] the similarity in coverage between them and the case law suggests that they most likely were based on the same philosophy. As seen above, common law evolution refined the definitions of retaliatory eviction as new situations arose. Statutory definitions too are in various stages of development in coverage and complexity. All states which have statutes proscribing retaliatory eviction directly forbid eviction in retaliation for reporting building or health code violations. Comparable sections are found in the two proposed uniform landlord-tenant acts.[24] A typical provision would allow a defense to eviction proceedings where "[t]he alleged termination was intended as a penalty for the defendant's good faith report to a governmental authority of the plaintiff's violation of any health, safety, housing or building codes or ordinances."[25] These provisions cover landlord conduct which the court rejected in *Edwards*.

Pennsylvania uses a somewhat different formula for encouraging code adherence. In that state the tenant may place his rent in escrow if the dwelling is adjudged to be unfit for human habitation. The act provides that "[n]o tenant shall be evicted for any reason whatsoever while rent is deposited in escrow."[26] Thus the statute adopts a stringent prerequisite for protection as it demands an actual adjudication of unfitness rather than a mere "bona fide complaint." This limitation in scope reflects a more limited public policy behind the statute. Such a provision serves only to mandate that houses already found to be unfit be repaired. It does not encourage positive action by the tenant in initiating the investigative process.[27]

10.10 to -10.12 (Cum. Supp. 1975); N.Y. UNCONSOL. LAWS § 8590(2) (McKinney 1974); R.I. GEN. LAWS ANN. § 34-20-10 (1969).

23. One of the earliest of these statutes states simply that "[i]t is declared to be against the public policy of the State for a landlord to terminate or refuse to renew a lease or tenancy" because of bona fide complaints by a tenant of building code or health ordinance violations. ILL. ANN. STAT. ch. 80, § 71 (Smith-Hurd 1966). *See also* N.Y. UNCONSOL. LAWS § 8590(2) (McKinney 1974).

24. ABF MODEL RESIDENTIAL LANDLORD-TENANT CODE § 2-407 (1969); UNIFORM RESIDENTIAL LANDLORD & TENANT ACT § 5.101 (1972).

25. MINN. STAT. ANN. § 566.03 subd. 2(2) (Cum. Supp. 1975).

26. PA. STAT. ANN. tit. 35, § 1700-1 (Cum. Supp. 1975).

27. For an analysis of why a statute should not protect good faith reporting, see the ABF MODEL RESIDENTIAL LANDLORD-TENANT CODE §§ 2-407(2)(f), (4)(a), Commentary (1969). These subsections disallow the retaliatory eviction defense when the landlord shows that the building is in full compliance with the building codes. The drafters acknowledge "mixed emotions" and concede that by writing in this provision they "*pro tanto* defeat a major purpose of the section," encouragement of tenant complaints. They base their decision on three factors: (1) there is less likelihood of eviction when the building is in compliance, (2) the provision encourages the landlord to comply with the codes, and (3) they do not like to restrict the landlord's freedom

Some states have adopted legislation to protect the self help tenant right which the California court protected by common law in *Schweiger*. California itself now provides protection after the tenant "in good faith, has given notice pursuant to"[28] the self help statute. Unlike the Pennsylvania statute, this provision requires only good faith by the tenant and begins its coverage after notice to the landlord of problems rather than after adjudication of unfitness and an escrow deposit by the tenant. This type of statute is based on the broader policy of encouraging tenant initiative in addition to the narrow code adherence policy.

The corollary advanced in *Schweiger* concerning indirect eviction by rent increases has been adopted by several legislatures.[29] The Connecticut statute, for example, states that "[n]o landlord shall . . . demand an increase in rent from the tenant, or decrease the services to which the tenant has been entitled" in retaliation for specified acts by the tenant.[30] In those states where statutes do not expressly forbid disproportionate rent increases, the courts will likely follow the rationale of *Schweiger* and include indirect evictions within the meaning of retaliatory eviction.[31]

Free Speech

Retaliatory eviction surfaced in another genre of cases—those dealing with free speech and association. The usual fact situation, represented by *Church v. Allen Meadow Apartments*,[32] is eviction of a tenant because he tried to form, or actively participated in, a tenants association. In *Allen Meadows* the court stated that the landlord's action was motivated by the tenant's activities and that "[a]ny proceeding for eviction so motivated and retaliatory is unconstitutional in that it seeks to have a state penalize a person for exercising his constitutional rights of free speech."[33] The *Allen Meadows* court approved the rationale adopted in a federal decision, *Hosey v. Club Van Cortlandt*.[34] There

absent some showing of dereliction on his part. The Delaware retaliatory eviction statute contains this same exception. DEL. CODE ANN. tit. 25, § 5516(c)(6) (1974).

28. CAL. CIV. CODE § 1942.5(a)(1) (West Supp. 1975).

29. *See, e.g., id.* § 1942.5(a); MINN. STAT. ANN. § 566.03, subd. 2(2) (Cum. Supp. 1975); R.I. GEN. LAWS ANN. § 34-20-10 (1969).

30. CONN. GEN. STAT. ANN. § 19-375a (Cum. Supp. 1976).

31. This was done in E. & E. Newman, Inc. v. Hallock, 116 N.J. Super. 220, 281 A.2d 544 (App. Div. 1971).

32. 69 Misc. 2d 254, 329 N.Y.S.2d 148 (Onondaga County Sup. Ct. 1972). The court denied the defendant's motion for a temporary injunction but noted that retaliatory eviction was available as a defense.

33. *Id.* at —, 329 N.Y.S.2d at 149 (citation omitted).

34. 299 F. Supp. 501 (S.D.N.Y. 1969).

the court reasoned that tenants have a right to organize other tenants to improve living conditions under the first amendment. As first amendment rights are incorporated under the fourteenth amendment, a state "can take no action to prevent or penalize their exercise."[35] Thus "the 14th amendment prohibits a state court from evicting a tenant when the overriding reason the landlord is seeking the eviction is to retaliate against the tenant for an exercise of his constitutional rights."[36] Cases dealing with tenants in government housing have approved this theory.[37]

The constitutional protection may be limited to disputes which directly involve the tenant's occupancy. Incidents in which a landlord evicts a tenant because he supported a particular political candidate, for example, may be permissible. This issue was raised in *Pohlman v. Metropolitan Trailer Park, Inc.*,[38] where the landlord evicted a tenant because he opposed the landlord's position on zoning regulations. The court rather directly addressed this problem and suggested that a direct relation between the dispute and occupancy need not be involved. It did, however, find some need for a "reasonable" relationship between the two. Although other state and federal courts do not directly discuss this problem, many do refer to the purpose of the tenants association and its relation to occupancy problems.[39] Nevertheless, given state involvement through the judicial process, it is not readily apparent why one form of constitutionally protected activity should be more favored than the other. One interesting explanation suggests that because of the competing freedoms of speech and association advocated by both landlord and tenant,[40] the tenant's interest is not sufficient in itself to trigger constitutional protection and thus the court needs a reasonable relation to public policy considerations to resolve the "balance" in favor of the tenant.

One situation not requiring an occupancy-related issue occurs when a "suspect" equal protection issue, rather than a free speech issue, is involved. Thus eviction for racial reasons would be rejected[41] and it is likely that racial overtones in a free speech issue could supplant any public policy factor, such as an occupancy-related dispute, required.

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35. *Id.* at 504 (footnote omitted).
36. *Id.* at 506 (footnote omitted).
37. *E.g.*, McQueen v. Druker, 317 F. Supp. 1122 (D. Mass. 1970).
38. 126 N.J. Super. 114, 312 A.2d 888 (Ch. 1973).
39. *E.g.*, Engler v. Capital Management Corp., 112 N.J. Super. 445, 271 A.2d 615 (Ch. 1970).
40. *See* text accompanying note 42 *infra.*
41. Abstract Inv. Co. v. Hutchinson, 204 Cal. App. 2d 242, 22 Cal. Rptr. 309 (2d Dist. 1962).

Constitutional protection of free speech through retaliatory eviction defenses is not universally accepted, even on occupancy issues. In *Aluli v. Trusdell*,[42] a case involving a tenants association, the Hawaii Supreme Court rather ingeniously reversed the typical "free speech" approaches. The court held that by evicting a tenant the landlord only "lessened his interest" in the subject matter of the tenant's speech. He did not foreclose it.[43] Nothing was taken from him as the landlord has the superior right to possession. The court in affect argued that the landlord's rights would be violated by disallowing eviction. Further, the court found no state action even though eviction was by judicial enforcement.[44] Nevertheless, other jurisdictions[45] faced with this issue have found retaliation for free speech activities to be constitutionally impermissible.

Statutory prohibitions against retaliation frequently include provisions concerning free speech activities.[46] These provisions are usually narrowly constructed and typically provide that a landlord may not retaliate against a tenant because the "tenant is a member or organizer of any tenants' organization."[47] Michigan passed a broad statute[48] protecting "lawful acts" with the limitation, however, that the acts protected include only those arising out of the tenancy; a limitation similar to that which some courts have suggested.[49] Probably the broadest provision, one that appears to cover all free speech provisions including non-occupancy-related disputes, was adopted by Rhode Island. That state forbids retaliation when it "was intended as a penalty for any other

42. 54 Hawaii 417, 508 P.2d 1217, *cert. denied*, 414 U.S. 1040 (1973).

43. In practical terms the landlord's action may have the effect of foreclosing the tenant's speech. Current housing shortages have led to an unequal bargaining position between landlord and tenant in most areas. *See, e.g.*, Sabato v. Sabato, 135 N.J. Super. 158, 342 A.2d 886 (Law Div. 1975); Pohlman v. Metropolitan Trailer Park, Inc., 126 N.J. Super. 114, 312 A.2d 888 (Ch. 1973). The tenant's problem in finding a suitable replacement would cause the threat of eviction to have a chilling effect and thus foreclose speech.

44. The New Jersey court in Pohlman v. Metropolitan Trailer Park, Inc., 126 N.J. Super. 114, 312 A.2d 888 (Ch. 1973) seems to agree by dictum when it suggests that in spite of eviction "there is no showing of governmental involvement in defendant's conduct." *Id.* at 123, 312 A.2d at 892. Note also the dictum in Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968) in which Judge Wright suggests that the judicial action doctrine in Shelley v. Kraemer, 334 U.S. 1 (1948), may be limited to racial violations.

45. *See, e.g.*, Hosey v. Club Van Cortlandt, 299 F. Supp. 501 (S.D.N.Y. 1969).

46. California, Connecticut, and Minnesota do not provide such protection. In the uniform codes the ABF version does not protect this activity while that of the Commissioners does. UNIFORM RESIDENTIAL LANDLORD & TENANT ACT § 5.101(a)(3) (1972).

47. MD. REAL PROP. CODE ANN. § 8-208.1 (Cum. Supp. 1975).

48. MICH. STAT. ANN. § 27A.5720 (Cum. Supp. 1975).

49. *See* text accompanying notes 38-40 *supra*.

justified lawful act of the defendant."[50]

Other Protected Activities

One tenant activity, which the statutes generally cover but which is not dealt with in the common law, protects a tenant's attempts to enforce contract rights or rights granted by statutes. Minnesota provides that a tenant cannot be evicted for a "good faith attempt to secure or enforce rights under a lease or contract . . . or under the laws of the state . . . ."[51] One statute extends protection to a tenant who only asks the landlord to make repairs.[52] Probably additional protection will be extended as new situations arise.

Summary

These cases and statutes are based on substantially similar policy. Courts have prohibited eviction when it would penalize a tenant, or act as a threat to other tenants, for an exercise of tenant rights provided by statute or by constitution. This policy represents the theoretical basis that courts and legislatures must accept to fashion protection for tenants against retaliatory eviction. Once this basis is accepted, however, the most difficult problem—determining the practical operation of the doctrine—still remains. For example, is retaliatory eviction merely a defense or can it be the basis for positive action such as an injunction? How does one find the retaliatory motive and how long does it last? What remedy is appropriate? Can it be waived?

OFFENSE OR DEFENSE

One must first consider how the tenant should raise the issue. In the cases discussed above, the courts usually allowed retaliatory eviction as a defense to eviction proceedings initiated by the landlord.[53] Because the doctrine first surfaced in most jurisdictions in this manner, there is little doubt that it can be raised as an affirmative defense.

A split is developing, however, on whether retaliatory eviction can be raised for purposes of injunctive relief. New York struggled with

50. R.I. GEN. LAWS ANN. § 34-20-10 (1969).

51. MINN. STAT. ANN. § 566.03, subd. 2(1) (Cum. Supp. 1976). Maryland forbids evictions because a tenant files a lawsuit against the landlord. MD. REAL PROP. CODE ANN. §§ 8-208.1(a)(2)(1)-(2) (Cum. Supp. 1975).

52. CONN. GEN. STAT. ANN. § 19-375a(a)(3) (Cum. Supp. 1976).

53. The court in Markese v. Cooper, 70 Misc. 2d 478, —, 333 N.Y.S.2d 63, 69 (Monroe County Ct. 1972), emphasized that "the court's process cannot be permitted to be used to penalize someone for reporting a housing code violation . . . ."

this issue over a period of years. The New York federal courts, anticipating the probable decision of the state courts, refused to allow a preliminary injunction on an otherwise valid constitutional claim by a tenant on the theory that, should he be evicted, state law would permit the claim as an affirmative defense.[54] In a similar fact situation the state did just that in *Church v. Allen Meadows Apartments*,[55] in which it denied a preliminary injunction but stated that it would allow the claim as a defense to eviction proceedings.

A similar struggle in California seems headed for a different result. In an early case, *Hill v. Miller*,[56] involving racial discrimination, the court held that while the tenant could not be lawfully evicted because of his race, "the Fourteenth Amendment does not impose upon the state the duty to take positive action to prohibit private discrimination of the nature alleged here."[57] Recently, however, the California Court of Appeals, in *Aweeka v. Bonds*,[58] indicated that the trial court had erred in refusing to consider a preliminary injunction for the tenant. The facts differ from the *Miller* case in that the indirect eviction was based on the tenants' evident intent to invoke a self help statute for repairs in their apartment. Nevertheless the court, noting a recent decision allowling retaliatory eviction as an affirmative defense, stated that "[w]e can discern no rational basis for allowing such a substantive defense while denying an affirmative cause of action." The court reasoned that it "would be unfair and unreasonable to require a tenant, subjected to retaliatory rent increase by the landlord, to wait and raise the matter as a defense only, after he is confronted with an unlawful detainer action and a possible lien on his personal property."[59] A reconciliation of the views, however, lies in the fact that in the California case the tenant was indirectly evicted through a disproportionate rent increase and, if he waited until the landlord brought a forcible detainer action, he would risk having to pay the exorbitant rent should he lose, in addition to enduring liens on his property while the matter is resolved. In ordinary summary ejectment, as in the New York cases, he would not suffer such a disadvantage. Due to these considerations, the better reasoned[60]

54. Hosey v. Club Van Cortlandt, 299 F. Supp. 501 (S.D.N.Y. 1969).
55. 69 Misc. 2d 254, 329 N.Y.S.2d 148 (Onondaga County Sup. Ct. 1972).
56. 64 Cal. 2d 757, 415 P.2d 33, 51 Cal. Rptr. 689 (1966).
57. *Id.* at 759, 415 P.2d at 34, 51 Cal. Rptr. at 690.
58. 20 Cal. App. 3d 278, 97 Cal. Rptr. 650 (1st Dist. 1971).
59. *Id.* at 281, 97 Cal. Rptr. at 652.
60. In Frampton v. Central Ind. Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973), the court granted a preliminary injunction. The case involved a retaliatory discharge but the court based its analysis on the probable results in a retaliatory eviction decision.

decisions will, at a minimum, allow injunctive relief in instances of retaliatory rent increases. In ordinary summary ejectment proceedings, the argument is less forceful although there may be considerable remedial advantage to injunctive relief as is discussed below.

Of the statutes currently in force which prohibit retaliatory eviction, only New Jersey has provided the tenant with an injunctive remedy.[61] That statute, however, suffers from a "catch-22" provision which may render it ineffective in the critical area of indirect evictions through rent increases. The tenant is empowered to bring a civil action against the landlord for damages and "other appropriate relief, including injunctive and other equitable remedies."[62] Use of this provision hinges on the landlord violating the provisions of the section. Under the strict language of the statute the landlord only violates the section when he institutes an action to evict the tenant. Therefore the tenant who is indirectly evicted by a disproportionate rent increase would be required to wait until the landlord brought an action for dispossession based on nonpayment of rent. As in the common law cases, this subjects the tenant to a variety of evils including possible liens on his properties. Other sections of the New Jersey statute, however, suggest that the legislature had a different intent. In a section discussing presumptions, the legislature referred to an action by the tenant and stated that "a notice to quit *or any substantial alteration of the terms of the tenancy without cause*"[63] as a reprisal creates a presumption of retaliation in certain circumstances. Clearly the legislature here contemplates injunctive relief being granted prior to notice to quit in the instance of disproportionate rent increases. Courts dealing with this statute could find the latter interpretation to be controlling of legislative intent or possibly use that statute in conjunction with other statutory or common law power to grant an injunction.[64] In any event the statute is unclearly worded and certain to cause confusion. As noted at the outset, most statutes do not provide for any positive action by the tenant. Rather they merely deny the landlord use of summary ejectment statutes when the tenant successfully presents a retaliatory eviction defense. Absent some other deterrent to landlord actions,[65] this omission leaves a narrow but clear gap in the tenant's protection.

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61. N.J. STAT. ANN. tit. 2A, § 42-10.10 (Cum. Supp. 1975).

62. *Id.*

63. *Id.* § 42-10.12 (emphasis added).

64. One statute which could be useful would be an unfair trade practices act as discussed in text accompanying notes 66-73 *infra.*

65. Treble damages authorized by some statutes would serve to deter the landlord

The North Carolina Attorney General's Office presented a quasi-statutory theory to justify injunctive relief in a recent eviction case involving code violation reports.[66] The State alleged that the eviction constituted an act in violation of North Carolina public policy as established by the housing code statutes.[67] Pointing to decisions of both the federal government[68] and other state courts, the Attorney General reasoned that an act which violates the public policy of a state is an unfair trade practice within the coverage of North Carolina's "little FTC Act."[69] The Attorney General is authorized by statute to "obtain a mandatory order, including (but not limited to) permanent or temporary injunctions and temporary restraining orders."[70] The theory appears sound and merits consideration. It has been accepted in North Carolina on at least the superior court level. In the case discussed above, the court, in issuing a temporary injunction, found as a conclusion of law that "the acts and practices as described above violate the provisions of G.S. 75-1.1 in that such acts and practices fail to provide good faith and fair dealings between buyers and sellers; fail to maintain ethical standards of dealings between persons engaged in business and the consuming public; constitute unfair methods of competition; and are unfair and deceptive acts and practices in the conduct of trade and commerce."[71]

In one jurisdiction, a similar theory has received administrative approval. Florida, in administrative rule 2-11.07,[72] under the Florida Deceptive and Unfair Trade Practices Act,[73] adopted the position that retaliatory eviction is an unfair trade practice subject to injunction by the state.

PROOF AND PRESUMPTIONS

Much conflict has arisen among the various jurisdictions over the nature of the proof needed to demonstrate retaliatory eviction and its

from such rent increase tactics. *See* ABF MODEL RESIDENTIAL LANDLORD-TENANT CODE § 2-407(3) (1969).

66. State v. Cleve, 74 CVS 852 (Carteret County Super. Ct. 1974).

67. N.C. GEN. STAT. § 160A-441 (Cum. Supp. 1974), *as amended*, [1975] Adv. Legis. Serv., No. 5, at 683-84.

68. North Carolina gives weight to decisions under the federal FTC Act. Hardy v. Toler, 288 N.C. 303, 218 S.E.2d 342 (1975).

69. N.C. GEN. STAT. § 75-1.1 (1975).

70. *Id.* § 75-14.

71. State v. Cleve, 74 CVS 852 (Carteret County Super. Ct. 1974) (order for preliminary injunction, Sept. 17, 1974).

72. 1 FLA. ADMINISTRATIVE CODE 22, rule 2-11.07. This rule has been recognized in Kendig v. Kendall Constr. Co., 294 So. 2d 709 (Fla. Ct. App. 1974).

73. FLA. STAT. ANN. § 501.205 (1974).

evidentiary effect. As retaliatory eviction constitutes a relatively new defense, most of the litigation has centered on its theoretical validity. The retaliatory motive is usually "given," probably because, when making new law, courts use cases with minimal factual controversies in order to keep the legal issues clearly in focus. Thus most courts to date have dealt with admitted or obvious retaliation. Nevertheless the mechanics of the defense must be worked out as more cases are brought and as landlords, aware of the law, seek to disguise their actions.

Evidentiary requirements have been squarely faced at least once in a New York case, *Toms Point Apartments v. Goudzward.*[74] The court held that the following elements must be shown: (1) the tenant must have exercised a constitutional right in his action (this includes reporting a housing code violation); (2) the grievance must be "bona fide, reasonable, serious in nature," and have a foundation in fact—it need not have been adjudicated; (3) the tenant cannot have created the condition complained of; (4) the grievance must be present at the time the landlord commences his proceedings; (5) the retaliation for the tenant's exercise of rights must be the overriding reason the landlord seeks the eviction.

The first two requirements, which amount to a good faith act by the tenant, cannot be seriously questioned. They are a logical prerequisite. Also the final requirement of retaliatory motive seems beyond challenge although, as will be discussed, it can be satisfied by proof or presumption. The third and fourth elements are more debatable. If a landlord has responsibility to remedy a situation as part of the contractual relation, it seems illogical that he should escape that duty solely because a particular tenant caused it. The instance where the tenant creates a problem deliberately to "qualify" for a retaliatory eviction defense or violates his duty to the landlord could presumably be handled under the language of the good faith elements. The situation in which the landlord in fact is evicting the tenant because of his creation of the problem rather than his reports of it would be dealt with through the retaliatory motive requirement. The element as written has little flexibility and introduces unwanted rigidity into the law. The fourth element, that the grievance be present at the commencement of proceedings by the landlord, runs counter to part of the theoretical basis of the defense. The requirement would be effective if one looks narrowly at the landlord and the particular tenant. The landlord can repair and then evict.

74. 72 Misc. 2d 629, 339 N.Y.S.2d 281 (Nassau County Dist. Ct. 1972).

Thus the tenant leaves but the problem has been remedied. Compliance with the housing code, a frequently cited goal, has been secured but other objectives have not been achieved.[75] As commentators have argued,[76] a retaliatory eviction produces ripples with cumulative effects. Other tenants are put on notice that they may be evicted should they air their grievances. In a time of housing shortages they may consider it wiser to keep silent. The evicted tenant will certainly be a bit more cautious about exercising his rights vis a vis his next landlord. In essence there is a chilling effect.[77] Therefore the defense must be centered on the tenant's report of the violation, not on the violation itself.

From the discussion above it is apparent that the elements of proof enumerated by the New York court must be somewhat constricted in order most effectively to promote the policy considerations behind the retaliatory eviction doctrine. The tenant should be required to prove only that at one time he had a bona fide or reasonable grievance; that he acted on it pursuant to statutory or constitutional rights; that he was evicted and that the primary motive for eviction was retaliation for his exercise of those rights.[78]

The elements can be proven by two methods. Most often they are issues of fact to be decided by the appropriate fact finding body, whether judge or jury.[79] Determining the existence of a bona fide act by the tenant and a subsequent eviction by the landlord presents little problem for a fact finder. Some controversy may arise over whether the problem was sufficient to force the tenant to act as he did. Far greater problems arise in determining the motive of the landlord in evicting. Like other issues of motive and intent, it can be resolved by a fact finder[80] but is likely to be a troublesome issue with great potential for injustice. Often the tenant will not have the facts available which can prove such an assertion. The landlord on the other hand would likely have access to evidence which disproves retaliatory motive, such as rising cost projections in the case of a rent increase.

75. This problem parallels that analyzed in the discussion of the theoretical basis of the Pennsylvania statute. *See* text accompanying note 26 *supra.*

76. Annot., 40 A.L.R.3d 753, 755 (1971).

77. *See* note 43 *supra.*

78. This was adopted in Dickhut v. Norton, 45 Wis. 2d 389, 173 N.W.2d 297 (1970).

79. *See* Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968); La Chance v. Hoyt, 6 Conn. Cir. 207, 269 A.2d 303 (1969).

80. "The question of permissible or impermissible purpose is one of fact for the court or jury, and while such a determination is not easy, it is not significantly different from problems with which the courts must deal in a host of other contexts . . . ." Edwards v. Habib, 397 F.2d 687, 702-03 (D.C. Cir. 1968).

There is, however, a way to avoid this problem for most retaliatory eviction claims. Such evictions have primarily been in retaliation for either tenant reports of health code violations or for connections with tenant associations. The existence of these acts is proven by the first two elements. Problems arise in proving the "motive" element. Courts could deal with this situation by shifting the burden of proof to the landlord to disprove a retaliatory motive when the first two elements have been shown and the tenant has been evicted within a certain time period thereafter. Thus the tenant could create a rebuttable presumption of retaliation. To date, however, most courts have been reluctant to do so. In *Cornell v. Dimmick*[81] a lower New York court, finding no state statute prohibiting retaliatory eviction, recognized it as an equitable defense. The court incorporated in that equitable defense a presumption of retaliatory eviction modeled on a city ordinance passed after the case was decided at trial. Finding that the tenant made a report to the code enforcement agency and that the landlord instituted eviction within ninety days of that complaint, the court held that the tenant "became entitled to the presumption that proceedings to evict were commenced as a retaliatory measure."[82] The burden had now shifted to the landlord.

The method of proof used by the tenant can have considerable effect on the quantum of proof required for the landlord's rebuttal. When the question of motive goes to the fact finder without presumptions, as in *Dickhut v. Norton*,[83] the landlord need only prove that the acts of the tenant were not the *primary* reason for the eviction. In the burden of proof concept, however, the court may look to a more stringent standard. Following the lead of a New Jersey case, *Silberg v. Lipscomb*,[84] the court in *Cornell* held that the landlord's burden could only be satisfied by showing that "the decision to evict was reached independent of any consideration of the activities of the tenants protected . . . ."[85] Thus *Silberg* and *Cornell* require that the landlord go further and show that the decision to evict was *independent* of the tenant's acts. The consequences of this difference were graphically illustrated by the decision in *Cornell*. There the court expressly found economic factors to be the "dominant reason" to evict, obviously enough proof to reject retaliatory eviction in *Dickhut*, a question of fact jurisdic-

81. 73 Misc. 2d 384, 342 N.Y.S.2d 275 (Binghamton City Ct. 1973).
82. *Id.* at —, 342 N.Y.S.2d at 279.
83. 45 Wis. 2d 389, 173 N.W.2d 297 (1970).
84. 117 N.J. Super. 491, 285 A.2d 86 (Union County Dist. Ct. 1971).
85. Cornell v. Dimmick, 73 Misc. 2d 384, —, 342 N.Y.S.2d 275, 280 (Binghamton City Ct. 1973).

tion. Yet in *Cornell* the court finds it not to be enough as it found that the retaliatory motive appeared to be too great for eviction to have been "independently" arrived at. These variations could provide conflict in the future as each jurisdiction decides for itself what measure of proof is required for the landlord.[86]

Legislatures have adopted requirements similar to those suggested above on the elements of proof necessary to prove retaliatory eviction. Rhode Island requires that the tenant allege and show by a preponderance of the evidence that he made a "justified" attempt to secure one of certain enumerated rights, that the landlord is attempting to evict him, and that the eviction is intended as a "penalty" for the tenant's acts.[87]

Some statutes, such as that of Rhode Island discussed above, do not establish a system of presumptions. Many legislatures, however, have gone this extra step and have worked out such a system. New Jersey, for example, established rebuttable presumptions in a separate section of its tenancy statutes.[88] The statute requires a threshold finding of a good faith action by the tenant and a subsequent eviction or substantial alteration of the terms of the lease by the landlord without cause. Once these are established, there arises "a rebuttable presumption that such notice or alteration is a reprisal against the tenant" for his acts. Some states have established variations on this scheme by inserting a specific time period[89] during which eviction by the landlord would create such a presumption. In these states eviction outside the time period would presumably return the burden to the tenant.[90] In a few instances a time limit may be imposed beyond which no eviction may be deemed retaliatory.[91] The landlord's burden for overcoming the presumption will be

86. Special situations arise which allow the landlord to move the tenant out in spite of a retaliatory motive. Robinson v. Diamond Housing Corp., 267 A.2d 833 (D.C. Ct. App. 1970), exemplifies such a situation. After the landlord's property had been determined unsafe and unsuitable for habitation because of code regulation violations, he gave the tenant notice as prescribed and brought an action for eviction. Expressly limiting *Edwards v. Habib*, the court of appeals held that rather than repair, the landlord may evict and withdraw his property from the rental market regardless of his retaliatory intent.

87. R.I. GEN. LAWS ANN. § 34-20-10 (1969).

88. N.J. STAT. ANN. tit. 2A, § 42-10.12 (Supp. 1975).

89. *See, e.g.*, CONN. GEN. STAT. ANN. § 19-375a (Cum. Supp. 1976) (sixty days); DEL. CODE ANN. tit. 25, § 5516(b) (1974); ME. REV. STAT. ANN. tit. 14, § 6001 (Cum. Supp. 1975); MASS. GEN. LAWS ANN. ch. 239, § 2A (1974); MICH. STAT. ANN. § 27A.5720 (Cum. Supp. 1975); MINN. STAT. ANN. § 566.03, subd. 2 (Cum. Supp. 1976) (ninety days); ABF MODEL RESIDENTIAL LANDLORD-TENANT CODE § 2-407 (1969) (six months); UNIFORM RESIDENTIAL LANDLORD & TENANT ACT § 5.101 (1972) (one year).

90. MICH. STAT. ANN. § 27A.5720 (Cum. Supp. 1975).

91. MD. REAL PROP. CODE ANN. § 8-208.1 (Cum. Supp. 1975).

similar to that required by common law.[92] The only case involving a statute which has touched directly on this point, *Silberg v. Lipscomb*,[93] held that the landlord must show that the eviction was "independent" of any consideration of the tenant's protected activity. Many courts, however, will probably require proof only that retaliation was not the "dominant purpose" of the landlord.[94]

REMEDIES

Once the theory of retaliatory eviction is accepted and proven, the court faces the final problem of what remedies should be available. Initially the defense was used solely to prevent the tenant from being evicted. Yet, as Judge Skelly Wright recognized from the outset in *Edwards v. Habib*,[95] even this simple remedy raises problems. The court there stated that even if retaliatory eviction is shown, the tenant is not "entitled to remain in possession of perpetuity. If this illegal purpose is dissipated, the landlord can . . . evict his tenant or raise their rents for economic or legitimate reasons . . . ."[96] Controversy has arisen primarily over what is required to "dissipate" the taint. A New York court partially answered the question in *Markese v. Cooper*[97] where it acknowledged Judge Wright's principles of dissipation but expressed regret that he left no practical guidelines for trial courts. The court formed its own guidelines, holding that "at a minimum . . . the tenant should be permitted to remain until the landlord has made the repairs required by law."[98] As a minimum period this requirement would serve to further the public policy of providing safe housing. Used in conjunction with a rent escrow[99] or self help[100] statute, the time period would be particularly effective. Once the repair duty is discharged, the courts face a more difficult task since the rights of the

92. *See* text accompanying notes 83-85 *supra*.
93. 117 N.J. Super. 491, 285 A.2d 86 (Union County Dist. Ct. 1971).
94. Statutes, like the case law, acknowledge situations where the landlord may evict in spite of a retaliatory intent. CONN. GEN. STAT. ANN. § 19-375a(b) (Cum. Supp. 1976) provides that notwithstanding the retaliatory eviction the landlord may recover possession if the condition complained of was caused willfully by the tenant; notice was given prior to the tenant's complaint; or if the tenant is using the property for a purpose which is illegal or contrary to the rental terms. *Id.* § 19-375a(c) provides situations where the landlord may increase rent in spite of a retaliatory intent.
95. 397 F.2d 687 (D.C. Cir. 1968).
96. *Id.* at 702.
97. 70 Misc. 2d 478, 333 N.Y.S.2d 63 (Monroe County Ct. 1972).
98. *Id.* at —, 333 N.Y.S.2d at 75.
99. PA. STAT. ANN. tit. 35, § 1700-1 (Cum. Supp. 1975).
100. CAL. CIV. CODE § 1942 (West Supp. 1975).

landlord and tenant are then more evenly weighted. The court must consider the second policy objective, prevention of the "chilling effect" of the eviction. At the same time it should recognize that the landlord too has important rights. A suggested solution should the landlord maintain a retaliatory motive after the conditions have been remedied would be to allow the tenant sufficient time from that point to find other suitable housing.[101] This solution has not been universally adopted. Other courts would cut off the defense completely once the condition has been remedied.[102] The latter solution is overly rigid and does not serve all of the policy goals underlying retaliatory eviction. It does offer the advantage of simplicity and certainty.

Most statutes have treated retaliatory eviction as a defense to the summary dispossession action of the landlord.[103] Thus they often provide only that an eviction will not issue if retaliation be proven. They have approached the dissipation problem with the same hesitancy as have the common law cases. Illinois statutes say nothing on the issue.[104] Presumably the courts must work out a formula on the same basis as is done for common law evictions. In those states where the burden is shifted for a specified period of time,[105] the landlord, in a new action, must still overcome the presumption so long as the time period has not elapsed. In addition some statutes create a cause of action when the termination "was intended as a penalty for the defendant's justified attempt to secure or enforce rights under . . . the laws of the state."[106] Arguably a defense of retaliation constitutes such an attempt. Thus under such a law the tenant should be allowed a second period equivalent to that which he received after his first encounter with the landlord. These time periods, it must be emphasized, do not prescribe the time during which a tenant may not be evicted; they only specify the time period during which he enjoys the presumption of retaliation. It is likely, however, that he could successfully maintain his defense during that period in most situations. After the time period expires most states do allow the tenant his defense although the burden is on him. California, however, limits the tenant. The legislature proscribed retaliatory evictions within sixty days of the tenant's acts *but* then provided that the

101. Markese v. Cooper, 70 Misc. 2d 478, —, 333 N.Y.S.2d 63, 75 (Monroe County Ct. 1972).
102. Cornell v. Dimmick, 73 Misc. 2d 384, —, 342 N.Y.S.2d 275 (Binghampton City Ct. 1973).
103. *See, e.g.*, MINN. STAT. ANN. § 566.03, subd. 2 (Cum. Supp. 1976).
104. ILL. ANN. STAT. ch. 80, § 71 (Smith-Hurd 1966).
105. *See* note 89 *supra.*
106. R.I. GEN. LAWS ANN. § 34-20-10(A) (1969).

tenant cannot invoke "the provisions of this section more than once in any twelve-month period."[107] Therefore the tenant can only rely on the sixty days from the original act even to contest the eviction. Effectively the taint is dissipated for the next ten months and the tenant is an open target unless he can delay the decision in the first case for a full year.[108] Probably the most rigid statutory period was adopted in Maryland. There no eviction is retaliatory after a six-month period following the determination of the initial case by a court on the merits.[109] Again simplicity and certainty are the advantages.

Perhaps a better method of assuring such simplicitly and certainty for both case law and statutes would be to adopt the injunctive remedies discussed above.[110] Although the courts would face essentially the same problems and would answer them from the same considerations, the court's decision would be "up front." The trial judge could indicate in his order what time period, based on current market conditions, will be required to dissipate the taint. Thus the landlord and tenant will not have to guess and risk another court battle to find out how long the tenant may remain.

In addition to the remedies discussed above, some courts have been willing to grant compensatory and special damages and have suggested that in some situations exemplary or punitive damages would be appropriate. In *Markese v. Cooper*,[111] for example, the court allowed damages for retaliation under an equitable defense theory. It did so under the authorization of a New York statute which allowed the answer to contain any equitable defense *or* counterclaim.[112] In spite of the court's "assumption" that damages are permissible, some jurisdictions may find it difficult to award damages for an action which is essentially a defense. These courts may consider damages to be too harsh in view of the landlord's own problems.

A further problem may arise in defining the scope of general and special damages. One court implicitly suggested that the unsanitary

107. CAL. CIV. CODE § 1942.5 (West Supp. 1975).

108. The statute is very confusing. For an analysis see Note, *Retaliatory Eviction in California: The Legislature Slams the Door and Boards Up the Windows*, 46 S. CAL. L. REV. 118 (1972).

109. MD. REAL PROP. CODE ANN. § 8-208.1 (Cum. Supp. 1975).

110. *See* text accompanying notes 54-73 *supra*.

111. 70 Misc. 2d 478, 333 N.Y.S.2d 63 (Monroe County Ct. 1972).

112. N.Y. REAL PROP. ACTIONS § 743 (McKinney 1963), *as amended*, (Cum. Supp. 1975). The court seems procedurally confused: the damages should have been allowed for a counterclaim rather than a defense. Nevertheless, liberal pleading rules minimize the importance of this flaw.

condition complained of may be a basis for compensation in certain circumstances.[113] The court denied damages because the tenant had lived in the apartment for two preceeding winters and therefore had notice of the excessive cost of heating due to a faulty furnace. The code violation itself should not concern a court deciding a retaliatory eviction claim. Such damage claims are outside the scope of the doctrine and should have been discounted peremptorily unless, as the opinion does not show, they were part of another claim based on code violations.[114] Any damages granted under a retaliatory eviction claim should be limited to those which stem from the eviction. Such damages most likely arise when the landlord uses self help or when he constructively evicts the tenant by acts such as cutting off essential services. One court, however, has gone so far as to suggest that it will entertain a damages claim for intentional infliction of mental distress caused by the landlord's attempts at eviction.[115] The court found that the relationship between landlord and tenant was one which could be abused in a manner so as to warrant these damages. No other court has gone this far.

Legislatures have been as leery as courts about allowing damages. A minimal recovery is provided by Maryland. That state allows the tenant to recover attorney fees and court costs at the discretion of the court.[116] Although the allowance of attorney's fees is generally punitive in nature,[117] in most eviction cases they will reflect the actual damages suffered by the tenant. Thus they provide a good minimal recovery. New Jersey alone provides the tenant with a full statutory right to maintain an action for "damages and other appropriate relief."[118] In the only case directly applying this provision,[119] the New Jersey court granted compensatory but not punitive damages. It stated that punitive damages were not warranted on the facts of this case,[120] a clear implication that punitive damages may be awarded in other circumstances. Although the court did not state its reasons for denying damages, it is

113. Cornell v. Dimmick, 73 Misc. 2d 384, 342 N.Y.S.2d 275 (Binghampton City Ct. 1973).

114. *See* Brown v. Southall Realty Co., 237 A.2d 834 (D.C. Ct. App. 1968).

115. Aweeka v. Bonds, 20 Cal. App. 3d 278, 97 Cal. Rptr. 650 (1st Dist. 1971).

116. MD. REAL PROP. CODE § 8-208.1 (Cum. Supp. 1975).

117. D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 3.8, at 197 (1973).

118. N.J. STAT. ANN. § 2A:42-10.10 (Cum. Supp. 1975).

119. Pohlman v. Metropolitan Trailer Park, Inc., 126 N.J. Super. 114, 312 A.2d 888 (Ch. 1973).

120. The tenants were evicted because they actively opposed the landlord on a zoning ordinance issue. *Id.* at 117, 312 A.2d at 889.

possible that more evidence of a willful violation was needed. Also the court may grant such damages more readily when stronger public policy, such as that embodied in health codes, is involved. In any event, guidelines are unclear at the moment.

Delaware allows the tenant to recover three months rent or treble damages, whichever is greater, plus the cost of the suit.[121] The statute does not say how the tenant raises the damages issue although he would likely use a section of the summary eviction provision which provides that the "answer may contain any legal or equitable defense or counterclaim."[122] A uniform provision[123] allows a similar recovery. In a comment to that provision, the drafters stated its purpose to be to "put teeth" into the prohibition. Another set of "teeth" involving treble damages can be found in the unfair trade practice theory[124] in North Carolina. Should the courts accept that theory, a recent unfair trade practices decision, *Hardy v. Toler*,[125] would likely allow treble damages for the plaintiff.

WAIVER

A final question must be asked concerning the defense of retaliatory eviction. Can it be waived either expressly by contract or impliedly? The common law has not dealt with this problem to date. Nevertheless it is doubtful that a court could uphold a waiver absent some indication that it was expressly bargained for by equal parties. The defense itself is based largely on public policy recognition of the superior bargaining position of the landlord.[126] Thus a waiver clause would likely be considered another manifestation of this superior position and be voided as contrary to public policy.

Most statutes have not dealt with the waiver question. California, which does speak to the issue, disallows waiver. The statute provides that "[a]ny waiver by a lessee of his rights under this section shall be void as contrary to public policy."[127] Because of these strong public policy considerations, most other states with statutes will likely follow this rationale.

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121. DEL. CODE ANN. tit. 25, § 5516(d) (1974).
122. *Id.* § 5709.
123. ABF MODEL RESIDENTIAL LANDLORD-TENANT CODE § 2-407(3) (1969).
124. *See* text accompanying notes 66-73 *supra.*
125. 288 N.C. 303, 218 S.E.2d 342 (1975).
126. *See* note 43 *supra.*
127. CAL. CIV. CODE § 1942.5(c) (West Supp. 1975).

CONCLUSION

As noted at the outset, this article begins with the assumption that retaliatory eviction should be prohibited. It therefore foregoes an analysis of the merits of the doctrine and focuses on the form that such prohibitions should take, by common law or by statute. It is difficult to say which of these two modes would best serve the goals of the doctrine. Legislative action delineates rights and duties far more surely and cleanly than is possible under a case law approach. One judge in an opinion holding for retaliatory eviction commented that "[u]nfortunately, unless the legislature acts, these admittedly incomplete standards will have to suffice until the slow hand of experience shapes new and better ones."[128] Precise and detailed guidelines issued by the legislature would shortcut much of the process that case law requires for effective implementation. In addition, for law based on public policy, it is better that the people's direct representatives, the legislature, adopt that law. However, as the court indicated, the legislature must act. To date legislatures have been slow to react to the changing needs of landlord-tenant relations.[129] Reform bills often never get to the legislative floor or arrive in a totally emasculated form. Statutes may be enacted which are ineffective to accomplish the real objectives of the doctrine.[130] In these instances no law at all would be better as the tenants could more easily persuade the courts to act. Thus both statutory and case law serve a purpose and either can be an effective tool to implement the prohibition in a given situation.

No matter which mode is used, it is imperative that those in a decisionmaking position understand the objectives which underlie the doctrine. Without constant attention to these goals, decisions affecting practical application will be inconsistent and at times contradictory.

Although the goals of retaliatory eviction are viewed differently by various courts and legislatures, it is the view of this commentator that the following model represents the most consistent and best reasoned expressions. The primary function of the retaliatory eviction prohibition is to enforce building and health codes and thus to promote safe and sanitary housing. The larger goal, however, must be understood in

128. Markese v. Cooper, 70 Misc. 2d 478, —, 333 N.Y.S.2d 63, 75 (Monroe County Ct. 1972).

129. For a discussion of a legislative history behind landlord-tenant acts see Note, 46 S. CAL. L. REV. 118, *supra* note 108, at 120-25.

130. ABF MODEL RESIDENTIAL LANDLORD-TENANT CODE § 2-407, Commentary (1969).

terms of its two component objectives. First, the particular building must be made to satisfy the codes. This objective is approached through such means as rent escrow and tenant repair statutes. Statutes which prohibit eviction until the violation has been remedied are another example. The second component objective, prevention of a "chilling effect" on tenant activities, has been less widely accepted. This policy calls essentially for the encouragement of rightful tenant activities which promote safe and sanitary housing. An example would be those statutes which provide the tenant with protection for "good faith" acts. This objective deals with the landlord-tenant relationship rather than the purely mechanical code enforcement process. Therefore it requires that benefits to the tenant will be countered by detriments to the landlord which in some cases may work unjust hardships. Nevertheless, this policy must be accepted. Without this additional protection, housing shortages and dislocation problems could potentially cause such timidity among tenants as to drastically curtail code enforcement efforts.

With these twin objectives in mind a framework for practical implementation of the doctrine can be devised.

Activity Protected

The primary activity protected is tenant reports to authorities about buildings and health code violations. In furtherance of the second policy objective, all "good faith" reports should be protected whether they constitute a violation or not. Similarly, protection should be extended to good faith attempts by the tenant to invoke self help or rent escrow statutes. Eviction in retaliation for a tenant's exercise of free speech and associational rights presents a tougher dilemma. Such retaliation should be proscribed but only in those instances in which the activity bears a reasonable relationship to the tenancy. When there is such a relationship the tenant should be protected by "retaliatory eviction policy" in addition to the constitutional protection which has often been used in the past. The former basis would avoid potential state action roadblocks. An easy example justifying protection would be formation of a tenants' association. A situation closer to the borderline would be that in which the tenant works for a general goal affecting tenancy such as a state or local tenant rights bill. Such a situation should probably be considered to be "reasonably related." Eviction for free speech activities such as campaigning for a particular candidate, while perhaps wrongful, should not be proscribed under laws based on

the policy assumptions accepted for retaliatory eviction. They do not violate those assumptions. Protection for this type of activity should be based on constitutional grounds if they so qualify. Other acts such as tenant attempts to enforce contract rights or "tenant rights laws" also deserve protection. In addition there is a need to keep open the list of protected activities as new situations deserving protection will undoubtedly arise. Language protecting "justified lawful acts" of the tenant may serve this purpose, but such a provision must be narrowly construed to include only those acts pertaining to the tenancy.

Eviction Defined

Eviction should include both actions in law, such as summary dispossession initiated by the landlord, and disproportionate rent increases which are intended as a penalty for protected activities. Other types of landlord activities such as constructive evictions through termination of essential services should also be included.

Type of Legal Action

Retaliatory eviction arises most naturally as an affirmative defense. In addition, courts and legislatures should let it be raised as a counterclaim. This change would permit the court to award damages as further deterrent to this type of willful landlord act. Finally, injunctive relief should be permitted in those instances where the tenant could suffer irreparable harm. A typical situation would occur when the landlord has ordered a disproportionate rent increase.

Method of Proof

Retaliatory eviction is a question of fact for the appropriate fact finder. The elements required to prove it should include (1) a good faith "protected" act by the tenant, (2) an eviction, direct, indirect or constructive, and (3) a primary motive of retaliation. The last element, motive, should be presumed upon the tenant proving the protected act followed within a stated time period, such as ninety days, by the eviction. This presumption could be rebutted by a showing by the landlord that retaliation was not the primary motivation for the eviction. The "independent" motivation test is rejected as it does not substantially further the named policy objectives.

Remedies

Upon a showing of retaliatory eviction, the landlord's legal action should be dismissed if he is directly evicting the tenant, or enjoined should he be attempting an indirect or constructive eviction. The tenant should be permitted to remain until the landlord remedies the violation (thus satisfying the first policy goal) or until the tenant has sufficient time to find other housing (thus satisfying the second), whichever is later. Nevertheless the landlord should be permitted to evict the tenant within this period if he can show a substantial economic reason. The chance of landlord abuse of this exception through harassment is slight because, having lost once, he would not likely further expose himself to a damage claim by the tenant without substantial motivation. To increase deterrence for this and other objectives, the tenant should be allowed to collect court costs, reasonable attorney's fees and treble damages. Damage should include compensatory and special damages which arise out of the eviction. In addition, where the landlord's illegal act is particularly willful or malicious, punitive damages should be readily permitted.

Waiver

Because of the disadvantaged bargaining position of the tenant which underlies the entire policy, waiver should not be permitted.

CAVEAT

The proper form and procedure of retaliatory eviction cannot be stated with absolute certainty. It is too recent a development for easy answers. Time and experience will modify even the most carefully thought out proposal. Social and political changes may even alter the thrust of the policy goals behind the doctrine. The above discussion attempts only to define those goals as they are now perceived and examine existing alternatives with an emphasis on those measures which are consistent and effective in the implementation of those goals.

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