

# The Tenant As A Consumer

## I. INTRODUCTION

One of America's goals is to provide low rent housing consisting of "decent, safe, and sanitary dwellings within the financial reach of families of low income . . . ." <sup>1</sup> In order to provide privately-owned rental housing for the urban tenant which meets this standard, the general problems of unconscionable lease contracts and uninhabitable housing must be solved. These two general problems can be broken down into the following:

1) The current housing shortage often forces the tenant to accept housing in the "as is" condition, which is uninhabitable, and often forces him to remain and pay rent on premises which become uninhabitable due to landlord neglect. <sup>2</sup>

2) Adequate services, such as heat, light, and water, are sometimes not provided. <sup>3</sup>

3) The landlord often does not maintain either the leased apartment or the common areas in a habitable state. <sup>4</sup>

4) The housing shortage and the tenant's unequal bargaining power usually force the tenant to accept contracts of adhesion which unconscionably favor the landlord. <sup>5</sup>

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<sup>1</sup>Housing Act, 42 U.S.C. § 1402 (1) (1969).

<sup>2</sup>Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO. L. J. 519, 520 (1966) [hereinafter cited as Schoshinski].

<sup>3</sup>Schier, *Protecting the Interests of the Indigent Tenant: Two Approaches*, 54 CALIF. L. REV. 670, 670, 671 (1966) [hereinafter cited as Schier].

<sup>4</sup>*Id.* at 671.

<sup>5</sup>Schoshinski, *supra* note 2, at 521.

5) The tenant is often subjected to retaliatory rent increases or eviction when he attempts to legally improve his housing condition.<sup>6</sup>

6) Exorbitant rent is often charged for inadequate space.<sup>7</sup>

7) Leases are often of short duration.<sup>8</sup>

8) The tenant often does not have an assurance of privacy.<sup>9</sup>

The resolution of these problems can be aided by abandoning the archaic and anachronistic landlord-tenant concept, and replacing it with a modern, realistic concept—the concept of the tenant as a consumer.

In attempting to solve these problems, much can be learned from an examination of the weaponry that has been provided chattel consumers under state retail installment sales acts and the *Uniform Commercial Code*. Some of this weaponry has proved rather pointless or useless in the area it was specifically designed to cover, *i.e.*, the area of chattel consumption. Some portions may be irrelevant to the problems of the tenant as a consumer. But other portions, those which will be examined in this paper, do have a good deal of relevance to the problems of the tenant and can aid in their solution.

A social and legal trend has begun to protect the consumer of goods.<sup>10</sup> The tenant is a consumer of housing, *i.e.*, space and services. Since the tenant is a consumer in his own right and has disabilities similar to those of the consumer of goods, he should be included within the consumer protection trend and receive the benefits which that trend has to offer.

## II. THE TENANT AS A CONSUMER

### A. THE OLD CONCEPT OF LANDLORD-TENANT IS NO LONGER VALID

The anachronous and archaic landlord-tenant concept of an agrarian age is no longer valid in today's urban society. *Cessante ratione cessat lex*.<sup>11</sup> In yesterday's agrarian society, the common law estab-

<sup>6</sup>*Id.* at 520-521.

<sup>7</sup>*See* Schier, *supra* note 3, at 671.

<sup>8</sup>*Id.* at 670.

<sup>9</sup>*See id.* at 671.

<sup>10</sup>1 CCH 1969 POVERTY LAW REP. ¶ 3050.

<sup>11</sup>When the reason for the law ceases, the law itself should cease. *Kitchen v. Herring*, 42 N.C. 137, 138, 7 Ire. Eq. 190, 192 (1851).

lished the concept of the lease as a grant of an estate in land.<sup>12</sup> The tenant was concerned primarily with the land itself rather than housing. Consequently, there was little need for and were few affirmative duties on the part of the landlord.<sup>13</sup> The landlord's duties could rightfully end by allowing inspection by the tenant and with delivery of physical possession of the land.

In today's urban society, the function of the lease has changed. It is now in reality a purchase by contract of space in a building and landlord/vendor supplied services such as heat, electricity, and water.<sup>14</sup> The tenant takes title to space in a building rather than to an estate in land.<sup>15</sup> He desires to live in that space and survive by using the services the landlord has contracted to provide for him; the tenant no longer desires to be granted an estate in land so that he may till the soil, cut down trees for firewood, and dig his own well and bathroom facilities. The tenant is not interested in the soil. He cannot supply his own heat, light, and water in a multiple dwelling; he needs the gas, electricity, and plumbing systems of the building owned by the landlord in order to survive.

Consequently, the landlord's duties should no longer end with the mere delivery of physical possession of the rooms; he is selling shelter in a "landlord's market"<sup>16</sup> and he should be responsible for those services which the tenant cannot supply and which make the space habitable. The landlord should be responsible for supplying these services because the gas, electricity, and plumbing systems are part of the larger building which the landlord owns and controls and out of which the tenant buys title only to a small space. The tenant needs the services to live, and since he cannot supply them for himself he relies upon the control and superiority of the landlord to furnish the needed services. The housing shortage<sup>17</sup> exacerbates the tenant's problem; he cannot easily move on to more habitable housing but must remain where he is and rely upon the landlord to supply the services which make his space habitable.<sup>18</sup>

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<sup>12</sup>Garrity, *Redesigning Landlord-Tenant Concepts for an Urban Society*, 46 J. URBAN L. 695, 700 (1969) [hereinafter cited as Garrity].

<sup>13</sup>Schoshinski, *supra* note 2, at 535.

<sup>14</sup>*Id.*

<sup>15</sup>See *Shawmut National Bank v. City of Boston*, 118 Mass. 125 (1875).

<sup>16</sup>A "landlord's market" is one which the housing shortage compels the prospective tenant to accept a lease strictly on the landlord's terms. Schoshinski, *supra* note 2, at 521.

<sup>17</sup>THE REPORT OF THE PRESIDENT'S COMMITTEE ON URBAN HOUSING—A DECENT HOME 40 (1968).

<sup>18</sup>Schoshinski, *supra* note 2, at 520.

## B. THE FEASIBILITY OF CONCEPTUALIZING THE TENANT AS A CONSUMER

To conceptualize the tenant as a consumer of housing is feasible.<sup>19</sup> The tenant is a consumer of space and services, *i.e.*, housing. The leasing of space and services is analogous to the sale of goods.<sup>20</sup> *Uniform Commercial Code*<sup>21</sup> § 2—106(1) states that “[a] ‘sale’ consists in the passing of title from the seller to the buyer for a price . . . . A ‘present sale’ means a sale which is accomplished by the making of the contract.” In the landlord-tenant relationship, the title to the space and services passes from the landlord to the tenant. In this sense, the lessor is a merchant<sup>22</sup> with respect to the thing leased; he is the seller and the lessee is the buyer.<sup>23</sup> The lease is really a contract to purchase space and services within a building<sup>24</sup> for a limited time. The rent is the consideration for the sale.<sup>25</sup> When the rent is due and unpaid it constitutes a debt from the tenant to the landlord.<sup>26</sup> Consequently, the estate for years should be viewed as a secured transaction. The lease is the installment contract, the periodic rental payments are the installment payments, and the security deposit, the goods seized under the baggage lien laws, or the repossessed space which must be resold to mitigate damages is the security for the debt. The periodic tenancy should be viewed as a series of secured sales. If the tenant has obligations similar to those of the chattel consumer, he should also have the rights of the chattel consumer; if the tenant must pay his debt for consuming housing, he should be afforded the rights and protections which the chattel consumer has in order to insure that he gets that for which he pays.

The lease now “more closely resembles a contract for the purchase of space and services than it does the purchase of an interest in land. Neither the tenant nor the landlord believes that an estate in land has been conveyed. The transaction is an exchange of money for space and services.”<sup>27</sup> The leasing of housing, then, is a sale in the commercial sense.<sup>28</sup> Therefore, the concept of landlord-tenant should

<sup>19</sup>Garrity, *supra* note 12, at 705.

<sup>20</sup>See Schier, *supra* note 3, at 677.

<sup>21</sup>Hereinafter cited as UCC in text and footnotes.

<sup>22</sup>See UCC § 2—104 (1) for a definition of “merchant.”

<sup>23</sup>See UCC § 2—103 (1) (a) and (d) for definitions of “buyer” and “seller.”

<sup>24</sup>Schoshinski, *supra* note 2, at 535. See UCC §§ 1—201 (11), 2—106 (1), and 2—612.

<sup>25</sup>Schoshinski, *supra* note 2, at 536.

<sup>26</sup>Knutte v. Superior Court, 134 Cal. 660, 66 P. 875 (1901).

<sup>27</sup>Schoshinski, *supra* note 2, at 535-536.

<sup>28</sup>Skillern, *Implied Warranties in Leases: The Need for Change*, 44 DENVER L. J. 387, 399 (1967).

be reshaped to accommodate the new function of the lease and to support the true beliefs of the parties involved. Legally, the concept should be that of the tenant as a consumer rather than that of a conveyee of an estate in land. The concept should be that of the tenant as a consumer because this concept reflects that which is actually taking place—both the landlord and the tenant believe that consumption of housing will result from their contract for space and services within a building in consideration for an amount of money.

### C. JAVINS V. FIRST NATIONAL REALTY CORPORATION

In *Javins v. First National Realty Corporation*,<sup>29</sup> Judge Skelly Wright recognized that the old concept of landlord-tenant is no longer valid and that residential landlord-tenant law should be brought into harmony with consumer protection cases. In holding that the Housing Regulations of the District of Columbia imply a warranty of habitability into leases of all housing that they cover, measured by the standards which the Regulations set out, Judge Wright wrote:<sup>30</sup>

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Since, in traditional analysis, a lease was the conveyance of an interest in land, courts have usually utilized the special rules governing real property transactions to resolve controversies involving leases. However, as the Supreme Court has noted in another context, "the body of private property law \* \* \*, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical." Courts have a duty to reappraise old doctrines in the light of the facts and values of contemporary life—particularly old common law doctrines which the courts themselves created and developed. As we have said before, "[T]he continued vitality of the common law \* \* \* depends upon its ability to reflect contemporary community values and ethics."

The assumption of landlord-tenant law, derived from feudal property law, that a lease primarily conveyed to the tenant an interest in land may have been reasonable in a rural, agrarian society; it may continue to be reasonable in some leases involving farming or commercial land. In these cases, the value of the lease to the tenant is the land itself. But in the case of the modern apartment dweller, the value of the lease is that it gives him a place to live. The city dweller who seeks to lease an apartment on the third floor of a tenement has little interest in the land 30 or 40 feet below, or even in the bare right to possession within the four walls of his apartment.

<sup>29</sup>428 F.2d 1071 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 925 (1970).

<sup>30</sup>*Id.* at 1074-1080. The court's footnotes are omitted.

When American city dwellers, both rich and poor, seek “shelter” today, they seek a well known package of goods and services—a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance.

. . . .

Modern contract law has recognized that the buyer of goods and services in an industrialized society must rely upon the skills and honesty of the supplier to assure that goods and services purchased are of adequate quality. In interpreting most contracts, courts have sought to protect the legitimate expectations of the buyer and have steadily widened the seller’s responsibility for the quality of goods and services through implied warranties of fitness and merchantability. . . .

Implied warranties of quality have not been limited to cases involving sales. The consumer renting a chattel, paying for services, or buying a combination of goods and services must rely upon the skill and honesty of the supplier to at least the same extent as a purchaser of goods. Courts have not hesitated to find implied warranties of fitness and merchantability in such situations. In most areas product liability law has moved far beyond “mere” implied warranties running between two parties in privity with each other.

The rigid doctrines of real property law have tended to inhibit the application of implied warranties to transactions involving real estate. Now, however, courts have begun to hold sellers and developers of real property responsible for the quality of their product. . . .

Despite this trend in the sale of real estate, many courts have been unwilling to imply warranties of quality, specifically a warranty of habitability, into leases of apartments. Recent decisions have offered no convincing explanation for their refusal; rather they have relied without discussion upon the old common law rule that the lessor is not obligated to repair unless he covenants to do so in the written lease contract. . . .

. . . In our judgment the common law itself must recognize the landlord’s obligation to keep his premises in a habitable condition. This conclusion is compelled by three separate considerations. First, we believe that the old rule was based on certain factual assumptions which are no longer true; on its own terms, it can no longer be justified. Second, we believe that the consumer protection cases . . . require that the old rule be abandoned in order to bring residential landlord-tenant law into harmony with the principles on which those cases rest. Third, we think that the nature of today’s urban housing market also dictates abandonment of the old rule.

The common law rule absolving the lessor of all obligation to repair originated in the early Middle Ages. Such a rule was perhaps well suited to an agrarian economy; the land was more important than whatever small living structure was included in the leasehold, and the tenant farmer was fully capable of making repairs himself. These historical facts were the basis on which the common law constructed its rule; they also provided the necessary prerequisites for its application.

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It is overdue for courts to admit that these assumptions are no longer true with regard to all urban housing. Today's urban tenants, the vast majority of whom live in multiple dwelling houses, are interested, not in the land, but solely in "a house suitable for occupation." Furthermore, today's city dweller usually has a single, specialized skill unrelated to maintenance work; he is unable to make repairs like the "jack-of-all-trades" farmer who was the common law's model of the lessee. Further, unlike his agrarian predecessor who often remained on one piece of land for his entire life, urban tenants today are more mobile than ever before. A tenant's tenure in a specific apartment will often not be sufficient to justify efforts at repairs. In addition, the increasing complexity of today's dwellings renders them much more difficult to repair than the structures of earlier times. In a multiple dwelling repair may require access to equipment and areas in the control of the landlord. Low and middle income tenants, even if they were interested in making repairs, would be unable to obtain any financing for major repairs since they have no long-term interest in the property.

Our approach to the common law of landlord and tenant ought to be aided by principles derived from the consumer protection cases . . . . In a lease contract, a tenant seeks to purchase from his landlord shelter for a specified period of time. The landlord sells housing as a commercial businessman and has much greater opportunity, incentive and capacity to inspect and maintain the condition of his building. Moreover, the tenant must rely upon the skill and bona fides of his landlord at least as much as a car buyer must rely upon the car manufacturer. In dealing with major problems, such as heating, plumbing, electrical or structural defects, the tenant's position corresponds precisely with "the ordinary consumer who cannot be expected to have the knowledge or capacity or even the opportunity to make adequate inspection of mechanical instrumentalities, like automobiles, and to decide for himself whether they are reasonably fit for the designed purpose." *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 375, 161 A.2d 69, 78 (1960).

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Even beyond the rationale of traditional products liability law,

the relationship of landlord and tenant suggests further compelling reasons for the law's protection of the tenants' legitimate expectations of quality. The inequality in bargaining power between landlord and tenant has been well documented. Tenants have very little leverage to enforce demands for better housing. Various impediments to competition in the rental housing market, such as racial and class discrimination and standardized form leases, mean that landlords place tenants in a take it or leave it situation. The increasingly severe shortage of adequate housing further increases the landlord's bargaining power and escalates the need for maintaining and improving the existing stock. Finally, the findings by various studies of the social impact of bad housing has led to the realization that poor housing is detrimental to the whole society, not merely to the unlucky ones who must suffer the daily indignity of living in a slum.

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### III. INCLUDING THE TENANT WITHIN THE CONSUMER PROTECTION TREND

Today, the trend in federal and state legislation is to protect the consumer of goods in his dealings with the seller and lender and to educate him about his sales transactions.<sup>31</sup> To protect the consumer of goods, legislatures have passed disclosure acts,<sup>32</sup> credit sales acts,<sup>33</sup> and consumer loan acts,<sup>34</sup> and they have regulated advertising,<sup>35</sup> collection practices,<sup>36</sup> and secured credit and sales.<sup>37</sup> In addition, legislatures have devised penalties for failure to comply with the various acts,<sup>38</sup> have provided consumers with remedies,<sup>39</sup> and have established agencies to enforce the acts.<sup>40</sup> To educate and help the consumers in their activities, legislatures have offered governmental services.<sup>41</sup> By court decision and by statute, the need for consumer protection in

<sup>31</sup>1 CCH 1969 POVERTY LAW REP. ¶ 3050.

<sup>32</sup>See *id.* at ¶ 3100.

<sup>33</sup>See *id.* at ¶ 3110.

<sup>34</sup>See *id.* at ¶ 3125.

<sup>35</sup>See *id.* at ¶ 3130.

<sup>36</sup>See *id.* at ¶¶ 3530-3545.

<sup>37</sup>See *id.* at ¶ 3010.

<sup>38</sup>See *id.* at ¶ 3145.

<sup>39</sup>See *id.* at ¶ 3545 and ¶¶ 3800-3830.

<sup>40</sup>See *id.* at ¶¶ 3140 and 3825.

<sup>41</sup>See *id.* at ¶ 3950.



the area of leasing of goods by rental concerns has been recognized.<sup>42</sup>

Generally, as far as the consumer of goods is concerned, the trend in commercial law has been toward "commercial decency",<sup>43</sup> fairness,<sup>44</sup> reasonableness, equity and good faith.<sup>45</sup> And still, advocates of consumer protection are arguing that not enough is being done in the consumer protection field and are pressing for new laws.<sup>46</sup>

Legislatures, courts, and other public agencies have developed a broad range of safeguards for the consumer of goods, but much of this protection has not been extended to the tenant, a consumer of housing. "In contrast with concern for and protection of [chattel] consumers . . . , [some] legislatures have reinforced the legal status of suppliers of rental housing and have under-regulated their responsibilities."<sup>47</sup> In addition, courts have often refused to overturn or condemn illogical precedents or unreasonable practices.<sup>48</sup>

Admittedly, some of the legislation and devices designed to protect the chattel consumer have proved unsatisfactory. But, nevertheless, a strong legal and social consumer protection trend has begun. If the tenant, a consumer of space and services, were included within that protective trend, as he conceptually could and should be, a new, desirable, and more equitable relationship between the landlord and the tenant would be established. The tenant is a consumer in his own right and he should justifiably receive the benefits which that trend has to offer.

What is needed to include the tenant in the consumer protection trend is "governmental intervention to reform landlord-tenant concepts to conform to contemporary urban needs."<sup>49</sup> Such intervention should be in the form of the application of current and new laws, court decisions, and agency enforcement.<sup>50</sup> "If the [legislatures and] courts have been willing to provide relief in the case of automobile

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<sup>42</sup>E.g., *Cintrone v. Hertz Truck Leasing & Rental Service*, 45 N.J. 434, 212 A.2d 769 (1965); *Moscone Automobile Leasing Act of 1969*, CAL. CIV. CODE § § 2985.7-2985.93 (West 1969).

<sup>43</sup>See Note, *Commercial Decency and the Code—The Doctrine of Unconscionability Vindicated*, 9 WM. & MARY L. REV. 1143, 1161 (1968).

<sup>44</sup>See Ganz, *Limitation of Liability Under the Sales Provisions of the Uniform Commercial Code*, 14 DE PAUL L. REV. 73, 81 (1964).

<sup>45</sup>See Witherspoon, *Torts or Warranties?*, 73 COM. L. J. 134, 136 (1968); UCC § 1—203, and its accompanying Comment.

<sup>46</sup>See, e.g., Kripke, *Gesture and Reality in Consumer Credit Reform*, 44 N.Y.U.L. REV. 1 (1969).

<sup>47</sup>Garrity, *supra* note 12, at 697-698.

<sup>48</sup>*Id.* at 698.

<sup>49</sup>Garrity, *supra* note 12, at 721.

<sup>50</sup>See Schier, *supra* note 3, at 683.

purchases,<sup>[51]</sup> how much more willing should they be to provide similar relief for the . . . [urban] tenant when the basic necessity of shelter is at stake?"<sup>52</sup>

To provide the needed relief for the consumer of housing, the states should adopt a uniform act,<sup>53</sup> coupled with a uniform housing code,<sup>54</sup> which recognizes the tenant as a consumer. Until the uniform act is formulated and adopted, the courts should conceptualize the tenant as a consumer<sup>55</sup> and apply existing consumer protection laws to the landlord-tenant relationship. Of course, these laws were either not intended for the tenant or expressly exclude him from the scope of their provisions; if as a result of this situation the courts refuse to apply these laws to the landlord-tenant relationship, the legislatures should make minor amendments to the laws so that they may be more easily and willingly applied by the courts to tenant problems.<sup>56</sup>

#### IV. APPLYING EXISTING CONSUMER PROTECTION LAWS TO ALLEVIATE TENANT HARDSHIPS

What would be the result if existing consumer protection laws were applied to the landlord-tenant relationship? Examination of sections of the UCC and the Unruh Act<sup>57</sup> of California will illustrate how a more equitable landlord-tenant relationship could be created by applying existing laws to tenant problems.

If the tenant were viewed as a consumer, the California courts could conceptually apply the Unruh Act to the landlord-tenant relationship. Should the courts strictly construe the scope and definitions of the Unruh Act, the scope of the Act could be amended by the legislature to include rental housing, and the definitions of "goods"

<sup>51</sup>Footnote added. *See, e.g.*, CAL. CIV. CODE §§2981-2984.4 (West 1969); *Henningson v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

<sup>52</sup>Schoshinski, *supra* note 2, at 556.

<sup>53</sup>To be discussed *infra*.

<sup>54</sup>*See* REPORT OF THE NATIONAL COMMISSION ON CIVIL DISORDERS 263 (1968).

<sup>55</sup>"Courts have a duty to reappraise old doctrines in the light of the facts and values of contemporary life—particularly old common law doctrines which the courts themselves created and developed [footnote omitted]". *Javins v. First National Realty Corporation*, 428 F.2d 1071, 1074 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 925 (1970).

<sup>56</sup>*E.g.*, the Unruh Act, CAL. CIV. CODE §§ 1801-1812.10 (West 1969), should be amended so that its scope includes rental housing, and the definitions of "goods" and "services" within the Act should be amended respectively to include rooms in a building and services necessary for habitability.

<sup>57</sup>CAL. CIV. CODE §§ 1801-1812.10 (West 1969).

and “services”<sup>58</sup> within the Act could be amended respectively to include rooms in a building and services necessary for habitability.

By authority of UCC § 1—102 (1) and (2) and its accompanying Comment 1, the UCC could be applied by the courts to tenant problems if the lease agreement were viewed as a commercial transaction and the tenant were viewed as a consumer. Section 1—102 (1) and (2) provide:

- (1) This Act shall be liberally construed and applied to promote its underlying purposes and policies.
- (2) Underlying purposes and policies of this act are
  - (a) to simplify, clarify and modernize the law governing commercial transactions;
  - (b) to permit the continued expansion of commercial practice through custom, usage and agreement of the parties;
  - (c) to make uniform the law among the various jurisdictions.

Comment 1 states:

Subsections (1) and (2) are intended to make it clear that: This Act is drawn to provide flexibility so that, since it is intended to be a semi-permanent piece of legislation, it will provide its own machinery for expansion of commercial practices. It is intended to make it possible for the law embodied in this Act to be developed by the courts in the light of unforeseen and new circumstances and practices. However, the proper construction of the Act requires that its interpretation and application be limited to its reason.

Courts have been careful to keep broad acts from being hampered in their effects by later acts of limited scope. *Pacific Wool Growers v. Draper & Co.*, 158 Or. 1, 73 P.2d 1391 (1937), and compare § 1—104. They have recognized the policies embodied in an act as applicable in reason to subject-matter which was not expressly included in the language of the act, *Commercial Nat. Bank of New Orleans v. Canal-Louisiana Bank & Trust Co.*, 239 U.S. 520, 36 S.Ct. 194, 60 L.Ed. 417 (1916) (bona fide purchase policy of Uniform Warehouse Receipts Act extended to case not covered but of equivalent nature). They have done the same where reason and policy so required, even where the subject-matter had been intentionally excluded from the act in general. *Agar v. Orda*, 264 N.Y. 248, 190 N.E. 479 (1934) (Uniform Sales Act charge in seller’s remedies applied to contract for sale of choses in action even though the general coverage of that Act was intentionally limited to goods “other than things in action.”) They have implemented a statutory policy with liberal and useful remedies not provided in the statutory text. They have disregarded a statutory limi-

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<sup>58</sup>The definitions of “goods” and “services” within the Unruh Act are found respectively in sections 1802.1 and 1802.2. These sections are set out in Appendix A of this article.

tation of remedy where the reason of the limitation did not apply. *Fiterman v. J. N. Johnson & Co.*, 156 Minn. 201, 194 N.W. 399 (1923) (requirement of return of the goods as a condition to a rescission allowed). Nothing in this Act stands in the way of the continuance of such action by the courts.

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Until a uniform act is formulated to deal comprehensively with the landlord-tenant relationship, the legal reasoning and principles of Comment 1 of UCC § 1—102 should be followed by applying existing consumer protection laws to help alleviate tenant problems. If the consumer of housing has problems and liabilities similar to those of the consumer of goods, the consumer of housing should have the benefit of those laws which have been passed to protect the consumer of goods. His rights should be consonant with his liabilities. His problems are there to be solved, and existing laws which can be used within reason should be utilized to help solve them.

## V. THE PROBLEM OF UNCONSCIONABILITY

### A. ADHESION CONTRACTS

A major problem to be solved in achieving an equitable landlord-tenant relationship is the tenant's forced acceptance of contracts of adhesion.<sup>59</sup> Contracts of adhesion are defined as "agreements in which one party's participation consists in his mere 'adherence', unwillingly and often unknowing, to a document drafted unilaterally and insisted upon by what is usually a powerful enterprise."<sup>60</sup>

In signing the landlord formulated, usually standard form, finely printed contract, the urban tenant has had no opportunity to negotiate terms;<sup>61</sup> he has no alternative other than to accept the landlord formulated contract or reject it entirely.<sup>62</sup> If he rejects one adhesion lease contract he will only encounter a similar one from a second landlord. The result is that the tenant signs a document of which he has no understanding and which strictly favors the landlord.<sup>63</sup> The problem with adhesion lease contracts is not that they are standard form contracts. Standard form contracts have much utility and equity if they are drafted bilaterally by two interest groups with equal bar-

<sup>59</sup>For a general discussion of contracts of adhesion, see Ehrenzweig, *Adhesion Contracts in the Conflict of Laws*, 53 COLUM. L. REV. 1072 (1953).

<sup>60</sup>*Id.* at 1075.

<sup>61</sup>Schoshinski, *supra* note 2, at 552.

<sup>62</sup>Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PENN. L. REV. 485, 505 (1967).

<sup>63</sup>Schoshinski, *supra* note 2, at 552.

gaining power. The problem with adhesion lease contracts is that they are drafted unilaterally by the landlords. What is needed is a contract which would be fair to both landlord and tenant. If tenant unions cannot gain enough power to bargain equally with landlords, the state legislature should create a standard form contract which would be equitable for both landlord and tenant.

The adhesion lease contract which the tenant is forced to accept may contain all or any number of the following provisions:

1) a clause which prohibits annoying or destructive acts of which the landlord is the sole judge;<sup>64</sup>

2) a clause which exculpates the landlord of liability for damages that result from his nonfeasance, including his failure to repair;<sup>65</sup>

3) in a contract of sufficiently long duration, a clause which allows the landlord to accelerate the payment of rent if the tenant fails to make any installment payment;<sup>66</sup>

4) a clause which allows the landlord to terminate the tenancy at his option if the tenant defaults regardless of the reason for the default;<sup>67</sup>

5) a clause which obligates the tenant to pay attorney's fees and other expenses in case of the tenant's default;<sup>68</sup>

6) a clause which imposes the duty of repair on the tenant;<sup>69</sup>

7) a clause waiving the tenant's statutory right to a notice to vacate;<sup>70</sup>

8) a clause waiving a judicially supervised civil process of eviction;<sup>71</sup>

9) a clause waiving the tenant's right to report housing code violations to enforcement agencies;<sup>72</sup>

10) a clause waiving the landlord's duty to supply essential services such as heat, electricity, and water;<sup>73</sup>

11) a clause vesting the landlord with unrestricted apartment inspection privileges;<sup>74</sup>

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<sup>64</sup>*Id.* at 552-553.

<sup>65</sup>*Id.* at 553.

<sup>66</sup>*Id.*

<sup>67</sup>*Id.*

<sup>68</sup>*Id.*

<sup>69</sup>*Id.*

<sup>70</sup>Garrity, *supra* note 12, at 716.

<sup>71</sup>*Id.*

<sup>72</sup>*Id.*

<sup>73</sup>*Id.*

<sup>74</sup>*Id.*

12) a clause allowing summary eviction for late or nonpayment of rent even though the tenant is not responsible for the delinquency;<sup>75</sup>

13) a clause requiring a security deposit<sup>76</sup> to secure performance of the contract and to guarantee payment for damages, but without provisions that the deposit be placed in a bank, that the deposit is returnable to the tenant, that the tenant is entitled to interest on the deposit, or that the tenant is entitled to a list of damages, if any;<sup>77</sup>

14) a clause which establishes the tenancy on a short-term basis.<sup>78</sup>

## B. APPLICATION OF THE UCC

The consumer of goods has fought against adhesion contracts with the defenses of “procedural” and “substantive” unconscionability<sup>79</sup> under UCC § 2—302.

Section 2—302 provides:

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

A definition of unconscionability has been given by a federal court:<sup>80</sup>

Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. Whether a meaningful choice is present in a partic-

<sup>75</sup>*See id.* at 718.

<sup>76</sup>*See id.* at 718-719.

<sup>77</sup>*See* 1 CCH 1969 POVERTY LAW REP. ¶ 2130.

<sup>78</sup>*See* Schier, *supra* note 3, at 670.

<sup>79</sup>Leff, *supra* note 62, at 487.

<sup>80</sup>*Williams v. Walker-Thomas Furniture Company*, 350 F.2d 445, 449-450 (D.C. Cir. 1965) (footnotes omitted). The court was concerned with the unconscionability of installment contracts for the purchase of household goods, including a stereo set, by an uneducated mother. If the court was concerned over a transaction involving a stereo set (as it rightfully should have been), how much more should it be concerned with the unconscionability of a transaction involving the basic necessity of shelter?

ular case can only be determined by consideration of all the circumstances surrounding the transaction. In many cases the meaningfulness of the choice is negated by a gross inequality of bargaining power. The manner in which the contract was entered is also relevant to this consideration. Did each party to the contract, considering his obvious education or lack of it, have a reasonable opportunity to understand the terms of the contract, or were the important terms hidden in a maze of fine print and minimized by deceptive sales practices? Ordinarily, one who signs an agreement without full knowledge of its terms might be held to assume the risks that he has entered a one-sided bargain. But when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms. In such a case the usual rule that the terms of the agreement are not to be questioned should be abandoned and the court should consider whether the terms of the contract are so unfair that enforcement should be withheld.

In determining reasonableness or fairness, the primary concern must be with the terms of the contract considered in light of the circumstances existing when the contract was made. The test is not simple, nor can it be mechanically applied. The terms are to be considered "in the light of the general commercial background and the commercial needs of the particular trade or case." . . .

Although UCC § 2—302 is not necessarily a chattel consumer statute, the unconscionability defense under UCC § 2—302 has been made available to the consumer of goods. Since the tenant is a consumer in his own right, this statutory defense should also be available to him. An equitable doctrine of unconscionability also exists, but unconscionability under the UCC is broader and more useful.<sup>81</sup> Equitable unconscionability was designed to cover the individualized bargaining situation where the stronger party overreached, whereas the UCC unconscionability is designed to apply to the modern mass transaction which is characterized by a lack of bargaining. Moreover, under the equitable doctrine the entire contract is rejected, whereas under the UCC individual clauses may be limited or invalidated with the remainder of the contract enforced.

A landlord, whose adhesion lease contract is similar to those used throughout the urban rental market, might try to use UCC § 2—302 (2) as a defense against the charge of unconscionability. But UCC § 2—302 (2) only gives the court insight into the "commercial setting" of the contract; it would not aid the court in deciding whether

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<sup>81</sup>Note, *supra* note 43, at 1153-1154.

a harsh provision is justifiable as a matter of social or economic policy.<sup>82</sup> The fact that a certain clause is widely used does not necessarily mean that that clause is proper and required and thus not unconscionable.

The urban tenant in many cases would choose to avoid eviction and remain in his apartment under reasonable terms rather than invalidate his entire unconscionable lease contract thereby causing him to move. UCC § 2—302 can help him achieve this goal. The section gives the court power, as a matter of law, to refuse to enforce individual clause or clauses, to enforce the remainder of the contract without the invalidated clause or clauses, or to so limit the application of any unconscionable clause as to avoid any unconscionable result.<sup>83</sup> Indeed, the purpose of the section is to give the courts power to police contracts so that they may correct unfair or oppressive bargains as a matter of law, “thereby establishing the minimum standards of decent commercial conduct.”<sup>84</sup> If the courts would conceptualize the tenant as a consumer and the lease as a commercial transaction, they could apply UCC § 2—302 which would invalidate the above outlined unconscionable clauses but would enforce the remainder of the contract, thereby allowing the tenant to remain in the apartment. This defense, along with other consumer defenses and rights to be discussed *infra*, would enable the urban tenant to achieve his ultimate goal of remaining in a habitable apartment under reasonable terms with a certain degree of permanence.

UCC § 2—309 (3) could also help the urban tenant to invalidate clauses allowing unjust summary eviction. Section 2—309(3) provides:

Termination of a contract by one party except on the happening of an agreed event requires that reasonable notification be received by the other party and an agreement dispensing with notification is invalid if its operation would be unconscionable.

Comment 8 of § 2—309 (3) states:

Subsection (3) recognizes that the application of principles of good faith and sound commercial practice normally call for such notification of the termination of a going contract relationship as will give the other party reasonable time to seek a substitute arrangement. An agreement dispensing with notification or limiting the time for the seeking of a substitute arrangement is, of course, valid under this subsection unless the results of putting it into operation would be the creation of an unconscionable state of affairs.

<sup>82</sup>*Id.* at 1152.

<sup>83</sup>UCC § 2—302, Comment 2; Eisenberg, *Let the Seller Beware: A New Concept Under the U.C.C.*, 72 COM. L. J. 349 (1967).

<sup>84</sup>Squillante, *Unconscionability—Part II*, 73 COM. L. J. 141, 142 (1968).



UCC § 2—302 might also be used by the urban tenant, in addition to invalidating specific clauses in an adhesion contract, to have an excessive lease contract price declared unconscionable by raising the defense of gross inadequacy of consideration<sup>85</sup> or to raise the defense of deceptiveness of sales practice.<sup>86</sup>

The doctrine of unconscionability in the UCC is also given effect in § 2—719 (3) and § 2—718 (1). These sections might be used by the tenant to invalidate, respectively, lease clauses which unconscionably limit or exclude consequential damages or fix unreasonably large liquidated damages. UCC § 2—719 (3) provides:

Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

UCC § 2—718 (1) provides:

Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.

Finally, it should be noted, in reference to adhesion lease contracts and unconscionability under the UCC, that § 1—203 sets forth a basic principle running throughout the UCC, which is that in commercial transactions good faith is required in the performance and enforcement of all agreements or duties. UCC § 1—203 provides:

Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.

UCC § 2—103 (b) defines “good faith” in the case of a merchant (in this instance the landlord who is in the business of selling space and services) as “honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.”

### C. APPLICATION OF THE UNRUH ACT OF CALIFORNIA

Some jurisdictions which adopted the UCC have strengthened or replaced § 2—302 with additional chattel consumer protection acts. The Unruh Act<sup>87</sup> of California is such a law. The principles set forth

<sup>85</sup>American Home Improvement, Inc. v. MacIver, 105 N.H. 435, 201 A.2d 886 (1964); cf. Hume v. United States, 132 U.S. 406 (1889).

<sup>86</sup>Note, *supra* 43, at 1147.

<sup>87</sup>CAL. CIV. CODE §§ 1801-1812.10 (West 1969).

in the disclosure, policed contracts, and penalties for enforcement clauses would protect the consumer of space and services as they do the consumer of goods. An examination of the Unruh Act's relevant sections will show that the tenant as a consumer would benefit from the application of the Act to him because, in effect, it would help prevent the landlord from forcing an adhesion lease contract upon him.

### *1. SECTIONS 1803.1, 1803.2, 1803.4, and 1803.7*

Sections 1803.1<sup>88</sup> and 1803.2<sup>89</sup> deal with procedural unconscionability. Section 1803.1 requires that the contract be dated and in writing, and requires that it be printed in an least eight-point type. Section 1803.2 requires that the contract be contained in a single document, which shall contain the cost and terms of payment and a notice to the buyer not to sign the contract before he reads it or if it contains blank space, that he is entitled to a completely filled-in copy of the contract, and that he has a right to pay off in advance the full amount due and obtain a partial refund of the finance charge. These sections would help to prevent the forced acceptance by the consumer of space and services of a finely printed, standard form lease contract, which he has not understood nor read, and of which he has not received a filled-in copy. To further guard against procedural unconscionability § 1803.4<sup>90</sup> provides that the seller shall not obtain the signature of the buyer to a contract when it contains blank spaces to be filled in after it has been signed. Section 1803.7<sup>91</sup> provides that after the buyer has signed the contract the seller must deliver to the buyer a copy of the contract or any other document which the buyer has signed during the contract negotiation.

### *2. SECTION 1803.3*

Section 1803.3<sup>92</sup> guards against procedural and substantive unconscionability by providing that the contract shall contain certain clauses, including:

- 1) the names of the seller and buyer;
- 2) the place of business of the seller;
- 3) a description of the thing sold;
- 4) the cash price;

<sup>88</sup>CAL. CIV. CODE § 1803.1 is set out in Appendix A of this article.

<sup>89</sup>CAL. CIV. CODE § 1803.2 is set out in Appendix A of this article.

<sup>90</sup>CAL. CIV. CODE § 1803.4 is set out in Appendix A of this article.

<sup>91</sup>CAL. CIV. CODE § 1803.7 is set out in Appendix A of this article.

<sup>92</sup>CAL. CIV. CODE § 1803.3 is set out in Appendix A of this article.

- 5) the amount of the down payment (in the tenant's case it would be the first and last month's rent deposit);
- 6) the unpaid balance of the cash price;
- 7) the number of installments required, the amount of each installment, and the due date or period thereof;
- 8) the deferred payment price;
- 9) any "balloon payments."

### 3. *SECTION 1803.6*

Section 1803.6<sup>93</sup> allows a contract to provide for the payment by the buyer of a delinquency charge in each installment in default for a period of not less than ten days in an amount not in excess of five percent of such installment or five dollars, whichever is less, but a minimum charge of one dollar may be made. However, only one such delinquency charge may be collected on any such installment regardless of the period during which it remains in default. These disclosure provisions should be available for the protection of the consumer of space and services as they are for the protection of the consumer of goods.

### 4. *ARTICLE 4*

In striking out unconscionable clauses in adhesion lease contracts, Article 4 of the Unruh Act would be very useful to the consumer of space and services.

#### a. *Section 1804.1*

Section 1804.1<sup>94</sup> sets forth provisions which shall not be included in the contract. They are:

- 1) a clause by which the buyer agrees not to assert against the seller or assignee (other than as provided in § 1804.2)<sup>95</sup> a claim or defense arising out of the sale;
- 2) a clause which allows the holder of the contract to accelerate the maturity of the amount owing in the absence of the buyer's default;
- 3) a clause by which a power of attorney is given to confess judgment, or an assignment of wages is given;
- 4) a clause which allows the holder or his agent to enter upon the buyer's premises unlawfully or to commit any breach of the peace in repossession;
- 5) a clause by which the buyer waives any right of action against

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<sup>93</sup>CAL. CIV. CODE § 1803.6 is set out in Appendix A of this article.

<sup>94</sup>CAL. CIV. CODE § 1804.1 is set out in Appendix A of this article.

<sup>95</sup>CAL. CIV. CODE § 1804.2 is set out in Appendix A of this article.

the seller, holder, or agent for any illegal act committed in the collection of payments or in repossession;

6) a clause by which the buyer executes a power of attorney appointing the seller, holder, or agent as the buyer's agent in collection of payments or in repossession;

7) a clause by which the buyer relieves the seller from liability for any legal remedies which the buyer may have against the seller under the contract;

8) a clause by which the buyer agrees to the payment of any charge by reason of the exercise of his right to rescind or void the contract;

9) a clause by which the seller or holder is given the right to commence an action in an inconvenient county.

These clauses are unconscionable and are therefore prohibited from chattel consumer contracts. Similar clauses are found in urban tenant lease contracts. Since the urban tenant is really a consumer of space and services, it can reasonably be assumed that the clauses are unconscionable in lease contracts. Therefore, the Unruh Act should be applied to the landlord-tenant relationship so as to exclude these clauses from the lease contract. The Unruh Act protects consumers. The tenant is a consumer in his own right. The Act can and should protect the consumer of space and services from unconscionable clauses as it does the consumer of goods.

*b. Section 1804.4*

Section 1804.4<sup>96</sup> provides that any provision in a contract which is prohibited by the Act shall be void but shall not otherwise affect the validity of the contract. This provision would allow the consumer of space and services to remain in his apartment under the contract but would strike out or limit unconscionable clauses.

*5. ARTICLE 6*

Article 6 deals with unconscionability in reference to payments.

*a. Section 1806.1*

Section 1806.1<sup>97</sup> provides that unless the buyer has notice of actual or intended assignment of the contract, payment thereunder made by the buyer to the last known holder of the contract, shall to the extent of the payment, discharge the buyer's obligation.

*b. Section 1806.4*

Section 1806.4<sup>98</sup> requires that after all payments have been made that the buyer receive an acknowledgement of payment in full and

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<sup>96</sup>CAL. CIV. CODE § 1804.4 is set out in Appendix A of this article.

<sup>97</sup>CAL. CIV. CODE § 1806.1 is set out in Appendix A of this article.

<sup>98</sup>CAL. CIV. CODE § 1806.4 is set out in Appendix A of this article.

that all security in the goods under the contract be released (in the case of the consumer of space and services, the security that would be released would be the security deposit the landlord received at the beginning of the tenancy).

#### 6. SECTION 1811.1

Application of § 1811.1<sup>99</sup> to the consumer of space and services would not allow the landlord to force the tenant to contract to pay the landlord's attorney's fees and costs whether or not the landlord is the prevailing party. Section 1811.1 awards reasonable attorney's fees and costs in any action on the contract to the prevailing party; moreover, where the defendant alleges in his answer that he tendered to the plaintiff the full amount to which he was entitled, and thereupon deposits in court, for the plaintiff, the amount so tendered, and the allegation is found to be true, then the defendant is deemed to be a prevailing party.

#### 7. SECTIONS 1812.2 and 1812.5

According to § 1812.2,<sup>100</sup> the seller, upon default of the buyer, may either proceed to recover judgment for the balance due without retaking the goods, or he may retake the goods and give notice to the buyer of his intention to sell the goods at public sale or he may give notice to the buyer of his intention to retain the goods in satisfaction of the balance due. In either case the buyer has the absolute right to redeem the goods within ten days after the notice by tendering the amount owing. If the holder gives notice of election to sell the goods, the buyer shall also have the absolute right to redeem the goods at any time before the sale. Section 1812.5<sup>101</sup> further provides that if the proceeds of the sale are not sufficient to cover the expenses of the resale, the expenses of retaking and repairing the goods for sale, and the satisfaction of the balance due, the holder may not recover the deficiency from the buyer or from anyone who has succeeded to the obligations of the buyer.

The application of these sections to the consumer of space and services would help him to avoid summary eviction for late or non-payment of rent; it would allow him to remain in the apartment by tendering the rental payment within ten days after the notice is given. If the consumer of space and services remained in default, the landlord would have to make a choice either to proceed to recover judg-

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<sup>99</sup>CAL. CIV. CODE §1811.1 is set out in Appendix A of this article.

<sup>100</sup>CAL. CIV. CODE § 1812.2 is set out in Appendix A of this article.

<sup>101</sup>CAL. CIV. CODE § 1812.5 is set out in Appendix A of this article.

ment for the balance due without evicting the consumer of space and services (without retaking the goods) or to evict the consumer of space and services with the intention to retain the apartment in satisfaction of the balance due or with the intention to rent the apartment in mitigation of the default (sell the goods). If the re-renting was not sufficient to fully mitigate the damages, the landlord would not be able to recover the deficiency from the consumer of space and services.

#### 8. *SECTIONS 1812.6 THROUGH 1812.9*

Sections 1812.6 through 1812.9<sup>102</sup> set forth penalties for violations of the Unruh Act. A criminal sanction, coupled with civil remedies, would give the consumer of space and services an additional weapon in his fight to alleviate the hardships which he currently endures.

#### 9. *SECTION 1801.1*

Finally, it should be noted that § 1801.1<sup>103</sup> of the Unruh Act provides that any waiver by the buyer of the provisions of the Act shall be deemed contrary to public policy and shall be unenforceable and void. This section is important in combatting unconscionability; it would prevent the landlord from forcing the consumer of space and services to contract away the protection afforded by the Act.

## **VI. THE PROBLEM OF UNINHABITABLE HOUSING— APPLICATION OF THE UCC WARRANTY PROVISIONS**

We have seen that if the tenant were viewed as a consumer of space and services, existing consumer protection laws could be applied to alleviate the tenant hardship of forced acceptance of adhesion lease contracts and the unconscionable results and conditions they impose upon him. A second tenant problem is that the tenant, partly because of the housing shortage, is forced to accept uninhabitable housing and is forced to remain and pay rent on premises which become uninhabitable due to landlord neglect.<sup>104</sup> Conceptualized as a consumer, the tenant should be able to invoke the warranty and damages/

<sup>102</sup>CAL. CIV. CODE § § 1812.6 through 1812.9 are set out in Appendix A. of this article.

<sup>103</sup>CAL. CIV. CODE § 1801.1 is set out in Appendix A of this article.

<sup>104</sup>Schoshinski, *supra* note 2, at 520-521.

remedies provisions of the UCC,<sup>105</sup> thereby helping to alleviate the problem.

The language of UCC § 1—102 (1) and (2) and its accompanying Comment 1 which would allow the application of the UCC unconscionability provisions to the landlord-tenant relationship<sup>106</sup> would also allow the application of the UCC warranty and damages/remedies provisions to the relationship. A strong argument has been made for the extension of the UCC warranty provisions to lease transactions for goods.<sup>107</sup> The argument can easily be extended to transactions for space and services. Basically, that argument is that no section of the UCC expressly prohibits the extension of warranties to lease transactions for goods,<sup>108</sup> and the elements which justify the imposition of warranties in transactions for the sale of goods are also present in lease transactions for goods.<sup>109</sup> Likewise, no section of the UCC expressly prohibits the extension of warranties to transactions for space and services, and the elements which justify the imposition of warranties in transactions for the sale of goods are also present in transactions for space and services.

In most transactions for space and services as in most transactions for the sale of goods, the seller is in a better position to know and control the quality of the subject of the transaction and to distribute the loss and bear the risk of harm if the subject of the transaction is defective.<sup>110</sup> In both cases the consumer relies upon the superiority of the other party to furnish what he needs.<sup>111</sup> In both cases the consumer cannot bargain at arm's length and the result is a contract that unilaterally favors the other party.<sup>112</sup> In both cases the party who has superior knowledge, control, ability to absorb the loss, and who supplies the subject of the transaction should assume affirmative

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<sup>105</sup>UCC §§ 2—313 through 2—318, 2—714 through 2—721, 2—601, 2—608, and 2—612 are set out in Appendix B of this article.

<sup>106</sup>See text discussion pp. 69-70 *supra*.

<sup>107</sup>Commentary, *The Extension of Warranty Protection to Lease Transactions*, 10 B. C. IND. & COM. L. REV. 127 (1968) [hereinafter cited as Commentary].

<sup>108</sup>*Id.* at 127 n.4.

<sup>109</sup>*Id.* at 134.

<sup>110</sup>*Javins v. First National Realty Corporation*, 428 F.2d 1071, 1079 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 925 (1970). See Commentary, *supra* note 107, at 134 n.57; Schier, *supra* note 3, at 675; *Cintrone v. Hertz Truck Leasing & Rental Service*, 45 N.J. 434, 212 A.2d 769 (1965).

<sup>111</sup>See Commentary, *supra* note 107, at 137; Schier, *supra* note 3, at 675; *Javins v. First National Realty Corporation*, 428 F.2d 1071, 1079 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 925 (1970).

<sup>112</sup>See Commentary, *supra* note 107, at 137; Schier, *supra* note 3, at 673; *Javins v. First National Realty Corporation*, 428 F.2d 1070, 1079 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 925 (1970).

duties<sup>113</sup> and bear the risk of harm from defects rather than should the injured consumer.<sup>114</sup>

That the UCC warranty provisions can only help to alleviate the problem must be emphasized. For “[t]he problem is —can landlords be compelled to deliver possession of premises at the commencement of a tenancy in a safe, sanitary condition, in repair, and free from rodents and vermin? For the [often] exorbitant rental payment he must pay, is the tenant entitled to shelter that at least meets the minimum standards of habitability?”<sup>115</sup> Under the UCC warranty provisions the landlord could not be compelled to warrant the premises because UCC § 2—316<sup>116</sup> allows the exclusion or modification of warranties.

However, it should be noted that UCC § 2—316 does not unqualifiedly support *caveat emptor* and that good faith is still a requirement in the imposition of a disclaimer.<sup>117</sup> Indeed, one of the purposes of § 2—316 is to protect the buyer from the seller’s concealed attempt to shrink his legal obligations.<sup>118</sup> Furthermore, where the waiver or disclaimer of warranty was included in the contract as a result of a gross inequality in bargaining power, the waiver or disclaimer might be able to be struck out of the contract as an unconscionable clause by the application of UCC § 2—302.<sup>119</sup>

Some jurisdictions have established, to protect the tenant, an implied warranty of habitability based on local housing codes;<sup>120</sup> in those jurisdictions it may be unnecessary to apply the UCC warranty provisions to protect the urban tenant. However, other jurisdictions have rejected the implied warranty of habitability and have followed “[t]he general rule . . . that there are no implied covenants or warranties that, at the time the lease commences, the premises will be in a tenantable condition or are suitable for the purposes for which they were leased.”<sup>121</sup> These jurisdictions apparently still accept the fictions that the landlord and the urban tenant bargain at arm’s length and that the urban tenant, rather than relying on the superior knowledge

<sup>113</sup>See Schier, *supra* note 3, at 675; *Javins v. First National Realty Corporation*, 428 F.2d 1071, 1079 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 925 (1970).

<sup>114</sup>See Commentary, *supra* note 107, at 135; *Javins v. First National Realty Corporation*, 428 F.2d 1071, 1079 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 925 (1970).

<sup>115</sup>Schoshinski, *supra* note 2, at 521.

<sup>116</sup>UCC § 2—316 is set out in Appendix B of this article.

<sup>117</sup>See Witherspoon, *supra* note 45, at 136.

<sup>118</sup>Commentary, *supra* note 107, at 129.

<sup>119</sup>Witherspoon, *supra* note 45, at 139; Schier, *supra* note 3, at 678.

<sup>120</sup>*E.g.*, *Javins v. First National Realty Corporation*, 428 F.2d 1071 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 925 (1970); *Lemle v. Breeden*, 51 Haw. 426, 462 P.2d 470 (1969); *Pines v. Perssion*, 14 Wis. 2d 590, 111 N.W.2d 409 (1961).



and control of the landlord, has the opportunity to inspect the premises prior to renting them. Their governments scrutinize "food processing facilities for vermin before the product is passed on for consumption but the consumer of housing is allowed to rent housing premises where it would require an experienced inspector to locate rodents in the walls."<sup>122</sup> These jurisdictions apparently have not yet realized that "[t]he doctrine of *caveat emptor* as applied to leases epitomises . . . an anachronism."<sup>123</sup> In these jurisdictions that are not protecting the tenant through a separate and distinct implied warranty of habitability, the application of the UCC warranty provisions to the landlord-tenant relationship would at least begin to alleviate the problem of uninhabitable housing by shifting the emphasis from *caveat emptor* to *caveat venditor*.<sup>124</sup> As Judge Skelly Wright has noted:<sup>125</sup>

[T]he average tenant [should not] be thought capable of "inspecting" plaster, floorboards, roofing, kitchen appliances, etc. To the extent, however, that some defects *are* obvious, the law must take note of the present housing shortage. Tenants may also have no real alternative but to accept such housing with the expectation that the landlord will make necessary repairs. Where this is so, *caveat emptor* must of necessity be rejected.

## VII. A UNIFORM TENANT-AS-A-CONSUMER ACT

The preceding sections of this article have attempted to develop the concept of the tenant as a consumer and to show how existing laws might be applied to the landlord-tenant relationship so that the tenant as a consumer might benefit from the current social and legal consumer protection trend. Admittedly, not enough has been done for the consumer of goods, and some of the weaponry provided the consumer of goods under state retail installment acts, the UCC, and elsewhere<sup>126</sup> has proved somewhat ineffective. But nevertheless a strong, beneficial, protective, and equitable trend has begun. Much must be done now to include the consumer of space and services within that

<sup>121</sup>Comment, *Implied Warranties—Sale of a Completed House*, 1 CALIF. W. L. REV. 110, 113 (1965).

<sup>122</sup>Garrity, *supra* note 12, at 714.

<sup>123</sup>Skillern, *supra* note 28, at 387.

<sup>124</sup>See Witherspoon, *supra* note 45, at 136.

<sup>125</sup>Javins v. First National Realty Corporation, 428 F.2d 1071, 1079 n.42 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 925 (1970).

<sup>126</sup>*E.g.*, Truth in Lending Act, 15 U.S.C. §§ 1601-1665 (1970); UNIFORM CONSUMER CREDIT CODE.

trend. A start can be made by applying existing consumer protection laws. Of course, portions of these laws may be irrelevant to landlord-tenant problems (but as has been shown, others do have a good deal of relevance) since the consumer of space and services has his peculiar problems; it is for this reason that “[t]he ultimate . . . solution is a complete revamping of landlord-tenant law . . . [through] a Model Code or Uniform Act.”<sup>127</sup> “What is needed is a broad legislative revision and recodification of the terms and conditions of occupancy affecting low-income tenants with strict provision for non-waiverability.”<sup>128</sup> True, the implementation of such a uniform act would abandon the “laissez-faire approach”<sup>129</sup> and substitute “governmental regulation and intervention in urban housing problems,”<sup>130</sup> but freedom of contract should be restricted where public policy calls for the elimination of adhesion contract abuse and uninhabitable housing.<sup>131</sup> Moreover, the act would be designed to create an equitable relationship rather than unduly favor one party over the other.

To present a complete draft of a uniform tenant-as-a-consumer act is beyond the scope of this paper, but a few broad and necessary inclusions can be outlined.

First, the act should set forth a modern concept of the landlord-tenant relationship based upon what the parties really believe they are doing — upon their belief that they are entering into a contract transaction for the exchange of money for space and services rather than for a conveyance of an interest in land.<sup>132</sup>

An unconscionability and disclosure section should be included. Such a section could set forth a general unconscionability provision<sup>133</sup> along with a list of prohibited clauses and practices<sup>134</sup> and a list

<sup>127</sup>Garrity, *supra* note 12, at 709 (footnote omitted).

<sup>128</sup>*Id.* at 717 (footnote omitted). California has seen fit to adopt separate acts for different kinds of consumers who have their own kinds of problems—Unruh Act, CAL. CIV. CODE §§ 1801-1812.10 (West 1969); Contracts for Dance Studio Lessons and Other Services, CAL. CIV. CODE §§ 1812.50-1812.68 (West 1969); Contracts for Health Studio Services CAL. CIV. CODE §§ 1812.80-1812.95 (West 1969); Rees-Levering Motor Vehicle Sales and Finance Act, CAL. CIV. CODE §§ 2981-2984.4 (West 1969); Moscone Automobile Leasing Act of 1969, CAL. CIV. CODE §§ 2985.7-2985.93 (West 1969). The tenant is also a consumer with his own special needs and problems—a separate act should also be enacted for him.

<sup>129</sup>Garrity, *supra* note 12, at 718.

<sup>130</sup>*Id.*

<sup>131</sup>Schoshinski, *supra* note 2, at 526.

<sup>132</sup>*Id.* at 535-536.

<sup>133</sup>*E.g.*, UCC § 2—302.

<sup>134</sup>*E.g.*, CAL. CIV. CODE § 1804.1 (West 1969); UNIFORM CONSUMER CREDIT CODE § 6.111. A list of clauses which are often found in urban lease contracts is on pp. 71-72 *supra*.

mandatory clauses and practices.<sup>135</sup> For those terms and conditions which are left open to negotiation, obligations of good faith, reasonableness, and equity should be imposed.<sup>136</sup>

The act should provide for an implied warranty of habitability based upon a housing code;<sup>137</sup> a housing code could be an integral part of the act. The warranty section should provide for protection when a tenant reports a housing code violation.<sup>138</sup>

Along with the warranty, remedies should be provided for its breach. Since the tenant would usually like to remain in possession and feel a sense of permanency,<sup>139</sup> a damages remedy should be set forth with rescission and cancellation of the lease available when the space and services are totally unfit.<sup>140</sup> The measure of damages could be the difference in the value between the space and services in their nonconforming condition and the value had they been as warranted.<sup>141</sup> Alternatively, the cost of repairing the dwelling to meet the requirements of the housing code could be assessed as damages.<sup>142</sup> A reduction of rent due because of breach of warranty could be interposed by way of a counterclaim in an action by the landlord for rent or by way of a recoupment in an action by the landlord for possession based on nonpayment of rent.<sup>143</sup>

To further assure habitability, the act could require that the landlord "obtain a certificate of occupancy or . . . be granted a license to . . . [sell space and services], which would state in effect that the . . . [dwelling] comply with the . . . housing code. Such a certificate or license would be required prior to . . . [the selling of the space and services] and at periodic intervals thereafter."<sup>144</sup>

The act should regulate security deposit practices.<sup>145</sup> For example, it could require that the money be paid into an escrow fund maintained by a municipal housing agency<sup>146</sup> or be placed in a bank with interest paid to the tenant.<sup>147</sup> The act could also require that the land-

<sup>135</sup>E.g., CAL. CIV. CODE § 1803.3 (West 1969).

<sup>136</sup>E.g., UCC § 1—203. See Witherspoon, *supra* note 45, at 136.

<sup>137</sup>See Schoshinski, *supra* note 2, at 523.

<sup>138</sup>See *id.* at 543. See, e.g., S.H.A. ILL. ch. 80, § 71 (1966).

<sup>139</sup>See Schier, *supra* note 3, at 671.

<sup>140</sup>Skillern, *supra* note 28, at 396.

<sup>141</sup>Schoshinski, *supra* note 2, at 527. See UCC § 2—714.

<sup>142</sup>Schoshinski, *supra* note 2, at 527. See UCC § 2—715(2).

<sup>143</sup>Schoshinski, *supra* note 2, at 528.

<sup>144</sup>Garrity, *supra* note 12, at 712. See N.Y. MULTIPLE RESIDENCE LAW § 302 (McKinney 1970).

<sup>145</sup>See, e.g., N.J.S.A. 46:8-19 (West 1969); CAL. CIV. CODE § 1951 (1970).

<sup>146</sup>Garrity, *supra* note 12, at 719.

<sup>147</sup>See 1 CCH 1969 POVERTY LAW REP. ¶ 2130.

lord provide the tenant with a written list of any damages to the dwelling for which the landlord claims the tenant is liable.<sup>148</sup>

The tenant's need of a term of sufficiently long duration to assure a degree of permanency should be met by the act.<sup>149</sup> The "entrepreneur"<sup>150</sup> landlord "should have no objection to allowing the continuation of occupancy by orderly and non-destructive tenants who pay their rent. A landlord should certainly have the right to control the use of his premises by evicting undesirable tenants. If [the act creates] a tenant vested-interest in continuing occupancy . . . , the landlord should not be allowed to resort to subterfuge by dispossessing tenants through arbitrary and excessive rent increase."<sup>151</sup>

The act should provide criminal penalties for violations of its provisions<sup>152</sup> and administrative agencies to enforce its provisions and to regulate the private housing market.<sup>153</sup> The act should also prevent the "practice of conditioning appellate review in eviction cases on posting appeal bonds . . .";<sup>154</sup> and in place of that practice the act should substitute the practice of "speedy appellate hearing with continued occupancy conditioned on paying rent into court in turn to be forwarded to the landlord."<sup>155</sup>

Along with providing for administrative agencies to enforce its provisions, the act should also provide for agencies to help in planning education programs, to disseminate information, to provide legal assistance, and to cooperate with and assist private agencies helping the urban tenant.<sup>156</sup>

The above broad outline of suggested inclusions in a uniform tenant-as-a-consumer act is not meant to be comprehensive as to what should be in the act; they are put forth as remedies to what appear to be the major problems of the urban tenant. They are designed, as the whole act should be, to create an equitable relationship between the landlord and the tenant.

## VIII. CONCLUSION

The problems of the urban tenant are there to be solved. The old

<sup>148</sup>See, e.g., 68 P.S. § 250.512 (1970).

<sup>149</sup>See Schier, *supra* note 3, at 671.

<sup>150</sup>Garrity, *supra* note 12, at 711.

<sup>151</sup>*Id.*

<sup>152</sup>E.g., Truth in Lending Act, 15 U.S.C. § 1611 (1970); CAL. CIV. CODE § 1812.6 (West 1969).

<sup>153</sup>See Schier, *supra* note 3, at 683.

<sup>154</sup>Garrity, *supra* note 12, at 720.

<sup>155</sup>*Id.*

<sup>156</sup>1 CCH 1969 POVERTY LAW REP. ¶ 3950.

concept of the landlord-tenant relationship has become archaic and anachronistic; it has exacerbated the problems rather than afforded solutions; it has inequitably favored the "entrepreneur landlord"<sup>157</sup> over the low-income tenant. That concept should be replaced with a modern, realistic concept — the concept of the tenant as a consumer. The tenant is a consumer of housing, *i.e.*, space and services, and he is under disabilities similar to those of the consumer of goods. In addition, he must contend with a short supply of housing. A social and legal trend has begun to protect the consumer of goods. The tenant is a consumer in his own right and should justifiably receive the benefits which that trend has to offer.

*Claude W. Vanderwold*

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<sup>157</sup>Garrity, *supra* note 12, at 711.

**IX. THE TENANT AS A CONSUMER**  
**APPENDIX A — SECTIONS OF THE UNRUH ACT**  
**OF CALIFORNIA (1971)**

**CAL. CIV. CODE § 1801.1:**

Any waiver by the buyer of the provisions of this chapter shall be deemed contrary to public policy and shall be unenforceable and void.

**CAL. CIV. CODE § 1802.1:**

“Goods” means tangible chattels bought for use primarily for personal, family or household purposes, including certificates or coupons exchangeable for such goods, and including goods which, at the time of the sale or subsequently are to be so affixed to real property as to become a part of such real property whether or not severable therefrom, but does not include any vehicle required to be registered under the Vehicle Code, nor any goods sold with such a vehicle if sold under a contract governed by Section 2982 of the Civil Code.

**CAL. CIV. CODE § 1802.2:**

“Services” means work, labor and services, for other than a commercial or business use, including services furnished in connection with the sale or repair of goods as defined in Section 1802.1 or furnished in connection with the repair of motor vehicles or in connection with the improvement of real property or the providing of insurance, but does not include the services of physicians or dentists, nor services for which the tariffs, rates, charges, costs or expenses, including in each instance the deferred payment price, are required by law to be filed with and approved by the federal government or any official, department, division, commission or agency of the United States.

**CAL. CIV. CODE § 1803.1:**

A retail installment contract shall be dated and in writing; the printed portion thereof shall be in at least eight-point type.

**CAL. CIV. CODE § 1803.2:**

Except as provided in Section 1808.3, every retail installment contract shall be contained in a single document which shall contain:

(a) The entire agreement of the parties with respect to the cost and terms of payment for the goods and services, including any promissory notes or any other evidences of indebtedness between the parties relating to the transaction.

(b) Either at the top of the contract or directly above the space reserved for the signature of the buyer, the words “Security Agreement” or “Lien Contract,” as the case may be, shall appear in at least 10-point bold type where a security interest in the goods is

retained or a lien on other goods or realty is obtained by the seller as security for the goods or services purchased. Either at the top of the contract or directly above the space reserved for the signature of the buyer, the words "Retail Installment Contract" shall appear in at least 10-point bold type where a security interest or lien is not obtained by the seller as security for the goods or services purchased. As used in this subdivision, the terms "security interest" and "lien" refer to a contractual interest in property and not to a mechanic's lien or other interest in property arising by operation of law.

(c) A notice in at least eight-point bold type reading as follows: "Notice to the buyer: (1) Do not sign this agreement before you read it or if it contains any blank space. (2) You are entitled to a completely filled-in copy of this agreement. (3) Under the law, you have the right to pay off in advance the full amount due and to obtain a partial refund of the finance charge, if any, provided for herein."

**CAL. CIV. CODE §1803.3:**

Except as provided in Article 8 (commencing with Section 1808.1) of this chapter, a contract shall contain the following:

(a) The names of the seller and the buyer, the place of business of the seller, the residence or place of business of the buyer as specified by the buyer and a description of the goods or services sufficient to identify them. Services or multiple items of goods may be described in general terms and may be described in detail sufficient to identify them in a separate writing.

(b) The cash price of the goods, services and accessories which are the subject matter of the retail installment sale.

(c) The amount of the buyer's downpayment, itemizing the amounts paid in money and in goods and containing a brief description of the goods, if any, traded in.

(d) The difference between item (b) and item (c), which is the unpaid balance of cash price.

(e) The amount, if any, included for insurance, specifying the coverages.

(f) The amount, if any, of official fees.

(g) The amount financed, which is the sum of items (d), (e), and (f).

(h) The amount of the finance charge, if any.

(i) The total of payments, which is the sum of items (g) and (h), payable by the buyer to the seller, the number of installments required, the amount of each installment expressed in dollars and the due date or period thereof.

(j) The deferred payment price, which is the sum of the amounts determined in (b), (e), (f) and (h).

(k) Any "balloon payments," as described in Section 1807.3.

(1) An identification of the method of computing the unearned portion of the finance charge in the event of prepayment of the buyer's obligation and a statement of the amount or method of computation of any charge that may be deducted from the amount of any rebate of such unearned finance charge that will be credited to the obligation or refunded to the buyer. Reference to the Rule of 78's, the sum of digits or the actuarial method shall constitute a sufficient identification of the method of computing the unearned portion of the finance charge.

The items need not be stated in the sequence or order set forth above; additional items may be included to explain the computations made in determining the amount to be paid by the buyer.

**CAL. CIV. CODE §1803.4:**

The seller shall not obtain the signature of the buyer to a contract when it contains blank spaces to be filled in after it has been signed.

**CAL. CIV. CODE §1803.6:**

A contract may provide for the payment by the buyer of a delinquency charge on each installment in default for a period of not less than 10 days in an amount not in excess of 5 percent of such installment or five dollars (\$5), whichever is less, but a minimum charge of one dollar (\$1) may be made. Only one such delinquency charge may be collected on any such installment regardless of the period during which it remains in default. The contract may also provide for payment of any actual and reasonable costs of collection occasioned by removal of the goods from the State without written permission of the holder, or by the failure of the buyer to notify the holder of any change of residence, or by the failure of the buyer to communicate with the holder for a period of 45 days after any default in making payments due under the contract.

**CAL. CIV. CODE §1803.7:**

The seller shall deliver to the buyer at the time of the buyer's signature a legible copy of the contract or of any other document which the seller has required or requested the buyer to sign, and which he has signed, during the contract negotiation. In addition to the penalties provided under Article 12.2 (commencing with Section 1812.6) of this chapter, until the seller delivers such documents, the buyer shall be obligated to pay only the cash price. Any acknowledgment by the buyer of delivery of a copy of such documents shall be printed or written in a size equal to at least 10-point bold type and, if contained in the contract shall also appear directly above the space reserved for the buyer's signature. The buyer's written acknowledgement, conforming to the requirements of this section of delivery of a copy of such documents shall be a rebuttable presumption of such delivery and of compliance with this section and Section 1803.4, in any action or proceeding by or



against an assignee of the contract without knowledge to the contrary when he purchases the contract. If the holder furnishes the buyer a copy of such documents, or a notice containing the items required by Section 1803.3 and stating that the buyer should notify the holder in writing within 30 days if he was not furnished a copy of the contract or of any other document which the seller had required or requested the buyer to sign, and which he did sign, during the contract negotiation, and no such notification is given, it shall be conclusively presumed in favor of the third party that copies of such documents were furnished as required by Sections 1803.4 and 1803.7.

**CAL. CIV. CODE §1804.1:**

No contract or obligation shall contain any provision by which:

(a) The buyer agrees not to assert against a seller a claim or defense arising out of the sale or agrees not to assert against an assignee such a claim or defense other than as provided in Section 1804.2.

(b) In the absence of the buyer's default in the performance of any of his obligations, the holder may accelerate the maturity of any part or all of the amount owing thereunder.

(c) A power of attorney is given to confess judgment in this state, or an assignment of wages is given; provided, that nothing herein contained shall prohibit the giving of an assignment of wages contained in a separate instrument, executed pursuant to Section 300 of the Labor Code.

(d) The seller or holder of the contract or other person acting on his behalf is given authority to enter upon the buyer's premises unlawfully or to commit any breach of the peace in the repossession of goods.

(e) The buyer waives any right of action against the seller or holder of the contract or other person acting on his behalf, for any illegal act committed in the collection of payments under the contract or in the repossession of goods.

(f) The buyer executes a power of attorney appointing the seller or holder of the contract, or other person acting on his behalf, as the buyer's agent in collection of payments under the contract or in the repossession of goods.

(g) The buyer relieves the seller from liability for any legal remedies which the buyer may have against the seller under the contract or any separate instrument executed in connection therewith.

(h) The buyer agrees to the payment of any charge by reason of the exercise of his right to rescind or void the contract.

(i) The seller or holder of the contract is given the right to commence an action on a contract under the provisions of this chapter in a county other than the county in which the contract was in fact signed by the buyer, the county in which the buyer resides at the

commencement of the action, the county in which the buyer resided at the time that the contract was entered into, or in the county in which the goods purchased pursuant to such contract have been so affixed to real property as to become a part of such real property.

**CAL. CIV. CODE §1804.2:**

Except as provided in Section 1812.7, an assignee of the seller's rights is subject to all claims and defenses of the buyer against the seller arising out of the sale notwithstanding an agreement to the contrary, but the assignee's liability may not exceed the amount of the debt owing to the assignee at the time that the defense is asserted against the assignee.

The rights of the buyer under this section can only be asserted as a matter of defense to a claim by the assignee.

**CAL. CIV. CODE §1804.4:**

Any provision in a contract which is prohibited by this chapter shall be void but shall not otherwise affect the validity of the contract.

**CAL. CIV. CODE §1806.1:**

Unless the buyer has notice of actual or intended assignment of a contract or installment account, payment thereunder made by the buyer to the last known holder of such contract or installment account, shall to the extent of the payment, discharge the buyer's obligation.

**CAL. CIV. CODE §1806.4:**

After the payment of all sums for which the buyer is obligated under a contract and upon demand made by the buyer, the holder shall deliver, or mail to the buyer at his last known address, such one or more good and sufficient instruments as may be necessary to acknowledge payment in full and to release all security in the goods under such contract.

**CAL. CIV. CODE §1811.1:**

Reasonable attorney's fees and costs shall be awarded to the prevailing party in any action on a contract or installment account subject to the provisions of this chapter regardless of whether such action is instituted by the seller, holder or buyer. Where the defendant alleges in his answer that he tendered to the plaintiff the full amount to which he was entitled, and thereupon deposits in court, for the plaintiff, the amount so tendered, and the allegation is found to be true, then the defendant is deemed to be a prevailing party within the meaning of this article.

**CAL. CIV. CODE §1812.2:**

In the event of any default by the buyer in the performance of his obligations under a contract or installment account, the holder,

pursuant to any rights granted therein, may proceed to recover judgment for the balance due without retaking the goods, or he may retake the goods and proceed as hereinafter provided. If he retakes the goods, he shall, within 10 days, give notice to the buyer of his intention to sell the goods at public sale or give notice to the buyer of his intention to retain the goods in satisfaction of the balance due. The notice must state the amount of the overdue payments, that the buyer must pay, if he pays within 10 days of the notice, in order to redeem the goods. In either case the buyer shall have an absolute right to redeem the goods within 10 days after the notice is given by paying or tendering the amount owing under the contract. If the holder gives notice of election to sell the goods the buyer shall also have the absolute right to redeem the goods at any time before sale by paying or tendering the amounts specified above and also any expense reasonably incurred by the seller or holder in good faith in repairing, reconditioning the goods or preparing them for sale. If the holder gives notice of his intention to retain the goods in satisfaction of the indebtedness he shall be deemed to have done so at the end of the 10-day period if the goods are not redeemed; at the time the notice is given, the holder shall furnish the buyer a written statement of the sum due under the contract and the expenses provided for in this section. For failure to render such a statement the holder shall forfeit to the buyer ten dollars (\$10) and also be liable to him for all damages suffered because of such failure.

**CAL. CIV. CODE §1812.5:**

If the proceeds of the sale are not sufficient to cover items (1), (2) and (3) of Section 1812.4, the holder may not recover the deficiency from the buyer or from anyone who has succeeded to the obligations of the buyer.

**CAL. CIV. CODE §1812.6:**

Any person who shall willfully violate any provision of this chapter shall be guilty of a misdemeanor.

**CAL. CIV. CODE §1812.7:**

In case of failure by any person to comply with the provisions of this chapter, such person or any person who acquires a contract or installment account with knowledge of such noncompliance is barred from recovery of any finance charge or of any delinquency, collection, extension, deferral or refinance charge imposed in connection with such contract or installment account and the buyer shall have the right to recover from such person an amount equal to any of such charges paid by the buyer.

**CAL. CIV. CODE §1812.8:**

Notwithstanding the provisions of this article, any failure to comply with any provision of this chapter may be corrected by the

holder in accordance with the provisions of this section, provided that a willful violation may not be corrected, and a correction which will increase the amount owed by the buyer or the amount of any payment shall not be effective unless the buyer concurs in writing to the correction. If a violation is corrected by the holder in accordance with the provisions of this section, neither the seller nor the holder shall be subject to any penalty under this article.

The correction shall be made by delivery to the buyer of a corrected copy of the contract within 30 days of the execution of the original contract by the buyer. Any amount improperly collected from the buyer shall be credited against the indebtedness evidenced by the contract.

**CAL. CIV. CODE §1812.9:**

In any case in which a person willfully violates any provision of this chapter in connection with the imposition, computation or disclosures of or relating to a finance charge on a consolidated total of two or more contracts under the provisions of Article 8 (commencing with Section 1808.1) of this chapter, the buyer may recover from such person an amount equal to three times the total of the finance charges and any delinquency, collection, extension, deferral or refinance charges imposed, contracted for or received on all contracts included in the consolidated total and the seller shall be barred from the recovery of any such charges.

**X. THE TENANT AS A CONSUMER APPENDIX B —  
SECTIONS OF THE UNIFORM COMMERCIAL CODE  
(1962 OFFICIAL TEXT)**

**UCC Section 2—313. Express Warranties by Affirmation,  
Promise, Description, Sample.**

(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as “warrant” or “guarantee” or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller’s opinion or commendation of the goods does not create a warranty.

**UCC Section 2—314. Implied Warranty: Merchantability; Usage of Trade.**

(1) Unless excluded or modified (Section 2—316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as

(a) pass without objection in the trade under the contract description; and

(b) in the case of fungible goods, are of fair average quality within the description; and

(c) are fit for the ordinary purposes for which such goods are used; and

(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) are adequately contained, packaged, and labeled as the agreement may require; and

(f) conform to the promises or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified (Section 2—316) other implied warranties may arise from course of dealing or usage of trade.

**UCC Section 2—315. Implied Warranty: Fitness for Particular Purpose.**

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller’s skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

**UCC Section 2—316. Exclusion or Modification of Warranties.**

(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 2—202) negation or limitation is inoperative to the extent that such construction is unreasonable.

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

(3) Notwithstanding subsection (2)

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and

(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and

(c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

(4) Remedies for breach of warranty can be limited in accordance with the provisions of this Article on liquidation or limitation of damages and on contractual modification of remedy (Sections 2—718 and 2—719).

### UCC Section 2—317. Cumulation and Conflict of Warranties Express or Implied.

Warranties whether express or implied shall be construed as consistent with each other and as cumulative, but if such construction is unreasonable the intention of the parties shall determine which warranty is dominant. In ascertaining that intention the following rules apply:

(a) Exact or technical specifications displace an inconsistent sample or model or general language of description.

(b) A sample from an existing bulk displaces inconsistent general language of description.

(c) Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose.

### UCC Section 2—318. Third Party Beneficiaries of Warranties Express or Implied.

A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is

injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

**UCC Section 2—601. Buyer's Right on Improper Delivery.**

Subject to the provisions of this Article on breach in installment contracts (Section 2—612) and unless otherwise agreed under the sections on contractual limitations of remedy (Sections 2—718 and 2—719), if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may

- (a) reject the whole; or
- (b) accept the whole; or
- (c) accept any commercial unit or units and reject the rest.

**UCC Section 2—608. Revocation of Acceptance in Whole or in Part.**

(1) The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it

- (a) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or
- (b) without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

(2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.

(3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them.

**UCC Section 2—612. "Installment Contract"; Breach.**

(1) An "installment contract" is one which requires or authorizes the delivery of goods in separate lots to be separately accepted, even though the contract contains a clause "each delivery is a separate contract" or its equivalent.

(2) The buyer may reject any installment which is non-conforming if the non-conformity substantially impairs the value of that installment and cannot be cured or if the non-conformity is a defect in the required documents; but if the non-conformity does not fall within subsection (3) and the seller gives adequate assurance of its cure the buyer must accept that installment.

(3) Whenever non-conformity or default with respect to one or more installments substantially impairs the value of the whole contract there is a breach of the whole. But the aggrieved party reinstates the contract if he accepts a non-conforming installment without seasonably notifying of cancellation or if he brings

an action with respect only to past installments or demands performance as to future installments.

#### UCC Section 2—714. Buyer's Damages for Breach in Regard to Accepted Goods.

(1) Where the buyer has accepted goods and given notification (subsection (3) of Section 2—607) he may recover as damages for any non-conformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.

(2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

(3) In a proper case any incidental and consequential damages under the next section may also be recovered.

#### UCC Section 2—715. Buyer's Incidental and Consequential Damages.

(1) Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.

(2) Consequential damages resulting from the seller's breach include

(a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and

(b) injury to person or property proximately resulting from any breach of warranty.

#### UCC Section 2—716. Buyer's Right to Specific Performance or Replevin.

(1) Specific performance may be decreed where the goods are unique or in other proper circumstances.

(2) The decree for specific performance may include such terms and conditions as to payment of the price, damages, or other relief as the court may deem just.

(3) The buyer has a right of replevin for goods identified to the contract if after reasonable effort he is unable to effect cover for such goods or the circumstances reasonably indicate that such effort will be unavailing or if the goods have been shipped under reservation and satisfaction of the security interest in them has been made or tendered.



**UCC Section 2—718. Liquidation or Limitation of Damages; Deposits.**

(1) Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.

(2) Where the seller justifiably withholds delivery of goods because of the buyer's breach, the buyer is entitled to restitution of any amount by which the sum of his payments exceeds

(a) the amount to which the seller is entitled by virtue of terms liquidating the seller's damages in accordance with subsection (1), or

(b) in the absence of such terms, twenty per cent of the value of the total performance for which the buyer is obligated under the contract or \$500, whichever is smaller.

(3) The buyer's right to restitution under subsection (2) is subject to offset to the extent that the seller establishes

(a) a right to recover damages under the provisions of this Article other than subsection (1), and

(b) the amount of value of any benefits received by the buyer directly or indirectly by reason of the contract.

(4) Where a seller has received payment in goods their reasonable value or the proceeds of their resale shall be treated as payments for the purposes of subsection (2); but if the seller has notice of the buyer's breach before reselling goods received in part performance, his resale is subject to the conditions laid down in this Article on resale by an aggrieved seller (Section 2—706).

**UCC Section 2—719. Contractual Modification of Limitation of Remedy.**

(1) Subject to the provisions of subsections (2) and (3) of this section and of the preceding section on liquidation and limitation of damages,

(a) the agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts; and

(b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be inclusive, in which case it is the sole remedy.

(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.

(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

**UCC Section 2—720. Effect of “Cancellation” or “Rescission” on Claims for Antecedent Breach.**

Unless the contrary intention clearly appears, expressions of “cancellation” or “rescission” of the contract or the like shall not be construed as a renunciation or discharge of any claim in damages for an antecedent breach.

**UCC Section 2—721. Remedies for Fraud.**

Remedies for material misrepresentation or fraud include all remedies available under this Article for non-fraudulent breach. Neither rescission or a claim for rescission of the contract for sale nor rejection or return of the goods shall bar or be deemed inconsistent with a claim for damages or other remedy.