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The Oklahoma Residential Landlord and Tenant Act--The Continuing Experience

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Oklahoma renters and landlords are now in their fourth year of experience with the Oklahoma Residential Landlord and Tenant Act (ORLTA). The Act, which became effective on October 1, 1978, initially was the object of a moderate amount of publicity as the bar and media attempted to inform landlords and tenants in Oklahoma of the changes which had been made in the laws affecting their relationship. After this initial flurry of information, however, the publicity subsided and the landlord-tenant relationship returned to where it had been for the purpose of dispute settlement—the small claims courts. This article will evaluate the changes which the Act has made in the Oklahoma landlord-tenant situation, and suggest needed revisions.

The time since October 1, 1978, has not been sufficient for the courts to have produced any appellate opinions dealing with the revisions of the law. Moreover, it is unlikely that much litigation in the residential lease area will reach the appellate courts. In this period of

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1. OKLA. STAT. tit. 41, §§ 101-135 (Supp. 1980) [hereinafter referred to as ORLTA]. See also OKLA. STAT. tit. 12, §§ 1148.1 and 1148.14 (Supp. 1980) (enacted as a part of the landlord-tenant statutory revision in 1978).
3. See, e.g., Downing, Oklahoma Residential Landlord Tenant Act, 50 OKLA. B.J. 412 (1979). A program on ORLTA was presented on April 28, 1979, by the University of Oklahoma Law Center. A pamphlet outlining tenant's rights and duties under the Act was prepared by Legal Aid of Western Oklahoma, Inc. Pamphlets outlining the obligation of both landlords and tenants under ORLTA were issued by the Oklahoma Bar Association on January 1, 1980. For an example of the typical media publicity devoted to the Act, see The Sunday Oklahoman, Dec. 3, 1978, § A, at 55. There were also "public service" television shows which featured discussions of the new law.
economic instability, marked by frequent rent increases and short term leases, many tenants prefer to relocate rather than litigate, and the relatively small dollar value involved in those few claims asserted makes appeals unlikely. To supplant this absence of case law, this writer decided that a survey of Oklahoma trial judges was the best alternative to study the effect of ORLTA on landlord-tenant disputes in Oklahoma.

The purpose of this article is not to provide a detailed analysis of ORLTA. The specific revisions in Oklahoma’s landlord-tenant law made by ORLTA have been outlined elsewhere. Rather, this article will examine specific sections of the Act where claims might arise under Oklahoma’s Forcible Entry and Detainer statute.

I. HISTORICAL PERSPECTIVE: THE POSSESSORY ACTION

Historically, the law favored landlords over tenants by providing a speedy, effective remedy for landlords to recover possession of leased premises from defaulting tenants. The United States Supreme Court, in an opinion by Justice White, discussed this historical preference for landlords and its gradual demise:

At common law, one with the right to possession could bring an action for ejectment, a "relatively slow, fairly complex, and substantially expensive procedure." But . . . the common law also permitted the landlord to "enter and expel the tenant by force, without being liable to an action of tort for damages, either for his entry upon the premises, or for an assault in expelling the tenant, provided he uses no more force than is necessary, and do[es] no wanton damage." The landlord-tenant relationship was one of the few areas where the right to self-help was recognized by the common law of most States, and the implementation of this right has been fraught with "violence and quarrels and bloodshed." An alternative legal remedy to prevent such breaches of the peace has appeared to be an overriding necessity to many legislators and judges.

The "alternative legal remedy" provided by legislatures is the summary proceeding for the recovery of possession of real property by landlords.

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4. Downing, supra note 3.
5. OKLA. STAT. tit. 12, §§ 1148.1-.16 (Supp. 1980) [hereinafter referred to as FED]. Claims under ORLTA which do not involve a possessory claim would not give rise to an FED action. Two such instances would be the tenant’s rights to damages for wrongful removal or exclusion, or for harassment as set forth in OKLA. STAT. tit. 41, §§ 123 & 124 (Supp. 1980). These sections contemplate the possible continuance of the lease.
Typically, these statutes provide for trial within a much shorter time than the usual civil action and significantly limit the issues which can be tried in the proceeding. The basic issue in such proceedings is the right to possession, which turns on whether the tenant has paid the rent. Some states limit the landlord's remedy in summary proceedings to the recovery of possession only; others also allow the landlord to recover unpaid rent in the summary action. Unlike the typical civil suit, however, where the parties may litigate all of their claims arising from the transaction in a single action, the nature of summary proceedings requires other issues to be tried in a separate civil action.

The customary lease contains many provisions which govern the rights and obligations of the parties during the lease term. The basic right of the tenant is possession of the leased premises, and that of the landlord is to receive the agreed-upon rent in exchange for possession. In terms of common law estates in land, the lease creates a term of years subject to a condition subsequent, or a term of years on special limitation in the tenant, while the landlord retains the reversion coupled with a right of entry or a possibility of reverter. When the rent is not paid, the tenant's right to possession comes to an end by the nature of the estate granted, and the landlord may obtain possession by means of the summary action.

Normally, however, the typical residential lease contains other covenants. Traditionally, these covenants between the parties were held to be independent in that a breach by one party did not excuse full performance by the other. For example, if a lease imposed upon a tenant the obligation to pay $250 per month in rent during the lease term and also imposed upon the landlord the obligation to keep the premises in good repair, the failure by the landlord to repair would not excuse the tenant's obligation to pay the rent. The tenant's only remedy would be to sue the landlord in an independent action seeking either specific performance of the promise to repair or damages for the...
breach of the promise measured by the diminution in rental value.\textsuperscript{15} Thus, in dealing with independent covenants, the only inquiry in a possessory action is whether or not the rent has been paid. Even if a statute permitted the joinder of claims by the landlord for rent\textsuperscript{16} and for damages to the premises,\textsuperscript{17} or allowed the defendant to present a counterclaim for breach of a covenant, the basic rental obligation would remain, and the existence of the renter's counterclaim would not prevent a judgment for the landlord on the issue of possession.

In recent years, a growing number of jurisdictions has abandoned the concept of independent lease covenants, and has recognized an implied covenant of habitability in the residential lease.\textsuperscript{18} The tenant's obligation to pay rent in such instances is dependent upon the performance of certain obligations by the landlord, such as the obligation to repair. Accordingly, a tenant may raise the landlord's breach of this obligation as a defense to a possessory action for failure to pay rent. Jurisdictions that have recognized the concept of dependent covenants have expanded possessory actions either by case law\textsuperscript{19} or by statute,\textsuperscript{20} to allow a tenant to present defenses to a landlord's claim for rent in a summary possessory action. The failure to repair, for example, may cause total or partial abatement of the rental obligation, and the landlord will be denied possession of the rental unit.

Despite this trend, the singular nature of the summary possessory action withstood constitutional attack in \textit{Lindsey v. Normet}.\textsuperscript{21} In \textit{Lindsey}, a group of month-to-month tenants, who refused to pay rent until the landlord repaired the leased premises, brought suit in federal district court, seeking a declaratory judgment that the Oregon Forcible

\textsuperscript{15} Id. at ¶ 250 [2].
\textsuperscript{16} Note 10 supra.
\textsuperscript{17} Note 8 supra.
\textsuperscript{19} E.g., Green v. Superior Court, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974); Jack Spring v. Little, 50 Ill.2d 351, 280 N.E.2d 208 (1972).
\textsuperscript{20} See, e.g., \textit{Uniform Residential Landlord-Tenant Act} § 4.105 (hereinafter cited as URLTA). This section allows tenants to pay rent into court, to assert defenses and counterclaims, and to maintain possession if no net rental is unpaid. At least seventeen states have adopted landlord-tenant codes over the past decade which are based, at least in part, on URLTA. For a list of states and the nature of their legislative adoptions, see 7A \textit{Uniform Laws Annotated} 132 (Supp. 1981).
\textsuperscript{21} 405 U.S. at 56.
Entry and Wrongful Detainer Statute (FED)\(^{22}\) violated the fourteenth amendment of the United States Constitution. Specifically, the tenants attacked three characteristics of the Oregon FED Statute: (1) the requirement of a trial no later than six days after service of the complaint; (2) the limitation of triable issues and; (3) the requirement of posting an appeal bond in twice the amount of rent expected to accrue pending final decision.\(^{23}\) The district court upheld the statute and dismissed the suit. On appeal, the United States Supreme Court agreed with the tenants that the double-bond requirement, as a condition precedent to appeal, violated the equal protection clause of the fourteenth amendment. The Court found, however, that neither the early trial nor the limited issues provisions violated the fourteenth amendment due process or equal protection clauses. The early trial provision was held to be reasonable, since the issues were not complicated and the facts were within the knowledge of the tenant in the FED setting.\(^{24}\) The Supreme Court also rejected the tenants' assertion that treating the covenants in the lease as independent violated the due process clause. The Court stated that: “[t]he Constitution has not federalized the substantive law of landlord-tenant relations, however, and we see nothing to forbid Oregon from treating the undertakings of the tenant and those of the landlord as independent rather than dependent covenants.”\(^{25}\) The Court did recognize that some states view lease covenants as dependent, allowing tenants to raise breaches by landlords as defenses to suits for nonpayment of rent, and that some states have statutes authorizing rent withholding in certain instances.\(^{26}\)

The Court also rejected the tenants' equal protection argument. In doing so, the Court recognized the need for rapid and peaceful settlement of disputes between landlords and tenants and found “the provisions for early trial and simplification of issues . . . closely related to that purpose.”\(^{27}\)

II. THE OKLAHOMA SETTING—ORLTA\(^{28}\)

The enactment of ORLTA in 1978, provided a detailed statutory

\(^{23}\) 405 U.S. at 64.
\(^{24}\) Id. at 65.
\(^{25}\) Id. at 68.
\(^{26}\) Id. at 69 nn.15 & 16.
\(^{27}\) Id. at 70.
\(^{28}\) OKLA. STAT. tit. 41, §§ 101-135 (Supp. 1980).
framework for the Oklahoma residential landlord-tenant relationship. Although the Act does not contain a statement of legislative purpose, as does the Uniform Residential Landlord and Tenant Act (URLTA), from which a number of ORLTA's sections were taken, it is clear that the Oklahoma legislature wanted to provide specific guidelines for the regulation of residential rental property. The Act, however, does not adopt the dependent covenant approach, nor does it authorize the withholding of rent.

Generally, tenants may raise two types of issues in possessory actions brought by their landlords: defenses to the claim for rent, or a counterclaim against the landlord for breach of a lease covenant. If a tenant's defense to a claim for rent is valid, the rent under the lease is neither due in whole nor in part, and the landlord may not be entitled to possession. On the other hand, a counterclaim does not affect the landlord's right to possession because it arises from the landlord's breach of an independent covenant, and the tenant is not entitled to withhold the rent.

Under ORLTA, what defenses may a tenant assert to the land-

29. URLTA § 1.102. Its statement of purpose provides:
   (a) This act shall be liberally construed and applied to promote its underlying purposes and policies.
   (b) Underlying purposes and policies of this Act are
      (1) to simplify, clarify, modernize, and revise the law governing the rental of dwelling units and the rights and obligations of landlords and tenants;
      (2) to encourage landlords and tenants to maintain and improve the quality of housing; and
      (3) to make uniform the law with respect to the subject of this Act among those states which enact it.

30. For a comparison of URLTA with ORLTA, see Downing, note 3 supra.
31. But see URLTA § 4.105, which provides:
   (a) In an action for possession based upon nonpayment of the rent or in an action for rent when the tenant is in possession, the tenant may [counterclaim] for any amount he may recover under the rental agreement or this Act. In that event the court from time to time may order the tenant to pay into court all or part of the rent accruing and thereafter accruing, and shall determine the amount due to each party. The party to whom a net amount is owed shall be paid first from the money paid into court, and the balance by the other party. If no rent remains due after application of this section, judgment shall be entered for the tenant in the action for possession. If the defense or counterclaim by the tenant is without merit and is not raised in good faith, the landlord may recover reasonable attorney's fees.
   (b) In an action for rent when the tenant is not in possession, he may [counterclaim] as provided in subsection (a) but is not required to pay any rent into court.

32. See Prince Hall Village Apartments v. Braddy, 538 P.2d 603 (Okla. Ct. App. 1975). The Oklahoma Court of Appeals held that a tenant, who withheld the cost of insect prevention (which the landlord was obligated to provide under the lease) from her rent, was entitled to a jury trial and to assert the withholding as a defense to the landlord's possessory action.
33. For the most part, this seems to be the approach under ORLTA. See Okla. Stat. tit. 41,
lord's claim for possession? What provisions of ORLTA will permit a counterclaim by a tenant to be adjudicated in a summary possessory action in Oklahoma?

In general, the defenses available to a tenant in a possessory action in Oklahoma under ORLTA are limited to showing a proper payment of rent,34 or failure of the landlord to give the required notice to quit.35 Full payment of the rent is excused, however, in several instances:

1. If the landlord fails to repair after proper notice from the tenant, the tenant may make repairs of less than $100 and deduct the cost or value of the repairs from the rental payment;36
2. If the landlord fails to deliver possession of the rental unit at the commencement of the lease, the rent may be abated until such time as the tenant obtains possession;37
3. The tenant may deduct the cost of essential services which the landlord has willfully or negligently failed to provide or, alternatively the tenant may be excused from paying rent if substitute housing is obtained during the suspension of such essential services38 and;
4. The tenant may also be excused from a proportionate part of the rent if there is a partial destruction of the rental unit.39

All of these situations are defenses which may be raised against a claim for rent. Other claims for damages arising under ORLTA for a breach of a covenant would be cognizable as counterclaims and not as defenses.40

§ 121 (Supp. 1980), which outlines the tenant's remedies for a breach of agreement by the landlord.

34. OKLA. STAT. tit. 41, § 131 (Supp. 1980) governs delinquent rent:
   A. If rent is unpaid when due, the landlord may bring an action for recovery of the rent at any time thereafter.
   B. A landlord may terminate a rental agreement for failure to pay rent when due, if the tenant fails to pay the rent within five (5) days after written notice of landlord's demand for payment.
   C. Demand for past due rent is deemed a demand for possession of the premises and no further notice to quit possession need be given by the landlord to the tenant for any purpose.

Id.

35. Id.
37. Id. § 120(A).
38. Id. § 121(C).
39. Id. § 122(A)(2).
40. E.g., OKLA. STAT. tit. 41, § 123 (Supp. 1980).
III. FED ACTIONS IN OKLAHOMA

Oklahoma's Forcible Entry and Detainer statutes were enacted in 1968, as a part of the judicial reform and reorganization of that year. Prior to 1969, when the statutes went into effect, FED actions fell within the jurisdiction of justices of the peace. Present statutes grant the district court jurisdiction to try all actions for either forcible entry and detainer, or detention of real property. Claims for the collection of rent or damages to the premises were includable in FED actions but, prior to the enactment of ORLTA, other claims were not.

In an FED action, the defendant must appear for trial not less than five days, nor more than ten days, from the date of the issuance of the summons, and the summons must be served at least three days before the date of the trial. If the jurisdictional amount for small claims court is not exceeded, the matter shall be placed on the small claims docket of the district court. If the amount is exceeded, the case will be heard by the district court. Oklahoma's FED statutes are

41. 1968 Okla. Sess. Laws, ch. 172, § 1 (codified in Okla. Stat. tit. 12, §§ 1148.1-13 (1971 & Supp. 1980)). The FED statutes were also revised in 1969 (amending § 1148.4); 1970 (repealing § 1148.12); 1971 (repealing § 1148.11 and enacting §§ 1148.10A and 1148.14-16); 1973 (amending § 1148.16 to provide for trial within 3 days after service, but not less than 5 days from issuance, instead of the seven days previously allowed); 1976 (enacting § 1148.5 to permit constructive service in actions for possession only); 1978 (amending §§ 1148.3, 1148.6 and 1148.14 to allow for interface with ORLTA, and to change the procedure in leasehold cases in which a tenant claims title); and 1980 (amending § 1148.4 to repeal the provision limiting plaintiff's recovery to the amount stated in the summons, and to permit pleadings to be amended to conform to proof).

42. See Fraser, Oklahoma's New Judicial System, 21 Okla. L. Rev. 373 (1968).


44. Okla. Stat. tit. 12, § 1148.1 (Supp. 1980). The district court shall have jurisdiction to try all actions for the forcible entry and detention, or detention only, of real property, and claims for the collection of rent or damages to the premises, or claims arising under the Oklahoma Residential Landlord and Tenant Act, may be included in the same action, but other claims may not be included in the same action. A judgment in an action brought under this act shall be conclusive as to any issues adjudicated therein, but it shall not be a bar to any other action brought by either party.

45. Id. § 1148.1.

46. Id. § 1148.4. The 1980 amendment to this section, which deleted the provision that judgment would not be rendered for an amount in excess of that stated in the affidavit and authorized amendment of pleadings to conform to proof, seems to be in conflict with the present summons form set out in § 1148.16, which allows judgment in the amount stated in the affidavit. If the purpose of the 1980 amendment were to allow a judgment in excess of that sought in the summons, it would seem constitutionally infirm.

47. Id. § 1148.6.

48. Id. §§ 1148.14-16 (Supp. 1980). The jurisdictional amount for small claims court in Oklahoma was recently increased to $1000.00, effective October 1, 1981. 1981 Okla. Sess. Law Serv. ch. 240, tit. 12, § 1751.
unique in that they limit issues that may be tried, significantly shortening the time for answer and trial as compared to other civil actions.49

When ORLTA was enacted, the legislature amended two sections of the FED statutes in the same bill.50 The amendments broadened the issues which might be tried in an FED action to include "claims arising under the Oklahoma Residential Landlord and Tenant Act."51 The amended FED statutes do not specifically refer to what counterclaims might be asserted by a defendant tenant. The recent Oklahoma Supreme Court decision in Schuminsky v. Field,52 however, may have indirectly answered the question of what counterclaims may be heard in FED actions in Oklahoma.

In Schuminsky, which involved a commercial lease of a retail drug store,53 the landlord brought an FED action seeking to recover possession of the premises and $3818 in rent for the tenant's alleged violation of the leasehold agreement.54 The tenant filed four counterclaims for damages.55 The landlord sought to dismiss the counterclaims on the basis that with regard to non-residential property, only claims for rent and damages may be included in the same action.56 The special judge dismissed the first counterclaim, allowed the others to stand, and, over the landlord's objection, set the case for jury trial. The landlord sought and was granted a writ of prohibition from the Oklahoma Supreme Court regarding the remaining counterclaims. The supreme court affirmed the limited scope of the proceedings in an FED action.57 The court found that, although the statute does not specifically mention

49. In civil actions in Oklahoma, a defendant has 30 days from the date of issuance of the summons in which to file an answer. Okla. Stat. tit. 12, § 155 (Supp. 1980). Counterclaims are permitted insofar as they are factually related to plaintiff’s claim. Okla. Stat. tit. 12, §§ 272 & 273 (1971). In small claims actions, the time period for an answer is shorter but the scope of counterclaims does not differ from the basic civil action. Okla. Stat. tit. 12, § 1758 (1971).
51. Id.
52. 606 P.2d 1133 (Okla. 1980).
53. ORLTA applies only to residential leases. Okla. Stat. tit. 41, § 103(A) (Supp. 1980). Nonetheless, the rationale in Schuminsky may be applicable to FED actions involving ORLTA claims. See notes 59-61 infra and accompanying text.
54. 606 P.2d at 1133-34. The landlord alleged the tenant’s failure to pay excess rentals due under the percentage lease, failure to keep the premises free of debris, and wrongful sub-leasing by tenants. Id.
55. Id. at 1134. The counterclaims were based on: loss of sales and punitive damages as a result of the landlord’s telling people he was trying to terminate tenant’s lease; damages for the landlord’s failure to repair the roof resulting in increased utility bills and destruction of property; damages for his allowing competitive business in the shopping center in violation of the lease; and damages for loss of business due to his failure to repair the parking lot. Id. at 1134-35.
56. Id. at 1135.
57. Id.
counterclaims, the limitation on the claims available to a landlord would result in a denial of equal protection to the landlord if a tenant's counterclaims were unlimited. 58

The decision in *Schuminsky*, although involving a commercial lease, seems to present a mirror image of the statutory situation presently affecting the residential landlord and tenant. In *Schuminsky*, the court held that since the landlord's claims were limited by statute, the tenant's counterclaims must likewise be limited. 59 Reversing that rationale, it seems logical that since the 1978 amendments to the FED statutes authorized landlords to include claims under ORLTA, 60 defendant tenants in FED actions should also be authorized to raise those counterclaims provided in ORLTA.

The argument for allowing tenant counterclaims is further strengthened by the language of section 105(B) of ORLTA, which specifies the courts in which any right, obligation, or remedy arising under the act may be enforced. 61 including FED actions. If the legislature were not only speaking of landlord's claims, but of any right, obligation, or remedy, this would clearly include the tenant's rights and remedies which might be asserted as counterclaims.

IV. THE OKLAHOMA SURVEY

A survey of the state trial judges was undertaken to determine the effect of ORLTA on the most basic landlord-tenant confrontation—the nonpayment of rent, and to obtain information on the nature of FED practice in Oklahoma. 62

The design of the survey called for the directing of inquiries to all

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58. Id.
59. See id. at 1135-37.
60. Note 44 *supra*.
61. OKLA. STAT. tit. 41, § 105(B) (Supp. 1980) provides:

Any right, obligation or remedy declared by this act is enforceable in any court of appropriate jurisdiction including small claims court and may be prosecuted as part of an action for forcible entry or detainer unless the provision declaring it specifies a different and limited effect. In any action for breach of a rental agreement or to enforce any right or obligation provided for in this act, the prevailing party shall be entitled to reasonable attorneys' fees.

Id.

62. The following questionnaire was mailed to Oklahoma trial judges, together with a letter from Chief Justice Lavender which urged response to the project.
**Oklahoma trial judges, even though many district judges and associate district judges, by virtue of their case assignments, do not hear FED actions, and others hear only occasional actions, in which the amount**

<table>
<thead>
<tr>
<th>District</th>
<th>( )</th>
</tr>
</thead>
<tbody>
<tr>
<td>Associate</td>
<td>( )</td>
</tr>
<tr>
<td>Special</td>
<td>( ) Judge _______________ County __________________________</td>
</tr>
<tr>
<td>City in which court sits __________________________</td>
<td></td>
</tr>
</tbody>
</table>

1. Approximately how many forcible entry and detainer actions do you hear each year?
   - Fewer than 50
   - 50 to 100
   - 100 to 500
   - 1000 to 2500
   - More than 2500
   - I do not hear FED actions

2. If you can ascertain whether the actions involve residential property, how many of the above actions involve residential property?
   - 0 to 25%
   - 25 to 50%
   - 50 to 75%
   - Over 75%
   - I have no way of knowing

3. In how many residential FED cases does the tenant make no appearance?
   - 0 to 25%
   - 25 to 50%
   - 50 to 75%
   - Over 75%

4. How many of these tenants are represented by counsel?
   - 0 to 25%
   - 25 to 50%
   - 50 to 75%
   - Over 75%

5. Do you hear tenant counterclaims in FED actions?
   - Yes
   - No

   In what percentage of cases?
   - 0 to 25%
   - 25 to 50%
   - 50 to 75%
   - Over 75%

6. What kinds of issues do residential tenants raise or attempt to raise in FED actions?
   - Rights to return of security deposits. What percentage of cases?
   - Rights to offset rental or resist eviction on basis of self-help repair remedy provided by 41 O.S. § 121(B)
     What percentage of cases?
   - Counterclaim for failure to provide essential services under 41 O.S. § 121(C)?
     What percentage of cases?

7. Do tenants attempt to assert a defense of retaliatory eviction, claiming that the landlord is acting unfairly because they have asserted their legal rights as tenants?
   - Would you entertain such a defense?
     In what percentage of cases?

8. Is it your perception that residential tenants frequently assert claims against landlords?

9. Do you perceive that tenants in your county are well-informed as to their legal rights as tenants?

10. Do you have free legal aid services available for low income tenants in your county?
    - Yes
    - No

11. If your answer above was affirmative, what percentage of residential tenants who appear with counsel are represented by legal aid?
    - 0 to 25%
    - 25 to 50%
    - 50 to 75%
    - Over 75%
    - I have no way of knowing
in question exceeds the jurisdictional amount for small claims court.\(^6\)

The Court Administrator's Office supplied current names and addresses of all state trial judges. Questionnaires were distributed in December 1980, with a request for response by January 30, 1981. A follow-up letter was sent in February 1981, requesting further information. The responses received are as follows:

**TABLE 1**

<table>
<thead>
<tr>
<th>QUESTIONNAIRE (^6)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Response</strong></td>
</tr>
<tr>
<td>Questionnaires mailed</td>
</tr>
<tr>
<td>Responses Received</td>
</tr>
</tbody>
</table>

Of the responses received, the following table indicates the FED case load of the respondents:

12. Do you believe that the Residential Landlord-Tenant Act has made many changes in the nature of practice in Landlord-Tenant cases in your court?
   Very little __________ Some change __________ A great deal __________ Please explain

13. (A) Do you have any comments about the Act? (B) Do you have any suggestions for its improvement?

\(^6\) See OKLA. STAT. tit. 12, § 1148.14 (Supp. 1980) which provides that if recovery does not exceed the jurisdictional amount, an FED action "shall be placed on the small claims docket."

\(^6\) Concerning those judges who did not respond, the author determined that it is highly probable that an additional twenty district judges and eight special judges do not hear FED cases. This determination was based on the geographic location of the non-respondents. No determination could accurately be made about the non-responding associate district judges.

After adding the judges who almost certainly do not hear FED cases to the total, it appears that fifty-four state judges who might hear FED actions did not respond. This figure represents 27.5% of the total number of the trial judges in the state. This total included 17.3% of the district judges; 50% of the associate district judges; and only 11.7% of the special judges, who are the most likely to hear FED actions.
Table 2 reveals that a very small number of special judges hear the bulk of FED actions in Oklahoma. As would be expected, these judges sit in densely populated areas, where the incidence of rental housing is comparatively high.66

Of the judges who hear FED cases (66 of the 114 respondents), all but nine have an FED case load which is composed of more than 75% residential leases. Of the other nine judges, six are district judges who presumably hear transfers from the small claims docket, and three are associate judges who hear mostly non-residential cases. Furthermore, none of these nine judges hears more than fifty FED cases per year.

Judges were asked to estimate the percentage of FED cases per year in which the tenant made no appearance.

Table 3

Cases in Which Tenants Make No Appearance67

65. Percentages given are of the response group, not of the total poll.

66. Judges responding who hear more than 500 FED cases per year are from Cleveland, Oklahoma, and Tulsa counties.

67. In tables 3-5, the responses were tabulated according to the percentage of judges.

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Table 2

<table>
<thead>
<tr>
<th>Responses by No. of cases</th>
<th>%</th>
<th>District Judges</th>
<th>%</th>
<th>Associate Judges</th>
<th>%</th>
<th>Special Judges</th>
<th>%</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Did not hear</td>
<td>42.1</td>
<td>27</td>
<td>69.2</td>
<td>13</td>
<td>34.2</td>
<td>8</td>
<td>21.6</td>
<td>48</td>
</tr>
<tr>
<td>Less than 50 cases</td>
<td>35.0</td>
<td>12</td>
<td>30.7</td>
<td>22</td>
<td>57.9</td>
<td>6</td>
<td>16.2</td>
<td>40</td>
</tr>
<tr>
<td>50-100 cases</td>
<td>9.6</td>
<td>—</td>
<td>2</td>
<td>2</td>
<td>5.2</td>
<td>9</td>
<td>24.3</td>
<td>11</td>
</tr>
<tr>
<td>100-500 cases</td>
<td>8.8</td>
<td>—</td>
<td>1</td>
<td>2</td>
<td>2.6</td>
<td>9</td>
<td>24.3</td>
<td>10</td>
</tr>
<tr>
<td>500-1000 cases</td>
<td>1.8</td>
<td>—</td>
<td>—</td>
<td>—</td>
<td>—</td>
<td>2</td>
<td>5.4</td>
<td>2</td>
</tr>
<tr>
<td>More than 2500 cases</td>
<td>2.6</td>
<td>—</td>
<td>—</td>
<td>—</td>
<td>—</td>
<td>3</td>
<td>8.1</td>
<td>3</td>
</tr>
<tr>
<td>Totals</td>
<td>99.9</td>
<td>39</td>
<td>99.9</td>
<td>38</td>
<td>99.9</td>
<td>37</td>
<td>99.9</td>
<td>114</td>
</tr>
</tbody>
</table>

Table 3

<table>
<thead>
<tr>
<th>Responses by No. of cases</th>
<th>% of cases</th>
<th>0-25%</th>
<th>25-50%</th>
<th>50-75%</th>
<th>over 75%</th>
<th>No response</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than 50 cases</td>
<td>25.6</td>
<td>28.1</td>
<td>10.2</td>
<td>5.1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>50-100 cases</td>
<td>9.1</td>
<td>27.2</td>
<td>18.2</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>100-500 cases</td>
<td>20.0</td>
<td>40.0</td>
<td>20.0</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>500-1000 cases</td>
<td>100.0</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>more than 2500 cases</td>
<td>100.0</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Table 3 indicates that the judges who hear a very limited number of cases have a higher appearance rate for tenants who contest the landlord’s right to possession, rent, or damages, or who file a counterclaim against the landlord. Those judges who hear more cases experience a higher percentage of tenants who fail to appear.

Judges who hear more than fifty FED actions per year reported that tenants who appear in FED actions are represented by counsel in less than twenty-five percent of the cases.68 This seems consistent with the usual small claims situation in which an attorney’s services are not used. Three of the district judges who reported a higher percentage of representation, explained that they hear FED cases only when the amount in controversy exceeds the five thousand dollar limitation placed on the jurisdiction of special judges.69

The survey asked the judges whether or not they hear tenant counterclaims in FED actions. The responses to this question were diverse, and require specific analysis. Of the judges hearing less than fifty cases per year, 87.5% hear counterclaims in FED actions, 10% do not, and one judge did not respond. Of the judges hearing counterclaims, 71.4% stated that counterclaims were presented in less than 25% of their cases. The remaining judges reported a higher percentage of cases in which counterclaims were asserted.

Of the twenty-six judges responding who hear more than fifty FED cases per year, twenty indicated that they do hear tenant counterclaims, but in no more than twenty-five percent of their cases; one judge stated that counterclaims “are not usually allowable”, and five judges indicated that they hear no tenant counterclaims, and cited Schuminsky v. Field as the basis for this policy.70 The significance of this latter view is that two of the judges heard more than 2500 cases in 1980, two others heard 347 cases in one county in 1980, and the remaining judge heard 94 cases in 1980.

Judges were asked whether they perceived tenants to be well informed of their rights and duties under ORLTA. The overwhelming majority of judges perceived tenants as not being well informed.

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68. There were twenty-six judges in this category. See note 65 supra and accompanying text.
70. 606 P.2d 1133 (Okla. 1980). See notes 52-60 supra and accompanying text.
TABLE 4

JUDGES DEALING WITH UNINFORMED TENANTS

<table>
<thead>
<tr>
<th>Responses by No. of cases</th>
<th>% of Uninformed Tenants</th>
<th>% of Informed Tenants</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than 50 cases</td>
<td>82.5</td>
<td>17.5</td>
</tr>
<tr>
<td>50-100 cases</td>
<td>81.8</td>
<td>18.2</td>
</tr>
<tr>
<td>100-500 cases</td>
<td>90</td>
<td>10</td>
</tr>
<tr>
<td>500-1000 cases</td>
<td>100</td>
<td>-</td>
</tr>
<tr>
<td>More than 2500 cases</td>
<td>67</td>
<td>33%</td>
</tr>
</tbody>
</table>

Comments were made by a number of judges regarding specific areas in which tenants were poorly informed. The most frequent issue raised was the ORLTA requirement for written notices. Six judges commented that landlords are also poorly informed about ORLTA.

Judges were asked to categorize their perception of the effect of ORLTA on the landlord-tenant cases presented to them.

TABLE 5

PERCEPTION OF CHANGE DUE TO ORLTA

<table>
<thead>
<tr>
<th>Responses by No. of cases</th>
<th>% Little Change</th>
<th>% Some Change</th>
<th>% A Great Deal</th>
<th>% NA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than 50 cases</td>
<td>47.5</td>
<td>30.0</td>
<td>7.5</td>
<td>15</td>
</tr>
<tr>
<td>50-100 cases</td>
<td>72.7</td>
<td>27.3</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>100-500 cases</td>
<td>70</td>
<td>10</td>
<td>10</td>
<td>10</td>
</tr>
<tr>
<td>500-1000 cases</td>
<td>50</td>
<td>50</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>More than 2500 cases</td>
<td>66</td>
<td>33</td>
<td>-</td>
<td>-</td>
</tr>
</tbody>
</table>

Not surprisingly, judges in the urban areas where publicity on the law was greatest and where most FED cases are heard, perceived the greatest change.

The survey also inquired into the availability of free legal services for low income tenants. Of the judges responding, 77.3% sit in counties in which legal services are available, the remaining 22.7% do not have such services. In cases in which tenants actually make an appearance, only three judges reported more than twenty-five percent of tenants represented by Legal Aid, and two of these judges hear less than fifty cases per year.

71. Of the three judges responding in this category, the special judge from Tulsa felt that tenants were "fairly well" informed.
72. See OKLA. STAT. tit. 41, §§ 111(A), 115(B), 120(A), 121(E), 122(A)(1), 124, 131(B), and 132 (Supp. 1980). Each of these sections requires written notice to the other party as a condition precedent to the rights or remedies it provides.
V. Judges' Comments on ORLTA

At the end of the survey, judges were asked to comment on the Act, the nature of the changes the Act has had in landlord-tenant actions, and ways in which the Act might be improved. Twenty-eight of the sixty-six respondents, or 42.4%, of those who hear FED cases had no comments. Of the judges who provided general comments, several made similar observations. Twelve noted that the new law is clearer for the court and makes the rights and obligations of each party explicit. These same judges commented that professional landlords are better informed and are more tolerant of tenant problems. Two other judges stated that the new law is fair to both parties. Twelve judges, however, reiterated their response in the question tabulated in Table 4, that tenants are not well informed about the provisions of the law. Several judges made suggestions of how tenants might be made more aware of their rights and responsibilities. A northeastern Oklahoma county judge suggested that the Act be printed and handed out in the county treasurer's office at tax time; other judges suggested television spots or having brochures made available in welfare offices, social security offices, or other central locations; while other judges suggested that a summary of the Act involving tenants' rights and obligations be appended to the lease, with a requirement that the tenant sign an acknowledgement of receipt.

One judge remarked that the law was more relevant to the urban landlord-tenant situation and therefore has had limited application to tenants in the rural counties. Several other judges from rural areas responded that there is very little litigation of this type in their counties.

Three troublesome areas of the law were singled out for specific comment by seven judges: the security deposit, abandoned property, and the requirements for written notices.

As the law is presently written, a tenant must make written demand for the return of the security deposit within six months after the termination of the tenancy, and the landlord has thirty days to respond to the tenant's written demand for the deposit's return. 73 Those provisions are likely to work more effectively if the parties are not involved in FED litigation since the time limitations are not compatible with the statutorily mandated trial schedule. They also require the landlord and

73. OKLA. STAT. tit. 41, § 115 (Supp. 1980). This section was amended by 1981 Okla. Sess. Laws, ch. 125, § 1 at 240 to require that the landlord keep the escrow account in the State of Oklahoma in a federally insured bank.
tenant to be aware of the technical requirements of the law. The judges' responses indicate that tenants do not understand the procedures they must follow under ORLTA to assert their rights for the return of a security deposit. A metropolitan area judge suggested a possible alternative. He recommended that issues involving the return of the security deposit be capable of inclusion in an FED action without the written demand and the time limitations imposed by ORLTA.

Provisions for dealing with abandoned property are also set out in the Act. The law requires the landlord to hold any abandoned property of value for thirty days after the tenant abandons or surrenders possession of the dwelling unit. After thirty days, to dispose of the property, the landlord must adhere to ORLTA provisions requiring petition for sale, notice, and hearing on the fact of abandonment. Following the hearing, the landlord may sell the property, file an affidavit setting out the proceeds of the disposition thereof and deposit the balance, if any, into court.

Regarding property left by a tenant following an adverse FED judgment, one judge suggested that the law be amended to allow disposal of such property in a less cumbersome manner than that required by ORLTA. Other judges agreed that the present procedure was too costly and ineffective.

ORLTA requires that written notice be given by either party to the lease in a number of instances. Since the judges responding indicated a great amount of tenant ignorance about the provisions of the Act, it is not surprising that many pointed out specific problems with tenants forfeiting their rights because they failed to comply with the notice requirements in the Act. One suggested alternative was that section 121 of ORLTA be amended to allow tenants to assert rights even though written notice is not given, when there is clear and convincing evidence that the landlord knew of the claimed defects or otherwise waived the requirement of notice.

VI. COMMENTS BY THE AUTHOR

Need for Education: After studying the questionnaires returned by the trial judges, the item that stands out most clearly is the need for
better education of tenants (and landlords) concerning their responsibilities and rights under the law. The most effective way to do this would be to require that when the lease is signed, tenants be furnished with either a copy of the Act or a summary of the Act's provisions which relate to their rights and responsibilities.

The Schuminsky case and the residential lease: The effect of the Schuminsky case on the residential tenant should be clarified. Schuminsky involved a commercial lease and is not authority for limiting counterclaims in residential lease cases. The 1978 amendments to the FED statutes clearly broadened the scope of FED actions to include claims "arising under the Oklahoma Residential Landlord and Tenant Act", 78 and similarly, ORLTA authorizes the settlement in a single action of all rights arising under it, including FED actions. 79 Judges who construe the 1978 amendments to FED as allowing landlords to file claims for rent, damages, and claims arising under ORLTA, but who disallow any tenant counterclaims may be denying those tenants equal protection of the laws. 80

Written Notice: Some accommodation should be made in the act to deal with situations in which the average tenant would not comply with the Act's written notice requirements. For example, if the landlord has knowledge of a defect, the tenant is not likely to give written notice. Therefore, tenants should be allowed an equitable defense of waiver based on clear and convincing evidence of actual knowledge of the landlord of the existence of a defect.

Retaliatory eviction: As drafted, ORLTA contains no provision to cover the problem of retaliatory conduct by landlords. Retaliatory eviction is a defense which has been successfully asserted by tenants in a number of states when landlords have attempted to terminate a periodic tenancy or increase rent drastically within a short time after a tenant had complained to a housing authority, had requested that repairs be made, or had made use of the self-help provisions provided by law. 81 There are no Oklahoma cases which recognize this defense, although there is a passing reference to retaliatory eviction in the final

78. OKLA. STAT. tit. 12, § 1148.1 (Supp. 1980).
79. See note 61 supra and accompanying text.
80. See Schuminsky v. Field, 606 P.2d 1133, 1135 (Okla. 1980) (the court hinted at the equal protection problem inherent in such a situation).
paragraph of the Schuminisky decision. ORLTA should be amended to clearly provide this protection to tenants.

**Tenant's Remedies:** The Act should be amended to provide alternative tenant remedies where dilapidation or failure to repair decreases the rental value of the premises. The Act acknowledges the tenant’s right to damages for diminution of rental value for a landlord’s willful failure to provide essential services and rent abatement for partial destruction due to casualty. However, if the goal of the legislation is the improvement of the quality of rental housing, tenants should have a more meaningful remedy for the failure to repair. The present law only provides for lease termination, or self-help repair for amounts below one hundred dollars.

Lease termination is not a useful remedy because the tenant may not have alternative housing available, and even if he does, he will be required to pay moving costs. The self-help limit of one hundred dol-

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82. 606 P.2d at 1137. “No question concerning retaliatory eviction actions has been raised in this proceeding. We express no opinion as to that question.” *Id.* (citations omitted).
83. One approach might be to adopt § 5.101 of the URLTA which provides:
   - (a) Except as provided in this section, a landlord may not retaliate by increasing rent or decreasing services by bringing or threatening to bring an action for possession after:
     - (1) the tenant has complained to a governmental agency charged with responsibility for enforcement of a building or housing code of a violation applicable to the premises materially affecting health and safety; or
     - (2) the tenant has complained to the landlord of violation under Section 2.104; or
     - (3) the tenant has organized or become a member of a tenant’s union or similar organization.
   - (b) If the landlord acts in violation of subsection (a), the tenant is entitled to the remedies provided in Section 4.107 and has a defense in any retaliatory action against him for possession. In an action by or against the tenant, evidence of a complaint within [1] year before the alleged act of retaliation creates a presumption that the landlord’s conduct was in retaliation. The presumption does not arise if the tenant made the complaint after notice of a proposed rent increase or diminution of services. “Presumption” means that the trier of fact must find the existence of the fact presumed unless and until evidence is introduced which would support a finding of its nonexistence.
   - (c) Notwithstanding subsections (a) and (b), a landlord may bring an action for possession if:
     - (1) the violation of the applicable building or housing code was caused primarily by lack of reasonable care by the tenant, a member of his family, or other person on the premises with his consent; or
     - (2) the tenant is in default in rent; or
     - (3) 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.
   - (d) The maintenance of an action under subsection (c) does not release the landlord from liability under Section 4.101(b).
84. **OKLA. STAT. tit. 41, §§ 121(C)(3) and 122 (A)(2) (Supp. 1980).**
85. *Id.* § 121(A).
86. *Id.* § 121(B).
lars is of little value in these inflationary times. Tenants should at least be given the right to recover damages by way of a counterclaim for diminution of rental value during periods of dilapidation.

Another alternative remedy would be to allow a tenant to raise failure to repair as a defense, and to permit a partial abatement of the obligation to pay rent. To protect both parties, the total rent could be paid into the court pending determination of the amount of abatement warranted under the circumstances.

VII. CONCLUSION

As housing costs escalate, it is likely that a larger percentage of the population in Oklahoma will be housed in rental property. The courts and the legislature should take care to fashion rules which will be fair to tenants, while recognizing the needs of landlords to have an adequate return on their investment and preservation of their dwelling units. ORLTA has clarified the law for both landlords and tenants, but there are areas in which improvements in the law should be made. No matter how good the law, it is of little value if those who must rely on it are ignorant of its provisions. Therefore, the first priority should be to improve the understanding of landlords and tenants of ORLTA and their respective rights and duties under it.