



1-1-2009

Landlord Weapon or Tenant Shield? A Proposal to reform North Dakota's Residential Security Deposit Statute

Danny Schafffzin

Follow this and additional works at: <https://commons.und.edu/ndlr>



Part of the [Law Commons](#)

Recommended Citation

Schafffzin, Danny (2009) "Landlord Weapon or Tenant Shield? A Proposal to reform North Dakota's Residential Security Deposit Statute," *North Dakota Law Review*. Vol. 85 : No. 2 , Article 1.

Available at: <https://commons.und.edu/ndlr/vol85/iss2/1>

This Article is brought to you for free and open access by the School of Law at UND Scholarly Commons. It has been accepted for inclusion in North Dakota Law Review by an authorized editor of UND Scholarly Commons. For more information, please contact zeineb.yousif@library.und.edu.

LANDLORD WEAPON OR TENANT SHIELD?
A PROPOSAL TO REFORM NORTH DAKOTA’S
RESIDENTIAL SECURITY DEPOSIT STATUTE

DANNY SCHAFFZIN*

TABLE OF CONTENTS

I. INTRODUCTION	252
II. HISTORICAL FOUNDATIONS OF RESIDENTIAL LEASE SECURITY: PROTECTING THE LANDLORD.....	254
III. SHIFTING THE FOCUS TO TENANT PROTECTION: A BACKDROP TO NORTH DAKOTA’S RESIDENTIAL SECURITY DEPOSIT LAW.....	260
IV. THE NORTH DAKOTA RESIDENTIAL SECURITY DEPOSIT ACT: ITS INTENDED PROTECTIONS AND EVOLUTION.....	264
A. THE UNDERLYING INTENT AND LANGUAGE OF THE STATUTE	264
B. THE EVOLUTION AND IMPACT OF NORTH DAKOTA CENTURY CODE § 47-16-07.1	266
V. FIXING THE NORTH DAKOTA RESIDENTIAL SECURITY DEPOSIT STATUTE.....	270
A. CLARIFY PERMISSIBLE WITHHOLDINGS AND MANDATE PRE-TENANCY INSPECTION.....	270
B. REQUIRE AN INSPECTION AT LEASE END AND BOLSTER THE REQUIREMENTS OF THE LANDLORD’S ITEMIZED STATEMENT.....	274
C. PROMOTE EFFECTIVE ENFORCEMENT OF TENANT RIGHTS BY MORE CLEARLY CATEGORIZING AND PENALIZING LANDLORD NON-COMPLIANCE.....	277

*Visiting Assistant Professor of Clinical Law, University of Memphis Cecil C. Humphrey’s School of Law; J.D., B.A. Temple University. Completion of this article would not have been possible without the ongoing support and inspiration supplied by Professor Katharine Traylor Schaffzin and the excellent research assistance of Jordan Schuetzle. Special thanks to each of you.

D. TAKE ADDITIONAL STEPS TO PROTECT THE TENANT AND GIVE DIRECTION TO THE LANDLORD.....	280
VI. CONCLUSION.....	280

I. INTRODUCTION

When, more than 30 years ago, the North Dakota Legislature enacted section 47-16-07.1 of the North Dakota Century Code governing residential security deposits, the bill's sponsor, State Senator Howard Freed, expressed that "his intent in this legislation was to put some of the security over to the lessee."¹ This effort to regulate the security deposit in North Dakota came toward the end of a period during which many other states took similar steps to establish equivalent protections for both landlord *and* tenant throughout the life of the tenancy and at its end.² While it can be said that the principle of *caveat emptor* characterized the residential lease throughout American history,³ by the early 1970s, courts, legislators, and commentators recognized the need to even the balance of power between residential landlords and their tenants.⁴

1. See *Lease Security Deposits: Hearing on S.B. 2277 Before the Comm. on Judiciary*, 1977 Leg., 45th Sess. (N.D. Jan. 25, 1977) (statement of Sen. Howard Freed) [hereinafter *Senate Hearing*].

2. See Lucy Yee, *Tenant Protection Through Security Deposit Legislation*, 8 REAL EST. L.J. 136, 136-39 (1979) (reviewing "the wave of pro-tenant law reform" that characterized the late 1960s and early 1970s).

3. In American jurisprudence, the principle of *caveat emptor*, a Latin phrase meaning "let the buyer beware," is first attributed to the decision of the United States Supreme Court in *Laidlaw v. Organ*, 15 U.S. 84, 2 Wheat. 178 (1817). In that case, Organ agreed to buy a large amount of tobacco from Laidlaw. *Id.* at 178. Before the transaction, Laidlaw asked Organ if he was aware of conditions that might cause a rise in the value of tobacco. *Id.* at 183. Although he knew that the signing of the Treaty of Ghent would result in the end of the War of 1812 and a dramatic rise in the price of tobacco, Organ did not provide this information to Laidlaw. *Id.* When he later learned of the Treaty, Laidlaw refused to deliver the tobacco to Organ on the basis that Organ had deceived him. *Id.* at 179. After Organ won a lawsuit to compel delivery of the tobacco, Laidlaw appealed to the United States Supreme Court. Addressing the issue of non-disclosure, Chief Justice John Marshall explained that Organ had no obligation to share the information with Laidlaw even though Organ knew that Laidlaw was under a misapprehension:

The question in this case is, whether the intelligence of extrinsic circumstances, which might influence the price of the commodity, and which was exclusively within the knowledge of the vendee, ought to have been communicated by him to the vendor? The court is of opinion that he was not bound to communicate it. It would be difficult to circumscribe the contrary doctrine within proper limits, where the means of intelligence are equally accessible to both parties. But at the same time, each party must take care not to say or do anything tending to impose upon the other.

Id. at 194.

4. Yee, *supra* note 2, at 136-37.

With respect to the security deposit, the historical imbalance of power manifested itself in a rather obvious way. In general, landlords and tenants each understood that the tenant's expense in going to court to seek return of the security deposit would almost always exceed the amount of the deposit itself.⁵ As such, tenants often chose not to act on their right to return of the deposit rather than involving the courts.⁶ Appreciating the economic and procedural realities at play, many landlords simply retained the security deposit as a matter of course.⁷

In an effort to shift some of the protection afforded by the security deposit from the landlord to the tenant and aiming to pass "good, important consumer-protection legislation," the North Dakota Legislature answered in 1977 by effectuating "limitations and requirements" for the proper withholding of security deposits.⁸ In particular, the Legislature sought to incentivize landlord compliance with the statute by including provisions allowing tenants to recover treble damages for improper withholding.⁹ Through a more just disposition of the security deposit, the Legislature aimed to bring the relationship and relative bargaining positions of the landlord and tenant closer together.¹⁰

While well-intentioned, North Dakota's security deposit legislation remains essentially untested by state courts more than three decades after its passage. As a result, even in the face of clear legislative intent and express provisions aimed at deterring landlord mishandling of the security deposit, the potential for such misconduct—and the unavailability of effective means for tenant recourse against it—still remains.¹¹

5. Kathryn Porter Reimer, Comment, *Colorado's Wrongful Withholding of Security Deposits Act: Three Litigious Snares in an Untested Law*, 49 DENV. L.J. 453, 453 (1973); see also Claude M. McQuarrie, III, *The Residential Tenant's Security Deposit—A Protected Interest Worth Litigating*, 8 ST. MARY'S L.J. 829, 831 (1976) ("Tenants have been especially vulnerable to excessive deductions and withholding of their deposits because of the prohibitive expense of litigation and the inconvenience involved. . .").

6. See Jay Victor Jory, *The Residential Lease: Some Innovations for Improving the Landlord-Tenant Relationship*, 3 U.C. DAVIS L. REV. 31, 38 (1971) (addressing the "erratic nature of security deposit refunding procedures" and noting that "many tenants often tacitly accept the inequitable results").

7. *Id.* at 38-39.

8. *Lease Security Deposits: Hearing on S.B. 2277 Before the H. Judiciary Comm.*, 1977 Leg., 45th Sess. (N.D. Feb. 23, 1977) (statement of Dale Sandstrom, Consumer Fraud Division, Att'y Gen.'s Office) [hereinafter *House Hearing*].

9. See N.D. CENT. CODE § 47-16-07.1(3) (1999 & Supp. 2007).

10. See Porter Reimer, *supra* note 5, at 453, 459.

11. See, e.g., Paul T. Rosynsky, *Landlord Docked \$5.5 Million for Withholding Security Deposits*, OAK. TRIB., Nov. 7, 2008, at A5 (detailing Alameda, California Superior Court jury verdict in class action lawsuit filed by at least two hundred tenants against owner of apartment buildings and single family homes who purposefully withheld more than \$180,000 worth of security deposits; lawsuit revealed that owner fought tenants' claims to deposits "by filing lawsuits against those who tried to recoup costs in small claims court. In his suits . . . [the owner] would

In an effort to address this lingering problem, this article reviews North Dakota's existing residential security deposit law and proposes amendments aimed at carrying out its stated purpose. Part II explores the historical foundations of residential landlord-tenant law in America, detailing the disproportionate treatment tenants uniformly received at common law and describing the evolution of lease security as a mechanism with the exclusive goal of protecting the landlord. Part III considers the progressive national context in which the North Dakota Legislature enacted the state's security deposit statute. This section places particular focus on the paradigm shift of the 1960s and early 1970s, in which courts and legislators throughout the United States took steps to protect tenants from overreaching landlords. Part IV highlights the pro-tenant motivations that led to the enactment of the North Dakota security deposit legislation and reviews the statute's specific provisions. Lastly, part V identifies relevant shortcomings and ambiguities in the current security deposit provisions and proposes specific amendments to the legislation for consideration by North Dakota lawmakers.

II. HISTORICAL FOUNDATIONS OF RESIDENTIAL LEASE SECURITY: PROTECTING THE LANDLORD

Until the late 1960s and 1970s, residential landlord-tenant law in the United States was skewed heavily in favor of the landlord.¹² Commentators trace the origins of this imbalance to the pre-medieval and medieval periods of Europe, during which serfs, or small farmers, rented land for agricultural purposes.¹³ With land rather than a dwelling serving as the focus of the tenancy, the common law treatment of the transaction as a conveyance of property governed. The tenant was considered to be something akin to the servant of the landlord and the resulting "tenancy at will" gave the tenant

claim a larger sum of money by moving the case to Superior Court, forcing many tenants to drop cases because of costs." The relative number of home rentals in North Dakota makes the threat of misconduct in the landlord-tenant setting considerable. As of 2000, approximately one-third (33.4 percent) of all occupied housing units in North Dakota were inhabited by renters, giving North Dakota the twelfth highest proportion of renter-occupied units in the United States at that time. *The Population Bulletin*, North Dakota State Data Center at North Dakota State University, Vol. 17, No. 7, July 2001, at 1.

12. See Amanda Quester, *Evolution Before Revolution: Dynamism in Connecticut Landlord-Tenant Law Prior to the Late 1960s*, 48 AM. J. LEGAL HIST. 408, 409 (2006) ("Implicit in this focus upon the late 1960s and 1970s are two ideas about the preceding period: that landlord-tenant law prior to the 1960s consistently favored landlords and that the rules governing the relations between landlord and tenant changed very little in America from the reception of the English common law to the eve of the late-twentieth-century revolution.").

13. See ROBERT S. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT § 1.1, at 2 (1980); Paul G. Garrity, *Redesigning Landlord-Tenant Concepts for an Urban Society*, 46 J. URB. L. 695, 700 (1969).

“only rights regarding occupying the land . . . [but] no protection from, and no remedy against, wrongful actions of the landlord.”¹⁴

Indeed, although the development of business and commerce in early colonial times saw an intertwining of contract principles with the property law view of landlord-tenant law,¹⁵ most American jurisdictions historically honored the baseline rule of caveat emptor—“let the buyer beware”—and permitted landlords to act without interference in evicting tenants upon any perceived breach, offering poor quality properties, choosing or rejecting tenants, and enjoying immunity from tort liability.¹⁶ Beyond the obligations to provide quiet title to the tenant and honor a tenant’s implied right for quiet enjoyment during the lease period, the landlord had no duty to deliver a rental property in any specific condition or otherwise to maintain or repair the property at any point.¹⁷ In addition to his periodic rent obligations, the tenant assumed all risk of loss or deterioration once the lease was entered and was responsible for making all repairs necessary to prevent waste or deterioration.¹⁸

14. See Tom G. Geurts, *The Historical Development of the Lease in Residential Real Estate*, 32 REAL EST. L.J. 356, 357 (2004). See also Garrity, *supra* note 13, at 700 (“The terms and conditions of these early tenancies were recognized and reinforced by the common law of conveyancing and were designed and structured for a rural society by landlord-oriented lawyers and courts.”).

15. Although not the focus of this article, much has been written about the dual nature of the lease as a “hybrid” creature understandably governed by both property law and contract law. See, e.g., Robert H. Kelley, *Any Reports of the Death of the Property Law Paradigm for Leases Have Been Greatly Exaggerated*, 41 WAYNE L. REV. 1563, 1565-68 (1995) (listing the operative principles of the property law and contract law paradigms of lease governance); Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. REV. 503, 505-09 (1982); Geurts, *supra* note 14.

16. See SCHOSHINSKI, *supra* note 13, § 1.1, at 2; Garrity, *supra* note 13, at 700. Notably, a very small number of states, including North Dakota, legislated limited exceptions to the rule of caveat emptor as early as the 1800s. See Glendon, *supra* note 15, at 515 (citing Reppy, *The Field Codification Concept*, in David Dudley Field Centenary Essays 17, 48 (A Reppy ed. 1949)). The exception statutes required the lessor of a building intended for human occupation, in the absence of an agreement to the contrary, to deliver the building in habitable condition. *Id.* Thereafter, the lessor was obligated to repair all subsequent dilapidations not caused by the tenant’s negligence. If the landlord violated these duties, the tenant was permitted to either leave the premises or to apply rent, in the amount of one month’s worth or more, toward the cost of making the repairs. *Id.* at 515. Still, although the statutes were intended to curb abuses in the tenancy through a delineation of “the duties and rights of landlords and tenants,” courts appeared to liberally construe them in favor of the landlord. See, e.g., *Torreson v. Walla*, 92 N.W. 834, 836 (N.D. 1902) (holding that the absence of a sewer in a home, which caused water to run unabated into the home’s basement, did not render the house unfit for human occupancy). Moreover, all of the duties imposed on the landlord under these early statutes “could be, and presumably frequently were, excluded by contract.” Glendon, *supra* note 15, at 515.

17. Glendon, *supra* note 15, at 510-11.

18. *Id.* at 511 n.51 (quoting *Franklin v. Brown*, 118 N.Y. 110, 115 23 N.E. 126, 127 (1889)) (“It is uniformly held in this state that the lessee of real property must run the risk of its condition. . . . As was said by the learned General Term when deciding this case: ‘The tenant hires at his peril and a rule similar to that of caveat emptor applies, and throws on the lessee the

Apart from issues surrounding the physical condition of the property before and during the tenancy, the law viewed the notion of “security” in the landlord-tenant context, referring to those protections necessary to secure against tenant non-performance, almost exclusively from the perspective of the landlord.¹⁹ In instances of tenant failure to pay rent at any point during the lease term, the law generally authorized landlords to immediately terminate the lease.²⁰ Frustrated landlords were additionally able to make use of self-help rights rooted in English common law against the property of the tenant even where a written lease agreement was silent regarding such rights.²¹ For example, landlords were generally permitted to forcibly enter and remove the tenant without facing the threat of civil liability.²² Alternatively, a landlord seeking to recover rent could exercise his “right of distress,” a restricted entitlement to take control of his tenant’s belongings located on the leased property,²³ or his “right of distraint,” the act of locking the tenant out of the premises for the purpose of gaining control over the tenant’s property.²⁴ Most jurisdictions permitted these harsh mechanisms despite the seemingly unchecked power they conferred upon landlords.²⁵

responsibility of examining as to the existence of defects in the premises, and of providing against their ill effects.”).

19. See Note, *Methods of Securing Lessor Against Rental Defaults on Long Term Leases*, 45 YALE L.J. 537, 537 (1936) (“To minimize the risks attendant upon long-term leases, landlords have resorted to various devices by which the lessee, upon execution of the lease, places the landlord in possession of assets sufficient to assure that if the lessee becomes financially unable to pay the rent, the lessor will nevertheless be able to have satisfaction for the damages thereby incurred.”); Jory, *supra* note 6, at 38 (“Theoretically, the security deposits are created to insure against the contingencies of unpaid rents, tenant-inflicted damages, and unclean premises at the termination of the lease.”).

20. See Glendon, *supra* note 15, at 512.

21. See Edward L. Schwartz & Noah H. Adler, *Security Deposits and Guaranties Under Leases*, 1 REAL PROP. PROB. & TR. J. 405, 405 (1966) (citing 32 AM. JUR. *Landlord and Tenant* § 564 (1941); 52 AM. JUR. *Landlord and Tenant* § 605 (1947); 9 A.L.R. 300 (1920)); see also Randy G. Gerchick, *No Easy Way Out: Making the Summary Eviction Process a Fairer and More Efficient Alternative to Landlord Self-Help*, 41 UCLA L. REV. 759, 775 (1994).

22. See Gerchick, *supra* note 21, at 776. See generally RESTATEMENT (SECOND) OF TORTS § 88, General Principle (1965) (identifying the many American jurisdictions that “follow the earlier English rule, which was reinstated by *Hemmings v. Stoke Poges Golf Club*, 1 K.B. 720 (C.A.) (1920), and holding that no civil action for assault and battery is available to one who has been forcibly ousted by the person entitled to possession if the force used was not unreasonable”).

23. See Allan W. Rhyhart, *Distress*, 13 MD. L. REV. 185, 185 (1953).

24. See Richard E. Blumberg & Brian Quinn Robbins, *Beyond URLTA: A Program for Achieving Real Tenant Goals*, 11 HARV. C.R.-C.L. L. REV. 1, 17 (1976); see Tova Indritz, *The Tenants’ Rights Movement*, 1 N.M. L. REV. 1, 48 (1971) (noting the overlap and oft-interchangeable use of the terms “right of distress” and “right of distraint” and reviewing the common law roots of each right).

25. See MILTON R. FRIEDMAN, FRIEDMAN ON LEASES § 20.1, at 1265, n.1 (4th ed. 1997 & Supp. 2002) (citations omitted) (describing the right of distraint as “crude, quick, and drastic” and noting that it “allowed a man to be his own avenger, or to administer redress to himself”); see also Quester, *supra* note 12, at 410-11 (quoting ELIZABETH BLACKMAR, *MANHATTAN FOR RENT, 1785-1850*, at 222 (1989)) (indicating that New York lawmakers in the early 1800s described

In the early part of the twentieth century, the proliferation of the residential tenancy in the urban setting gave rise to a renewed focus on security for landlords:

With the concentration of urban real estate ownership in a few hands, and the increase in tenants consequent upon the growth of cities, lease security for landlords has become a matter of considerable importance. To have a place to live, or conduct their business, the great percentage of urban dwellers must obtain the use of premises by way of lease. In anticipation of this demand, large sums have been invested in real estate, and in improvements thereon; in many instances the land and improvements are mortgaged to secure the sums for investment. Under such circumstances the enterprise is bound to be a losing one for the owner if he is not in some way assured of the profits from his leases. Assurance may possibly be had in the personal responsibility of the lessee, but in many cases it is far from certain that this will be adequate.²⁶

Coinciding with this “urbanization” of the landlord-tenant relationship, many state legislatures and courts imposed upon landlords severe restrictions or outright bans on self-help evictions.²⁷ In an effort to curb abuses by landlords employing the rights of distress and distraint,²⁸ states also acted to modify or abolish these rights by passing landlord lien statutes seeking to regulate recovery against the goods, chattels, or property of the tenant.²⁹

distraint as “‘one of the most severe’ remedies and speculated that it ‘may be the instrument of more oppression than any other proceeding.’”)

In *Lindsey v. Normet*, the United States Supreme Court explained that “[t]he landlord-tenant relationship was one of the few areas where the right to self-help was recognized by the common law of most States, and the implementation of this right has been fraught with ‘violence and quarrels and bloodshed.’” *Lindsey v. Normet*, 405 U.S. 56, 71 (1972) (quoting *Entelman v. Hagoood*, 22 S.E. 545, 545 (Ga. 1895)).

26. James R. Wilson, *Lease Security Deposits*, 34 COLUM. L. REV. 426, 426 (1934) (citations omitted).

27. In many jurisdictions, summary process statutes were enacted to provide for “expeditious judicial procedures” for landlords seeking to recover against tenants in default or holding over after the end of the lease term. Glendon, *supra* note 15, at 512. While summary process statutes afforded some protection to tenants against forcible eviction, they tended to favor landlords by providing a simpler and more efficient alternative to ejectment, which generally required the landlord to prove he held superior title to the property in dispute and was a relatively slow, fairly complex, and substantially expensive procedure. *Id.*

28. See Blumberg & Robbins, *supra* note 24, at 17-18 (reviewing the roots and inequities of the common law concepts of distress and distraint).

29. Wilson, *supra* note 26, at 427; see Blumberg & Robbins, *supra* note 24, at 17 (noting that even as modified, the landlord lien statutes “nevertheless function[ed] extrajudicially without affording the tenant a prior hearing or court supervision”); see also Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 538 (1984) (citing SCHOSHINSKI, *supra* note 13, § 6:27) (noting that “of the minority of states that

Conscious of the limitations on and inconvenience of recovery under the common law and statutory security mechanisms, landlords increasingly relied upon the inclusion of explicit security provisions in lease agreements.³⁰ Such provisions created express security through a variety of means: monetary security deposits from tenants, the creation of a mortgage or lien on the tenant's property, the undertaking of a surety or guarantor, or the placement of buildings, improvements, or other fixtures on the rental premises by the tenant.³¹ It was commonly understood that the security deposit,³² the most popular of these lease agreement security devices, was "for the sole benefit of the landlord, and the competitive ability of landlords to demand and obtain such deposits directly reflects the tightness of the housing market."³³ Consistent with this thinking, the common law placed no limitations on the security deposit amount, and neither required the landlord to pay interest on the deposit nor prohibited the landlord from commingling the deposit funds.³⁴ Other facets of security deposit administration also caused clear unfairness to the tenant, including the absence of checks on "the various rights and duties arising upon assignment of the landlord's interest in the deposit, the landlord's freedom to use the money deposited for his own purposes, . . . and the tenant's priority in the deposit vis-a-vis creditors of the landlord upon the landlord's insolvency."³⁵

Of all the potential security deposit concerns facing tenants, none were greater than the uncertainty surrounding the ultimate return of the deposit

recognized distraint against residential tenants in 1952, many have abandoned the remedy either by statute or judicial decision").

30. See SCHOSHINSKI, *supra* note 13, § 6:27, at 450 (noting that the costliness and uncertainty of litigation and judgment satisfaction, the inconvenience of the common law right of distraint and equivalent statutory lien provisions, and other reasons have compelled landlords to "resort[] to contractual protection by insisting upon establishment of a fund to answer for tenant delinquencies"); see also Schwartz & Adler, *supra* note 21, at 406-07; Wilson, *supra* note 26, at 427; Rabin, *supra* note 29, at 539.

31. See Wilson, *supra* note 26, at 427; see also Note, *Methods of Securing Lessor Against Rental Defaults on Long Term Leases*, 45 YALE L.J. 537, 537-38 (1936).

32. Blumberg & Robbins, *supra* note 24, at 18 n.92 (citing 2 POWELL ON REAL PROPERTY § 231(2) (P. Rohan ed. 1974)). "A security deposit is a device to assure the lessor the full benefit of his original agreement by requiring the tenant to pay an amount to the landlord to be held as security against the tenant's failure of payment or other breach of covenant in the lease." *Id.*

33. Note, *The Uniform Residential Landlord and Tenant Act: Facilitation of or Impediment to Reform Favorable to the Tenant?*, 15 WM. & MARY L. REV. 845, 875 (1973-74) [hereinafter Note, *Landlord and Tenant Act*].

34. See generally SCHOSHINSKI, *supra* note 13, §§ 6:27-6:38, at 450-87 (analyzing the "ambiguities and inequities that pervade the common law administration of tenant deposits"); Rabin, *supra* note 29, at 539.

35. Note, *Landlord and Tenant Act*, *supra* note 33, at 875; see also McQuarrie, *supra* note 5, at 831 (noting that "[l]andlord abuse usually takes three forms: (1) requiring an excessively large amount as a deposit, (2) making excessive deductions from deposits for unspecified or vaguely defined damages, and (3) failing to return the deposit upon termination").

monies by the landlord at lease end.³⁶ On this point, the law was generally clear that, where the controlling lease agreement called for the tenant to make a security deposit to the landlord at the inception of the tenancy to ensure the lessee's performance,³⁷ the tenant was entitled to a return of the deposit amount less any loss or damage the landlord sustained.³⁸ Still, landlords could and did take comfort in knowing that the realities of the legal system would make such recovery extremely difficult, if not impossible:

[T]he security deposit in actuality has evolved into a bonus to be kept by the landlord upon termination of the lease agreement regardless of the damages actually sustained by the landlord. Landlords will retain security deposits after the departure of a tenant secure in the knowledge that a former tenant is severely inhibited from initiating legal action. This restraint is a product of a combination of factors including problems of proof, the relatively small sum of money at issue, the time factor, and the distance now separating the tenant from his former landlord. Where the reimbursement is forthcoming, usually the payments are delayed, the application of the retained amounts unitemized, and the interim retention and use of the funds having been without cost to the landlord.³⁹

So through the 1960s the majority of residential tenants in America, faced with specific concerns about security deposits and the more general ob-

36. See James F. Conley, *An Overview of the Tennessee Residential Landlord and Tenant Act*, 7 MEM. ST. U. L. REV. 109, 116 (1976-77) ("Perhaps no area of contention between landlord and tenant is of greater concern or occurrence than that of the return of deposits at the termination of the lease. Such concern may be due to frequent complaints of landlords' unjustifiable retention of all or part of the deposit and the lack of an effective tenant remedy.").

37. While not considered in detail here, courts viewed "monies paid upon the execution of a lease . . . [as] fall[ing] into four classes: (1) advance payment of rent; (2) as a bonus or consideration for the execution of the lease; (3) as liquidated damages; and (4) as a deposit to secure faithful performance of the terms of the lease. *Thompson v. Swiryn*, 213 P.2d 740, 744 (Cal. Dist. Ct. App. 1950) (emphasis added); see also SCHOSHINSKI, *supra* note 13, § 6:27, at 450-51. Although courts were apt to honor the classification given to the prepayment if the intent of the parties could clearly be evinced by the lease language, "[e]merging from the cases [was] a constructional preference for a security deposit since this classification accommodates the landlord's desire for protection and the normal expectation of the tenant for return of all or part of the fund at the end of the tenancy." SCHOSHINSKI, *supra* note 13, § 6:27, at 451-52 (citations omitted). Where a valid liquidated damages clause was found, it was commonly held that the landlord could retain the entire prepayment amount upon tenant non-performance despite the actual damages suffered. *Id.* at 451.

38. Schwartz & Adler, *supra* note 21, at 418.

39. Jory, *supra* note 6, at 38-39; see also Blumberg & Robbins, *supra* note 24, at 18-19 & n.93 (citing 2 *National Housing and Economic Development Law Project, Handbook on Housing Law*, ch. 3, at 70 (1970)) ("While security deposits may serve legitimate landlord interests, they are also readily abused. . . . The withholding of security deposits after termination of the lease may be a fruitful strategy due to the inconvenience of bringing an action in small claims court.").

stacles emanating from the one-sidedness inherent in the residential leasehold setting, were hamstrung in their abilities to find clean and safe housing.⁴⁰

III. SHIFTING THE FOCUS TO TENANT PROTECTION: A BACKDROP TO NORTH DAKOTA'S RESIDENTIAL SECURITY DEPOSIT LAW

Sparked by ever-increasing rates of residential tenancies throughout the United States⁴¹ and the rise in the general political consciousness that characterized the 1960s, commentators like Boston College Law School Professor Paul Garrity began to speak out on the need for legislatures and the judiciary to address the accepted dormancy of landlord-tenant law and the resulting harmful impact on the residential tenant:

In contrast with concern for and protection of consumers of other necessities of life, legislatures have reinforced the legal status of suppliers of rental housing and have under-regulated their responsibilities. Moreover, by refusing to overturn or condemn illogical precedents or unreasonable practices, courts have further entrenched landlords' prerogative and have impeded needed improvements to much urban low-income housing. There has been a conspicuous reluctance to revise legal theory to respond to the exigencies of the contemporary housing crisis.⁴²

Simultaneously, urban tenants from the poor, middle, and upper classes banded together to form groups advocating for tenants' rights and to organize rent and condition strikes decrying poor living conditions.⁴³ Upon

40. See Charles Donahue, Jr., *Change in the American Law of Landlord and Tenant Law*, 37 MOD. L. REV. 242, 245-46 (1974) ("All this has brought us approximately to 1965. American had an antique if not an antiquated landlord-tenant law, legislatures which were incapable of or uninterested in doing anything about it, a system of housing which put the renting classes almost exclusively on the private market, and a procedural system heavily skewed in favour of landlords."); Indritz, *supra* note 24, at 7 ("Thus it is that tenants continue to pay high rent and endure wet basements, leaky plumbing, exposed wires, unvented gas fixtures, doors that won't lock, sagging stairs and porches, days without heat or hot water, unlit corridors, rats and rat bites, illegally converted apartments without proper light and air, weeks without garbage collection, and combination kitchen-toilets. And all the while the landlord can say, 'If you don't like it, move out,' knowing he can rent the apartment to someone else.").

41. Toward the end of the 1960s, it was estimated that 40% of all housing in the United States was occupied by tenants, and that well over 70% of residents rented in bigger cities, such as New York City and Chicago. Indritz, *supra* note 24, at 5 (noting that seventy million Americans and a majority of urban residents were tenants).

42. Garrity, *supra* note 13, at 697-98.

43. See Donahue, *supra* note 40, at 246 (noting that with the "new mood of radical consumerism . . . [t]he resident of a Park Avenue flat who could not get his landlord to fix the garbage disposal unit began to perceive himself as having a problem different in quality but not in kind from that of the black resident of Harlem whose flat was infested with rats"). See generally

this foundation of “activism that demanded prompt, dramatic changes,” the relatively short period of time from approximately 1968 to 1978 saw a “revolutionary” surge of pro-tenant law reform that would forevermore change the face of the landlord-tenant relationship.⁴⁴

Before the 1960s, only a small minority of states had acted to protect tenants against landlord abuses.⁴⁵ Toward the end of that decade, however, courts and legislatures began to act, almost in concert, to effectuate changes aimed at breaking away from the pro-landlord tenets of the common law.⁴⁶ In a number of jurisdictions, courts were first to dismiss the accepted notion of caveat emptor to find an implied warranty or covenant of habitability in lease agreements.⁴⁷ Decisional law also moved further away from common law precedent by significantly expanding landlord liability for torts that occurred on their properties⁴⁸ and substantially limiting the ability of landlords to use eviction as a means of retaliation against their tenants.⁴⁹

Indritz, *supra* note 24, at 4-41 (discussing the mobilization efforts of the tenants’ rights movement in the late 1960s and 1970s).

44. See Rabin, *supra* note 29, at 520-21, 546-47 (describing “the revolution” and exploring the relationship between the civil rights movement and the contemporaneous reform of landlord-tenant law).

45. See *supra* note 16. See also, e.g., *Delameter v. Foreman*, 239 N.W. 148, 149 (Minn. 1931) (finding that the landlord of an apartment building infested with vermin had violated an “implied covenant that the premises will be habitable”); *Pines v. Persson*, 111 N.W.2d 409, 413 (Wis. 1961) (finding an implied warranty of habitability in leases on the justification that “[t]he need and social desirability of adequate housing for people in this era of rapid population increases, is too important to be rebuffed by that obnoxious legal cliché, caveat emptor”).

46. See Glendon, *supra* note 15, at 521-28 (discussing the interaction between courts and legislatures in forging the “demise” of traditional landlord-tenant law in residential tenancies).

47. See, e.g., *Javins v. First National Realty*, 428 F.2d 1071 (D.C. Cir. 1970); *Lemle v. Bredan*, 462 P.2d 470 (Haw. 1969). *Javins* and *Lemle* are most commonly cited as the lead cases in recognizing the anachronism of applying feudal property law in the modern urban context and replacing the traditional land conveyance view of residential tenancy with the contractual doctrine of an implied warranty of habitability. Explaining its holding, the *Javins* Court stated:

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.

Javins, 428 F.2d at 1077.

48. See, e.g., *Sargent v. Ross*, 308 A.2d 528, 534 (N.H. 1973) (“[W]e today discard the rule of ‘caveat lessee’ and the doctrine of landlord nonliability in tort to which it gave birth. . . . Henceforth, landlords as other persons must exercise reasonable care not to subject others to an unreasonable risk of harm. . . . A landlord must act as a reasonable person under all of the circumstances.”). See generally SCHOSHINSKI, *supra* note 13, at Ch. 4 (reviewing landlord liability in tort).

49. See, e.g., *Edwards v. Habib*, 397 F.2d 687, 699-701 (D.C. Cir. 1968) (holding that a landlord could not terminate a lease in retaliation for a tenant’s actions in reporting alleged code

While it might be said that judicial activism kick-started the overhaul of landlord-tenant law, legislation in the overwhelming majority of jurisdictions would “become the principal mode of regulation in the field” during the 1970s.⁵⁰ Coinciding with the changes brought on by decisional law, some forty states enacted legislation by 1980 delineating in more particular terms the rights and remedies available to tenants when the landlord failed to provide a dwelling meeting minimum standards of habitability.⁵¹ Many states based this new legislation upon the Uniform Residential Landlord and Tenant Act (URLTA), which the National Conference of Commissioners on Uniform State Laws approved in 1972:

(1) to simplify, clarify, modernize, and revise the law governing the rental of dwelling units and the rights and obligations of landlords and tenants; (2) to encourage landlords and tenants to maintain and improve the quality of housing; and (3) to make uniform the law with respect to the subject of this Act among those states which enact it.⁵²

In addition to regulating the conditions of the property during the lease term, several states acted between 1967 and 1971 to craft specific laws regulating the behavior with respect to the tenant security deposit.⁵³ Following the issuance of the URLTA in 1972, a number of additional states adopting its suggested provisions in whole or in part legislated provisions specific to the handling of security deposits.⁵⁴ In 1979, Professor Lucy Yee

violations to housing authorities). *See generally* SCHOSHINSKI, *supra* note 13, at Ch. 12 (reviewing the court decisions protecting tenants from retaliatory eviction).

50. Glendon, *supra* note 15, at 528.

51. *See* Glendon, *supra* note 15, at 523-24 (specifying those states that had enacted comprehensive landlord-tenant statutes based on the Uniform Residential Landlord and Tenant Act and those states in which less comprehensive legislation still had the impact codifying an implied warranty of habitability, statutory remedies for housing code violations, or both). *See infra* note 52 and accompanying text (discussing the URLTA).

52. UNIFORM RESIDENTIAL LANDLORD & TENANT ACT, 7B U.L.A. 292 (2006) § 1.102(b) [hereinafter URLTA]. Following the issuance of the URLTA and over the period of years thereafter, numerous articles were written evaluating the URLTA and the state-specific legislation that adopted its provisions in whole or in part. *See generally e.g.*, Brian J. Strum, et al., *The Uniform Residential Landlord and Tenant Act: Some Suggestions for Improvement*, 9 REAL PROP. PROB. & TR. J. 402 (1974); J. Conley, *supra* note 36.

53. *See* Yee, *supra* note 2, at 137-38; *see also* URLTA § 2.101 (Comment) (identifying California, Colorado, Delaware, Florida, Illinois, Maryland, Massachusetts, Minnesota, New Jersey, New York, and Pennsylvania as states that passed “[w]idely varying legislation . . . affecting security deposits” between 1967 and 1971).

54. *See* Yee, *supra* note 2, at 137 n.5 (identifying Alaska, Arizona, Florida, Hawaii, Kansas, Kentucky, Nebraska, New Mexico, Oregon, Tennessee, and Virginia as states that enacted the URLTA). The URLTA § 2.101 sets forth the following “obligations” of the landlord relating to the security deposit:

(a) A landlord may not demand or receive security, however denominated, in an amount or value in excess of [1] month[s] periodic rent.

noted in “Tenant Protection Through Security Deposit Legislation,” that typical security deposit legislation included variations on the following seven elements: (1) payment of a limited monetary amount from tenant to landlord at lease commencement to assure the tenant’s performance of obligations under the lease agreement; (2) restrictions on commingling of the security deposit money, including provisions governing the kind of account in which the deposit needed to be kept by the landlord; (3) imposition of a time limit following lease end, usually thirty or sixty days, within which the landlord was required to return the entire security deposit to the tenant or, in the instance of damage caused by the tenant, provide the tenant with an itemization of all amounts withheld to allow for repairs and the balance of the deposit, if any; (4) the right of the tenant to file a lawsuit, upon written notice to do so, if he wished to challenge the landlord’s right to retain all or some of the security deposit; (5) a provision permitting the tenant to recover two or three times the amount of the security deposit if wrongfully withheld; (6) the ability for the tenant to recover attorney’s fees if the security deposit was wrongfully withheld; and (7) language prohibiting counterclaims by any landlord who failed to comply with the security deposit statute in question.⁵⁵

Although the transcendent changes to landlord-tenant law that commenced in the 1960s differed in detail and scope from jurisdiction to jurisdiction, those states effectuating such changes clearly and uniformly aimed to move away from the one-sidedness in the tenancy context that had always favored the landlord.⁵⁶

(b) Upon termination of the tenancy property or money held by the landlord as security may be applied to the payment of accrued rent and the amount of damages which the landlord has suffered by reason of the tenant’s noncompliance with Section 3.101 all as itemized by the landlord in a written notice delivered to the tenant together with the amount due [14] days after termination of the tenancy and delivery of possession and demand by the tenant.

(c) If the landlord fails to comply with subsection (b) or if he fails to return any pre-paid rent required to be paid to the tenants under this Act the tenant may recover the property and money due him together with damages in an amount equal to [twice] the amount wrongfully withheld and reasonable attorney’s fees.

(d) This section does not preclude the landlord or tenant from recovering other damages to which he may be entitled under this Act.

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

Id. § 2.101.

55. See Yee, *supra* note 2, at 139-41 (citing specific provisions of the security deposit acts then in effect in Colorado, Texas, and New Jersey).

56. See Rabin, *supra* note 29, at 519 (“The residential tenant, long the stepchild of the law, has now become its ward and darling. Tenants’ rights have increased dramatically; landlords’ rights have decreased dramatically.”).

IV. THE NORTH DAKOTA RESIDENTIAL SECURITY DEPOSIT ACT: ITS INTENDED PROTECTIONS AND EVOLUTION

Within this “trend toward greater protection of the residential tenant,” the North Dakota Legislature acted in 1977 to bolster the plight of residential tenants living within its borders by passing its own security deposit statute.⁵⁷

A. THE UNDERLYING INTENT AND LANGUAGE OF THE STATUTE

On April 20, 1977, the North Dakota Legislature passed the state’s first security deposit legislation by adding section 47-16-07.1 to the North Dakota Century Code.⁵⁸ Upon passage, the declared purpose of the statute was:

to create and enact a new section . . . relating to lease security deposits on real property and dwellings; the return of such deposits with interest upon termination of a lease, deposit amounts which may be withheld by a lessor and conditions under which amounts may be withheld; recovery by a lessee for wrongful withholding of security deposits; providing for transfer of security deposits upon a change of ownership; and binding the lessor holding the lease at the time of termination to return the security deposit.⁵⁹

Although the actual language of the statute shows no clear preference toward either landlord or tenant, the intent of the North Dakota Legislature in passing the 1977 security deposit law is apparent from the discussions of the Senate and House Judiciary Committees in the months preceding its adoption.⁶⁰ During the Senate Judiciary Committee’s discussion on January 25, 1977, Senator Howard Freed, the sponsor of the legislation, articulated that “his intent in this legislation was to put some of the security over to the lessee.”⁶¹ In the same discussion, Dale Sandstrom, then with the consumer fraud division of the North Dakota Attorney General’s Office,⁶² argued against the inclusion of certain proposed amendments by noting that “the bill, as it is written, is a strong tenant’s bill, and if we put in all of the suggested amendments, it will be a strong landlord’s bill.”⁶³ During the House

57. SCHOSHINSKI, *supra* note 13, § 1:1, at 5; 1977 N.D. Laws 927.

58. 1977 N.D. Laws 927.

59. *Id.* (citing the legislation’s title).

60. *See Senate Hearing, supra* note 1 (statement of Sen. Howard Freed); *House Hearing, supra* note 8 (statement of Dale Sandstrom, Consumer Fraud Division, Att’y Gen.’s Office).

61. *Senate Hearing, supra* note 1 (statement of Sen. Howard Freed).

62. Justice Sandstrom was elected a Justice of the North Dakota Supreme Court in 1992 and still sits today as a member of that Court.

63. *House Hearing, supra* note 8.

Judiciary Committee's deliberation about the proposed statute, on February 23, 1977, Sandstrom explained that "[t]he law now seems to protect the landlord the most. Some of them don't give back the deposit for various reasons and that's where the trouble comes in. . . . This type of legislation is needed to protect the consumers."⁶⁴

Toward this end of consumer protection, the North Dakota security deposit statute enacted in 1977 contained several noteworthy provisions. The first paragraph capped the security deposit amount at not more than one month's rent.⁶⁵ That paragraph also addressed the handling of the security deposit monies during the lease term, requiring that the landlord place the monies in an interest-bearing savings account and pay interest accruing on the deposit to the tenant upon lease termination.⁶⁶

In the second paragraph, the statute specified that the landlord "may apply security deposit money and accrued interest upon termination of a lease towards any damages the lessor has suffered by reason of deteriorations or injuries to the real property or dwelling through the negligence of the lessee or his guest."⁶⁷ In instances where the security deposit was applied to cover damages, the landlord was obligated to "itemize[]" the "[a]pplication" and deliver or mail "[s]uch itemization . . . to the lessee at the last addressed furnished lessor, along with a written notice within thirty days after termination of the lease and delivery of possession by the lessee."⁶⁸ In the notice, the landlord would be required to include a statement of monies still due to the lessor or the refund due to the lessee.⁶⁹

The third paragraph deemed the lessor "liable for treble damages for any security deposit money withheld without reasonable justification."⁷⁰ The fourth paragraph addressed the status of the security deposit upon a transfer in the ownership of the leased property during the lease term, specifying that the deposit and any interest accrued were to be transferred to the "grantee of the lessor's interest" and that the grantee would, upon actual transfer of the deposit and interest, be bound by all provisions of the North Dakota security deposit statute.⁷¹

64. *Id.* Sandstrom added that the North Dakota Attorney General's Offices and other consumer offices throughout the state were receiving ten to fifteen security deposit related complaints each month from tenants. *Id.* He opined "that this bill, as written, is good as a potential for putting one of the most specific types of legislation into law for consumer protection." *Id.*

65. 1977 N.D. Laws 927.

66. *Id.*

67. *Id.*

68. *Id.* at 927-28.

69. *Id.* at 928.

70. *Id.*

71. *Id.*

The statute was also notable for its exclusions.⁷² Unlike the security deposit legislation prescribed by the URLTA and contemporaneously adopted in some other jurisdictions, the North Dakota security deposit statute did not explicitly provide for the recovery of costs and attorney's fees by the tenant⁷³ or place limitations on counterclaims or independent actions by the landlord in the event of landlord noncompliance.⁷⁴ Further, the North Dakota statute included no language forbidding a tenant to waive the statute's protections⁷⁵ or a landlord's inclusion of prohibited provisions in a lease agreement.⁷⁶ With respect to the return of the security deposit or, alternatively, the provision of written notice of an itemized damages statement to the tenant, the statute gave the landlord thirty days after the termination of the tenancy and delivery of possession rather than the more limited fourteen-day period suggested by the URLTA.⁷⁷

B. THE EVOLUTION AND IMPACT OF NORTH DAKOTA CENTURY
CODE § 47-16-07.1

Before the enactment of section 47-16-07.1, no statute and not a single reported court decision addressed the administration of security deposits in North Dakota. The common law void on the subject likely extended from the reality that attorneys had little incentive, in terms of time or money, to litigate security deposit disputes on behalf of tenants where the law did not allow for the recovery of monetary penalties or attorney's fees against the landlord in instances of misconduct.⁷⁸ Following the passage of the North Dakota security deposit statute in 1977, one might have reasonably anticipated an increase in illustrative appellate decisions resulting from an expected upsurge in security deposit litigation focused on the statute's

72. See discussion *infra* Part V (discussing the specific omissions and other deficiencies, as well as proposed remedies).

73. See URLTA § 2.101, 7B U.L.A. 316 (2006); N.J. REV. STAT. § 46:8-21.1 (2003 & Supp. 2009).

74. See URLTA § 2.101, 7B U.L.A. 316; COLO. REV. STAT. § 38-12-103(2) (2008).

75. See URLTA § 1.403(a)(1), 7B U.L.A. 313; SCHOSHINSKI, *supra* note 13, §6:43, at 497.

76. See URLTA § 1.403(b), 7B U.L.A. 33; SCHOSHINSKI, *supra* note 13, §6:43, at 497.

77. See URLTA § 2.101(b), 7B U.L.A. 316. The discussions of the North Dakota Senate before the passage of the security deposit statute reveal a debate over whether 14 days was sufficient time for the landlord to return the deposit or provide the required statement of itemized damages and any balance of the deposit to the tenant. See *Senate Hearing*, *supra* note 1. While Assistant Attorney General Sandstrom believed that 14 days was "more than adequate time" for the landlord, Wally Owen and John Kavaney, both of the North Dakota Association of Realtors, and Lyle Kirmis, of the North Dakota Home Builders Association, all disagreed. *Id.* Despite the presence of support for the shorter, more tenant-protective period, the final legislation required landlords to return the deposit or itemization within 30 days. 1977 N.D. Laws 927-28.

78. See Peggy L. England, *Tenants' Rights Under the Missouri Security Deposit Statute*, 28 ST. LOUIS U. L.J. 1035, 1036 (1984) (addressing the unsettled state of the law regarding security deposits in Missouri before the enactment of that state's legislation in 1983).

specific provisions. In fact, only one appellate case since 1977, *Mitchell v. Preusse*,⁷⁹ speaks to the substantive provisions of the security deposit statute. The Legislature's two-fold failure to arm the statute with real deterrents to landlord abuse and concomitant incentives for tenants to seek recourse against abusive landlords is responsible for this lack of interpretive jurisprudence.

In *Mitchell v. Preusse*, the single appellate case considering the statute, the tenants signed a three-month lease in July 1983, paying \$300 for the first month's rent and a \$300 security deposit to rent a Fargo apartment from landlord Preusse.⁸⁰ Before the lease signing, Preusse promised to make specific improvements, including the installation of new doors, the purchase of a refrigerator, window repair, and cleaning the apartment, before lease commencement on September 1, 1983.⁸¹ When the tenants arrived in Fargo on September 2, 1984, Preusse had not made the promised improvements to the apartment.⁸² Upon Preusse's commitment to complete the improvements by September 7, plaintiffs left some furniture and boxes, but did not begin to reside in the apartment.⁸³ When, on September 7, the tenants found the leased apartment still unrepaired, they moved into a motel.⁸⁴ The next day, the tenants found another apartment, terminated the lease with Preusse, and requested return of their rent and security deposit.⁸⁵ Preusse consented to the cancellation of the lease, but failed to return the rental payment or security deposit.⁸⁶

The tenant-plaintiffs sued their landlord in small claims court alleging breach of the apartment rental contract.⁸⁷ Upon removal of the case to the district court for a bench trial, the trial court found that Preusse had breached the rental contract by failing to have the apartment ready for occupancy and awarded plaintiffs \$300 for rent paid and treble damages of \$900 for Preusse's withholding of the security deposit without reasonable justification.⁸⁸ On appeal, the North Dakota Supreme Court explained that, pursuant to North Dakota Century Code section 47-16-07.1(3), "[t]he determination if the security deposit is withheld unreasonably is a question of

79. 358 N.W.2d 511 (N.D. 1984).

80. *Mitchell*, 358 N.W.2d at 513.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

fact and will not be overturned unless clearly erroneous.”⁸⁹ Because Preusse “offered no argument or authority to support his position or to convince [the court it] should second-guess the trial court’s conclusion that he unreasonably withheld the security deposit,” the Court affirmed the judgment against him.⁹⁰ Notably, the Court deemed “meritless” Preusse’s contentions that North Dakota Century Code section 47-16-07.1(3) was unconstitutionally vague.⁹¹

Although the security deposit statute has not been subject to judicial interpretation beyond the holding of *Mitchell v. Preusse*, the Legislature has amended it eight times since its original enactment. In 1979, the Legislature amended the statute to require that the landlord store the security deposit in a federally insured deposit account.⁹² In 1983, the Legislature added language to allow the landlord to use the security deposit to cover any unpaid rent or “[t]he costs of cleaning or other repairs which were the responsibility of the lessee, and which are necessary to return the dwelling unit to its original state when the lessee took possession.”⁹³ The only concession to the tenant in this amendment was the addition of language that prohibited landlords from using the security deposit to cover the ambiguous category of “reasonable wear and tear.”⁹⁴ In 1985, the Legislature amended North Dakota Century Code section 47-16-30.1, relating to abandoned property left on a leasehold, to permit landlords to recover from the tenant’s security deposit any storage and moving expenses in excess of the proceeds from the sale incurred in disposing of such property.⁹⁵ In 1989, a house-keeping bill amended the security deposit statute to clarify that the landlord was required to itemize any withholding of the deposit, regardless of whether such withholding was for damages the landlord has covered, unpaid rent, or cost of cleaning or other repairs.⁹⁶ In 2003, the Legislature amended the statute to require the landlord to hold the security deposit in a savings account or checking account established for the benefit of the tenant.⁹⁷ In 1995 and 2007, the Legislature used amendments to raise the maximum security deposit amount, first to a \$1500 ceiling and next to a

89. *Id.* at 514.

90. *Id.*

91. *Id.*

92. 1979 N.D. Laws 1233.

93. 1983 N.D. Laws 1534.

94. *Id.*

95. 1985 N.D. Laws 1815.

96. 1989 N.D. Laws 1449. Before this amendment, an oversight in the statute required itemization only when withholding for damages.

97. 2003 N.D. Laws 1361.

\$2500 ceiling, when the tenant has a pet.⁹⁸ Most recently, in 2009, the statute was updated to clarify that any portions of the security deposit not claimed by the tenant within a year of termination of the lease agreement needs to be reported by the Landlord pursuant to North Dakota's Uniform Unclaimed Property Act.⁹⁹

98. 1995 N.D. Laws 1278; 2007 N.D. Laws 1465.

99. 2009 N.D. Laws 1156. Today, the exact language of the North Dakota security deposit statute is as follows:

1. The lessor of real property or a dwelling who requires money as a security deposit, however denominated, shall deposit the money in a federally insured interest-bearing savings or checking account for the benefit of the tenant. The security deposit and any interest accruing on the deposit must be paid to the lessee upon termination of a lease, subject to the conditions of subsection 2. A lessor may not demand or receive security, however denominated, in an amount or value in excess of one month's rent, except if the lessee is housing a pet on the leased premises, the security may not exceed the greater of two thousand five hundred dollars or an amount equivalent to two months' rent.
2. A lessor may apply security deposit money and accrued interest upon termination of a lease towards:
 - a. Any damages the lessor has suffered by reason of deteriorations or injuries to the real property or dwelling through the negligence of the lessee or the lessee's guest.
 - b. Any unpaid rent.
 - c. The costs of cleaning or other repairs which were the responsibility of the lessee, and which are necessary to return the dwelling unit to its original state when the lessee took possession, reasonable wear and tear excepted. Application of any portion of a security deposit not paid to the lessee upon termination of the lease must be itemized by the lessor. Such itemization together with the amount due must be delivered or mailed to the lessee at the last address furnished lessor, along with a written notice within thirty days after termination of the lease and delivery of possession by the lessee. The notice must contain a statement of any amount still due the lessor or the refund due the lessee. A lessor is not required to pay interest on security deposits if the period of occupancy was less than nine months in duration. Any amounts not claimed from the lessor by the lessee within one year of the termination of the lease agreement are subject to the reporting requirements of section 47-30.1-08.
3. A lessor is liable for treble damages for any security deposit money withheld without reasonable justification.
4. Upon a transfer in ownership of the leased real property or dwelling, the security deposit and accrued interest shall be transferred to the grantee of the lessor's interest. The grantor shall not be relieved of liability under this section until transfer of the security deposit to the grantee. The holder of the lessor's interest in the real property or dwelling at the termination of a lease shall be bound by this section even though such holder was not the original lessor who received the security deposit.
5. This section applies to the state and to political subdivisions of the state that lease real property or dwellings and require money as a security deposit.

N.D. CENT. CODE § 47-16-07.1 (1999 & Supp. 2009).

V. FIXING THE NORTH DAKOTA RESIDENTIAL SECURITY DEPOSIT STATUTE

As a means of neutralizing the disparity in bargaining power that historically characterized the landlord-tenant relationship in North Dakota and elsewhere, the Legislature contended in 1977 that its security deposit legislation would be an important step toward affording the North Dakota tenant consumer-type protections that had already been given effect in other jurisdictions and in transactions outside of the leasehold setting. Specifically, the Legislature attempted to detail a procedure for handling security deposits that would be clear to and protective of both landlord and tenant, and provide adequate remedies for tenants victimized by landlords who do not comply with the statutory procedures. If enhanced protection of the tenant's security was the Legislature's intent, however, a number of deficiencies and exclusions in the current security deposit statute stand in the way of that primary aspiration being realized. The Legislature can correct these shortcomings by amending the security deposit procedures in section 47-16-07.1 in the fashion detailed below. The proposed amended statute that follows this article incorporates the prescribed changes, most of which are based upon existing security deposit law in other jurisdictions.¹⁰⁰

A. CLARIFY PERMISSIBLE WITHHOLDINGS AND MANDATE PRE-TENANCY INSPECTION

Presently, subsection 47-16-07.1(2) permits a landlord, upon lease termination, to apply the security deposit and interest toward:

- a. Any damages the lessor has suffered by reason of deteriorations or injuries to the real property or dwelling through the negligence of the lessee or the lessee's guest.
- b. Any unpaid rent.
- c. The costs of cleaning or other repairs which were the responsibility of the lessee, and which are necessary to return the dwelling unit to its original state when the lessee took possession, reasonable wear and tear excepted.¹⁰¹

Because of its ambiguous wording, subsection (2)(a) now gives North Dakota landlords leeway to unilaterally determine what "damages" have been suffered because of "deteriorations or injuries" to the leased property and to

100. See John P. Ludington, Annotation, *Landlord-Tenant Security Deposit Legislation*, 63 A.L.R. 4th 901 (1988) (surveying security deposit legislation across the United States and the case law interpreting it).

101. N.D. CENT. CODE § 47-16-07.1(2) (2007).

make corresponding deductions from the security deposit by simply claiming that such “deteriorations or injuries” were caused by the “negligence” of the tenant.¹⁰² Further, although another statutory provision within section 47-16-13.2 defines the “cleaning” and “other repair” responsibilities of the tenant during the lease term,¹⁰³ subsection (2)(c) presents confusion regarding what amounts to “reasonable wear and tear” and the manner in which landlords must determine the “original state [of the property] when the [tenant] took possession.”¹⁰⁴

While disputes over the kinds and causes of damages to the leased property must be determined on a fact-specific, case-by-case basis, three additions reflected in the proposed amended version of the statute would better protect both landlord and tenant by giving more definition and structure to the damage assessment process presently contemplated by subsection 47-16-07.1(2). First, the term “reasonable wear and tear” should be more precisely defined as follows:

As used in this section, “reasonable wear and tear” includes any deterioration to the real property or dwelling

- (i) based upon the use for which the rental unit is intended, without negligence, carelessness, accident, or abuse of the premises or equipment or chattels by the lessee or members of his household, or their invitees or guests; or

102. *See Id.*

103. *Id.* § 47-16-13.2 (2007 & Supp. 2008). This section sets forth the obligations of the tenant in maintaining a rental unit, articulates what a tenant must specifically do with respect to keeping the leased property “clean”:

A tenant of a residential dwelling unit shall:

1. Comply with all obligations primarily imposed upon tenants by applicable provisions of building and housing codes materially affecting health and safety.
2. Keep that part of the premises that the tenant occupies and uses as clean and safe as the condition of the premises permit.
3. Periodically remove all ashes, garbage, rubbish, and other waste from the tenant’s dwelling unit, and dispose of them in a clean and safe manner.
4. Keep all plumbing fixtures in the dwelling unit or used by the tenant as clean as their condition permits.
5. Use in a reasonable manner all electrical, plumbing, sanitary, heating, ventilating, air-conditioning, and other facilities and appliances including elevators in the premises.
6. Not deliberately or negligently destroy, deface, damage, impair, or remove any part of the premises or knowingly permit any person to do so.
7. Conduct oneself and require other persons on the premises with the tenant’s consent to conduct themselves in a manner that will not disturb the tenant’s neighbors’ peaceful enjoyment of the premises.

Id.

104. *See England, supra* note 78, at 1047 (focusing on similar ambiguities in Missouri’s security deposit legislation).

- (ii) caused by the lessor's failure to prepare for expected conditions or by the lessor's failure to comply with an obligation of the lessor imposed by this chapter.¹⁰⁵

This more detailed definition makes explicit that the security deposit monies cannot be used to pay for normal depreciation of the property and fixtures,¹⁰⁶ or for any repairs caused by the landlord's failure to maintain the leased property in the manner required by section 47-16-13.1 of the North Dakota Century Code.¹⁰⁷

Second, to reinforce that landlords may not deduct for any "reasonable wear and tear" or conditions that preexisted the tenancy, that exception

105. Proposed Amended Statute, attached following article, § 47-16-07.1(5)(c) [hereinafter Proposed Amended Statute].

106. Maine's statutory definition of "normal wear and tear" in the lease setting provides: "Normal wear and tear" means the deterioration that occurs, based upon the use for which the rental unit is intended, without negligence, carelessness, accident or abuse of the premises or equipment or chattels by the tenant or members of the tenant's household or their invitees or guests. The term "normal wear and tear" does not include sums or labor expended by the landlord in removing from the rental unit articles abandoned by the tenant such as trash. If a rental unit was leased to the tenant in a habitable condition or if it was put in a habitable condition by the landlord during the term of the tenancy, normal wear and tear does not include sums required to be expended by the landlord to return the rental unit to a habitable condition, which may include costs for cleaning, unless expenditure of these sums was necessitated by actions of the landlord, events beyond the control of the tenant or actions of someone other than the tenant or members of the tenant's household or their invitees or guests. ME. REV. STAT. ANN. tit. 14, § 6031 (West 2003 & Supp. 2008); *see also* COLO. REV. STAT. § 38-12-102 (2008) (defining "normal wear and tear"); IDAHO CODE ANN. § 6-321 (Michie 2008) (defining "normal wear and tear"); ALASKA STAT. § 34.03.070(b) (2008) (defining "damages" as "deterioration of the premises and, if applicable, of the contents of the premises," but excepting deterioration "that is the result of the tenant's use of the premises by normal, nonabusive living").

107. N.D. CENT. CODE § 47-16-13.1(1) (1999). The North Dakota Century Code sets forth the obligations of the landlord in maintaining a rental unit:

1. A landlord of a residential dwelling unit shall:
 - a. Comply with the requirements of applicable building and housing codes materially affecting health and safety.
 - b. Make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition.
 - c. Keep all common areas of the premises in a clean and safe condition.
 - d. Maintain in good and safe working order and condition all electrical, plumbing, sanitary, heating, ventilating, air-conditioning, and other facilities and appliances, including elevators, supplied or required to be supplied by the landlord.
 - e. Provide and maintain appropriate receptacles and conveniences for the removal of ashes, garbage, rubbish, and other waste incidental to the occupancy of the dwelling unit and arrange for their removal.
 - f. Supply running water and reasonable amounts of hot water at all times and reasonable heat, except if the building that includes the dwelling unit is not required by law to be equipped for that purpose or if the dwelling unit is so constructed that heat or hot water is generated by an installation within the exclusive control of the tenant and supplied by a direct public utility connection or if the water or heat is unavailable due to supply failure by a public utility.

Id.

should be stated independently of the types of damages for which deductions are permitted by incorporating the following language into the section:

A lessor may claim of the security deposit only those amounts as are reasonably necessary for the purposes specified in subsection 5(a). The lessor may not assert a claim against the lessee or the security for damages to the premises or any defective conditions that preexisted the tenancy, for reasonable wear and tear or the effects thereof, whether the wear and tear preexisted the tenancy or occurred during the tenancy, or for the cumulative effects of reasonable wear and tear occurring during any one or more tenancies.¹⁰⁸

Lastly, to assure that both landlord and tenant have a hand in memorializing the “original state” of the lease property, the proposed amended statute requires the landlord, before lease commencement and the tenant’s tender of the security deposit, to present to the tenant a detailed checklist of existing damage to the premises. The tenant would have the option of inspecting the property before move-in, but thereafter would be required to either sign the checklist agreeing to the condition of the property and any known defects at that time or to prepare in writing and sign a statement of dissent:

3. Prior to tendering any consideration deemed to be a security deposit, the prospective lessee shall be presented with a comprehensive listing of any then-existing damage to the unit, which would be the basis for a charge against the security deposit and the estimated dollar cost of repairing such damage. When presenting the required listing to the lessee, the lessor shall make a good faith effort to explain the contents of the listing to the lessee. The lessee shall have the right to inspect the premises to ascertain the accuracy of such listing prior to taking occupancy. The lessor and the lessee shall sign the listing, which signatures shall be conclusive evidence of the accuracy of such listing, but shall not be construed to be conclusive to latent defects. If the lessee shall refuse to sign such listing, he shall state specifically in writing the items on the list to which he dissents, and shall sign such statement of dissent.

108. Proposed Amended Statute, § 47-16-07.1(5)(b). This subsection, which would clarify the “reasonable wear and tear” exception, is based on the current language of California’s security deposit act. CAL. CIV. CODE § 1950.5(e) (Deering 2005 & Supp. 2009).

- a. A lessor who fails to comply with the requirements of this subsection shall be subject to the penalties set forth at subsection 7(a)-(d).
- b. If, upon presentation and good faith explanation of the checklist to the lessee, the lessee shall fail to sign the listing or specifically dissent in accordance with this subsection, the lessee shall not be entitled to recover any damages under this section.¹⁰⁹

This checklist created at the pre-tenancy review would serve as proof that could be used by either party if there is a dispute at lease termination over “the original state” when the tenant took possession and whether the tenant caused any subsequent damages to the property alleged by the landlord.¹¹⁰ Failure to participate in the pre-tenancy inspection or listing process would result in the landlord’s forfeiture of the right to retain the security deposit or bring claims against the tenant at lease end¹¹¹ and similarly cause the tenant to waive the right to recover damages at lease end.¹¹²

B. REQUIRE AN INSPECTION AT LEASE END AND BOLSTER THE REQUIREMENTS OF THE LANDLORD’S ITEMIZED STATEMENT

As currently written, subsection 47-16-07.1(2) of the North Dakota Century Code further obligates landlords to “itemize” the “[a]pplication of any portion of a security deposit not paid to the lessee upon termination of the lease.”¹¹³ The subsection fails, however, to articulate the required specificity of the itemization’s content or to mandate particularized support for each of the charges being allocated to the tenant through deduction from the security deposit. Leaving the landlord without necessary direction for compilation of the itemization and the tenant without sufficient means to

109. Proposed Amended Statute, § 47-16-07.1(3). In large part, subsection 47-16-07.1(3) of the proposed amended statute takes the language from the Kentucky and Georgia security deposit provisions mandating this kind of pre-tenancy review. *See* KY. REV. STAT. ANN. § 383.580(2)-(3) (LexisNexis 2002); GA. CODE ANN. § 44-7-33(a) (1991); *see also* MASS. GEN. LAWS ANN. 186, § 15B(2)(c) (West 2003 & Supp. 2009) (requiring upon receipt of deposit or by ten days after lease commencement, whichever is later, a written statement of present condition of property, including a comprehensive damage listing, and allowing a tenant the opportunity to provide a separate listing if the tenant believes the landlord’s list is incorrect); MONT. CODE ANN. § 70-25-206 (2007) (requiring, at lease commencement, the preparation and, upon request, furnishing to tenant, a statement signed by the landlord “as to the present condition of the premises intended to be let”); MICH. COMP. LAWS. SERV. § 554.608 (LexisNexis2007) (requiring completion of an inventory checklist by a tenant at lease commencement).

110. *See* SCHOSHINSKI, *supra* note 13, § 6:43, at 498.

111. *See* Proposed Amended Statute, § 47-16-07.1(3)(a); *see also* discussion *infra* notes 123-25 and accompanying text.

112. *See id.* at § 47-16-07.1(3)(b).

113. N.D. CENT. CODE § 47-16-07.1(2) (1999 & Supp. 2009).

validate or challenge specific charges, this sort of vagueness again increases the likelihood of landlord abuse and disputes over the administration of the security deposit after lease termination. Moreover, it leaves North Dakota courts called upon to settle such disputes without a clear standard by which to evaluate the landlord's itemization and ultimate decision to make withholdings from the deposit.

The proposed amended version of the statute would honor the deterrent goals of the Legislature and bring further certainty to both landlord and tenant at lease end by requiring the landlord and tenant to conduct a joint inspection of the property immediately before lease termination and by adding important details to the itemization requirements currently set forth in subsection 47-16-07.1(2). Following the lead of several states,¹¹⁴ a damage inspection involving both landlord and tenant would take place at least five days before the tenant's termination of occupancy.¹¹⁵ After this inspection, the landlord would have three additional days to prepare and present to the tenant a comprehensive damages listing, which the tenant could then confirm or, as necessary, dispute:

4. At least five days prior to the lessee's termination of occupancy, the lessor and lessee shall jointly inspect the premises to ascertain any existing damage to the premises. At least two days prior to the termination of occupancy, the lessor shall present to the lessee a comprehensive list of any damage done to the premises which is the basis for any charge against the security deposit and the estimated dollar value of such damage. When presenting the required listing to the lessee, the lessor shall make a good faith effort to explain its contents to the lessee. The lessor and the lessee shall sign the list, and this shall be conclusive evidence of the accuracy of the list. If

114. *See, e.g.*, ARIZ. REV. STAT. ANN. § 33-1321(C) (2007 & Supp. 2008) (requiring a landlord, at move-in, to give their tenant "a move-in form for specifying any existing damages to the dwelling unit and written notification to the tenant that the tenant may be present at the move-out inspection"); MD. CODE ANN. REAL PROPERTY § 8-203(f)(1)(ii) (LexisNexis 2003 & Supp. 2008) (authorizing a tenant who gives proper notice of intention to move the right to be present at inspection); MONT. CODE ANN. § 70-25-201(2) (2007) (requiring, "[a]t the request of either party," the inspection of the lease property within one week prior to lease termination); TENN. CODE ANN. § 66-28-301(b) (Supp. 2008) (outlining requirements for a pre-termination inspection by a landlord and tenant and a related process through which a listing of damage to the property will be confirmed or challenged by the tenant).

115. Proposed Amended Statute, § 47-16-07.1(4). The proposed amended statute would generally follow the lease-end inspection requirements presently in place in both Georgia and Kentucky. *See* GA. CODE ANN. § 44-7-33(b) (1991 & Supp. 2008); KY. REV. STAT. ANN. § 383.580(3) (LexisNexis 2002); *see also* ARIZ. REV. STAT. ANN. § 33-1321(C) (West 2008); MD. CODE ANN. § 8-203(f)(1)(ii); MONT. REV. CODE ANN. § 70-25-201(2) (Smith 2008); TENN. CODE ANN. § 66-28-301(b).

the lessee refuses to sign the list, he shall state specifically in writing the items on the list to which he dissents and shall sign such statement of dissent. If the lessee terminates occupancy without notifying the lessor, the lessor may make a final inspection within a reasonable time after discovering the termination of occupancy.

- a. A lessor who fails to comply with the requirements of this subsection shall be subject to the penalties set forth at subsection 7(a)-(d).
- b. If, upon presentation and good faith explanation of the listing to the lessee, the lessee shall fail to sign the listing or specifically dissent in accordance with this subsection, the lessee shall not be entitled to recover any damages under this section.¹¹⁶

Like the pre-tenancy inspection process described above, obligating the landlord and tenant to meet and confer in the fashion proposed by this amendment before lease end would hopefully create a dialogue and lead to the efficient and timely resolution of disagreements between the parties rather than litigation.¹¹⁷ The proposed statute would also drive compliance by imposing clear penalties on both landlord and tenant for failure to adhere to the post-tenancy inspection and listing requirements.¹¹⁸

With respect to the itemization of damages, which would still be required within thirty days of lease termination if the landlord retained any portion of the security deposit, the proposed amended statute would make clear that, first, the landlord must state with specificity *each* of the charges that he seeks to pass along to the tenant, and second, that each such charge must be supported by “satisfactory evidence,” such as receipts, invoices, or bills. The specific language added to subsection 47-16-07.1(6) would read as follows:

- a. individually list any damages for which the landlord claims the tenant is liable;
- b. indicate with particularity the nature of any repair necessary to correct any damage; and
- c. provide satisfactory evidence that the repair necessary to correct these damages has been or will be completed.

116. See Proposed Amended Statute, § 47-16-07.1(4).

117. See Laura K. Weimer, *Tenants' Rights Get New Support: Chapter 1061*, 34 MCGEORGE L. REV. 495, 503 (2002) (reviewing the contemplated benefits and detriments of a pre-moveout walkthrough).

118. See Proposed Amended Statute, § 47-16-07.1(4)(a)-(b).

Satisfactory evidence may include, but not be limited to, receipts for purchased repair materials and labor estimates, bills, or invoices indicating the actual or estimated cost thereof.¹¹⁹

By enhancing the itemization requirements in this way, the landlord will have more confidence as to his obligations for supporting the damages he believes in good faith are appropriate for deduction from the security deposit. At the same time, the tenant will be protected from the arbitrary assessment of charges that the current statute seems to condone.

C. PROMOTE EFFECTIVE ENFORCEMENT OF TENANT RIGHTS BY MORE CLEARLY CATEGORIZING AND PENALIZING LANDLORD NON-COMPLIANCE

In simply providing that a landlord is “liable for treble damages for any security deposit money withheld without reasonable justification,”¹²⁰ subsection 47-16-07.1(3) of the North Dakota Century Code presently omits the necessary detail setting forth the process and apportioning the burden of proof for challenging the withholding of a security deposit. Further, because it does not explicitly allow a tenant to recover attorney’s fees and costs in addition to treble damages when a security deposit is withheld without reasonable justification, the statute fails to adequately incentivize tenants—or the attorneys who would hopefully represent them—to bring such challenges.¹²¹ Finally, the provisions of this subsection do not suffi-

119. *Id.* at § 47-16-07.1(6). This subsection of the proposed amended statute, which would amend the itemization requirements currently in N.D. CENT. CODE § 47-16-07.1(2) (1999 & Supp. 2009), is modeled after the requirements in place in New Hampshire. *See* N.H. REV. STAT. ANN. § 540-A:7(I) (LexisNexis 2006 & Supp. 2008) (identifying “receipts for purchased repair materials and labor estimates, bills or invoices” as types of “satisfactory evidence” needed to support itemized charges); *see also* MASS. GEN. LAWS ANN. ch. 186, § 15B(4)(iii) (West 2003 & Supp. 2009) (requiring the landlord, within 30 days of lease end, to provide to tenant “an itemized list of damages, sworn to by the lessor or his agent under pains and penalties of perjury, itemizing in precise detail the nature of the damage and of the repairs necessary to correct such damage, and written evidence, such as estimates, bills, invoices or receipts, indicating the actual or estimated cost thereof”); HAW. REV. STAT. § 521-44(c) (LexisNexis 2006) (requiring notification “together with the particulars of and grounds for the retention, including written evidence of the costs of remedying tenant defaults, such as estimates or invoices for material and services or of the costs of cleaning, such as receipts for supplies and equipment or charges for cleaning services”); IND. CODE ANN. § 32-31-3-14 (LexisNexis 2002) (requiring list to set forth “the estimated cost of repair for each damaged item” and “the amounts and lease on which the landlord intends to assess the tenant”).

120. N.D. CENT. CODE § 47-16-07.1(3) (1999 & Supp. 2009).

121. *See* SCHOSHINSKI, *supra* note 13, § 6:43, at 497 (noting that many states have legislated the recovery of court costs and attorney’s fees “[a]s further encouragement for tenants to assert their statutory rights”); England, *supra* note 78, at 1056 (noting that the importance of “allowing attorney’s fees is two fold: 1) it insulates the award from being totally depleted by attorney’s fees,

ciently address the possibility of landlord non-compliance with the statute's procedural obligations. For instance, it is presently unclear whether or what, if any, penalties will befall a landlord who withholds some or all of a tenant's security deposit, but does not provide the obligatory itemization of damages until some point after the requisite thirty-day period has expired.¹²²

Several additions within the proposed amended statute are designed to address and bring clarity to each of the above-described issues.¹²³ As a means of encouraging landlord compliance with the deposit return and itemization requirements, proposed subsection 47-16-07.1(7) would make clear that a lessor who fails to return the security deposit or provide the requisite itemization and deposit balance within thirty days, whether in good faith or not, forfeits all rights to recovery against the tenant and is liable for reasonable attorney's fees and costs on top of treble damages:

7. If the lessor fails to provide the lessee with the written, itemized notice of deductions from the deposit and the balance shown by the notice to be due, or otherwise to comply with subsection 5, within thirty days after termination of the lease and delivery of possession by the lessee, the lessor:
 - a. shall forfeit the right to withhold any portion of the deposit;
 - b. shall forfeit the right to assert any counterclaim in any action brought to recover that deposit;
 - c. shall be liable to the lessee for treble damages, plus court costs and reasonable attorneys' fees; and
 - d. shall forfeit the right to assert an independent action against the lessee for damages to the rental property.¹²⁴

Mandating these penalties for landlord violations would make more likely the realization of tenants' rights that were the goal of the statute's drafters.¹²⁵

and 2) it encourages the private bar to enforce the security deposit law when small amounts are at stake").

122. *See* N.D. CENT. CODE § 47-16-07.1(1) (2007). Another example of landlord non-compliance under the current statute would be the failure to deposit the security deposit monies into a federally insured, interest-bearing savings or checking account for the benefit of the lessee. *See Id.*

123. *See* Proposed Amended Statute, § 47-16-07.1(7)-(8).

124. *Id.* § 47-16-07.1(7). This subsection of the proposed amended statute closely resembles the penalty provisions set forth in New Mexico's security deposit statute. *See* N.M. STAT. ANN. § 47-8-18(D) (Supp. 1995). Regarding other forms of landlord non-compliance with the statute, the proposed amended statute also makes clear that a landlord is subject to the penalties set forth at proposed subsection (7) if he or she fails to place the deposit in a federally-insured, interest-bearing account, follow the pre-tenancy inspection and checklist requirements, or follow the lease-end inspection and checklist requirements. *See* Proposed Amended Statute, § 47-16-07.1(2)(c), (3)(c), 4(c).

The proposed amended statute would go further to honor tenant rights by enhancing the existing provisions aimed at deterring the wrongful withholding of the security deposit. Specifically, the addition of language to subsection 47-16-07.1(8) would permit the recovery of attorney's fees and costs on top of the punitive damages already available to the tenant and set forth in more detail the litigation process that will govern withholding disputes. As amended, the pertinent provision would state that:

8. A lessor is liable for treble damages, together with reasonable attorney's fees and court costs, for any security deposit money withheld without reasonable justification.
 - a. A lessee who wishes to initiate a court action under this section has the obligation to give notice to the lessor of his intention to file legal proceedings at least seven days prior to filing said action.
 - b. In any court action brought by a lessee under this section, the lessor shall bear the burden of proving that his withholding of the security deposit or any portion of it was not justified.
 - c. In any action brought under this section, attorney's fees may be awarded to the prevailing party at the discretion of the court.¹²⁶

Of note, a tenant would be required to give at least seven days notice to the landlord before filing a lawsuit seeking recovery of the security deposit,¹²⁷ the landlord would bear the burden of proving that the withholding of the security deposit, in whole or in part, was not supported by reasonable justification,¹²⁸ and the court would have the discretion to award attorney's fees to the prevailing party.¹²⁹

125. See SCHOSHINSKI, *supra* note 13, § 6:43, at 496 (reviewing the “various penalties . . . imposed” on landlords “[t]o achieve effective enforcement of tenant rights under the [security deposit] statutes”).

126. See Proposed Amended Statute, § 47-16-07.1(8).

127. See COLO. REV. STAT. § 38-12-103(3)(a) (2008) (obligating the tenant “to give notice to the landlord of his intention to file legal proceedings a minimum of seven days prior to filing said action”); ME. REV. STAT. ANN. tit. 14, § 6034(1) (2003) (also mandating the minimum of seven days).

128. See COLO. REV. STAT. § 38-12-103(3)(b) (landlord has burden of proving that the withholding was not “wrongful”); ME. REV. STAT. ANN. tit. 14, § 6034(3) (same); MONT. CODE ANN. § 70-25-204(1) (2007) (“burden of proof of damages caused by the tenant to the leasehold premises is on the landlord”); 68 PA. STAT. ANN. § 250.512(c) (West 2004) (same).

129. See MONT. CODE ANN. § 70-25-204(1) (noting that attorney's fees can be awarded at the court's discretion).

D. TAKE ADDITIONAL STEPS TO PROTECT THE TENANT AND GIVE DIRECTION TO THE LANDLORD

The proposed amended version of the North Dakota security deposit statute is rounded-out with a few other additions also designed to provide more specific instruction to the landlord regarding administration of the deposit while maximizing the intended protection to the tenant. First, to clarify the scope of the statute, the term “security deposit” is defined as “any advance, deposit or prepaid rent, however denominated, which is refundable to the lessee at the termination or expiration of the lease. The function of a security deposit is to secure the performance of a lessee’s obligations to pay rent and to maintain a dwelling unit.”¹³⁰

Second, to further elucidate that the deposit is the protected property of the tenant, language is added to the already-existing safekeeping provisions of subsection 47-16-07.1(2) making explicit:

The security deposit and any interest accrued shall continue to be the property of the lessee, shall not be commingled with the assets of the lessor, and shall not be subject to the claims of any creditor of the lessor or of the lessor’s successor in interest, including a foreclosing mortgagee or trustee in bankruptcy.¹³¹

Lastly, a concluding provision forbids the waiver or modification of the protections guaranteed by the security deposit in a lease or rental agreement.¹³²

VI. CONCLUSION

In proposing an exhaustive legislative remedy to the problem he described as “the old shell game, sometimes known as the ‘disappearing security deposit,’” Professor John G. Murphy, Jr. noted “[t]he provision suffers from an overkill of detail, but does so on the assumption that only the most carefully constructed cage can confine the quarry.”¹³³ With respect to the North Dakota security deposit statute, the additional detail that would be

130. Proposed Amended Statute, § 47-16-07.1(1). This subsection of the proposed amended statute is based on the definition of “security deposit” presented in Vermont’s corresponding legislation. *See* VT. STAT. ANN. tit. 9, § 4461(a) (2006 & Supp. 2008); *see also* GA. CODE ANN. § 44-7-30(3) (Supp. 2009); COLO. REV. STAT. § 38-12-102(2); CONN. GEN. STAT. ANN. § 47a-21(10) (West 2006); MD. CODE ANN., REAL PROP. § 8-203(a)(3) (LexisNexis 2003 & Supp. 2008); TEX. PROP. CODE ANN. § 92.102 (Vernon 2007).

131. *See* Proposed Amended Statute, § 47-16-07.1(2); *see also* MASS. GEN. LAWS ANN. ch. 186, § 15B(1)(e) (West 2003 & Supp. 2009).

132. *See* Proposed Amended Statute, § 47-16-07.1(11); *see also* N.H. REV. STAT. ANN. § 540-A:8(III) (2006); 68 PA. STAT. ANN. § 250.512(d) (2009).

133. John G. Murphy, Jr., *A Proposal for Reshaping the Urban Rental Agreement*, 57 GEO. L.J. 464, 475 (1969).

added through the amendments suggested in this article is necessary to safeguard the legitimate interests of *both* the tenant and landlord in the residential leasehold setting. For tenants, more comprehensive protections, including the availability of attorney's fees and court costs, will make enforcement against abusive landlords through litigation more feasible. Simultaneously, bolstered itemization requirements and clarification of proper withholdings will serve to assure the majority of landlords of the proper means of handling the security deposit. By adopting the proposed changes, the North Dakota Legislature would honor the tenant-protective intent of the statute and codify a truly "excellent tool for the effective administration of justice in security deposit disputes."¹³⁴

134. McQuarrie, *supra* note 5, at 852.

PROPOSED AMENDED VERSION
OF
NORTH DAKOTA CENTURY CODE § 47-16-07.1

CHAPTER 47-16.
LEASING OF REAL PROPERTY

47-16-07.1. Real property and dwelling security deposits—Limitations and requirements.

1. As used in this section, the term “security deposit” means any advance, deposit or prepaid rent, however denominated, which is refundable to the lessee at the termination or expiration of the lease. The function of a security deposit is to secure the performance of a lessee’s obligations to pay rent and to maintain a dwelling unit.
2. The lessor of real property or a dwelling who requires money as a security deposit, however denominated, shall deposit the money in a federally insured interest-bearing savings or checking account for the benefit of the lessee. The security deposit and any interest accruing on the deposit must be paid to the lessee upon termination of a lease, subject to the conditions of subsections 5 and 6. The security deposit and any interest accrued shall continue to be the property of the lessee, shall not be commingled with the assets of the lessor, and shall not be subject to the claims of any creditor of the lessor or of the lessor’s successor in interest, including a foreclosing mortgagee or trustee in bankruptcy.
 - a. A lessor may not demand or receive security, however denominated, in an amount or value in excess of one month’s rent, except if the lessee is housing a pet on the leased premises, the security may not exceed the greater of two thousand five hundred dollars or an amount equivalent to two months’ rent.
 - b. A lessor is not required to pay interest on security deposits if the period of occupancy was less than nine months in duration.
 - c. A lessor who fails to comply with the requirements of this subsection shall be subject to the penalties set forth at subsection 7(a)-(d).
3. Prior to tendering any consideration deemed to be a security deposit, the prospective lessee shall be presented with a comprehensive listing of any then-existing damage to the unit, which would

- be the basis for a charge against the security deposit and the estimated dollar cost of repairing such damage. When presenting the required listing to the lessee, the lessor shall make a good faith effort to explain the contents of the listing to the lessee. The lessee shall have the right to inspect the premises to ascertain the accuracy of such listing prior to taking occupancy. The lessor and the lessee shall sign the listing, which signatures shall be conclusive evidence of the accuracy of such listing, but shall not be construed to be conclusive to latent defects. If the lessee shall refuse to sign such listing, he shall state specifically in writing the items on the list to which he dissents, and shall sign such statement of dissent.
- a. A lessor who fails to comply with the requirements of this subsection shall be subject to the penalties set forth at subsection 7(a)-(d).
 - b. If, upon presentation and good faith explanation of the checklist to the lessee, the lessee shall fail to sign the listing or specifically dissent in accordance with this subsection, the lessee shall not be entitled to recover any damages under this section.
4. At least five days prior to the lessee's termination of occupancy, the lessor and lessee shall jointly inspect the premises to ascertain any existing damage to the premises. At least two days prior to the termination of occupancy, the lessor shall present to the lessee a comprehensive list of any damage done to the premises which is the basis for any charge against the security deposit and the estimated dollar value of such damage. When presenting the required listing to the lessee, the lessor shall make a good faith effort to explain its contents to the lessee. The lessor and the lessee shall sign the list, and this shall be conclusive evidence of the accuracy of the list. If the lessee refuses to sign the list, he shall state specifically in writing the items on the list to which he dissents and shall sign such statement of dissent. If the lessee terminates occupancy without notifying the lessor, the lessor may make a final inspection within a reasonable time after discovering the termination of occupancy.
- a. A lessor who fails to comply with the requirements of this subsection shall be subject to the penalties set forth at subsection 7(a)-(d).
 - b. If, upon presentation and good faith explanation of the listing to the lessee, the lessee shall fail to sign the listing or specifically dissent in accordance with this subsection, the lessee

- shall not be entitled to recover any damages under this section.
5. a. A lessor may apply security deposit money and accrued interest upon termination of a lease towards:
 - (1) Any damages the lessor has suffered by reason of deteriorations or injuries to the real property or dwelling through the negligence of the lessee or the lessee's guest.
 - (2) Any unpaid rent.
 - (3) The costs of cleaning or other repairs which were the responsibility of the lessee, and which are necessary to return the dwelling unit to its original state when the lessee took possession, reasonable wear and tear excepted.
 - b. A lessor may claim of the security deposit only those amounts as are reasonably necessary for the purposes specified in subsection 5(a). The lessor may not assert a claim against the lessee or the security for damages to the premises or any defective conditions that preexisted the tenancy, for reasonable wear and tear or the effects thereof, whether the wear and tear preexisted the tenancy or occurred during the tenancy, or for the cumulative effects of reasonable wear and tear occurring during any one or more tenancies.
 - c. As used in this section, "reasonable wear and tear" includes any deterioration to the real property or dwelling
 - (1) based upon the use for which the rental unit is intended, without negligence, carelessness, accident, or abuse of the premises or equipment or chattels by the lessee or members of his household, or their invitees or guests; or
 - (2) caused by the lessor's failure to prepare for expected conditions or by the lessor's failure to comply with an obligation of the lessor imposed by this chapter."
6. Application of any portion of a security deposit not paid to the lessee upon termination of the lease must be itemized by the lessor. Such itemization together with the amount due must be delivered or mailed to the lessee at the last address furnished lessor, along with a written notice within thirty days after termination of the lease and delivery of possession by the lessee. The notice must contain a statement of any amount still due the lessor or the refund due the lessee. The itemization must:
 - a. individually list any damages for which the landlord claims the tenant is liable;

- b. indicate with particularity the nature of any repair necessary to correct any damage; and
 - c. provide satisfactory evidence that the repair necessary to correct these damages has been or will be completed. Satisfactory evidence may include, but is not be limited to, receipts for purchased repair materials and labor estimates, bills, or invoices indicating the actual or estimated cost thereof.
7. If the lessor fails to provide the lessee with the written, itemized notice of deductions from the deposit and the balance shown by the notice to be due, or otherwise to comply with subsection 5, within thirty days after termination of the lease and delivery of possession by the lessee, the lessor:
 - a. shall forfeit the right to withhold any portion of the deposit;
 - b. shall forfeit the right to assert any counterclaim in any action brought to recover that deposit;
 - c. shall be liable to the lessee for treble damages, plus court costs and reasonable attorney's fees; and
 - d. shall forfeit the right to assert an independent action against the lessee for damages to the rental property.
8. A lessor is liable for treble damages, together with reasonable attorney's fees and court costs, for any security deposit money withheld without reasonable justification.
 - a. A lessee who wishes to initiate a court action under this section has the obligation to give notice to the lessor of his intention to file legal proceedings at least seven days prior to filing said action.
 - b. In any court action brought by a lessee under this section, the lessor bears the burden of proving that withholding the security deposit or any portion of it was not justified.
 - c. In any action brought under this section, attorney's fees may be awarded to the prevailing party at the discretion of the court.
9. Upon a transfer in ownership of the leased real property or dwelling, the security deposit and accrued interest shall be transferred to the grantee of the lessor's interest. The grantor shall not be relieved of liability under this section until transfer of the security deposit to the grantee. The holder of the lessor's interest in the real property or dwelling at the termination of a lease shall be bound by this section even though such holder was not the original lessor who received the security deposit.

10. This section applies to the state and to political subdivisions of the state that lease real property or dwellings and require money as a security deposit.
11. Any provision in a lease or rental agreement by which the tenant is purported to waive any of his rights under this section is void.