The Landlord Protection Act, Arkansas Code § 18-17-101 et seq.

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In the last legislative session the Legislature passed, apparently with little discussion or criticism, what is alleged to be a new landlord-tenant act. As will be detailed in this article the act would better be titled "The Landlord Protection Act." The Residential Landlord and Tenant Act of 2007 is another, and particularly glaring example of how powerless tenants are in this state and the strength of the Realtors' lobby acting on behalf of landlords. Arkansas already had the unique distinction of being the only state where it is a crime not to pay your rent.[2] The statute, section 18-16-101, a relic of the 1900s, remains in place in spite of judicial[3] and scholarly[4] criticism, and indeed was strengthened in the 2001 Legislative session.[5] Tenants are now subject to jail time as well as fines. At a time when the national trend is to increase landlord liability for accidents on the premises, Arkansas in the 2005 Legislative session not only reaffirmed the common law limitations on landlord liability,[6] but arguably extended them.[7] Finally, in 2006, Alabama announced

1. The author wishes to acknowledge the invaluable assistance of my colleague, Margaret Reger, Esq., who took the time to reprint the Uniform Residential Landlord Tenant Act highlighting the deletions and additions in the Arkansas Act.

2. Ark. Code Ann. § 18-16-101.

3. *See* dissenting opinion of Justice Purtle in Duhan v. State, 299 Ark. 503 at 512.

4. *See* Goforth, *Arkansas Code § 18-16-101: A Challenge to the Constitutionality and Desirability of Arkansas' Criminal Eviction Statute*, 2003 Ark. L. Notes 21.

5. Ark. Code Ann. § 18-16-101(c) was added to provide that if the tenant did not deposit rent with the Court and it was found a final hearing to be owed, the tenant would be guilty of a Class B misdemeanor.

6. Ark. Code Ann. 18-16-110.

7. *See* Kathryn Hake, Note, *Is Home Where Arkansas's Heart Is?: State Adopts Unique Statutory Approach to Landlord Tort Liability and Maintains Common Law "Caveat Lessee,"* 59 Ark. L. Rev. 737.

with some fanfare that it had passed a warranty of habitability statute, so it would not be one of only two states not recognizing the concept.[8] That leaves Arkansas as the only state where landlords do not have to maintain their residential rental units to at least minimal standards.

The Residential Landlord and Tenant Act of 2007[9] (hereinafter Arkansas Act) is purportedly modeled on the Uniform Residential Landlord and Tenant Act (hereinafter URLTA) drafted by the National Conference of Commissioners of Uniform State Laws.[10] As would be expected, the URLTA is a balanced approach to the rights of both parties in a tenancy. Unfortunately, the Arkansas Act eliminates everything in the URLTA that is even remotely pro tenant. The URLTA lists three purposes, 1. [t]o simplify, clarify, modernize, and revise the law governing the rental of dwelling units and the rights and obligations of landlords and tenants; 2. [t]o encourage landlords and tenants to maintain and improve the quality of housing and; 3. [t]o make uniform the law with respect to the subject of this Act those states which enact it (emphasis supplied).[11] As will be shown the cuts made in the Arkansas Act are so extensive that section 3 of the purpose clause of the URLTA was eliminated, further underscoring the variance between Arkansas's landlord tenant law and that of the rest of the country.

The first major section cut from the URLTA is 1.303 which deals with unconscionability.[12] That section contains fairly standard language that a court may refuse to enforce any rental agreement or provision of a rental agreement that was unconsionable when made, or enforce the agreement without the unconsionable provision or limit the application of the unconscionable provision to avoid an unconscionable result. Similarly a court may refuse to enforce an unconscionable settlement in which a party waives or foregoes a claim or right or limit the extent to which the settlement is enforced. The URLTA further provides that if unconscionability is put into issue, the parties shall have the opportunity to present evidence as to the setting, purpose, and effect of the agreement or settlement to help the court determine if the agreement or settlement is truly unconscionable under all the circumstances. The language deleted from the URLTA mirrors both the general unconscionability provision of the Arkansas version of the Uniform Commercial Code[13] and the more specific Code provision dealing with leases.[14] Nevertheless, the Legislature found no reason to include the same language found appropriate for the sale or lease of goods for agreements to rent residential property.

The failure to retain the unconscionability provisions of the URLTA is significant. There is an increasing realization that residential leases are not freely negotiated but rather

8. In 2006, effective January 1, 2007, Alabama enacted the Uniform Landlord and Tenant Act at Code of Alabama § 35-9A-101 et seq., § 35-9A-204 specifically imposes on landlords a warranty of habitablility.

9. Ark. Code Ann. § 18-17-101 et seq.

10. Unif. Residential Landlord & Tenant Act (URLTA), 7B U.L.A. 285 (2006) and following.

11. URLTA § 1.102 at 7B U.L.A. 292 (2006).

12. 7B U.L.A. 304 (2006).

13. Ark. Code Ann. § 4-2-302.

14. Ark. Code Ann. § 4-2A-108.

imposed on a take-it-or-leave it basis by the landlord, especially the larger landlords.[15] Many leases are multipage documents prepared by the landlord's attorney with multiple provisions and penalties. Tenants are typically unrepresented and unsophisticated. Leases are often classic contracts of adhesion. To cite one example the author has encountered, the lease was 6 pages long in small print with 39 separate provisions. Paragraph 20 of the lease provided for the landlord to receive liquidated damages for the "cost of rerenting" if the tenant left early. However, the tenant would still be responsible for "past due rent, future rentals, cleaning, repairing, repainting, lock changes, or other sums due under this Rental Agreement." Additionally the amount of the liquidated damages was not in Paragraph 20 but that Paragraph referred back to Paragraph 5 for the amount of the damages. While the Court chose not to enforce the provision, it did so not on the grounds of unconscionability, but rather because the provision did not meet the standards for liquidated damages under Arkansas case law and the landlord could not show any actual damages as the premises had been immediately rerented. Similarly, the largest residential landlord in Northwest Arkansas and possibly the state has a 5 page small print standard lease with 40 separate provisions and multiple penalties.

The URLTA seeks to provide some guidance on what might be considered unconscionable by a section dealing with rules and regulations the landlord may adopt.[16] Under the URLTA the rule or regulation must be for the purpose of promoting the convenience, safety or welfare of the tenants, preserving the landlord's property from abuse, or to make a fair distribution of services and facilities for all the tenants. It must be reasonably related to the purpose for which it was adopted, apply fairly to all the tenants, be explicit enough for the tenant to understand what must be done or not done, and not be for the purpose of evading any obligation of the landlord. The tenant must have notice of the rule or regulation at the time the rental agreement is entered. If not, and the subsequently adopted rule or regulation works a substantial modification of the rental agreement, it is only valid if agreed to in writing by the tenant. Needless to say this whole section was deleted from the Arkansas Act.

A particularly troubling aspect of the Arkansas Act[17] is the changes made to the URLTA provisions on access.[18] At common law a landlord in renting land or premises gave the tenant the right to the exclusive possession of the land during the lease term unless agreed otherwise.[19] The URLTA seeks to modify the common law by providing rights of access for the landlord under specific conditions and with appropriate limitations. The Arkansas Act dangerously expands the conditions under which the landlord may enter and completely eliminates the limitations. Under the URLTA the tenant may not unreasonably withhold consent for the landlord to enter to inspect the premises, make necessary repairs, alterations or improvements,

15. Jeremy K. Brown, Note, *A Landlord's Duty to Mitigate in Arkansas: What It Was, What It Is, and What It Should Be,* 55 Ark. L. Rev. 129 (2002).

16. URLTA 3.102, 7B U.L.A. 372 (2006).

17. Ark. Code Ann. § 18-17-602.

18. URLTA 3.103, 7B U.L.A. 373 (2006).

19. Watson v. Calvin, 69 Ark. App. 109 at 113 (2000).

supply necessary or agreed services or show the premises to prospective purchasers, tenants, mortgagees, workmen or contractors.

The Arkansas Act has added that the landlord can enter to "investigate possible criminal activity." Allowing the landlord to investigate criminal activity raises all sorts of policy and constitutional questions. Should landlords with no experience in law enforcement be investigating criminal activity? Especially given the many ways the parties may be at odds with each other. The tenant may have rejected the landlord's sexual advances. The landlord may want the premises for himself or a family member. The tenant may have made legitimate complaints about condition in the premises to the landlord or code enforcement. Does the landlord now have the authority to consent to a search of the tenant's premises by law enforcement?[20] What if the landlord enters and finds illegal drugs? Can they be turned over to law enforcement and the tenant prosecuted? And if so, who's to say the drugs came from the tenant and not the landlord? The Fourth Amendment prohibits unreasonable searches and seizures by law enforcement and there is a whole body of law as to what must be done for a proper search. The Arkansas Act would appear to eliminate those protections for tenants. This is not to say that a landlord shouldn't be able to have a tenant investigated if there is a valid suspicion of illegal activity. Rather it should be done by notifying law enforcement and letting the professionals do the investigation under the constitutional mandates.

Equally troublesome under the Arkansas Act is the limitations on access provided in the URLTA have been deleted. Under the URLTA the landlord shall not abuse the right of access and, other than emergencies, must give the tenant two days notice and enter at reasonable times. The tenant has the right to seek injunctive relief if the landlord enters in violation of the act or makes repeated demands for entry pursuant to the act solely for the purpose of harassing the tenant. Those provisions were deleted from the Arkansas Act. Left in was a provision that the landlord may obtain injunctive relief if the tenant refuses access.[21] Added to the Arkansas Act was language that the injunction could be obtained in District Court and without posting a bond. Nothing in the Arkansas Constitution or statutes gives district court judges equitable powers, the power necessary to issue an injunction.[22] Further the Arkansas Court Rules regarding injunction provide for a bond with respect to preliminary injunctions as security in case the injunction is found to be improper at the final hearing.[23] No rationale is given in the statute for the departure from the normal procedure. However, it is probably a moot point, given the other addition made in the Arkansas Act. Under the Arkansas Act the tenant may not change the locks without

20. In Breshears v. State, 94 Ark. App. 192 (2006) the landlord had given the tenant a Notice to Quit. When the police asked to search the premises the tenant refused, but the landlord, claiming the tenant had no right to be in the premises, consented. The Court of Appeals reversed the conviction as based on an illegal search. A different result may now be warranted under the Arkansas Act.

21. Ark. Code Ann. § 18-17-705. Interestingly, the statute retains the URLTA heading for the section, "Landlord and tenant remedies for abuse of access," but deletes the remedy provided the tenant.

22. *See* Amendment 80, Arkansas Constitution and Supreme Court Administrative Rule 7. Limitations on district court jurisdiction is also discussed in greater detail later in this article.

23. Ark. R. Civ. Proc. 65(d).

the landlord's permission, thereby insuring that the virtually limitless access provided under the statute will not be impeded.[24]

Perhaps the sections that best illustrate the one-sidedness of the Arkansas Act are the treatment of the URLTA sections dealing with the obligations of the landlord[25] and the tenant.[26] The Arkansas Act deleted the landlord's obligations and left all the tenant obligations. Even the most cursory reading of the URLTA makes it clear the obligations were meant to be co-dependent. For example the URLTA provides the tenant is to comply with all building and housing code sections primarily imposed on tenants that affect health and safety. The reciprocal duty of the landlord to comply with building and housing code sections affecting health and safety is deleted from the Arkansas Act. The tenant is to dispose of ashes, garbage, rubbish and other waste in a clean and safe manner. The landlord's reciprocal duty to provide appropriate receptacles for ashes, garbage, rubbish and other waste is deleted from the Arkansas Act. Under the URLTA the tenant is to keep his unit clean and safe, but the Arkansas Act leaves out the dependent duty of the landlord to keep the common areas clean and safe. Finally the tenant under both acts is to keep plumbing fixtures clean and use all electrical, plumbing, sanitary, heating, ventilating, air conditioning and other appliances, including elevators, in a reasonable manner. Eliminated from the Arkansas Act is the duty of the landlord to maintain those items.

The URLTA also requires the tenant not to damage the premises or allow others to do so. The Arkansas Act adds clarification in that a third party doing damage must be on the premises with the tenant's permission or allowed access to the premises by the tenant. This may be the only change in the Arkansas Act that can be said to favor the tenant. Both acts require that the tenant or the tenant's guest not disturb the peaceful enjoyment of the other tenants. However the Arkansas Act adds language that the tenant must also comply with the lease and rules which are enforceable pursuant to the act. As was discussed previously, given the deletions regarding rules and unconscionability, the tenant obligation may very well be as broad as landlords and their attorneys can conceive in their leases.

The URLTA contains an extensive multisectional part dealing with the tenant's remedies under the act. It is deleted in toto from the Arkansas Act. Part of the deletions, along with eliminating some of the landlord's obligations under the URLTA, can be attributed to a reaffirmation of Arkansas's continuing and unique position as the only state not to recognize a warranty of habitability. For whatever reason, this state refuses to impose minimal standards for residential rental housing in spite of continuing scholarly criticism.[27] Indeed the Arkansas Act appears to take the state's lack of concern for tenants a step further. As stated earlier one of the landlord's obligations eliminated in the Arkansas

24. Ark. Code Ann. § 18-17-602(b).

25. URLTA 2.104, 7B U.L.A. 326 (2006).

26. URLTA 3.101, 7B U.L.A. 369 (2006).

27. *See* Propst v. McNeill, *Arkansas Landlord-Tenant Law, A Time for a Change*, 51 Ark. L. Rev. 575.

statute was to comply with local housing codes affecting health and safety. Not only can't the tenant demand minimal health and safety standards, it appears the municipality can't either. The arguments for a warranty of habitability have been eloquently and persuasively made elsewhere.[28] Suffice it to say for this article the Arkansas Legislature once again ignored those arguments, jeopardizing the health and safety of the over one-quarter of our population that rely on residential rentals for a roof over their head.[29] The failure to act does, however, directly contradict one of the stated purposes of the statute, "to encourage landlords and tenants to maintain and improve the quality of housing." Under the Arkansas Act landlords are left free to let their premises deteriorate to the point of constituting a danger to health and safety.

Some of the other remedies eliminated are harder to understand. Section 4.102 of the URLTA provides remedies if the landlord fails to deliver possession of the premises. The tenant can terminate the agreement on 5 days notice to the landlord or, in the alternative, obtain possession from the landlord and recover any damages sustained. If the landlord willfully fails to grant possession of the premises, the tenant can obtain the greater of treble damages or three months rent. While the Legislature might not have chosen to enact the enhanced damages for willful failure to deliver possession, what argument can be made against the tenant terminating the agreement or taking possession and being paid any damages suffered? Similarly deleted was a provision for the tenant to be able to terminate the rental agreement if the premises were damaged or destroyed by fire or other casualty. That provision also provides for the tenant to stay and pay a reduced rent if only part of the premises are damaged. Given the recent spate of floods and tornados in the last year, this would seem a necessary provision, rather than one to be discarded.

The URLTA also provides protection for the tenant against retaliatory evictions by the landlord against tenants who assert their rights under the statute.[30] Since the Arkansas Act eliminates any rights accruing to the tenant, it is not surprising that this section is totally deleted from the Arkansas Act. After all, with no rights for the tenant to assert, how could the landlord engage in a retaliatory eviction for the tenant asserting rights under the statute?

With respect to remedies for the landlord, the Arkansas Act retains and strengthens the remedies in the URLTA and adds an additional remedy. Under the URLTA if the tenant is in material violation of the rental agreement, the landlord can give the tenant a notice that the rental agreement will terminate in 30 days from service of the notice. The tenant then has 14 days to cure the breach in the agreement. The Arkansas Act provides the termination of the tenancy will be in 14 rather than 30 days and eliminates the requirement that the noncompliance with the rental agreement be material. It does retain the provision that the tenant can avoid termination by curing the non-compliance within the 14 days.[31] Given the unfettered right of the landlord to put any clause he or she wants in the lease, as previously discussed, the elimination of the materiality require-

28. *Id.*

29. Kathryn Hake, Note, *Is Home Where the Heart Is?: State Adopts Unique Approach to Landlord Tort Liability and Maintains Common Law "Caveat Lessee,"* 59 Ark. L. Rev. 737 at 739.

30. URLTA § 5.101 at 7B U.L.A. 411 (2006).

31. Ark. Code Ann. § 18017-701(a).

ment is significant. The possibilities for non-compliance with a 5-page 40-section lease form are almost endless.

The URLTA provides that if the tenant is behind in the rent, the landlord can give a notice that the tenant has 14 days to bring the rent current. If the rent is not brought current within the 14 days, the landlord may terminate the rental agreement. The Arkansas Act provides if the rent is 5 days late, the landlord may terminate the rental agreement.[32] The tenant is given no time to bring the rent current after the notice and a later section eliminates even the requirement of giving the tenant notice if the rent is late.[33] The rent being five days past due is deemed legal notice to the tenant that the landlord may begin eviction proceedings. Under the URLTA the landlord may seek damages and injunctive relief. The Arkansas act adds that the landlord may seek "evictions in circuit court or district court without posting bond for any non-compliance by the tenant with the rental agreement."[34]

The added language raises two significant problems. The first is the elimination of any requirement for a bond. Both the Arkansas Court Rules[35] and the existing forcible entry and detainer statute[36] require the landlord to put up a bond if relief is granted a party prior to a full hearing. Under the existing statute, which remains an alternate remedy to evict a tenant, the landlord is entitled to an expedited hearing on possession, and if the landlord can make a prima facie case, subject to rebuttal by the tenant, that the landlord is likely to succeed on the merits at the full hearing, a writ of possession will issue. However, the landlord must post adequate security as determined by the Court. The elimination of the bond requirement is especially troublesome in light of a later added provision in the Arkansas statute. The tenant, as part of his or her defense, must pay the landlord any rent alleged to be owed unless the tenant can show the Court a receipt or canceled check. If, at the final hearing, the tenant prevails and shows the rent was not owed, the tenant is granted a judgment against the landlord. However, since there was no bond requirement, there is no guarantee the judgment will be collectable. This provision would appear to be based on an absolute presumption that if there is no receipt or check the rent was not paid, but there are landlords who do not give receipts and there are tenants naive enough to pay cash without receiving a receipt. An even more common scenario is one where the landlord and tenant agree that, in lieu of part or all of the rent, the tenant will make repairs to the premises or provide other services. Such agreements are rarely in writing and almost never will there be a receipt or other document acknowledging the rental forgiveness. There often, however, will be ample evidence to convince a court at a full hearing of what

32. Ark. Code Ann. § 18-17-701(b).

33. Ark. Code Ann. § 18-17-901(b).

34. Ark. Code Ann. § 18-17-701(c)(1).

35. Ark. R. Civ. Proc. 65(d).

36. Ark. Code Ann. § 18-60-307(d)(1)(B)(i).

was done and its value in the form of witnesses to the work, pictures and other physical evidence. The requirement of rent payment based on the allegations of the landlord also raises significant constitutional questions. The United States Supreme Court has found void on due process grounds prejudgment garnishment[37] and replevin[38] unless subject to review by an independent judicial officer and the opportunity for the other party to be heard. The Arkansas statute does not appear to provide for such a review.

The second problem with the added language is it provides for eviction in the district court. Indeed it would appear one of the legislative goals in enacting the statute was to provide for evictions in the district courts. The only problem is the Arkansas Constitution in Amendment 80 gives the Supreme Court, not the Legislature, the power to determine what matters are to be heard in the district courts. Section 7 of the Amendment specifically provides that subject matter of civil cases in the district courts shall be established by Supreme Court rule. Administrative Rule 18 of the Arkansas Supreme Court sets out the civil jurisdiction of the district courts and does not provide for evictions. Jurisdiction is limited to contract and tort cases where the damages are $5,000.00 or less. Had the Supreme Court wanted district courts to hear eviction matters, it could have done so by extending district court jurisdiction to include cases under the existing forcible entry and detainer statute. The Court chose not to do so. The statutes grant of jurisdiction to the district courts is a violation of the separation of powers established in the Arkansas Constitution and an attempt by the Legislature to substitute its judgment for that of the Court as to what matters are appropriate to be heard by the district courts.

The final aspect of the Arkansas statute to be discussed is an additional eviction remedy tacked on the end of the act and having no counterpart in the uniform act. Indeed Subchapter 9 providing for eviction proceedings appears after both Subchaper 7, dealing with landlord remedies, and Subchapter 8, the miscellaneous provisions for severability and transactions prior to the act being exempt from it.

The additional eviction remedy appears to have two purposes. The first is to provide an eviction remedy in the district court. This is evidenced by much of the section dealing with the procedure for appealing a decision to the circuit court. Also the fee for filing an action is $25.00, the district court filing fee, rather than the $140.00 circuit court filing fee. The problems with the Legislature granting district court jurisdiction have already been addressed.

The second purpose would seem to be an attempt to create a more *pro se* friendly process for landlords. The tenants may be evicted if they fail to pay rent, fail to vacate at the end of the term of the tenancy or violate the terms and conditions of the lease.[39] The tenant's failure to pay rent within five days of it being due is deemed legal notice that the landlord can bring an action for eviction,[40] eliminating the obligation to provide an actual written notice as required under the ex-

37. Sniadach v. Family Finance Corp. of Bay View, 395 U.S. 337, 89 S. Ct. 1820, 23 L. Ed. 2d 349 (1968).

38. Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983, 34 L. Ed. 2d 556 (1972).

39. Ark. Code Ann. § 18-17-901.

40. Ark. Code Ann. § 18-17-901(b).

isting forcible entry and detainer statute.[41] The action begins by the landlord filing an "affidavit of eviction" specifying the grounds for eviction.[42] The court then issues an order for the tenant to vacate the premises or show cause within ten days of service why he or she should not be evicted.[43] If the tenant fails to appear and show cause within ten days, a writ of eviction will issue.[44] If the tenant appears and contests the action, the "court shall hear and determine the case as any other civil case."[45] This is where the process gets dicey. In any other civil case the landlord would have filed a complaint and the tenant an answer and possibly a counterclaim, and/or cross claim and/or third-party complaint, which the landlord would then answer. The parties would further clarify and narrow the issues through discovery. Also, the Arkansas Constitution provides a right to jury trial in civil cases.[46] While the right does not apply to all actions, it does apply to all matters triable to a jury at common law.[47] While the statute provides for a new action for eviction, eviction actions existed at common law and were triable to a jury.[48] Indeed the Arkansas Act provides the tenant is "ejected" on failure to show cause,[49] ejectment being the common law cause of action. While the Legislature probably did not envision a full trial with a jury as the meaning of "hearing the case as any other civil case," that is the way any other civil case would be heard. Further, anything less raises questions of whether the procedure meets the requirements of a due process hearing under the United States Constitution and that of the State of Arkansas and satisfies one's constitutional right to jury trial under the Arkansas Constitution.

An additional problem with the added remedy for eviction is the provisions for service of the order to show cause why the tenant should not be evicted. As presently written[50] it is, quite frankly, gobblygook, due to what appears to be a blatant drafting error. Ark. Code Ann. section 18-17-903(a) calls for service of the order as provided for by law for the service of a summons in a circuit court action. No problems there. Ark. Code Ann. section 18-17-903(b)(1), however, provides if no one is found in possession of the premises, the notice may be served by affixing to the most conspicuous part of the premises. Ark. Code Ann. section 18-17-903(b)(2)(A) states if service as provided in (b)(1) is attempted unsuccessfully, the order may be served by affixing it to the most conspicuous part of the premises and mailing it. If tacking on the door is unsuccessful, then you tack and mail? How do you know tacking on the door was unsuccess-

41. Ark. Code Ann. § 18-60-304(3).
42. Ark. Code Ann. § 18-17-902(a)(1).
43. Ark. Code Ann. § 18-17-902(b).
44. Ark. Code Ann. § 18-17-904.
45. Ark. Code Ann. § 18-17-905.
46. Ark. Const., art. II § 7.
47. First National Bank v. Curthis, 360 Ark 528 at 534 (2005).
48. Jackson v. Frazier 175 Ark. 421 (1927); Cole v. Mettee, 65 Ark. 503 (1998).
49. Ark. Code Ann. § 18-17-904.
50. Ark. Code Ann. § 18-17-903.

ful? Ark. Code Ann. section 18-17-903(b)(2)(B) provides on the first unsuccessful attempt to serve the order, the notice shall be affixed to the most conspicuous part of the premises. What first attempt to serve the notice, that under (a) or (b)(1)? It appears the intent was to add an additional method of service if the tenant cannot be personally served as provided for under Rule 4 of the Arkansas Rules of Civil Procedure,[51] dealing with service of a summons in circuit court. Assuming the Arkansas Act meant to add service by affixing to the premises and mailing, the section could be effectively drafted by eliminating Ark. Code Ann. section 18-17-903(b)(1) and having Ark. Code Ann. section 18-17-903(b)(2) provide "when service under (a) is unsuccessful, service may be had by affixing the notice to a conspicuous part of the premises and mailing." Ark. Code Ann. section 18-17-903(b)(2)(B) would also make sense, as defining how many attempts must be made to serve the tenant pursuant to Rule 4 before tacking and mailing would be allowed.

Assuming the service provisions are more clearly drafted, the question remains whether service by affixing notice to the premises and mailing is sufficient under the due process clauses of the United States and Arkansas Constitutions.[52] It is axiomatic that notice is the hallmark of due process and a necessary requisite for courts to act. In the case of *Mulane v. Central Hanover Bank*[53], the United States Supreme Court set out the basic constitutional requirement for service, finding it must be by the means most likely to apprise the parties of the action. The Arkansas Court Rules and cases take that admonition seriously. If the whereabouts of the defendant are known, service must be either personally on the defendant or a member of his family or in a writing where the defendant acknowledges receipt, such as a certified mail receipt or a written acknowledgment of service.[54] Unclaimed certified mail is not considered good service under the Arkansas cases[55] and there are no provisions for service of the pleading initiating an action by ordinary mail, as provided for in the Arkansas Act. Posting in a conspicuous spot on the premises also provides no assurance that the defendant will actually receive notice. The posted document is subject to being blown away, washed away or torn off by a curious passerby. Neither ordinary mail nor posting provide the assurance of actual notice that appears to be required under Arkansas law. While the Rules do provide for constructive service by publication, it may only be resorted to where, after diligent inquiry, the defendant cannot be found. Service by publication, where it is shown the defendant's whereabouts were known or would have been revealed through inquiry, has been set aside.[56] Further, service by publication carries the additional requirement that notice also be sent to the last

51. Rule 4 essentially provides service must be personally made on the defendant or a member of the household over 14 years of age, by certified mail with delivery restricted to the defendant or his or her agent or by warning order if the whereabouts of the defendant are unknown after diligent inquiry, with the warning order to be published and certified mail sent to the defendant's last known address.

52. Meeks v. Stevens, 301 Ark. 464, 785 S.W.2d 18 (1990).

53. 339 U.S. 306 (1950).

54. Ark. R. Civ. Proc. 4.

55. *Meeks*, *supra.*

56. Smith v. Edwards, 279 Ark. 79, 648 S.W.2d 482 (1983).

known address of the defendant with delivery restricted to the defendant or his agent.[57] Tacking and mailing does not satisfy the requirements of the case law for service of an original pleading.

Conclusion

Landlord-tenant cases have traditionally presented a dilemma. How to give the tenant a full and fair trial without creating undue hardship on the landlord with respect to a nonpaying tenant. At common law the action to remove a tenant was ejectment. The problem was it took a long time to bring the action to judgment. If the tenant was not paying rent for the months it took to process the ejectment, the landlord was out a significant sum. Also a tenant, who could not pay the rent was likely to be someone against whom a judgment could not be collected. As a result jurisdictions developed various summary procedures for an expedited hearing on possession with the full trial to follow.[58] Arkansas has long since had such a procedure in the form of the Forcible Entry and Detainer Statute.[59] Under that statute a landlord files a complaint with the Court that is then served on the tenant. If the tenant fails to file an objection within 5 business days, a writ of possession issues. If the tenant files an objection, the matter is set for a hearing on possession. While the statute does not set a time in which the hearing should be set, the practice is that the matter is set quickly, often a week to ten days. If the landlord can show a *prima facie* case of a right to possession, subject to rebuttal by the tenant, a writ of possession will issue upon the landlord posting adequate security as determined by the Court. If the tenant wishes to remain in the premises, the tenant must, within five days, post adequate security as determined by the Court. The statute further provides that the possession hearing is not a final adjudication of the rights of the parties. That will only occur after a full trial of the matter. Under this procedure a non-paying tenant will be quickly removed from the premises. If not within five days of service, at least at the end of the possession hearing. A tenant who cannot pay rent will not be able to post a bond. On the other hand, in cases that are not that clear, disputes over noise or alleged violations of rules, the tenant will have the opportunity to fully develop the record and present it to a jury. The reality is very few cases go to a final hearing, at least at the tenant's insistence. Typically if there is a final hearing, it is for the purpose of the landlord presenting damage claims against a tenant who is long gone.

While the procedure laid out in the Forcible Entry and Detainer is rarely used in its entirety, it is there and assures that claims will be fully tried and, if requested, tried to a jury. Due process is served. The landlord's interest in a rapid adjudication of possession with respect to a non-paying tenant is also met. The new Arkansas Act has no procedure for an expedited hearing if the tenant appears and contests the matter. It seems to rely on the tenant not responding to the Order to Show

57. Ark. R. Civ. Proc. 4(f)(2).

58. Robert S. Schoshinski, American Law of Landlord and Tenant, p.408-409, Bankcroft-Whitney Co. (1980).

59. Ark. Code Ann. § 18-60-301 et seq.

Cause. However, the existing Forcible Entry and Detainer Statute has a similar provision under which the tenant has only five days to respond, so it is unclear what is gained by the new remedy. As was discussed earlier, one possible rationale for the new remedy is to provide an action for eviction in the district court; however, that is beyond the power of the Legislature. Further, if the Supreme Court deemed it appropriate for district courts to hear eviction matters, jurisdiction under the existing forcible entry and detainer statute could have been extended to the district courts.

The Arkansas Act as presently written seems to presume that the tenant is always in the wrong and the landlord always in the right. That flies directly in the face of the author's experience practicing landlord-tenant law for 35 years. The reality is there are some very bad tenants and some very bad landlords and most cases fall somewhere in between. The law needs to protect both landlords and tenants. However, in this state it appears only the landlords have the ear of the Legislature. That can probably be attributed to the fact that the landlords have a strong lobbying group in the form of the Realtors Association and, unlike many other states, there is no strong tenants association. As long as that is the case, the rule in Arkansas will be, as one commentator put it, caveat lessee,[60] or let the tenant beware.

60. *See* Kathryn Hake, Note, *Is Home Where Arkansas's Heart Is?: State Adopts Unique Statutory Approach to Landlord Tort Liability and Maintains Common Law "Caveat Lessee,"* 59 ARK. L. REV. 738.