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Landlord’s Duty To Maintain

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I. [3.1] SCOPE OF CHAPTER

This chapter first examines the landlord's duty to maintain premises under express covenants to repair and the implied warranty of habitability. It then sets forth remedies for breach of the duty to maintain, including actions for damages, rent withholding, repair and deduct, constructive eviction, injunctive relief, building code enforcement, and other possible remedies. It also discusses maintenance of migrant housing and explains the municipal code enforcement process and the tenant's role therein.

II. EXPRESS COVENANT TO REPAIR

A. [3.2] Traditional Rule

The mere relationship between landlord and tenant creates no duty in the landlord to make repairs to premises absent an express agreement to make repairs or to maintain the property in good condition. *Jones v. Chicago Housing Authority,* 59 Ill.App.3d 138, 376 N.E.2d 26, 17 Ill.Dec. 133 (1st Dist. 1978). *See also Mandelke v. International House of Pancakes, Inc.,* 131 Ill.App.3d 1076, 477 N.E.2d 9, 87 Ill.Dec. 408 (1st Dist. 1985); *McDaniel v. Silvernail,* 37 Ill.App.3d 884, 346 N.E.2d 382 (4th Dist. 1976).

B. [3.3] Remedies for Breach

Under Illinois law, a tenant has various remedies available for breach of the landlord's express covenant to repair. The tenant may (1) abandon the premises if they become untenantable because of the breach, (2) remain in possession and recoup damages in an action for rent, (3) make the repairs and deduct the cost from the rent or sue the landlord for the cost, or (4) sue the landlord for breach of the covenant and recover damages. *American National Bank & Trust Co. v. K-Mart Corp.,* 717 F.2d 394 (7th Cir. 1983); *Book Production Industries, Inc. v. Blue Star Auto Stores, Inc.,* 33 Ill.App.2d 22, 178 N.E.2d 881 (2d Dist. 1961). Note that the breach of the landlord's express covenant to repair does not give rise to any action in tort but only in contract for breach of the covenant. *Zion Industries, Inc. v. Loy,* 46 Ill.App.3d 902, 361 N.E.2d 605, 5 Ill.Dec. 282 (2d Dist. 1977).

C. [3.4] Damages for Breach

Damages for breach of the landlord's express covenant to repair are limited to actual losses arising from the breach. *First National Bank of Des Plaines v. Shape Magnetronics, Inc.,* 135 Ill.App.3d 288, 481 N.E.2d 953, 90 Ill.Dec. 153 (1st Dist. 1985). The "diminution of rental value" approach used to measure these damages is the difference between the value of the rental property in and out of repair. *American National Bank & Trust Co. v. K-Mart Corp.,* 717 F.2d 394 (7th Cir. 1983); *Zion Industries, Inc. v. Loy,* 46 Ill.App.3d 902, 361 N.E.2d 605, 5 Ill.Dec. 282 (2d Dist. 1977).

III. IMPLIED WARRANTY OF HABITABILITY

A. [3.5] Nature of Warranty

In *Jack Spring, Inc. v. Little,* 50 Ill.2d 351, 280 N.E.2d 208 (1972), the Illinois Supreme Court held that landlords are bound by an implied warranty of habitability in the leasing of residential units. The court stated:

> **[W]e hold that included in the contracts, both oral and written, governing the tenancies of the defendants in the multiple unit dwellings occupied by them, is an**

implied warranty of habitability which is fulfilled by substantial compliance with the pertinent provisions of the Chicago building code. 280 N.E.2d at 217.

The court explained that if the amount of damages resulting from the breach of the implied warranty or an express covenant to repair equalled or exceeded the rent claimed to be due, then the tenant would have a defense to an eviction action based on nonpayment of rent. The court stated:

> **It would be paradoxical, indeed, to hold that if these were actions to recover sums owed for rent the defendants would be permitted to prove that damages suffered as the result of the plaintiffs' breach of warranty equalled or exceeded the rent claimed to be due, and therefore, that no rent was owed, and at the same time hold that because the plaintiffs seek possession of the premises, to which admittedly, they are not entitled unless rent is due and unpaid after demand, the defendants are precluded from proving that because of the breach of warranty no rent is in fact owed. The argument that the landlords' claim is for rent and the tenants' for damages should not be permitted to obfuscate the sole and decisive issue, which simply stated is whether the tenants owe the landlords rent which is due and remains unpaid.** 280 N.E.2d at 213.

The Supreme Court of Illinois extended this implied warranty of habitability to leases of single-family dwellings in *Pole Realty Co. v. Sorrells,* 84 Ill.2d 178, 417 N.E.2d 1297, 49 Ill.Dec. 283 (1981).

Following the court's decision in *Jack Spring, supra,* many divisions of the appellate court interpreted the case to stand for the proposition that the implied warranty of habitability is fulfilled only by substantial compliance with a building code. The court addressed this interpretation in *Glasoe v. Trinkle,* 107 Ill.2d 1, 479 N.E.2d 915, 88 Ill.Dec. 895 (1985), which held that an implied warranty of habitability applies to all residential leases, regardless of the existence of housing or building codes. In *Glasoe,* Justice Ryan stated:

> **Just as tenants in single-family dwellings have the same legitimate expectations as those in multiple-unit dwellings . . . so tenants in areas without building codes have the same legitimate expectations as those in areas with building codes. All tenants of residential property enter into leases with the legitimate expectation that the dwelling will be fit for habitation for the entire period of the tenancy. [**Citation omitted.**]** 479 N.E.2d at 919.

The court in *Glasoe* established flexible guidelines for determining the scope of the warranty. Specifically, the warranty requires that a dwelling be fit for its intended use and that the premises remain habitable throughout the term of the lease. In addition, the warranty also requires that at the beginning of the lease there be no latent defects in those facilities vital to the use of the dwelling and vital to the life, health, and safety of the tenant.

In order to constitute a breach of the implied warranty of habitability, the *Glasoe* court stated that the defect must be of such substantive nature as to render the premises unsafe or unsanitary and thus unfit for occupancy. The factors to be considered in determining the existence of the breach include

1. the nature of the deficiency;

2. the its effect on habitability;

3. the length of time the deficiency persisted;

4. the age of the structure;

5. the amount of the rent;

6. the area in which the premises are located;

7. whether the tenant waived the defects; and

8. whether the defects resulted from abnormal or unusual use by the tenant.

B. [3.6] Notice to the Landlord

In addition to the above factors, the court should consider whether the landlord knew or reasonably should have known of such conditions and that the landlord did not correct the condition within a reasonable time. *Glasoe v. Trinkle,* 107 Ill.2d 1, 479 N.E.2d 915, 88 Ill.Dec. 895 (1985); *Abram v. Litman,* 150 Ill.App.3d 174, 501 N.E.2d 370, 103 Ill.Dec. 349 (4th Dist. 1986) (latent defect). The *Abram* court refused to follow the holding in *Jarrell v. Hartman,* 48 Ill.App.3d 985, 363 N.E.2d 626, 6 Ill.Dec. 812 (4th Dist. 1977), that a tenant was under no obligation to give a landlord notice of a defective condition.

C. [3.7] Chicago Residential Landlord and Tenant Ordinance

In addition to the implied warranty existing by case law, tenants in Chicago have additional remedies for material noncompliance by the landlord with the rental agreement or statute provisions pursuant to the Chicago Residential Landlord and Tenant Ordinance (RLTO), Chicago Municipal Code §5-12-010, *et seq.* This ordinance applies to all rental units in Chicago except for buildings of six or fewer units when the landlord lives in the building. Also excluded are hotels, motels, rooming and boarding houses (except when a tenant has resided there for 32 days and pays rent on a monthly basis), hospitals, school dormitories, shelters, employer's housing, nonresidential properties, co-ops, and condominiums. The RLTO has been held to supersede the state forcible entry and detainer statute. *City of Evanston v. Create, Inc.,* 85 Ill.2d 101, 421 N.E.2d 196, 51 Ill.Dec. 688 (1981). It has also been specifically found to apply to month to month tenancies. *Reed v. Burns,* 238 Ill.App.3d 148, 606 N.E.2d 152, 179 Ill.Dec. 320 (1st Dist. 1992). *See Plambeck v. Greystone Management & Columbia National Trust Co.,* 281 Ill.App.3d 260, 666 N.E.2d 670, 217 Ill.Dec. 1 (1st Dist. 1996), for an interesting analysis of the RLTO.

If there is material noncompliance by the landlord with a rental agreement or with the ordinance that renders the premises not reasonably fit and habitable, the tenant under the rental agreement may deliver a written notice to the landlord specifying the acts and/or omissions constituting the material noncompliance and specifying that the rental agreement will terminate on a date not less than 14 days after receipt of the notice by the landlord unless the material noncompliance is remedied by the landlord within the time period specified in the notice. If the material noncompliance is not remedied within the time period specified in the notice, the rental agreement will terminate, and the tenant shall deliver possession of the dwelling unit to the landlord within 30 days after the expiration of the time period specified in the notice. RLTO §5-12-110(a).

Another alternative available to the tenant when there is a breach of the rental agreement or ordinance provisions is to withhold from the monthly rent an amount that reasonably reflects the reduced value of the premises due to the breach. The tenant may withhold the rent only after giving the landlord 14 days' notice to cure the breach. RLTO §5-12-110(d). The tenant also has the option of making the needed repairs and deducting the cost from the rent. RLTO §5-12-110(c).

In addition to the above, if there is material noncompliance by the landlord with the rental agreement or with the ordinance, the tenant may obtain injunctive relief and/or recover damages by claim or defense. RLTO §5-12-110(e).

D. [3.8] Extent of Tenant's Obligation To Pay Rent

In *Jack Spring, Inc. v. Little,* 50 Ill.2d 351, 280 N.E.2d 208, 213 (1972), the court stated:

> **It is established law that** *liability for rent continues so long as the tenant is in possession* **and equally well established that a tenant may bring an action against his landlord for breach of a covenant or may recoup for damages in an action brought to recover rent. [**Emphasis added.**]**

This admonition was repeated in *Pole Realty Co. v. Sorrells,* 84 Ill.2d 178, 417 N.E.2d 1297, 49 Ill.Dec. 283 (1981). The meaning of this axiom has caused problems for some trial courts when a tenant asserts breach of warranty as a defense to a nonpayment of rent claim.

Spring specifically held that a tenant is entitled to set off against a landlord's claim for rent damages sustained by the tenant as a result of the landlord's breach of implied warranty. If the tenant's damages exceed the landlord's claim for rent, then no rent is "due," thereby justifying the tenant's withholding of rent and defeating the eviction action.

The tenant therefore is liable only for fair rental value of the defective premises during the breach of the implied warranty of habitability and is entitled to an abatement of the rent in excess of that amount. If full rent has been paid for a period for which a tenant is entitled to abatement, damages may be awarded in the tenant's favor in that amount. *Glasoe v. Trinkle,* 107 Ill.2d 1, 479 N.E.2d 915, 88 Ill.Dec. 895 (1985). By way of example (using the percentage reduction theory), Tenant (*T*) refused to pay the monthly $300 rent for three months because for the past six months *T* has had no heat, no hot water, and a leaking roof. At trial, *T* proves that the value of the apartment has been reduced 50 percent for three months of summer and fall and 75 percent for three winter months. *T* was therefore legally obligated to pay only $150 per month for the first three months (50 percent x $300). *T* had already paid $900 during this six-month period, whereas the landlord was only entitled to $675 (3 x $150 plus 3 x $75). Thus no rent is "due," and *T* may recover $225 in a counterclaim against the landlord.

E. [3.9] Tenant's Knowledge of Defects

The fact that a tenant continues to live in the premises does not mean that the premises are in substantial compliance with the building code. A tenant may live in an apartment that is not in compliance with the code without waiving the right to seek damages from the landlord for breach of the implied warranty. *Pole Realty Co. v. Sorrells,* 84 Ill.2d 178, 417 N.E.2d 1297, 49 Ill.Dec. 283 (1981). This principle is consistent with the rationale stated in *Jack Spring, Inc. v. Little,* 50 Ill.2d 351, 280 N.E.2d 208 (1972), and *Javins v. First National Realty Corp.,* 428 F.2d 1071 (D.C.Cir. 1970), that inequality of bargaining power forces many tenants to accept substandard housing.

F. Applicability of Implied Warranty

1. [3.10] Type of Dwelling Unit

In *Jack Spring, Inc. v. Little,* 50 Ill.2d 351, 280 N.E.2d 208 (1972), the Supreme Court applied the implied warranty of habitability to leases, both oral and written, of multiple residential dwellings. *South Austin Realty Association v. Sombright,* 47 Ill.App.3d 89, 361 N.E.2d 795, 5 Ill.Dec. 472 (1st Dist. 1977), extended the warranty to two-flat buildings. In *Pole Realty Co. v. Sorrells,* 84 Ill.2d 178, 417 N.E.2d 1297, 49 Ill.Dec. 283 (1981), the court extended the warranty to leases of single-family dwellings. The warranty was further extended to jurisdictions without building codes in *Glasoe v. Trinkle,* 107 Ill.2d 1, 479 N.E.2d 915, 88 Ill.Dec. 895 (1985).

Outside the landlord-tenant context, *Petersen v. Hubschman Construction Co.,* 76 Ill.2d 31, 389 N.E.2d 1154, 27 Ill.Dec. 746 (1979), held that the implied warranty of habitability applied to contracts for the sale of new homes by builder-vendors. Since *Petersen* was decided, the warranty of habitability has been broadly applied to protect innocent home buyers. In *Park v. Sohn,* 90 Ill.App.3d 794, 414 N.E.2d 1, 46 Ill.Dec. 279 (3d Dist. 1980), the court held that the warranty applied to the sale of a home by a builder-vendor even though he had lived in the home for approximately two years before the sale. *See also Cotter v. Parrish,* 166 Ill.App.3d 836, 520 N.E.2d 1172, 117 Ill.Dec. 821 (5th Dist. 1988), in which persons had resided in the home for nearly four years. The implied warranty of habitability was extended from builder-vendors of new homes to subsequent purchasers in *Redarowicz v. Ohlendorf,* 92 Ill.2d 171, 441 N.E.2d 324, 65 Ill.Dec. 411 (1982). The warranty was also successfully invoked against a subcontractor of the builder-vendor in *Minton v. Richards Group of Chicago,* 116 Ill.App.3d 852, 452 N.E.2d 835, 72 Ill.Dec. 582 (1st Dist. 1983). In *Hefler v. Wright,* 121 Ill.App.3d 739, 460 N.E.2d 118, 77 Ill.Dec. 259 (5th Dist. 1984), a defendant was a builder-vendor because he was engaged in the commercial business of building houses. In *McClure v. Sennstrom,* 267 Ill.App.3d 277, 642 N.E.2d 885, 205 Ill.Dec. 20 (2d Dist. 1994), the foundation of a home was old and was used as the base for erecting a new home. The court held that the house was "new" within the meaning of the implied warranty of habitability.

In the area of sales, the warranty has been applicable to town houses (*Colsant v. Goldschmidt,* 97 Ill.App.3d 53, 421 N.E.2d 1073, 52 Ill.Dec. 210 (2d Dist. 1981)) and condominiums (*Tassan v. United Development Co.,* 88 Ill.App.3d 581, 410 N.E.2d 902, 43 Ill.Dec. 769 (1st Dist. 1980); *Herlihy v. Dunbar Builders Corp.,* 92 Ill.App.3d 310, 415 N.E.2d 1224, 47 Ill.Dec. 911 (1st Dist. 1980)).

2. [3.11] Subsequent Additions

The implied warranty of habitability extends to cases involving subsequent additions to homes brought by subsequent purchasers. *VonHoldt v. Barba & Barba Construction, Inc.,* 175 Ill.2d 426, 677 N.E.2d 836, 222 Ill.Dec. 302 (1997).

3. [3.12] Latent Defects in Homes

To establish a breach of warranty of habitability, one must prove that the home had a latent defect caused by improper design, material, or workmanship that rendered the property unsuitable for use as a home. *Naiditch v. Shaf Home Builders, Inc.,* 160 Ill.App.3d 245, 512 N.E.2d 1027, 111 Ill.Dec. 486 (2d Dist. 1987).

4. [3.13] Commercial Premises and Vacant Lots

In contrast to the above, the Illinois appellate court has consistently held that the implied warranty of habitability does not extend to commercial leases. *J. B. Stein & Co. v. Sandberg,* 95 Ill.App.3d 19, 419 N.E.2d 652, 50 Ill.Dec. 544 (2d Dist. 1981); *Elizondo v. Perez,* 42 Ill.App.3d 313, 356 N.E.2d 112, 1 Ill.Dec. 112 (1st Dist. 1976); *Yuan Kane Ing v. Levy,* 26 Ill.App.3d 889, 326 N.E.2d 51 (1st Dist. 1975). One court has also refused to apply the warranty to the sale of a vacant lot. *Witty v. Schramm,* 62 Ill.App.3d 185, 379 N.E.2d 333, 19 Ill.Dec. 669 (3d Dist. 1978).

5. [3.14] Common Areas and Inside Apartments

A tenant may assert a breach of the implied warranty of habitability for defects both within an individual apartment and in the common areas of the building. In *Jarrell v. Hartman,* 48 Ill.App.3d 985, 363 N.E.2d 626, 628, 6 Ill.Dec. 812 (4th Dist. 1977), the Fourth District Appellate Court stated:

> **We are unpersuaded by the defendants' argument that since the defects complained of primarily pertain to the common area, *i. e.*, halls and stairways, they are not "substantial." Building code violations in the common areas of a multi-unit dwelling may be as dangerous or uncomfortable to the tenants as defective conditions within their respective apartments. The public policy considerations that permit a cause of action are not so fractured as to allow for a cause of action for a substantial defect *in* an apartment and deny any remedy for defects in halls or stairs leading *to* the apartment. [**Emphasis in original.**]**

Illinois courts have repeatedly held that a landlord has a duty to maintain the common areas of the building in a reasonably safe condition. *See Smith v. Rengel,* 97 Ill.App.3d 204, 422 N.E.2d 1146, 52 Ill.Dec. 937 (4th Dist. 1981).

6. [3.15] Applicability to Federally Subsidized Housing

South Austin Realty Association v. Sombright, 47 Ill.App.3d 89, 361 N.E.2d 795, 5 Ill.Dec. 472 (1st Dist. 1977), holds that the warranty of habitability applies to property acquired by HUD after foreclosure on federally insured mortgages. However, in *Alexander v. HUD,* 555 F.2d 166 (7th Cir. 1977), the Seventh Circuit refused to extend the warranty of habitability to HUD-owned property. *Alexander* failed to take into account 42 U.S.C. §3535(i), which provides that HUD is subject to state and local law in dealing with properties thus acquired. *Alexander* arose in Indiana, which, at the time the case was filed, did not yet have a definite judicial recognition of the warranty of habitability.

G. [3.16] Waiver of Implied Warranty

See Chapter 1 for a discussion of the effectiveness of lease clauses purporting to limit the implied warranty of habitability.

IV. REMEDIES FOR LANDLORD'S FAILURE TO MAINTAIN

A. Damages

1. [3.17] Methods of Recovery

A tenant may assert a cause of action for a landlord's breach of an express or implied warranty of habitability by way of

a. an affirmative defense to an eviction action based on nonpayment of rent (*Jack Spring, Inc. v. Little,* 50 Ill.2d 351, 280 N.E.2d 208 (1972); *Pole Realty Co. v. Sorrells,* 84 Ill.2d 178, 417 N.E.2d 1297, 49 Ill.Dec. 283 (1981); *Richardson v. Wilson,* 46 Ill.App.3d 622, 361 N.E.2d 110, 5 Ill.Dec. 110 (1st Dist. 1977));

b. a counterclaim in such a case (*Pole Realty, supra; Fisher v. Holt,* 52 Ill.App.3d 164, 367 N.E.2d 370, 9 Ill.Dec. 936 (1st Dist. 1977)); the counterclaim survives even if the claim is dismissed (*Fisher, supra*);

c. an equitable counterclaim seeking specific performance of a landlord's express or implied warranty by requiring the landlord to bring the premises into compliance with building code regulations (*South Austin Realty Association v. Sombright,* 47 Ill.App.3d 89, 361 N.E.2d 795, 5 Ill.Dec. 472 (1st Dist. 1977)); or

d. an affirmative cause of action for damages (*Morford v. Lensey Corp.,* 110 Ill.App.3d 792, 442 N.E.2d 933, 66 Ill.Dec. 372 (3d Dist. 1982); *Jarrell v. Hartman,* 48 Ill.App.3d 985, 363 N.E.2d 626, 6 Ill.Dec. 812 (4th Dist. 1977); *Gillette v. Anderson,* 4 Ill.App.3d 838, 282 N.E.2d 149 (2d Dist. 1972)).

NOTE: Breach of the warranty cannot serve as a basis for the recovery of property damage. *Abram v. Litman,* 150 Ill.App.3d 174, 501 N.E.2d 370, 103 Ill.Dec. 349 (4th Dist. 1986).

See Chapter 4 for a further discussion of eviction defenses or counterclaims.

2. [3.18] Methods of Calculation

Section 3.4 discusses the methods of calculating damages for a breach of the express covenant to repair.

The court in *Glasoe v. Trinkle,* 107 Ill.2d 1, 479 N.E.2d 915, 88 Ill.Dec. 895 (1985), addressed the issue of how to determine the amount of damages suffered by a tenant as a result of a breach of the implied warranty. While acknowledging that several methods have been used by various courts and authors, the court stated that whatever approach is appropriate to the facts in a given case shall be used. A law review article by Anthony J. Fusco, Jr., et al., *Damages for Breach of the Implied Warranty of Habitability in Illinois — A Realistic Approach,* 55 Chi.-Kent L.Rev. 337 (1979), was cited with approval in *Glasoe* and should be read by all practitioners in this area.

a. [3.19] Difference in Value

Glasoe v. Trinkle, 107 Ill.2d 1, 479 N.E.2d 915, 88 Ill.Dec. 895 (1985), specifically discussed the "difference in value" and "percentage reduction in use" methods. Two varieties of the "difference in value" approach can be used. The first variety measures the tenant's damages as the difference between the fair rental value of the premises if they had been as warranted and their fair value during their occupancy by the tenant in the unsafe, unsanitary, or unfit condition. Under the second approach, the difference between the agreed rent and the fair rental value of the premises during their occupancy by the tenant in the unsafe condition is used to measure the damages. The court further stated that the agreed rent could be considered as evidence of the fair market value. Prior to this decision, courts had debated the question of whether expert testimony was needed to determine the measure of damages. This question was finally answered in *Glasoe,* in which the court stated that the parties involved are qualified to testify as to the difference in fair rental value, and therefore expert testimony is not required.

b. [3.20] Percentage Reduction in Use

Glasoe v. Trinkle, 107 Ill.2d 1, 479 N.E.2d 915, 88 Ill.Dec. 895 (1985), also discussed the "percentage reduction in use" theory, which reduces the tenant's rent by a percentage reflecting the diminution in the value and enjoyment of the premises by reason of the existence of defects that give rise to the breach of the implied warranty of habitability.

The percentage reduction theory appears more suited to reflect the actual loss suffered by the tenant. This factor was addressed by the court in *Vanlandingham v. Ivanow,* 246 Ill.App.3d 348, 615 N.E.2d 1361, 186 Ill.Dec. 304 (4th Dist. 1993), in which the defendant-tenants, arguing that the plaintiffs had breached the implied warranty of habitability, proved their damages by using this theory. The trial court found that the defendants' value of the leasehold was diminished to the extent

of 50 percent (due to numerous problems, including 43 building code violations), and the breach existed for the entire term of the tenancy. After doing the necessary calculations, it was determined that the amount of rent that defendants paid exceeded the amount that they were required to pay, and, therefore, their damages exceeded the amount of damages sought by the plaintiffs in unpaid rent.

3. [3.21] Consequential Damages

In *Pole Realty Co. v. Sorrells,* 84 Ill.2d 178, 417 N.E.2d 1297, 49 Ill.Dec. 283 (1981), the Supreme Court noted without comment that the tenant was seeking damages in the amount of $1,000 for physical and emotional injury and was seeking recovery for extermination costs and excess heating bills allegedly caused by the landlord's breach of the implied warranty of habitability. The Illinois Supreme Court has not yet ruled on whether damage to property or personal injuries sustained by a tenant may be asserted in a breach of warranty count.

In *Hoffman v. Monaco,* 330 Ill.App. 98, 69 N.E.2d 718 (1st Dist. 1946), a commercial tenant was permitted to recover consequential damages resulting from a breach of an express covenant to provide heat. These damages included spoilage of merchandise, damage to machinery, and loss of profits. Other jurisdictions have allowed the recovery of proven incidental and consequential damages. *See In re Estate of Vazquez v. Hepner,* 564 N.W.2d 426 (Iowa App. 1997); *Creekside Apartments v. Poteat,* 116 N.C.App. 26, 446 S.E.2d 826 (1994); *Johnson v. Scandia Associates, Inc.,* 641 N.E.2d 51 (Ind. App. 1994).

In an analogous area of law, home purchasers have been allowed to recover certain consequential damages for breach of a house builder's implied warranty of habitability. In *Park v. Sohn,* 89 Ill.2d 453, 433 N.E.2d 651, 60 Ill.Dec. 609 (1982), the court held that the proper measure of damages under breach of warranty in the sale of a home was either the cost to correct the defective condition or the amount by which the defects reduced the value of the property.

In *Colsant v. Goldschmidt,* 97 Ill.App.3d 53, 421 N.E.2d 1073, 52 Ill.Dec. 210 (2d Dist. 1981), the court held that the cost of repairing and replacing a carpet that had been damaged as a result of water leaking from a defective roof was a proper measure of damage in warranty. Finally, the court in *Redarowicz v. Ohlendorf,* 92 Ill.2d 171, 441 N.E.2d 324, 65 Ill.Dec. 411 (1982), seems to indicate that consequential damages sounding both in contract and in tort such as those recoverable in a product liability case may appropriately be requested in an implied warranty of habitability action.

4. [3.22] Punitive Damages

The general rule in Illinois is that punitive damages are not recoverable in a breach of contract action unless the breach constitutes an independent wilful tort. *See Community Consolidated School District No. 169 v. Meneley Construction Co.,* 86 Ill.App.3d 1101, 409 N.E.2d 66, 42 Ill.Dec. 571 (4th Dist. 1980). For a history of punitive damages in Illinois, see Brian R. McKillip, *Punitive Damages in Illinois: Review and Reappraisal,* 27 DePaul L.Rev. 571 (1978).

One court that analyzed the necessity for punitive damages for a landlord's wilful failure to maintain his premises stated:

> **To deny punitive damages . . . would encourage serious violations of the warranty of habitability by assuring landlords that the worst consequence of such violations would be an abatement of rent which would merely reduce the lease rent to the proper value for the level of services actually provided.** *111 East 88th Partners v. Simon,* 106 Misc.2d 693, 434 N.Y.S.2d 886, 889 (1980) (assessing $25,000 in punitive damages against landlord whose tenants lived 43 days without heat, 53 days without hot water, and 38 days without elevator service).

5. [3.23] Recovery for Personal Injuries in Tort

See Chapter 9 for causes of action against a landlord for personal injuries.

B. [3.24] Repair and Deduct

A tenant who repairs an apartment because the landlord has failed to comply with an express agreement to maintain the premises may deduct the cost from the rent. *Book Production Industries, Inc. v. Blue Star Auto Stores, Inc.,* 33 Ill.App.2d 22, 178 N.E.2d 881 (2d Dist. 1961). As a result, the tenant would have a defense to an eviction based on nonpayment of the amount deducted from the rent. *Hareas v. Kyriakopoulos,* 101 Ill.App.3d 393, 428 N.E.2d 500, 56 Ill.Dec. 908 (1st Dist. 1981). The tenant must show that the expense incurred is no more than is fair and reasonable. *Strode v. Brown,* 351 Ill.App. 194, 114 N.E.2d 467 (1st Dist. 1953) (abst.).

The tenant's right to repair and deduct for breach of the implied warranty of habitability has not yet been recognized in Illinois. In his dissent in *Jack Spring, Inc. v. Little,* 50 Ill.2d 351, 280 N.E.2d 208, 222 (1972), Justice Ryan suggested that when a landlord fails to make repairs, the tenant "should have the right to himself make the repairs which the lessor failed to perform and to offset against his obligation to pay rent the reasonable cost of the repairs which he has made."

C. [3.25] Repair and Deduct Under the Chicago Residential Landlord and Tenant Ordinance

The Chicago Residential Landlord and Tenant Ordinance provides that if there is material noncompliance by the landlord and the reasonable cost of compliance does not exceed the greater of $500 or one half of the monthly rent, the tenant may recover damages for the material noncompliance or may notify the landlord in writing of the tenant's intention to correct the condition at the landlord's expense, provided, however, that this subsection shall not be applicable if the reasonable cost of compliance exceeds one month's rent. RLTO §5-12-110(c).

The tenant must have the work done in a workmanlike manner and in compliance with existing law and building regulations. The tenant must then submit to the landlord a paid bill from an appropriate tradesperson or supplier; this cost is not to exceed the reasonable price customarily charged for such work.

If the defective condition affects facilities shared by more than one dwelling unit, the tenant has an obligation to notify all other affected tenants and to make sure that the repair work does not cause any inconvenience to the other tenants.

Material noncompliance by the landlord includes, but is not limited to, any of the following circumstances set forth in RLTO §5-12-110:

1. failure to provide smoke detectors, sprinkler systems, automatic fire detectors, or fire extinguishers where required by the Municipal Code;

2. failure to provide or maintain in good working order a flush water closet, lavatory basin, bathtub or shower, or kitchen sink;

3. failure to maintain heating facilities or gas-fired appliances in compliance with the requirements of the Municipal Code;

4. failure to provide heat or hot water in such amounts and at such levels and times as required by the Municipal Code;

5. failure to provide hot and cold running water as required by the Municipal Code;

6. failure to exterminate insects, rodents, or other pests;

7. failure to maintain plumbing facilities, piping, fixtures, appurtenances, and appliances in good working condition;

8. failure to maintain the dwelling unit and common areas in a fit and habitable condition.

9. failure to maintain windows, exterior doors, or basement hatchways in sound condition and to provide locks or security devices as required by the Municipal Code, including deadlatch locks, deadbolt locks, sash or ventilation locks, and front door windows or peepholes.

D. [3.26] Constructive Eviction

Constructive eviction is defined as something of a serious and substantial nature done by the landlord with the intent of depriving the tenant of beneficial enjoyment of the premises that results in the tenant vacating the premises. *First National Bank of Evanston v. Sousanes,* 96 Ill.App.3d 1047, 422 N.E.2d 188, 52 Ill.Dec. 507 (1st Dist. 1981). The wrongful act of the landlord may result from the landlord's failure or refusal to perform the conditions under the lease. *John Munic Meat Co. v. H. Gartenberg & Co.,* 51 Ill.App.3d 413, 366 N.E.2d 617, 9 Ill.Dec. 360 (1st Dist. 1977). Whether a tenant has been constructively evicted is a question of fact. *Applegate v. Inland Real Estate Corp.,* 109 Ill.App.3d 986, 441 N.E.2d 379, 384, 65 Ill.Dec. 466 (2d Dist. 1982). Constructive eviction has been found when "as a result of the landlord's breach of his covenant to repair, the leased premises become unfit for the purpose for which they were leased." *American National Bank & Trust Co. v. Sound City, U.S.A., Inc.,* 67 Ill.App.3d 599, 385 N.E.2d 144, 145, 24 Ill.Dec. 377 (2d Dist. 1979).

Although case law holds that the landlord must have intended to deprive the tenant of the enjoyment of the premises (*Applegate, supra,* 441 N.E.2d at 379), the landlord need not have the express intent to deprive the tenant of the premises. Such intent will be presumed from the acts of the landlord forcing the tenant to move.

> **It is not essential that there be an express intention of the landlord to compel a tenant to leave the demised premises or to deprive him of their beneficial enjoyment, since persons are presumed to intend the natural and probable consequence of their acts and, accordingly, acts or omissions of the landlord making it necessary for the tenant to move from the demised premises constitutes a constructive eviction.** *John Munic Meat Co., supra,* 366 N.E.2d at 620.

The tenant must notify or attempt to notify the landlord of the defects or problems and give the landlord a reasonable opportunity to cure. Reasonable efforts to notify the landlord will suffice. As stated in *Applegate, supra* (in which the tenant made repeated efforts over three days to notify the landlord of the problems):

> **The evidence shows that plaintiff before deciding to vacate did make several attempts to notify defendant of the problems with the apartment which were unavailing because the defendant's agents could not be reached.** 441 N.E.2d at 383.

The court found further that the landlord had been aware of the problem for some time and had failed to take corrective action so that "an opportunity for an attempt to cure would have availed the plaintiff little." *Id.*

Notice to the original landlord is deemed notice to the new landlord when a building is sold. *American National Bank, supra,* 385 N.E.2d at 146.

If a tenant is constructively evicted by a landlord, the tenant is not liable for rent accruing after the date of eviction. In order for a tenant to avoid completely the obligation to pay rent under the constructive eviction doctrine, the tenant must vacate the premises within a reasonable time after the landlord has had an opportunity to remedy the breach. *Advertising Checking Bureau, Inc. v. Canal-Randolph Associates,* 101 Ill.App.3d 140, 427 N.E.2d 1039, 56 Ill.Dec. 634 (1st Dist. 1981). What is a reasonable length of time is a question of fact for the jury.

The typical constructive eviction arises when the landlord breaches an express written covenant or oral agreement to provide essential services or maintain the premises. Examples taken from both commercial and residential leases include the following:

Failure to provide heat: *Automobile Supply Co. v. Scene-In-Action Corp.* 340 Ill. 196, 172 N.E. 35 (1930)*; Giddings v. Williams,* 336 Ill. 482, 168 N.E. 514 (1929); *Lawler v. McNamara,* 203 Ill.App. 285 (1st Dist. 1917); *Harmony Co. v. Rauch,* 64 Ill.App. 386, 388 (1st Dist. 1896); *Ira Handelman Building Corp. v. Dolan,* 15 Ill.App.2d 49, 145 N.E.2d 250 (2d Dist. 1957) (abst.).

Failure to provide water: *Lippman v. Harrell,* 39 Ill.App.3d 308, 349 N.E.2d 511 (4th Dist. 1976).

Infestation of roaches together with other defects: *Applegate v. Inland Real Estate Corp., supra. See also Home Rentals Corp. v. Curtis,* 236 Ill.App.3d 994, 602 N.E.2d 859, 176 Ill.Dec. 913 (5th Dist. 1992).

Constructive eviction can result from a landlord's breach of duties other than an express agreement to make repairs or provide essential services. For instance, in *Scudder v. Marsh,* 224 Ill.App. 355 (1st Dist. 1922), the court held that a landlord's failure to disclose to a tenant who rented a house during warm weather that the capacity of the furnace was insufficient to heat the house adequately in the winter justified the tenant in vacating the premises in the winter. The court held that the landlord had violated the rule that

> **where there are concealed defects in demised premises which a careful examination would not disclose to the tenant, but which are known to the landlord, the latter is under obligation to reveal them to the tenant before leasing, and that failure so to do amounts to a fraud upon the tenant, and if, by reason of such defect, the tenant is compelled to vacate the premises, he will be relieved from liability for rent thereafter.** 224 Ill.App. at 358.

In *Kesner v. Consumers Co.,* 255 Ill.App. 216 (1st Dist. 1929), a landlord continued to rent a unit in a building to a business after a fire had occurred in that unit and after an investigation showed that the extreme danger of fire constituted a nuisance, which the landlord had a duty to abate. The landlord failed to abate the nuisance, and another tenant moved out as a result. The court held that the other tenant was justified in moving out under the constructive eviction doctrine.

In addition to relieving a tenant from further obligation under the lease, a tenant may be entitled to other damages under the constructive eviction doctrine. The measure of damages is as follows:

> **In addition to the value of the unexpired term and any direct and reasonably certain lost profits, the tenant may recover compensation for any other loss which results to him as a direct and natural consequence of the landlord's wrongful act, and which is not attributable to his own fault or want of care.** *John Munic Meat Co., supra,* 366 N.E.2d at 622, quoting 49 AM.JUR.2d *Landlord and Tenant* §324 (1970).

Thus the tenant's damages could include the costs of moving and the difference in rent if the new premises are leased at a higher rate. The tenant, however, must act to mitigate damages.

E. [3.27] Lease Rescission for Breach of Warranty of Habitability

Under the doctrine of constructive eviction, a tenant is justified in vacating the premises if the landlord's failure to comply with an express covenant to repair or to provide essential services renders the premises uninhabitable or unfit for the purpose for which they were rented or substantially interferes with the tenant's use and enjoyment of the premises. See §3.26 above. The question of whether a similar breach of the implied warranty of habitability would justify a tenant in vacating the premises has not yet been answered in Illinois. The courts have found that rescission is the proper remedy for a breach of the implied warranty of habitability in cases between purchasers and sellers of homes. *Cotter v. Parrish,* 166 Ill.App.3d 836, 520 N.E.2d 1172, 117 Ill.Dec. 821 (5th Dist. 1988). *See also Genender v. Erlich,* 272 Ill.App.3d 895, 651 N.E.2d 544, 209 Ill.Dec. 366 (1st Dist. 1995).

As previously noted, a tenant residing in a tenancy governed by the Chicago Landlord and Tenant Ordinance may terminate the tenancy upon 30 days' written notice for material noncompliance with the lease or the duty to maintain. See §3.7.

F. Affirmative Suits for Equitable Relief

1. [3.28] Remedies Available

Tenants may wish to act affirmatively instead of defensively to force landlords to make necessary repairs to their buildings. An effective tool for this purpose is 65 ILCS 5/11-13-15, which, provides:

> **In case any building or structure, including fixtures, is constructed, reconstructed, altered, repaired, converted, or maintained, or any building or structure, including fixtures, or land, is used in violation of an ordinance or ordinances adopted under Division 13, 31 or 31.1 of the Illinois Municipal Code, or of any ordinance or other regulation made under the authority conferred thereby, the proper local authorities of the municipality, or any owner or tenant of real property, within 1200 feet in any direction of the property on which the building or structure in question is located who shows that his property or person will be substantially affected by the alleged violation, in addition to other remedies, may institute any appropriate action or proceeding (1) to prevent the unlawful construction, reconstruction, alteration, repair, conversion, maintenance, or use, (2) to prevent the occupancy of the building, structure, or land, (3) to prevent any illegal act, conduct, business, or use in or about the premises, or (4) to restrain, correct, or abate the violation. When any such action is instituted by an owner or tenant, notice of such action shall be served upon the municipality at the time suit is begun, by serving a copy of the complaint on the chief executive officer of the municipality, no such action may be maintained until such notice has been given.**

In any action or proceeding for a purpose mentioned in this section, the court with jurisdiction of such action or proceeding has the power and in its discretion may issue

a restraining order, or a preliminary injunction, as well as a permanent injunction, upon such terms and under such conditions as will do justice and enforce the purposes set forth above.

If an owner or tenant files suit hereunder and the court finds that the defendant has engaged in any of the foregoing prohibited activities, then the court shall allow the plaintiff a reasonable sum of money for the services of the plaintiff's attorney. This allowance shall be a part of the costs of the litigation assessed against the defendant, and may be recovered as such.

An owner or tenant need not prove any specific, special or unique damages to himself or his property or any adverse effect upon his property from the alleged violation in order to maintain a suit under the foregoing provisions.

In *City of Chicago v. Westphalen,* 93 Ill.App.3d 1110, 418 N.E.2d 63, 49 Ill.Dec. 419 (1st Dist. 1981), *cert. denied,* 102 S.Ct. 1625 (1982), the City of Chicago brought suit against the defendant pursuant to 65 ILCS 5/11-13-15, alleging various building code violations and seeking injunctive relief. Tenants residing in the defendant's building also brought suit seeking to force the defendant to make repairs. The complaints were consolidated and tried together. After 16 days of trial, the court found that defendant's building violated 69 provisions of the building code and was unsafe and dangerous. The court appointed a receiver for the purpose of bringing the building into substantial compliance with the building code.

Defendant appealed, arguing inter alia that the court erred in appointing a receiver. The appellate court disagreed and found the appointment of a receiver to be especially appropriate because of the continuing violations and unsafe conditions. See Chapter 6 for a further discussion of receivers.

Next, defendant argued that the private tenants' complaint was duplicative of the city's and should therefore have been dismissed. Defendant relied on the word "or" in the first paragraph of the statute to argue that either the city or the tenants, but not both, could file a complaint. The court dismissed the defendant's argument, finding there was an obvious legislative intent to provide an expansive remedy to persons affected by defective building conditions. The court further found that the private tenants were proper parties in that their interests were not identical to those of the city because they alleged different violations of the building code.

2. [3.29] Strategical Considerations

During the initial interview with the client, it is essential to gather the basic information necessary for filing suit, including the length of time the tenant has resided in the premises, the type of lease arrangement, the nature of the defective conditions and the length of time they have existed, the nature and method of communication of complaints to the landlord, the landlord's response or repairs, if any, and any damages to the property or person of the tenant as a result of the defective conditions.

Once this information is gathered, the official court records should be checked to determine whether a current building court suit is pending against the landlord. In Chicago, you can find a building court case number by doing a title check or by calling the corporation counsel's office, advising the office that you represent a tenant at a particular address, and inquiring if there is a pending case.

If a case is pending, the attorney should note what violations are cited in the complaint, how long the suit has been pending, and what, if any, violations have been corrected. The building

inspector in charge of the case should be consulted to determine his opinion of the property. Many times, the

inspector will readily admit that the building is in substantial noncompliance with the code. In any event, by talking with the inspector, the attorney should be able to judge what the inspector's testimony will be and how cooperative a witness he will be. If the inspector appears uncooperative, the attorney may wish to resort to expert testimony from an architect or other person familiar with the building code.

The attorney should then become familiar with all local building code provisions. Chicago has one of the most comprehensive building codes in the nation, but experience has demonstrated that the most common defective conditions are violations of the following provisions of the Chicago Municipal Code:

a. The foundation, exterior walls, and exterior roof shall be substantially watertight and protected against rodents and shall be kept in sound condition and repair. Chicago Municipal Code §13-196-530.

b. From April 15 – November 15 every window or other outside opening used for ventilation purposes on the fourth floor or below shall be supplied with a screen of not less than 16 mesh per inch. Chicago Municipal Code §13-196-560(b).

c. Every stairway, inside or outside of the dwelling, and every porch shall be kept in safe condition and sound repair. Chicago Municipal Code §13-196-570.

d. Every kitchen sink, lavatory basin, and bathtub or shower required by the Code shall be connected with hot and cold water lines. Chicago Municipal Code §13-196-420.

e. All existing dwellings that are three stories in height and contain six or more dwelling units shall be equipped with approved smoke detectors. Chicago Municipal Code §13-196-100.

f. Every family unit or rooming unit to which heat is furnished from a common source shall be supplied with heat from September 15 of each year to June 1 of the succeeding year at a minimum temperature of 65 degrees at 7:30 a.m., 68 degrees at 8:30 a.m. and thereafter until 10:30 p.m., and 63 degrees from 10:30 p.m. and thereafter until 7:30 a.m. averaged throughout the family unit or rooming unit. Chicago Municipal Code §13-196-410.

g. Landlords must install deadlatch bolt locks on front and rear building vestibule entrance doors, deadbolt locks on front and rear rental unit doors, and peepholes in apartment doors. Chicago Municipal Code §§13-164-010 through 13-164-050.

After becoming familiar with the applicable building code, the attorney should then visit the premises accompanied by a photographer in order to take pictures of all conditions that violate the code. If an attorney has access to architectural services, a licensed architect or student intern should also visit the premises, take pictures, and write a report on the conditions observed.

3. [3.30] Sample Complaint

The following is a sample complaint seeking injunctive relief and damages for a landlord's failure to maintain the premises in substantial compliance with the local building code. Please note that the attorney must serve a copy of the complaint on the chief executive officer of the municipality when the suit is begun under 65 ILCS 5/11-13-15. The problems of calculating and proving the amount of damages for breach of the implied warranty of habitability are discussed in §§3.17 – 3.22.

The sample complaint contains a prayer for relief seeking appointment of a receiver. Such a prayer may be warranted when the building has substantial unpaid utility bills as well as building code violations or when the landlord appears incapable of effecting repairs to the building. For a discussion of receiverships in general, see Chapter 6.

COMPLAINT FOR INJUNCTIVE RELIEF AND RESTITUTION

1. Plaintiffs JOHN DOE and MARY ROE, by and through their attorneys, complain against defendants as follows:

COUNT I

2. This count is an action for injunctive relief pursuant to 65 ILCS 5/11-13-15 to abate violations of the Municipal Code of the City of Chicago.

3. Plaintiffs, JOHN DOE and MARY ROE, are both residents of the 25-unit apartment complex located at _____, Chicago, Illinois.

4. Defendant, DANIEL JONES, is the owner of the premises located at _____, Chicago, Illinois. At all relevant times, Defendant JONES has owned, controlled, and managed said premises.

5. Plaintiff, JOHN DOE, resides at _____, first floor apartment, Chicago, Illinois, with his wife and two children, ages 2½ and 4 years.

6. On or about January 1, ____, plaintiff DOE entered into an oral lease contract with defendant for a month-to-month tenancy of the first floor apartment in the aforementioned building at a monthly rental of $400.

7. Plaintiff, MARY ROE, resides at _____, third floor apartment, Chicago, Illinois, with her husband and their three children, ages 5, 3, and 1.

8. On or about March 1, ____, Plaintiff ROE entered into an oral lease contract with defendant for a month-to-month tenancy of the third-floor apartment in the aforementioned building at a monthly rental of $350.

9. Upon plaintiffs' entry, and continuing throughout the course of their tenancies, said premises were in a state of disrepair, and the premises failed to comply with the City of Chicago Municipal Code (Code).

10. Said violations and defective conditions relating to plaintiff DOE include, but are not limited to, the following:

A. profusely leaking ceilings and falling plaster in the living room and dining rooms (Code §5-12-110);

B. a 3-by-4 foot area of cracked and peeling paint on the living room wall (*id.*).

[etc.**]**

11. Said violations and defective conditions relating to plaintiff ROE include, but are not limited to, the following:

A. inoperable shower and extreme low pressure in tub and shower (*id.*)

B. lack of screens on windows (*id.*).

[etc.]

12. Said violations and defective conditions relating to both plaintiff DOE and plaintiff ROE include, but are not limited to, the following:

[list]

13. Immediately upon obtaining knowledge of such defects and throughout the course of their tenancies, plaintiffs provided defendant with notice thereof and requested that these defects be repaired so as to be in substantial compliance with the Code.

14. Defendant acknowledged said defects but failed to remedy such defects.

15. The existence of said violations and defendant's failure to maintain the premises in compliance with the Code constitutes a violation of 65 ILCS 5/11-13-15.

16. A copy of this suit was served on the Mayor of the City of Chicago on _____.

WHEREFORE, plaintiffs pray that this Court enter an order:

A. Declaring the condition of plaintiff's property at _____, Chicago, Illinois, to be in violation of 65 ILCS 5/11-13-15.

B. Appointing a receiver to bring the building into substantial compliance with the Chicago Building Code.

C. Enjoining defendant to abate said violations by repairing the property so as to be in substantial compliance with the Chicago Building Code.

D. Awarding plaintiffs' costs and attorneys' fees pursuant to 65 ILCS 5/11-13-15.

E. Granting any further relief that is just and proper.

COUNT II

1. This is an action for damages for breach of the implied warranty of habitability.

2 – 13. Plaintiffs repeat and reallege paragraphs 3 – 14 of Count I as paragraphs 2 – 13 of this Count II.

14. The existence of the violations as above set forth and defendant's failure to maintain the premises in compliance with the Code constitute a breach of defendant's warranty of habitability, which is implied by law in every lease of multifamily dwellings.

15. As a result of defendant's breach, plaintiff DOE has been damaged in the amount of $1400 through July 31, ____ (50 percent of the amount paid to defendant as rent).

16. As a result of defendant's breach, plaintiff ROE has been damaged in the amount of $1225 through July 31, ____ (50 percent of the amount paid to defendant as rent).

WHEREFORE, plaintiffs pray that this Court enter judgment against defendant in the amount of $2625.00.

Respectfully submitted,

_____

Attorney for Plaintiffs

G. [3.31] Criminal Housing Management

The criminal housing management statute, 720 ILCS 5/12-5.1, was first enacted in 1965. However, it was not until 1971 that the statute began to be systematically prosecuted by the Cook County State's Attorney.

The statute reads:

> **(a) A person commits the offense of criminal housing management when, having personal management or control of residential real estate, whether as a legal or equitable owner or as a managing agent or otherwise, he recklessly permits the physical condition or facilities of the residential real estate to become or remain in any condition which endangers the health or safety of any person.**
>
> **(b) Sentence.**
>
> **Criminal housing management is a Class A misdemeanor. A subsequent conviction for a violation of subsection (a) is a Class 4 felony.**

The criminal housing management statute is a complex one, comprised of six elements, all of which must be proved beyond a reasonable doubt since this crime is a Class A misdemeanor.

The first element that must be proved is that of personal management or control. The statute itself sets forth certain incidents of control, such as ownership or management, but does not limit the manner in which this control must be exercised. Control is usually proved through the testimony of the tenants of the building by asking them to whom they register complaints or who is responsible for making repairs.

The second statutory element that is required is that the property in question be residential in nature. This element can be proved either through the testimony of the building inspector who describes the character of the property involved or by producing tenants from the building as witnesses.

The third element that must be proved is that the conditions of the property have become or remain dangerous to human health or safety. Again, this element can be proved through the testimony of building inspectors and the testimony of the tenants. The building inspectors testify to the conditions that they found when they made their first inspection and those present when they made a reinspection. The purpose served by the reinspection is to show that no substantial repair work was done during the time period in question. The tenants' testimony is used both to corroborate the testimony of the inspectors and, perhaps more dramatically, to relate to the trier of fact the dangerous conditions under which they must live.

The fourth element of the criminal housing management statute that must be proved is that the conditions have become dangerous through the recklessness of the person charged. Besides showing that no work was done during the time period in question, this element may be proved by showing that the tenants complained of the problems in their apartments but that no action was taken to correct these conditions.

The fifth and sixth elements that must be established are that, as a result of the dangerous conditions, the health and safety of the inhabitants of the building are endangered. Thus, according to the statute, vacant buildings are not prosecutable under the criminal housing management statute. If properly qualified as experts, the building inspectors may be permitted to give their opinions regarding the effect of the dangerous conditions on the health and safety of the inhabitants. The tenants may also testify on this issue if they have suffered injuries such as rat bites or lead poisoning due to the conditions present in the building.

The criminal housing management statute has been construed by the appellate courts. In *People v. Intercoastal Realty, Inc.,* 148 Ill.App.3d 964, 501 N.E.2d 1305, 103 Ill.Dec. 767 (1st Dist. 1986), the statute, as it was formerly worded, was not found to be unconstitutionally vague even though it failed to enumerate specific types of "deterioration" it was designed to protect. The statute can, through its criminal sanctions, force errant landlords to make needed repairs. In *People v. Susberry,* 68 Ill.App.3d 555, 386 N.E.2d 361, 25 Ill.Dec. 90 (1st Dist. 1979), the defendant was tried and found guilty of criminal housing management. He was fined $500 and given a sentence of 18 months' probation. One year later, due to the continuing defective conditions in the subject building, the trial judge revoked the defendant's probation and sentenced him to six months in jail. In *Susberry,* the judge's sanctions provide an example of how the criminal process can be used to bring about needed repairs.

The statute makes the offense of criminal housing management a Class A misdemeanor subjecting violators to a $1,000 fine or up to one year in jail. In 1988, there were 30 cases pending in Cook County under this statute with 50 outstanding warrants. While a separate fine is usually not imposed for each day that a building violates the statute, the state's attorney's office may ask for this penalty with a particularly recalcitrant landlord. In Cook County, persons wishing to pursue a complaint for criminal housing management should contact the housing division of the state's attorney's office.

P.A. 86-584, effective January 1, 1990, added 720 ILCS 5/12-5.2, which provides that in addition to any other remedies, the state's attorney of the county where the property described in 720 ILCS 5/12-5.1 is located is authorized to file a complaint and apply to the circuit court for a temporary restraining order, and the circuit court shall, upon hearing, grant a temporary restraining order or a preliminary or permanent injunction, without bond, restraining any person who owns, manages, or has any equitable interest in the property from collecting, receiving, or benefiting from any rents or other money available from the property as long as the property remains in the condition described in 720 ILCS 5/12-5.1.

This section provides that the court may order any rents or other money owed to be paid into an escrow account. Paragraph (c) provides that the owner shall be responsible for contracting to have the necessary repairs completed and shall be required to submit all bills, together with certificates of completion, to the manager of the escrow account within 30 days after their receipt by the owner.

H. Misrepresentation and Consumer Fraud Act

1. [3.32] Illinois Consumer Fraud Act

The Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1, *et seq.,* makes it illegal for any person to employ any deception, fraud, false pretense, false promise, or misrepresentation or to conceal, suppress, or omit any material fact, with the intent that others rely thereon, in the conduct of any trade or commerce, regardless of whether a person was in fact misled, deceived, or damaged thereby. 815 ILCS 505/10a creates a private right of action for actual damages and "any other relief which the court deems proper" for violation of the Act.

Under this Act, a plaintiff must show (a) a deceptive act or practice (a single deceptive act is sufficient) (*Rubin v. Marshall Field & Co.,* 232 Ill.App.3d 522, 597 N.E.2d 688, 173 Ill.Dec. 714 (1st Dist. 1992)); (b) an intent by the defendant that the plaintiff rely on the act or practice; and (c) that the deception occurred in the course of conduct involving trade or commerce. *Hoke v. Beck,* 224 Ill.App.3d 674, 587 N.E.2d 4, 167 Ill.Dec. 122 (3d Dist. 1992). *See also Breckenridge v. Cambridge Homes, Inc.,* 246 Ill.App.3d 810, 616 N.E.2d 615, 186 Ill.Dec. 425 (2d Dist. 1993).

The Consumer Fraud Act has been successfully applied by home purchasers in actions against the real estate brokers who sold them the home. In *Beard v. Gress,* 90 Ill.App.3d 622, 413 N.E.2d 448, 46 Ill.Dec. 8 (4th Dist. 1980), the court held that the Consumer Fraud Act applied to a real estate transaction in which the broker innocently misrepresented the interest rate in a mortgage that encumbered the home. The court concluded that

> **the broadened scope of §2 now covers real estate transactions and permits purchasers of real estate to sue for violations of that section even though they still do not come within the definition of "consumers" set forth in the act.** 413 N.E.2d at 452.

The Appellate Court, Second District, held that the Consumer Fraud Act applied to the leasing of a mobile home in *People ex rel. Fahner v. Hedrich,* 108 Ill.App.3d 83, 438 N.E.2d 924, 63 Ill.Dec. 782 (2d Dist. 1982). *Accord, People ex rel. Fahner v. Testa,* 112 Ill.App.3d 834, 445 N.E.2d 1249, 68 Ill.Dec. 396 (1st Dist. 1983). In *Hedrich,* tenants were not informed of the possibility of having to pay an assignment fee upon the resale of their mobile home. Upon the sale of a home the landlord charged a fee of $1,500 to assign the lease to a buyer. The court held that the tenant was a "consumer" within the meaning of the Act and that the hidden fee was a violation of the Act.

The rationale in *Hedrich, Testa,* and *Gress* applies equally to misrepresentations or omissions of material fact regarding the physical condition of a residential apartment or the services to be provided, made by a landlord to a tenant. *Carter v. Mueller,* 120 Ill.App.3d 314, 457 N.E.2d 1335, 75 Ill.Dec. 776 (1st Dist. 1983). For example, statements made that there is no insect or rodent infestation or that the heat provided is adequate may be actionable if untrue. In like manner, the concealment or omission of facts regarding these matters may also constitute a violation of the Consumer Fraud Act, entitling the tenant to sue for damages and attorneys' fees.

2. [3.33] Misrepresentation

The fraudulent concealment by a home seller of defective conditions gives rise to a cause of action for common law fraud. In *Reimer v. Leshtz,* 90 Ill.App.3d 980, 414 N.E.2d 114, 46 Ill.Dec. 392 (1st Dist. 1980), a home buyer was allowed to sue a seller who had allegedly concealed the fact that the home experienced water leakage. The court rejected the argument that the representations were merged into the deed or barred by the parol evidence rule. Similar cases have upheld fraud complaints

based on misrepresentation as to roof leaks (*Posner v. Davis,* 76 Ill.App.3d 638, 395 N.E.2d 133, 32 Ill.Dec. 186 (1st Dist. 1979)) and faulty sewer hookups (*Rotello v. Scott,* 95 Ill.App.3d 248, 419 N.E.2d 1233, 50 Ill.Dec. 784 (2d Dist. 1981)). The benefit of proceeding under a fraud theory is the possibility of recovering punitive damages. *See Anvil Investment Limited Partnership v. Thornhill Condominiums, Ltd.,* 85 Ill.App.3d 1108, 407 N.E.2d 645, 41 Ill.Dec. 147 (1st Dist. 1980).

In *Carter v. Mueller,* 120 Ill.App.3d 314, 457 N.E.2d 1335, 75 Ill.Dec. 776 (1st Dist. 1983), a tenant of residential property affirmatively raised fraud as a cause of action against her landlord for his misrepresentation of the apartment's condition. In addition, she alleged that the actions of the landlord constituted a breach of the Illinois Consumer Fraud Act. At trial, the tenant's claims of common law fraud and breach of the Act were denied although she recovered on the basis of the implied warranty of habitability. The appellate court reversed the decision of the trial court and remanded the case to determine properly whether punitive damages should be awarded.

In their decision, the appellate court discussed the elements of a cause of action for fraudulent misrepresentation and found that all were met here. The tenant had been told that the apartment she would lease would be in the same condition as the model apartment she had been shown. Testimony established that this statement was false and that it was material to the tenant's decision in leasing the apartment. After the court held that the tenant established a prima facie case of fraud and deceit, it went on to discuss whether the tenant proved a cause of action under the Illinois Consumer Fraud Act. The court determined that there was precedent for applying the statute to the landlord-tenant relationship (*People ex rel. Fahner v. Hedrich,* 108 Ill.App.3d 83, 438 N.E.2d 924, 63 Ill.Dec. 782 (2d Dist. 1982); *People ex rel. Fahner v. Testa,* 112 Ill.App.3d 834, 445 N.E.2d 1249, 68 Ill.Dec. 396 (1st Dist. 1983)), and since the tenant established a prima facie case of fraud, the court concluded that the same acts violated the Act because the Act prohibits any misrepresentation. *Carter, supra,* 457 N.E.2d at 1342.

V. CODE ENFORCEMENT

A. [3.34] Introduction

Municipalities in Illinois typically enforce their local building codes through proceedings in "housing" or "building" court. Although such proceedings are usually initiated by the municipality itself, tenants or tenant organizations can also precipitate building court action by complaining to their local building department about the condition of their premises.

The conduct of these building court cases is controlled by the Illinois Code of Civil Procedure (735 ILCS 5/1-100, *et seq.*) and by local court rules. Because examination of the idiosyncrasies of local building court procedures throughout the state is not practical, Chicago housing courts will be used as a general model. Except when otherwise indicated, this section focuses on prosecutions initiated by the Department of Inspectional Services in Chicago rather than other departments such as the fire department and the Department of Environment Control.

The housing division for the City of Chicago consists of six courtrooms within the First Municipal District. Each court specializes by violation type and area. For example, one court tries only demolition cases while another tries all lead paint violations and all general violations in Chicago's far southwest side. Cases that have persisted in the courtroom for a long period of time or that involve imminently dangerous or hazardous conditions are assigned to the Criminal Housing Management Division in Room 1109. When cases concerning the same building have been initiated by inspectors having different authority, such as electrical and fire department inspectors, these cases may be heard separately or consolidated by motion.

B. [3.35] Administrative Enforcement

Any municipality having a population over 100,000 may adopt the building code hearing procedures set forth in 65 ILCS 5/11-31.11, *et seq.* If adopted, these procedures constitute the exclusive legal, though not equitable, remedy available to that municipality for housing code violations. 65 ILCS 5/11-31.1-3. Chicago has not adopted 65 ILCS 5/11-31.1.

In Chicago, initiation of court action generally follows unsuccessful administrative efforts to cure a building's defects. However, in some instances, such as fire regulation violations or violations threatening the health or safety of residents, the city may file a lawsuit immediately. See Chicago Municipal Code §2-36-320.

Administrative involvement commences with an inspection of the building. Certain types of structures, such as large multifamily buildings, require an annual inspection. Chicago Municipal Code §13-20-020. An inspection can also be initiated by a complaint. An inspection must be conducted within 21 days of the filing of such a complaint. Chicago Municipal Code §13-8-060.

The Department of Inspectional Services initially attempts to seek voluntary repairs of the violations disclosed by its investigation. If such violations endanger life, safety, or health, the commissioner must notify a person in possession of the premises, which may be a lessee, of those violations. Chicago Municipal Code §13-8-070. If the violations are not corrected to the extent of ensuring the public safety and health within the time set by the commissioner, which shall not exceed 15 days after service of notice, the commissioner "may institute enforcement proceedings based on violations of this code by referring the matter . . . to the corporation counsel for prosecution." Chicago Municipal Code §13-8-070. See also Chicago Municipal Code §13-12-130. Additionally, administrative authorities may close "any building . . . where . . . there is any violation . . . which imperils life, safety, or health." Chicago Municipal Code §13-12-120.

Violations not endangering health or safety may be referred to the building code enforcement bureau within the office of administrative adjudications. Chicago Municipal Code §13-14-020. "The violation notice and report form shall be forwarded by the building inspector to the code enforcement bureau. . . . The hearing date shall be not less than 30 or more than 40 days after the violation is reported." Chicago Municipal Code §13-14-040. See also Chicago Municipal Code §13-8-070. "However, if the building code enforcement hearing officer finds that the owner has already begun to correct the violations proved, he may schedule a separate hearing on the imposition of the fines or other sanctions for a date no later than 30 days after the date of the findings." Chicago Municipal Code §13-14-140.

C. Building Code Enforcement by City

1. [3.36] Initiation of Action by Corporation Counsel

Once violations are forwarded to the corporation counsel of the City of Chicago, court action can be initiated. *E.g.,* 65 ILCS 5/11-13-15. If the building threatens health or safety, immediate equitable relief, such as an order closing the premises to the public, may be appropriate. For a building actually to be demolished, however, it must not be repairable. The court in *City of Chicago v. Busch,* 132 Ill.App.2d 486, 270 N.E.2d 249 (1st Dist. 1971), stated that when hazardous conditions can be remedied by repair without major reconstruction, a building cannot be destroyed. Generally, the city cannot request either an order to make a building safe or an order to demolish a building until 15 days after written notice to its owners and lienholders. 65 ILCS 5/11-31-1. Holding that the function of notice is to give the owner time in which to act without a court order (*City of Danville v. Hartley,* 101 Ill.App.2d 31, 241 N.E.2d 460, 462 (4th Dist. 1968), the courts have interpreted this statute liberally.

Notice is required before a "municipality may make application . . . for an injunction requiring compliance with [building] ordinances or for such other order . . . necessary . . . to secure compliance." 65 ILCS 5/11-31-2.

However, when a true emergency arises, the city can demolish a building without first obtaining a court order or notifying the owner. *City of Chicago v. Garrett,* 136 Ill.App.3d 529, 483 N.E.2d 409, 91 Ill.Dec. 127 (1st Dist. 1985). In *Garrett,* the court ruled that the city's summary demolition procedure is a valid and reasonable exercise of its police power.

There are no cases specifically dealing with notice requirements, but it appears that there is a stricter standard with the use of an injunction. In *Village of Schaumburg v. Kingsport Village, Inc.,* 122 Ill.App.3d 85, 460 N.E.2d 800, 77 Ill.Dec. 496 (1st Dist. 1984), the court held that the village could use an injunction to force compliance with a building code only when necessary to protect the health and safety of the community as a whole. In addition, the court held that the village could not obtain an injunction against developers for alleged violations of the building code until it could be established that criminal penalties provided in the ordinance would not prompt developers to correct the violations. *Id.*

To correct building code violations, the City of Chicago may sue any person entitled to exercise control or management over the illegal premises, including both trustees and beneficiaries under land trusts and mortgagees. Chicago Municipal Code §13-12-020. *City of Chicago v. LaSalle National Bank Trust No. 34471,* 20 Ill.App.3d 462, 314 N.E.2d 737 (1st Dist. 1974).

However, when the real parties in interest are disguised through employment of secret land trusts or are otherwise difficult to locate, the city can require disclosure of these parties by serving notice on the trustees (765 ILCS 425/1) or on an agent managing the property (Chicago Municipal Code §5-4-220). Regarding the trustees, a formal request usually is not necessary to effect disclosure. Chicago Municipal Code §13-12-020 provides:

> **The liabilities hereunder imposed on an owner shall attach to a trustee under a land trust, holding title to such building . . . unless said trustee in a proceeding under said provisions of this code discloses in a verified pleading or in an affidavit filed with the court, the name and last known address of each person who was a beneficiary of the trust at the time of the alleged violation and of each person, if any, who was then acting as agent for the purpose of managing, controlling, or collecting rents, as the same may appear on the records of the trust.**

To avoid liability for a building in which they have no real interest, the trustees will usually disclose the identity of these persons. This disclosure may occur during the administrative efforts to cure the premises. If the city does not know the name of the beneficiaries or managing agents when its complaint is filed, such parties can be added later by amendment of the city's complaint. 735 ILCS 5/2-616.

In addition, contract sellers and contract purchasers have also been held liable for violations of the building code when it has been shown that they were in possession and control of the premises at the time the violations occurred. *City of Chicago v. North End Building Corp.,* 34 Ill.App.2d 306, 180 N.E.2d 726 (1st Dist. 1962); *City of Chicago v. Franko,* 84 Ill.App.2d 238, 228 N.E.2d 500 (1st Dist. 1967) (abst.).

Defendants are typically served with a two-count complaint, one count praying for legal relief and the other praying for equitable relief. If the city has been unable to gain subsequent entry to the premises, the complaint will allege violations revealed by the initial inspection. However, the

corporation counsel may also request the court to order another inspection once the defendant appears. The complaint then can be amended accordingly to add further violations of the local building code as they occur.

2. Litigation of Action

a. [3.37] Evidence

The city primarily depends on its inspector's testimony to prove the complainant's allegations. Several hearings are usually necessary before code compliance is achieved and court proceedings can be terminated. Consequently, the inspector is ordered to inspect the building on a specific date between consecutive court hearings.

At the beginning of each hearing, the inspector usually testifies concerning the progress of the defendant's work in bringing the premises into compliance with the local building code. As to each code violation alleged, the inspector gives a status report based on his inspection. In the usual case, however, this report may be no more than a statement that the defendant has or has not complied or that there is work in progress. Often the court or the corporation counsel will ask the inspector to estimate the percentage of total compliance with the alleged violations. Although the defendant has the right to cross-examine the inspector and to present its own evidence, the court generally relies on the inspector's testimony for its factual conclusions.

In addition to using inspectors, the corporation counsel may employ other witnesses as well as photographers to prove building code violations. Two sources of nonofficial witnesses are community groups and building tenants, the more important of which, from the corporation counsel's viewpoint, being community groups. Because they are thought to have a genuine and continuing interest in their community, these organizations generally are respected by the court, the corporation counsel, and the inspector. Even without formal intervention by these groups, their representatives are often sworn in as witnesses for the city. The tenants are also often valuable witnesses.

b. [3.38] Procedure

Any person entitled to exercise control or management authority over the premises, and in some circumstances the trustee, is liable for building code violations. Often, however, the city prosecutes only the building's owners.

Although the owner may appear pro se — or if unable to attend, through a friend or relative — the owner is most effectively defended by legal counsel. Without an opposing attorney present, the court routinely grants the corporation counsel's motions, whether for continuance dates, inspections, contempt citations, vacation of the building, or amendments to the complaint. Absent defense counsel, the city's attorney often effectively controls the conduct and outcome of building court proceedings. When the defendant appears through counsel, the defendant should attend the proceeding to exhibit concern to the court.

The city's allegations, which are often not denied by the defendant, usually are proved on defendant's first or second court appearance. The court rarely will order the building immediately vacated. Instead, the action may be continued to enable the defendant to produce evidence of taking preliminary steps, such as development of plans and procurement of permits, necessary to comply with the building code. Although this continuance usually is for six weeks, its precise period varies according to the preliminary acts required. When the defendant must obtain architect's plans, a more extended period may be appropriate.

After plans and permits are submitted to the court, an order is usually entered requiring full compliance by a certain date. The period in which the defendant is to comply depends on the nature of the violations and whether financing is needed. The court's efforts to instill compliance have been hampered in certain areas of the city by problems of obtaining the financing required to make the necessary repairs and improvements. An inspection is ordered to occur before each hearing date.

At each subsequent hearing, the corporation counsel questions the inspector regarding the progress of the defendant's work. If the defendant has not "substantially complied" (the term used to denote that the action should be dismissed), the city may ask the court to issue a rule requiring the defendant to show cause why the defendant should not be held in contempt. However, if the inspector states that the defendant is making an effort to comply, often evidenced by whether there is sufficient "work in progress," the corporation counsel simply may move for a continuance and an order requiring an inspection before the next court date.

When continuing inspections reveal new building code violations, the city may move to amend its complaint. Although this motion is usually granted, a court may be reluctant to do so when the case has been on the docket for a long time and the owner has made a significant percentage of the repairs necessitated by the existing complaint.

c. [3.39] Penalties

The city's complaint has a legal count and an equitable count. Pursuing the legal count subjects the defendant to a fine of up to $200 for each violation with each day the violation exists constituting a separate and distinct offense for which a fine can be imposed. However, $200 per count is what is usually obtained. Chicago Municipal Code §13-12-040. Under the equitable count, the court has the power to order compliance with those provisions of the building code that the defendant has violated. If the defendant does not comply with this order, the corporation counsel may move the court to issue a rule for the defendant to show cause why the defendant should not be held in contempt. If unable to show cause, the defendant may be fined or even imprisoned.

The court may also order that a receiver be appointed with the power to take control, manage, and collect rents from the building. In the most severe cases, the court can order the building vacated to protect the residents from imminently dangerous and hazardous conditions. See Chapter 6.

Fines levied pursuant to the court's contempt power may be vacated if the defendant subsequently complies. The court is reluctant to collect fines because such payments may decrease the defendant's financial ability to repair the premises. The court may also believe that its duty is not to penalize building owners but rather to effect compliance with the building code, an attitude shared by many corporation counsel and inspectors.

3. [3.40] Termination of Action

When the defendant has "substantially complied" with the building code, the action will be dismissed, sometimes subject to reinspection. Whether there has been "substantial compliance" appears to be a subjective determination defined in terms of a high percentage, such as 90 percent of work completed. Dismissal may be with or without court costs. The determination whether to charge the defendant with costs may depend on the length of the litigation and the defendant's good-faith efforts to put the building in compliance.

If the owner is unable to obtain the financing necessary to correct the building code violations or has been recalcitrant, the city may move for an order to vacate the premises. Before vacation is

ordered, the court must find the building is "unsafe for habitation." If found unsafe for habitation, the building is ordered vacated by a certain date. In certain cases, the court will order the defendant either to "legalize or vacate" the premises before the next hearing. In such cases, the city's Department of Human Services will be ordered to assist in relocating the tenants.

After the building is vacated, the city will not automatically seek an order for its demolition. If the owner expresses a desire to rehabilitate the premises, the city may not object to an order permitting the owner to comply with the building code.

D. Building Code Enforcement by Private Plaintiffs Through Intervention

1. [3.41] Preliminary Considerations

When a municipality has charged the owners or operators of a building with violations of that municipality's building code, tenants disposed to take affirmative action against their landlord should consider intervention as parties plaintiff in the building code violation proceeding. Not only is the procedural device of intervention expressly permitted by the Code of Civil Procedure at 735 ILCS 5/2-408, but also Illinois courts have firmly established that tenants are entitled to intervene as a matter of right in a building court proceeding brought against their landlord. *City of Chicago v. John Hancock Mutual Life Insurance Co.,* 127 Ill.App.3d 140, 468 N.E.2d 428, 82 Ill.Dec. 166 (1st Dist. 1984); *City of Chicago v. Harris Trust & Savings Bank, Trust No. 5133,* 12 Ill.App.3d 808, 299 N.E.2d 57 (1st Dist. 1973) (abst.). *Cf. City of Chicago v. Zik,* 63 Ill.App.2d 445, 211 N.E.2d 545 (1st Dist. 1965).

Intervention can provide tenants with a forum not otherwise available in which to raise issues concerning building conditions that the landlord cannot evade but will be compelled to address. As a practical matter, intervention will afford a means by which tenants can take advantage of ongoing proceedings to place maximum pressure on their landlord for an immediate resolution of problems. Finally, because an intervenor has all the rights of an original party to a proceeding, a tenant intervention can result in discovery of matters quite useful to tenants in future negotiations and dealings with their landlord. Although tenants have a right to intervene in the city's suit to enforce the local building code, few tenants employ this affirmative action.

2. [3.42] Intervention as a Matter of Right

Intervention may be had as of right

> **(1) when a statute confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant will or may be bound by an order or judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody or subject to the control . . . of the court.** 735 ILCS 5/2-408(a).

The interest warranting intervention as of right must be of such direct and immediate character that the intervenor will either gain or lose by direct legal operation and effect of the judgment. Intervention as of right will be denied when one's interest is merely indirect, inconsequential, or contingent. *See, e.g., Castleman v. Civil Service Commission of City of Springfield,* 58 Ill.App.2d 25, 206 N.E.2d 514 (4th Dist. 1965); *Hagen v. Ruby Construction Co.,* 13 Ill.App.3d 725, 301 N.E.2d 311 (2d Dist. 1973); *DeWolf v. Central National Bank,* 118 Ill.App.2d 397, 255 N.E.2d 10 (1st Dist. 1969); *Gray v. Starkey,* 41 Ill.App.3d 555, 353 N.E.2d 703 (5th Dist. 1976); *United Steelworkers of America, Local 5292 v. Bailey,* 29 Ill.App.3d 392, 329 N.E.2d 867 (2d Dist. 1975).

A necessary party with an interest in the subject matter may intervene as of right. *Yangas v. Mercantile Laundry Co.,* 19 Ill.App.3d 111, 311 N.E.2d 216 (1st Dist. 1974). Even when a petitioner's interest is identical to the interest of one already a party to the action, the petitioner's interest may be inadequately represented by the original parties to the action. The petitioner will be allowed to intervene if the first party is not diligent in its prosecution of the action. *Lurie v. Rupe,* 51 Ill.App.2d 164, 201 N.E.2d 158 (1st Dist. 1964), *cert. denied,* 85 S.Ct. 1108 (1965).

3. [3.43] Intervention as a Matter of Discretion

Upon timely application, a petitioner may be allowed to intervene in the court's discretion "(1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common." 735 ILCS 5/2-408(b). In determining whether to permit intervention as a matter of discretion, the court may consider whether intervention would "delay or prejudice the adjudication of the rights of original parties." 735 ILCS 5/2-408(e).

To intervene in the court's discretion, the intervenor must have more than a mere general interest in the subject matter. *Cooper v. Hinrichs,* 10 Ill.2d 269, 140 N.E.2d 293 (1957). However, such intervention does not require a direct interest in the suit. *Mensik v. Smith,* 18 Ill.2d 572, 166 N.E.2d 265 (1960).

4. [3.44] Procedure for Intervention

735 ILCS 5/2-408(e) requires that a person desiring to intervene present a petition setting forth the grounds for intervention, accompanied by an initial proposed pleading or motion. Because intervention is not an independent proceeding but is ancillary to the main action (*Ackmann v. Clayton,* 39 Ill.App.3d 1013, 350 N.E.2d 824 (5th Dist. 1976)), the right of intervention is not unqualified; all provisions of this section must be met. There must be timely application, even when intervention is of right. *Elmhurst-Chicago Stone Co. v. Village of Bartlett,* 26 Ill.App.3d 1021, 325 N.E.2d 412 (2d Dist. 1975). Timeliness is a matter within the trial court's discretion. Intervention after judgment will be granted only when it is the sole way to protect the intervenor's rights. *Moore v. McDaniel,* 48 Ill.App.3d 152, 362 N.E.2d 382, 5 Ill.Dec. 911 (5th Dist. 1977). Whether intervention after judgment will be permitted is in the discretion of the trial court, and there is no time period after judgment (*e.g.,* 30 days) within which the petition must be filed. *See Avery v. Moseley,* 19 Ill.App.3d 1001, 313 N.E.2d 274 (1st Dist. 1974), in which the trial court erred when it assumed it had no discretion to permit intervention more than 30 days after entry of judgment by a petitioner who would be adversely affected by the judgment and who had no prior knowledge of the lawsuit.

Denial of a petition to intervene is not subject to Supreme Court Rule 304(a) but is a final order that may be appealed immediately. *Koester v. Yellow Cab Co.,* 18 Ill.App.3d 56, 309 N.E.2d 269 (1st Dist. 1974).

5. [3.45] Operation and Effect of Intervention

An intervenor has all the rights of an original party, including all rights of discovery. In addition to adopting the city's complaint, intervening tenants also may allege other violations of the local building code by their landlord. Whether tenants may allege such new or additional violations is within the court's discretion. However, whether the intervention is discretionary or as of right, the court may order that the applicant be bound by all orders already entered or evidence already received, that the applicant not raise issues more properly raised at an earlier stage, that the applicant not raise new issues or add new parties, or that in other respects the applicant not interfere with the

control of the litigation. These restrictions may be imposed as "justice and the avoidance of undue delay may require." 735 ILCS 5/2-408(f). Accordingly, in order to avoid or minimize restrictions imposed by the court on the intervenor's freedom of action, the petition for intervention should be filed as early in the proceedings as possible.

Once they have intervened and filed their complaint, the tenants are bound by neither the city's proof nor the city's acceptance of the landlord's compliance with the alleged building code violations. The tenants may present their own evidence and may object to any motion to dismiss a defendant.

6. [3.46] Intervention by Tenants as Parties Plaintiff in Building Court Cases

Illinois courts have increasingly recognized the right of tenants to intervene as parties plaintiff in proceedings brought against their landlords by municipalities based on violations of the local building code.

In *City of Chicago v. Harris Trust & Savings Bank, Trust No. 5133,* 12 Ill.App.3d 808, 299 N.E.2d 57 (1st Dist. 1973) (abst.), a tenant union and individual tenants living in a building on the south side of Chicago petitioned to intervene in an action filed by the City of Chicago against their landlord in the Chancery Division of the Circuit Court of Cook County. The City's original complaint listed 11 housing code violations of the Chicago Municipal Code and prayed for a fine and/or appropriate orders to enforce minimum standards of health and safety with respect to the building in question. The City later amended its complaint to add new violations.

Approximately one month after the City filed its complaint in circuit court, the tenants filed a petition for intervention (see §3.51 below) and an accompanying memorandum in support. In addition, the tenants also filed a complaint incorporating the provisions of the City's complaint and praying for similar relief. In their petition for intervention, the tenants successfully contended that they were entitled to intervene in the pending litigation as a matter of right because (a) as tenants residing in the affected property, they would be directly bound and affected by any judgment, decree, or order entered in the action; (b) unless they were made parties, they would not be able to present evidence or appeal from an adverse judgment as to the very premises in which they lived; (c) the representation of their interest by existing parties — the City of Chicago — had been inadequate; (d) their familiarity with existing conditions would be helpful; and (e) protection of their leasehold interests could be effected only by allowing intervention. The tenants alternatively contended that even if they could not intervene as of right, the denial of intervention by the trial court was an abuse of discretion.

7. [3.47] Effect of Intervention by Tenants as Parties Plaintiff in Building Court Cases

After the ruling on appeal in *City of Chicago v. Harris Trust & Savings Bank, Trust No. 5133,* 12 Ill.App.3d 808, 299 N.E.2d 57 (1st Dist. 1973) (abst.), the tenants intervened in the trial court with the full rights of an original party, as provided in 735 ILCS 5/2-408(f). Although the trial below was not stayed, a short record appeal and expedited hearing together with a slow building court docket enabled the tenants to return to the hearings on the premises before they were concluded. The tenants deposed their landlord, moved for the production of documents, and also served interrogatories. Moreover, the tenants participated fully in all further hearings in court. Their counsel was entitled to cross-examine adverse witnesses, including the inspectors for the City of Chicago, and was able to call tenants as witnesses to voice their grievances against their landlord.

As a result of their intervention, the tenants were able to achieve a more favorable resolution of their grievances against their landlord in a relatively short period of time. The tenants were able to

maintain constant pressure on the landlord, in contrast to the more desultory pace of corporation counsel unable to focus on one proceeding. This additional pressure that the tenants brought to bear on their landlord resulted in expedited action to repair the building, thereby culminating in a settlement on terms advantageous to the tenants.

Of course, in many cases, the tenants may not have the resources in the organization to prosecute the case against their landlord with sufficient force to lead to a speedy and favorable resolution. Nevertheless, the device of intervention as parties plaintiff in building court cases should be seriously considered by every tenant organization seeking to take affirmative action against their landlord. Even when tenants' resources are so limited that discovery cannot be undertaken, intervention still provides a readily accessible forum in which to air tenants' grievances and also furnishes tenants the opportunity to neutralize (at least to an extent) the power and leverage that landlords can summon.

8. [3.48] Intervention for Injunctive Relief

Although tenants can formally intervene in an action brought by the city to enforce the building code, there is also statutory authority permitting, in addition to local authorities of the municipality, "any owner or tenant of real property, within 1200 feet in any direction of the property," to institute an action "(1) to prevent the unlawful construction, reconstruction, alteration, repair, conversion, maintenance, or use, (2) to prevent the occupancy of the building, structure, or land, (3) to prevent any illegal act, conduct, business, or use in or about the premises, or (4) to restrain, correct, or abate the violation." 65 ILCS 5/11-13-15. See §3.28 for a further discussion of the statute.

In such an action, the court is given express jurisdiction to provide injunctive relief or other equitable relief, including correction or abatement of the violations. See §3.50 below. It has been held by one federal district court that monetary damages do not fall within the purview of the statute. *Burroughs v. Hills,* 564 F.Supp. 1007 (N.D.Ill. 1983).

However, upon a finding that the defendant has engaged in one of the prohibited activities listed above, the plaintiff is entitled to reasonable attorneys' fees. *City of Chicago v. Westphalen,* 93 Ill.App.3d 1110, 418 N.E.2d 63, 49 Ill.Dec. 419 (1st Dist. 1981).

Such an action could be brought as a separate action in chancery or may serve as the basis for intervention in a building code suit brought by the city. In either case, the plaintiff is required to serve notice of the action on the chief executive officer of the municipality at the time such action is initiated. See §3.51 below.

9. [3.49] Petition for Intervention

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT — CHANCERY DIVISION

CITY OF CHICAGO, A MUNICIPAL CORPORATION,	)	
	)	
Plaintiff,	)	
	)	
	)	
vs.	)	**No.**
	)	
_____,	)	
	)	
Defendants.	)	

PETITION FOR INTERVENTION

Petitioners _____ petition the Court for leave to intervene as parties plaintiff in the above cause. This petition is based on the following grounds:

1. Intervention is sought in this case by Petitioners pursuant to 735 ILCS 5/2-408.

2. The property that is the subject of this action is residential property located at _____, City of Chicago, Cook County (the building). The building is owned, controlled, and managed by the defendants. It is now properly before the Court in this cause and is subject to the control or disposition of this Court.

3. The plaintiff, City of Chicago, seeks appropriate orders of this Court in order to enforce minimum standards of health and safety with respect to the building because the defendants have permitted the building to remain in constant and continuous disrepair, causing it to become a menace to public health, safety, comfort, and welfare.

4. Each of the petitioners lives in the building as a tenant of the defendants. As tenants, they each have a direct interest in this suit because they are the persons whose health and safety are directly threatened by the actions of the defendants in permitting the building to remain in constant and continuous disrepair. As tenants in the building, Petitioners may be adversely affected by orders, judgments, or decrees entered in this cause. Therefore, intervention by the individual petitioners is appropriate under 735 ILCS 5/2-408(a).

5. 65 ILCS 5/11-13-15 confers on petitioners a statutory cause of action against the defendants for relief from the numerous uncorrected violations of the Municipal Code of the City of Chicago as set forth in the original Complaint filed by the City of Chicago against the defendants. Thus, intervention is appropriate under 735 ILCS 5/2-408(c).

6. The building code violations that are the subject matter of this action have existed for more than one year and have not been corrected by the defendants.

7. Petitioners have attempted to communicate and negotiate with the managing agents or owners in regard to the deplorable conditions existing on the premises. Such negotiations have thus far proved fruitless.

8. Petitioners believe the building to be structurally sound and capable of rehabilitation. Because of the serious lack of adequate housing in the City of Chicago, the individual petitioners face great difficulty in securing alternative housing.

9. There is presently pending in this suit an Order requiring Defendant to vacate the residential premises by _____.

WHEREFORE, Petitioners pray that this Court:

A. Grant them leave to intervene in this cause.

B. Stay the Order requiring Defendants to vacate residential premises by _____.

Petitioners,

By: _____
One of the Attorneys for Petitioners

10. [3.50] Intervenor's Complaint for Injunctive Relief

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT — CHANCERY DIVISION

CITY OF CHICAGO,		
A MUNICIPAL CORPORATION,	)	
	)	
Plaintiff,	)	
vs.	)	**No.**
	)	
_____,	)	
	)	
Defendants,	)	
	)	
vs.	)	
	)	
_____	)	
	)	
_____,	)	
	)	
Intervenors.	)	**Jury**
	)	**Demanded**

INTERVENORS' COMPLAINT FOR INJUNCTIVE RELIEF AND RESTITUTION

Intervenors, _____, by their attorneys, _____, complain against Defendants as follows:

COUNT I

1. This Count is an action for injunctive relief pursuant to 65 ILCS 5/11-13-15 to abate violations of the Municipal Code of the City of Chicago (Code).

2. Intervenors are both residents of the building located at _____, Chicago, Illinois.

3. Defendants under _____ owned, controlled, and/or managed the premises located at _____, Chicago, Illinois, at all times relevant to this action.

4. On or about October 31, 1996, Intervenor _____ entered into a long-term written lease with Defendant, _____, for a term of five years commencing November 1, 1996, and ending October 31, 2001, to occupy the premises referred to as _____ in said lease. (A copy of said lease is attached hereto, made a part hereof, and marked Exhibit A).

5. On or about September 28, 1996, Intervenor _____ entered into a long-term lease with Defendants, _____, for a lease term of three years commencing on October 1, 1996, and ending September 30, 1999, to occupy the premises referred to as _____ in said lease. (A copy of said lease is attached hereto, made a part hereof, and marked as Exhibit B).

6. Upon Intervenors' entry and continuing throughout the course of their tenancies, said premises were in a state of disrepair, and the premises failed to comply with the City of Chicago Municipal Code.

7. Said violations and defective conditions relating to Intervenors include, but are not limited to, those stated in Plaintiff City of Chicago's complaint in this action.

8. Immediately upon obtaining knowledge of said defects and throughout the course of their tenancies, Intervenors provided Defendants with notice thereof and requested that these defects be repaired so as to be in substantial compliance with the Code.

9. Defendants acknowledged said defects, but failed to remedy said defects.

10. The existence of said violations and Defendants' failure to maintain the premises in compliance with the Code constitute a violation of 65 ILCS 5/11-13-15.

WHEREFORE, Intervenors pray that this Court enter an Order:

1. Declaring the condition of Defendants' property at _____, Chicago, Illinois, to be in violation of 65 ILCS 5/11-13-15.

2. Enjoining Defendants to abate said violations by repairing the property so as to be in substantial compliance with the Chicago Building Code.

3. Awarding intervenors costs and attorneys' fees pursuant to 65 ILCS 5/11-13-15.

COUNT II

1. This is an action for damages for breach of the implied warranty of habitability.

2. Intervenors repeat and reallege paragraphs 2 through 9 of Count I as paragraphs 2 through 9 of this Count II.

10. The existence of the violations as above set forth and Defendants' failure to maintain the premises in compliance with the Code constitute a breach of Defendants' warranty of habitability, which is implied by law in every lease of multifamily dwellings.

11. As a result of Defendants' breach, Intervenor _____ has been damaged in the amount of _____.

12. As a result of Defendants' breach, Intervenor _____ has been damaged in the amount of _____.

WHEREFORE, Intervenors pray that this Court enter judgment against Defendants in the amount of $____, together with reasonable attorneys' fees, costs, and for all other relief the Court shall deem necessary.

COUNT III

1. This is an action for damages for breach of the implied warranty of quiet enjoyment.

2. Intervenors repeat and reallege paragraphs 2 through 9 of Count I as paragraphs 2 through 9 of their Count III.

10. As a result of the above-stated violations of the Code, the City brought suit against Defendants, and an Order was entered on or about January 31, 1997, requiring Defendants to vacate the subject premises.

11. As tenants residing in the premises that are the subject of that Order, Intervenors have not been permitted peaceably and quietly to enjoy said premises, and Defendants have not kept and maintained Intervenors in such peaceable and quiet enjoyment.

12. As a result of Defendants' wrongful acts, Intervenors are required to vacate the premises by virtue of the above-stated judgment being duly issued and executed thereon.

13. Intervenor _____ has suffered damages directly resulting from Defendants' wrongful acts in breach of her covenant of quiet enjoyment.

14. Intervenor _____ has suffered damages directly resulting from Defendants' wrongful acts in breach of her covenant of quiet enjoyment.

WHEREFORE, Intervenors pray that this Court enter judgment against Defendants in an amount equal to all damages suffered by Intervenors as a result of Defendants' breach of covenant of quiet enjoyment together with reasonable attorneys' fees and costs and for all other relief the Court deems necessary.

_____

One of the Attorneys for Intervenors

11. [3.51] Notice to Municipality for Injunctive Relief

[Date**]**

Honorable _____
Mayor, City of Chicago
121 North LaSalle Street
Chicago, Illinois 60602

Re: City of Chicago v. _____
Case No. _____

Dear Mayor _____:

Enclosed please find a copy of Intervenor's pleadings in the above-captioned action. Intervenor's First Count is brought pursuant to 65 ILCS 5/11-13-15.

Sincerely,

[Signature**]**

VI. MIGRANT HOUSING

A. [3.52] Introduction

In Illinois, migrant farm workers often live in dilapidated housing that is usually provided by their employer. This portion of the chapter explores Illinois and federal remedies for migrant housing problems.

B. Illinois Laws Relating to Migrant Camps

1. [3.53] In General

The Illinois Migrant Labor Camp Law (IMLCL) is the foremost Illinois law that governs the conditions of migrant housing camps. See 210 ILCS 110/1, *et seq.,* and regulations promulgated under IMLCL by the Illinois Department of Public Health, 77 Ill.Admin. Code, Part 935. IMLCL applies to all Illinois migrant housing camps. A "migrant" under IMLCL is any person who moves seasonally from one place to another, within or without Illinois, for the purpose of employment in agricultural activities. IMLCL has various housing standards and licensing requirements for camps depending on the number of workers living in the housing camp and the number of days per year of camp operation.

The Illinois Department of Public Health (IDPH) is the agency responsible for overseeing compliance with IMLCL. IDPH inspects camps for IMLCL compliance, issues camp complaints, and issues camp violations to camp operators. Violations of IMLCL are prosecutable as Class A misdemeanors. IMLCL §14.

2. [3.54] Housing Standards

Plans for the construction of a migrant labor camp or for any major alteration or major expansion in any such camp or its facilities shall be submitted to the Department for approval before the construction or making of such major alteration or major expansion. IDPH shall, by rule, define

what constitutes a major alteration and a major expansion. The plans shall contain the information necessary to show compliance with the Act. IMLCL §8.

IDPH may make and adopt such reasonable rules and regulations relating to migrant labor camps as may be necessary to carry out and administer the provisions of the Act and to assure the safety of migrant workers and their families. IMLCL §10.

Local ordinances and codes may also govern migrant camps. Thus, an IMLCL license does not relieve the operator from additional and higher housing standards set by local ordinances and codes.

3. [3.55] Housing License and Inspections

No person shall operate or maintain a migrant labor camp within Illinois without first having obtained a license. Establishments that provide housing for fewer than ten migrant workers or fewer than four families containing migrant workers shall meet the minimum standards established by the Department but shall not be required to be licensed. IMLCL §3.

Application for licensing or renewal must be made by the camp operator at least 60 days before the date of occupancy. The camp must be ready for inspection at least 30 days before the date of occupancy. IDPH is to inspect license-required migrant camps at least twice during the year, once before occupancy and once during occupancy. IMLCL §4.

If IDPH finds the camp in compliance with IMLCL standards, it issues a housing license at least 15 days prior to occupancy. If a housing license is denied, IDPH notifies the applicant of the denial at least 15 days before the date of housing occupancy. The denial is to set forth the reasons for license denial. IMLCL §6. If the conditions constituting the basis for denial are remediable, the applicant may correct the substandard conditions and notify IDPH for further license reconsideration.

Conditional licenses may be issued by IDPH if the camp is habitable without undue prejudice to the migrant workers and their families. IDPH sets forth the conditions on which the license is issued and the manner in which the camp must comply with IMLCL, stating time deadlines within which the applicant must make corrections. IMLCL §7.

A person operating a migrant housing camp without a license and who is subject to IMLCL is guilty of a Class A misdemeanor. Each day's violation constitutes a separate offense. The state's attorney of the county in which the violation occurs shall bring an action for an injunction to restrain such violations or to enjoin the operation of any such establishment. IMLCL §14.

4. [3.56] Emergency Orders

Whenever an emergency exists in a migrant camp that requires immediate action to protect the public health, IDPH, without notice or hearing, may issue an order reciting the existence of the emergency. Action would then be taken as necessary to deal with the emergency, including closing the camp with the suspension or revocation of the license. IMLCL §15.

5. [3.57] Discrimination Prohibited

It is unlawful for any person to evict, discharge, or in any other manner discriminate against any migrant worker because that worker has filed any complaint under IMLCL or has testified in any proceeding. IMLCL §17.

6. Remedies

a. [3.58] Administrative

If a camp has not been inspected or has serious violations since its inspections, a complaint should be filed with IDPH. A migrant housing complaint filed with IDPH is treated as confidential, and thus there is no disclosure to the camp operator of the complainant. *Flores v. Joan of Arc, Inc.,* No. 71 C 108 (N.D.Ill.). Nondisclosure helps protect the worker from retaliation by the camp operator.

Filing a written and an oral complaint with IDPH may be the fastest available relief since it prompts the camp owner to correct the camp's substandard conditions. IDPH has been cooperative in checking reported substandard conditions ever since it was sued for nonenforcement of IMLCL in *Flores, supra.* If problems arise with IDPH camp enforcement, the *Flores* final order should be used for IDPH compliance. The class in *Flores* is all migrants residing in Illinois migrant camps.

A report of IMLCL violations to IDPH should stress the gross violations of IMLCL standards. If IDPH finds violations, it can revoke or suspend the camp license or order the camp operator to take immediate corrective actions. Corrective orders are the most desirable because the housing camp is usually the only affordable housing for migrants.

It is vital to submit all available evidence for the administrative record when filing an administrative complaint with IDPH to ensure that a final IDPH administrative decision is not reversed on the basis that there was not "substantial evidence" for the administrative decision. New evidence is generally not considered by the reviewing court unless it is shown that such evidence is of substantial relevance and was not available in the administrative process. 735 ILCS 5/3-111(a)(7).

b. [3.59] Litigation

Any worker aggrieved by a violation of the IMLCL may file suit in the circuit court having jurisdiction over the labor camp. IMLCL §16. If there is a finding by the court that the labor camp owner wilfully violated any provision of the Act, the court may issue a restraining order or preliminary injunction as well as a permanent injunction on such terms and conditions as will do justice and enforce the purposes set forth above.

A private right of action for injunctive relief and attorneys' fees for municipal housing violations is also provided for under the Illinois Municipal Code, 65 ILCS 5/11-13-15. The Code covers only housing in incorporated cities and towns. Research at the local level is necessary to determine whether the camp location is incorporated as part of the town and what municipal housing laws exist. Some local ordinances may be more stringent than IMLCL. An exemption from this Code provision exists if the local municipality excludes farm worker migrant housing from local municipal building and health ordinances. *Id.*

A private right of action also exists under the Illinois Farm Labor Contractor Certification Act (IFLCCA), 225 ILCS 505/1, *et seq.* Persons claiming to be aggrieved by the misconduct of any farm labor contractor certified under this Act may bring suit for violations of any provision of this Act. Damages are limited to actual damages or $500 per violation, whichever is greater.

C. Federal Laws Relating to Migrant Farm Worker Housing

1. [3.60] Introduction

The United States Department of Labor administers three programs that affect farm labor camp housing: The Wagner-Peyser Act, 29 U.S.C. §49, *et seq.;* the Occupational Safety and Health Act (OSHA), 29 U.S.C. §651, *et seq.;* and the Migrant and Seasonal Agricultural Worker Protection Act (AWPA), 29 U.S.C. §1801, *et seq.* If the facts of a particular case meet the differing definitional and jurisdictional requirements of each Act, election of remedies among them is not necessary. Administrative complaints concerning labor camp conditions under any or all of the three Acts can be pursued simultaneously.

2. Wagner-Peyser Act

a. [3.61] In General

The Wagner-Peyser Act can be the basis for a migrant house claim when the employer uses the state-federal Employment Service interstate clearance system to recruit and hire migrants. On the federal level, the Employment and Training Administration encompasses the U.S. Employment Service and administers the Wagner-Peyser Act. The U.S. Employment Service works together with state employment service agencies to fill job orders for farm workers through a federal-state clearinghouse system. Any employer placing an interstate job order must comply with minimum employment and housing standards if housing is provided. The local officer of the Illinois Employment Service should be able to determine whether a particular employer used the Wagner-Peyser Act system. *See Alvarez v. Joan of Arc, Inc.,* 658 F.2d 1217 (7th Cir. 1981).

b. [3.62] Housing Standards and Inspections

In 1968, the Wagner-Peyser Act regulations were amended to specify minimum standards for migrant housing. 20 C.F.R. §§654.402 – 654.417.

In 1971, OSHA temporary labor camp regulations were promulgated. 29 C.F.R. §1910.142. Migrant housing built on or after April 3, 1980, must comply with OSHA standards. *Id.* Housing built before April 3, 1980, may follow Wagner-Peyser Act or OSHA standards, depending on the standard the owner relied on. 20 C.F.R. §654.401. An Employment and Training Administration-U.S. Employment Service inspection must be done before the housing is occupied by the workers. 20 C.F.R. §654.400(b).

c. [3.63] Remedies

If a camp has not been inspected or does not meet the applicable Wagner-Peyser Act standards, an administrative complaint should be filed. The first complaint is filed with the Illinois State Employment Services (20 C.F.R. §658.410) with appeal to the Employment and Training Administration regional administration (20 C.F.R. §658.420). An initial informal resolution period is provided (20 C.F.R. §§658.414(c), 658.501(a)) as well as formal administrative hearings at the state and federal levels (20 C.F.R. §658.422). Failure to adhere to Wagner-Peyser Act housing standards can result in denial of Wagner-Peyser Act services for the employer. 20 C.F.R. §658.500, *et seq.*

3. Occupational Safety and Health Act

a. [3.64] Jurisdiction over Migrant Housing

Migrant housing standards apply to all camps for which living in the camp is a condition of employment. *Frank Diehl Farms v. Secretary of Labor,* 696 F.2d 1325 (11th Cir.), *reh'g denied,* 704 F.2d 1253 (1983).

b. [3.65] Housing Standards and Inspections

Migrant camps built after April 3, 1980, are governed by OSHA standards. 29 C.F.R. §1910.142. OSHA housing standards are similar but not identical to Wagner-Peyser Act standards. OSHA standards cover site, shelter, water supply, toilet facilities, sewage disposal facilities, laundry, hand washing and bathing facilities, lighting, refuse disposal, construction and operation of kitchens, dining halls and eating facilities, and insect and rodent control.

c. [3.66] Remedies

Farm workers who feel that camp housing does not comply with OSHA standards may file an administrative complaint. 29 C.F.R. §1903.11. Before filing, however, an employee representative may want to exercise the right to accompany the OSHA inspector on the inspection tour. 29 C.F.R. §1903.8.

OSHA citations are not issued unless ten or more OSHA violations are found. Civil penalties will also not be proposed nor assessed against an employer of ten or fewer employees for OSHA violations, other than serious, wilful, or repeated violations, if, prior to the inspection, such employer has

1. voluntarily requested consultation from OSHA or a private consultant;

2. had the consultant examine the condition cited; and

3. made or is in the process of making a reasonable good-faith effort to eliminate any hazard identified by the consultant unless changing circumstances or workplace conditions render inapplicable the advice obtained by such consultants. See 29 U.S.C. §662.

OSHA prohibits discharge of or discrimination against an employee by an employer in retaliation for the employee's filing an OSHA complaint. However, unlike AWPA, there is no private right of action granted for retaliation. 29 U.S.C. §660(c). Discretion to file a suit for retaliation lies with the Secretary of Labor.

4. Migrant and Seasonal Agricultural Worker Protection Act

a. [3.67] Housing Requirements

Under AWPA, a farm labor contractor, agricultural employer, or agricultural association that recruits migrants must disclose to each migrant worker at the time of recruitment the housing to be provided, if any. AWPA §201(a)(5). A "migrant" under AWPA is an individual employed in agricultural employment on a seasonal or temporary basis and who is required to be absent overnight from the worker's permanent place of residence. AWPA §3. Housing disclosures shall be provided to workers in written form and in the language in which the worker is fluent. AWPA §201(g).

If housing is provided, a statement of occupancy terms and conditions, if any, are to be conspicuously placed or presented to the worker prior to occupancy. AWPA §201(c). The person who owns or controls the labor camp must comply with substantive federal and state safety and health standards applicable to that housing. AWPA §203(a). Occupancy of the housing camp is prohibited unless a license certification is posted at the camp.

Camp license exemption lies if a request for inspection was made by the camp owner or lessee to the appropriate state or local agency at least 45 days before occupancy and such agency has not conducted an inspection by the occupancy date. *Id.* However, the failure of an agency to complete its inspection does not relieve the camp owner or controller from the duty to provide safe and healthy housing. H.R.Rep. No. 885, 97th Cong., 2d Sess. (1982), reprinted in 1982 U.S.C.C.A.N. 2583.

b. [3.68] Remedies

AWPA authorizes private civil actions for migrants with camp problems. *Bueno v. Mattner,* 829 F.2d 1380 (6th Cir. 1987). AWPA Title V, Part A, §§504, 505. Under AWPA's anti-retaliation provision, a private individual or the Secretary of Labor seeking to enforce the anti-retaliation provisions can receive "all appropriate relief, including rehiring or reinstatement of the worker, with the back pay, or damages." AWPA §505(b).

AWPA limits damages to "actual damages, or statutory damages up to $500 per plaintiff per violation, or other equitable relief." AWPA §504(c). Multiple infractions of a single AWPA provision or a regulation constitute only one violation for purposes of determining the amount of damages. The amount of damages also depends on showing an *intentional* violation. *Id.*

"Intentional" in the context of awarding statutory damages means conscious or deliberate and does not require specific intent to violate the Act. *Howard v. Malcolm,* 658 F.Supp. 423 (E.D.N.C. 1987). Intent will be found if a defendant was or should have been aware of a law governing the conduct in question and its possible application to the defendant. *Id. See also Avila v. A. Sam & Sons,* 856 F.Supp. 763 (W.D.N.Y. 1994).

In *Hernandez v. Ruiz,* 812 F.Supp. 734 (S.D.Tex. 1993), the court held that the nonworking children of migrant workers who were housed with their parents in substandard homes or apartments had standing to sue for the violations of AWPA's housing standard regulations.