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# Necessity or Overkill? Regulating Residential Landlord-Tenant Relations through the Utah Consumer Sales Practices Act

## I. INTRODUCTION

Under current Utah landlord-tenant law, residential tenants have little recourse against unfair or unconscionable acts of a landlord. With its landlord-biased landlord-tenant law, Utah has provided little recourse for aggrieved tenants. One method of providing recourse to tenants is to apply the Utah Consumer Sales Practices Act (UCSPA)<sup>1</sup> to landlord-tenant relations. Recourse through the UCSPA could provide residential tenants with the much needed relief that is currently available to other types of consumers.

This comment argues that the UCSPA should apply to landlord-tenant relations. Section II discusses the background and purpose of the UCSPA and the factors motivating the need for such regulation in landlord-tenant relations. Section III discusses why the UCSPA should apply to landlord-tenant relations. Finally, section IV demonstrates that the legislative intent of the Utah landlord-tenant statutes should not preclude application of the UCSPA to landlord-tenant relations.

## II. BACKGROUND AND PURPOSE OF THE UCSPA

Most states have adopted some type of legislation against unfair or deceptive acts or practices within the course of business dealings.<sup>2</sup> Although many similarities exist among the different state statutes and their general purposes, some commentators have divided the statutes into four separate groups according to their specific emphases.<sup>3</sup>

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1. UTAH CODE ANN. §§ 13-11-1 to -23 (1986 & Supp. 1990).

2. Batt, *Litigation Under the Idaho Consumer Protection Act*, 20 IDAHO L. REV. 63, 64 (1984).

3. *Id.* at 64 n.10 (citing Sebert, *Enforcement of State Deceptive Trade Practice*

The first group is modeled after the Federal Trade Commission Act (FTCA)<sup>4</sup> and outlaws unfair methods of competition and unfair or deceptive acts or practices.<sup>5</sup> The second group is a broad prohibition of consumer fraud, covering deceptive acts or practices.<sup>6</sup> The third group was adopted from the Uniform Deceptive Trade Practices Act,<sup>7</sup> and the fourth group, in which the Utah statute belongs, was adopted from the Uniform Consumer Sales Practices Act (Uniform Act).<sup>8</sup> Like the second group of statutes, the Uniform Act applies only to consumer transactions.<sup>9</sup>

In 1970, the National Conference of Commissioners on Uniform State Laws and the American Bar Association approved the Uniform Act.<sup>10</sup> The Uniform Act was subsequently amended in 1971 and approved as amended.<sup>11</sup> The National Conference of Commissioners on Uniform State Laws realized that "[u]niform legislation concerning consumer sales practices is desirable from the standpoint of both consumers and businessmen. Consumers are entitled to protection from deceptive and unconscionable sales practices no matter where they live, and businessmen are entitled to predictable standards of conduct no matter where they sell."<sup>12</sup>

The impetus for the Uniform Act was the rapid pace of state consumer protection legislation since 1960.<sup>13</sup> The amount of disparate consumer sales practices legislation enacted by the states made it appropriate and beneficial to "establish optimum state standards for the regulation of consumer sales practices."<sup>14</sup> Even though other federal regulations such as the FTCA might overlap with the Uniform Act, the approach was determined to "complement[], rather than conflict[] with, the regulation of

*Statutes*, 42 TENN. L. REV. 689, 698-701 (1975)).

4. 15 U.S.C. §§ 41-77 (1982).

5. See Batt, *supra* note 2, at 64 n.10.

6. *Id.*

7. UNIFORM DECEPTIVE TRADE PRACTICES ACT, 7A U.L.A. 265-98 (1966 & Supp. 1990).

8. UNIFORM CONSUMER SALES PRACTICES ACT, 7A U.L.A. 231-64 (1971 & Supp. 1990).

9. *Id.*

10. *Id.* at 231 (historical note).

11. *Id.*

12. *Id.* at 231 (prefatory note).

13. *Id.*

14. *Id.*

consumer sales practices of national scope by . . . federal agencies."<sup>15</sup>

Utah adopted the Uniform Act effective April 7, 1973.<sup>16</sup> Kansas and Ohio are the only other states that have adopted the Uniform Act.<sup>17</sup> Texas, however, has adopted an act with the same general purposes and some similar provisions.<sup>18</sup> Other states have been reluctant to adopt the Uniform Act, presumably because of reliance on and confidence in one of the other three types of consumer protection acts mentioned earlier.<sup>19</sup>

Although the different groups of consumer protection acts contain different wording and definitions, the main purpose of all of the statutes seems consistent—to protect consumers. For example, a main purpose of the Utah Consumer Sales Practices Act (UCSPA) is “to protect consumers from suppliers who commit deceptive and unconscionable sales practices.”<sup>20</sup> That purpose is the thrust of not only the UCSPA but also of the other states’ consumer protection acts.<sup>21</sup>

### III. APPLICATION OF THE UCSPA TO LANDLORD-TENANT RELATIONS

#### A. *Motivation for Applying the UCSPA*

Utah residential tenants may be motivated to apply the UCSPA because they are afforded little protection otherwise from unfair or unconscionable acts of a landlord.<sup>22</sup> Utah landlord-tenant law is silent as to unfair or unconscionable acts or practices and, therefore, provides no express remedies for tenants injured by such acts.<sup>23</sup> Furthermore, a Utah residential tenant may have no recourse under common law fraud for injury due to an unfair or unconscionable act because common law fraud requires a

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15. *Id.*

16. UTAH CODE ANN. §§ 13-11-1 to 13-11-23 (1986 & Supp. 1990).

17. KAN. STAT. ANN. §§ 50-623 to 50-643 (1983 & Supp. 1990); OHIO REV. CODE ANN. §§ 1345.01-.13 (Anderson 1979).

18. TEX. BUS. & COM. CODE ANN. §§ 17.41-.63 (Vernon 1987 & Supp. 1990).

19. Batt, *supra* note 2, at 64 n.10.

20. UTAH CODE ANN. § 13-11-2(2) (1953).

21. Batt, *supra* note 2, at 63-64.

22. See generally Backman, *The Tenant as a Consumer? A Comparison of Developments in Consumer Law and in Landlord/Tenant Law*, 33 OKLA. L. REV. 1 (1980).

23. See UTAH CODE ANN. §§ 57-17-1 to -5 (1990) (Residential Renters' Deposits); *Id.* at §§ 57-22-1 to -6 (Supp. 1990) (Utah Fit Premises Act); *Id.* at §§ 78-36-1 to -12 (1987 & Supp. 1990) (Forcible Entry and Detainer).

showing of deceit,<sup>24</sup> and unfair or unconscionable acts may be performed without deceit.<sup>25</sup>

For a loss suffered due to a landlord's deceptive act, a Utah residential tenant can bring a cause of action under the UCSPA or under common law fraud. However, bringing an action under the UCSPA would be much more desirable. The cause of action would be proven more easily under the UCSPA than under strict common law fraud, because no proof of intent or deceit is required to maintain an action for an unconscionable act or practice under the UCSPA.<sup>26</sup>

Besides the lack of alternatives for residential tenants, the UCSPA also contains other attractive aspects. A consumer who suffers a loss due to a violation of the UCSPA may recover actual damages or two thousand dollars, whichever is greater, plus court costs.<sup>27</sup> Additionally, if the UCSPA were applied to landlord-tenant relations, a prevailing residential tenant could also recover reasonable attorney's fees for work reasonably performed when a landlord as "a supplier has committed an act or practice that violates" the UCSPA.<sup>28</sup>

The above-mentioned incentives are significant to the average residential tenant. Many residential tenants are low-income tenants and, without such incentives, generally would not choose to pursue an action through the courts.<sup>29</sup> These incentives are also necessary to neutralize the advantage generally enjoyed by landlords who "typically have greater access to the courts because of their familiarity with the system."<sup>30</sup> Because no other reasonable recourse is currently available in Utah,<sup>31</sup> residential tenants injured by unfair or unconscionable acts of a landlord would be strongly motivated to bring the action under the UCSPA.

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24. See Batt, *supra* note 2, at 64.

25. For a discussion of what constitutes "unconscionable" acts for purposes of the Utah Consumer Sales Practices Act, see Reed, *Utah Consumer Sales Practices Act: Memo*, 2 UTAH B.J. 59, 69-72 (1974).

26. See UTAH CODE ANN. § 13-11-5 (1953).

27. *Id.* at § 13-11-9.

28. *Id.* at § 13-11-19(5)(a).

29. For a discussion of major problems facing residential tenants, see generally Note, *The Tenant as a Consumer*, 3 U.C. DAVIS L. REV. 59 (1971); Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO. L.J. 519 (1966).

30. See Backman, *supra* note 22, at 41.

31. See UTAH CODE ANN. §§ 57-17-1 to -5 (1990) (Residential Renters' Deposits); *Id.* at §§ 57-22-1 to -6 (Supp. 1990) (Utah Fit Premises Act); *Id.* at §§ 78-36-1 to -12 (1987 & Supp. 1990) (Forcible Entry and Detainer).

### B. Residential Lease as a Consumer Transaction

As mentioned earlier, the main purpose of the UCSPA is to protect consumers by regulating consumer transactions.<sup>32</sup> This section explains why, under the UCSPA, a residential tenant should be considered a consumer, a residential landlord a supplier, and hence, a residential lease a consumer transaction.

#### 1. Tenant and landlord as consumer and supplier

Intuitively, a residential tenant shares many of the traits of a typical consumer.<sup>33</sup> Black's Law Dictionary defines consumers as "individuals who purchase, use, maintain, and dispose of products and services, . . . to be distinguished from manufacturers (who produce goods), and wholesalers or retailers (who sell goods)."<sup>34</sup> The residential tenant purchases and uses the services provided by the landlord<sup>35</sup> for shelter from the elements. This use of the landlord's services is for the tenant's own needs, rather than to produce or sell goods, and should, therefore, subject the residential tenant to the dictionary definition of consumer.

Beyond the dictionary definition, there are other similarities between the consumer and the tenant.<sup>36</sup> Both the consumer and the tenant are characterized by the same two general classes of use: (1) business, or (2) personal.<sup>37</sup> Commercial tenants consume the services of a commercial lease for solely business purposes such as producing goods or services, whereas residential tenants enjoy the services of their landlord for personal uses such as shelter, rest and relaxation, and raising a family.<sup>38</sup>

Another consumer trait shared by the residential tenant is "the lack of bargaining power . . . in . . . transactional settings."<sup>39</sup> The residential tenant is usually subject to a form contract and allowed little or no input as to the contract's terms.<sup>40</sup>

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32. See *supra* notes 20-21 and accompanying text.

33. Backman, *supra* note 22, at 3; Note, *supra* note 29, at 60.

34. BLACK'S LAW DICTIONARY 286 (5th ed. 1979) (emphasis added).

35. Providing residential housing should be considered a service. See *infra* note 50 and accompanying text.

36. Backman, *supra* note 22, at 3; Note, *supra* note 29, at 59-62.

37. Backman, *supra* note 22, at 3.

38. See generally Cunningham, *The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status*, 16 URBAN L. ANN. 3 (1979).

39. Backman, *supra* note 22, at 3.

40. *Id.*

The tenant's negotiating power is, therefore, very weak, as is the negotiating power of the typical consumer of other goods and services.<sup>41</sup> Left with such weak bargaining power, most consumers and tenants find themselves in "a take-it-or-leave-it position."<sup>42</sup>

Similarly, both tenants and consumers lack the transactional expertise generally held by landlords and suppliers.<sup>43</sup> The landlord and supplier regularly provide goods and services, while the tenant and consumer enter into transactions much less frequently.<sup>44</sup> For example, a residential tenant may enter into a lease transaction only once or twice a year, whereas a landlord of a large apartment complex may enter into as many as fifty lease transactions per year. Similarly, an automobile consumer may only purchase one or two automobiles every few years, whereas an automobile dealer may sell thousands of automobiles during the same period. This lack of experience and expertise puts the tenant and other consumers at a disadvantage.<sup>45</sup>

Additional support for classifying the tenant as a consumer is that both tenant and consumer enter into "transactions to satisfy personal needs of consumption,"<sup>46</sup> unlike the landlord and supplier or producer who enter into transactions with a profit-making motive.<sup>47</sup> These similarities between tenants and other kinds of consumers lead to the conclusion that residential tenants should be classified as consumers.<sup>48</sup>

For the same reasons that a tenant should be considered a consumer, a landlord should be considered a supplier. The UC-SPA defines "supplier" as a "seller, lessor, . . . or other person who regularly solicits, engages in, or enforces consumer transactions."<sup>49</sup> A landlord is a "lessor" and actually "supplies" the ten-

41. Note, *supra* note 29, at 59.

42. Backman, *supra* note 22, at 3; see *Love v. Pressley*, 34 N.C. App. 503, 239 S.E.2d 574 (1977), *appeal dismissed*, 294 N.C. 441, 241 S.E.2d 843 (1978); *Commonwealth v. Monumental Properties*, 459 Pa. 450, 474-78, 329 A.2d 812, 824-26 (1964).

43. Note, *supra* note 29, at 62.

44. Backman, *supra* note 22, at 3.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Commonwealth v. Monumental Properties*, 459 Pa. 450, 466, 329 A.2d 812, 826 (1974). But compare with the reasons for treating landlord-tenant relations differently than other consumer transactions in Backman, *supra* note 22, at 9-11.

49. UTAH CODE ANN. § 13-11-3(6) (Supp. 1990) (emphasis added).

ant with services such as maintenance and administrative needs resulting from the use of leased premises.<sup>50</sup>

Under the UCSPA, a “[c]onsumer transaction’ means a . . . lease . . . or other written or oral transfer or disposition of . . . services, or other property, both tangible and intangible . . . to a person for primarily personal, family, or household purposes.”<sup>51</sup> The residential lease is, therefore, a consumer transaction based on the implication that landlords and tenants are suppliers and consumers, respectively; indeed, a residential lease is a transfer of “services” to a person for primarily personal, family, or household purposes.

## *2. Case law support of residential lease as consumer transaction*

Many jurisdictions have supported the classification of a residential lease as a consumer transaction. In doing so, those jurisdictions sustain the rationale that providing housing is a service. The tenant uses the services provided by the landlord supplier and is therefore a consumer.

A federal district court in *Rodriguez v. Berrybrook Farms, Inc.*<sup>52</sup> ruled that landlord-tenant relations were within the scope of the Michigan Consumer Protection Act.<sup>53</sup> In *Rodriguez*, migrant farmworkers were provided housing as partial compensation for their services. The court first determined that the migrant farmworkers were tenants, even though Berrybrook Farms alleged that the housing provided was free. Berrybrook’s argument was based on the fact that the farmworkers did not have to make any rental payments; instead, Berrybrook deducted a housing fee from their wages. Notwithstanding this argument, Berrybrook and the farmworkers were still considered to have maintained a landlord-tenant relationship because Berrybrook supplied the farmworkers with housing in return for valuable consideration.<sup>54</sup>

Once the migrant farmworkers were held to be tenants, the *Rodriguez* court considered the specific language of the Michigan Consumer Protection Act to determine whether the

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50. *Carter v. Mueller*, 120 Ill. App. 3d 314, 322-23, 457 N.E.2d 1335, 1341-42 (1983).

51. UTAH CODE ANN. § 13-11-3(2) (1986 & Supp. 1990) (emphasis added).

52. 672 F. Supp. 1009 (W.D. Mich. 1987).

53. *Id.* at 1021.

54. *Id.*



farmworker tenants were consumers under the Act. The court noted that "[t]he [Michigan Consumer Protection Act] contains a very broad definition of 'trade or commerce,'"<sup>55</sup> broad enough to include landlord-tenant relations. In response to Berrybrook's argument that the housing was used only for business purposes, the court held that Berrybrook provided housing used primarily for family or household purposes.<sup>56</sup> Since the housing was for personal use, the court held that the employer/landlord providing the housing was subject to the Michigan Consumer Protection Act.<sup>57</sup>

The meaning of "consumer transaction" under Illinois' consumer protection statute was also interpreted to include landlord-tenant relations in *Carter v. Mueller*.<sup>58</sup> In *Carter*, the landlord showed the tenant a model apartment and stated that the actual apartment to be rented would be comparable in quality. But when the tenant moved in, she discovered the condition of the apartment actually rented to her to be much worse than the model apartment originally shown to her.<sup>59</sup>

The *Carter* court emphasized that the residential apartment lease provided for maintenance of the apartment grounds, heating, and plumbing facilities.<sup>60</sup> The court defined such provisions as services to the tenant.<sup>61</sup> Since the landlord provided the services, the landlord was a "supplier" and the lessee a "consumer" under the Illinois Consumer Fraud and Deceptive Business Practices Act.<sup>62</sup>

Similarly, North Carolina held in *Love v. Pressley*<sup>63</sup> that residential leases are part of commerce under the North Carolina Unfair Trade Practices Act.<sup>64</sup> In *Love*, the two plaintiffs, who were husband and wife, entered into a residential lease agreement with the defendant.<sup>65</sup> After moving into the rental house, the two tenants had a personal quarrel, and both left the

55. *Id.* at 1020.

56. *Id.* at 1021.

57. *Id.*

58. 120 Ill. App. 3d 314, 457 N.E.2d 1335 (1983).

59. *Id.* at 317, 457 N.E.2d at 1338.

60. *Id.* at 320, 457 N.E.2d at 1341.

61. *Id.*

62. *Id.*

63. 34 N.C. App. 503, 239 S.E.2d 574 (1977), *appeal dismissed*, 294 N.C. 441, 241 S.E.2d 843 (1978).

64. *Id.* at 512, 239 S.E.2d at 583.

65. *Id.* at 505, 239 S.E.2d at 576.

house.<sup>66</sup> After the plaintiffs had been away for only two days, the landlord's agent entered the premises and removed the wife's personal belongings.<sup>67</sup> The landlord did not evict the tenants pursuant to any judicial action or process.<sup>68</sup> The *Love* court held that such an act constituted unfair trade practices in commerce contrary to the North Carolina Unfair Trade Practices Act.<sup>69</sup>

In determining whether "trade or commerce" under the Unfair Trade Practices Act encompassed the business of providing rental housing, the *Love* court relied on a North Carolina Supreme Court case holding that "a lease is a chattel real and as such is a species of intangible personal property."<sup>70</sup> The *Love* court then held that "the rental of residential housing is 'trade or commerce' under" the Unfair Trade Practices Act.<sup>71</sup>

The *Love* court also pointed out that the North Carolina Unfair Trade Practices Act had been revised and the definition of trade or commerce expanded.<sup>72</sup> However, even under the earlier, more restrictive scope of the North Carolina Unfair Trade Practices Act, a residential lease was considered "trade or commerce."<sup>73</sup>

The Supreme Court of Pennsylvania in *Commonwealth v. Monumental Properties, Inc.*<sup>74</sup> has also ruled that a residential lease is subject to the Pennsylvania consumer protection statute.<sup>75</sup> The court in *Monumental Properties* held that Pennsylvania's consumer protection statute, which is identical to the North Carolina Unfair Trade Practices Act, covered unfair or deceptive practices in connection with residential leasing.<sup>76</sup>

In *Monumental Properties*, the Commonwealth of Pennsylvania, pursuant to Pennsylvania's consumer protection statute, initiated an action against landlords who used printed form leases allegedly in violation of Pennsylvania's consumer protec-

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66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 517, 239 S.E.2d 583.

70. *Id.* at 516 (citing *Investment Co. v. Cumberland County*, 245 N.C. 492, 96 S.E.2d 341 (1957)).

71. *Id.* at 516, 239 S.E.2d 583.

72. *Id.*

73. *Id.*

74. 459 Pa. 450, 329 A.2d 812 (1974).

75. *Id.* at 457, 329 A.2d at 815.

76. *Id.* at 470, 329 A.2d at 822.

tion statute.<sup>77</sup> The complaint alleged that the form leases contained "archaic and technical language beyond the easy comprehension of the consumer of average intelligence."<sup>78</sup> The complaint also alleged that certain provisions of the printed form leases were unfair and deceptive.<sup>79</sup>

In holding the landlords liable under Pennsylvania's consumer protection statute, the court focused on the issue of whether the leasing of housing was a consumer transaction.<sup>80</sup> The court found much support for the conclusion that "the modern apartment dweller is a consumer of housing services."<sup>81</sup>

When American city dwellers, both rich and poor, seek "shelter" today, they seek a well known package of goods and services—a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance.<sup>82</sup>

The court in *Monumental Properties* emphasized the need to view residential leases realistically as consumer transactions to afford tenants adequate consumer protection.<sup>83</sup> The court reasoned that tenants deserve such protection because "tenants are in every meaningful sense consumers."<sup>84</sup>

### 3. *Limited application of residential lease as consumer transaction*

Although some states have defined the rental of housing to be a consumer transaction, a few states have refused to do so under specific circumstances. For example, the Supreme Court of Missouri held that residential rental property was not part of "goods or services" as described in the section of the Missouri consumer protection statute authorizing private civil actions.<sup>85</sup> However, Missouri's consumer protection statute, the Merchan-

77. *Id.* at 454, 329 A.2d at 814.

78. *Id.*

79. *Id.* at 455, 329 A.2d at 815.

80. *Id.* at 467-70, 329 A.2d at 820-22.

81. *Id.* at 467, 329 A.2d at 820.

82. *Id.* at 468, 329 A.2d at 821 (quoting *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1074, *cert. denied*, 400 U.S. 925 (1970) (footnote omitted)).

83. *Id.* at 467-70, 329 A.2d at 820-22.

84. *Id.* at 478, 329 A.2d at 826.

85. *Detling v. Edelbrock*, 671 S.W.2d 265, 272-73 (Mo. 1984).

dising Practices Act,<sup>86</sup> is unique in one important aspect. The definition of what is "consumed" through a transaction is different for actions by the Attorney General than for private civil actions. The section authorizing actions by the Attorney General allows remedies for deceptive or fraudulent practices in connection with the sale or advertisement of any "merchandise."<sup>87</sup> "Merchandise" is defined broadly to include real estate or services.<sup>88</sup> In contrast, private actions are authorized only with the purchase or lease of "goods or services."<sup>89</sup>

The *Detling* court reasoned that since the word "merchandise" was not used in the section authorizing private civil actions, the broad definition including real estate transactions was not appropriate.<sup>90</sup> The court recognized that other jurisdictions have held residential leases subject to their state's consumer protection statute, but supported its position by stating that the "trade or commerce" language in most consumer protection statutes is much broader in scope than "goods or services" described in the Missouri Merchandising Practices Act.<sup>91</sup>

The District Court of Appeal of Florida has also limited the scope of Florida's consumer protection statute in *State v. De Anza Corp.*<sup>92</sup> In *De Anza*, the court held that the leasing of a real estate lot in a mobile home park was not a "consumer transaction" as defined in the Florida Deceptive and Unfair Trade Practices Act.<sup>93</sup> The court distinguished the practice of leasing an empty lot from that of leasing land along with a housing structure. The court reasoned that "since a real estate lot is not an item of goods, a consumer service or an intangible . . . , the lease of a real estate lot is not a 'consumer transaction.'"<sup>94</sup> In reaching its conclusion, the court emphasized that no service was being provided along with the lease.<sup>95</sup>

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86. MO. ANN. STAT. § 407 (Vernon 1979 & Supp. 1990).

87. *Id.* § 407.020.

88. *Id.* § 407.010(4).

89. *Id.* § 407.025.1.

90. *Detling v. Edelbrock*, 671 S.W.2d 265, 272-73 (Mo. 1984).

91. *Id.* at 273 n.8.

92. 416 So.2d 1173 (Fla. Dist. Ct. App. 1982).

93. *Id.* at 1174-75.

94. *Id.* at 1175 (footnote omitted).

95. *Id.* This was important because the leasing of a real estate lot by itself could not fall under the category of goods or intangibles. The only plausible argument was that it included a service.

### C. *Owner/Occupant Exception to the UCSPA*

Although a residential lease should generally be considered a consumer transaction, the UCSPA may not apply to a residential lease if the landlord is also an owner/occupant of the leased building. A residential lease by an owner/occupant may not be a consumer transaction under the UCSPA because such a lease transaction probably is primarily personal, rather than business, in nature. This is evidenced by the likelihood that most owner/occupants lack the business expertise and bargaining power wielded by larger scale suppliers of residential housing.<sup>96</sup>

Faced with this same issue, Massachusetts courts have ruled that a landlord occupying a two- or three-family house has primarily a personal objective, and consequently the landlord's practices are not in "trade or commerce" as defined by the Massachusetts consumer protection statute.<sup>97</sup>

Although a similar argument could be made in Utah, a business purpose, however small, still exists in an owner/occupant situation. Therefore a court may find it to be within the realm of a "consumer transaction." Further support for considering a lease by an owner/occupant to be a consumer transaction is that continuous leasing by an owner/occupant could be considered "regular" enough to deem a landlord a supplier under the UCSPA definition of "supplier,"<sup>98</sup> even if the leasing is limited to only one building.

## IV. USE OF UCSPA NOT PRECLUDED BY UTAH LANDLORD-TENANT LAW

The following discussion first demonstrates that jurisdictions with landlord-tenant statutes not covering deceitful, unfair or unconscionable acts have freely applied their consumer protection statutes to landlord-tenant relations. Next, it discusses the jurisdictions that, in contrast, refuse to apply the state's consumer protection statute because of specific provisions in the state's landlord-tenant statute covering deceitful, unfair or un-

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96. See *supra* text accompanying notes 39-45.

97. *Billings v. Wilson*, 397 Mass. 614, 493 N.E.2d 187 (1986); *Sayah v. Hatzipetro*, 397 Mass. 1004, 492 N.E.2d 1131 (1986); *Young v. Patukonis*, 24 Mass. App. Ct. 907, 506 N.E.2d 1164 (1987).

98. Whether the activity is "regular" is important because "supplier" in the UCSPA is defined as a "person who *regularly* solicits, engages in, or enforces consumer transactions." UTAH CODE ANN. § 13-11-3(6) (Supp. 1990) (emphasis added).

conscionable practices. Finally it demonstrates that Utah landlord-tenant law does not specifically cover deceitful, unfair or unconscionable practices, and that redress due to injuries caused by such practices should be available through the UCSPA.

A. *States With Non-Conflicting Landlord-Tenant Statutes*

In *Myers v. Ginsburg*,<sup>99</sup> the Texas Court of Appeals held that the legislative intent of the Texas consumer protection statute was to include unfair or deceptive acts by landlords.<sup>100</sup> The Texas landlord-tenant statute does not explicitly provide a remedy for unfair or deceptive acts in a landlord-tenant relationship. The court held that applying the Texas Deceptive Trade Practices Act to landlord-tenant relations was not precluded by the Texas landlord-tenant statute, and that such application was therefore consistent with legislative intent.<sup>101</sup>

Similarly, the Supreme Court of Connecticut in *Conaway v. Prestia*<sup>102</sup> ruled that bringing a landlord-tenant action under its consumer protection statute is not precluded by Connecticut's landlord-tenant statute.<sup>103</sup> In *Conaway*, the court implied that because Connecticut's landlord-tenant statute did not provide a specific remedy for unfair or deceitful practices, the legislative intent of the two statutes did not conflict.<sup>104</sup> The court did, however, require the tenant/plaintiff to follow the stricter guidelines for proof of damages as outlined in the consumer protection statute instead of the more lenient standards of the landlord-tenant statute.<sup>105</sup>

*McGrath v. Mishara*<sup>106</sup> is another example of a landlord-tenant statute not displacing an action by a tenant under a consumer protection statute. In *McGrath*, the tenant/plaintiff brought an action under both the Massachusetts landlord-tenant statute and the state consumer protection statute for improper retention of a security deposit.<sup>107</sup> The Supreme Court of Massachusetts held that even though both statutes contain overlap-

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99. 735 S.W.2d 600 (Tex. Ct. App. 1987).

100. *Id.* at 605.

101. *Id.*

102. 191 Conn. 484, 464 A.2d 847 (1983).

103. *See id.* at 491, 464 A.2d at 851.

104. *Id.*

105. *Id.* at 490, 464 A.2d at 853.

106. 386 Mass. 74, 434 N.E.2d 1215 (1982).

107. *Id.* at 75, 434 N.E.2d at 1217.

ping prohibitions and remedies, no legislative intent precluded the application of one over the other.<sup>108</sup> The court, however, did limit the plaintiff to recovery of only a single action, holding that the consumer protection statute was not "intended to authorize a duplicate recovery for wrong under both statutes."<sup>109</sup>

The Michigan Court of Appeals expanded the scope of its consumer protection statute even further than Massachusetts. In *Smolen v. Dahlmann Apartments, Ltd.*,<sup>110</sup> the court allowed an action to be brought under both the landlord-tenant statute and the consumer protection statute.<sup>111</sup> In *Smolen*, the landlord/defendant deducted part of the security deposit for alleged damages to an apartment caused by the tenant/plaintiff.<sup>112</sup> The claimed damages turned out to be only dirty spots requiring cleaning, not repairs.<sup>113</sup> The court held that the landlord's actions were sufficient for a cause of action under both the landlord-tenant statute, under which the landlord had defined "damages" incorrectly, and the consumer protection statute, which regulated the deceitful aspect of the landlord's actions.<sup>114</sup> The court's ruling in *Smolen* indicated that no conflict of legislative intent existed in applying the two statutes in tandem.<sup>115</sup>

### B. States With Overriding Landlord-Tenant Statutes

In contrast to the jurisdictions above, a few states have held that their landlord-tenant statutes preclude certain actions under their consumer protection statutes.<sup>116</sup> However, the landlord-tenant statutes of these few states vary significantly from the Utah landlord-tenant statutes and the landlord-tenant statutes of the above-mentioned jurisdictions.

In *State v. Schwab*,<sup>117</sup> the Supreme Court of Washington allowed recovery for city housing code violations under Wash-

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108. *Id.* at 83, 434 N.E.2d at 1221.

109. *Id.* at 84, 434 N.E.2d at 1222. The plaintiff could have, however, proven his case under either act and was not required to make a choice of which theory to pursue exclusively. *Id.*

110. 338 N.W.2d 892; 127 Mich. App. 108, 338 N.W.2d 892 (Mich Ct. App. 1983).

111. *Id.* at 894-96.

112. *Id.* at 893.

113. *Id.* at 895.

114. *Id.* at 894-96.

115. *Id.* The *Smolen* court allowed recovery under both statutes. *Id.*

116. *State v. Schwab*, 103 Wash. 2d 542, 693 P.2d 108 (1985); *Chelsea Plaza Homes v. Moore*, 226 Kan. 430, 601 P.2d 1100 (1979).

117. 101 Wash. 2d 542, 693 P.2d 108 (1985).

ington's landlord-tenant statute, but denied the State Attorney General's complaint under Washington's consumer protection statute.<sup>118</sup> The court stated that not every violation of the landlord-tenant statute is a per se consumer protection statute violation and gave various reasons for its holding.<sup>119</sup> First, Washington's landlord-tenant statute deals with a wide spectrum of landlord-tenant problems, and because the statute is so thorough, the legislature intended it to be all encompassing.<sup>120</sup> Furthermore, Washington's consumer protection statute does not specifically include landlord-tenant relations. Because the consumer protection statute is very specific in other areas, the court reasoned, the legislature would have included landlord-tenant relations, had it so intended.<sup>121</sup>

The Supreme Court of Kansas, in *Chelsea Plaza Homes v. Moore*,<sup>122</sup> also held that the state's landlord-tenant statute displaces its consumer protection statute regarding landlord-tenant relations.<sup>123</sup> In *Chelsea Plaza Homes*, the tenant/plaintiff sought damages under the Kansas Consumer Protection Act for deceptive practices in the lease document. The court held that since such acts were specifically covered in the landlord-tenant statute, relief under the consumer protection statute was precluded.<sup>124</sup>

In its analysis, the Supreme Court of Kansas reviewed the legislative history of the landlord-tenant statute.<sup>125</sup> Prior to the enactment of that statute, no law existed to regulate landlord-tenant activity to any great extent.<sup>126</sup> Because the purpose of the landlord-tenant statute was to cover all the obligations, rights, and remedies of both landlords and tenants, the court decided the more specific landlord-tenant statute should control exclusively, overriding the less specific coverage of the consumer protection statute.<sup>127</sup> In an interesting analogy, the court explained

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118. *Id.* at 545, 693 P.2d at 110.

119. *Id.* at 549-52, 693 P.2d at 112-14.

120. *Id.*

121. *Id.* For a criticism of the *Schwab* opinion arguing that the court effectively limited consumer protection in Washington, see Note, *New Limits to the Application of the Consumer Protection Act*, 61 WASH. L. REV. 275 (1986).

122. 226 Kan. 430, 601 P.2d 1100 (1979).

123. *Id.* at 433-34, 601 P.2d at 1102-04.

124. *Id.* at 434, 601 P.2d at 1104.

125. *Id.* at 433-34, 601 P.2d at 1102-04.

126. *Id.*

127. *Id.*



why only one governing statute was feasible: "The attempted hybridization of the two acts herein has resulted in a sterile hybrid which is not viable, let alone capable of reproducing itself."<sup>128</sup>

Similarly, the Supreme Court of Ohio recently denied application of Ohio's consumer protection statute because of an overriding landlord-tenant statute.<sup>129</sup> In *Heritage Hills*,<sup>130</sup> the landlord, after entering into the original lease, instituted a policy that made the tenant liable for any damages to the premises absent proof that the tenant did not cause the damages.<sup>131</sup> The unilateral provision by the landlord also placed the burden of proof on the tenant to show who actually caused the damages.<sup>132</sup>

The trial court in *Heritage Hills* held that the landlord's practice of placing the conclusive burden of proof on tenants in damage situations was manifestly unconscionable.<sup>133</sup> Nevertheless, the trial court determined that Ohio's landlord-tenant statute specifically provided a remedy for unconscionable practices, and therefore refused to apply Ohio's consumer protection statute.<sup>134</sup>

The Court of Appeals of Ohio affirmed the trial court's decision and the Supreme Court of Ohio subsequently affirmed the court of appeals' decision.<sup>135</sup> In holding that the landlord-tenant statute exclusively governed unconscionable practices, the Supreme Court of Ohio noted that nothing in the legislative history of the enactment of the consumer protection statute suggested that it was ever intended by the Legislature to be applied to the rental of residential housing.<sup>136</sup> The court, however, did not suggest that the historical perspective was determinative of the coverage of the consumer protection statute. Instead, the court emphasized that the language of the Ohio consumer protection statute was intentionally drawn with a broad brush to cover a broad range of human inventiveness.<sup>137</sup> The court concluded that the determinative factor was that the Ohio landlord-tenant

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128. *Id.* at 434, 601 P.2d at 1104.

129. *Heritage Hills, Ltd. v. Deacon*, 49 Ohio St. 3d 80, 551 N.E.2d 125 (1990).

130. *Id.*

131. *Id.* at 81, 551 N.E.2d at 126.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 80, 551 N.E.2d at 125.

136. *Id.*

137. *Id.* at 83, 551 N.E.2d at 128.

statute specifically spoke to unconscionable practices and, therefore, retained exclusive control over that area.<sup>138</sup>

### C. Utah Landlord-Tenant Law

The Utah landlord-tenant statutes state nothing regarding unfair or unconscionable acts or practices by a landlord.<sup>139</sup> In that regard, the Utah landlord-tenant statutes are similar to the landlord-tenant statutes of the first group of states mentioned above, while they differ from the landlord-tenant statutes of Washington, Kansas and Ohio, for the same reason. Accordingly, Utah residential tenants damaged by unfair or unconscionable practices of a landlord should be able to seek compensation through the UCSPA. This alternative would provide Utah residential tenants with the same rights enjoyed by residential tenants from other jurisdictions with landlord-tenant statutes similar to Utah's landlord-tenant statutes.

Like other states with narrow landlord-tenant statutes, Utah has "resisted comprehensive reform in residential landlord-tenant law."<sup>140</sup> Currently, "the landlord-tenant relationship [in Utah] is governed largely by vague common law principles that provide inadequate guidance to either party."<sup>141</sup> Many attempts have been made to pass the Uniform Residential Landlord and Tenant Act (ULTRA) in Utah,<sup>142</sup> but each attempt has failed.<sup>143</sup> The result has been "[t]he introduction of individual, particularized bills, dealing with troublesome landlord-tenant matters in a piecemeal fashion."<sup>144</sup>

The Utah Legislature has focused on troublesome issues regarding tenant's abandonment, implied covenant of quiet enjoyment, implied warranty of habitability, forcible entry and detainer, and security deposits.<sup>145</sup> Even though the Utah

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138. *Id.*

139. See UTAH CODE ANN. §§ 57-17-1 to -5 (1990) (Residential Renters' Deposits); *Id.* at §§ 57-22-1 to -6 (Supp. 1990) (Utah Fit Premises Act); *Id.* at §§ 78-36-1 to -12 (1987 & Supp. 1990) (Forcible Entry and Detainer).

140. Backman, *Landlord-Tenant Law: A Perspective on Reform in Utah*, 1981 UTAH L. REV. 727, 737. Utah's newest landlord-tenant statute is the Utah Fit Premise Act, UTAH CODE ANN. §§ 57-22-1 to 57-22-6 (Supp. 1990) which basically provides a warranty of habitability. However, it does not specifically cover unfair or unconscionable practices of a landlord. See *id.*

141. Backman, *supra* note 140, at 727.

142. See *id.* at 735.

143. *Id.*

144. *Id.*

145. *Id.* at 737-53. See UTAH CODE ANN. §§ 57-17-1 to -5 (1990) (Residential Rent-

Legislature has made the needed reforms in these areas of law, nothing in the Utah landlord-tenant statutes specifically addresses the problems raised by unfair or unconscionable acts or practices of a landlord.<sup>146</sup>

By not specifically addressing unfair or unconscionable acts or practices in the Utah landlord-tenant statutes, perhaps the Utah Legislature did not intend to provide residential tenants with recourse for such acts or practices, either through the UCSPA or otherwise. However, despite the Utah Legislature's hesitancy to pass sweeping reform in the landlord-tenant area, the hesitancy probably does not represent legislative intent to deny compensation to tenants suffering losses from unfair or unconscionable acts of a landlord. The lack of legislation in that area emphasizes the need to apply the UCSPA, as has been done equitably in other jurisdictions.<sup>147</sup>

Even though some jurisdictions have refused to apply consumer protection statutes to landlord-tenant relations, the landlord-tenant statutes of those jurisdictions are easily distinguished from Utah's landlord-tenant statutes. For example, the state of Ohio, which denied application of its consumer protection statute to landlord-tenant relations,<sup>148</sup> relies on a much more specific and comprehensive landlord-tenant statute than Utah's current landlord-tenant statutes.<sup>149</sup> As explained by the Supreme Court of Ohio in *Heritage Hills v. Deacon*, Ohio's landlord-tenant statute specifically affords sufficient protection to tenants against unconscionable agreements.<sup>150</sup> The statute provides:

If the court as a matter of law finds a rental agreement, or any clause thereof, to have been unconscionable at the time it was made, it may refuse to enforce the rental agreement or it may enforce the remainder of the rental agreement without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.<sup>151</sup>

In the Ohio landlord-tenant statute, the respective rights and

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ers' Deposits); *Id.* at §§ 57-22-1 to -6 (Supp. 1990) (Utah Fit Premises Act); *Id.* at §§ 78-36-1 to -12 (1987 & Supp. 1990) (Forcible Entry and Detainer).

146. Backman, *supra* note 140, at 737-53.

147. See *supra* notes 99-115 and accompanying text.

148. See *Heritage Hills, Ltd. v. Deacon*, 49 Ohio St. 3d 80, 551 N.E.2d 125 (1990).

149. See OHIO REV. CODE ANN. § 5321 (Anderson 1989).

150. *Heritage Hills*, 49 Ohio St. 3d at 83, 551 N.E.2d at 127-28.

151. OHIO REV. CODE ANN. § 5321.14(A) (Anderson 1989).

duties of residential tenants and landlords, as well as specific remedies for violations, are set forth in great detail.<sup>152</sup>

Similarly, the landlord-tenant statutes of Washington and Kansas also contain specific remedies for a broad range of violations, including unfair or unconscionable acts or practices.<sup>153</sup> Those statutes contain language similar to Ohio's comprehensive coverage, and cover a significantly broader area than does Utah's narrow coverage. The Utah landlord-tenant statutes make no reference to unfair or unconscionable acts or practices, thereby providing no remedy for victims of such acts or practices.<sup>154</sup>

## V. CONCLUSION

The background and purpose of the UCSPA demonstrate its intent to curb losses due to unfair or unconscionable acts or practices in consumer transactions. Applying the UCSPA to landlord-tenant relations will effectuate that intent. Under current Utah landlord-tenant law, residential tenants suffering losses due to unfair or unconscionable acts or practices of a landlord have little recourse. In such situations, the UCSPA may be the only option available to tenants. Without that option, residential tenants could be unjustly victimized.

Applying the UCSPA to landlord-tenant relations is appropriate because a residential lease should be considered a consumer transaction under the UCSPA. The residential tenant is a consumer because the services provided by the landlord are "consumed" during the tenancy and must be replaced if the tenancy continues. As provider of the services, the landlord is a supplier. Because the landlord-tenant relationship encompasses both elements of a consumer transaction, a supplier and a consumer, a residential lease should therefore be considered a consumer transaction under the UCSPA.

Furthermore, the UCSPA should apply to unfair or unconscionable acts or practices because the Utah landlord-tenant statutes fail to cover that area. Utah landlord-tenant law not only remains silent as to unfair or unconscionable acts or practices, but also provides no language that would preempt applica-

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152. *See id.*

153. *See* WASH. REV. CODE § 18.86 (1983); KAN. STAT. ANN. § 58-2544 (1983 & Supp. 1989).

154. *See* UTAH CODE ANN. §§ 57-17-1 to -5 (Supp. 1990) (Residential Renters' Deposits); *Id.* at §§ 57-22-1 to -6 (Supp. 1990) (Utah Fit Premises Act); *Id.* at §§ 78-36-1 to -12 (1987 & Supp. 1990) (Forcible Entry and Detainer).

tion of the UCSPA in that area. Applying the UCSPA to landlord-tenant relations is consistent with the likely intent of the Utah Legislature to control losses caused by unfair or unconscionable acts or practices and will afford Utah residential tenants a protection that is otherwise lacking.

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