**30.00 ALASKA JURY INSTRUCTIONS — LANDLORD‑TENANT —INTRODUCTORY USE NOTE AND COMMENT**

I. The Problem with Landlord-Tenant Instructions

This Article contains no specific instructions. This introduction outlines the principle jury issues in landlord-tenant cases and suggests how existing Alaska law may be transformed into understandable instructions.

There are several reasons for the absence of specific instructions.

First, many landlord-tenant issues, for both judge and jury, are covered by contract principles, and not by a separate body of property law. See, e.g., Lathrop Co. v. Lampert, 583 P.2d 789 (Alaska 1978) (This court has, on occasion, applied certain principles of contract law to the interpretation of leases."); McCall v. Fickes, 556 P.2d 535 (Alaska 1976) ("The more recently enacted Uniform [Residential Landlord and Tenant] Act constitutes a basic reform of landlord-tenant law, according tenants previously unrecognized rights by recognizing the contractual nature of the landlord-tenant relationship."). Thus, such issues as existence of a lease, terms of a lease, waiver, frustration of purpose, impossibility, commercial impracticability, breach of terms, and anticipatory repudiation can be handled by using contracts instructions with appropriate modifications.

Second, the recent enactment of theUniform Residential Landlord and Tenant Act (AS Title 34, Chapter 3, hereinafter referred to as URLTA or "the Act") makes it impractical to draft special landlord-tenant instructions at this time. The Act is so new it has not been the subject of much appellate analysis.

Some language employed in the Act is sufficiently clear that it can be directly and easily incorporated into a jury instruction. For example, if a tenant were claiming that his landlord had breached part of AS 34.03.100(3), ("The landlord shall maintain in good and safe working order and condition all electrical, plumbing, sanitary, heating, air-conditioning, kitchen and other facilities and appliances, including elevators, supplied or required to be supplied by him."), the judge could fashion the following instruction.

The landlord, (name of landlord, is legally required to keep the elevators in the building in good working order and in a reasonably good and safe condition. In order for the tenant, (name of tenant) to win his claim, you must find that it is more likely than not that the landlord did not satisfy this requirement. If you find otherwise, the tenant cannot win on his claim.

Such instructions are so easily fashioned that no great benefit would be served by compiling model instructions on points made clear by the Act.

Other parts of the Act, ostensibly straightforward, will in fact require a judicial choice between one of several possible interpretations. In particular, the Act, as enacted by Alaska, is devoid of references to allocation and magnitude of burdens of proof. It is not possible to anticipate how the Alaska Supreme Court will resolve these matters.

A related problem is interpretation of the Act in light of previously existing common law. Although some parts of URLTA clearly replace common law (e.g., the tenant's covenant of payment is now dependent upon the landlord's covenant of habitability), other sections may or may not require supplementation by existing common law (e.g., no Alaska case has decided whether a plaintiff's contributory negligence reduces tort recovery of damages claimed under § 34.03.100).

Finally, it is difficult to fashion Alaska jury instructions for landlord-tenant cases, because there are virtually no Alaska cases that address the division of issues between judge and jury. In particular, the Alaska Supreme Court has not ruled whether a defendant-tenant has a right to jury trial in a landlord's forcible entry and detainer (F.E.D.) action (covered by AS 09.45.060-160.) The United States Supreme Court, in Pernell v. Southall Realty, 416 U.S. 363 (1974) ruled that, under the Seventh Amendment to the United States Constitution, a District of Columbia tenant has the right to jury trial in a summary eviction proceeding. The Court, used its standard that a modern civil action merits jury trial when it "involves rights and remedies of the sort traditionally enforced in an action at law, rather than in an action at equity or admiralty." 416 U.S. at 375. It found the statutory summary eviction action to be parallel to other actions to recover land, such as ejectment, which had always been held to be an action at law, triable by a jury. 416 U.S. at 370.

Although Seventh Amendment rights are not applicable to state court proceedings, parallel rights seem to be afforded to state court litigants by Art. 1, § 16 of the Alaska Constitution. That section preserves a right to jury trial "[i]n civil cases where the amount in controversy exceeds two hundred fifty dollars . . . to the same extent as it existed at common law." In deciding whether particular actions would have been suits at common law, the Alaska Supreme Court has consistently referred to the "similar language of the Seventh Amendment to the United States Constitution" and has followed federal courts' rulings on whether an issue would have been triable by jury at common law. Winegardner v Greater Anchorage Area Borough Bd. of Equalization, 534 P.2d 541 (Alaska 1975); Fruit v. Schreiner, 502 P.2d 133 (Alaska 1972). In fact, the Alaska decisions generally exhibit a more favorable attitude toward jury trial in both civil and criminal cases than that exhibited by the United States Supreme Court. See, e.g., Loomis Electronic Protection, Inc. v. Schaeffer, 549 P.2d 1341, 1342 n.16 (Alaska 1976) (right to jury trial upheld in suit for damages under Alaska statute prohibiting sex discrimina­tion in employment: "there has always been a strong policy favoring jury trials in Alaska"); Baker v. City of Fairbanks, 471 P.2d 386, 401 (Alaska 1970) (under Alaska Constitution, right to jury trial accorded even for petty criminal offenses; "while we must enforce the minimum constitutional standards imposed upon us by the United States Supreme Court's interpretation of the Fourteenth Amendment, we are free . . . to develop additional constitutional rights and privileges to be within the intention and spirit of our local constitutional language . . . . We need not stand by idly and passively, waiting for constitutional direction from the highest court in the land.").

Thus, although the Alaska Supreme Court has only noted the existence of the Pernell rule without choosing to accept or reject it for Alaska, Schiable v. Fairbanks Medical and Surgical Clinic, Inc., 531 P.2d 1252, 1260 n.34 (Alaska 1975), it seems likely that the Court will eventually adopt its rationalei.e., it will provide a jury trial at least to the extent Pernell did.

An increasing number of tenantdefendants may wish to avail themselves of their right to jury trial in F.E.D actions, particu­larly where they are asserting the landlord's violation of § 100 and 310 of URLTA. The right to assert these defenses was granted in McCall v. Fickes, supra. "We hold that defenses available under the Uniform Act may be asserted in F.E.D. proceedings." 556 P.2d at 541.

II. Principal Jury Issues Under URLTA

A. Habitability

Section 100 of Alaska's URLTA imposes upon the landlord a general duty to maintain the premises in fit and habitable condition, as well as delineating specific landlord responsibilities e.g., maintaining common areas, sanitary, heating and elevator facilities, and providing waste disposal facilities and running water. See AS 34.03.090. Tenants may enforce their. rights under § 100 in several ways. First, they may bring suit for damages and injunctive relief. AS 34.03.160(b). (A suit solely for injunctive relief would presumably not merit jury trial due to its equitable foundations.) Where noncompliance with § 100 "materially affect[s] health and safety," and the breach is not cured by the landlord within 10 days of notification, the tenant has, in addition to his right to damages, the right to terminate the lease. AS 34.03.160(x).

Second, when a landlord "willfully or negligently" fails to provide certain "essential" services such as running water and heat, the tenant has a wide choice of remedies. He may elect to bring suit for the diminution in rental value; he may procure substitute services and deduct their cost from his rent; or he may procure substitute housing for the period of inhabitability. In the last instance he is excused from paying rent and may recover the amount by which his substitution rent exceeded his rent under the lease. AS 34.03.180.

Finally, a tenant may simply refuse to pay rent to the landlord, counterclaiming for his damages when the landlord sues for possession and rent. AS 34.03.190; McCall v. Fickes, supra.

Clearly, whether the landlord has committed specific illegal acts enumerated in § 100, such as cutting off electricity, would be a jury question in a tenant's suit for damages or a landlord's suit for possession and rent. See, e.g. Javins v. First National Realty Corporation, 428 F.2d 1071 (D.C. 1970). The Javins court, using the D.C. housing code equivalent to § 100, held that the finder of fact must decide "whether the alleged violations existed during the period for which past due rent is claimed." Id. at 1082. See also, Amick v. Metropolitan Mortgage & Securities Co. 453 P.2d 412 (Alaska 1969) (under lease agreement allowing tenant to terminate should premises become "untenantable," held that tenant could vacate only where reasonable difference of opinion over "tenantability" existed and existence of reasonable difference of opinion was question of fact). Thus the trial judge; in cases where the tenant claims one of the enumerated violations of § 100, can easily construct an instruction patterned after the sample set forth in Section I of this Introduction.

It is unclear, however, whether a jury could be instructed simply that the landlord had a general duty to "maintain the premises in fit and habitable condition" in cases where the tenant's complaint, though possibly serious, is not covered by the enumerated § 100 conditions. Use of this standard could give rise to unpredictability and unevenness of outcome in landlord-tenant cases. The supreme court may wish to define these words so that a jury has more guidance on the purpose of the statute. Or, the court may wish to impose upon the landlord a duty to protect tenants from criminal acts in areas under the landlord's control, as done in Kline v. 1500 Massachusetts Ave. Apartment Corporation, 439 F.2d 477 (D.C. 1970). If so, the court could decide that a specific condition, such as rampant vermin infestation, would be a violation of § 100 as a matter of law. Similarly, the court could develop specific legal standards defining "other essential services" whose curtailment gives rise to the special remedies of § 180. Development of these specific standards as a matter of law would be consistent with case law on the constructive eviction doctrine, predecessor of § 100 and 180 . See, C.J.S. Landlord and Tenant § 460(5) ("[i]t has been said that usually constructive eviction is a question of fact for the jury; but it has also been stated that generally the question of whether acts of the landlord in consequence of which the tenant abandons the premises amount to an eviction is question of law, although it is for the jury to determine whether such acts have been proved."). These approaches, the use of a general duty instruction and the designation by the court of specific condition of unfitness, are not mutually exclusive. The supreme court could decide to employ both.

It is unclear whether the jury or judge should decide, in close cases, if the landlord's alleged violation of § 100 "materially affect[ed] health and safety" so as to justify the tenant's termination of the rental agreement under § 160.

B. Retaliatory Eviction and Related Matters.

Because the subject of retaliatory eviction is extremely complicated, the relevant portion of AS 34.03.310 is set forth below:

Sec. 34.03.310. Retaliatory conduct prohibited (a) except as provided in (c) and (d) of this section, a landlord may not retaliate by increasing rent or decreasing services or by bringing or threatening to bring an action for possession after the tenant has

(1) complained to the landlord of a violation of § 100 of this chapter;

(2) endeavored to avail himself of rights remedies granted him under the provisions of this chapter.

(3) organized or become a member of a tenant's union or similar organization; or

(4) complained to a governmental agency responsi­ble for enforcement of governmental housing, wage, price or rent controls.

(b) If the landlord acts in violation of (a) of this section, the tenant is entitled to the remedies provided in § 210 of this chapter and has a defense in an action against him for possession.

(c) Notwithstanding (a) and (b) of this section, a landlord may bring an action for possession if

(1) the tenant is in default in rent;

(2) compliance with the applicable building or housing code requires alteration, remodeling, or demolition which would effectively deprive the tenant of use of the dwelling unit;

(3) the tenant is committing waste, or a nuisance, or is using the dwelling unit for an illegal purpose or for other than living or dwelling purposes in violation of his rental agreement;

(4) he seeks in good faith to recover possession of the dwelling unit for personal purposes;

(5) he seeks in good faith to recover possession of the dwelling unit for the purpose of substantially altering, remodeling, or demolishing the premises;

(6) he seeks in good faith to recover possession of the dwelling unit for the purpose of immediately terminating for at least six months use of the dwelling unit as a dwelling unit; or

(7) he has in good faith contracted to sell the property, and the contract of sale contains a representation by the purchaser corresponding to (4), (5) or (6) of this subsection.

(d) Notwithstanding (a) of this section, the landlord may increase the rent if he

(1) has become liable for a substantial increase in property taxes, or a substantial increase in other maintenance or operating costs not associated with his complying with the complaint or request, not less than four months before the demand for an increase in rent; and the increase in rent bears a reasonable relationship to the net increase in taxes or costs;

(2) has completed a capital improvement of the dwelling unit or the property of which it is a part and the increase in rent does not exceed the amount which may be claimed for federal income tax purposes as a straight-line depreciation of the improvement, prorated among the dwelling units benefited by the improvement;

(3) can establish, by competent evidence, that the rent now demanded of the tenant does not exceed the rent charged other tenants of similar dwelling units in his building or, in the case of a single-family residence or if there is no similar dwelling unit.

(e) Maintenance of the action under (c) of this section does not release the landlord from liability under 4 160(b) of this chapter. (§ 1 ch 10 SLA 1974).

Section 310(a) of the Act prohibits the landlord from either increasing rent, decreasing services, or bringing or threatening to bring an action for possession in retaliation following specified tenant actions. These four actions are: (1) complaint to the landlord of § 100 violations; (2) organization of or membership in a tenant's union; (3) complaint to government agency responsible for enforcement of rent and habitability controls; and (4) other attempts to procure tenant's rights endowed by URLTA. Retaliatory action entitles the tenant to the remedies provided by § 210-i.e., termination of the rental agreement and recovery of up to 1½ times actual damages. The landlord's retaliatory motive also provides a tenant with a defense in an action for possession.

The retaliatory nature of a landlord's eviction will be a question for the jury. See, Uniform Residential Landlord and Tenant Act § 501 Comment (''the question as to whether the landlord is engaging in retaliatory conduct as prohibited by the statute is a question of fact"). Accord, Edwards v. Habib, 397 F.2d at 702 ("the question of permissible or impermissible purpose is one of fact for the court or jury").

Most of the problems arise when a landlord seeks to repossess property. Notwithstanding § 310(a), a landlord may bring an action for possession under the specified conditions of § 310(c).

These conditions include the tenant's nonpayment of rent and the landlord's good faith desire to recover possession for his own use, to substantially remodel the premises, or to terminate its use as a dwelling unit. It is clear that if the landlord proves that he is acting under circumstances specified in § 310[c), the landlord wins, even if his motive is, in whole or in part, retaliatory. But if the landlord denies retaliation, and does not fall under [c), it is less clear what happens.

The Alaska version of URLTA, as well as Alaska case law on affirmative defenses, imply that the tenant bears the burden of proving a landlord's retaliatory motive when he is in a defendant's posture in a suit for possession, as well as when he is the plaintiff suing for damages. § 5.101 of the Uniform Act helps tenants prove their cases by providing that evidence of a habit­ability complaint (§ 100 of the Alaska Act) made within the year preceding the alleged act of retaliation creates a rebuttable presumption of retaliation, thus placing a burden of disproof on the landlord. See also, Edwards v. Habib, 397 F.2d 687 (D.C. 1968); Silberg v. Lipscomb, 285 A.2d 114, 86 N.J. Super. 491 (1971); Cornell v. Dimmick, 73 Misc. 2d 384, 342 N.Y.S.2d 275 (1913) for holdings which allocate to the landlord the burden of disproving a retaliatory motive with differing ways of measuring that burden). The Alaska version of URLTA, however, omits all reference to a rebuttable presumption. Simply stating that violation of § 310 entitles the tenant to "a defense in an action against him for possession." AS 34.03.310(b). Similarly, McCall v. Fickes refers to retaliatory eviction as a "defense." 556 P.2d at 540. No presumption is mentioned.

Presented below is one sample retaliation instruction. This particular instruction is applicable to tenancies at will or sufferance, or any other tenancies in which the landlord has complied with statutory or lease notice requirements. It would be appropriate if the tenant must prove retaliation as with any normal affirmative defense.

The statute does not make clear whether a landlord who has some retaliatory motivation and some non-retaliatory motivation can repossess. It may be that the solution is that the tenant would have to prove that the repossession would not have been attempted but for the tenant's conduct, protected under 3 [a).

If so, the jury could be instructed as follows:

The tenant claims that the landlord would not have tried to remove him if the tenant had not joined a tenant's union. If you find that this is more likely than not true, you must award possession to the tenant. Otherwise, you must award possession to the landlord.

This reading of the statute appears to be the most logical one. But it depends upon an assumption that the Alaska Legislature intended to place the burden of persuasion on tenants when it omitted the model act's presumption, which would have placed a proof of burden on landlords.

It must be noted, however, that the Legislature may have intended to leave the Alaska courts, which have the final word on "procedural matters," with some role to play in interpreting the statute. It would be possible for the courts to construe sections [a] and [b) as requiring the tenant first to prove that some protected activity under [a) occurred prior to claiming a defense in a possession action under [b). Once the tenant did this, a second step might require the landlord to come forward with some evidence of a nonretaliatory purpose-i.e., a presumption would be created that would require the landlord to bear a production burden, but not a persuasion burden. In some cases, even a persuasion burden could be placed on a landlord. For example, a court could decide that the best reading of the various sections of the statute is that when a tenant shows that a landlord attempted repossession for the first time immediately after an exercise of some activity by the tenant protected under [a], the landlord must prove that the repossession was not retaliatory. To so hold, the court would be interpreting the statute in the same way it interprets all statutes-i.e., by trying to determine what the legislature intended to protect and why, and by filling out the interstices of the statute with appropriate subsidiary rules designed to further the legislative scheme.

If the courts adopted this approach, they might treat actions not involving repossession differently. This could result in the creation of presumptions following some landlord acts, but not others. For instance, in a rent case a court might conclude that landlords reasonably move to raise rents from time to time, and that there is not as strong a connection between a rent increase and a prior act by a tenant falling under (a). Such a conclusion might be supported by a judicial concern that any other reading of the statute would give tenants an incentive to file complaints under (a) whenever they thought a rent increase might be forthcoming, so that they could place the burden on the landlord of justifying the increase as nonretaliatory. Since repossession is a much more dramatic and unusual event than a rent increase, an attempt to repossess with a close temporal connection to a tenant's act falling under (a) might be viewed with greater suspicion. This all is quite speculative, it should be emphasized. The fact is that section 310 is sufficiently different from its counterpart in the Uniform Commissioners' Act that it is difficult to tell exactly what the legislature wanted to do in enacting it.

As for section (d), it seems that the landlord must bear the burden of persuasion to take advantage of it. If the landlord does so, rents may be raised even if the motivation is largely retaliatory.

C. Good Faith

Section 310 of the Alaska Act and Section 1.302 of the Uniform Act provides:

Every duty under this chapter and every act which must be performed as a condition precedent to the exercise of a right or remedy under this chapter imposes an obligation of good faith in its performance or enforcement. The aggrieved party has a duty to mitigate damages.

The Comment to the Uniform Act's 4 1.302 provides that the section was adopted from U.C.C. 4 1-203, and that the rule of good faith in landlord-tenant relationship is intended to be identical to that applied in commercial relationships, particularly in cases of exclusion, retaliatory evictions, and obligation to repair. "Good faith" is defined in § 360 of the Alaska Act and § 1.301 of URLTA as "honesty in fact in the conduct of the transaction con­cerned." The phrase is further utilized in sections of the Act where the presence of good faith might be particularly suspect. See, e.g., § 170(b) ("if a person's failure to deliver possession is willful and not in good faith, an aggrieved tenant may recover from that person an amount not to exceed one and one-half times the actual damages").

Good faith may therefore be a decisive issue in a landlord-tenant case. The issue of good faith ordinarily is resolved as a question of fact. 17A C.J.S. Contracts § 630(b) at 270; Eisenberg, Good Faith Under the Uniform Commercial Code, 54 Marq. L. Rev. 1, 15 (1971). Unfortunately, it is impossible to create a satisfactory definition of good faith, in the UFLTA context, which goes much beyond the phrase "honesty in fact." As Professor Summers argues, the phrase only takes on concrete meaning when used within context:

In contract law, taken as a whole, good faith is an "excluder." It is a phrase without general meaning (or meanings) of its own and serves to exclude a wide range of heterogenious forms of bad faith. In a particular context the phrase takes on specific meaning, but usually this only by contrast with the specific form of bad faith actually or hypothetically ruled out.

Summers, Good Faith in General Contract Law and the Sales Provisions of the Uniform Commercial Code, 54 Va. L. Rev. 195, 201 (1968).

Accepting Summers' hypothesis, courts must either develop definitions of good faith for each particular context in which it can arise in an URLTA-based dispute, or else entrust to juries the task of interpreting the term. The drafters of URLTA do not clearly show their intended definitions of the phrase. For example, § 170(b) (awaiting punitive damages when failure to deliver possession is willful and not in good faith) implies that a withholding of possession could be willful, but still be in good faith. Does this cover the situation where the landlord has a good faith belief that he can legally retain possession, but is nevertheless motivated by racial or sex discrimination? The Act does not provide a definitive answer.

Should the court merely wish to deliver a general definition of good faith to the jury, it may draw upon several Alaska cases for background. However, it should be noted that, with the exception of Frantz v. First National Bank of Anchorage, 584 P.2d 1125 (:Alaska 1978, none of the cases involve the term "good faith" as used in the U.C.C. or in URLTA, (Frantz merely serves to remind courts that good faith involves a subjective inquiry, e.g., an inquiry into the actual state of mind of the person and not what would have been a reasonable person's state of mind.) See, Hash v. Hogan, 453 P.2d 468, (Alaska 1969) (forbidding imposition of punitive damages for false arrest if the defendants "acted in good faith under an erroneous sense of duty or right without any intention to oppress or without actual oppression.") Id. at 474. Footnoted in Hash (453 P.2d at 475 n.19) is Webster's definition of the term, "a state of mind indicating honesty and lawfulness of purpose \* \* \* a belief that one's conduct is not unconscionable." Webster's New International Dictionary (3d ed. 1967) at 978. Also footnoted is one California court definition:

The phrase 'good faith' in common usage has a well-defined and generally understood meaning, being ordinarily used to describe that state of mind denoting honesty of purpose, freedom from intention to defraud, and generally speaking, means being faithful to one's duty or obligation.

People v. Bowman, 156 Cal. App. 2d 784, 320 P.2d 70, 76-77 (1958). See also, Budges v. Alaska Housing Authority, 375 P.2d 696, 702 (Alaska 1962) (punitive damages merited “where the wrongdoer's conduct can be characterized as outrageous, such as acts done with malice or bad motives or in reckless indifference to the interests of others”).

Presented below is a sample instruction, defining good faith generally:

You have been instructed that the landlord had a duty to act in good faith when he (insert alleged good faith action). The law defines good faith as "honesty in fact." For the landlord to have acted in good faith, he must have acted in the belief that his actions were legal. [He must not have taken those actions in order to evade the requirements of the law. The landlord must also have acted without any intent to interfere with the tenant's rights, to punish the tenant for claiming his rights, or to damage the tenant's property.]

Where one party alleges bad faith on the part of the other, it is not clear who bears the burden of proof on the issue. Eisenberg, supra, writes that, "The burden of proof of the allegations in the complaint rests upon the plaintiff. It is not necessary, however, that the plaintiff allege in the complaint that good faith was an integral part of the transaction at each stage . . . ." 54 Marq. L. Rev, at 14. However, Alaska law may not follow this general rule. In Kobuk Engineering & Contracting Services, Inc. v. Superior Tank & Construc. Co., Inc., 568 P.2d 1007 (Alaska 1977), a seller resold, under the U.C.C., goods which a buyer had contracted to buy but then defaulted in payment. The seller then sued the buyer for the difference between the contract price and the actual resale price. The Court held that the seller bore the burden of showing that the sale was commercially reasonable.

[W]e choose to follow those jurisdictions which hold that the secured party must establish that every aspect of the sale was commercially reasonable. This seems to us to be the better rule because the secured party has a duty under the Code to proceed in good faith (U.C.C. § 1.203, AS 45.05.024) and in a commercially reasonable manner.

Id. at 1012. If Kobuk is followed, the jury should be instructed. "In order for the landlord to win on his claim, you must find it more likely than not that he acted in good faith." It must be remembered, however, that Kobuk itself does not speak to landlord-tenant cases, and the burden of persuasion issue still is undecided.

D. Mitigation of Damages

Under the Act, the aggrieved party has a general duty to mitigate damages, AS 34.03.320. Such a duty can be explained to the jury using a modification of the Contracts instruction on Avoidable Consequences (24.11). The Act also specifically delineates the landlord's duty to use reasonable efforts to rent abandoned premises:

If the tenant abandons the dwelling unit, the landlord shall make reasonable efforts to rent it at a fair rental value. If the landlord rents the dwelling unit for a term beginning before the expiration of the rental agreement, the agreement is considered terminated on the date the new tenancy begins. The rental agreement is considered terminated by the landlord on the date the landlord has notice of the abandonment if the landlord fails to use reasonable efforts to rent the dwelling unit at a fair rental value or if the landlord accepts the abandonment as a surrender.

AS 34.03.230(c).

Just as it is unclear whether the burden of proving good faith rests upon the actor or his accuser, it is similarly unclear whether the tenant must prove the landlord did not make reasonable efforts to mitigate, or whether the landlord must affirmatively show his reasonable efforts. At least one state follows the rule that the burden of proving the landlord's failure to mitigate is on the defendant-tenant, except where a clause in the lease obliges the landlord to relet "as he sees fit." In the latter case the burden shifts to the landlord. See, Hirsch v. Merchants Nat. Bank & Trust Co. of Indiana, lnd. App. 336 N.E. 2d 833 (1975); Carpenter v. Wisniewski, 139 Ind. App. 325, 215 N.E.2d 882 (1966).

Analogizing a reletting to the U.C.C. resale at issue in Kobuk, supra, the landlord would bear this burden of proof. An appropriate instruction might be:

The landlord must use reasonable efforts to rent the (insert property), at a fair price, to someone else after the tenant left. If you find that it is more likely than not that the landlord used reasonable efforts to rent the apartment, but could not, you must award him this measure of damages: [the amount of monthly rent multiplied by the number of months remaining in the lease after the tenant left.]

If you find otherwise, then you must instead use the following measure of damages: You must award to the landlord an amount equal to [the monthly rent times the number of months remaining in the lease, but less the amount of total rent for the remaining term of the lease which the landlord could have obtained, using reasonable efforts to re-rent the (insert property).]

The court may wish to instruct the jury that the landlord had the right to limit new tenants to those who would agree to terms of the old lease. Carpenter, supra at 884.

Note that under traditional property law, a reletting of the premises could operate as a landlord's acceptance of the tenant's surrender, thus cutting off his claim against the tenant for the difference between the tenant's rent and the "mitigating" rent. However, Alaska has long held that the landlord should mitigate and can recover the difference between the two rentals. Amick v. Metropolitan Mortg. & Securities Co., 453 P. 2d 412 (Alaska 1969).

E. Damages

Suits for damages will be a crucial enforcement mechanism for the Act. Except for the specific provisions relating to constructive eviction damages, (§ 180), the Act provides scant guidance on how to assess damages. Alaska case law is undeveloped on the subject. Thus, only basic suggestions on how the jury can be instructed to assess damages in the most commonly arising cases can be offered.

Where the tenant's claimed damages for violations of the landlords statutory obligation to maintain the premises in a fit and habitable condition § 100 do not include injury to person or property, but merely involve his aggravation resulting from the non-complying conditions, there are three possible methods of assessing damages. The first, based upon the "market value" theory, would award the tenant the difference between the fair market value of the premises when in § 100 compliance and the value of the defective premises. See, Mease v. Fox, 200 N.W. 2d 791 (Iowa 1972); Boston Housing Authority v. Hemingway, 363 Mass. 184, 293 N.E. 2d 831 (1973). There are two related problems with this approach, however: First, proof of market value of the premises in both complying and non-complying condition can be difficult for the parties and the court; second, any expense for an expert witness, even in a relatively simple case, may be prohibitive for the ordinary tenant.

The second possible damage measurement, called the "percentage reduction theory," entails a reduction in the rent (and rebate thereof) of the percentage by which the use and enjoyment of the premises were diminished by the § 100 violations.. See, Green v. Superior Court of City & County of San Francisco, 10 Cal. 3d 616 517 P.2d 1168 (1974); Academy Speres, Inc. v. Brown, 111 N.J. Super. 477, 268 A.2d 556 (1970). This is an easier approach from the tenant's perspective because no expert testi­mony is required; the tenant's own testimony as to his loss of use is sufficient. However, the percentage reduction theory may present more conceptual difficulties for the jury and involves a high degree of imprecision.

Finally, the jury may simply be instructed to straightforwardly award the tenant the value of his inconvenience and suffering. This approach is rarely used by courts. For a discussion of its merits, and the drawbacks of the other two measures, see Moskovitz, The Implied Warranty of Habitability: A New Doctrine Raising New Issues. 62 Calif. L. Rev. 1444, 1464-73 (1974).

Where the tenant claims damages for personal or property injuries resulting from § 100 violations, Alaska cases have not yet determined the relationship between common law and URLTA. One issue to be decided is whether the tenant's contributory negligence may diminish his recovery of damages asserted under URLTA. Two possible theories could render irrelevant the plain­tiff's contributory negligence. First would be the hypothesis that § 100 is an integral part of the lease, whose violations are a breach of contract or warranty, giving rise to the landlord's strict liability. Second would be the hypothesis that § 100, whose duties are not waivable, is analagous to any statute which is designed for the very protection of those most vulnerable to its violation and most likely to be contributorily negligent (such as a statute prohibiting the sale of airplane glue to minors).

As just mentioned, it remains for the Alaska Supreme Court to decide whether § 100 damages for personal and property injuries may be recovered under tort or contract theories, or under both. That decision may in turn determine how the jury should be in­structed on such issues as foreseeability and certainty.

Finally, CRITA allows, but does not require, imposition of what resembles punitive damages in specified case where a defendant has acted in bad faith. See, § 30(b), 170(d), 210, 230(a), imposition of punitive damages is discretionary with the trier of fact: Bridges v. Alaska Housing Authority, 375 P.2d 696 (Alaska 1962). The Alaska court must thus decide whether the sums to be discretionarily awarded in "bad faith" cases are in fact punitive damages, or are part of an equitable remedy to be given by the Court.