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Refunding Residential Tenant Security Deposits: A Legislative Proposal for West Virginia

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REFUNDING RESIDENTIAL TENANT SECURITY DEPOSITS: A LEGISLATIVE PROPOSAL FOR WEST VIRGINIA

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I. INTRODUCTION

Landlord-tenant law has been the focus of much current legal reform. The legal relationship between landlords and tenants has been described as “an outmoded, unworkable and mischievous anachronism that is dangerously maladjusted to the social, economic and political

needs of an urban democracy . . . "2 Created to serve an agrarian society, traditional landlord-tenant law worked to the advantage of the landlord and the disadvantage of the tenant.3 However, modern reformers have recognized the lack of bargaining power possessed by the tenant and have worked to adjust the law accordingly. For example, the old law that leases contain no implied warranty of habitability has been rejected under modern conditions.4

The area of residential security deposits creates an easy target for landlord abuse. The landlord has the sole power to determine the amount of the deposit to be withheld for damages allegedly caused by the tenant.5 Although the tenant may disagree with the landlord’s estimate, a unique economic barrier exists which may prevent the tenant from seeking remedial action: The cost of bringing a legal action frequently exceeds the amount of a tenant’s potential recovery.6

Thirty-seven states have enacted laws regulating the return of residential security deposits.7 Although these acts vary, they all entitle the tenant to punitive damages when a landlord has wrongfully with-

3. Kalish, supra note 1, at 570.
5. ROSE, supra note 2, at 80.
6. Id. at 81.
held the whole or a portion of the security deposit. These damages may include double or treble the amount wrongfully withheld and many of these acts provide for attorneys' fees and court costs. Despite the vast recognition of the special need for reform in the area of residential security deposits, West Virginia provides no punitive damages for tenants whose security deposit has been wrongfully withheld. Thus, tenants are faced with the economic barrier discussed above: The cost of bringing a lawsuit exceeds the potential recovery. There is no significant deterrent to prevent a landlord from withholding a security deposit even when such an action is unwarranted.

This Note will first discuss the history of landlord-tenant law followed by a discussion of previous attempts of the West Virginia Legislature to reform landlord-tenant law in the area of residential security deposits. This Note will then discuss current legislation involving the return of residential security deposits in other jurisdictions. This section will analyze how the courts in several key states have interpreted and applied their statutes. Finally, this note will set forth a legislative proposal for West Virginia followed by a discussion of its essential underlying assumptions.

II. HISTORY OF LANDLORD-TENANT LAW

In the last several decades, residential landlord-tenant law has changed dramatically. Many of the changes in landlord-tenant law go to the core of the landlord-tenant relationship. Traditionally, the landlord had the right to determine the amount of rent, to choose tenants, and was under no obligation to keep the premises in a habitable condition. However, both courts and legislatures have modified the law in these and other areas to assist tenants in vindicating their rights.

Below is a brief discussion of several areas of landlord-tenant law that reflect this reformation. A survey of these areas and how they have developed in favor of the tenant, is illustrative of the need for

9. Id. at 521.
10. Id. at 521. See, e.g., Teller v. McCoy, 253 S.E.2d 114 (W. Va. 1978).
similar reformation under West Virginia law governing residential security deposits.

A. Implied Warranty of Habitability

The implied warranty of habitability is one doctrine that has arisen to help tenants vindicate their rights. The traditional rule in landlord-tenant law was that the tenant’s contractual duty to pay rent was not dependent on the landlord maintaining the premises in good repair.\textsuperscript{11} However, in 1970, in the case of \textit{Javins v. First National Realty Corp.}, this traditional rule was modified. In \textit{Javins}, the landlord attempted to evict tenants for nonpayment of rent.\textsuperscript{12} After finding over 1,500 housing code violations, the United States Court of Appeals for the District of Columbia ruled in favor of the tenant.\textsuperscript{13} The court held that the landlord has a duty to keep the premises in good repair, thus, creating the doctrine of implied warranty of habitability.\textsuperscript{14} In so holding, \textit{Javins} paved the way for many other courts to find the existence of such a duty.\textsuperscript{15}

Today, in many jurisdictions a tenant’s duty to pay rent is dependent on a landlord’s substantial performance of his obligations.\textsuperscript{16} A majority of states have adopted this rule into their landlord-tenant law.\textsuperscript{17} On March 11, 1978, the West Virginia Legislature amended its landlord-tenant law to include the implied warranty of habitability.\textsuperscript{18}

\begin{itemize}
    \item[11.] \textit{The Revolution}, supra note 8, at 524.
    \item[13.] \textit{Id}.
    \item[14.] \textit{The Revolution}, supra note 8, at 525.
    \item[15.] \textit{Id}.
    \item[16.] \textit{Id}. at 526.
    \item[17.] \textit{Id}. at 522.
    \item[18.] W. VA. CODE § 37-6-30 (1985); see also Teller v. McCoy, 253 S.E.2d 114 (W. Va. 1978).
\end{itemize}
B. Rent Control

In addition to the implied warranty of habitability, the 1970s brought another change in the landlord-tenant relationship—rent control. The objective of rent control is to protect tenants from excessive rent increases and to assure landlords a fair return on their investments. Rent control statutes attempt to satisfy these interests by regulating rent increases and eviction procedures, while also providing exemptions for certain types of rental units.

Traditionally, landlord-tenant law required a housing emergency before a rent control ordinance would be validated. For example, rent controls were instituted in urban areas from the time of World War II until the end of the Korean War. However, modern times and the recognition of a tenant’s vulnerability, brought about an abandonment of the housing emergency requirement. Today, rent control ordinances will be upheld if there is a rational basis for the legislative determination that a housing shortage exists.

C. Tort Liability

Tort law has also evolved over the last several decades in favor of tenants’ rights. Under the common law, the landlord was not liable for injuries caused by defects in the leased premises. This notion was a product of an agrarian society where the land was the primary object

20. Id. at 517 (rental units subject to exemption may include dwellings with four units or less, luxury housing, motels, rooming houses, etc.).
22. SCHOSHINSKI, supra note 19, at 502.
and value of the lease. As society changed, the courts recognized the need for exceptions to this general rule. Since the early 1970s, most courts have rejected the tort immunity of landlords and have imposed a duty of reasonable care.

Currently, landlords are generally held liable for failing to disclose hidden defects, for injuries caused by defects in a portion of the premises over which the landlord retained control, for negligently repairing the leased premises, and for failing to perform in accordance with an express agreement to repair. Additionally, landlords have been held responsible for the criminal acts of others such as rapes, burglaries, and assaults which could have been prevented with reasonable care.

D. Right to Reject New Tenants

In the past, a landlord had the sole discretion to select or reject new tenants. Before 1968, only a few states barred discrimination in the area of residential landlord-tenant law. However, in 1968, Congress passed the Fair Housing Act (FHA or the Act). This Act, prohibited the landlord from discriminating in renting on the grounds of "race, color, religion, sex, family status or national origin." Thus, under modern law, a landlord’s power to arbitrarily select or reject tenants is significantly hampered.

26. SCHOSHINSKI, supra note 19, at 187.
27. The Revolution, supra note 8, at 529. See Marsh v. Riley, 188 S.E. 748 (W. Va. 1936) (stating West Virginia law as requiring a landlord to maintain areas over which he has control in a reasonably safe condition).
28. SCHOSHINSKI, supra note 19, at 188.
30. SCHOSHINSKI, supra note 19, at 717; see, e.g., Dorsey v. Stuyvesant Town Corp., 87 N.E.2d 541 (N.Y. 1949).
31. The Revolution, supra note 8, at 531.
33. Id. § 3604(a).
This anti-discrimination requirement has carried over into the area of assignment and subleasing.35 Traditionally, a lease prohibiting assignment or sublease without the landlord’s consent carried with it the notion that the landlord could withhold such consent arbitrarily.36 However, in the 1970s, courts began to rule that a landlord could withhold consent only if he acts reasonably.37 Furthermore, the Restatement of Property takes the position that the landlord must act reasonably.38 Therefore, the possibility of discrimination in granting consent to sublease or assign a rental unit has also been diminished.

E. Right to Evict

Modern landlord-tenant law also favors the tenant by restricting the landlord’s ability to evict tenants at will. Historically, a landlord could evict a tenant for any reason or for no reason at the end of the lease period.39 However, in the case of Edwards v. Habib,40 the District Court held that a landlord could not refuse to renew a lease in retaliation for a tenant’s complaint to a housing authority regarding code violations. Following this decision, many states adopted and expanded this retaliatory eviction doctrine.41

The common law right of the landlord to evict for any or no reason has also been limited by several other factors.42 The Fair Housing Act prohibits a landlord from evicting a tenant based on the tenant’s race, religion, national origin, or sex.43 Also, some states have enacted “Just Cause” eviction statutes which permit a landlord to evict a tenant only for the reasons listed in the statute.44 Finally, rent
control statutes also limit the circumstances under which a landlord may evict a tenant.\textsuperscript{45}

\textbf{F. Remedies Following Tenant's Breach}

In the past, the landlord had a variety of self-help remedies available when a tenant breached the lease agreement.\textsuperscript{46} Such remedies included tenant lockouts, utility cut-offs, and seizing the tenant's property located on the premises.\textsuperscript{47} Most jurisdictions today will hold a landlord liable for damages if he takes such action.\textsuperscript{48} The Restatement of Property takes the position that the availability of a summary proceeding bars the use of self-help remedies.\textsuperscript{49}

The majority position at common law imposed no duty on the landlord to mitigate damages upon the tenant's wrongful abandonment of the premises.\textsuperscript{50} Although the Restatement of Property follows this "no mitigation" rule, few modern cases have been decided consistent with this position.\textsuperscript{51} Today, a landlord will normally lose his right to damages if there has not been a reasonable attempt to mitigate.\textsuperscript{52}

\textbf{G. Security Deposits}

The law of residential security deposits has experienced a similar shift in favor of tenant rights. At common law, the landlord had the sole discretion to determine the proper amount of a residential security deposit.

\begin{itemize}
  \item of just causes for eviction include creating substantial damage to the premises, causing extreme nuisance, interfering with the safety, comfort and enjoyment of other tenants, etc.).
  \item \textsuperscript{45} \textit{Id.}
  \item \textsuperscript{46} \textit{The Revolution, supra note 8, at 538.}
  \item \textsuperscript{47} \textit{Id.}
  \item \textsuperscript{48} SCHOSHINSKI, \textit{supra} note 19, at 408; see also Goodwin v. Thomas, 403 S.E.2d 13 (W. Va. 1991) (awarding a tenant $25,000 in punitive damages for landlord's action in tearing down the leased premises before obtaining a judgment on the validity of a lease).
  \item \textsuperscript{49} \textit{RESTATEMENT (SECOND) PROPERTY} § 14.2 (1977).
  \item \textsuperscript{50} SCHOSHINSKI, \textit{supra} note 19, at 676.
  \item \textsuperscript{51} \textit{RESTATEMENT (SECOND) OF PROPERTY} § 12.1(3) (1977).
  \item \textsuperscript{52} \textit{The Revolution, supra note 8, at 539.}
\end{itemize}
deposit;\textsuperscript{53} there was no ceiling on the amount of the deposit.\textsuperscript{54} Furthermore, the majority rule did not require the landlord to pay interest on the deposit.\textsuperscript{55} Nor did it forbid him from commingling the deposit with his own funds.\textsuperscript{56} Presently, most jurisdictions limit the size of the deposit, dictate how the landlord is to use the deposit money, and provide damages and attorneys' fees for a tenant if the landlord wrongfully withholds a deposit.\textsuperscript{57}

\textbf{H. Summary}

The shift in favor of tenants' rights has permeated all aspects of landlord-tenant law. Recently, courts have begun to recognize the vulnerable position that the tenant holds in relation to the landlord. The need to equalize this disparity is even greater in the area of residential security deposits. The proper return of a residential security deposit will be the focus of the remainder of this Note. First, the past attempts of the West Virginia legislature to incorporate such provisions into the existing landlord-tenant law will be discussed. Second, this Note will then look to other jurisdictions and analyze how statutes governing this area have been interpreted. Finally, a proposed statute for West Virginia will be presented followed by a commentary explaining the specific provisions.

\section*{III. WEST VIRGINIA LEGISLATIVE HISTORY}

On February 14, 1976, House Bill 1500 was introduced into the West Virginia House of Delegates.\textsuperscript{58} The Legislation's goal was to reform the existing landlord-tenant law in West Virginia.\textsuperscript{59} The bill was proposed to amend Chapter thirty-seven of the West Virginia

\begin{itemize}
\item\textsuperscript{53} \textit{Id.}
\item\textsuperscript{54} \textit{Id.}
\item\textsuperscript{55} \textit{Id.}
\item\textsuperscript{56} \textit{Id.}
\item\textsuperscript{57} \textit{See supra part IV.}
\item\textsuperscript{58} H.B. 1500 (1976).
\item\textsuperscript{59} \textit{Id.}
\end{itemize}
Code by adding an additional section designated as "article six-a." Section 37-6A-17 of this bill consisted of provisions governing residential security deposits.

The specific provisions relating to the return of security deposits consisted of the following requirements: (1) the landlord must return the deposit within fourteen days after termination of the tenancy; (2) if the landlord withholds any amount, he must itemize such deductions in a written statement delivered to the tenant within fourteen days after termination of the tenancy; (3) if the landlord failed to comply with these provisions, the tenant would be entitled to damages in an amount equal to twice the amount wrongfully withheld and attorneys' fees. Unfortunately, House Bill 1500 was not passed and the existing law continued to govern the relations between landlords and tenants.

On February 9, 1978, a second proposed bill was introduced into the House of Delegates to reform the existing landlord-tenant law. This bill also provided certain procedures, similar to those in the 1976 proposed bill, that a landlord must follow when returning residential security deposits. In addition, the bill proposed damages and attorneys' fees against a landlord who wrongfully withheld a security deposit. However, the provisions governing security deposits did not pass. Therefore, to date, there remains no regulation of the return of residential security deposits in West Virginia.

IV. CURRENT LEGISLATION

Contrary to West Virginia, most states have passed legislation governing the return of residential security deposits. These states have responded to the growing concern regarding a tenant's ability to bargain with the landlord on an equal level. The purposes and policy

60. Id.
61. Id. at § 37-6A-17.
62. Id.
65. See supra note 7 and accompanying text.
interests behind such legislation was best stated in *Shands v. Castrovinci*. In *Shands*, the Ohio court set forth three reasons in favor of legislation providing statutory damages for the wrongful withholding of security deposits:

1. The recovery of double damages and attorneys' fees provides tenants with an incentive to bring legal actions to enforce their rights.
2. Actions brought by tenants serve not only to enforce their individual rights but also act to enforce the aggregate rights of the public.
3. Tenants' suits deter impermissible conduct and thus strengthen the bargaining power of tenants in dealing with landlords.

Most states that have adopted legislation concerning the return of security deposits have followed these policy issues and applied their statutes liberally to protect the tenant. The following subsections present a summary and analysis of the relevant case law in several key states regarding security deposit legislation. This case law provides an illustration of how security deposit legislation has been interpreted and applied. An inquiry into this law provides insight into the effectiveness of security deposit legislation and renders guidance when drafting a similar statute for West Virginia.

A. *Ohio*

Ohio's statute governing the return of residential security deposits requires landlords to follow specified procedures after terminating a rental agreement. Further, the statute provides the tenant with protective measures in case the landlord fails to adhere to these provisions. First, a landlord must itemize and identify, in written form, any deductions from the security deposit. Second, the landlord must deliver this itemized list, together with the amount due, to the tenant within thirty days after termination of the rental agreement. Third, if

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66. 340 N.W.2d 506, 509 (Wis. 1983).
67. Id.
69. Id.
70. Id. at § 5321.16(B).
71. Id.
the landlord fails to comply with these requirements, the tenant is entitled to the money due to him, together with damages in an amount equal to the amount wrongfully withheld, and reasonable attorneys fees. The only burden placed on the tenant is the obligation to provide the landlord with a forwarding address to which the written notice and amount due from the landlord may be sent.

The Ohio courts have interpreted and applied the act rather liberally to protect the tenant. The courts have recognized two key interests satisfied by providing tenants recovery of damages for wrongfully withheld security deposits: (1) to compensate the tenant for loss of the use of the money; and (2) to create an incentive for landlords to comply with the law. The courts have held that such cases should be decided with the goal of permitting a recovery of the wrongfully withheld money at no cost to the tenant.

In Smith v. Padgett, the tenants sued their landlord for failing to return an adequate amount of the security deposit. Although the landlord provided an itemized list of the deductions and justifications for each, the court found such deductions incorrect. The Court of Appeals of Ohio allowed the tenants to recover damages under the statute without proving that the landlord’s deductions were made in bad faith.

Thus, to recover damages under the statute, it is only necessary that the landlord wrongfully withhold all or a portion of the security deposit. The Ohio courts do not require that such withholding be a willful or unreasonable act by the landlord. Therefore, even in the case of an innocent mistake by the landlord, the tenant may still invoke the statute to recover damages and attorneys’ fees.

72. Id. at § 5321.16(C).
73. Id. at § 5321.16(B).
76. 513 N.E.2d 737 (Ohio 1991).
77. Id. at 741.
78. Id. at 742.
80. Id.
81. Id.
In addition to the liberal interpretation applied regarding the intentions of the landlord, the Ohio courts have also construed the statute liberally when evaluating the obligation of the tenant to provide a written forwarding address. In *Smitson v. Zeches*, the tenant failed to provide the landlord with a forwarding address after termination of the lease. Despite the tenant’s failure to comply with this statutory obligation, the Ohio court held that the tenant may still invoke the statute to recover damages. In this case, there was evidence that the landlord had actual knowledge of the tenant’s current business address. The court stated that “[w]e view the statute as one permitting substantial compliance as a predicate to its feature permitting double damages.” Thus, the court ruled that actual delivery of a forwarding address is not required when the landlord has actual knowledge of an acceptable alternative address.

Finally, this same liberal construction has been applied regarding recovery of attorneys’ fees. In *Lacare v. Dearing*, the tenant sued the landlord for recovery of his security deposit and the landlord counterclaimed for damages caused to the premises. The court ruled for the tenant and awarded him substantial attorneys’ fees including those incurred while defending the counterclaim. The landlord argued that the amount of attorneys’ fees awarded should be limited to only those fees involving recovery of the security deposit and not the defense of the counterclaim. However, the court held that success on the action for recovery of the deposit was dependant on rebuttal of the

84. Id.
85. Id. at *7.
86. Id. at *6.
87. Id. at *6; see also Cristal v. DRC International, Inc., 599 N.E.2d 706, 708 (Ohio 1991) (holding that the landlord's duty to return the security deposit applies when the landlord has actual knowledge of the tenant's new residence, even if the tenant failed to supply the address in writing).
89. Id. at 1098.
90. Id.
91. Id.
counterclaim, and thus, the two actions could not be separated.\textsuperscript{92} Therefore, the court held that the statute must be read to allow recovery of all attorneys’ fees related to the tenant’s action, including any fees incurred as a result of defending a counterclaim.\textsuperscript{93}

In summary, the Ohio Act has detailed the proper procedure for a landlord to follow in returning residential security deposits, and has also provided a remedy for tenants who fall victim to those landlords who do not comply with the statute.\textsuperscript{94} The Ohio courts have applied all aspects of the statute liberally including the provisions regarding damages for wrongful detention, the awarding of attorneys’ fees, and the duty on the tenant to provide a forwarding address. The Ohio courts have recognized the necessity of providing damages and fees to tenants in this position, and have construed the act to accomplish this objective.

\textbf{B. New Jersey}

New Jersey’s statute was one of the first modern security deposit acts to be passed.\textsuperscript{95} Originally enacted in 1968, the statute has generated much case law and is a helpful reference when analyzing this area of law.\textsuperscript{96} The statute requires a landlord to return the security deposit within 30 days of the termination of the tenant’s lease and to itemize any deductions from such amount.\textsuperscript{97} If the landlord fails to comply with these requirements, the tenant is entitled to double the amount of the money due, together with full costs of the action and attorneys’ fees.\textsuperscript{98}

In applying the statute, the New Jersey courts have construed the act liberally to offer optimal protection to the tenant. For instance, in \textit{Henry v. Levy},\textsuperscript{99} the tenant brought an action against her landlord

\begin{small}
\textsuperscript{92} \textit{Id.} at 1099.
\textsuperscript{93} \textit{Id.} at 1100.
\textsuperscript{94} \textit{Ohio Rev. Code Ann.} \textsection{5321.16} (Anderson 1992).
\textsuperscript{95} \textit{The Revolution, supra} note 8, at 539.
\textsuperscript{96} \textit{Id.}
\textsuperscript{98} \textit{Id.}
\textsuperscript{99} 603 A.2d 1000 (N.J. 1991).
\end{small}
claiming that the amount of her security deposit refund was delinquent. The original deposit was a significantly greater amount than the amount the tenant claimed to be wrongfully withheld. The court found that the landlord had wrongfully withheld a small portion of the deposit. However, the Superior Court of New Jersey held that the words "said moneys" as referred to in the statute regarding the appropriate penalty, should be read to provide the tenant with double the amount of the initial deposit rather than double the amount wrongfully withheld.100

In addition, the courts have held that a tenant who breaches his lease is nevertheless entitled to the benefit of the security deposit statute.101 In Watson v. Jaffe, a tenant who was evicted for failing to pay his rent, brought an action against his landlord under the New Jersey security deposit statute.102 The New Jersey court ruled that a tenant who has been evicted for nonpayment of rent is, nonetheless, entitled to utilize the provisions of the security deposit statute.103

As further evidence of the New Jersey courts' willingness to extend the security deposit act to protect the tenant, the New Jersey court held that the penalty of double damages applies to tenants who have a lease even if they never moved into the premises.104 In Sanchez v. Vaccarelli, the tenant never moved into the leased premises because he discovered a problem with the heating system.105 The court recognized that to adequately protect the tenant, the issue must be "not whether a tenant took physical or actual possession of the apartment, but rather that a landlord should not be exonerated for wrongfully withholding a security deposit . . . ."106

102. Id.
103. Id. See also Smith v. Stark, 378 A.2d 1169 (N.J. 1977) (holding that a tenant who was evicted for nonpayment of rent is entitled to the benefits of the security deposit statute).
104. Sanchez v. Vaccarelli, 619 A.2d 1050, 1052 (N.J. 1992). The court in Sanchez noted that this is applicable where the reason for not moving in was no fault of the tenant's. Id.
105. Id. at 1052.
106. Id.
Finally, in *Veliz v. Meehan*, the tenant brought an action against his landlord under the New Jersey security deposit statute. The New Jersey court held that the burden was not on the tenant to prove that the landlord wrongfully withheld the security deposit. Rather, the landlord must prove that he suffered damages warranting such retention. The court reasoned that the landlord is in a superior position to provide such proof and to require otherwise would place an unreasonable burden on the tenant to prove that the landlord was not damaged.

The liberal application of the New Jersey statute governing the return of security deposits is consistent with many other states. Courts have recognized the legislative intent to provide strong protective measures for tenants who are in positions of unequal bargaining power. The New Jersey court in *Sanchez* stated that “[i]f there is not a fixed, sure and meaningful penalty confronting the landlord in the event he withholds the tenant’s security, then he has no incentive to return the security deposit.”

C. Colorado

The Colorado security deposit statute was also one of the earliest acts to be passed. Originally enacted in 1971, the Colorado courts have generated a great deal of case law on the return of security deposits. The Colorado statute requires a landlord to return the security deposit within thirty days after termination of a lease, or in accordance with the time set out in the lease not to exceed sixty days. The landlord is required to submit to the tenant, in written form, the exact reasons for the retention of any amount of the security depos-

108. *Id.* at 47.
109. *Id.*
110. *Id.*
111. 619 A.2d at 1052.
113. *Id.*
it. Unlike the Ohio act, Colorado requires that the wrongful withholding of the deposit be willful. However, the Colorado courts have interpreted this provision liberally to protect the tenant. If the landlord fails to comply with these provisions of the act, the tenant is entitled to treble the amount wrongfully withheld, together with attorneys’ fees and court costs. In order to recover, the tenant must notify the landlord seven days prior to filing suit.

Consistent with the jurisdictions previously discussed, the Colorado courts have construed its security deposit statute liberally to protect the tenant. For instance, the Colorado courts have held that an award of attorneys’ fees against a landlord who has wrongfully withheld a security deposit is mandatory. In Ball v. Weller, the District Court granted judgment for the tenants against their landlord for wrongfully withholding their security deposit. However, the court denied recovery of reasonable attorneys’ fees. The Colorado Court of Appeals reversed and ruled that awarding attorneys’ fees is mandatory under the statute. The court stated that this is necessary to prevent the amount of damages from being substantially reduced by fees, and to encourage the private bar to enforce the statute.

In addition, the Colorado courts have found the statute applicable where the lease agreement was entered into prior to the effective date of the statute, as long as the wrongful retention occurred subsequent to enactment. The court noted that the statute is designed to protect against the wrongful retention of security deposits. Thus, if this action occurs after the effective date of the statute, there is a violation regardless of when the lease was created.

115. Id.
116. Id. at § 103(3). See Kirkland v. Allen, 678 P.2d 568, 571 (Colo. 1984).
117. COLO. REV. STAT. ANN. § 38-12-103(3) (1993).
118. Id. at § 103(3)(a).
120. Id. at 371.
121. Id.
122. Id. at 372.
123. Id.
125. Id. at 1075.
126. Id.
In *Kirkland v. Allen*, a tenant suing his landlord under the Colorado security deposit statute, gave the landlord seven days notice of his intent to file suit. 127 The Colorado court held that the requirement that the landlord "willfully" withhold the security deposit is satisfied merely by failing to return it within the seven day period after being notified of the potential suit. 128 Thus, there is no burden on the tenant to prove the landlord's bad faith in withholding the deposit. 129 If the tenant complies with the statute and issues a seven day notice, and the landlord fails to return the deposit, the landlord is deemed to be willfully withholding the money under the terms of the statute. 130

Finally, landlords have been unable to use their bargaining power to convince tenants to waive their rights to recovery under the statute. 131 In *Anderson v. Rosebrook*, the landlord attempted to create a waiver of the tenant's rights under the statute by an endorsement on the back of the tenant's refund check. 132 The court held that section seven of the act made any such waiver void. 133 The court recognized that tenants are not in a position to return partial refunds because they often need the money for other demands. 134 To allow otherwise would defeat the purpose of the act which is to "assist tenants in vindicating their legal rights and to equalize the disparity in power which exists between landlord and tenant . . ." 135

In summary, Ohio, New Jersey and Colorado have all detailed the proper procedure for a landlord to follow in returning residential security deposits. Further, these courts have provided adequate remedies for tenants who are victims of landlords who do not comply with their procedures. The courts in these states have applied the acts liberally to protect the tenant in many aspects including determining damages,

127. 678 P.2d at 571.
128. Id.
129. Id.
130. Id.
131. COLO. REV. STAT. ANN. § 38-12-103(7) (1993); see also Anderson v. Rosebrook, 737 P.2d 417 (Colo. 1987).
132. 737 P.2d at 421.
133. Id.
134. Id. at 421.
awarding attorneys’ fees and the tenants’ compliance with their obligations under the various acts. Because the return of security deposits is so vulnerable to potential abuse by the landlord, the courts have applied the security deposit statutes in a manner intended to neutralize the disparity in bargaining power that exists in the landlord-tenant relationship.

V. THE PROPOSED LEGISLATION

The previous analysis of the current legislation surrounding residential security deposits is illustrative of how such provisions are interpreted and applied. As is evident from the discussions of these jurisdictions, provisions governing the wrongful withholding of security deposits are essential to maintaining balance in the landlord-tenant relationship. Based on the review of these key states, below is a similar statute drafted as a proposal for West Virginia.

A. The Provisions

The proposed legislation governing return of residential security deposits reads as follows:

Section __________. Return of Security Deposit
(1) A landlord shall, within thirty days after termination of the rental agreement or surrender and acceptance of the premises, return to the tenant the full security deposit deposited with the landlord by the tenant, subject to subsection (2) of this section.
(2) No deduction from the security deposit shall be retained to cover normal wear and tear. Upon termination of the rental agreement, a landlord may apply the security deposit to the payment of past due rent and to the payment of the amount of damages that the landlord has suffered by reason of the tenant’s noncompliance with the rental agreement. Any deduction from the security deposit shall be itemized by the landlord, in a written notice, delivered to the tenant together with payment of the difference between any sum deposited and the amount retained, subject to subsection (3) of this section.
(3) A tenant shall provide the landlord in writing with the forwarding or new address to which the written notice and amount due from the landlord may be sent. If the tenant fails to provide the landlord with the forwarding or new address as required, the tenant shall not be entitled to damages or attorneys fees under subsection (4) of this section unless the tenant can show that the landlord had actual knowledge of such an address.
(4) The retention of a security deposit in violation of this section shall render a landlord liable for double the amount of the portion of the security deposit wrongfully withheld from the tenant, together with reasonable attorneys' fees and court costs; except that the tenant has the obligation to give notice to the landlord of his intention to file legal proceedings a minimum of seven days prior to filing said action.

(5) In any court action brought by the tenant under this section, the landlord shall bear the burden of proving that his withholding of the security deposit or any portion of it was not wrongful.

(6) Any provision, whether oral or written, in or relating to a rental agreement whereby any provision of this section is waived shall be deemed to be against public policy and shall be void.

(7) The holder of the landlord's interest in the premises at the time of the termination of the tenancy is bound by this section.

B. Commentary

The procedures governing the return of residential security deposits should satisfy several interests: (1) the landlord's interest in efficient use and application of the funds; (2) the tenant's interest in preventing unreasonable action by landlords; and (3) society's interest in reducing litigation. The proposed legislation attempts to meet all of these interests. First, the landlord is provided with the procedure to follow when determining the proper amount of the deposit to refund to the tenant. Second, the provision provides adequate remedies for the tenant when faced with a landlord who arbitrarily withholds a security deposit. Finally, the provisions attempt to avoid unwanted litigation by mandating a minimum of seven days notice to the landlord of a potential lawsuit. Thus, the landlord is provided guidance when determining the amount due, the tenant is afforded remedies upon satisfaction of certain obligations, and societal interest are respected.

Subsections (1) and (2) of the proposed legislation describe the manner in which the landlord is to return the amount of the security deposit due to the tenant. The landlord is given adequate time to determine any rent due or damages incurred as a result of the tenant's noncompliance with the rental agreement. In addition, the requirement

136. Kalish, supra note 1, at 596.
of a written itemized statement of all deductions results in open communication between the landlord and the tenant. This allows the tenant to review the landlord’s assessment and have some input into the landlord’s decisions. Such communication will require the landlord to evaluate the validity of his deductions and determine the risk of such withholdings.\textsuperscript{137} This requirement may lead to the settlement of disputes between the parties and avoid unnecessary litigation.\textsuperscript{138}

In order to facilitate the process dictated by subsection (2) of this act, subsection (3) imposes upon the tenant the obligation to provide the landlord with an address to which the written itemized statement and amount due can be sent. If the tenant fails to do so, the tenant is not entitled to damages. However, the language makes an exception if the landlord has actual knowledge of an appropriate address. This exception has been judicially imposed by courts construing similar statutes.\textsuperscript{139} The purpose of this requirement is to assure that the landlord has the ability to comply with his obligations under the statute. The purpose of the act would certainly be defeated if the landlord had the burden of returning deposit money to an unknown locale.\textsuperscript{140} In contrast, if the landlord has actual knowledge of an address, he has the ability to return the written statement and any money due. Therefore, the purpose of the act would be just as equally thwarted if a landlord, with actual knowledge of an address, could escape his responsibilities because of a technical error on the part of the tenant.\textsuperscript{141}

Subsection (4) provides double damages and mandatory attorneys’ fees and court costs for a landlord who withholds deposit money in violation of the act. The language does not require the withholding to be in bad faith. A wrongful withholding consists of simply retaining money that is owed to the tenant.\textsuperscript{142} Thus, even if the landlord supplies a written itemized statement, if the deductions taken were incorrect, the landlord has violated the act. This provision is necessary to

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\textsuperscript{137} Id. at 597.
\textsuperscript{138} Id.
\textsuperscript{139} See, e.g., Smitsom v. Zeches, No. 92AP-1773, 1993 Ohio App. LEXIS 4036.
\textsuperscript{140} Id. at *6.
\textsuperscript{141} Id. at *7.
\textsuperscript{142} Smith v. Padgett, 513 N.E.2d 737, 742 (Ohio 1991).
\end{flushleft}
the effectiveness of the act because a landlord will not be deterred from making unfounded deductions from the deposit if the penalties provided by the statute can be avoided by sending a list of fabricated reasons for the deductions.\textsuperscript{143}

Subsection (4) of the act also requires the tenant to give notice to the landlord of his intention to file suit at least seven days in advance of such action. This requirement is similar to that contained in the Colorado's security deposit statute.\textsuperscript{144} The theory of open communication that is at the root of the entire legislation is particularly relevant here. By providing notice to the landlord prior to filing suit, the tenant gives the landlord one final chance to reconsider his deductions and evaluate the risk of liability for damages under the statute. This requirement will help facilitate settlement between the parties and avoid litigation.

Subsection (5) of the act places the burden on the landlord to prove that the withholding of the security deposit was not wrongful. Courts have held that this is the proper placement of the burden because the landlord is in a superior position to provide such proof.\textsuperscript{145} The landlord can easily prove how much was paid to fix various problems. However, since the tenant has left the premises, his ability to provide evidence sufficient to satisfy such a burden would be minimal.\textsuperscript{146}

Subsection (6) of the act voids any attempt to waive the provisions of the act. A Colorado court addressed this subject and held that allowing such waivers would defeat the attempt to neutralize the unequal bargaining power between landlords and tenants.\textsuperscript{147} Landlords cannot be allowed to use their superior positions to waive the tenant's rights or to vary provisions that are designed to equalize such power disparity. Thus, a written or oral agreement, or any other type of action will not serve as a waiver under this subsection.

\textsuperscript{143} Id.
\textsuperscript{144} COLO. REV. STAT. ANN. § 38-12-103(1) (1993).
\textsuperscript{145} See, e.g., Veliz v. Meehan, 609 A.2d at 45.
\textsuperscript{146} Kalish, supra note 1, at 595.
\textsuperscript{147} Anderson v. Rosebrook, 737 P.2d at 421.
VI. CONCLUSION

The status of the residential tenant has been described as changing from "the stepchild of the law, . . . [to] its ward and darling." What once worked for the advantage of the landlord, now serves as a cushion of protection for the tenant. Virtually every jurisdiction has followed this trend and modified its landlord-tenant law to help tenants' vindicate their rights. The area of residential security deposits places the tenant in an particularly vulnerable position. Courts have come to recognize that the sole discretion of the lessor to determine disposition of the deposit often leads to arbitrary decisions. Because the cost to challenge such a decision often exceeds the potential recovery, the landlord can usually predict that the decision will not be contested. In response to this paradox, statutes have been enacted which provide punitive damages and attorneys' fees for tenants who have been the victim of such misconduct. Presently, thirty-seven states have enacted legislation specifically governing the refunding of residential security deposits.

Unfortunately, West Virginia has not enacted legislation to protect tenants in this susceptible situation. Past attempts of the West Virginia Legislature to modify this important aspect of the law have failed. Without such legislation, there exists no incentive for the landlord to handle the deposit money in a manner fair to both parties. Thus, the weaker of the bargaining parties, the tenant, often bears the loss.

This note has proposed legislation to govern the procedure of refunding residential security deposits. The legislation is based on an investigation of similar statutes and how courts in other jurisdictions have interpreted and applied them. The legislation is an attempt to provide guidance to landlords, remedies for tenants, and overall fairness in the landlord-tenant relationship. This legislation will not entirely end the battle surrounding residential security deposits. It will, how-

148. The Revolution, supra note 8, at 519.
149. See supra note 7.
150. See supra notes 55-59 and accompanying text.
ever, provide guidance, certainty, and an equal playing field for the parties involved.

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