Nebraska Law Review

Volume 100 | Issue 4 Article 4

6-29-2022

Nebraska's Anything-but-Uniform Residential Landlord and Tenant Act

Ryan P. Sullivan
University of Nebraska College of Law, sullivan@unl.edu

Ryan P. Sullivan*

Nebraska's Anything-but-Uniform Residential Landlord and Tenant Act

TABLE OF CONTENTS

* Ryan P. Sullivan, Associate Professor of Law, University of Nebraska College of Law. My deepest gratitude to the incredible contributions of my research assistant Rachel Tomlinson Dick, for the meticulous editing of my amazing legal assistant Deanna Lubken, and of course many thanks to each of my reviewers Kevin Ruser, Laurie Heer Dale, Scott Mertz, Gary Fisher, and Kate Mahern for their thoughtful insight and generous feedback.

I. INTRODUCTION

In 1974, the Nebraska Legislature adopted the Uniform Residential Landlord and Tenant Act. Except, it didn't.

The National Conference of Commissioners of Uniform State Laws developed and proposed the Uniform Residential Landlord and Tenant Act (Uniform Act)[1] with the intent to simplify, codify, and modernize the laws governing the relationship between landlords and tenants and to protect certain vital interests of the parties and the public.[2] The Uniform Act recognized the imbalance of bargaining power between tenants and landlords and included protections to ensure that leases were fair and that landlords could not take advantage of tenants. The Uniform Act also included provisions aimed to protect the business interests of landlords, including liquidated damages and streamlined lease terminations. All in all, the Uniform Act was reasonably fair to both tenants and landlords and brought a semblance of balance to an otherwise imbalanced relationship.

That is not the act that Nebraska enacted.[3] Gutted from the Uniform Act were several provisions intended to protect tenants. And of the tenant-favorable provisions that remained, many either were left toothless by the removal of language that would have made the terms enforceable or were so whittled down that tenants would have been better served under common law. But it didn't end there. Other provisions were developed and incorporated, either at the time of adoption or through later amendments, each furthering landlords' procedural and substantive advantages over tenants. For example, a section was

1. UNIF. RESIDENTIAL LANDLORD & TENANT ACT (UNIF. L. COMM'N 1972).
2. *Id.* § 1.102 & cmt.
3. *See* Mason v. Schumacher, 231 Neb. 929, 931, 439 N.W.2d 61, 64 (1989) (labeling Nebraska's version of the Act the "Motley and Multiform Uniform Residential Landlord and Tenant Act," the Nebraska Supreme Court observed "that the Uniform Residential Landlord and Tenant Act, approved by the National Conference of Commissioners on Uniform State Laws, has 43 sections which contain substantive provisions relevant to the landlord–tenant relationship for residential real estate and that 30 of those 43 sections have been amended by or deleted from the Nebraska act" (citation omitted)).

added to prohibit tenants from seeking a continuance of an eviction hearing, even for good cause. Nebraska was and remains the only state to have adopted such a law. Another addition permits the use of constructive service in eviction proceedings without any judicial oversight, and as a result, tenants often do not receive actual notice of the eviction proceedings until the sheriff arrives to forcibly remove them from their home following a trial that took place in their absence.[4]

In large part, the equilibrium of the Uniform Act was upset because of asymmetric interest representation in the capitol in 1973–1974. With limited presence of tenant or housing advocates, the real estate and landlord lobbies (collectively, the real estate lobby) were successful in crafting a compilation of haphazardly created statutes that have favored landlords to the detriment of tenants for nearly fifty years. In recent legislative sessions, housing advocates have sought to amend Nebraska's version of the Act to better reflect the balance and uniformity intended by the commissioners, but predictably, such efforts have been met with ferocious opposition from landlord groups keen on maintaining the status quo.

This Article examines Nebraska's "Uniform" Residential Landlord and Tenant Act (Nebraska's Act or the Act), discusses recent attempts by the modern legislature to return balance to the laws governing residential tenancies, and offers guidance for continuing this effort. Part II of the Article offers an overview of landlord–tenant law and why protections are necessary in this unique consumer environment. Part III describes what went down in 1973–1974, when Nebraska's Legislature adopted its version of the Act, and examines select provisions that were substantially and substantively modified from the Uniform Act. Finally, Part IV proposes options to obtain equilibrium and uniformity in the laws governing residential tenancies.

II. OVERVIEW

In 1969, the National Conference of Commissioners of Uniform State Laws—known also as the Uniform Law Commission or ULC—took on the daunting task of codifying state laws governing the transactions and relationships between residential landlords and their te-

4. *See infra* note 191 (describing how many tenants never receive the summons when constructive service is used, but instead learn of pending eviction only as the result of outreach efforts conducted by housing justice programs); *see also Hearing on L.B. 46 Before the Comm. on the Judiciary*, 107th Leg., 1st Reg. Sess. 63 (Neb. Jan. 27, 2021) (statement of Abbie Kuntz, Attorney, Legal Aid of Nebraska), https://www.nebraskalegislature.gov/FloorDocs/107/PDF/Transcripts/Judiciary/2021-01-27.pdf [https://perma.cc/B6FS-9V6F] (testifying that constructive service "results in tenants being less likely to receive proper notice and . . . less likely to appear for their hearings where they will eventually get evicted").

nants. After two years of study by the American Bar Foundation, followed by three years of intellectual labor by the ULC, the Uniform Act was ready for consumption. Twenty-one states adopted the Uniform Act in whole or part, including Nebraska.[5] While most states adopted the Uniform Act in its intended form with few modifications, Nebraska took a different approach.[6] After the bill was introduced, apparent pressure from the real estate lobby, coupled with the absence of tenant advocacy, steered the legislature toward an act that ignored the ULC's years of research and intentional calibration between conflicting interests. Whether the result of lobbyist pressure or other considerations, the legislature removed many of the provisions that would have provided necessary protections to tenants and injected new text that greatly favored landlords. The net result was an anything-but-uniform hodgepodge of statutes that not only obliterated the central purposes of the Uniform Act but also took away many of the rights tenants had under existing law and gave landlords additional leverage and power over tenants.

The conventional purpose of many acts that govern transactions between parties is to recognize the immense disparity in bargaining power between them—so immense that permitting the parties to freely contract would undoubtedly and consistently result in unconscionable outcomes.[7] Such acts include the Federal Truth in Lending

5. *See* UNIF. L. COMM'N, 2020–2021 GUIDE TO UNIFORM AND MODEL ACTS 50 (2021) [hereinafter 2020–2021 GUIDE TO MODEL & UNIFORM ACTS], https://cdn.ymaws.com/www.nabenet.org/resource/resmgr/gr_2020/2020-2021_guide_to_uniform_a.pdf [https://perma.cc/5BFA-NA9Y].

6. *See Mason*, 231 Neb. at 931, 439 N.W.2d at 64. It is unclear why the ULC reported that Nebraska enacted the Uniform Act when it clearly had not. 2020–2021 GUIDE TO MODEL & UNIFORM ACTS, *supra* note 5 (indicating Nebraska enacted the Uniform Act as proposed). Historical records obtained from the ULC suggest it may have received incomplete or misleading reports of what transpired in Nebraska. *See* UNIF. L. COMM'N, URLTA REPORT (1975) (on file with author) (stating that Nebraska had adopted the URLTA with "minor variations from the Uniform Act" and then listing only five of the thirty departures from the Uniform Act); *see also* UNIF. L. COMM'N, LEGISLATIVE REPORT (1974) (on file with author) (inaccurately indicating that Nebraska had adopted the Uniform Act and that the amendments brought by landlord and realtor groups had been "beaten back, and a good act finally succeeded"). Other explanations as to why the ULC may have mistakenly understood Nebraska to have adopted the Uniform Act could be Nebraska's misuse of the word "Uniform" in the title of its version of the act or its retention of § 1.102. In any event, it was then and remains today disingenuous and misleading to refer to an act as "Uniform" when it bears little resemblance to its parent, or any other act in the nation governing residential tenancy.

7. *See* Phillip I. Blumberg, *Consumer Protection in the United States: Control of Unfair or Unconscionable Practices*, 34 AM. J. COMPAR. L. SUPPLEMENT 99, 108–10 (1986) (observing that the ULC "has approved and proposed no less than ten Model or Uniform Acts dealing with specialized areas of consumer protection for adoption by the various states that provide remedies against 'unfair' or 'unconscionable' dealings," which encompasses disparities in bargaining power); *see also*

Act[8] and the Federal Fair Debt Collection Practices Act,[9] and state laws such as Nebraska's Consumer Protection Act,[10] Fair Housing Act,[11] and Uniform Deceptive Trade Practice Act.[12] A common thread among these acts is an aim to bring balance to an otherwise imbalanced relationship. While such acts primarily seek to protect the more vulnerable and less sophisticated party to the transaction, they typically also include provisions favorable to the more powerful party in order to provide balance and ensure adoption. The uniform acts developed and proposed by the ULC are intended to be adopted with minimal modification, as most of the negotiating, compromising, and general tinkering have already taken place.[13] While minor modifications are often necessary to sync a uniform act with a state's related statutes, any significant change risks diluting the uniformity and cohesion of an act's intertwining provisions. More importantly, alterations risk upsetting the underlying purpose of the law as well as the uniformity and balance it seeks to maintain or, in the case of consumer protection laws, to gain.

Unfortunately, the Nebraska Legislature apparently was undeterred by these risks when it indiscriminately chopped, moved, modified, and added language at the behest of a powerful real estate lobby seeking to preserve certain legal and practical advantages that the Uni-

---

1 HOWARD J. ALPERIN & ROLAND F. CHASE, CONSUMER LAW: SALES PRACTICES AND CREDIT REGULATION § 102 (2021) (noting the promulgation of model laws to help shield consumers "from deceptive and unconscionable sales practices" in consumer transactions); *id.* § 187 (discussing unconscionability and inequality of bargaining power in consumer transactions).

8. 15 U.S.C. §§ 1601–1667f.
9. *Id.* §§ 1692–1692p.
10. NEB. REV. STAT. §§ 59-1601 to –1622 (Cum. Supp. 2020).
11. *Id.* §§ 20-301 to –344.
12. *Id.* §§ 87-301 to –306.
13. *See* 2020–2021 GUIDE TO MODEL & UNIFORM ACTS, *supra* note 5, prologue ("The ULC improves the law by providing states with non-partisan, carefully-considered, and well-drafted legislation that brings clarity and stability to critical areas of the law."); *see also* Travis Andrews, Note, *Technology & Legal Ethics: The Need for Uniform Regulation*, 7 CHARLOTTE L. REV. 185, 210 (2016) ("[The ULC] urge[s] state legislatures 'to adopt the Uniform Acts exactly as written, to promote uniformity in the law among the states.'" (citation omitted); LEE F. PEOPLES, CONSUMER LAW: A LEGAL RESEARCH GUIDE, 29 (2012) ("Although it is the prerogative of each state's legislature to adopt a particular law in full or to adopt and modify it, state legislatures are encouraged to adopt uniform acts exactly as written to promote uniformity among the states."); *Hearing on L.B. 293 Before the Comm. on the Judiciary*, 83d Leg., 1st Sess. 41 (Neb. 1973) [hereinafter *L.B. 293 Judiciary Comm. Hearing*] (statement by Professor Wallace Rudolph) (Professor Rudolph, who assisted Senator Harold D. Simpson in the introduction of LB 293 as a commissioner on uniform state laws, stated that the Uniform Act was "[t]he result of . . . three years of work with real estate people, mortgage people, landlord groups, tenant groups and it has gone through a number of drafts and considerable consideration during this three years").

form Act, as proposed, would have extinguished. What ultimately transpired in Nebraska's adoption of the Uniform Residential Landlord and Tenant Act, together with amendments in the decades that followed, was the removal of several of the tenant-protective provisions that had served as the foundation of the commission's Uniform Act while leaving most of the landlord-favorable provisions intact. In the end, a uniform act that was intended in part to expand the rights and protections provided to tenants under common law actually did the opposite in many respects. Landlords gained streamlined evictions,[14] a right to reimbursement of attorneys' fees for nearly every claim that could be asserted under the Act,[15] significant liquidated damages against tenants even where actual damages were absent,[16] minimal notice requirements,[17] expanded access,[18] and limited liability.[19] Tenants, on the other hand, gained very little by comparison. In

14. *See* Legis. B. 293, 83d Leg., 2d Reg. Sess. §§ 40–47 (Neb. 1974) (enacted) (codified as NEB. REV. STAT. §§ 76-1401 to -1449 (Cum. Supp. 1974)).
15. *See id.* § 28(1) (stating that a "landlord may recover reasonable attorney's fees" if a tenant brings a meritless defense or counterclaim not in good faith); *id.* § 31(3) (providing for landlord's recovery of reasonable attorney's fees for a tenant's willful noncompliance with the rental agreement or duties under section 21); *id.* § 35 (providing that a landlord may be entitled to recover reasonable attorney's fees "[i]f the rental agreement is terminated"); *id.* § 37(3) (providing that a landlord may recover reasonable attorney's fees if the tenant holds over without permission after the lease terminates); *id.* § 38(1) (allowing a landlord to recover reasonable attorney's fees if the tenant refuses to allow lawful access to the dwelling unit).
16. *See id.* § 26(2) (allowing recovery of three times the actual damages or up to three months' periodic rent against a tenant who fails to deliver possession, if such failure is willful and not in good faith); *id.* § 37(3) (allowing a landlord to recover three times actual damages or up to three months' periodic rent if a tenant without permission holds over after their lease term ends).
17. *See, e.g.*, *id.* § 23 (permitting landlords to enter the tenant's private living space with only one day's notice, and no notice in emergency situations); *id.* § 31(2) (providing that a landlord may initiate an action for restitution for nonpayment of rent after only three days' notice to the tenant, rather than the fourteen days suggested by the ULC); *id.* § 37(1) (allowing the landlord to "terminate a week-to-week tenancy" by giving the other party only seven days' written notice, rather than the fourteen days suggested by the ULC); *id.* § 37(2) (allowing the landlord to "terminate a month-to-month tenancy" by giving the tenant only thirty days' written notice, rather than the sixty days suggested by the ULC).
18. *See id.* § 23.
19. *See id.* § 18 (providing that a landlord may not be held liable for failing to "deliver possession of the premises to the tenant" where a third party remains unlawfully in possession and the landlord has made "reasonable efforts to obtain possession of the premises"); *id.* § 20(1) (relieving a landlord "of liability under the rental agreement" or the Act for events that occur after the landlord gives the tenant written notice that the property will be conveyed to a bona fide purchaser); *id.* § 25(2) (providing that a tenant may not recover consequential damages if a landlord's noncompliance with the rental agreement or the Act was "caused by conditions or circumstances beyond [the landlord's] control"); *id.* § 27(3) (limiting in several ways the remedies available to a tenant).

fact, certain rights that had been available under existing law were eliminated, including the right to make repairs to the property when the landlord refused to do so and an opportunity to continue a hearing for good cause.

Some might argue that the breadth of landlord-favorable departures from the Uniform Act was justified because the Uniform Act was not a balanced approach but instead favored the interests of tenants. However, most critics find that in general, the ULC process for developing uniform laws typically results in terms that favor wealthier, more powerful groups.[20] In fact, as the Uniform Act was being developed, it was generally viewed as a set of laws written for the benefit of landlords.[21] While reasonable minds can disagree on this point, a simple scorecard reveals that for every benefit the Uniform Act offered a tenant, the landlord received at least one in return. As detailed below in Part III, the scorecard for Nebraska's Act depicts an outcome that undisputedly favored landlords.

III. LEGISLATIVE HISTORY OF NEBRASKA'S ACT

Nebraska's Act was introduced as Legislative Bill (LB) 293 by Senator Harold Simpson. The intent, as described by Senator Simpson, was to "put down into law what now [is] taken care of by case law and common law concerning rental agreements between landlords and tenants."[22] The record indicates that no tenant groups were involved in

20. *See* Gail Hillebrand, *What's Wrong with the Uniform Law Process*, 52 HASTINGS L.J. 631, 631–32 (2001) (describing the "pay to play" process where more powerful associations and organizations are better represented at ULC meetings because attending numerous meetings spanning several years is often cost prohibitive to consumer groups); *see also* Andrew C. Spiropoulos, Essay *The Uniform Law Process: Observations of a Detached Participant*, 27 OKLA. CITY U. L. REV. 585, 590–92 (2002) (dissecting criticisms of the ULC and concluding: "The bottom line of these criticisms is that the [ULC] process makes it far too easy for interest groups representing the wealthy and powerful to obtain legislation they want or to block legislation they do not like"); Kathleen Patchel, *Interest Group Politics, Federalism, and the Uniform Law Process: Some Lessons from the Uniform Commercial Code*, 78 MINN. L. REV. 83, 131, n.208 (1993) ("Lawyers of all kinds tend to have a vested interest in the *status quo*; a reasonably high proportion of the members of [the ALI and the ULC], especially the ALI, could be expected to be moderately 'liberal,' but without seriously challenging established institutions and ways of doing things." (quoting WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 291 (1973))).

21. *See, e.g.*, *L.B. 293 Judiciary Comm. Hearing*, *supra* note 13, at 45 (statement of Professor Wallace Rudolf) (discussing the input from tenant organizations during the development of the Act, and conveying that "[a]t the Vail meeting when [the Uniform Act] was being discussed, we had three busloads of people in from Denver who were objecting to this bill because it was a landlords [sic] bill as far they were concerned").

22. *Id.* at 41 (statement of Sen. Harold Simpson).

the drafting of the bill as introduced.[23] This is corroborated by the series of modifications made to the Uniform Act before its appearance as LB 293: of the nineteen sections substantively altered from the Uniform Act before introduction, four were neutral in nature,[24] fourteen were favorable to landlords,[25] and only two could be viewed as benefiting tenants.[26] However, these departures from the Uniform Act that occurred prior to introduction were negligible compared to the landlord-favoring changes made during the period following the bill's introduction, wherein the real estate lobby pushed for a series of amendments that left the bill virtually unrecognizable by the time it was presented to the Governor.

The bill was called up for public hearing before the Judiciary Committee on February 7, 1973. Considering the real estate lobby's dominant role in the drafting of the bill, and in view of the final product that undeniably favored landlords, one might assume the hearing transcript would reveal strong support for the bill from the real estate lobby, and opposition from those advocating for fair housing—but it was just the opposite. Even with the initial departures from the Uniform Act, nearly all of which benefitting landlords, housing advocates testified in support of the bill as proposed, finding it to be both necessary and fair.[27] Lobbyists representing a half dozen landlord and real estate associations testified in opposition.[28] The opposition camp offered a series of additional amendments to the already maligned legis-

23. *Id.* at 42 (statement of Professor Wallace Rudolph) ("I talked to landlord groups. I haven't talked to any tenant groups. . . . We have been dealing mostly with landlord groups and not with tenant groups, as far as conferences on this bill.").

24. *See* Legis. B. 293, 83d Leg., 2d Reg. Sess. §§ 8, 28, 38 (Neb. 1974) (enacted); UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 4.202 (UNIF. L. COMM'N 1972) (removed by amendment after introduction).

25. *See* Legis. B. 293 §§ 6, 10, 12, 15, 16, 18–23, 25, 27, 29–33, 35–37, 39 (enacted); *see also* UNIF. RESIDENTIAL LANDLORD & TENANT ACT §§ 1.402, 1.404, 4.103 (UNIF. L. COMM'N 1972) (removed by amendment after introduction).

26. *See* Legis. B. 293 § 34 (enacted).

27. *L.B. 293 Judiciary Comm. Hearing*, *supra* note 13, at 48–49 (statement of Carol Reilly, League of Women Voters) (conveying the League's position that the laws proposed would be beneficial to landlords and tenants alike); *id.* at 50–51 (statement of Maggie Malloy, Lincoln Action Program) (discussing the program's work with low-income families and stating that the program "support[s] and encourage[s] the passage of LB 293 in its full intent"); *id.* at 52 (statement of Bea Richmond, President, Citywide Tenants Association) ("We think this is a well written bill and it would give equal rights to the tenants and to the landlord as well.").

28. *Id.* at 57–64 (statement of Phil Wayne) (testifying on behalf of an ad hoc committee comprised of the Metropolitan Omaha Builders Association, the State Homebuilders Association, the Nebraska Real Estate Board, the Institute of Real Estate Management, and the Builders, Owners and Managers Association); *id.* at 65–68 (statement of David Beber, Attorney, Omaha Housing Authority); *id.* at 68–71 (statement of Arlen Beam, Attorney, Nebraska State Homebuilders Association).

lation.[29] The committee, recognizing the breadth and complexity of the amendments, as well as the weight of opposition to the bill in its present form, held the bill in committee to allow time for "the various parties who have testified [to] attempt to bring back some consolidated set of amendments to this committee."[30]

The legislative history is void of precisely what transpired between the bill's introduction and its advancement out of committee, but the committee amendment made in tandem with the advancement of the bill suggests that housing advocates were only minimally involved, if at all.[31] This is a reasonable inference in part because in legislative matters involving vulnerable populations, advocacy for such populations is typically limited to public and expert testimony offered during committee hearings. Advocates testifying on behalf of these populations are most often volunteers or service providers, not professional lobbyists who can remain in the capitol for the remainder of the session or who have the capacity or resources to lobby senators yearround. The presumption is also supported by the bill's transformation between introduction and enactment, with all changes favoring landlords.

By the time it was signed into law, the Eighty-Third Legislature had substantively modified twenty-six out of the forty-three sections proposed by the Uniform Act,[32] discarded four sections entirely,[33] and added another eight sections prescribing an expedited eviction procedure,[34] plus one more to govern appeals.[35] While some departures from the Uniform Act resulted in harmless or neutral impact on tenants, most changes were moderately, if not extremely, detrimental to their interests. In fact, of the thirty sections changed or deleted by the Nebraska Legislature before adoption, four were neutral in effect,[36]

29. *Id.* at 68–70 (statement of Arlen Beam) (testifying on behalf of the Nebraska State Homebuilder's Association and proposing a series of amendments to LB 293 that were presumably incorporated into the Committee Amendment later proposed and adopted).

30. *Id.* at 70 (statement of Sen. Richard M. Fellman).

31. While several of the eighteen itemized changes proposed through the committee amendment were neutral in effect, the vast majority appeared to be written by landlords for landlords. Not one change proposed in the committee amendment could be viewed as an improvement to the law in a way that benefited tenants.

32. *See* Legis. B. 293, 83d Leg., 2d Reg. Sess. §§ 6, 8, 10, 12, 15–16, 18–23, 25, 27–39 (Neb. 1974) (enacted).

33. *See* UNIF. RESIDENTIAL LANDLORD & TENANT ACT §§ 1.402, 1.404, 4.103, 4.202 (UNIF. L. COMM'N 1972).

34. *See* Legis. B. 293 §§ 40–47 (enacted).

35. *Id.* at § 48.

36. *See id.* § 8 (adding rental agreements for "improved or unimproved residential land for a term of fifteen years or more" to the list of leaseholds that are excluded from the Act); § 28 (inserting minor grammatical changes); § 38 (changing the available recovery from "damages" to "actual damages"); *see also* UNIF. RESIDEN-

twenty-five were favorable to landlords,[37] and only one could be deemed an improvement from the tenant's perspective.[38]

Set out below are examples of Uniform Act provisions that were modified to the benefit of landlords, provisions favorable to tenants

---

TIAL LANDLORD & TENANT ACT § 4.202 (UNIF. L. COMM'N 1972) (governing tenant's failure to maintain; amended out of the bill following introduction).

37. *See* Legis. B. 293 § 6 (enacted) (removing the good faith requirement for the settlement of disputes); *id.* § 10 (narrowing the definition of building and housing codes in subsection 2 to include only housing codes "dealing specifically with health and minimum standards for habitation," among other alterations); *id.* § 12 (removing a court's ability to "refuse to enforce" an unconscionable settlement); *id.* § 15 (limiting a landlord's liability to only those instances where the landlord's conduct amounted to "active and actionable negligence" and eliminating tenant access to liquidated damages); *id.* § 16 (eliminating the tenant's access to liquidated damages); *id.* § 18 (limiting landlords' liability for failure to deliver possession); *id.* § 19 (providing a landlord need only "substantially comply" with applicable "housing codes materially affecting health and safety" and adding that compliance is only required after the landlord receives written notice, among other changes); *id.* § 20 (removing a landlord's continued liability if the landlord assigns the "security deposits or prepaid rent to a bona fide purchaser with written notice to the tenant"); *id.* § 21 (expanding tenants' duties and responsibilities with regard to maintenance and use of the premises); *id.* § 22 (adding appearance of the property to the list of acceptable reasons for a landlord to adopt a rule or regulation governing a tenant's occupancy and removing the requirement that a tenant consent in writing to any subsequently adopted rule or regulation); *id.* § 23 (reducing the amount of notice required before a landlord may enter the tenant's dwelling from two days to one day); *id.* § 25 (providing that a tenant cannot recover consequential damages for landlord noncompliance when it is the result of conditions outside the landlord's control); *id.* § 27 (providing that a landlord's failure to supply "running water, hot water, heat, or [other] essential services" must be deliberate in order for tenants to recover under the section); *id.* § 29 (adding that a "tenant is responsible for damage caused by his negligence"); *id.* § 30 (removing heat and hot water from the essential services of which a landlord's willful diminution entitles a tenant to damages); *id.* § 31 (reducing the notice period for claimed failure to pay rent from fourteen days to three days); *id.* § 32 (broadening the definition of abandonment); *id.* § 33 (adding language to align with landlord-favorable modifications to section 21); *id.* § 35 (changing "the landlord may have a claim for possession" to "the landlord is entitled to possession"); *id.* § 36 (removing heat and hot water from the list of essential services of which a landlord may not cause an interruption); *id.* § 37 (reducing the amount of written notice a landlord must give a tenant when terminating a short-term tenancy); *id.* § 39 (removing a tenant's complaint to their landlord of a violation of the landlord's duty to maintain the premises from the list of protected conduct, eliminating the rebuttable presumption, and allowing for "reasonable" retaliation); *see also* UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 1.402 (UNIF. L. COMM'N 1972) (addressing impacts of unsigned and undelivered lease agreements; removed by amendment after introduction); *id.* § 1.404 (providing that no instrument may permit a landlord to receive rent without imposing an "obligation . . . to maintain the premises;" removed by amendment after introduction); *id.* § 4.103 (providing tenants with self-help remedies to address minor defects; removed by amendment after introduction).

38. *See* Legis. B. 293 § 34 (enacted) (making any lien in the tenant's household goods on behalf of a landlord unenforceable).

that remained but were left toothless due to the removal of language that would have made them enforceable, tenant-favorable provisions that were removed, and landlord-favorable provisions that were added. Also included in the discussion below are additional landlord-supported amendments adopted by the legislature after the enactment of Nebraska's Act.

A. Significant Modifications Favoring Landlords

1. Section 76-1431(2): Reducing Notice Period for Nonpayment of Rent

Arguably the most debilitating departure from the Uniform Act was to the provision that became section 76-1431(2). Section 76-1431 contains the two primary grounds supporting a cause of action for restitution: subsection 2 provides a cause of action for nonpayment of rent, and subsection 1 provides a cause for virtually any other violation of the terms of the rental agreement. The language used for section 76-1431(2) was nearly identical to that in the Uniform Act except for one word—one word that effectively deprived tenants of a reasonable opportunity to avoid the termination of their tenancy when financial troubles arose. Subsection 2 provides that if a tenant does not pay rent when due, the landlord may provide the tenant written notice of the nonpayment and the landlord's intention to terminate the rental agreement if the rent is not paid within the statutory notice period. The Uniform Act set the notice period at fourteen days.[39] The ULC presumably determined that fourteen days was a reasonable and appropriate amount of time to allow a tenant to become current on rent and avoid termination of the tenancy. Nebraska, however, set the notice period at only *three* days.[40] This meant that in instances where

39. UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 4.201 (UNIF. L. COMM'N 1972); *see also* REV. UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 601 (UNIF. L. COMM'N 2015), https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=AF050844-2bcb-7cee-0683-9d07d27fb987 [https://perma.cc/FX9V-R3SY] (still suggesting fourteen days).

40. In opting for the three-day notice, Nebraska simply retained its current practice under common law. *See* R. Ladd Lonnquist & R. Michael Healey, *A Prospectus on the Uniform Residential Landlord and Tenant Act in Nebraska*, 8 CREIGHTON L. REV. 336, 380 (1975) ("The Nebraska version of URLTA reduced the period in which a tenant may remedy his failure to make rental payments to three days from the date that notice is received, rather than the suggested 14. Consequently, this modification merely retains existing Nebraska practice." (footnotes omitted)). Note that Nebraska was not alone in refusing to accept the commission's recommendation of fourteen days. *See State Laws on Termination for Nonpayment of Rent*, NOLO, https://www.nolo.com/legal-encyclopedia/state-laws-on-termination-for-nonpayment-of-rent.html [https://perma.cc/74FY-JKZU] (Dec. 10, 2020) (documenting that the notice period adopted by the fifty states range from three to thirty, with seven days being the most common). While a handful of states provide for three-day notices, most also include additional terms that make such a

the notice was mailed, the tenant would receive only one to two days' notice, or perhaps zero days' notice where the notice was sent by a landlord operating out of state.[41]

---

short period more reasonable. For example, the comparable laws in Arkansas, Oregon, and South Dakota utilize the short, three-day notice period, but also provide that a minimum of four, eight, and five days, respectively, must lapse after nonpayment of rent before such notice could be sent. *Id.* Also, California's and Florida's three-day period excludes non-judicial days like weekends and holidays, and Kansas statutorily builds in an additional two days if the notice is mailed. *Id.*

41. *See Hearing on L.B. 434 Before the Comm. on the Judiciary*, 106th Leg. 1st Sess. 95–97 (Neb. Mar. 1, 2019), https://www.nebraskalegislature.gov/FloorDocs/106/PDF/Transcripts/Judiciary/2019-03-01.pdf [https://perma.cc/7BBT-QKPT] (testimony from proponents of LB 434 describing examples where a three-day notice effectively resulted in a zero-day notice). *But see id.* at 100–01 (testimony of Scott Hoffman, local landlord) (describing his understanding that two days' mail time must be added to the three-day notice). At present, Nebraska law remains unsettled whether such notice is effective on the date it is mailed, or on the date it is delivered. *See id.* at 107 (statement of Sen. Matt Hansen, introducer of LB 434) ("I think there's different interpretations of how that three-day notice runs in the mail."). Section 76-1413(2) of Nebraska's Act specifically provides that written notice to a tenant is effective when it is either "delivered in hand to the tenant or *mailed* to him." (emphasis added). However, Section 76-1413(1), which should be interpreted to inform subsection 2, provides that "[a] person has notice of a fact if (a) he has actual notice of it, (b) he has received a notice or notification of it, or (c) from all the circumstances known to him at the time in question he has reason to know it exists." Thus, mailed notice in route to the tenant would not satisfy subsection 1— the tenant is effectively notified only upon receipt. Moreover, an argument could be made that Nebraska Court Rule section 6-1106(e) should apply here (automatically adding three days if notice is served by means other than hand delivery)—either directly or in spirit. Neb. Ct. R. Pldg. § 6-1106(e); *cf.* ATM One, LLC v. Landaverde, 763 N.Y.S.2d 631, 633 (N.Y. App. Div. 2003) (finding that commencing the statutorily required notice period when the tenant *receives* notice is proper because "it avoids the possibility that, in a case involving an abnormally extended delay in the delivery of the mail, a tenant might not be told of the date within which he or she may cure a violation until after that date has actually passed"), *aff'd*, 812 N.E.2d 298, 301 (N.Y. 2004) (affirming the lower court's decision in favor of the tenant, and approving the district court's application of the concept embodied in rule number 2103(b)(2), N.Y. C.P.L.R. 2103(b)(2) (CONSOL. 2020)—a corollary of NEB. REV. STAT. § 6-1106(e) (Cum. Supp. 2018)—and ultimately holding "that owners who elect to serve by mail must compute the date certain by adding five days to the 10-day minimum cure period." (citation omitted)). Additional commentary on the timing issue can be found in *Jefferson Garden Assocs. v. Greene*, 520 A.2d 173, 184 (Conn. 1987). The court, citing to 24 C.F.R. § 247.4 for support, determined that notice is to be deemed *received* on the date it is mailed or the date it is hand delivered or posted on the door, whichever is *later*, recognizing the need for the tenant to *receive* the notice in some manner in order for the notice period to begin. The court ultimately held "[w]hen there has been actual timely service upon a tenant, nothing in our statute or these regulations postpones 'receipt of the notice' until *delivery* of a mailed notice of impending termination." *Id.* Thus, in Nebraska, where the notice can be hand delivered *or* mailed rather than hand delivered *and* mailed, it would be reasonable to read subsections 76-1413(1) and (2) together to find that service would not be complete until it is received by the tenant, either by hand-delivery or mail, or where the tenant has otherwise been made aware of it. *See* NEB. REV. STAT. § 76-

Of course, from the landlord's perspective, each day it must wait before initiating eviction proceedings is a day of lost revenue, and many landlords already build in a short grace period before the notice is even issued. Nonetheless, three days is an incredibly short amount of time for a typical working-class family to cure the default. No other scenario involving the collection of money past due has such a short cure period and such a severe penalty for failing to meet the deadline. By comparison, when the home is owned by a bank rather than a landlord and the resident of the property is making mortgage payments instead of lease payments, the resident is provided *several months* to cure a default before eviction proceedings may begin.[42] Thus, even fourteen days, as proposed by the ULC, is quite short when compared to what the law provides to others similarly situated.[43]

1312(1)–(2) (Cum. Supp. 2018). In *War Eagle Village Apartments v. Plummer*, 775 N.W.2d 714 (Iowa 2009), the Supreme Court of Iowa held that using certified mail to serve a three-day notice in forcible entry and detainer (FED) actions "violates the due process clause of the Iowa Constitution on its face" because Iowa's statutory scheme made service complete upon the date notice was mailed, and therefore service could not be "reasonably calculated to reach the intended recipient at a meaningful time," *id.* at 723. The Iowa statute deemed unconstitutional in *Plummer* was subsequently amended to add the following: "A notice to quit served by mail under this section is deemed completed four days after the notice is deposited in the mail and postmarked for delivery, whether or not the recipient signs a receipt for the notice." *See* IOWA CODE § 648.3 (2010). The easiest way to resolve this question in Nebraska would be for the Nebraska Supreme Court or Nebraska Legislature to make clear that the concept within Nebraska Court Rule section 6-1106(e) would apply to all legal notices where the effective date of the notice is of legal significance. Neb. Ct. R. Pldg. § 6-1106(e)

42. *See* 12 C.F.R. § 1024.41 (2021) (providing that foreclosure proceedings cannot begin until a mortgage payment is more than 120 days delinquent); NEB. REV. STAT. § 76-1006 (Cum. Supp. 2020) (providing that following the 120-day period, a notice of default may be sent allowing the mortgagor a full month to cure the default in non-judicial foreclosures in Nebraska); NEB. REV. STAT. § 76-1007 (Cum. Supp. 2020) (mandating that thereafter, a notice of sale must be published for five successive weeks, with the last publication at least ten days before the sale). It is only after all these periods have run that an eviction proceeding may be initiated.

43. It is worth noting the disparate impact these divergent laws for renters and homeowners have on People of Color and people with disabilities, as these populations are more likely to be renters than homeowners. According to U.S. Census data, fifty-eight percent of Black households and fifty-three percent of Hispanic households are renters, compared to only thirty-one of white households. *Demographic Characteristics for Occupied Housing Units*, U.S. CENSUS BUREAU (2018), https://data.census.gov/cedsci/table?q=homeownership&tid=ACSST1Y2018.S2502&vintage=2018. In 2019, 73.3% of white non-Hispanic Americans were homeowners, whereas only 42.1% of Black Americans owned their own homes. *Homeownership Rates Show that Black Americans Are Currently the Least Likely Group To Own Homes*, USAFACTS (Oct. 16, 2020, 2:27 PM), https://usafacts.org/articles/homeownership-rates-by-race/ [https://perma.cc/FXJ5-FZP9]. Further, people with disabilities who are below age sixty-five are more likely to be renters (thirty-seven percent) than people without disabilities (thirty-one percent). NAT'L

Interestingly, while the 1974 legislature found it reasonable to reduce the proposed fourteen-day notice period to only three days for matters involving nonpayment of rent, it retained the fourteen-day notice periods for several other situations involving default. Pursuant to section 76-1431(1), if a tenant is in violation of the term of the rental agreement (other than nonpayment of rent), the landlord may provide them a written notice and fourteen days to cure the default; if the default is not cured within fourteen days, the tenancy will terminate after thirty days from the date of the initial notice.[44] Similarly, section 76-1425 provides a fourteen-day notice period for a landlord whose breach of the lease materially affects the tenant's health and safety.[45]

While housing advocates supported the Act as proposed, a version that included the three-day rather than fourteen-day notice period, one can assume that such support likely contemplated that the rest of the bill would remain fundamentally unchanged. Doubtless, advocates placed some reliance on the language in the bill, as introduced, that would have guaranteed a tenant at least ten days to vacate the premises after a hearing granting restitution to the landlord; this reliance proved misguided, however, as that provision was modified after introduction to allow the landlord to eject the tenant *immediately* following the hearing.[46]

As discussed in more detail below, a bill was introduced and passed in the 2019–2020 legislative session that increased the three-day no-

---

COUNCIL ON DISABILITY, THE STATE OF HOUSING IN AMERICA IN THE 21ST CENTURY: A DISABILITY PERSPECTIVE 28 (2010), https://ncd.gov/publications/2010/jan192010 [http://perma.cc/7TDC-BH72]. Although one could assert that there are reasonable grounds for treating these two groups differently (e.g., a homeowner could have equity in their home while a tenant would not), these arguments only highlight the existence of other inequities in our system (i.e., that People of Color and people with disabilities, by and large, have less opportunity to possess equity in a home) and therefore fail to justify the extreme disparities in treatment under the current legal framework. Centuries of public and private action, including federal housing and loan programs, intentionally facilitated white homeownership and allowed white households "to build and transfer assets across generations, contributing to glaring racial disparities in homeownership and wealth." *See* Danyelle Solomon, Connor Maxwell & Abril Castro, *Systemic Inequality: Displacement, Exclusion, and Segregation*, CTR. FOR AM. PROGRESS (Aug. 7, 2019), https://www.americanprogress.org/article/systemic-inequality-displacement-exclusion-segregation/ [https://perma.cc/3X7X-76X5].

44. *See* Legis. B. 293, 83d Leg., 2d Reg. Sess. § 31(1) (Neb. 1974) (enacted) (codified as NEB. REV. STAT. § 76-1431(1) (Cum. Supp. 1974)).

45. *See id.* § 25 (codified as NEB. REV. STAT. § 76-1425 (Cum. Supp. 1974)).

46. *See infra* note 173 and accompanying text, discussing modifications made to section 46 of the Act that changed the date on which a writ of restitution was to restore possession to the dwelling unit's owner from *at least* ten days to *no more than* seven days (later amended to "no more than ten days").

tice period to seven days.[47] Rather than jumping to the fourteen-day notice period suggested by the ULC, a compromise proposed by housing advocates and introduced as LB 434 suggested a seven-day notice, plus a seven-day period during which the tenant could redeem the tenancy by paying the rent in full before the expiration of the second seven-day period.[48] The period of redemption would have allowed the landlord to initiate eviction proceedings immediately after the first seven-day period expired, so as to not unnecessarily delay matters where eviction was inevitable; but where the tenant was able to come up with the rent before the final hearing, they would have the opportunity to cure the default and stay housed. This concept was aggressively opposed by the real estate lobby,[49] and ultimately agreement was found on lengthening the notice period from three to seven days.[50]

2. Section 76-1437: Reducing Notice Period for Terminating Periodic Tenancies

In a similar vein, the legislature adopted notice periods for terminating periodic tenancies that were shorter than those suggested by the ULC: thirty days for a month-to-month tenancy, rather than sixty,[51] and seven days for a week-to-week tenancy rather than ten.[52]

---

47. *See* Legis. B. 433, 106th Leg., 1st Reg. Sess. (Neb. 2019) (enacted) (this bill, as adopted by the Nebraska Legislature, was amended by AM 981 to include portions of LB 434); *infra* Part IV.

48. *See* Legis. B. 434, 106th Leg., 1st Reg. Sess. (as introduced, Neb. Jan. 18, 2019); *Hearing on L.B. 434 Before the Comm. on the Judiciary*, 106th Leg. 1st Sess. 89–90 (Neb. Mar. 1, 2019), https://www.nebraskalegislature.gov/FloorDocs/106/PDF/Transcripts/Judiciary/2019-03-01.pdf [https://perma.cc/7PEB-QBVD] (statement by the bill's introducer, Sen. Matt Hansen) ("[The bill] is a good middle ground that would have real-life benefits to renters, giving them a full week's notice, while at the same time being fair to landlords who are just trying to get rent paid on their properties."); *id*. at 93–95 (statement of Leigha Wichelt, student at the University of Nebraska College of Law) (testifying that the proposal is fair, particularly where landlords are given fourteen days to cure their own default before a tenant may terminate the lease).

49. *See, e.g*., *id*. at 100 (statement by John Chatelain, president of the Metro Omaha Property Owners Association) ("[T]his right of redemption I think is an unfair burden on the landlord because . . . they may be at their wit's end trying to work with this person by that point."); *id*. at 103 (statement of Scott Hoffman, local landlord) (referring to the right to redemption as a "get out of jail free card."). The redemption would not have been *free*; in order to redeem, the tenant would have to pay all past due rent, late fees, and court costs incurred. *See id.*

50. *See infra* Part IV.

51. *Compare* UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 4.301(b) (UNIF. L. COMM'N 1972), *with* Legis. B. 293, 83d Leg., 2d Reg. Sess. § 37(2) (Neb. 1974) (enacted).

52. *Compare* UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 4.301(a) (UNIF. L. COMM'N 1972), *with* Legis. B. 293, § 37(1) (enacted).

Here again, the legislature opted to retain current practices[53] rather than modernize.

3. Removal of Right to Jury Trial

As adopted, the Act did not restrict a tenant's access to a trial by jury in an action for restitution.[54] However, in 1995, the real estate lobby was successful in passing an amendment to deprive tenants of this right.[55] Although it has never been challenged at the appellate level, the restriction is likely unconstitutional.[56] Article I, section 6 of the Nebraska Constitution provides: "The right of trial by jury shall remain inviolate."[57] The Nebraska Supreme Court has held that this provision "preserve[s] the right to a jury trial as it existed at common law and under statutes in force when the Nebraska Constitution was adopted in 1875."[58] At that time, actions for possession proceeded under the forcible entry and detainer (FED) statutes, which provided

53. *See* Alloway v. Aiken, 146 Neb. 714, 720, 21 N.W.2d 495, 497–98 (1946) (establishing that notice to terminate a periodic lease shall be no less than the length of the periodic tenancy, unless by agreement).

54. *Compare* Legis. B. 293 § 46 (enacted) (providing that trial will proceed "as in all other cases"), *with* NEB. REV. STAT. § 76-1446 (Cum. Supp. 2020) (adding that an action for possession "shall be tried by the court without a jury," among other changes); *see also* Stephen E. Kalish, *The Nebraska Residential Landlord and Tenant Act*, 54 NEB. L. REV. 603, 694 (1975) (generally evaluating Nebraska's Act shortly after adoption and specifically discussing the issue of whether a party would have a right to a jury trial in a restitution proceeding).

55. Legis. B. 52, 94th Leg., 1st Reg. Sess. § 2 (Neb. 1995) (enacted). A similar bill introduced the year prior was voted out of committee but stalled on the floor. Legis. B. 888, 93rd Leg., 2nd Reg. Sess. (as introduced, Neb. Jan. 5, 1994).

56. *See* Kalish, *supra* note 54, at 694 (discussing the issue and concluding that "the Nebraska Constitution would require each party to have a right to a jury"). It appears from the record that the legislature paid little consideration to the constitutionality of LB 52. The limited discussions of constitutionality encompassed misstatements of the law by Senator Douglas A. Kristensen, the bill's introducer, which apparently went unchecked. For example, during floor debate, the senator commented that the constitutional right to a jury trial "is not an absolute right thing" and evicting a tenant, like small claims and divorce actions, are "of an equity nature," for which the constitution does not require trial by jury. FLOOR DEB., 94th Leg., 1st Reg. Sess. 474 (Neb. Jan. 24, 1995), https://www.nebraskalegislature.gov/FloorDocs/94/PDF/Transcripts/FloorDebate/Floor00474.pdf [https://perma.cc/EX8E-GSJR]. However, a suit for possession is an action at *law*, not in equity. *See* Vance v. Sumner, 119 Neb. 630, 631–32, 230 N.W. 490, 491–92 (1930); *see also* Foltz v. Brakhage, 151 Neb. 216, 219, 36 N.W.2d 768, 770 (1949) ("Ejectment is an action at law and triable to a jury, unless the right is waived, notwithstanding any equitable matters presented in the case." (citations omitted)).

57. NEB. CONST. art. I, § 6.

58. State *ex rel.* Cherry v. Burns, 258 Neb. 216, 223, 602 N.W.2d 477, 482 (1999) (citing State *ex rel.* Douglas v. Schroeder, 222 Neb. 473, 384 N.W.2d 626 (1986)).

for a trial by jury.[59] Today, sections 76-1440 to 76-1447 are deemed merely an "outgrowth of the normal FED action and [are] properly seen as extension of it."[60] Thus, because residential tenants had a right to a trial by jury when the Nebraska Constitution was adopted, they likely still have that right, despite the legislature's attempt to vacate it.

4. Other Landlord-Favorable Departures from the Uniform Act

The abbreviated notice periods and withdrawal of the right to a jury trial perhaps most clearly demonstrate the landlord-favoring imbalance of Nebraska's Act, but it is worth briefly describing the other provisions that diverged from the Uniform Act. Even without assuming that the Uniform Act represented an effective balance of conflicting interests, the following non-exhaustive examples illustrate the sheer quantity of changes made to the advantage of landlords.

Section 76-1410(2): qualified the definition of building and housing codes by adding that the "[m]inimum housing code shall be limited to those laws, resolutions, or ordinances or regulations, or portions thereof, dealing specifically with health and minimum standards for habitation,"[61] thereby constricting the standards to which landlords must adhere.

Section 76-1412: struck a subparagraph that would have prevented landlords from enforcing unconscionable settlement agreements.[62]

Section 76-1415: modified the text to allow language in rental agreements that limits a landlord's liability to only that which stems from "active and actionable negligence."[63]

Section 76-1418: added language to nullify a landlord's liability for failing to deliver possession of the premises to a tenant as long as the landlord makes "reasonable efforts" to do so.[64]

Section 76-1420: inserted language providing that if a landlord sells their property and gives the tenant notice of the assignment to the new owner, the landlord is released from liability for the return of the tenant's deposit.[65]

59. 1866 REV. STAT. TERR. NEB. §§ 1019–1032, 11th Leg. Sess. (current version at §§ 25-21,219–21,235 (Cum. Supp. 2020)); *see id*. § 1028, ("If a jury be demanded by either party, the proceedings, until the empaneling thereof, shall be in all respects as in other cases. The jury shall be sworn or affirmed, to well and truly try and determine whether the complaint of [the plaintiff] about to be laid before them is true according to the evidence.").
60. *See* Kalish, *supra* note 54, at 694.
61. Legis. B. 293, 83d Leg., 2d Reg. Sess. § 10(2) (Neb. 1974) (enacted) (codified as NEB. REV. STAT. § 76-1410(2) (Cum. Supp. 31974)).
62. *Id.* § 12 (codified as NEB. REV. STAT. § 76-1412 (Cum. Supp. 1974)).
63. *Id.* § 15 (codified as NEB. REV. STAT. § 76-1415 (Cum. Supp. 1974)).
64. *Id.* § 18 (codified as NEB. REV. STAT. § 76-1418 (Cum. Supp. 1974)).
65. *Id.* § 20 (codified as NEB. REV. STAT. § 76-1420 (Cum. Supp. 1974)).

Section 76-1421: expanded obligations on tenants in maintaining dwelling units and abiding by certain additional rules and regulations.[66]

Section 76-1422: increased matters about which a landlord could adopt rules, permitting rules related to property appearance, and allowed for rule and regulation changes during the term of a lease without obtaining agreement from tenants, as long as the landlord provides notice.[67]

Section 76-1423: reduced from two to one the number of days' notice a landlord must provide a tenant before entering the premises for reasons other than emergencies.[68]

Section 76-1424: as introduced, provided tenants were only required to notify their landlord when their absence from the property would exceed fourteen days but was later reduced to require notice to the landlord for absences exceeding seven days.[69]

Section 76-1432: refashioned with various modifications making it easier for a landlord to deem the rental agreement terminated by abandonment.[70]

B. Tenant-Favorable Provisions Left Toothless

It has long been acknowledged that an unenforceable right is no right at all.[71] The Uniform Act sought to codify and standardize a

66. *Id.* § 21 (codified as NEB. REV. STAT. § 76-1421 (Cum. Supp. 1974)).
67. *Id.* § 22 (codified as NEB. REV. STAT. § 76-1422 (Cum. Supp. 1974)). Notably, the bill allowed a landlord to require the tenant to abide by rules pertaining to the appearance of the property while eliminating the landlord's obligations to maintain anything that did not specifically affect health and habitable living. *See* note 61 and accompanying text. In short, while a tenant could be responsible for the appearance of the property, the landlord could not.
68. *Id.* § 23 (codified as NEB. REV. STAT. § 76-1423 (Cum. Supp. 1974)).
69. *Id.* § 24 (codified as NEB. REV. STAT. § 76-1424 (Cum. Supp. 1974)). As introduced and supported by tenant advocates, tenants would only be required to notify their landlord of an absence of over two weeks. As adopted, it was identical to what was proposed by the commissioners.
70. *Id.* § 32 (codified as NEB. REV. STAT. § 76-1432 (Cum. Supp. 1974)).
71. *See* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 460 (1897) ("I once heard the late Professor Agassiz say that a German population would rise if you added two cents to the price of a glass of beer. A statute in such a case would be empty words, not because it was wrong, but because it could not be enforced."); *see also* F.P.L., Note, *The Extinguishment of Unenforceable Equitable Restrictions Through the Torrens System*, 19 COLUM. L. REV. 53, 57 n.14 (1919) (describing the conception of a right "not as the basis of a course of action, but as the result reached, the relief given, the remedy obtained. . . . And, under this view, it would seem that an unenforceable right is no right at all" (citing Holmes, *supra*); 134 CONG. REC. 593 (1988) (statement by Rep. Constance Morella) (During a congressional hearing on Senate Joint Resolution 143 to designate the month of April as Fair Housing Month, Representative Morella stated: "We all agree that shelter is a basic human need, but the right to that need must

number of tenant rights—some that had existed in common law and some that were entirely novel. The proposed text setting forth those rights included language necessary to ensure each could be enforced. Unfortunately, while the Nebraska Legislature adopted the text setting forth certain tenant rights, it often removed the remedial language that would have given the provisions teeth. Set out below are four instances where the Nebraska Legislature appeared to placate housing advocates by codifying certain tenant rights, but instead accommodated the real estate lobby by ensuring these rights could not be enforced.

1. Section 76-1415: Prohibited Provisions in Rental Agreement

One of the most substantial modifications that left tenants with unenforceable rights was made to the section governing "Prohibited Provisions in Rental Agreement."[72] As proposed by the ULC, the section itemized four things a rental agreement could not require a tenant to do: (1) agree to waive or forego rights or remedies provided under the Act; (2) "authorize any person to confess judgment on a claim arising out of the rental agreement;" (3) assent to paying the landlord's attorney's fees; and (4) accept "the exculpation or limitation of any liability of the landlord arising under law or" agree to indemnify the landlord for any related costs or liability.[73]

The section as proposed also included language necessary to ensure tenants could enforce these prohibitions; but, presumably at the insistence of the real estate lobby, the enforcement language was altered to leave the section almost entirely useless.[74] As amended:

> (2) A provision prohibited by subsection (1) included in a rental agreement is unenforceable. If a landlord deliberately uses a rental agreement containing provisions known by him to be prohibited, the tenant may recover ~~in addition to his~~ actual damages sustained by him ~~an amount up to [3] months' periodic rent~~ and reasonable attorneys' fees.[75]

Although the legislature left the list of prohibited lease provisions largely untouched, its modification to the enforcement provision ultimately made them, well, unenforceable.[76] Six Uniform Act provisions

---

be constantly reaffirmed. An unenforceable right is no right at all and access to decent and affordable housing goes to the core of American values.").

72. *See* Legis. B. 293 § 15 (enacted).

73. UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 1.403 (UNIF. L. COMM'N 1972).

74. Expressing similar concern in 1974, Professor Lonnquist, in his preliminary evaluation of Nebraska's Act, recognized that "by excising the stronger economic sanction against continued use of illegal provisions, the legislature may have removed the only practical method of effectuating the policy the Act proclaims."). Lonnquist & Healey, *supra* note 40, at 359.

75. *Compare* UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 1.403 (UNIF. L. COMM'N 1972), *with* Legis. B. 293 § 15 (enacted).

76. Even early scholars reviewing the Act expressed this concern, warning that removing the liquidated damages provision "may make the enforcement of the

include statutory damages,[77] suggesting that the ULC found such damages critical to ensure compliance. In fact, the Nebraska Legislature preserved four of these liquidated damages provisions.[78] That these provisions were retained provides at least some indication that the legislature also believed they were necessary.

Because unlawful lease provisions often result in damages that are difficult to quantify, it would be quite challenging for a tenant—who almost never has legal counsel—to recover them.[79] Such obstacles to recovery are one reason liquidated damages are made available and held permissible.[80] Without the liquidated damages provision, land-

---

NRLTA [Nebraska Residential Landlord and Tenant Act] difficult, and it will be argued, in several instances, that the NRLTA would have been better without these deletions." Kalish, *supra* note 54, at 614 n.44.

77. UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 1.403 (UNIF. L. COMM'N 1972) (permitting tenant to recover up to three months' rent when landlord includes a prohibited provisions in the lease); *id.* § 2.101 (allowing tenant to recover double the amount of security deposit if landlord unlawfully withholds it); *id.* § 4.102 (providing that when landlord does not deliver possession to tenant in good faith, tenant may seek the greater of three months' rent or three times the actual damages); *id.* § 4.107 (allowing tenant to recover an amount up to three months' rent or three times the actual damages—whichever is greater—in case of ouster, exclusions, or diminution of service and also permitting the tenant the option to terminate the lease or recover possession); *id.* § 4.301 (stating that a tenant's willful holdover provides the basis for the landlord to recover up to three months' periodic rent or three times the actual damages, whichever amount is greater); *id.* § 4.302 (indicating a landlord's abuse of access permits a tenant to recover up to one month's rent in actual damages as well as reasonable attorney's fees).

78. *See* Legis. B. 293 § 26 (enacted) (codifying § 4.102 of the UNIFORM ACT); *id.* § 30 (codifying § 4.107 of the UNIFORM ACT); *id.* § 37 (enacting § 4.301 of the UNIFORM ACT); *id.* § 38 (enacting § 4.302 of the UNIFORM ACT). As introduced, the bill included all six statutory damages provisions, and only two—the ones that would have benefited tenants—were excised from the bill post-introduction. *Compare id.* § 15 (containing no statutory damages provision), *with* Legis. B. 293, 83rd Legis., 1st Reg. Sess. § 16 (Neb. Jan. 25, 1973) (as introduced) (providing that a tenant may recover statutory damages of up to three months' rent if a landlord purposefully and knowingly uses a prohibited term in a rental agreement); *compare* Legis. B. 293 § 16 (enacted) (containing no liquidated damages provision), *with* Legis. B. 293 § 18 (Neb. Jan. 25, 1973) (as introduced) (providing that a tenant may recover liquidated damages of up to two times the amount of the tenant's security deposit that the landlord "wrongfully withheld").

79. *See, e.g.*, Samuel Jan Brakel & Donald M. McIntyre, *The Uniform Residential Landlord and Tenant Act (URLTA) in Operation: Two Reports*, 1980 AM. BAR FOUND. RSCH. J. 555, 562–63 (citing a Michigan study that found the enactment of laws favorable to tenants made little difference in eviction proceedings because "tenants who do appear in court . . . do [so] without counsel in the vast majority of cases, which, in practical effect, means that their rights are not adequately asserted").

80. *See* Abel v. Conover, 170 Neb. 926, 931, 104 N.W.2d 684, 689 (1960) ("It is clearly within the province of the Legislature to provide for liquidated damages in favor of a private person, although in form a penalty, if the amount provided bears a reasonable relation to the actual damages which might be sustained and which damages are not susceptible of measurement by ordinary pecuniary standards.").

lords in Nebraska were free to include in their leases—essentially contracts of adhesion—any provision they desired with minimal chance of repercussion.[81] This has unsurprisingly resulted in a rental market in Nebraska where lease agreements are laced with unlawful provisions. In 2018, the Civil Clinical Law Program at the University of Nebraska College of Law reviewed forty Nebraska lease agreements and did not find a single lease in full compliance with the Act.[82] Even standard

---

The legislature's decision to retain liquidated damages in four sections puts to rest any argument that the legislature removed comparable provisions from what would become section 76-1415 (and section 76-1416, *see infra* subsection III.B.2) to circumvent concern that such damages could be ruled an unconstitutional penalty. *See infra* note 78 and accompanying text; Kalish, *supra* note 54, at 614 n.44 (discussing the constitutionality of liquidated damages provisions in Nebraska's Act).

81. *See* Kalish, *supra* note 54, at 614 ("The consequences of the 'softer' NRLTA approach will be that landlords may be tempted to include unenforceable clauses in their leases since they may have little to lose by doing so." (footnote omitted)). Although the statute retained the possibility of an award of attorney's fees, such costs can only be ordered by a court along with a judgment favorable to the tenant; thus, even a landlord caught red-handed could avoid paying the tenant's attorney's fees by resolving the matter before final judgment is entered. *See, e.g.*, Salkin v. Jacobsen, 263 Neb. 521, 526, 641 N.W.2d 356, 360 (2002) (noting that the Supreme Court of Nebraska's case law "generally treats attorney fees, where recoverable, as an element of court costs. An award of costs in a judgment is considered part of the judgment" (citations omitted)).

82. Common violative provisions included: an agreement to pay landlord's attorney's fees; unconscionably high late fees (exceeding 1,000% of rent due when annualized); pre-determined mandatory fees automatically deducted from tenant's security deposit to cover costs associated with ordinary wear and tear (often labeled "carpet-cleaning fees" or "repainting fees")—assessed even when tenant caused no damage); acceleration clauses and other terms waiving landlord's duty to mitigate; terms permitting unlawful deductions from tenant's security deposit; terms permitting automatic forfeiture of tenant's security deposit; liquidated damages not permitted by statute; fees assessed to tenant for the cost of installing locks on the premises; terms releasing landlord from all liability for work completed on the premises or limiting landlord's liability to the amount of rent paid by tenant; terms releasing landlord and its agents from all liability for death or injury occurring on the premises; delegation of landlord's duty to maintain the premises; terms limiting landlord's obligation to timely deliver the premises and limiting its damages for failing to do so; language stating that landlord did not waive their right to terminate with acceptance of rent, attempting to subvert section 76-1433; terms requiring foreign college students to pay a higher security deposit; terms requiring college students to adhere to certain rules not required of non-college students; limits on the amount of time tenant has to assert a claim for landlord's violation of the lease agreement (in one instance, the lease stated that if tenant did not notify landlord within five days of the violation, it constituted a total and complete waiver of any objection to landlord's violation); "cancellation fees" if tenant was absent from the property for a certain period of time (in one example, the term permitted landlord to cancel the lease and impose a $1,500 cancellation fee); condition prohibiting tenant from bringing a vehicle into the county unless they leased a parking space from one of landlord's parking lots located in the county; requirement that resident without a U.S. Social Security number pay "the final three installments of the rent on or prior to the date the first installment is due";

form lease agreements generated and disseminated by real estate groups in the state contained numerous violative provisions.[83] As an

waiver of landlord's duty to provide heat, electricity, water, and sewer charges; waiver of landlord's duty to repair major appliances included in the rental unit; requirement that tenant cover costs of damages caused by weather; terms contrary to the provisions of section 76-1432 regarding landlord's right to access the rental unit; terms permitting illegal self-help eviction; terms extending the period by when the security deposit must be returned (section 76-1416(2) requires it to be returned within fourteen days, but the lease term provided landlord could wait up to sixty days); terms providing that if tenant provided no forwarding address, landlord had no obligation to return the deposit; pre-established charges for repairs of certain damages, regardless of actual cost of performing the repairs; modification of notice requirements set forth in statute; alteration of the statutory definition for notice; requirement that tenant waive all rights under the Nebraska Disposition of Personal Property Landlord and Tenant Act; waiver of the right to a jury trial in any lawsuit tenant brought against landlord; and security and pet deposits that exceed the statutory maximum, among other more minor violations. *See* UNIV. OF NEB. COLL. OF L. CIV. CLINICAL L. PROGRAM, SURVEY OF NEBRASKA LEASE AGREEMENTS (2018) (unpublished survey) (on file with author).

83. *Compare* Standard Form Lease Agreement from the Omaha Area Bd. of Realtors § 5 (Sept. 2015) (on file with author) (requiring the tenant to affirmatively demand the return of their security deposit), *with* NEB. REV. STAT. § 76-1416(2) (Cum. Supp. 2020) (providing that demand is not required); *compare* Standard Form Lease Agreement, *supra*, at §§ 8, 20 (providing that landlord can have "free access at all reasonable times" after providing one day's notice, that landlord does not have to provide notice before entering to make repairs, and that the landlord may show the property to prospective tenants after providing the current tenant a maximum of one hour's notice during the last thirty days of the tenancy), *with* NEB. REV. STAT. § 76-1423 (Reissue 2018) (providing that except in an emergency, a landlord is permitted to access a rental unit for limited purposes only after providing notice, even to make repairs); *compare* Standard Form Lease Agreement, *supra*, at § 11 (providing that the landlord may terminate the agreement after three days if rent is unpaid when due), *with* NEB. REV. STAT. § 76-1431(2) (Cum. Supp. 2020) (requiring seven days' notice); Standard Form Lease Agreement, *supra*, at § 13 (permitting a landlord to retain a security deposit as a "fee" for re-renting the unit if the landlord concludes that the tenant has abandoned the property), *with* NEB. REV. STAT. § 76-1416 (Cum. Supp. 2020) (containing no provision that permits forfeiture of a security deposit in this manner); *compare* Standard Form Lease Agreement, *supra*, at § 13 (requiring tenants to agree that upon abandonment, the tenant's "liability to pay rent provided herein continues for the term of the lease."), *with* NEB. REV. STAT. §§ 76-1405 (Cum. Supp. 2020) (providing that the landlord "has a duty to mitigate damages"); *compare* Standard Form Lease Agreement, *supra*, at § 21 (requiring tenants to have all carpets "professionally steam-cleaned after vacating" and to provide the landlord with a receipt "before a security [or] pet deposit will be returned"), *with* NEB. REV. STAT. §§ 76-1421 (Reissue 2018), *and* § 76-1416 (Cum. Supp. 2020) (providing that a tenant need only return the property "in as clean condition, excepting ordinary wear and tear, as when the tenancy commenced," and that only damages beyond ordinary wear and tear may be deducted from the deposit; requiring that carpets be professionally cleaned exceeds the tenant's duties set out in the Act). Commonly used standard form leases also frequently provide for remedies not available under the Act. *See* Standard Form Lease Agreement, *supra*, at § 10 (providing landlords the option to terminate the rental agreement or enter the premises to make any repairs, the expense of which would be charged to the tenant as rent);

extreme example of how comfortable landlords have become in drafting lease terms, the Tenant Assistance Project recently reviewed a rental agreement that contained a provision requiring tenants submit to random drug tests upon the request of the landlord.[84]

One might presume that lease agreements with such unlawful terms would not stand the test of time, as tenants would simply refuse to sign them and either negotiate better terms or look elsewhere. The reality is that most tenants are likely unaware of their rights or unable to identify the unlawfulness of specific lease provisions;[85] and even if that were not the case, they would have no bargaining power to negotiate better terms.[86] And, because many of the unlawful lease agreements stem from "standardized forms" used by landlords across Nebraska,[87] seeking housing from a different landlord who also likely

---

id. § 20 (providing that the "[t]enant's security deposit will be forfeited" if the property cannot be shown during the last thirty days of the tenancy). It should be mentioned that two of the above violative provisions, namely sections 5 and 11, would have been lawful in 2019 before the passage of LB 433. *See infra* notes 220–28 and accompanying text. Nevertheless, as observed by the author, the 2015 version of the form lease has not been updated and is still distributed to and used by landlords and property managers in Nebraska. Additionally, a current form lease developed by the Apartment Association of Nebraska contains a comparable volume of violative provisions. *See* Apartment Lease Contract—Nebraska from the Nat'l Apartment Ass'n (Feb. 2020) (on file with author).

84. Copy of lease on file with the Author.

85. The density of many lease agreements exacerbates the issue. It is not uncommon for lease agreements to be ten to fourteen pages long, printed in six-point type. *See* UNIV. OF NEB. COLL. OF L. CIV. CLINICAL L. PROGRAM, *supra* note 82. Most leases are also written in legalese, often leaving a person without legal training in the dark as to the true meaning of the terms they are agreeing to. *Id.*

86. *See, e.g.*, Bedrosky v. Hiner, 230 Neb. 200, 207–08, 430 N.W.2d 535, 541 (1988) (noting that residential tenants are typically unable to "negotiate for the terms of" lease agreements because of "unfair disparit[ies] in bargaining power"); *see also* Subcomm. on the Model Landlord-Tenant Act of Comm. on Leases, *Proposed Uniform Residential Landlord and Tenant Act*, 8 REAL PROP. PROB. & TR. J. 104, 108 (1973) (describing the ULC's reasoning for including the penalty provision: "Some extremely inequitable situations have resulted from the lease being used as an adhesion contract by the landlord offering the burdensome lease agreement to the tenant on a 'take it or leave it' basis"); Marshall Prettyman, *The Landlord Protection Act, Arkansas Code § 18-17-101 et seq.*, 2008 ARK. L. NOTES 71, 72–73 ("There is an increasing realization that residential leases are not freely negotiated but rather imposed on a take-it-or-leave it basis by the landlord, especially the larger landlords." (footnote omitted)).

87. *See, e.g.*, *Hearing on L.B. 268 Before the Comm. on the Judiciary*, 107th Leg., 1st Reg. Sess. 87 (Neb. Jan. 27, 2021) (statement of Gene Eckel, Member of the Nebraska Association for Commercial Property Owners and the Apartment Association of Nebraska) (indicating that the members of the Apartment Association of Nebraska use a standard form lease with fixed terms). See *supra* note 83 for a discussion on the standard form lease agreements made available to members of the Omaha Area Board of Realtors and the Apartment Association of Nebraska. The use of and concerns with standard form lease agreements are not isolated to Nebraska. *See* Curtis J. Berger, *Hard Leases Make Bad Law*, 74 COLUM. L. REV.

uses the same or similar standardized form lease would provide no recourse.

2. Section 76-1416: Security Deposits and Prepaid Rent

Of all the sections of the Uniform Act modified by the Nebraska Legislature, none were as mangled as the one governing security deposits. The language proposed by the ULC was left principally untouched as introduced, but, through a series of amendments, it was sliced and diced into the Frankenstein-esque form ultimately signed into law. Ultimately, only thirty percent of the language within the modified subparagraphs can be traced back to the Uniform Act. As amended from the Uniform Act:

> (1) A landlord may not demand or receive security, however denominated, in an amount or value in excess of ~~[1]~~ one month's periodic rent, except that a pet deposit not in excess of one-fourth of one-month's periodic rent may be demanded or received when appropriate, but this subsection shall not be applicable to housing authorities organized or existing under sections 71-1518 to 71-1554.
>
> (2) Upon termination of the tenancy property or money held by the landlord as prepaid rent and 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 the rental agreement or section ~~3.101~~ 21. The balance, if any, and a written itemization shall be delivered or mailed ~~all as itemized by the landlord in a written notice delivered~~ to the tenant within ~~together with the amount due~~ fourteen days after ~~termination of the tenancy and delivery of possession and~~ demand and designation of the location where payment may be made or mailed ~~by the tenant~~.
>
> (3) If the landlord fails to comply with subsection ~~(b)~~ (2) ~~or if he fails to return any prepaid rent required to be paid to the tenants under this Act~~ the tenant may recover the property and money due him ~~together with damages in an amount equal to [twice] the amount wrongfully withheld~~ and reasonable attorney's fees.
>
> (4) This section does not preclude the landlord or tenant from recovering other damages to which he may be entitled under this act.
>
> (5) The holder of the landlord's interest in the premises at the time of the termination of the tenancy is bound by this section.[88]

The most significant of the many changes to this section was removing the language allowing for liquidated damages—language that would have provided tenants with critical leverage to compel landlords to return their deposit when the law required.[89] From a purely

---

791, 791 (1974) ("Standard form leases for residential and short term business tenancies appear in all urban centers."); Warren Mueller, *Residential Tenants and Their Leases: An Empirical Study*, 69 MICH. L. REV. 247, 249 (1970) (calling the residential lease "a classic example of the standard long-form contract").

88. *Compare* UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 2.101 (UNIF. L. COMM'N 1972), *with* Legis. B. 293, 83d Leg., 2d Reg. Sess. § 16 (Neb. 1974) (enacted) (codified as NEB. REV. STAT. § 76-1416 (Cum. Supp. 1974)).

89. *See* Stephen E. Kalish, *Residential Tenant Security Deposits: A Legislative Proposal*, 1974 U. ILL. L.F. 569 ("Current law rests most of the power with the landlord. If he does nothing but retain the [tenant's deposit], the often poor and unskilled

economic standpoint, there was no incentive to operate in good faith with regard to the lawful return of tenants' deposits. In effect, the legislature designed a system that incentivized unethical behavior and provided landlords operating in bad faith an economic edge over landlords who lawfully returned the tenant's deposit when warranted. Because relevant protections within the law could not be enforced, landlords could treat retained deposits as a new revenue source: a thirteenth month of rent for a twelve-month lease.[90] Eliminating the liquidated damages provision also disincentivized tenant claims by minimizing the amount that they may recover and thereby decreasing chances for legal representation. Although the law provides that a tenant may recover attorney's fees in a successful suit for a wrongful retention of security deposit, this can only be awarded if a judgment is entered in favor of the tenant.[91] Landlords could avoid paying a tenant's attorney's fees by simply returning the deposit at any point prior to the entry of judgment. Thus, unlawfully retaining tenants' deposits had significant upsides and virtually no downsides that might dissuade landlords from this conduct.[92] Such laws can lead to a culture in the rental market where a landlord would view the security deposit as their property when in reality, the money remains an asset of the tenant held in trust by the landlord.

---

tenant must take the initiative to get the funds back." (footnote omitted)). This concern was recognized soon after the adoption of Nebraska's Act. In an attempt to prevent this practice, the Urban Affairs Committee of the 1975 Nebraska Legislature offered an amendment to section 76-1416 that would have added an enhanced penalty for landlords violating this section. *See Urb. Affs. Comm. Statement on L.B. 7*, at 2 (Neb. Mar. 19, 1975); *see also Hearing on L.B. 7 Before the Comm. on Urb. Affs.*, 84th Leg., 1st Reg. Sess. 37 (Neb. Feb. 26, 1975) (statement of Robert H. Peterson, Attorney for the Nebraska Real Estate Commission) (advocating for the addition of a "special penalty provision" to section 76-1416 in order "to make it effective"). Predictably, the bill and the proposed amendment failed. *See* FLOOR DEB. RECS., 84th Leg., 2d Reg. Sess. 6244 (Neb. Jan. 30, 1976) (voting to withdraw LB 7).

90. *See Hearing on L.B. 7 Before the Comm. on Urb. Affs.*, *supra* note 89 (statement of Gale Pokorny, Attorney, Legal Aid Society) (stating this his office receives twenty to thirty complaints about damage deposits each week, and discussing how infrequently tenants are able to get their deposits back, even when they win a judgment against their landlord in small claims court); *id*. at 39–40 (statement of Robert H. Peterson, Attorney for the Nebraska Real Estate Commission) (recounting a recent situation in Omaha in which a large apartment complex had already spent all of the tenants' deposits on operating expenses and the tenants had "no effective remedy").

91. *See* note 81 (discussing tenants' ability to access attorney's fees).

92. *See Hearing on L.B. 433 Before the Comm. on the Judiciary*, 106th Leg., 1st Reg. Sess. 69 (Neb. Mar. 3, 2019) (statement of Sen. Matt Hansen) (referring to language that would provide for liquidated damages for a landlord's unlawful refusal to return a security deposit, the Senator expressed "[t]his part is important since currently if a landlord fails to return a security deposit the tenant is only entitled [to] money owed and the attorney fee if there is a judgment, which fails to have a [deterrent] effect.").

As described in more detail below, the legislature in 2019 sought to right this wrong by amending the law to shift the responsibility of returning the deposit to the landlord, to reinsert the liquidated damages provision, and to make clear that funds not claimed by a tenant are not the landlord's to keep but instead, must be treated as unclaimed property and turned over to the state treasurer.[93]

3. Section 76-1419: Landlord's Duty To Maintain

Another set of tenant rights left practically toothless can be found in section 76-1419. The language proposed by the Uniform Act would have required landlords to "comply with the requirements of applicable building and housing codes materially affecting health and safety."[94] The Nebraska Legislature modified this subparagraph to require that landlords need only "[s]ubstantially comply, after written or actual notice, with ~~all~~ the requirements of the applicable minimum ~~standards of applicable building and~~ housing codes materially affecting health and safety."[95]

As initially proposed, landlords would have needed only to comply with the minimum standards of the building and housing codes that materially affected health and safety—already a very low standard. The standard was further lowered by adding "substantially" as a qualifier to the duty to comply; this can be interpreted to mean that a landlord need not *fully* comply with these already minimal standards materially affecting health and safety. The legislature also removed the word "all," which suggests landlords must only substantially comply with *some* of the standards. And, as an additional gouge, the legislature removed reference to building codes. This removal meant that landlords had no obligation under the Act to meet minimal building codes that materially affected a tenant's health and safety. What remained when the dust settled was a requirement that landlords partially comply with only some housing codes, but only those that materially affect health and safety.

Even in situations where the living conditions of a rental unit are so deplorable as to fall below this extremely low bar, there is virtually no way to enforce those minimal requirements. The section describes a landlord's minimal duties in maintaining the premises but includes no repercussions if they fail to do so.[96] Here, even the ULC failed to recognize these requirements would be ineffective if they could not be enforced. The only arguable mechanism for enforcement of the land-

93. *See infra* Part IV; Legis. B. 433, 106th Leg., 1st Reg. Sess. (Neb. 2019) (enacted).
94. UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 2.104(a)(1) (UNIF. L. COMM'N 1972).
95. *Compare id.*, *with* Legis. B. 293, 83d Leg., 2d Reg. Sess. § 19(1)(a) (Neb. 1974) (enacted) (codified as NEB. REV. STAT. § 76-1419(1)(a) (Cum. Supp. 1974)).
96. Legis. B. 293 § 19(1)(a).

lord's duty to maintain fit premises can be found later in the Act, at section 76-1425(1). There, the Act provides that upon noncompliance with section 76-1419, a tenant could give written notice to the landlord, at which point the landlord would have fourteen days to remedy the violation, and if the landlord failed to do so, the tenant could terminate the rental agreement after thirty days.[97] On its face, this provision seemingly incentivizes a landlord to make the repair and fall into compliance. Recall that these are not insignificant repair requests—this statute comes into play only if the landlord has failed to at least partially comply with a housing code that materially affects health and safety.[98] Only extremely serious issues would give rise to the remedy set out in section 76-1425.[99] But, when alerted to such an extreme issue, the landlord is given a full fourteen days to remedy it—*if* the landlord chooses to do so. A landlord can refuse, and the tenant's only viable recourse is to move out.[100] Importantly, the landlord's obligation to make the repairs only arises if the tenant notifies the landlord of the defect in writing.[101] Actual notice is insufficient to impose an enforceable obligation to remedy the issue materially affecting health and safety.

As an example, if the sewer backs up into the basement of a rental unit, the landlord has a *duty* to remedy the issue, but no *enforceable*

97. *Id.* § 25 (codified as NEB. REV. STAT. § 76-1425 (Cum. Supp. 1974)).
98. *Id.* § 19(1)(a).
99. *See, e.g.*, Tighe v. Cedar Lawn, Inc., 11 Neb. App. 250, 255–57, 649 N.W.2d 520, 527–28 (2002) (asserting that sections 76-1419 and 76-1425 are intended "to assist tenants whose landlords fail to provide the basic necessities which make a dwelling unit habitable").
100. Legis. B. 293 § 19(1)(a) (enacted). Not only can the landlord refuse to make the repair, but the landlord is permitted to retaliate against the tenant for having made the complaint. *See infra* subsection III.B.4 (discussing the absence of protections for tenants who notify their landlord of issues with the rental unit impacting health and safety); Legis. B. 293 § 39 (enacted) (codified as NEB. REV. STAT. § 76-1439 (Cum. Supp. 1974)). In theory, the tenant may also have the option of seeking injunctive relief under section 76-1425(2) to force the landlord into compliance. *See* NEB. REV. STAT. § 76-1425(2) (Reissue 2018) (providing that a tenant may receive damages and obtain injunctive relief for a landlord's noncompliance with the terms of the lease or section 76-1439). However, such relief would likely be difficult to obtain by a tenant unfamiliar with the unique and nuanced requirements for obtaining injunctive relief. Moreover, this remedy would be unavailable if the tenant pursued any of the remedies provided under section 76-1427. While section 76-1427 permits tenants to procure essential services and deduct the cost from their rent, or to procure reasonable substitute housing, it explicitly states: "If the tenant proceeds under this section, he may not proceed under section 76-1425 as to that breach." NEB. REV. STAT. § 76-1427(2) (Reissue 2018). Thus, if the tenant exercises their right to procure reasonable substitute housing, they may have waived their right to terminate the lease for the landlord's noncompliance.
101. Legis. B. 293 § 19(1)(a) (enacted) (emphasis added) (requiring that landlords "[s]ubstantially comply" with minimum housing codes that impact health and safety "*after written or actual notice*" (emphasis added)).

obligation to do so, unless they are notified of it in writing (even if they have actual notice of the problem).[102] And, even if notice is provided in writing, the landlord is permitted by law to allow the issue to remain unaddressed for a full fourteen days before suffering any consequences.[103] If the landlord does not address the issue during the fourteen-day period, the tenant is not released from the tenancy until sixteen more days have passed.[104] This is objectively unreasonable and entirely unworkable in practice, and has likely resulted in the diminished conditions of rental units commonly observed by housing advocates.[105] This provision allows situations in which the tenant either endures the deplorable condition or—if they are able—moves out as soon as they are permitted. If the tenant moves out before thirty days, the landlord can sue them for breaching their lease.[106] Also, whether they move out before or after thirty days, the landlord has no obligation under the Act to make the repairs after that tenant vacates.[107] As a result, a new family may move into the unit unaware of the latent condition until it is too late; and, at that point, their only remedy is to give the landlord written notice and fourteen days to fix it, and if the landlord does not, they can move out after thirty. And the cycle continues.

4. Section 76-1439: Retaliatory Conduct Prohibited

Three changes were made to section 76-1439 following introduction, each significant on its own—but together render the section virtually inert. In fact, there is no record of a tenant ever having successfully utilized this section to prevent or respond to retaliatory conduct by a landlord.[108] The first alteration was removing from the

102. NEB. REV. STAT. §§ 76-1419, 76-1425 (Reissue 2018).
103. *Id.* § 76-1425(1).
104. *Id.* (providing that the tenancy cannot terminate until "a date not less than thirty days after receipt of the notice if the breach is not remedied in fourteen days"). Thus, although the tenant could vacate immediately, they would remain responsible for rent and utilities until the thirty-day notice period had expired.
105. *See* Kasey Ogle, Opinion, *Local View: Lincoln Needs Proactive Housing Policy*, LINCOLN J. STAR (July 27, 2021), https://journalstar.com/opinion/columnists/local-view-lincoln-needs-proactive-housing-policy/article_c8ba4be6-1766-5db1-a81e-b619dc1dd0b4.html [https://perma.cc/Z86H-NZLN] (pleading for housing reform, Ogle, an attorney and housing advocate, provides examples of the deplorable conditions tenants often endure).
106. NEB. REV. STAT. § 76-1431(3) (Cum. Supp. 2020) (providing that a "landlord may recover damages and obtain injunctive relief for" a tenant's material noncompliance with the parties' lease agreement, which includes the period of the tenancy).
107. Although Nebraska's Act requires that landlords "maintain fit premises," as discussed at length above, it does not impose any mechanisms for regular oversight to ensure landlords are held to this standard. *See id.* § 76-1419.
108. The nearest was in *Vasquez v. CHI Properties, LLC*, 302 Neb. 742, 766–67, 925 N.W.2d 304, 322–23 (2019), where the Nebraska Supreme Court found that tenants "alleged sufficient facts to state a cause of action for retaliation under § 76-

list of protected conduct the act of a tenant making a complaint directly to the landlord regarding a health and safety violation. As Professor Kalish pointed out in his review of the Act shortly after adoption, it is perplexing that the legislature chose not to protect the very conduct *required* to trigger certain obligations of the landlord.[109]

The next move was to delete the text establishing a rebuttable presumption of retaliation,[110] effectively eliminating any reasonable chance that a tenant could be successful in a claim under this section.[111] The final change was adding language to allow the landlord to impose "reasonable" increases of rent and decreases in services despite having engaged in retaliatory conduct.[112]

Reasonable arguments could be made in support of abandoning the presumption language, perhaps the most controversial text in the section.[113] But to eliminate all protection for making a good-faith com-

---

1439," in an appeal from the district court's dismissal of tenants' claims; however, the parties eventually filed a stipulated dismissal, so there was no decision on the merits following remand.

109. Kalish, *supra* note 54, at 684 ("It would be preferable to extend the protections afforded by section 76-1439(1) at least to those activities which the NRLTA encourages the tenant to perform in order to activate his rights under the NRLTA."); *see, e.g.*, Legis. B. 293, 83d Leg., 2d Reg. Sess. § 25(1) (Neb. 1974) (enacted) (codified as NEB. REV. STAT. § 76-1425(1) (Cum. Supp. 1974)) (requiring the tenant directly notify the landlord of any noncompliance with the lease or section 76-1419).

110. *See* NEB. LEGIS. J., 83rd Leg., 1st Reg. Sess. 1,104 (Apr. 4, 1973) (striking the language establishing the rebuttable presumption from the bill).

111. *See* Kalish, *supra* note 54, at 685 (discussing the removal of the presumption language and concluding "[t]his may emasculate the statute."); *see also* Lonnquist & Healey, *supra* note 40, at 368 (concluding that "the deletion of the presumptive period may be to transform the tenant's new-found defense into little more than an empty gesture").

112. *See* NEB. LEGIS. J., 83rd Leg., 1st Reg. Sess. 1,104 (Apr. 4, 1973), https://nebraskalegislature.gov/FloorDocs/83/PDF/Journal/r1journal.pdf [https://perma.cc/N33M-UzzM] (adding: "Nothing in this section shall be construed as prohibiting reasonable rent increases or changes in services notwithstanding the occurrence of acts specified in this subsection" into what would become section 76-1439).

113. In 2021, Senator Megan Hunt introduced LB 358 in the Nebraska Legislature. The bill sought to amend section 76-1439 to revive the presumption language that had been left out of Nebraska's Act. *See* Sen. Megan Hunt, *Introducer's Statement of Intent for L.B. 358*, 107th Leg., 1st Sess. (Neb. Jan. 27, 2021), https://nebraskalegislature.gov/FloorDocs/107/PDF/SI/LB358.pdf [https://perma.cc/NH9T-YPTP]. During the bill's Judiciary Committee hearing, the merits of adopting the rebuttable presumption were discussed at length. *See Hearing on L.B. 358 Before the Comm. on the Judiciary*, 107th Leg. 1st Sess. 111 (Neb. Jan. 27, 2021), https://www.nebraskalegislature.gov/FloorDocs/107/PDF/Transcripts/Judiciary/2021-01-27.pdf [https://perma.cc/3SYH-YLTN] (statement of Sen. Lathrop) (expressing concern that the presumption of retaliation—coupled with LB 358's addition of a tenant's "good faith complaint to the landlord of a violation of the housing code or noncompliance with the lease agreement" to the list of protected conduct—would result in landlords being prohibited from evicting tenants on valid grounds where the tenant had made an arbitrary complaint within the

plaint directly to one's landlord and then add language permitting a landlord to retaliate as long as they do so "reasonably" leaves little to the imagination as to who was at the helm in the final stages of the adoption of the Act.

C. Tenant-Favorable Provisions Removed

After the introduction of LB 293, the Nebraska Unicameral excised four entire sections proposed by the ULC.[114] One section[115] was essentially duplicative of another, so its departure had negligible impact.[116] The other three sections, each discussed in detail below, would have provided tenants critical rights and protections, the removal of which left tenants vulnerable in circumstances where the landlord operated in bad faith.[117]

1. Section 1.402: Effect of Unsigned or Undelivered Rental Agreement

After LB 293 was introduced, the Nebraska Legislature removed an entire section proposed by the ULC that would have given effect to unsigned or undelivered rental agreements.[118] Superficially, the removal appears neutral in effect, as the suggested provision would have benefited both a tenant whose landlord failed to sign or provide a copy of the lease and a landlord whose tenant failed to sign or return a copy of the signed lease. However, in practice, this language would

prior six months); *id.* at 118–19 (statement of Dennis Tierney, board member, Metropolitan Omaha Property Owners Association) (speculating that implementing LB 358's rebuttable presumption of retaliation would subject landlords to a "greater possibility of being sued for retaliation, paying liquidated damages and attorney fees," which would force them to implement "stricter screening procedures, which would create the inability of some tenants to find places to live and higher rents for all tenants."); *id.* at 121–22 (statement by Gene Eckel, board member, Nebraska Association of Commercial Property Owners and Apartment Association of Nebraska) (asserting that under the bill's plain language, the rebuttable presumption could still work against a landlord who repaired the issue that a tenant complained about and thereafter had good cause to initiate an eviction action against that same tenant).

114. UNIF. RESIDENTIAL LANDLORD & TENANT ACT §§ 1.402, 1.404, 4.103, 4.202 (UNIF. L. COMM'N 1972).

115. *Id.* § 4.202.

116. *See infra* notes 128–29 and accompanying text.

117. Unfortunately, there was no debate on the amendment that called for the elimination of these three sections, which may have been the result of testimony by Senator Goodrich, who proposed the amendments, downplaying and then mischaracterizing the purpose of the tenant protections included in those sections. *See generally* FLOOR DEB. RECS., 83rd Leg., 2d Reg. Sess. 4,946–47 (Neb. Jan. 30, 1974).

118. *See* NEB. LEGIS. J., 83rd Leg., 2d Reg. Sess. 446 (Jan. 30, 1974) (amendment introduced by Senator Goodrich striking section 15 from the bill as introduced); UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 1.402 (UNIF. L. COMM'N 1972).

have provided necessary protections to tenants that landlords simply did not need.

The proposed section in full read:

> (1) If the landlord does not sign and deliver a written rental agreement signed and delivered to him by the tenant, acceptance of rent without reservation by the landlord gives the rental agreement the same effect as if it had been signed and delivered by the landlord.
> (2) If the tenant does not sign and deliver a written rental agreement signed and delivered to him by the landlord, acceptance of possession and payment of rent without reservation gives the rental agreement the same effect as if it had been signed and delivered by the tenant.
> (3) If a rental agreement given effect by the operation of this section provides for a term longer than one year, it is effective for only one year.[119]

A typical lease transaction entails the landlord providing the lease to the tenant and the tenant returning the signed lease along with the deposit and the first month's rent. The tenant may request a copy of the fully executed lease, but at this point, they are at the mercy of the landlord to accommodate such a request.[120] Rarely will the tenant be in sole possession of the lease with the landlord in the position of requesting a copy. This is because the landlord has the leverage of refusing to accept the first month's rent if the lease is not executed and returned along with payment; the tenant has no similar leverage when requesting a copy of the fully executed lease. This is usually not an issue—until it is. The tenant may presume that payment of rent according to the lease they executed provides them protection, but in practice, if the landlord retains the only copy, the terms of the lease are enforceable only against the tenant. This deleted section would have leveled the playing field in this regard. Instead, it permits a landlord to accept rent without being bound to the terms of the lease.[121]

2. Section 1.404: Separation of Rent from Obligation To Maintain Property Forbidden

As proposed, section 1.404 of the Uniform Act generally sought to restrict the assignment of rents by prohibiting the bifurcation of the

119. Legis. B. 293, 83d Leg., 1st Reg. Sess. § 15 (Neb. Jan. 25, 1973) (as introduced).
120. In fact, even requesting a copy of the lease may prove dangerous. *See, e.g.*, Luke Jones, *Man Accused of Pulling Gun on Tenant Asking Apartment Manager for Copy of Lease*, WREG MEMPHIS (July 8, 2021, 10:14 PM), https://www.wreg.com/news/man-accused-of-pulling-gun-on-tenant-asking-apartment-manager-for-copy-of-lease/ [https://perma.cc/V62T-N9LR].
121. On the record, it appears this was the intent of the deletion. *See* FLOOR DEB. RECS., 83rd Leg., 2d Reg. Sess. 4,946 (Neb. Jan. 30, 1974) (statement of Sen. Goodrich) (discussing his amendment and explaining that "[t]he second one corrects the provision in the bill where if I am a tenant, for example, I can take a lease to the landlord, and whether he signs it or not. If he accepts my rent he automatically accepts the lease even if he didn't sign it. We are wiping that section out").

right to collect rent from the duty to maintain the property.[122] The commissioners feared that if rent could be assigned free of the obligations to maintain the property, the objectives set out in what would become section 76-1419 (Landlord To Maintain Fit Premises) and section 76-1428 (Landlord's Noncompliance as Defense to Action for Possession) would be thwarted.[123] Section 1.404 of the Uniform Act and what would become section 76-1428 of Nebraska's Act were complementary, intended to be read together.[124] As explained by Professor Kalish: "In effect, the assignee could bring an action for rent or possession, and the tenant could not counterclaim or defend charging the landlord's noncompliance. A rent assignment could thus neutralize one of the tenant's most effective remedial weapons."[125]

3. Section 4.103: Self-Help for Minor Defects

Section 4.103 of the Uniform Act permitted tenants in certain circumstances to make repairs to the premises and deduct the cost of the repairs from the rent due.[126] This section was included unaltered in the bill as proposed but was stricken prior to the adoption of the Act.[127] The benefit of the proposed language was twofold: 1) it allowed the tenant to make minor repairs to the unit if the landlord refused to or was untimely in doing so, and 2) it provided the tenant a possible defense in an action for possession if the value of the repairs made equated to or exceeded the rent the landlord claimed was past due. Some undoubtedly viewed the elimination of this section as commensurate with the removal of a contrasting section that would have permitted a landlord to enter the premises to make repairs necessitated by a tenant's "noncompliance . . . materially affecting health and safety," then charge the tenant for the cost of such repairs.[128] Al-

122. UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 1.404 (UNIF. L. COMM'N 1972); *see* Legis. B. 293 § 15 (as introduced).

123. *See* UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 1.404 cmt. 1 (UNIF. L. COMM'N 1972) ("The obligation of the landlord to maintain fit premises in accordance with Section 2.104(a) and the rights and remedies of the tenant under Article II and IV cannot be defeated or thwarted by the assignment of rents.").

124. Kalish, *supra* note 54, at 692 ("Section 1.404 of the URLTA and section 4.105 of the URLTA, the counterpart of section 76-1428, were to be read together, for they make the tenant's covenant to pay rent dependent on the landlord's compliance with building and housing codes.").

125. *Id.* at 692.

126. UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 4.103 (UNIF. L. COMM'N 1972).

127. *See* Legis. B. 293, 83d Leg., 1st Reg. Sess. § 29 (Neb. Jan. 25, 1973) (as introduced); NEB. LEGIS. J., 83rd Leg., 2d Reg. Sess. 446 (Jan. 30, 1974) (striking section 29 from LB 293, as introduced, with the language in amendment (10) reading: "At Page 22, Section 29, Lines 1 through 24 inclusive, strike the section.").

128. *See* Legis. B. 293 § 35 (as introduced); NEB. LEGIS. J., 83rd Leg., 2d Reg. Sess. 512 (Feb. 5, 1974) (striking section 35).

though the dual deletions were depicted as an even trade,[129] landlords' rights were essentially unaffected in the exchange. The removal of section 4.103 left a tenant with virtually no right to make necessary repairs when their landlord failed in its duties to do so.[130] In contrast, the removal of section 4.202 had little effect on the landlord's right to access units to make repairs due to the privileges already extended under section 3.103 of the Uniform Act, which the legislature adopted.[131] This removal, in conjunction with modifications elsewhere, left a tenant with no viable recourse when a landlord refused to make repairs—except to move.[132]

D. Landlord-Favorable Sections Added

In addition to these significant departures from the Uniform Act, the legislature incorporated into Nebraska's Act a series of additional sections favorable to landlords. As there were few counterbalancing provisions favoring tenants, these additions only exacerbated the imbalances already present. Some of these provisions were included in the bill as proposed, some were amended into the Act during its adoption, and some were added through subsequent amendments in the decades that followed.

1. Sections 76-1440 to 76-1447: Summary Eviction Proceedings

Prior to the adoption of Nebraska's Act, eviction proceedings were conducted pursuant to Nebraska's forcible entry and detainer (FED) statutes,[133] which at the time, applied to all actions for possession of

129. FLOOR DEB. RECS., 83rd Leg., 2d Reg. Sess. 5,320–21 (Neb. Feb. 11, 1974) (statement by Sen. Goodrich) ("We struck the tenants[']' side of the repair and deduct and we are agreeing to go ahead and strike the landlords[']' side also.").

130. Under present law, a tenant has a right to make repairs and deduct the cost from the rent only when "the landlord deliberately or negligently fails to supply running water, hot water, or heat, or essential services," and after providing notice in writing. *See* Legis. B. 293, 83d Leg., 2d Reg. Sess. § 27 (Neb. 1974) (enacted) (codified as NEB. REV. STAT. § 76-1427 (Cum. Supp. 1974)). Notably, even if a tenant were able to overcome the procedural and practical barriers to access the remedy available herein, if they utilize this remedy, they waive their right to the remedies available under section 76-1425, making the law almost entirely useless in practice. *See supra* note 100 (discussing the interaction between sections 76-1425 and 76-1427).

131. Legis. B. 293 § 23 (enacted) (codified as NEB. REV. STAT. § 76-1423 (Cum. Supp. 1974)) (providing that a tenant must reasonably grant consent for their landlord to enter the property to make necessary repairs and that the landlord may enter without notice or consent in the case of emergency).

132. *See supra* Part II.B.3 (discussing a tenant's limited options when a landlord ignores requests to make repairs and how this perpetuates substandard housing conditions).

133. NEB. REV. STAT. §§ 27-1401 to -1417 (Cum. Supp. 1974) (current version at §§ 25-21,219 to -21,235 (Cum. Supp. 2020)).

real property.[134] The FED statutes provided for a summary eviction proceeding that ensured the trial for restitution of the premises would occur within twenty-seven days of filing suit: the summons had to be served and returned within ten days,[135] the trial was set for ten days following the service of summons,[136] and the tenant could be granted a seven-day continuance.[137] The Uniform Act did not include any proposed language for codifying the eviction process.[138] Using components from the FED statutes together with language presumably developed by national real estate groups, Nebraska added eight sections to the Act that prescribed the summary procedure for a landlord to regain possession of a rental unit.[139]

What would become section 76-1440 provided that all actions for possession subject to the Act must be brought pursuant to sections 76-1441 through 76-1447.[140] Section 76-1441 was an improvement over the FED statutory procedure in that it required the plaintiff landlord to plead specific allegations in the complaint for restitution, namely: "(a) the facts with particularity, on which he seeks to recover; (b) a reasonably accurate description of the premises; and (c) the requisite

134. *See* Bass v. Boetel & Co., 191 Neb. 733, 737–38, 217 N.W.2d 804, 806–07 (1974) (generally affirming that the recovery of possession of real property is governed by the state's statutes on forcible entry and detainer).

135. NEB. REV. STAT. § 24-535 (Cum. Supp. 1974) (amended and transferred to § 25-507.01 (Cum. Supp. 2020)). At present, in a typical civil matter, the summons must be served within twenty days. NEB. REV. STAT. § 25-507.01 (Cum. Supp. 2020). In actions brought under both Nebraska's Uniform Residential Landlord and Tenant Act and Nebraska FED statutes, the law now requires the summons be served within three days, excluding non-judicial days. *See id*. §§ 76-1442, 76-1442.01, 25-21,223 (Cum. Supp. 2020).

136. NEB. REV. STAT. § 24-535 (Cum. Supp. 1974) (amended and transferred to § 25-2704 (Cum. Supp. 2020)). Current law is set forth in section 25-21,223, which provides that the trial is to take place no less than ten and no more than fourteen days after the summons was served. NEB. REV. STAT. § 25-21,223 (Cum. Supp. 2020).

137. NEB. REV. STAT. § 24-575 (Cum. Supp. 1974) (transferred to § 25-21,225 (Cum. Supp. 2020)).

138. *See* Eloisa C. Rodriguez-Dod, *"But My Lease Isn't Up Yet!": Finding Fault with "No-Fault" Evictions*, 35 U. ARK. LITTLE ROCK L. REV. 839, 841 (2013) (noting that Uniform Act did not address several pertinent issues, including procedures for and defenses to eviction).

139. Aside from varied language borrowed from the forcible entry and detainer statutes, it is unclear from where the language proposed for these sections was derived. However, language similar to what is found in Nebraska's statutes governing summary proceedings can be found in those of several other states, evidencing the existence of model language likely developed and circulated by real estate groups around the same time the Uniform Act was being marketed to the states for adoption.

140. Legis. B. 293, 83d Leg., 2d Reg. Sess. § 40 (Neb. 1974) (enacted) (codified as NEB. REV. STAT. § 76-1440 (Cum. Supp. 1974)).

compliance with the notice provisions of [the Act]."[141] Requiring the plaintiff to plead facts with particularity in these cases is critical because of the tenant's inability to utilize discovery to uncover this information due to the expedited nature of summary proceedings.[142]

It appears that section 76-1441, when viewed in conjunction with section 76-1444, sought also to protect tenants not present at the hearing. Section 76-1444 requires that, in the tenant's absence, "the court shall try the cause as though he were present."[143] This contemplates that the rules governing default proceedings should not apply and, therefore, the plaintiff would be required to present sufficient admissible evidence to the court to establish every element of the claim, including proving that the requisite notice was provided.[144] As Professor Kalish discussed in his 1975 review of Nebraska's Act:

> This is particularly important in landlord-tenant law for several reasons. Notices to quit, or notices of the opportunity to redeem, are often relied on by private parties in conducting their affairs. Also, there is a lot at stake. A court must be certain that a defendant, such as a defaulting tenant, was given notice of an opportunity to redeem, or else the result would be tantamount to declaring a forfeiture.[145]

Section 76-1442, which has been amended five times since its enaction,[146] governs how the summons can be served and what it must include. This section was modified significantly between the introduction and passage of Nebraska's Act.[147] A notable digression from its original form was to permit the summons to be served by "any per-

141. *Id.* § 41 (codified as NEB. REV. STAT. § 76-1441 (Cum. Supp. 1974)). Notably, these pleading requirements were recently amended to also require that the plaintiff plead the statutory grounds for eviction. *See infra* note 242 and accompanying text.

142. *See, e.g.*, NAT'L HOUS. L. PROJECT, PROCEDURAL DUE PROCESS CHALLENGES TO EVICTIONS DURING THE COVID-19 PANDEMIC 8 (May 22, 2020), https://www.nhlp.org/wp-content/uploads/procedural-due-process-covid-evictions.pdf [https://perma.cc/ZTE8-D29E] (noting that "formal discovery mechanisms are often either expressly disallowed or simply impractical (due to incompatible deadlines and procedural requirements) in summary eviction proceedings").

143. Legis. B. 293 § 44 (enacted) (codified as NEB. REV. STAT. § 76-1444 (Cum. Supp. 1974)).

144. *See* Kalish, *supra* note 54, at 686 (discussing the importance of the court sua sponte insisting the landlord prove compliance with the notice provisions).

145. *Id*.

146. *See* Legis. B. 858, 84th Leg., 2d Reg. Sess. § 1 (Neb. 1976); Legis. B. 324, 92d Leg., 1st Reg. Sess. § 3 (Neb. 1991); Legis. B. 52, 94th Leg., 1st Reg. Sess. § 1 (Neb. 1995); Legis. B. 876, 97th Leg., 2d Reg. Sess. § 82 (Neb. 2002); Legis. B. 760, 98th Leg., 1st Reg. Sess. § 18 (Neb. 2003).

147. *Compare* Legis. B. 293, 83d Leg., 1st Reg. Sess. § 46 (Neb. Jan. 25, 1973) (as introduced), *with* Legis. B. 293 § 42 (enacted) (codified as NEB. REV. STAT. § 76-1442 (Cum. Supp. 1974)).

son."[148] Presumably, this includes only a person authorized by law to serve process.[149] The other pre- and post-adoption amendments pertained to the timing of trial. As introduced, Nebraska's Act contained no requirement for when the trial must occur, except language in section 76-1446 indicating that "[t]rial shall be had as in all other cases."[150] Through the Committee Amendment, what would become section 76-1442 was modified to provide: "Trial of the action for possession shall be not less than seven nor more than ten days after the service of summons."[151] In 1995, the time parameters for setting trial were transferred to section 76-1446 and revised to: "Trial for the action for possession shall be held not less than ten nor more than fourteen days after the issuance of the summons."[152] As amended in 1995, the clock would start upon *issuance* of a summons rather than *service* of the summons; thus, the increase to ten to fourteen days (from the original seven to ten day timeframe) did not provide tenants any additional time to prepare for the trial.[153]

Summary proceedings provide landlords an avenue for nearly immediate repossession of the rental unit, but this benefit to landlords comes at a steep price paid by tenants. Summary proceedings are treated as sui generis, in that the normal rules of civil procedure do not apply.[154] The process to be followed in eviction actions in effect overwrites or makes irrelevant nearly every rule of civil procedure set out in statute or court rule. Most significantly, the short timeline eliminates any reasonable opportunity for the tenant to prepare a defense. Not only does it remove any prospect of conducting discovery or even

148. Legis. B. 293 § 42 (enacted) (providing that a "summons may be served and returned as in other cases, or by any person"). The "any person" language did not appear in the bill as introduced. *See* Legis. B. 293 § 46 (as introduced).

149. Though NEB. REV. STAT. § 76-1442 (Reissue 2018) provides that service may be completed by "any person" and one might argue this could include a landlord, such assertion would seem to run in contradiction with Nebraska's service statutes, which more specifically limit who can serve a summons. *See* NEB. REV. STAT. § 25-506.01 (Cum. Supp. 2020). Thus, "any person" must be interpreted to mean any person *permitted by law to serve process*.

150. Legis. B. 293 § 50, (as introduced).

151. *See* NEB. LEGIS. J., 83d Leg., 1st Reg. Sess. 1,104–05 (Apr. 4, 1973) (recording the Judiciary Committee's amendments to LB 293 before placing it on general file); Legis. B. 293 § 42 (enacted).

152. Legis. B. 52, 94th Leg., 1st Reg. Sess. § 2 (Neb. 1995) (amending NEB. REV. STAT. § 76-1446).

153. *Compare id.* ("Trial for the action for possession shall be held not less than ten nor more than fourteen days after the issuance of the summons."), *with* Legis. B. 293 § 42 (enacted) (providing that trial must be held not "less than seven nor more than ten days after the service of summons.").

154. *See* Lindsey v. Normet, 405 U.S. 56, 66–69 (1972); Sporer v. Herlik, 158 Neb. 644, 649–50, 64 N.W.2d 342, 346 (1954) (stating that "the general code of civil procedure relating to civil and criminal actions do not apply" to the summary proceedings established by Nebraska's FED statutes (citation omitted)).

subpoenaing witnesses or documents, but by the time the tenant is actually served with summons, they may have only a few days to seek legal advice or make arrangements to appear at the hearing.[155] The adoption of section 76-1443 furthered the impact of this condensed timeline by limiting a tenant's ability to seek a continuance of the eviction trial once set, specifying:

> No continuance shall be granted unless extraordinary cause be shown to the court, and then not unless the defendant applying therefor shall deposit with the clerk of the court payment of any rents that have accrued, or give an undertaking with sufficient surety therefor, and, in addition, deposit with the clerk such rental payments as accrue during the pendency of the suit.[156]

Arguments in support of this provision were likely economic in nature—i.e., these eviction actions should be moved along as quickly as possible, as any delay will result in the tenant living rent-free and the landlord suffering financially.[157] These arguments presume, of course, that the eviction is brought on the basis of nonpayment of rent, and that the eviction is brought lawfully. However, in practice, this restriction on continuances is broadly applied in all types of evictions, including cases where the eviction action lacks merit.[158] While the plain

155. Because the ten- to fourteen-day period begins when the summons is issued and the summons can be served up to three days later, the tenant may not receive notice until just seven days before trial. *See* NEB. REV. STAT. § 76-1442 (Reissue 2018). And, if the tenant is served by constructive service, where service is made in part through the mail, this time period may be reduced even further. *See id.*

156. Legis. B. 293 § 43 (enacted) (codified as NEB. REV. STAT. § 76-1443 (Cum. Supp. 1974)).

157. There was no specific discussion of this section on the record during the Act's introduction and passage; however, testimony in opposition to efforts in 2019 and 2021 to repeal section 76-1443 validate this presumption. *See Hearing on L.B. 396 Before the Comm. on the Judiciary*, 106th Leg., 1st Reg. Sess. 55–56 (Neb. Mar. 1, 2019), https://www.nebraskalegislature.gov/FloorDocs/106/PDF/Transcripts/Judiciary/2019-03-01.pdf [https://perma.cc/5QR8-TZ4B] (statement of John Chatelain, Metro Omaha Property Owners Association and Statewide Property Owners Association) (expressing concerns about the fairness to landlords of tenants moving for a continuance—"maybe more than once"—while landlords receive no rental payments); *id.* at 62 (statement of Gareth Rees) ("[T]he entire purpose of this legislation, as far as it affects me, is providing additional free rent to a tenant who is not going to pay rent."); *Hearing on L.B. 45 Before the Comm. on the Judiciary*, 107th Leg., 1st Reg. Sess. 48 (Neb. Jan. 27, 2021), https://www.nebraskalegislature.gov/FloorDocs/107/PDF/Transcripts/Judiciary/2021-01-27.pdf [https://perma.cc/C42L-ELQK] (statement of Lynn Fisher, president, Real Estate Owners and Managers Association) (stating that making continuances more accessible to tenants "invites a situation where a continuance could be granted continuously and we could be weeks or months before we ever get to the point of getting someone out for not paying rent"); *id*. at 51–52 (statement of attorney Ryan Norman) (expressing concern that liberalizing the standard for continuances "would also stretch many restitution actions into a second month, which means landlords would often incur an additional month of unpaid rent").

158. *See* Video Interview with Scott Mertz, Hous. Just. Project Managing Att'y, Legal Aid of Neb. (Sept. 14, 2021) (stating that in his experience litigating and observing eviction hearings, the anti-continuance law is applied indiscriminately to all

reading of the statute seems to indicate that the extraordinary cause standard would apply to both the plaintiff-landlord and the defendant-tenant, courts uniformly impose the heightened standard only upon a request for continuance made by a tenant.[159]

Nebraska was the only state in the country with such a restriction on continuances in eviction matters.[160] While some states have laws that require rent to be paid into the court for continuances of certain lengths,[161] none statutorily impose a heightened standard for establishing cause.[162] In fact, there is no applicable definition of extraordinary cause.[163] One could argue that it is a degree of cause exceeding that which would be deemed ordinary.[164] Presumably, this anti-continuance law was intended only for typical nonpayment of rent scenarios with no factual disputes and no defenses at law; in these cases, the tenant has not paid rent, and there is no procedural reason to delay the proceedings. But in all other situations—all non-ordinary situations—perhaps the restrictions on requesting a continuance should not apply.

As discussed below, the modern legislature, having been informed of the need for a tenant to have a reasonable opportunity to attend their hearing and present their case, approved substantial modifications to section 76-1443.[165] Under the new law, each party may be

---

types of evictions, including matters where there is evidence that the eviction action has no basis in the law).

159. *See Hearing on L.B. 45 Before the Comm. on the Judiciary*, *supra* note 157, at 41 (statement of Robert Larson) (testifying that in his experience "this higher burden [of extraordinary cause] is placed only on the tenant"); *id*. at 43 (statement of Erin Olsen, Attorney, Legal Aid of Nebraska) (sharing how a plaintiff-landlord can be granted a continuance "without any reasoning at all" and that the law "is used inconsistently to the detriment of tenants' rights").

160. Not only was Nebraska unique in enacting this law, but residential eviction matters were the only civil cases in Nebraska where a party must meet this standard to be granted a continuance. Even under FED procedures—from which § 76-1443 was likely birthed—a defendant would have been entitled to a continuance of up to seven days from the initial hearing date and would need to establish extraordinary cause only if a subsequent continuance was sought. *See* NEB. REV. STAT. § 25-21,225 (Cum. Supp. 2020) (original version at NEB. REV. STAT. § 24-575) ("No continuance shall be granted for a longer period than seven days, unless upon cause shown to the court of the existence of extraordinary causes.").

161. *See, e.g.*, S.D. CODIFIED LAWS § 21-16-7 (2020); VA. CODE ANN. § 55.1-1242 (2021); WYO. STAT. ANN. § 1-21-1007 (2021).

162. *See generally*, Ryan Sullivan, *Survey of State Laws Governing Continuances and Stays in Eviction Proceedings*, 24 CITYSCAPE (forthcoming 2022).

163. A search was conducted, and no case law or statutory definition applicable to requests for continuances could be located.

164. *Black's Law* defines the word extraordinary as "[b]eyond what is usual, customary, regular, or common." *Extraordinary*, BLACK'S LAW DICTIONARY (11th ed. 2019).

165. *See* Legis. B. 320, 107th Leg., 1st Reg. Sess. § 9 (Neb. 2021) (amending NEB. REV. STAT. § 76-1443).

granted one continuance for good cause, and any continuance thereafter requires the presence of extraordinary cause, unless the parties are in agreement.[166] The recent amendment to section 76-1443 also provided clarity to the application of section 76-1446's requirement that the trial be "held" no more than fourteen days after the summons was issued. The availability of one continuance for good cause (for each party), and additional continuances for extraordinary cause, leaves no doubt that for purposes of section 76-1446, "held" means only that the trial be *initially scheduled* for a date within the stated parameters, and that it may be *concluded* on a later date.[167] Any other interpretation would make section 76-1443 virtually meaningless.[168]

166. *Id.*

167. It is not uncommon for a trial to be held on a specific date and continued to a later date. Arguably, the trial was still *held* on that original date even if not concluded, since some action related to that trial took place, even if it was only the granting of a motion to continue. In fact, even before the recent amendment to section 76-1443, it was commonplace for an eviction matter to be continued beyond the fourteen-day trial window, whether by agreement (e.g., when the parties negotiated a payment plan), at the request of the landlord (for virtually any reason), or at the request of a tenant (for extraordinary cause or when seeking protections pursuant to an eviction moratorium in effect). *See* Ryan Sullivan, *Examination of Eviction Filings in Lancaster County, Nebraska, 2019–2021*, SSRN, Apr. 28, 2022, at 21–22, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4093257 [https://perma.cc/8JHW-2J9G] (revealing that during the period examined, continuances were granted in 28.7% of the cases filed, 560 of which were continued to a date beyond fourteen days from the issuance of summons); *see also* Video Interview with Scott Mertz, *supra* note 158 (stating that it is common for civil trials, including those for evictions, to be continued from the date on which they were originally scheduled, and that eviction hearings that are continued are most often scheduled for a date outside the fourteen-day window; also commenting that when it is a joint motion to continue, courts generally have no issue scheduling the trial for a date beyond the parameters prescribed by section 76-1446). Language within the prior version of section 76-1443 also supported the conclusion that the legislature contemplated a trial being continued beyond fourteen days. Before its amendment, the section provided that if a continuance was granted, the tenant must "deposit with the clerk such rental payments as accrue during the pendency of the suit." NEB. REV. STAT. § 76-1443 (Cum. Supp. 1974). This language, as well as the language in the statute as recently amended requiring payment of rent into the court when a second continuance extends into another rental period, anticipated prolonged proceedings in matters where a continuance was justified, and where the tenant was able to pay the monthly rent into the court as it came due.

168. A comparable situation exists within Nebraska's statutory scheme governing FED actions. *See* NEB. REV. STAT. § 25-21,219 to -21,235 (Cum. Supp. 2020). The relationship between sections 76-1446 and 76-1443 (as amended) is akin to that between sections 25-21,223 and 25-21,225. Like section 76-1446, section 25-21,223 requires that "[t]rial of the action for possession . . . be held not less than ten nor more than fourteen days after the date of issuance of the summons." And, somewhat similar to section 76-1443 (as amended), section 25-21,225 permits a continuance for up to seven days—arguably for good cause—and also allows additional continuances upon extraordinary cause, notwithstanding the requirement

Section 76-1445 provides that the tenant may appear in response to the summons and "assert any legal or equitable defense, setoff, or counterclaim."[169] Section 76-1446 covers the process for obtaining a writ of restitution following a judgment against the tenant for restitution of premises.[170] It provides that a writ of restitution may be issued "directing the constable or sheriff to restore possession of the premises to the plaintiff on a specified date."[171] As introduced, that specified date could not be "*less* than ten days after entry of judgment."[172] However, as part of the Committee Amendment, that language was flipped to provide "not *more* than seven days."[173]

Lastly, section 76-1447 provides an appeal procedure specific to judgments for restitution.[174] A consequential component of this section permits the writ of restitution to be stayed pending appeal if the tenant-defendant deposits with the clerk of the court the amount of judgment and costs ordered, or, in lieu of such cash deposit, the tenant-defendant can provide an appeal bond backed by a surety.[175] The tenant must also pay rent into the court during the pendency of the eviction action.[176] Notably, because of the above-discussed revisions that permit a writ of restitution to be executed immediately,[177] a ten-

---

that the trial be held no sooner than ten days and no later than fourteen days from the date of issuance of summons. The existence of section 25-21,225 alongside section 25-21,223 confirms that "held" can mean only that trial must be initially scheduled for a date ten to fourteen days from the issuance of summons.

169. Legis. B. 293, 83d Leg., 2d Reg. Sess. § 45 (Neb. 1974) (enacted) (codified as NEB. REV. STAT. § 76-1445 (Cum. Supp. 2020)).

170. NEB. REV. STAT. § 76-1446 (Reissue 2018).

171. *Id.*

172. Legis. B. 293, 83d Legis., 1st Reg. Sess. § 50 (Neb. Jan. 25, 1973) (emphasis added) (as introduced).

173. *See* NEB. LEGIS. J., 83rd Leg., 1st Reg. Sess. 1,105 (Apr. 4, 1973) (emphasis added) (amending LB 293 to "strike 'less than ten' and insert 'more than seven'"). A few years later, this section was amended to increase the *maximum* number of days that could be provided from seven to ten. *See* Legis. B. 858, 84th Leg., 2d Reg. Sess. (Neb. 1976) (enacted). However, the *minimum* number of days a tenant could be provided remained at zero even after the amendment. *Id.* Zero days is not only insufficient to reasonably allow a tenant to find a new home and move, it also makes it logistically difficult if not impossible for the tenant to appeal the ruling when the court gets it wrong. *See infra* note 178.

174. *See* Legis. B. 293 § 47 (enacted) (codified as NEB. REV. STAT. § 76-1447 (Reissue 2018)). Section 76-1447 effectively supplants the procedures set forth in section 25-1912 utilized for appealing a county court ruling in all other civil matters. *See* NEB. REV. STAT. § 25-1912 (Cum. Supp. 2020).

175. NEB. REV. STAT. § 76-1447 (Reissue 2018). Note that a summary action for possession will never include a money judgment, and therefore, a court could never order an appeal bond greater than the costs awarded, plus on-going rent. This is because claims beyond restitution of the premises, including all claims for money damages, must be tried separately in adherence with the traditional civil litigation timeline. *See id.* § 76-1441(1).

176. *Id.* § 76-1447.

177. *See supra* note 173.

ant must file their appeal immediately to avoid being removed from the home during the pendency of the appeal.[178]

2. Section 76-1442.01: Constructive Service

In 1991, the legislature enacted a law proposed by landlords that would further streamline the eviction process and, in turn, significantly diminish the due process rights of tenants.[179] The law provided that after diligent efforts to serve by traditional means, the summons could be served by posting it at the premises and mailing the same by first-class mail.[180] While posting and mailing is a permitted form of

178. Where a typical civil litigant would be granted thirty days to file an appeal, a tenant is given only the period of time before the writ is executed. *Compare* NEB. REV. STAT. § 25-1912 (Cum. Supp. 2020), *with id.* §§ 76-1446, -1447. Thus, in practice, because the writ can be executed immediately after judgment, the tenant may be given only moments to contemplate appealing the ruling and to file the notice of appeal. Under Nebraska's Act as introduced, the writ could not be executed until ten days following the entering of the judgment, effectively granting the tenant at least ten days to file a notice of appeal and stay the writ. *See* Legis. B. 293, 83d Legis., 1st Reg. Sess. § 50 (Neb. Jan. 25, 1973) (as introduced). However, this section as amended and enacted by the Nebraska Legislature virtually eliminated a tenant's opportunity to file an appeal. *See* Neb. Rev. Stat. § 76-1446 (Cum. Supp. 1974). It is unlikely this was the intent of the legislature; rather, it represents yet another example of why state legislatures should proceed with caution when tinkering with a multifaceted, interconnected set of uniform laws. *See* Kalish, *supra* note 54, at 697 ("It would have been better to have adopted the URLTA *in toto*, not because it is impossible to have legitimate policy differences with the URLTA draftsmen, but rather because piece-meal tinkering with a coherent piece of legislation invites confusion and litigation."). It is also worth mentioning here that a praecipe for a writ of execution is often filed without notice to the tenant or their attorney; thus, even in a case where an appeal has been initiated, a writ can be issued, served, and executed without the tenant's counsel or the appellate court having knowledge of this occurring. *See, e.g.*, NP Dodge Mgmt. Co. v. Holcomb, No. CI 21-9059 (Douglas Cnty. Neb. Cnty. Ct. filed May 19, 2021) (appeal filed June 22, 2021) (relevant filings on file with author) (During the pendency of an appeal of the order for restitution, the landlord's attorney sought a writ of restitution from the lower court without providing notice to the other party or their attorney; the lower court, despite knowledge that a notice of appeal had been filed (along with a motion to proceed in forma pauperis), issued a writ to be executed "forthwith."). Further exacerbating this issue is that a praecipe for a writ of restitution is, at the time of the writing of this Article, not eligible for electronic service through the Nebraska Supreme Court Electronic Filing System, preventing the tenant's counsel from receiving automatic notification of its filing. However, the author has submitted a request to the Nebraska Supreme Court to revise its electronic filing procedures to include praecipes among the types of filings that will generate an automatic electronic notification to all interested parties.

179. *See* Legis. B. 324, 92d Leg., 1st Reg. Sess. (Neb. 1991) (enacted); *Hearing on L.B. 324 Before the Comm. on the Judiciary*, 92d Leg., 1st Reg. Sess. 61–62 (Neb. Feb. 6, 1991) (statement by Sen. Hall) (introducing the bill and explaining that it was brought to him by landlords four years prior).

180. Legis. B. 324 (codified as NEB. REV. STAT. § 76-1442.01 (Supp. 1991)).

service in nearly all civil actions in Nebraska, it is usually available only after establishing to the court that service by traditional means could not be had.[181] Under section 76-1442.01, that judicial oversight is absent. Such judicial oversight is necessary to ensure that reasonable efforts were made before resorting to a form of service that is less likely to provide actual notice.[182] Having notice of the proceeding and an opportunity to appear are vital to due process and should not be taken lightly.[183] Nonetheless, in eviction matters—matters where the end result may be the forcible removal of a family from their home—the Nebraska Legislature deemed it appropriate to loosen these standards.

In a traditional civil matter, the plaintiff must first prove to the court that sufficient efforts were made to serve by traditional means and then receive permission to serve in this alternative manner,[184] but in eviction cases, the process is reversed. In an eviction action, the landlord can resort to post and mail upon its own determination that efforts were sufficiently diligent and then, after the fact, file an affidavit executed by the process server stating that diligent efforts were made.[185] Notably, although this law had been in place since 1991, the affidavit requirement was rarely enforced until recently.[186] Even at

181. NEB. REV. STAT. § 25-517.02 (Cum. Supp. 2020) (providing that substitute service may be used upon a "showing by affidavit that service cannot be made with reasonable diligence by any other method provided by statute").

182. The U.S. Supreme Court has recognized that constructive service effectuated by posting a summons to the door of a residential rental property often fails to "provide actual notice to the tenant" and that posting was vulnerable to removal by a third-party before the tenant received it. Greene v. Lindsey, 456 U.S. 444, 453–54 (1982). In *Greene*, the Court held that posting alone was insufficient to provide notice in summary eviction proceedings, but that posting coupled with mailing likely satisfies due process. *Id*. at 455–56. *But see id.* at 459–60 (O'Connor, J., dissenting) (recognizing that even mail service does not guarantee actual notice, noting there are "risks that notice mailed to public housing projects might fail due to loss, misdelivery, lengthy delay, or theft" and that "unattended mailboxes are subject to plunder by thieves"). The court did not go as far as say that posting together with mailing was constitutional, but implied that it was. *Id*. at 455 (majority opinion); *see also* 5 JOHN LENICH, NEBRASKA PRACTICE SERIES, CIVIL PROCEDURE § 10:19 (2022) (analyzing the constitutionality of section 76-1442.01 as recently amended).

183. *See* Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." (citations omitted)). The *Mullane* Court opined that the "right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Id*.

184. NEB. REV. STAT. § 25-517.02 (Cum. Supp. 2020).

185. *Id.* §§ 76-1442 to -1442.01.

186. According to data collected from the court filings in Lancaster County, Nebraska, from 2019 through 2021, the required affidavit was filed in less than two percent

present, the requirement is enforced inconsistently.[187] While a trial court arguably has an obligation to review the pleadings to ensure service was perfected before proceeding to trial,[188] it appears this almost never occurs. Even when an affidavit is filed, it rarely contains the information required by the statute and is often signed by the attorney for the landlord who had no first-hand knowledge of the attempts made to serve by traditional means, or of the act of posting and mailing the summons thereafter.[189] The lack of judicial oversight as to what amounts to diligent efforts has resulted in process servers becoming relatively lax in their efforts. For example, in Lancaster County and Douglas County, process servers commonly attempt to serve the summons only once or twice, on the same day and during working hours when the tenant is not likely to be home, and then post and mail.[190] As a result, tenants are often evicted without ever having

---

of the cases until April of 2020, when volunteer attorneys through the Tenant Assistance Project brought the issue to the attention of the court after observing how few tenants were appearing for their hearings. Even thereafter, the affidavit went unfiled in over a quarter of the cases. *See* Sullivan, *supra* note 167, at 13.

187. In Lancaster County, the affidavit requirement appears to be enforced only when a tenant has legal representation and only when that tenant's attorney objects to the matter moving forward. Phone Interview with Alan Dugger, Eviction Court Observer (Sept. 29, 2021); *see also* Sullivan, *supra* note 167, at 14 n.58 (revealing that from April 2020 to October 31, 2021, restitution judgments had been entered in 442 cases where the service affidavit had not been filed or was defective). In Douglas County, the affidavit filing requirement is reportedly enforced in some cases where constructive service is typically utilized but is not enforced when other forms of service are used. Even when the filing requirement is enforced in those matters involving constructive service, the affidavit filed is not scrutinized to ensure compliance with section 76-1442.01. *See* Video Interview with Scott Mertz, *supra* note 158 (discussing his observations in Douglas County eviction court).

188. The Nebraska Supreme Court has held "statutes prescribing the manner of service of summons are mandatory and must be strictly complied with." Anderson v. Autocrat Corp., 194 Neb. 278, 287, 231 N.W.2d 560, 565 (1975). Mandatory implies that the plaintiff must demonstrate compliance before the action can proceed, meaning the court is not free to ignore these deficiencies, particularly here in matters involving potentially defective service resulting in the defendant's inability to appear and assert the defense on their own behalf. *See also* Burns v. Burns, 23 Neb. App. 420, 425, 872 N.W.2d 900, 904 (Neb. Ct. App. 2015) *rev'd on other grounds*, 293 Neb. 633, 879 N.W.2d 375 (2016) (holding that requirements for service of summons must be "strictly construed"); 5 LENICH, *supra* note 182, at § 10:1 ("If the defendant is served in a manner that does not comply with the statutes, then the service is invalid even if the defendant received actual notice of the action." (footnote omitted)).

189. *See* Sullivan, *supra* note 167, at 15 and accompanying text (finding that during the period examined, 15.5% of affidavits filed were defective for having failed to include the statutory language or for having been executed by someone other than

190. A review of the service returns in over 3,000 eviction cases in Lancaster County, Nebraska, spanning 2019–2022 confirmed this as the common approach. *See also* Video Interview with Scott Mertz, *supra* note 158 (stating that it is common in

actual notice of the suit filed against them or notice of the trial date that had been set.[191]

3. Section 76-1431(4): Five-Day Evictions

The most recent landlord-favorable addition to Nebraska's Act was the adoption of section 76-1431(4).[192] This law created a new type of eviction based on alleged criminal activity, damage to the property, or harm or threats of harm to other tenants.[193] Before, landlords would have brought such evictions under section 76-1431(1), which provides a tenant fourteen days' notice to remedy the violation.[194] Under the

---

Nebraska for a process server to attempt to serve only once by traditional means before resorting to constructive service); Sullivan, *supra* note 167 (examining service returns in eviction cases filed in Lancaster County). Such a practice may be unconstitutional. *See* Greene v. Lindsey, 456 U.S. 444, 454 (1982) ("The failure to effect personal service on the first visit hardly suggests that the tenant has abandoned his interest in the apartment such that mere *pro forma* notice might be held constitutionally adequate." (citation omitted)). Under the prior version of the statute, it remained ambiguous how much effort was required for it to be considered diligent. Previously, section 76-1442 referenced "diligent efforts" (plural) but the required affidavit described in section 76-1442.01 referenced "an attempt" (singular). However, under the law as amended in 2021, it appears that—in line with *Greene*—diligent efforts means, at the very least, more than one attempt. *See* Legis. B. 320, 107th Leg., 1st Reg. Sess. § 8 (2021) (enacted). Even if deemed *proper* notice, a question remains as to whether it was *sufficient* notice. *See* 5 LENICH, *supra* note 182, at § 10:19 n.8 (discussing how a tenant served by constructive service is given only four days' notice of the hearing due to the mail delay, whereas a tenant served with personal service is given seven days' notice and indicating this was presumably an oversight by the legislature).

191. *See* Online Interview with Mindy Rush-Chipman, Dir., Lincoln Comm'n on Hum. Rts., Supervisor, Tenant Assist. Project outreach program (Nov. 15, 2021) (stating that it was common for a tenant with a pending eviction matter to first learn of the eviction trial from the commission's staff or an outreach volunteer who stopped by their home a couple of days before the scheduled eviction hearing to provide the tenant information about housing rights and resources, and had it not been for the contact with the staff or outreach volunteer, the tenant would have almost certainly missed their trial and as a result would have been evicted by default). Other tenants have reported only learning about the pending eviction via a letter sent out by Legal Aid of Nebraska that advises them of their hearing and resources available to them. *See* Video Interview with Scott Mertz, *supra* note 158 (reporting that Legal Aid of Nebraska combs the eviction docket of every county in the state and sends information and resources to every household in Nebraska with an eviction case pending).

192. Legis. B. 221, 104th Legis., 2d Reg. Sess. (Neb. 2016) (enacted) (codified as NEB. REV. STAT. § 76-1431(4) (Cum. Supp. 2018)).

193. *Id.* § 4(4).

194. NEB. REV. STAT. § 76-1431(1) (Cum. Supp. 2020) (providing that if a tenant violated their duties under section 76-1421 "materially affecting health and safety" or if a tenant engaged in "a material noncompliance . . . with the rental agreement or any separate agreement, the landlord" could provide proper notice "that the rental agreement will terminate upon a date not less than thirty days after receipt of the notice if the breach is not remedied in fourteen days").

new law, the tenant is provided only five days' notice and no opportunity to cure the default.[195]

The law's intent seems valid: certain types of conduct justify a faster process to remove the tenant from the premises.[196] Though well-intended and arguably needed to maintain safe living conditions for other tenants, particularly in multi-unit housing, the law contains overly broad language unnecessary to carry out this purpose. Most significantly, it encapsulates conduct that should be deemed remediable. For instance, it provides that a landlord may evict a tenant for certain alleged conduct of others, including members of the tenant's household or another person present on the premises with the tenant's consent.[197] Although certain conduct by the *tenant* may appropriately result in the near-immediate termination of their rights as a tenant, conduct by someone other than the tenant should not have the same result. The reality is that a tenant may not be able to predict or control the conduct of another, even an invited guest, and should not face eviction based on that guest's conduct alone. The conduct of an invited guest is something that could be remedied (by removing the guest from the property), and the tenant should have an opportunity to do this before facing eviction.[198] It is an extreme punishment to force a tenant into homelessness based solely on the acts of another, of which they had no knowledge or control.[199]

---

195. *Id.* § 76-1431(4) (allowing landlords to evict tenants "after five days' written notice of termination of the rental agreement and without the right of the tenant to cure the default" if the section's provisions are violated).

196. *Hearing on L.B. 385 Before the Comm. on the Judiciary*, 104th Leg., 2d Reg. Sess. 1–2 (Neb. Feb. 6, 2015), https://www.nebraskalegislature.gov/FloorDocs/104/PDF/Transcripts/Judiciary/2015-02-06.pdf [https://perma.cc/9HPL-66FD] (statement by Sen. Lindstrom) ("LB 385 gives landlords a more time-efficient remedy for tenants who . . . engage[ ] in behavior that threatens the health, safety, or peaceful enjoyment of specified others. . . . The goal here is to maintain a safe environment for tenants and all others on these premises, which helps to create safer communities across our state.").

197. NEB. REV. STAT. § 76-1431(4) (Cum. Supp. 2020).

198. It is noteworthy that the comparable provision found in the ULC's Revised Act provides an exception to a landlord's absolute right to evict under these circumstances if the tenant: "(1) neither knew nor should have known the act was going to be committed; and (2) took reasonable steps to ensure that there will not be a repeated criminal act on the premises by the immediate family member or guest." REV. UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 601 (UNIF. L. COMM'N 2015). Nebraska's law does include a very limited defense to the eviction if the conduct was committed by someone other than the tenant or a member of their household, and the tenant or household member sought a protective order, reported the activity to law enforcement or, if the activity was an act of domestic violence, reported it to a qualified third party. NEB. REV. STAT. § 76-1431(5) (Cum. Supp. 2018).

199. This "innocent tenant" issue was at the heart of *HUD v. Rucker*, in which the U.S. Supreme Court ruled on the implications of a similar federal statute that permits the Department of Housing and Urban Development (HUD) to evict a tenant for

Certain criminal conduct is also remediable. A common example is marijuana use in the rental unit. It seems unreasonable that this conduct could result in an automatic expulsion from one's home. Imagine if a similar law applied to a person with a mortgage, and if the bank had reason to believe the person was smoking pot in the home (a home owned by the bank until the mortgage is paid off), the bank could terminate the mortgage, and the person would have five days to vacate. Such an outcome would be deemed absurd when viewed through the lens of a resident with a mortgage but is apparently deemed acceptable when viewed through the lens of a resident with a lease. Although a landlord should have a right to excise criminal activity from the premises, this right should be limited in certain situations to provide tenants an opportunity to remedy the violation and remain in their home.

Another defect in this provision is the total absence of a stated burden of proof; it appears the landlord can send the five-day eviction notice based purely on speculation or no evidence at all.[200] A plausible scenario might involve a tenant who reports to the landlord the smell of marijuana coming from a neighboring apartment; this appears to be enough for the landlord to issue the five-day notice to the neighboring tenant. Although at trial the landlord would have to prove that the tenant or their guest engaged in the violative conduct, the reality is

---

any drug related activity on the premises of federally assisted low-income housing. *See* Dep't of Hous. & Urb. Dev. v. Rucker, 535 U.S. 125 (2002). The federal law at issue allowed eviction for violations committed not only by the tenant, but also by "any member of the tenant's household, or any guest or other person under the tenant's control." 42 U.S.C. § 1437d(l)(6). The Court relied on HUD's interpretation, which determined that the statute applies to "guests and 'other persons under the tenant's control,' and is not qualified by whether the resident knew about or literally 'controlled' the guest's unlawful actions. . . . [B]y 'control,' the statute means control in the sense that the tenant has permitted access to the premises." Screening and Eviction for Drug Abuse and Other Criminal Activity, 66 Fed. Reg. 28,776 (May 24, 2001) (codified in scattered parts of 24 C.F.R.); *see Rucker*, 535 U.S. at 126. The Court held that based on the plain reading of the statute, the tenant's knowledge of the conduct was not necessary for the tenancy to be terminated on these grounds. *Id*. at 136 ("Section 1437d(l)(6) requires lease terms that give local public housing authorities the discretion to terminate the lease of a tenant when a member of the household or a guest engages in drug-related activity, regardless of whether the tenant knew, or should have known, of the drug-related activity."). This reversed the judgment of the Ninth Circuit, which had found such an interpretation would lead to an absurd result not intended by Congress. *See* Rucker v. Davis, 237 F.3d 1113, 1124 (9th Cir. 2001), *rev'd sub nom.* Dep't of Hous. & Urb. Dev. v. Rucker, 535 U.S. 125 (2002); *see also* Evi Schueller, Note, HUD v. Rucker*, Unconscionable Due Process for Public Housing Tenants*, 37 U.C. DAVIS L. REV. 1175, 1201 (2004) ("The government's ability to make arbitrary decisions in this context should have led the Court to first find section 1437d ambiguous, and then hold HUD's interpretation unconstitutional. Public policy and common sense support only that holding.").

200. NEB. REV. STAT. §76-1431(4) (Cum. Supp. 2020).

that these cases are unlikely to be filed, let alone go to trial.[201] Rather, it can be presumed that in many cases the tenant receives the threatening notice, which includes no opportunity to cure, and they reasonably believe they have no choice but to leave within five days or be forcibly removed.[202]

IV. RECENT LEGISLATIVE ACTION SEEKING EQUILIBRIUM

Since its passage in 1974, Nebraska's Act remained largely untouched, benefiting landlords to the detriment of tenants for nearly fifty years. The legislature made only a handful of modifications in the last five decades and none that sought to correct the wrongs of the 1974 Act until recently. It is likely that few advocacy groups had the time or capacity to scrutinize, let alone address, the imbalances in Nebraska's Act.[203] It could be that many presumed that it was a fair set of laws or reasonably believed that Nebraska had actually adopted the Uniform Act in its intended form. Ironically, it was a legislative bill proposed by the real estate lobby in 2018 that ignited the fire that provided both light and warmth to the movement for legislative reform. The proposed legislation would increase the amount a landlord could charge for a pet deposit, in addition to the standard security deposit.[204] The bill drew the attention of the law students at the Tenant's Rights Project, part of the Civil Clinical Law Program at the University of Nebraska College of Law, who provided expert testimony on why the bill should not move forward.[205] During said testimony, the legislature learned of a number of other issues with Nebraska's laws governing tenant security deposits, including that landlords have no enforceable obligation to return a tenant's security

201. A review of eviction filings in Lancaster County, Nebraska, from December 1, 2019, through October 31, 2021, revealed that only one eviction brought pursuant to section 76-1431(4) resulted in a trial; *see also* Video Interview with Scott Mertz, *supra* note 158 (stating that it is rare for an eviction brought under section 76-1431(4) to go to trial, as most tenants who receive the five-day notice will vacate before the initial hearing); Phone Interview with Laurie Heer Dale, Director, Neb. State Bar Ass'n Volunteer Laws. Project (Sept. 29, 2021) ("Of the nearly 2,000 cases that have gone through the eviction courts since I have been facilitating the Tenant Assistance Project in Lancaster and Douglas Counties, only a handful have resulted in an actual trial, probably less than one percent.").

202. *See* Video Interview with Scott Mertz, *supra* note 158 (stating that in Legal Aid's experience, many tenants who receive the five-day notice vacate before the period expires, believing it to be their only option).

203. Moreover, legal aid organizations, who often serve as the only resource for legal representation for tenants facing eviction, are expressly prohibited from affirmatively lobbying for policy change. *See* 45 C.F.R. § 1612.3(a).

204. *See* Legis. B. 1039, 105th Leg., 2d Reg. Sess. (Neb. Jan. 17, 2018) (indefinitely postponed, Apr. 18, 2018).

205. *See Hearing on L.B. 1039 Before the Comm. on the Judiciary*, 105th Leg., 2d Reg. Sess. 27–28 (Neb. Feb. 15, 2018), https://www.nebraskalegislature.gov/FloorDocs/105/PDF/Transcripts/Judiciary/2018-02-15.pdf [https://perma.cc/U2N2-RXSY].

deposit, that landlords were allowed to comingle the tenant's deposit with funds in the landlord's operating account or even their personal bank account, and that there was zero oversight of how the tenant's funds were maintained.[206] During and following the hearing, members of the legislature urged the Civil Clinic students and faculty to return the next session with proposals to address the issues identified.[207]

In preparation for the next session, the Civil Clinic and other advocates developed proposals to resolve the security deposit issues and in doing so, began to uncover other imbalances in Nebraska's Act. Of the numerous proposals generated, four bills were introduced by Senator Matt Hansen. LB 395 sought to amend subsection 76-1431(4), which provides grounds for eviction for criminal activity on the premises,[208] so when the alleged criminal activity involved domestic violence, the victim would be protected from eviction.[209] LB 396 embodied housing advocates' first attempt to repeal section 76-1443, the law that limited a tenant's rights to a continuance of an eviction hearing, even for good cause.[210] LB 433 aimed to revise section 76-1416, the section governing security deposits. In effect, the bill sought to reinsert the enforcement language that had been removed by the 1974 legislature as part of its departure from the Uniform Act.[211] As discussed in Section III.B.2, section 76-1416 had been left toothless as a result of the com-

206. *See id.*

207. *See, e.g.*, *id.* at 28 (Statement of Sen. Ernie Chambers):

> Long, long ago, when I wore a younger man's clothes and you had not reached an age where you could wear diapers, I was doing work on landlord-tenant relationships. And I will be back next session and I want you, if you're willing, to lay out some of the things that you talked about today that definitely need to be modified, such as the tenant being required to demand. I would appreciate that, if you didn't mind doing it. And when I ask somebody to do something, it's not for an academic purpose. I will want to bring legislation. And I'm going to count on you and your students, or however you work it out, to present some of those. And you will have the chance to see your notions written into stone, at least for the time that I'm in the Legislature, because I think my colleagues would be willing to make some of those modifications. A couple of things said today I wasn't even aware of. So I would appreciate your doing that, if you would. And I'm not trying to put any pressure on you or coerce you, but I've been here when you talked about other things, so I don't feel reluctant to request that assistance from you.

208. Legis. B. 395, 106th Leg., 1st Reg. Sess. (Neb. Jan. 17, 2019).

209. *Id*. The bill was not voted out of committee. *See* NEB. LEGIS. J., 106th Leg., 2d Reg. Sess. 43, 1,489 (Aug. 13, 2020).

210. Legis. B. 396, 106th Leg., 1st Reg. Sess. (Neb. Jan. 17, 2019). The bill was voted out of committee and placed on general file but was never debated on the floor. *See* NEB. LEGIS. J., 106th Leg., 1st Reg. Sess. 786 (Mar. 12, 2020); NEB. LEGIS. J., 106th Leg., 2d Reg. Sess. 43, 1,489 (Aug. 13, 2020).

211. *Compare* UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 2.101 (UNIF. L. COMM'N 1972), *with* Legis. B. 293, 83d Leg., 2d Reg. Sess. § 16 (Neb. 1974) (enacted) (codified as NEB. REV. STAT. § 76-1416 (Cum. Supp. 1974)).

bined removal of the liquidated damages provision and the requirement that the tenant affirmatively demand the return of their deposit.[212] As proposed, LB 433 required that landlords return the balance of the security deposit to a tenant within fourteen days of the termination of the tenancy or face "liquidated damages of one times the periodic rent, plus costs and reasonable attorney's fees."[213] While the Uniform Act proposed liquidated damages of *twice* the amount wrongfully withheld,[214] imposing any amount of liquidated damages would at least provide some remedy for tenants whose deposits were unlawfully retained and some tangible consequence for landlords who failed to comply. Finally, LB 434 sought to increase from three to seven the number of days' notice a landlord must provide before they may terminate a lease for nonpayment of rent.[215] Recall that the Uniform Act proposed a *fourteen-day* notice.[216] LB 434 also included a provision that would have given a tenant an additional seven-day right of redemption.[217] In practical terms, this would mean the landlord could bring the eviction action immediately upon the expiration of the initial notice, but if the tenant was able to pay rent in full (including late fees and court costs) within the subsequent seven-day period, the tenancy could be redeemed.[218]

As the legislative dust settled and compromises were made between housing justice advocates and the real estate lobby, LB 395 and LB 396 were indefinitely postponed,[219] but Nebraska's 106th Legislature ultimately adopted some provisions of LB 433 and LB 434.[220] Under these provisions, merged together into LB 433, a tenant's deposit must be returned within fourteen days of the termination of tenancy, with no demand required on the part of the tenant.[221] The final version of LB 433 also set forth a procedure for handling the funds when a tenant does not leave a forwarding address or when the deposit is returned to the landlord undelivered.[222] The legislature also retained the portion of the bill entitling tenants to liquidated damages for their landlord's noncompliance, but as amended, the damages are only available if the noncompliance is proven to be "willful and not in good faith."[223] That limiting language was borrowed from section 76-

212. *See supra* notes 81–85 and accompanying text.
213. Legis. B. 433, 106th Leg., 1st Reg. Sess. (Neb. Jan. 18, 2019) (as introduced).
214. UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 2.101(c) (UNIF. L. COMM'N 1972).
215. Legis. B. 434, 106th Leg., 1st Reg. Sess. (Neb. Jan. 18, 2019) (as introduced).
216. UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 4.201 (UNIF. L. COMM'N 1972).
217. Legis. B. 434 (as introduced).
218. *Id.*
219. *See supra*, notes 208–10 and accompanying text.
220. *See* Legis. B. 433.
221. *Id.* § 1(2) (enacted) (amending NEB. REV. STAT. § 76-1416(2) (Cum. Supp. 2020)).
222. *Id.*
223. *Id.* § 1(3).

1437, which provides that a landlord shall be entitled to liquidated damages if a tenant "willfully and not in good faith" remains on the premises after termination of the tenancy.[224] However—providing another example of imbalance in the Act—a landlord meeting this "willful and not in good faith" standard would be entitled to damages from the tenant equaling *three* months' the periodic rent,[225] while a tenant meeting this standard would be entitled only to *one* month's periodic rent from their landlord.[226] Although the language of the Uniform Act would have provided even stronger incentive for landlords to comply with the law,[227] tenants at the very least now have access to some form of remedy for blatant violations.

LB 433 incorporated by amendment one small but significant change from LB 434 increasing the notice period before a landlord can bring an eviction action for nonpayment of rent to seven days.[228] Fortuitously, the new law was in place when the country was struck by the COVID-19 pandemic and the ensuing eviction crisis.[229] Those extra days undoubtedly provided tenants critical time to earn a few more dollars, collect an unemployment check, or obtain rental assistance. If it were not for this change in the law and tenants were provided only three days to cure, housing advocates estimate hundreds, if not thousands, more Nebraska families would have been made homeless during the pandemic.[230] Of course, the pandemic-related eviction crisis also highlighted why the fourteen-day notice period proposed by

224. NEB. REV. STAT. § 76-1437(3) (Cum. Supp. 1974).

225. *Id.*

226. NEB. REV. STAT. § 76-1416(3) (Cum. Supp. 2020).

227. The Uniform Act provided for liquidated damages equaling twice the amount wrongfully retained; it also did not include the condition that the retention be both willful and not in good faith. *See* UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 2.101 (UNIF. L. COMM'N 1972).

228. *See* Legis. B. 433 § 2(2) (amending NEB. REV. STAT. § 76-1431(2) (Cum. Supp. 2020)).

229. *See* Emily Benfer et al., *The COVID-19 Eviction Crisis: An Estimated 30–40 Million People in America Are at Risk*, ASPEN INST. (Aug. 7, 2020), https://www.aspeninstitute.org/blog-posts/the-covid-19-eviction-crisis-an-estimated-30-40-million-people-in-america-are-at-risk/ [https://perma.cc/6646-KKSQ] (discussing the staggering number of renters facing eviction due to the COVID-19 pandemic).

230. *See e.g.,* Online Interview with Erin Feichtinger, Dir. of Pol'y and Advoc., Together Omaha (Nov. 11, 2021) (describing how those extra few days have provided her team and other rental assistance providers critical additional time to help families obtain rental assistance and remain housed). Feichtinger noted that "seven days is still an extremely and unreasonably short period of time for service providers to intervene and attempt to save a family from eviction, but it made it at least possible in some situations—with only three days it would have been impossible to have processed any of the rental assistance funds made available and hundreds if not thousands of additional families would have been forced from their homes during this pandemic. The more time we have, the more money we can get to landlords and the more families we can save from homelessness." *Id.*

the ULC and utilized by many other states[231] is more reasonable, as seven days is still an exceptionally short grace period when considering the consequences.[232]

Housing justice advocates returned to the legislature in 2021 seeking to resume the effort to bring balance to Nebraska's Act with nearly two dozen proposals to provide housing justice to Nebraska's renters. Thirteen proposals were ultimately introduced, ranging from technical fixes such as harmonizing two related acts, to public policy initiatives including a right to counsel, to forward-looking measures, such as a comprehensive eviction data bill and granting authority to local government to pause evictions when faced with a health crisis.[233] The bills garnered nearly eighteen hours of public testimony, which prima-

231. *See, e.g.*, CONN. GEN. STAT. § 47a-15a (2021) (providing tenants in Connecticut with nine days); IND. CODE § 32-31-1-6 (2002) (providing Indiana tenants with ten days); MASS. GEN. LAWS ch. 186, § 11 (2020) (providing Massachusetts tenants with fourteen days); MINN. STAT. § 504B.135(b) (providing Minnesota tenants with fourteen days); N.C. GEN. STAT. § 42-3 (providing North Carolina tenants with ten days); OKL. STAT. tit. 41, § 6 (2021) (providing Oklahoma tenants with ten days); 68 PA. CONS. STAT. § 250.501(c) (2021) (providing Pennsylvania tenants with ten days); VT. STAT. ANN. tit. 9, § 4467(a) (2021) (providing Vermont tenants with fourteen days).

232. *See supra* note 42 and accompanying text (comparing a tenant's opportunity to cure with that of a person with a mortgage).

233. Legis. B. 45, 107th Leg., 1st Reg. Sess. (Neb. Jan. 7, 2021) (as introduced) (seeking to repeal anti-continuance statute); Legis. B. 46, 107th Leg., 1st Reg. Sess. (Neb. Jan. 7, 2021) (as introduced) (seeking to repeal constructive service statute); Legis. B. 196, 107th Leg., 1st Reg. Sess. (Neb. Jan. 8, 2021) (as introduced) (seeking to prohibit source of income discrimination); Legis. B. 205, 107th Leg., 1st Reg. Sess. (Neb. Jan. 8, 2021) (as introduced) (seeking to put limits on late fees that can be charged); Legis. B. 230, 107th Leg., 1st Reg. Sess. (Neb. Jan. 11, 2021) (as introduced) (seeking to bar discrimination on the basis of sexual orientation and gender identity); Legis. B. 246, 107th Leg., 1st Reg. Sess. (Neb. Jan. 11, 2021) (as introduced) (seeking to clarify pleading requirements and bring mobile home lot evictions under same procedures as residential home evictions); Legis. B. 268, 107th Leg., 1st Reg. Sess. (Neb. Jan. 11, 2021) (as introduced) (seeking to clarify notice requirements before a landlord could enter an occupied rental unit); Legis. B. 277, 107th Leg., 1st Reg. Sess. (Neb. Jan. 11, 2021) (as introduced) (seeking to harmonize recent amendments to the Residential Act with the Mobile Home Act); Legis. B. 320, 107th Leg., 1st Reg. Sess. (Neb. Jan. 13, 2021) (as introduced) (seeking to relieve victims of domestic violence from obligations of a lease agreement, along with other protective provisions); Legis. B. 358, 107th Leg., 1st Reg. Sess. (Neb. Jan. 13, 2021) (as introduced) (seeking to strengthen anti-retaliation protections), Legis. B. 394, 107th Leg., 1st Reg. Sess. (Neb. Jan. 14, 2021) (as introduced) (seeking to allow municipalities to enact eviction moratoriums); Legis. B. 402, 107th Leg., 1st Reg. Sess. (Neb. Jan. 14, 2021) (as introduced) (seeking to require the Nebraska Supreme Court to collect and report data on eviction filings); Legis. B. 419, 107th Leg., 1st Reg. Sess. (Neb. 2021) (as introduced) (seeking to provide right to legal counsel in eviction proceedings); Legis. B. 453, 107th Leg., 1st Reg. Sess. (Neb. Jan. 14, 2021) (as introduced) (seeking to require landlord to be in compliance with local registration requirements).

rily encompassed a band of housing justice advocates testifying in support of each bill, followed by several landlord and real estate lobbyists testifying in opposition.[234] The general themes of the proponents' testimony, as derived from the record, were fairness, justice, and consistency.[235] Opponent testimony ran the gamut, but themes consistent among most who testified included: a) if these bills are passed, rents will become unaffordable; b) a landlord's property rights are superior to a tenant's privacy rights; and c) things are just fine the way they are.[236] Ultimately, portions of eight of the bills were advanced to the

234. *See Hearing on L.B. 45, L.B. 46, L.B. 128, L.B. 205, L.B. 246, L.B. 268, L.B. 277, L.B. 320, and L.B. 358 Before the Comm. on the Judiciary*, 107th Leg., 1st Reg. Sess. (Neb. Jan. 27, 2021), https://www.nebraskalegislature.gov/FloorDocs/107/PDF/Transcripts/Judiciary/2021-01-27.pdf [https://perma.cc/E72T-UA87]; *Hearing on L.B. 196, L.B. 309, L.B. 394, L.B. 402, L.B. 419, and L.B. 453 Before the Comm. on the Judiciary*, 107th Leg., 1st Reg. Sess. (Neb. Feb. 4, 2021), https://www.nebraskalegislature.gov/FloorDocs/107/PDF/Transcripts/Judiciary/2021-02-04.pdf [https://perma.cc/E72K-KYAX].

235. *See, e.g.*, *Hearing on L.B. 45 et al.*, *supra* note 234, at 7 (statement of Scott Mertz, Managing Attorney, Housing Justice Project, Legal Aid of Nebraska) (testifying that LB 277 would help "restore fairness and consistency to all of Nebraska's landlord and tenant laws"); *id.* at 79 (statement of Tessa Lengeling) ("A reasonable cap on late fees provides consistency in the rental housing market and gives tenants a fighting chance to make payments and remain in their homes."); *id.* at 149 (statement of Vic Klafter, Community Organizer, Nebraska Appleseed Center for Law in the Public Interest) (testifying in favor of LB 128 and stating that it would effectuate a "moderate advancement toward housing justice"); *Hearing on L.B. 196 et al.*, *supra* note 234, at 126 (statement of Caitlin Cedfeldt, Attorney, Legal Aid of Nebraska) (urging that passage of LB 419 "will ensure every tenant equal justice under the law"); *id.* at 167 (statement of Wilson Hupp) ("This bill also makes sense from a fairness standpoint. Landlords take advantage of government resources like courts and the sheriff to enforce their property and contractual rights in eviction situations. It only seems logical that these landlords themselves should comply with the law before asking that same government for help in enforcing the law against their tenants.").

236. *See, e.g., Hearing on L.B. 46 et al.*, *supra* note 234, at 68–69 (statement by Dennis Tierney, Board Member, Metropolitan Omaha Property Owners Association) (testifying if LB 46 were to pass, it would likely cause "higher rents for all tenants"); *id*. at 65–66 (statement of Lynn Fisher, President, Real Estate Owners and Managers Association) (testifying that "the system works very well the way it is . . . and that if this [bill] is passed along with some of these others bills that we're testifying, it's going to raise rents. It's going to make housing less affordable"); *id.* at 51–52 (statement of attorney Ryan Norman) (testifying that if LB 45 were to pass, it would frustrate landlords' "ability to provide quality and affordable housing to Nebraskans"); *id*. at 56 (statement of Pierce Carpenter) ("So, you know, I think the system works well enough right now."); *id.* at 28 (statement of Lynn Fisher, President, Real Estate Owners and Managers Association) ("The current law works very well."); *id*. at 29 (statement of Douglas Lane) ("Ok. Looking at this bill, to me, it's fixing a problem that doesn't exist."); *id*. at 30 (statement of Dennis Tierney, Board Member, Metropolitan Omaha Property Owners Association) (testifying that landlords should be able to inspect for drugs without consent or notice because "[i]f the time and reason is given for entry has to be stated and consent is required, the tenant could simply destroy all the evidence

floor.[237] Six were amended into LB 320, which was designated a priority bill by Senator John Cavanaugh.[238] After three rounds of debate and a few minor amendments, the legislature passed LB 320 with forty-three senators in favor, three opposed, and one abstaining.[239] While the language from most of the incorporated bills was pared down significantly as the legislature sculpted the law into its final form, notable advancements in the sphere of fairness and equity remained.

A summary of the amendments to Nebraska's Act as a result of the adoption of LB 320:

> Section 76-1423 was amended to require a landlord to provide tenants with twenty-four-hours' written notice of the landlord's intent to enter the rented premises. Additionally, the notice must be provided to each individual unit and include the intended purpose for the entry and a reasonable period during which the landlord anticipates making entry.[240]
>
> Section 76-1431 was amended to allow a tenant who is a victim of domestic violence to seek early release from a rental agreement under certain conditions.[241]
>
> Section 76-1441 was amended to require that any complaint for restitution contain the specific statutory authority under which possession is sought.[242]
>
> Section 76-1442.01 was amended to require that constructive service be posted on the front door of the residence, and that the re-

---

before the landlord arrives," and that it would be too logistically challenging for a landlord to obtain consent to show the tenant's unit to prospective buyers of the property); *id*. at 24–27 (statement of Gene Eckel, Member, Nebraska Association for Commercial Property Owners, Apartment Association of Nebraska) (testifying that landlords should have a right to enter a tenant's home without consent if they suspect drugs, even in cases where law enforcement would be constitutionally prohibited from doing so).

237. LB 453 and LB 320 were both advanced. *See* NEB. LEGIS. J., 107th Leg., 1st Reg. Sess. 414 (Feb. 16, 2021) (documenting LB 453 progressing to General File, as amended); NEB. LEGIS. J., 107th Leg., 1st Reg. Sess. 601 (Mar. 11, 2021) (documenting LB 320 progressing to General File, as amended by A.M. 450). By Judiciary Committee amendment, LB 320 incorporated specified provisions from LB 45, LB 46, LB 246, LB 268, LB 277, and LB 402. *See id.*; A.M. 450, 107th Leg., 1st Reg. Sess. (Mar. 9, 2021).

238. *See* A.M. 450; NEB. LEGIS. J., 107th Leg., 1st Reg. Sess. 575 (noting Senator John Cavanaugh's designation of LB 320 as a priority bill).

239. *See* NEB. LEGIS. J., 107th Leg., 1st Reg. Sess. 1203–04 (Apr. 29, 2021) (recording the vote and final passage of LB 320).

240. Legis. B. 320, 107th Leg., 1st Reg. Sess. § 4 (Neb. 2021) (enacted).

241. *Id.* § 5.

242. *Id.* § 7.

quired service affidavit describes the efforts that were made to effect service by traditional means and state that the summons and complaint were both mailed and posted.[243]

Section 76-1443 was amended to permit landlords and tenants in an eviction proceeding to receive one continuance each for good cause, then upon a showing of extraordinary cause for any subsequent continuances. If an approved subsequent continuance extends into a new rental period, the tenant may be required to deposit into the court rental payments that accrue while the eviction proceeding is pending.[244]

The Nebraska Mobile Home Landlord and Tenant Act[245] was amended to incorporate the 2019 amendments to the Nebraska Residential Landlord and Tenant Act relating to the return of security deposits and increasing the notice period, from three days to seven, before a landlord may institute an eviction action for nonpayment of rent.[246] The Mobile Home Act was also amended to provide that civil actions for possession against renters of mobile home lots would follow the same procedures as those brought against renters of apartments, houses, mobile home trailers, and other residences.[247]

The Nebraska Supreme Court is now required to create a biannual report on the volume of evictions filed and ordered in each Nebraska county.[248]

The recent improvements to the laws governing residential tenancies were tremendous and long overdue, but additional changes are necessary to bring the Act into the twenty-first century and achieve genuine balance and fairness in the rental-housing realm.

V. FINDING BALANCE, EQUITY, AND UNIFORMITY

The Nebraska Legislature has a few possible responses to the issues and imbalances identified and described herein: it could do nothing, it could adopt the ULC's latest iteration of the Uniform

243. *Id.* § 8.
244. *Id.* § 9.
245. NEB. REV. STAT. §§ 76-1450 to -14,111 (Cum. Supp. 2020).
246. Legis. B. 320 §§ 10–13 (enacted); Legis. B. 433, 106th Leg., 1st Reg. Sess. (Neb. 2019) (enacted).
247. Legis. B. 320 § 1 (enacted) (amending NEB. REV. STAT. § 25-21,219 (Cum. Supp. 2020)).
248. *Id.* § 14 (codified as NEB. REV. STAT. § 24-232 (Supp. 2021)).

Residential Landlord and Tenant Act,[249] or it could further amend Nebraska's Act. Doing nothing is simply not a satisfactory or sensible policy choice, and Nebraska is unlikely to adopt the ULC's newest version of the Act, particularly where no state has yet done so.[250] Thus, the remaining reasonable option is to continue to improve Nebraska's Act through thoughtful and sensible amendment.

To improve Nebraska's Act, the legislature should consider reviving certain language proposed by the ULC through the Uniform Act but discarded by the 83rd Legislature. Legislators should also consider incorporating certain provisions from the Revised Uniform Act. The Revised Act includes language aimed to respond both to the shortcomings of the original Act and the challenges faced by contemporary landlords and tenants that were not present fifty years ago.[251] The legislature should also look to other jurisdictions for policies that have proven successful. Adopting provisions and language that have been effective in other states will not only improve the Act substantively but will allow those moving to Nebraska some level of assurance that the rights and responsibilities they knew previously are present in Nebraska as well. And finally, the legislature should strive to bring to the Act a degree of connectivity and uniformity not currently present. Numerous provisions of Nebraska's Act have become disjointed, ineffective, and in some instances in conflict due to the injudicious chopping and tinkering during its adoption and through certain amendments that followed.

A forthcoming article will offer a series of reasonable proposals for improving Nebraska's Act by addressing the issues and oversights examined above.[252] The proposals encompass an exhaustive list of suggested amendments, some that encourage both major and minor policy change and some that seek only to improve the Act's clarity, consistency, and uniformity.

---

249. REV. UNIF. RESIDENTIAL LANDLORD & TENANT ACT (UNIF. L. COMM'N 2015). Notably, Nebraska has enacted laws similar in concept to at least two proposals from the Revised Uniform Act. *Compare* Legis. B. 320 § 9 (enacted) (amending NEB. REV. STAT. §§ 76-1410, 76-1431), *with* REV. UNIF. RESIDENTIAL LANDLORD & TENANT ACT §§ 1101–09 (UNIF. L. COMM'N 2015) (providing protections for renters who are victims of domestic violence); *compare* Legis. B. 221, 104th Legis., 2d Reg. Sess. (Neb. 2016) (enacted) (codified as NEB. REV. STAT. § 76-1431(4) (Cum. Supp. 2018)), *with* REV. UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 601 (UNIF. L. COMM'N 2015).

250. *See* 2020–2021 GUIDE TO MODEL & UNIFORM ACTS, *supra* note 5, at 30.

251. *See* UNIF. L. COMM'N, WHY YOUR STATE SHOULD ADOPT THE REVISED UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT (2015) (Sept. 2017), https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=E4f5b25b-e9c1-eb0f-d46e-d96b7be33e11&forceDialog=0 [https://perma.cc/9ZV3-BSUM].

252. Ryan P. Sullivan, 101 NEB. L. REV. (forthcoming 2022).

VI. CONCLUSION

In 1974, the Nebraska Legislature had a chance to bring fairness, consistency, and uniformity to an area of the law where such principles are critical to judicial efficiency, economic viability, and the quality of life for many Nebraska families. Instead, it adopted what the Nebraska Supreme Court critically labeled the "Motley Multiform Uniform Residential Landlord and Tenant Act."[253] For nearly fifty years, while landlords and property managers benefited and prospered from these asymmetrical laws, Nebraska's renters suffered deplorable conditions, unfair and unreasonable lease terms, and unwarranted homelessness. Nebraska's modern legislature has an opportunity to correct this wrong by continuing the progress achieved over the last several years in improving housing justice for renters. Laws that govern one of the most fundamental needs of over a third of the state's population[254] should be continually reviewed, analyzed, scrutinized, and modified, as appropriate, to ensure all Nebraskans have access to "The Good Life."

253. Mason v. Schumacher, 231 Neb. 929, 931, 439 N.W.2d 61, 64 (Neb. 1989).

254. *See Out of Reach 2021: Nebraska*, NAT'L LOW INCOME HOUS. COAL., https://reports.nlihc.org/oor/nebraska [https://perma.cc/DLV2-P4AV] (last visited Sept. 26, 2021) (reporting that thirty-four percent of Nebraskans are renters).