

# A CASE STUDY ON ACCESS TO JUSTICE AND HOW TO IMPROVE IT

MICHELE COTTON<sup>1</sup>

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## I. INTRODUCTION

The “new legal realists” have been advocating for expansion in the scope and methods of empirical work in legal scholarship. For example, Howard Erlanger et al. have argued that we ought to be more concerned with “the impact of law on ordinary people’s lives” and therefore should “include in our toolkit some of the social science methods best suited for this task,” including “the qualitative methods developed by fields like

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1. Assistant Professor, Division of Legal, Ethical and Historical Studies, University of Baltimore Yale Gordon College of Arts and Sciences. A.B., The College of William and Mary, 1981; Ph.D., Brandeis University, 1985; J.D., New York University School of Law, 1988; Ed.M., Harvard Graduate School of Education, 2005. The author would like to thank Prof. David Reiss, Harold DeRienzo, Hon. Theodore Oshrine and Hon. Robert Cooper for comments on a draft of this Article. The author would also like to acknowledge the substantial research support provided by her Graduate Assistants Frankie Lucas, Nija Bastfield, Lyndsay Bates, Mark Sioson, and Beatrice Campbell. In addition, this article is based on the case studies done by Keegan App, Danielle Boone, Angel Brown, Beatrice Campbell, Sherketta Carter, Andrew Cryan, John Descoteaux, Chappin Eze, Debra Johnson, Kristina Sargent, Pamela Skaw, Ernest Stevens, Alicia Tatum, and Rebecca Ward, and it focuses in particular on a case study done by Andrew Cryan. The research project would not have been possible without the assistance of my colleague Jason Trumbour. The author would also like to thank the Provost’s Office at University of Baltimore for its generous grant to compile the archive of case materials that is the basis for this research project.

anthropology and history for examining everyday experience.”<sup>2</sup> Similarly, Victoria Nourse and Gregory Shaffer have called for “an empiricism that adopts anthropological and sociological approaches, in which academics leave their universities and investigate the world,”<sup>3</sup> with the goal of studying “the law in action.”<sup>4</sup> Implicit in these descriptions is the idea that the mostly quantitative approaches that have been employed by empirical researchers in studying the law are not providing a complete understanding—especially of the law as ordinary people experience it—and thus are not contributing enough to legal policy development and reform.

This perspective is revealing when applied to the situation of the mostly low-income tenants who attempt to use the court system to get repairs and compensation for substandard housing conditions. Almost all of the research that exists on the experience of these tenants is quantitative. It shows, for example, that they experience a low rate of success in using the warranty of habitability as a defense to a landlord’s nonpayment actions or in affirmative cases, and that the results they obtain usually improve when they have legal representation.<sup>5</sup> While such research is extremely valuable, it does not answer all of the important questions. It does not provide direct evidence of why these tenants manage to get so little relief from the courts, and it does not suggest specific ways of improving their outcomes, short of a massive and

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2. Howard Erlanger et al., *New Legal Realism Symposium: Foreword: Is It Time for a New Legal Realism?*, 2005 WIS. L. REV. 335, 339 (citing Joel Handler et al., *A Roundtable of New Legal Realism, Microanalysis of Institutions, and the New Governance: Exploring Convergences and Differences*, 2005 WIS. L. REV. 479, 482-89).

3. Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, 95 CORNELL L. REV. 61, 79 (2009).

4. *Id.* (quoting Stewart Macaulay, *The New Versus the Old Realism: “Things Ain’t What They Used to Be,”* 2005 WIS. L. REV. 365, 367-68.)

5. Marilyn Miller Mosier & Richard A. Soble, *Modern Legislation, Metropolitan Court, Miniscule Results: A Study of Detroit’s Landlord-Tenant Court*, 7 U. MICH. J.L. REFORM 8 (1973); Julian R. Birnbaum, Nancy B. Collins & Anthony J. Fusco Jr., *Chicago’s Eviction Court: A Tenants’ Court of No Resort*, 17 URB. L. ANN. 93 (1979); Barbara Bezdek, *Silence in The Court: Participation and Subordination of Poor Tenants’ Voices in Legal Process*, 20 HOFSTRA L. REV. 533 (1992); Paula Hannaford-Agor & Nicole Mott, *Research on Self-Represented Litigation, Preliminary Results and Methodological Considerations*, 24 JUST. SYS. J. 163 (2003); Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City’s Housing Court: Results of a Randomized Experiment*, 35 LAW & SOC’Y REV. 419 (2001); Steven Gunn, Note, *Eviction Defense for Poor Tenants: Costly Compassion or Justice Served?*, 13 YALE L. & POL’Y REV. 385 (1995); D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L. J. 2118 (2012); Rebecca L. Sandefur, *The Impact of Counsel: An Analysis of Empirical Evidence*, 9 SEATTLE J. SOC. JUST. 51 (2010).

unlikely investment in more attorneys (and judges). To complete our understanding of what the problems are, and to provide a wider range of possible solutions, we need more qualitative work, research that better illuminates what happens to unrepresented tenants' legal claims in court.

Case study research is a particularly useful method for such a purpose. It allows for sustained close attention to a phenomenon as it unfolds,<sup>6</sup> and thus helps explain how and why certain events occur.<sup>7</sup> Although it is seldom seen in legal scholarship,<sup>8</sup> the case study is a well-established method of empirical research and commonly used in many fields, including sociology, political science, anthropology, and business.<sup>9</sup> It admittedly lacks the reliability and predictive validity obtainable with quantitative research focused on large statistical archives. Yet properly conducted case studies nonetheless have been recognized as making important contributions to fields similar to law, including political science.<sup>10</sup> As the new legal realists call for, it is a method that allows for closer attention to "everyday experience" and for observing the "law in action." In addition, where other kinds of research

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6. John Gerring, *What is a Case Study and What is it Good for?*, 98 AM. POL. SCI. REV. 341, 342 (2004) (a case study is "an intensive study of a single unit for the purpose of understanding a larger class of (similar) units.").

7. ROBERT K. YIN, *CASE STUDY RESEARCH: DESIGN AND METHODS* 10-11 (5th ed. 2014).

8. LEXIS searches and other inquiries reveal no published case study research involving unrepresented litigants. David L. Eldridge, *The Making of a Courtroom: Landlord-Tenant Trials in Philadelphia's Municipal Court* (2001) (unpublished Ph.D. dissertation, University of Pennsylvania) examines several cases, involving mostly represented litigants, from the perspective of the discipline of social work (but also makes thoughtful points about the law governing the cases). Some published work does discuss case studies as pedagogical tools. See, e.g., Michael Millemann, *Case Studies and the Classroom: Enriching the Study of Law through Real Client Stories*, 12 RACE, RELIGION, GENDER & CLASS 219 (2012); Frank S. Bloch, *Framing the Clinical Experience: Lessons on Turning Points and the Dynamics of Lawyering*, 64 TENN. L. REV. 989 (1997). In addition, some published work does use tantalizing snippets from actual cases to illustrate a point. See, e.g., Jonathan I. Rose & Martin A. Scott, *"Street Talk" Summonses in Detroit's Landlord-Tenant Court: A Small Step Forward for Urban Tenants*, 52 J. URB. L. 967, 1009-11 (1975).

9. YIN, *supra* note 7, at 4 (identifying case studies as commonly used in "psychology, sociology, political science, anthropology, social work, business, education, nursing, and community planning").

10. A properly-done case study can reach findings that do apply more generally, albeit through analytic generalization rather than statistical generalization. See YIN, *supra* note 7, at 40. Further, to the extent that a given case study is congruent with other kinds of research in the same area, its findings are entitled to greater validity. *Id.* at 47 and 118-21. In addition, case studies that are replicated by other case studies, as in multiple-case study research, have a much-greater degree of generalizability than those associated with an isolated case. *Id.* at 57.

are already well-represented, case studies can be particularly useful in answering the questions raised but not answered by that research.<sup>11</sup>

As a means of beginning to fill the gap in our understanding, this Article presents a case study on the experience of an unrepresented low-income tenant seeking to address her unsafe and unhealthy housing conditions through a “rent escrow” action in Baltimore City District Court in 2012. The case was not chosen for attention because it is particularly “representative,” but the validity of case studies is not dependent on their representativeness.<sup>12</sup> In fact, case studies can be more useful when they deal with exceptional situations.<sup>13</sup> Although tenants usually assert the warranty of habitability as a defense against a nonpayment action brought by the landlord, this study focuses on an affirmative case brought by the tenant. It is easier to see how the court is evaluating the tenant’s claim than when the landlord’s suit for nonpayment is the centerpiece of the proceeding. Further, this tenant had significant exposure before the court, going before two different judges, and the facts of her case were sufficiently developed to establish her right to relief. Thus, this case study should be some indicator of what sort of justice unrepresented tenants get in the best case scenario.<sup>14</sup>

Of course, the problem with even a carefully selected case is that it can still amount to a fluke. However, this case was taken from a larger ongoing research project involving case studies of unrepresented litigants, and, based on the 50 randomly selected rent escrow case studies we have done so far, what happened to the tenant in this case is typical. In that sense, this case study is “representative,” and can be the source of some useful generalizations. Further, it is likely to be illuminating not simply about the situation in Baltimore but also in other jurisdictions. Many places have similar laws involving the warranty of habitability, similarly unrepresented tenants, similar courts with huge dockets, and similar economic conditions.<sup>15</sup>

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11. See, e.g., Gerring, *supra* note 6, at 353 (other methods of research and case study research are “interdependent, and this is as it should be,” and he suggests that “[a] field where cross-unit studies are hegemonic may be desperately in need of in-depth studies focused on single units”).

12. *Id.* at 51-53.

13. *Id.* at 52.

14. *Id.*

15. Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal about When Counsel is Most Needed*, 37 FORDHAM URB. L.J. 37 (2010) (“[d]espite some variation in details, the core features of the courts [that handle landlord-tenant cases] seem remarkably consistent”); David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CALIF. L. REV. 389, 394 (2011) (describes adoption of the warranty of habitability by “almost every state’s legislature or courts.”).

According to Erlanger et al, in order to work toward reform, we must have “an adequate understanding of how society and law actually work on the ground,” one that “take[s] account of people’s lived experience of the law in particular settings.”<sup>16</sup> This case study investigates the quality of the justice the unrepresented tenant obtained in court, and what obstacles she faced “on the ground,” with an eye toward determining what problems are likely to affect unrepresented litigants generally as well as in this particular setting. In providing insights not available from other kinds of empirical research, this case study also suggests ways of improving access to justice that may be more feasible and more effective than those usually recommended.

## II. THE LEVELNESS OF THE PLAYING FIELD

In Baltimore, as virtually everywhere, tenants who live in substandard housing can seldom afford to hire an attorney and are unlikely to benefit from the limited supply of free ones.<sup>17</sup> Many landlords who are small property owners may themselves be unrepresented by an attorney in such proceedings. In fact, this case study involves litigants on both sides without attorneys.

However, landlords, as businesspersons, are more likely than tenants to be knowledgeable about the law and familiar with legal processes. Unrepresented landlords are moreover in a better position than tenants to gain practical experience in handling such cases, which can make lack of counsel less of a handicap for them.<sup>18</sup> They may also enjoy the other advantages that accrue to “repeat players,” such as the establishment of relationships with judges and court personnel that can enhance chances of success.<sup>19</sup> It has also been suggested that because landlords generally have more social capital than tenants, courts accord them greater respect.<sup>20</sup> Thus, even in situations where both parties are unrepresented,

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16. Erlanger et al., *supra* note 2, at 345.

17. See, e.g., LEGAL SERVICES CORPORATION, DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS (2009); AMERICAN BAR ASSOCIATION, LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS (1994); DISTRICT OF COLUMBIA ACCESS TO JUSTICE COMMISSION, JUSTICE FOR ALL?: AN EXAMINATION OF THE CIVIL LEGAL NEEDS OF THE DISTRICT OF COLUMBIA’S LOW-INCOME COMMUNITY 7- 9 (Oct. 2008) (97% of tenants in landlord-tenant cases proceeded *pro se*). See also Super, *supra* note 15, at 460 (referring to the small number of tenants represented in court as having won “the legal aid lottery”).

18. See Bezdek, *supra* note 5, at 555-56.

19. See Super, *supra* note 15, at 416 (regarding the vulnerability of court to “capture” by landlords as repeat players).

20. See Bezdek, *supra* note 5, at 540 (“In important part, this is an expression of centuries of culture regarding landowning and its centrality to ‘worth,’ as well as an

that may not mean a level playing field when it comes to their access to justice.

Further, in Maryland, landlords can choose anyone they want, even non-lawyers, to represent them in court and otherwise assist them in defending cases involving rent escrow.<sup>21</sup> Maryland statutory law specifically exempts landlords' non-lawyer representatives in such cases from sanctions for unauthorized practice of law (UPL).<sup>22</sup> Landlords without counsel may thus rely on the expertise of non-lawyer colleagues, consultants, and agents who know something about the law.<sup>23</sup> But the tenants in rent escrow cases cannot legally get help from anyone who is not a State-licensed attorney (or a law student or paralegal directly supervised by one).<sup>24</sup> Thus, unrepresented tenants in Baltimore not only lack lawyers but also the same opportunity that landlords have to receive help from knowledgeable non-lawyers. Indeed, most jurisdictions have UPL restrictions that make the giving of legal advice or assistance solely the province of lawyers, and define UPL so broadly that meaningful non-lawyer assistance for unrepresented litigants is effectively foreclosed.<sup>25</sup>

### III. THE LAW APPLYING TO THE CASE

The particular Baltimore law that applied to this case<sup>26</sup> allows a tenant to pay her rent into a court-administered escrow account rather than to the landlord, if the conditions she complains of are not her fault and the landlord received adequate notice of their existence and did not make the repairs within a reasonable time given sufficient opportunity.<sup>27</sup>

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expression of judges' class-related assignments of parties' credibility and their conceptions of the social world. In order for tenants to articulate the claims available to them, they must challenge these powerful underlying premises held by the power-wielding figures in the room—the judge and the landlord”).

21. MD. CODE ANN., BUS. OCC. & PROF. § 10-206 (2005) (“in general ... before an individual may practice law in the State, the individual shall” be a member of the Bar, but that exceptions to this rule include “a person while representing a landlord in a summary ejectment or a rent escrow proceeding in the District Court of Maryland”).

22. *Id.*

23. Bezdek, *supra* note 5, at 562-63 (“Landlords get the lion’s share of non-attorney assistance. Ordinarily, they are represented in rent court by an agent who, in the great majority of cases, is a ‘repeat player’ possessing the specialized legal knowledge needed to operate effectively in the forum”).

24. MD. CODE ANN., BUS. OCC. & PROF. § 10-206(b)(2) (2005).

25. See, e.g., Michele Cotton, *Experiment, Interrupted: Unauthorized Practice of Law Versus Access to Justice*, 5 DEPAUL J. SOC. JUS. 179, 181-82 (2012).

26. Maryland has both state and local laws providing for rent escrow. MD. CODE ANN., REAL PROP. § 8-211 (2011), defers to the local law.

27. BALT. CITY, MD, PUB. LOC. L. § 9-9(b)(1969)(“[w]here property situated in the City of Baltimore is leased for the purpose of human habitation, the tenant of such

That law also provides tenants with a number of remedies including court orders directing the landlord to make repairs, abating the rent paid to the landlord or into escrow, awarding the amount in escrow in part or in whole to the tenant, and/or terminating the lease.<sup>28</sup> As part of the rent escrow action, the court may award not only a prospective rent abatement, but also damages for the breach of the warranty of fitness for human habitation (Baltimore's analog to the warranty of habitability), going back to the date the landlord first had notice of the conditions.<sup>29</sup> The Baltimore rent escrow law is supposed to be interpreted in such a

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property may assert . . . a fire hazard or serious threat to the life, health, or safety of occupants thereof, including but not limited to, a lack of heat or of hot or cold running water (except if the property is a one-family dwelling or a multiple dwelling where the tenant is responsible for payment of the water charge and where the lack of such water is the direct result of the tenant's failure to pay the water charge) or of light or of electricity or of adequate sewage disposal facilities or an infestation of rodents (except if the property is a one-family dwelling) or of the existence of paint containing lead pigment on surfaces within the dwelling, provided that the landlord has notice of the painted surfaces, and if such condition would be in violation of the Baltimore City Housing Code.") Subsection (d) indicates that "preconditions" for such assertion are (1) prior notice to the landlord of the conditions and the landlord's refusal or failure to after a reasonable opportunity to make the repairs, and (2) deposit of rent into escrow with the court, as called for under the lease or determined by the court.

28. BALT. CITY, MD, PUB. LOC. L. § 9-9(f) (1969)(provides that the court's orders may include, but are not limited to "Termination of the lease or ordering the premises surrendered to the landlord . . . Ordering that the escrow be continued until the complained-of condition or conditions be remedied . . . Ordering that the amount of rent, whether paid into the escrow account or paid to the landlord, be abated as determined by the court in such an amount as may be equitable to represent the existence of the condition or conditions found by the court to exist . . . Ordering any amount of monies accumulated in escrow disbursed to the tenant (where the landlord refuses to make repairs after a reasonable time) or to the landlord or to a contractor chosen by the landlord in order to make repairs or to otherwise remedy the condition . . . Order[ing] the landlord to make the repairs or correct the conditions complained of by the tenant and found by the court to exist."); *See also* MD. CODE ANN., REAL PROP. § 8-211(m) (2012).

29. *See* BALT. CITY, MD, PUB. LOC. L. § 9-9(f)(4) (1969) (the court could award damages in rent escrow cases in the form of retroactive rent abatements, as it describes the court's orders as reaching "the amount of rent, whether paid into the escrow account or paid to the landlord.") *See also* BALT. CITY, MD, PUB. LOC. L. § 9-14.2(d) (1969)(provides for a tenant defense in a nonpayment proceeding of breach of the warranty of fitness for human habitation, and provides that "[d]amages shall be computed retroactively to the date of the landlord's actual knowledge of the breach of warranty and shall be the amount of rent paid or owed by the tenant during the time of the breach less the reasonable rental value of the dwelling in its deteriorated condition." *See also* *Williams v. Housing Authority of Baltimore City*, 760 A.2d 697 (2000) (tenant in the rent escrow action is also entitled to have any breach of warranty claim joined with the rent escrow action, allowing for a rent abatement not only going forward from the time of the rent escrow but also going backward to the time the landlord first received notice of the conditions and failed to repair them).

way as to advance the legislative interest in improving substandard rental housing and to punish landlords who are slow to correct deficiencies. The law states its concern for housing conditions that "constitute a menace to the health, safety, welfare and reasonable comfort of its citizens," and "declare[s] that the interests of public policy require that meaningful sanctions be imposed upon those who would perpetrate or perpetuate such conditions."<sup>30</sup> As Maryland's highest court explained in *Neal v. Fisher*, 541 A.2d 1314 (1988), the rent escrow law is "remedial legislation."<sup>31</sup> Accordingly, "[a] court should not permit 'a narrow or grudging process of construction to exemplify and perpetuate the very evils to be remedied.'"<sup>32</sup> Rather, the court should "construe the statute in a way that will advance the purpose, not frustrate it."<sup>33</sup> Thus, it would be expected that the court hearing the case that is subject of this study would be operating both under the efficacious letter and remedial spirit of this law.

#### IV. THE COURT-PROVIDED FORM FOR INITIATING THE ACTION

The form petition provided to tenants by Maryland's District Courts to initiate the rent escrow action could, in theory, provide a mechanism to help them obtain the law's benefits. However, it is written in "legalese." The fact that the form petition is not very accessible to unrepresented tenants matters because it is unlikely that most of them come to the court already aware of their legal rights.<sup>34</sup> In addition, materials on rent escrow made available by the court are not very helpful, and even contain misleading statements that could cause a tenant to harm her own case or to believe that she is not eligible for relief to which she is in fact legally entitled.<sup>35</sup> In the particular case that is the

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30. BALT. CITY, MD, PUB. LOC. L. § 9-9(a) (1969).

31. *Neal*, 541 A.2d at 1318 (referring to the similar State rent escrow law, which applies in jurisdictions without specific local laws).

32. *Id.*

33. *Id.*

34. Bezdek, *supra* note 5, at 563 n. 107 (study surveyed only a small number of tenants in Baltimore who had brought rent escrow cases. Two of the nine did not even realize that they were entitled to pay their rent into escrow, and four of the nine were unaware that they were entitled to rent abatements. The overall results showed that about half of all tenants in landlord-tenant cases were unaware that their rent could be reduced to reflect the defects in their housing).

35. The materials consist of two sets of badly photocopied instructions stapled together. The first page is a double-sided sheet entitled "Rent Escrow," which is followed by additional pages entitled "Rent Escrow Manual for Tenants in Baltimore City." The instructions on how to fill out the rent escrow petition do not even appear until page 8 of the materials. The materials misleadingly say that "[t]he first step in the rent escrow



subject of this study, the tenant did not correctly fill out the form petition [see Figure 1]. Indeed, in the 50 case studies involving rent escrow that we have completed so far in connection with this project, none of the form petitions were filled out correctly by unrepresented tenants.

It appears, for example, that most unrepresented tenants are confused, as the tenant was here, by the “wherefore” clause in the petition.<sup>36</sup> They evidently do not understand that they should be checking off that clause and one or more of the boxes following it to indicate what relief they are asking the court to provide. By checking none of those boxes, the tenant in this case has essentially asked the court for no relief (and that is indeed what most unrepresented tenants have done in the cases we have seen).<sup>37</sup>

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procedure is for the tenant to inform the landlord of the needed repair by certified mail,” when in fact the law allows for actual notice. *See* BALT. CITY, MD, PUB. LOC. L. §9-14.1(b)(2)(c) and § 9-9(d)(1)(1969). The materials also say that “many tenants feel that they have the right to withhold rent (by keeping it in their own bank accounts) until the repairs are made. This is not the legal way to establish rent escrow.” This statement is also misleading, as it suggests that a tenant’s act of withholding rent for poor conditions is illegal when it is not. *See* BALT. CITY, MD, PUB. LOC. L. § 9-14.2(b) and (d) (1969). The materials also state that the tenant must have “[a] good rent record” in order for rent escrow to be established, which implies that the tenant must be up-to-date on rent payment or have no history of nonpayment. That is also not true. The law does prevent tenants from bringing a rent escrow action if they have had multiple (3-5) judgments for nonpayment during the previous year. *See* BALT. CITY, MD, PUB. LOC. L. § 9-9(d)(3) (1969).

36. The instructions in the materials made available by the court also do not perfectly correspond to this part of the form petition. In particular, the instructions refer to a part of the form petition that reads “FOR THE REASONS MENTIONED, the Tenant ....” This may refer to a former or planned version of the form petition that included a less legalistic “wherefore” clause. The materials are dated April 5, 2011; the form petition used by the court in this case study is dated July 2011. [See Figure 1].

37. The form presents a number of problems for unrepresented tenants. It has check off boxes for the tenant to indicate what kind of notice the landlord received of the conditions. This tenant checked off only the box referring to the court-ordered housing inspection as notice to the landlord, although testimony indicates that she provided him with actual notice of her heat complaint much earlier than the inspection. The term “actual notice” used in the form petition is a term of art that the tenant is unlikely to know the meaning of. Further, the different possible kinds of notice to the landlord are framed as alternatives (“... or ... or ...”), so the tenant must pick one kind of notice rather than all those given. In this case, the tenant picked the notice that was actually least legally advantageous to her. [See Figure 1]. *Williams v. Housing Authority of Baltimore City*, 760 A.2d 697, 705-06 (2000) explains that the rent escrow claim is “focus[ed] on the current situation,” and allows for abatement or reduction in the amount of rent during the period of escrow, while the “the breach of warranty action [is] looking back for some period,” and allows for damages based on “the difference between the amount of rent paid or owed and the reasonable rental value of the dwelling in its deteriorated condition, commencing from the time that landlord acquired actual knowledge of the breach.”

Most tenants probably do not carefully read the entire "petition in action of rent escrow," as it is likely to look to them like one of those legal documents in 8-point type that reading will not improve the understanding of. Even if the tenant does read the form carefully, that may not lead to actual knowledge of her legal entitlement to particular remedies. For example, the boxes on the form allow the tenant to ask the court:

- that the amount of the rent be abated and reduced to \$ \_\_\_\_\_ per \_\_\_\_\_ and a rent escrow account be established by this court until the above conditions are corrected by the Landlord and approved as required
- that damages be awarded for breach of the covenant of quiet enjoyment or warranty of habitability in the amount of \$ \_\_\_\_\_

The first of these boxes is intended to allow for an abatement of the rent going forward from the time of the establishment of the escrow until the repairs are obtained, while the second box allows for damages, likely effected in the form of a reduction in the rent, retroactive to the time that the landlord first got notice of the conditions in need of correction.<sup>38</sup> Even if the tenant carefully read the form, she might not be able to deduce that such is the case.

Even if tenants do not correctly fill out the form petition, the court is still supposed to enforce the dictates of the rent escrow law. Maryland's District Court rules call for all pleadings to be "construed to do substantial justice."<sup>39</sup> Further, the local rent escrow law indicates that in disposing of the case the court "shall make any order that the justice of the case may require."<sup>40</sup> In other words, technical errors by the tenant in filling out the form petition are not grounds for dismissal nor do they impede the court in awarding relief otherwise available under the law (unless it would not be doing justice to provide such relief). Indeed, the court in this case gave no indication that it was ruling out any particular relief because of defects in the tenant's pleadings.

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38. *Williams*, 760 A.2d at 705-6 (explains that the rent escrow claim is "focus[ed] on the current situation," and allows for abatement or reduction in the amount of rent during the period of escrow, while the "the breach of warranty action [is] looking back for some period," and allows for damages based on "the difference between the amount of rent paid or owed and the reasonable rental value of the dwelling in its deteriorated condition, commencing from the time that landlord acquired actual knowledge of the breach.").

39. BALT. CITY, MD, PUB. LOC. L. § 9-9(h) (1969).

40. *See Id.*

The conditions complained of by the tenant here included lack of heat and lack of hot water, which are conveniently indicated by boxes that the tenant did check off on the form. The local law in Baltimore City calls for rent escrow cases that allege lack of heat in winter to receive an expedited hearing.<sup>41</sup> However, this case (like other such heat complaints we have seen) did not receive any priority and was instead placed on the same 15-day turnaround that is the norm for all other rent escrow cases.<sup>42</sup>

## V. THE FIRST HEARING IN THE CASE

The beginning of the transcript of the first of the two hearings in this case<sup>43</sup> certainly gives a sense that this tenant has been living in seriously bad housing conditions of the kind the rent escrow law is concerned with remedying:

Inspector: An inspection was conducted by Housing Code Enforcement Official, who found the property in violation of the Building, Fire and Related Codes of Baltimore City. The Property was inspected on 7th of February. There were six outstanding violations from notice 808082A: Dining room light fades in and out, dining room right wall, living room light fades in and out, front bedroom's outlet will not work, rat infestation in rear of yard, end of yard, and under steps, and basement entrance defective door. There were four outstanding violations from notice 808069A: Broken carbon monoxide detector, no smoke detector, rodent hole in living room, and rodent entry way in dining room

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41. Subsection (h) of the rent escrow law states "[t]he initial hearing must be held within fifteen (15) calendar days from the posting by the court of notification of the hearing as provided in paragraph (j) [which provides for the court to notify the landlord by certified mail, return receipt requested], *except that the court shall order an earlier hearing where emergency conditions are alleged to exist upon the premises such as, failure of heat in winter, lack of adequate sewage facilities or any other condition which constitutes an immediate threat to the health or safety of the inhabitants of the leased premises.*" See BALT. CITY, MD, PUB. LOC. L. § 9-9(h) (1969). (Emphasis added.)

42. Almost all of the cases we have seen so far had their initial hearings set for exactly fifteen calendar days from the filing of the rent escrow action. The one exception had a later hearing date for some reason.

43. Md. Dist. Ct. Tr. February 16, 2012, Case #010100001632012. In-court proceedings are recorded and made available on CDs that may be purchased from the court. This transcript was made from a CD recording by a student, Andrew Cryan. The transcript in its entirety is included here, although it has been edited to remove the names of those present.

floor. There were two outstanding violations, notice 804501A: Inoperable furnace and inoperable water heater. And there were five outstanding violations issued January 27, 2012, 80481A-1: Bedroom ceiling water damage, dining room ceiling damage, item not working on the stove, mold on front bedroom wall, and mold on rear bedroom wall.<sup>44</sup>

Landlord: Those areas that needed repair were not brought to my attention following inspector's review except for ceiling in front, rear bedroom, and ceilings. I will get in touch with the inspector following court.

Judge: Tell me about when the rent was due.

Landlord: She has not paid for the months of November, December, January, February. Each month was 850 dollars.

Judge: When was the last time you paid the rent?

Tenant: The 5th of November. There was a notice for [inaudible].<sup>45</sup> The landlord did call. I spoke with him yesterday. He indicated that the furnace and hot water heater had been repaired. He just fixed it on Valentine's Day.

Judge: Valentine's Day?

Tenant: Yes, 2/14.

Judge: Is that when you had heat for the first time?

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44. Since the case did not commence until February 1, it is not clear why one of the inspections occurred prior to that date. It is possible that the tenant requested the inspection before actually filing the papers in the case and then received an additional inspection upon filing, or the inspection may have been made in connection with a previous rent escrow case that was for some reason dismissed or in connection with a nonpayment case that was dismissed.

45. It appears, based on later testimony in the proceeding, the tenant here is referring to the 60-day notice sent by the landlord as a condition precedent to filing a summary ejectment proceeding for nonpayment of rent.

Tenant: Yes. That's when my kids came back. Best Valentine's Day gift I had.

Judge: What did you do for heat in the meantime?

Tenant: I had heaters. The, um, I bought the heaters, that was 50 dollars for four. Had the receipt. And, um, Mrs. White, she came and took pictures of 'em. And I was boiling. I had, um, put water in pots like my grandma say and put it on the stove and keep warm like that. But I don't mind paying him. I got 2500 dollars now, but I did spend some of the money 'cause my children did have to go back and forth to my mother's house to bathe and stuff. I see my kids after school but at night they have to go to my mother's house. Then, I don't see them until, like-. It was hard. He knew. He did. Because when I was-

Judge: Why won't you keep your head up when you're answering the question?

Tenant: Because I'm so hurt. I-

Judge: So let me ask you a question. When did you move in?

Tenant: November.

Judge: When you moved in was there no heat?

Tenant: Yes. The hot water just went out two months ago. But there wasn't no heat.

Judge: Can you just answer the questions?

Tenant: Yes. I'm sorry.

It might seem surprising that after the reading into the record of inspection reports enumerating quite a few serious housing code violations, and after hearing testimony from the tenant about a lack of heat and hot water, the judge immediately focuses on rent arrears. However, he might be doing that because the law calls for the tenant to deposit "the amount of rent called for under the lease" into escrow.<sup>46</sup>

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46. BALT. CITY, MD, PUB. LOC. L. § 9-9(d)(2) (1969).

Based on what we have seen in our research, the Baltimore court has interpreted this provision to mean that all rent arrears must be deposited by the tenant, prior to the landlord making the repair of the housing violations. Indeed, such a requirement is evidently a common feature of rent escrow actions in other jurisdictions. Such an approach has, however, been criticized as "effectively excus[ing] the landlord's breach of her or his covenant of repair unless the tenant continues to perform her or his covenant to pay rent."<sup>47</sup>

Alternatively, it is also possible that the legislature, which did not use language specifically calling for rent *arrears* to be deposited, actually intended the law to refer to a deposit of rent going forward. Such a reading would make sense, given that when the landlord sues a tenant for nonpayment, the tenant is *not* required to deposit into court the rent arrears claimed by the landlord. By requiring a deposit of arrears in this rent escrow action – without requiring the landlord to formally counterclaim and without an adjudication on the merits – the court puts more obstacles in the path of the tenant who makes an affirmative case than one who makes defensive case in a nonpayment proceeding. That is an odd approach to what is supposed to be a remedial law, and raises questions of due process.

Although the judge's focus on the arrears at the outset of this case may be justifiable under a particular reading of the rent escrow law, and is certainly customary, he does not actually develop a clear record on the issue. If the landlord's testimony is correct, the tenant did not pay rent for November, December, January, and February, and thus the arrears amount to \$3400. If the tenant did pay rent on November 5, as she states, then the arrears are actually \$2550. It might be expected that the judge would address this discrepancy through further development of the testimony, but that does not happen.

The judge does ascertain that the tenant had been without heat and hot water for a considerable period of time. And, as the transcript continues, he seems to be trying to determine whether the tenant is entitled to a rent abatement and/or damages, as would be a natural step toward determining what the "justice of the case" requires:

Judge:        So, when you moved in you didn't have any heat but you had hot water. Is that right?

Tenant:       Yes.

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47. Super, *supra* note 15, at 424.

Judge: And when did the hot water go out?

Tenant: January.

Judge: So, you went without hot water from January to Valentine's Day? Is that correct?

Tenant: Yes. And the man just fixed the stove yesterday, on the 15<sup>th</sup>. He came at 10 o'clock at night. I let him in 10 o'clock at night.

(About 10 seconds elapse as judge is heard shuffling through papers.)

Tenant: Can I say something, sir?

Judge: Just let me write something down first. Sir, can you tell me why this tenant should pay any rent when she didn't have any heat or hot water?

Landlord: She never informed me of any of this when she first moved in there. She called and told me that the house was cold. I said, "Is the furnace on?" She said, "I don't know if the furnace is on or off." So I sent a technician to check it and he told me that the gas to the furnace is off. So I had to call and arrange for somebody to come in there to figure out what—

Judge: When was it?

Landlord: That was the first week of November.

Judge: So why wasn't there any heat in the first week of November?

Landlord: She told me everything was fine when I called to ask her—

Judge: (Responding to tenant's loud sigh) I need you to be quiet, okay? This is a courtroom; you're not out on the street here, okay?

Landlord: She told me everything was fine. And after that, Your Honor, when I called her about four or five times about the rent issue, she has never made mention about any of those things. When she had been made aware of the fact that the eviction process had been initiated, that's when she called, she called the, um, court enforcement office to list all of these complaints today. But she had never made me aware of all this. Of course, I wouldn't let her sit in the house with her kids with no water and no heat. I would not do that. She never made me aware of all these things. And then I got a call on the 27<sup>th</sup> of January from court enforcement telling me that there was a problem with the house. And I was really surprised because I know, as a parent, I will not let my child stay in the cold, or without hot water. I could not have done that to her. She avoided telling me these things because she knew she never had my rent to pay. Because she knew that she was moving, she called and told court enforcement that there were issues with the house.

Judge: Are you moving?

Tenant: No.

Judge: Okay. Why did you wait until February 1<sup>st</sup> to file this with the court?

Tenant: No, I told him—

Judge: No, my question is, why did you file this on February 1<sup>st</sup>?

Tenant: No, I had—

Judge: Ma'am, the petition for this was filed February 1<sup>st</sup>. Why did you wait so long to file it with the court?

Tenant: Because he said he was going to fix, gonna have the man come out and fix the heat, and the man never did.

The tenant's failure to file the escrow action earlier evidently concerned the court, though the law itself provides no penalties for tenant



“delay.”<sup>48</sup> In fact, evidence indicates that knowledge of the rent escrow action is not widespread among all tenants,<sup>49</sup> and it may take some time for an aggrieved tenant to learn of its existence. Further, tenants who do know about it may not have heard good “word of mouth” and so may attempt to work with the landlord as long as possible before resorting to the court. And tenants may be concerned about their ability to find future housing if they turn to litigation, as landlords can screen out prospective tenants who have filed such proceedings in the past.<sup>50</sup> In any event, this tenant’s right to damages for breach of the lease is well within Maryland’s three-year statutory period for contracts,<sup>51</sup> and no reasonable defense of laches was raised or presented by the facts.<sup>52</sup>

The landlord brings up the theory that the tenant brought the rent escrow action only because he was in the process of initiating a summary ejectment proceeding against her for nonpayment of rent,<sup>53</sup> but that detail is legally irrelevant. If the summary ejectment had been filed first, the tenant still would have had the right to plead a defense of breach of warranty and counterclaim for damages and repairs.<sup>54</sup> It is even possible that the threatened summary ejectment caused the tenant to make the inquiries that led to her learning about the existence of the rent escrow action. The landlord also claims that the tenant is not paying her rent because she intends to move. The court may show particular concern about this allegation because termination of the lease is one of the forms of relief available under the rent escrow law.<sup>55</sup> But as the tenant insists that she has no such intention, it gets, and deserves, no further attention from the court.

The question looming over the exchange is whether the tenant should receive rent abatement and/or damages going back to the date the landlord received notice and continuing until all violations are corrected. Although she did not ask for such relief and apparently did not even

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48. BALT. CITY, MD, PUB. LOC. L. § 9-9(d)(1) (1969).

49. Bezdek, *supra* note 5, at 563.

50. Tenant screening services for landlords exist that answer the question “Did the prospective tenant have problems with their previous landlord(s)?” See, e.g., *Tenants Screening Services*, TENANTREPORTS.COM, <https://www.tenantreports.com/tenant-screening-services/> (last visited Feb. 21, 2015).

51. MD. CODE ANN. CTS. & JUD. PROC. § 5-101 (1974).

52. The court does not adduce facts showing that the tenant was negligent in asserting her rights. “[S]ince laches implies negligence in not asserting a right within a reasonable time after its discovery, a party must have had knowledge, or the means of knowledge, of the facts which created his cause of action in order for him to be guilty of laches.” *Parker v. Board of Election Supervisors*, 230 Md. 126, 131 (1962).

53. See MD. CODE ANN. REAL PROP. § 8-401 (1974).

54. See BALT. CITY, MD, PUB. LOC. L. § 9-14.2(b) and (d) (1969).

55. BALT. CITY, MD, PUB. LOC. L. § 9-9(f)(1) (1969).

know that the law provides for it, the court adduces facts that would seem to justify a substantial award. It is evident from the landlord's testimony, despite some equivocation on his part, that he had actual notice of the lack of heat three-and-a-half months before finally fixing the problem, and actual notice qualifies under the law as sufficient.<sup>56</sup> He acknowledged that the tenant had called him the "first week of November" and told him that she was cold. He also admitted that the technician he sent to check on the situation said that the gas to the furnace was off. It is also evident from the testimony that responsibility for providing heat was the landlord's, not the tenant's, and that the tenant had done nothing to cause the lack of heat. These are the elements that satisfy the legal requirements for an award to the tenant.<sup>57</sup>

The rent escrow law calls for the amount of such award to be based on what is "equitable to represent the existence of the condition or conditions."<sup>58</sup> In *Williams v. Housing Authority of Baltimore City* (2000), the Maryland Court of Appeals described it as involving the "difference between the amount of rent paid or owed and the reasonable rental value of the dwelling in its deteriorated condition."<sup>59</sup> In considering such a claim in the *Neal* case, the trial judge based his valuation of the property on his own real estate experience, of which he took "judicial notice."<sup>60</sup> In reviewing that case, the Maryland Court of Appeals cautioned that trial judges should not "take judicial notice of rental values and other matters within [their] own personal knowledge, but not notorious or readily verifiable."<sup>61</sup> Unfortunately, the Court of Appeals did not discuss what kind of evidence was needed to establish the reasonable rental value of such a property.

However, the tenant can testify as to what the property is worth to her in its deteriorated condition. And unlike the judge's own knowledge about rental values that the Court of Appeals rejected in *Neal*, such testimony is fully admissible evidence and constitutes an actual datum on rental value. Tenants cannot realistically be expected to hire real estate experts to come in and testify as to how much the particular conditions reduced the value of the property (assuming that could even be done with any precision), nor does it seem plausible to believe that the legislature intended them to do so. Most jurisdictions have in fact concluded that

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56. BALT. CITY, MD, PUB. LOC. L. § 9-14.1(b)(2)(c) (1969). See also BALT. CITY, MD, CODE PUB. LOC. L. § 9-9(d)(1) (1969).

57. See BALT. CITY, MD, CODE PUB. LOC. L. § 9-9(b), (d)(1), and (e) (1969).

58. MD. CODE ANN., REAL PROP. § 8-211(m)(3) (West 1975); BALT. CITY, MD, CODE PUB. LOC. L. § 9-9(f)(4) (1969).

59. *Williams v. Hous. Auth. of Baltimore City*, 361 Md. 143, 158 (2000).

60. *Neal v. Fisher*, 541 A.2d 1314 (1988).

61. *Id.*

expert testimony is not necessary in this situation.<sup>62</sup> Further, the local rent escrow law here places the burden on the landlord to "show cause why there should not be an abatement of the rent."<sup>63</sup> Accordingly, it appears that once the tenant has testified as to value of the housing to her, that should establish a *prima facie* case, and the ball is in the landlord's court to establish that a different amount is more appropriate. The judge can then use such evidence in determining what would be an "equitable" or "reasonable" amount for any award to the tenant. However, we have seen only one instance in our research in which a tenant was actually asked what she considered the value of the property in its deteriorated condition to be, or indeed that any kind of evidence at all was adduced on equitable or reasonable rental value. Rather, as was true in this case study, any amount awarded by the Baltimore court appears to be entirely arbitrary.

Here, the tenant gave no testimony on what she believed the rental value of her housing to be. Nonetheless, this would seem to be an easy case because local law specifically identifies housing without heat as unfit for human habitation.<sup>64</sup> Accordingly, it could be argued that the rent for the period that she had no heat should be \$0 as a matter of law. The judge implies as much in saying to the landlord, "Sir, can you tell me why this tenant should pay rent when she didn't have any heat or hot water?" Since none of the evidence developed by the court or proffered by the landlord would meet his burden of showing why there should not

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62. Few precedents directly address what form of proof must be offered by residential tenants for damages or rent abatement based on warranty of habitability claims against landlords. However, case law generally rejects the idea that expert witness testimony is necessary. See *Wade v. Jobe*, 818 P.2d 1006, 1012-13 (Utah 1991) ("methodological difficulties" make it difficult to determine fair market value, but court may use discretion to award rent abatement based on diminution of value to tenant); *McKenna v. Begin*, 5 Mass. App. 304, 311 (1977) (citation omitted) ("[u]seful expert testimony is unlikely to be readily available as to the 'worth' of the defects..., and even if it were available, the imposition upon indigent tenants of the financial burden of supplying expert witnesses would seriously diminish the effectiveness of the relief..."); *Birkenhead v. Coombs*, 143 Vt. 167, 173-74 (1983); *Park W. Mgmt. Corp. v. Mitchell*, 47 N.Y.2d 316, 329-30 (1979) (citations omitted) ("That damages are not susceptible to precise determination does not insulate the landlord from liability...Since both sides will ordinarily be intimately familiar with the conditions of the premises both before and after the breach, they are competent to give their opinion as to the diminution in value occasioned by the breach"). It should be noted that the New York case relied upon a statutory provision that specifically provided that expert testimony was not required. *Mitchell*, 47 N.Y.2d at 330.

63. BALT. CITY, MD, CODE PUB. LOC. L. § 9-9(f)(4) (1969).

64. See BALT. CITY, MD, CODE PUB. LOC. L. § 9-14.1(b)(3) (1969).

be a rent abatement,<sup>65</sup> and enough facts were adduced on the record to justify a complete refund of the rent from November through mid-February, the outcome that justice requires would appear to be an award to the tenant of nearly \$3000 for that period.<sup>66</sup>

Yet the transcript continues to the conclusion of the hearing without such a result:

Judge: How much money do you have with you today?

Tenant: 2500 dollars.

(There is a roughly 30-second pause as judge shuffles through papers.)

Judge: The rent is due on when?

Landlord: The 5th of the month.

Judge: The 5th is fine? As of today's date, the 16th of February, you are to pay the court the sum of 2500 dollars for the amount of November to February rent. That's the amount found by the court to be the amount of rent due as of today's date. That is after a payment of 900 dollars for a total of 3400 dollars. You can pay 850 dollars a month beginning on the 5th of March.

If you want to, if you're confident everything's been done, you can get in touch with the inspector. And after the inspection, bring that back to court. Now, your responsibility is to complete the repairs, get in touch with the inspector, have the inspector sign off on the repairs.

Ma'am, your responsibility is to pay to the court the amount of 2500 dollars today and to allow the workmen in to do the rest of the repairs. Also, when you're notified of the inspection, you need to be there for the

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65. BALT. CITY, MD, CODE PUB. LOC. L. § 9-9(f)(4) (1969) (provides that "the burden shall be upon the landlord to show cause why there should not be an abatement of the rent").

66. Three-and-a-half months' rent at \$850 per month abated to \$0 per month would amount to \$2975  $[(850 \times 3) + (1/2 \text{ of } 850) = 2975]$ .

inspection.

Tenant: Yes, sir.

The hearing thus ends. The judge told the landlord that it is “your responsibility to complete the repairs,” but did not order him to do so.<sup>67</sup> The judge did establish a rent escrow account for the tenant to pay into, and determined that the total amount of money that had been brought by the tenant on that day to court should be deposited. He also required her to pay into the account her rent in full for the following month, although serious conditions, including leaks and mold, rodent infestation, inadequate electricity, and lack of smoke and carbon monoxide detectors remained uncorrected in her housing, and although the local law allows for a reduction in the rent paid into escrow to reflect the conditions.<sup>68</sup>

## VI. THE COURT’S ORDER

It can be seen from the order issued by the court establishing the rent escrow account after this hearing [see Figure 2] that the judge simply accepted the landlord’s testimony about the amount of the rent in arrears. The judge wrote that rent was owed for the months of November, December, January, and February, apparently discounting the tenant’s testimony that she had already paid rent for November. The tenant was not given the opportunity to demonstrate whether her testimony was correct (such as by showing a receipt), nor did the judge inquire more closely of the landlord to verify that his contrary testimony was supported by evidence (such as by showing a balance sheet for the property).<sup>69</sup> There is nothing in the record to suggest that the judge had reason to believe that the tenant was less credible than the landlord. It seems most likely that the judge simply assumed that the landlord was right.

The court’s order also indicates that the tenant was being given a rent abatement of \$900. Of course, if the tenant did pay rent for the month of November, then the actual amount of this abatement would be only \$50. Because the judge did not explain his decision very clearly in court, the tenant could have thought, when told to deposit the \$2500 she had

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67. The law authorizes the court to order repairs. See BALT. CITY, MD, CODE PUB. LOC. L. § 9-9(f)(8) (1969).

68. BALT. CITY, MD, CODE PUB. LOC. L. § 9-9(d)(2) (1969).

69. Bezdek, *supra* note 5 at 570 (“As practiced in Baltimore’s rent court, a person appearing at the landlord’s table is virtually never asked to prove any element of his case, including the amount of rent allegedly unpaid, a lease basis for other claimed charges, authority to collect rent, or title”).

brought with her, that she was simply being asked to pay into escrow the rent for December, January, and February, less the \$50 that she had testified was spent on space heaters. Thus, the tenant may not have had sufficient knowledge and understanding of what was happening to even protest that she had already paid November's rent (or to argue that the abatement in any event was unreasonably small). It is not clear, however, whether the judge intended the abatement specified in the order to be the entire amount due to the tenant for the three-and-a-half months she spent without heat or intended that a further amount would be determined at the next hearing based on further evidence to be adduced pertaining to the other conditions.<sup>70</sup>

#### VII. THE SECOND AND FINAL HEARING IN THE CASE

On the next court date, which took place nearly two months later,<sup>71</sup> a different judge presided over the case. At that point, the tenant had paid an additional month's rent into the escrow account as directed, and the repairs had apparently all been completed by the landlord and a reinspection had occurred. The proceedings on this second date are very brief:

Judge: Okay, so we're here for a reinspection?

Inspector: Yes, there was a reinspection on March 21<sup>st</sup>. All violations have made it.

Tenant: Yes.

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70. *Cf.* Balt. City Pub. Loc. L. § 9-9(d)(2) (providing for "[p]ayment by the tenant into court of the amount of rent called for under the lease at the time of any assertion of rent escrow, unless ... such amount is modified by subsequent order of the court under subsection (f)(4), below."). *Cf.* Balt. City Pub. Loc. L. § 9-9(f)(4) (permitting the court to provide relief including "[o]rdering that the amount of rent, whether paid into the escrow account or paid to the landlord, be abated as determined by the court in such an amount as may be equitable to represent the existence of the condition or conditions found by the court to exist."). *See Id.* (indicating that if amount of the abatement indicated in the judge's order is intended to fall under subsection (f)(4), then it would seem to be the full amount based on the determination of the conditions found by the court to exist). *Id.* at §9-9(f)(2) (allowing for the disbursement of the escrow account in whole or in part to the tenant at the conclusion of the case). *See Williams v. Hous. Auth. of Baltimore City*, 361 Md. 143, 148 (2000) (appearing to be more common in Baltimore court for any abatement or an additional abatement to be determined at the time of the disbursement of the escrow, as in the *Williams* case, where the District Court judge reduced the rent paid into the escrow but postponed the decision on any further abatement to such time as the escrow would be disbursed).

71. *See infra* Figure 4 (hearing took place April 9, 2012).

Judge: And is there money? Let's see. Is there money in the escrow?

Tenant: Yes.

Judge: Okay. So it looks like there's 3350 dollars. And that's for rent for November of 2011, it appears, through March of 2012. Okay. Well the question is, who gets the money now?

Tenant: He can get it, he did his work.

Judge: Well, you're making my life easier by telling me that. Okay, if you want to give him the money, we'll give him the money. So I forget what the amount was. It was 3350 dollars, paid to the landlord at the suggestion of, the suggestion of the tenant. Okay, thank you very much.

Tenant: Thank you.

After this hearing, the judge ordered the entire amount in the escrow account disbursed to the landlord [see Figure 3]. This judge was privy to the information that the tenant had "no heat from Nov. move in to 2/14/12" and "no hot water from Jan. to 2/14/12," because that information was explicitly stated on the "case action" form that he initialed and stamped [see Figure 4]. He even provided the tenant with an opportunity to ask for an award when he said, "Well the question is, who gets the money now?" But the tenant did not take the hint. Her response suggested that she believed that because the landlord had completed the repairs, he was entitled to all of the money in the escrow account. The judge's reaction ("you're making my life easier by telling me that") implied that he was relieved at avoiding a hearing on the award of any amount to the tenant.

The judge must have realized that the tenant was likely ignorant of her right to the relief, as people do not ordinarily forego thousands of dollars to which they are legally entitled.<sup>72</sup> Perhaps for that reason, he felt the need to "blame" her for his award of the full amount of the escrow to the landlord – "Okay, if you want me to give him the money,

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72. See *supra* note 66 (calculating the rent abatement for the period from November through mid-February). See *infra* Figure 1 (housing code violations that were not corrected until mid-March, which should have led to an additional abatement amount).

we'll give him the money ... 3350 dollars, paid to the landlord at ... the suggestion of the tenant" – rhetorically saddling her with the decision, although it is his responsibility under the law to do "substantial justice" in the case.

### VIII. THE PROBLEMS IDENTIFIED

The experience of this tenant suggests that a number of obstacles impeded her access to justice. First, she did not have a good understanding of her legal rights, and she evidently did not and probably could not get assistance with her case from someone who did. Certainly, the legalistic language and format of the petition the tenant was provided with by the court was not very accessible to her as a lay person. Although mistakes and omissions in the pleadings do not in theory prejudice her case, the form petition also did not help her understand the legal process she was initiating, and thus she was less able to assert and protect her legal rights and more dependent on the judges in the case to have them vindicated.

Further, despite what the law says, the tenant's heat complaint was not given an expedited hearing. Among the cases we have seen, heat complaints do not receive any faster attention than less serious housing problems, which lengthens the period that some tenants, and their families, must live in conditions that are particularly stressful, hazardous, and unhealthful.<sup>73</sup>

In addition, courts are also apparently very reluctant to issue orders to landlords to correct the housing violations. The particularly egregious complaints about lack of heat and hot water in this case were corrected by the landlord after the inspection and before the first hearing, but a number of serious housing code violations still remained and the court did not order the landlord to correct those. In the 50 rent escrow cases we have examined so far, we have seen no orders to correct issued by the court to the landlord. This result is consistent with the findings of Barbara Bezdek's research of two decades ago, which also documented that the court seldom if ever ordered the landlord to make repairs.<sup>74</sup> Judges do tell landlords, as in this case, that it is their "responsibility" to make them. But not putting this directive in the form of a judicial order means that any failure to correct does not and cannot lead to a contempt of court determination, which decreases the leverage that can be applied

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73. See BALT. CITY, MD, CODE PUB. LOC. L. § 9-14.1(b)(3) (1969) (providing the definition for "Fit for human habitation.").

74. Bezdek, *supra* note 5, at 554 ("Not a single order to the landlord to repair was observed in the sample.").



to the landlord to ensure that repairs made. Indeed, as in this case, months can go by before repairs are completed, even with rent being paid into escrow. Without the leverage of an order to correct, the tenant also does not have a ready basis to bring the case back to court for further action. Rather, the landlord generally determines when the case is returned, by motion after he contacts the housing inspector for reinspection to confirm that the violations have been corrected.

This case study presents the best set of facts and the most developed evidence we have seen so far for a substantial monetary award to the tenant, but she still did not receive one. Bezdek's research indicated that awards are seldom given to tenants,<sup>75</sup> and we have seen few in our studies as well, and invariably for small amounts. This case study, and the others we have done, indicate that tenants' lack of success in getting monetary relief does not stem from weaknesses in their cases. Rather, the problem seems to be that the judges are not awarding such relief even where the facts, as here, establish the legal entitlement to one.

However, it is also true that the facts on rent abatement are not being well-developed or well-documented by the judges in these cases. The rent escrow law specifically calls for the court to make "findings of fact,"<sup>76</sup> and the court has a form specifically intended for the use of the judges to use to make such findings. In the 50 cases we have looked at, this form was not used in a single one of them. Instead, judges tend to make all notations on the "case action" section on a form headed "rent escrow disposition" [Figure 4]. The notations that the judges place on this form are, as here, shorthand and incomplete and cannot be said to amount to findings of fact. In this case, the first judge did not make any notations about the notice to the landlord, although the record of the proceedings clearly established that such notice was given and received in early November with regard to the lack of heat. When the case passed to a second judge, that judge could not have given any kind of relief based on the "findings" of the first judge and would have had to adduce the evidence a second time.<sup>77</sup> Of course, the second judge did not make an effort to elicit any facts at all. In short, the relevant facts are not all being adduced by the court, and even when relevant facts are adduced, they are not documented as required by the law.

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75. *Id.* ("Abatement of rent to reflect housing violations was ordered in just 1.75% of all cases in the Observation Study.").

76. BALT. CITY, MD, CODE PUB. LOC. L. § 9-9(f) (1969).

77. *See Williams v. Hous. Auth. of Baltimore City*, 361 Md. 143, 149-50 (2000) (hearing by more than one judge with the first judge assuming that the court had jurisdiction to hear both the tenant's rent escrow and warranty of habitability claims and the second judge concluding that it did not).

This case study suggests that the current process is not likely to lead to an outcome that is in keeping with either the letter or the spirit of the law. It is difficult to see how the landlord in this case—who rented the tenant and her family housing that lacked heat and hot water in winter, was infested with rodents, had electrical problems, leaks, and mold, and was missing fire and carbon monoxide detectors—could be seen as anything other than one of those persons intended by the rent escrow law to be the object of “meaningful sanctions.”<sup>78</sup> Instead, the court declined to order the landlord to correct the conditions and helped him collect nearly all of the substantial rent he charged the tenant under the lease. He did eventually fix the housing code violations but only after the winter was nearly over, thereby saving the cost of paying for heat during the most expensive part of the year. He was thus probably better off financially than he would have been if he had provided decent housing for this tenant and her family from the start. The law, as thus enforced, provides little reason for the landlords to keep housing in good condition or to complete repairs expeditiously.

#### IX. PROPOSED IMPROVEMENTS

David A. Super has suggested that a number of different factors combine to create the context that works against the enforcement of the warranty of habitability, including the “capture” of the courts by landlords, insufficient judicial resources to fully adjudicate claims, and moralistic attitudes on the part of judges and clerks, all occurring within a marketplace with its own countervailing realities and an environment in which the government has essentially abdicated responsibility for maintaining housing quality by transferring that responsibility to tenants.<sup>79</sup> Other factors identified by legal scholars may also play a role in undermining enforcement of the warranty of habitability, including overconcern on the part of judges with maintaining an appearance of neutrality<sup>80</sup> and a shortage of free and affordable lawyers to effectively

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78. BALT. CITY, MD, CODE PUB. LOC. L. § 9-9(a)(4) (1969).

79. See Super, *supra* note 15.

80. See, e.g., Richard Zorza, *The Disconnect between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality when Parties Appear Pro Se: Causes, Solutions, Recommendations, and Implications*, 17 GEO. J. LEGAL ETHICS 423 (2004); Russell Engler, *Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role*, 22 NOTRE DAME J. L., ETHICS & PUB. POL’Y 367 (2008); Paris R. Baldacci, *Symposium: The New York City Housing Court in the 21st Century: Can It Better Address the Problems Before It?: Assuring Access to Justice: The Role of the Judge in Assisting Pro Se Litigants in Litigating their Cases in New York City’s Housing Court*, 3 CARDOZO PUB. L. POL’Y & ETHICS J. 659 (2006).

prosecute tenants' warranty of habitability claims.<sup>81</sup> In other words, the problem is multifarious and any proposed solutions will have to take into account the roles of these many factors.

Despite considerable attention from legal scholars, it is not clear, however, that overconcern with appearing impartial significantly affects enforcement of tenants' legal rights. There is nothing in Maryland's Code of Judicial Conduct, for example, that would have prohibited the judges in this case from making "reasonable accommodations" for both unrepresented litigants, as long as it did not lead to an "unfair advantage" to either of them.<sup>82</sup> It is true that the first judge in this case study did seem particularly determined at the conclusion of the hearing to convey an impression of evenhandedness. He told the landlord that it was his responsibility to complete the repairs in the same vein as he told the tenant that her responsibility was to pay the rent into the escrow account and to allow access for the repairs to be made. But to treat the tenant and landlord the same at that point is to undermine enforcement of the law, as it has been revealed that the landlord has been in serious violation of it, while the tenant has suffered considerable harm as a result and has not done anything that the law does not permit.

Legal scholars often point to biases on the part of the judges as another factor in low rates of tenant success. Super in part blames "attitudes of the trial judges ... [that] genuinely may not result from any organized, conscious decision making"<sup>83</sup> and suggests that their behavior may reflect an underlying belief that poor litigants are less morally worthy than others.<sup>84</sup> In addition, Bezdek accuses judges of effectively "silencing" unrepresented tenants in the courtroom.<sup>85</sup> This case study supports these criticisms. The first judge simply assumed that the

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81. See, e.g., Raymond H. Brescia, *Sheltering Counsel: Towards a Right to a Lawyer in Evictions Proceedings*, 25 *TOURO L. REV.* 187, 204-06 (2009).

82. See MARYLAND CODE OF JUDICIAL CONDUCT RULE 2.2. IMPARTIALITY AND FAIRNESS cmt. 4 (2010), available at <http://www.courts.state.md.us/rules/reports/codeofjudicialconduct2010.pdf> ("[i]t is not a violation of this Rule for a judge to make reasonable accommodations to ensure self-represented litigants the opportunity to have their matters fairly heard"); See also MARYLAND CODE OF JUDICIAL CONDUCT RULE 2.6. ENSURING THE RIGHT TO BE HEARD cmt. 2 (2010), available at <http://www.courts.state.md.us/rules/reports/codeofjudicialconduct2010.pdf> ("[i]ncreasingly, judges have before them self-represented litigants whose lack of knowledge about the law and about judicial procedures and requirements may inhibit their ability to be heard effectively. A judge's obligation under Rule 2.2 to remain fair and impartial does not preclude the judge from making reasonable accommodations to protect a self-represented litigant's right to be heard, so long as those accommodations do not give the self-represented litigant an unfair advantage. This Rule does not require a judge to make any particular accommodation).

83. Super, *supra* note 15, at 440.

84. *Id.* at 395-96, 459-60.

85. Bezdek, *supra* note 5, at 536.

landlord rather than the tenant was correct about the amount of rent in arrears, suggesting a predisposition toward accepting the claims of the landlord rather than basing a decision on the evidence. In addition, several times during the short hearing, the judge rebuked the tenant for seemingly minor misdeeds: for not holding her head up when answering his questions, for giving answers that went beyond the bounds of the question asked, for sighing loudly in court as if she were "out on the street" (though sighing loudly hardly seems like a vice of "the street"), and for not filing the proceeding earlier. Moreover, the judge interrupted her several times and even declined to allow her to speak when she requested, while he tolerated a long, self-serving monologue from the landlord.

The judge's impatience with the tenant occurred even though she did more than the landlord to demonstrate politeness to the court. For example, the record shows this tenant twice addressing the judge as "sir," apologizing after being rebuked for not holding her head up, and thanking the judge at the conclusion of the case. The landlord gives no thanks and offers no apologies. (However, the fact that he is a repeat player is suggested by the fact that he knows to address the judge as "Your Honor.") Other cases we have looked at are similar, with judges seeming more dismissive and less trusting of tenants than of landlords. Such an attitude would be more understandable if we saw many examples of tenants with unfounded claims or disrespectful attitudes. Yet only two cases out of the 50 randomly-selected cases we have studied so far were apparently brought in bad faith or lacked clear justification, and the tenants in the cases displayed general politeness toward the court, even when the courtesy was not returned.

Nonetheless, the behavior of the judges in this case was also somewhat ambivalent. The first judge was evidently appalled at the fact that the tenant had no heat and hot water, and suggested that she should not have to pay any rent under such conditions. The second judge evidently recognized that the tenant suffered serious deficiencies in her housing and even gave her a hint about asking for an award of the escrow. It is difficult to draw conclusions based on appearances, but these judges may favor the landlord's case as the path of least resistance, rather than out of greater allegiance to his cause. Further, while it is tempting to cast judges as the villains, this may be a situation in which the system shapes their attitudes rather than their attitudes shaping the system. Data indicate that tenants with warranty of habitability claims fare poorly in many jurisdictions, increasing the likelihood that the problem is structural.

Indeed, one of the pressures on such courts that has been stressed by commentators is the large number of cases on their dockets each day, which could help explain judges' limited attention to potentially time-consuming claims.<sup>86</sup> However, time also appears to be a complex factor in these cases. In *Williams*, the argument was made to the Court of Appeals that tenant claims for damages for breach of the warranty of habitability should not be joined with rent escrow actions because the court would not have time to hear evidence on damages.<sup>87</sup> The Court of Appeals was unpersuaded, noting that the trial court already had to develop most of the same evidence in order to rule in the escrow case itself, so finding the facts on damages would take little additional time.<sup>88</sup> Of course, the Court of Appeals assumed that trial judges are actually finding the relevant facts in rent escrow cases, while this case study and others we have done indicate that they are not.

Nonetheless, the Court of Appeals does appear to be right that shortage of time does not directly explain the court's performance. The judge in the first hearing in this case study did not seem rushed, and even took time to pursue seemingly tangential matters such as why the tenant did not file the case sooner. The second judge, though eager to get things over with, nonetheless himself offered, however obliquely, to consider a monetary claim. Our other case studies do not suggest any greater hurry than was seen in this case. Indeed, the Court of Appeals in *Williams* pointed out that because the vast majority of cases on the court's docket are uncontested, judges actually have to hold hearings in only a few of them, suggesting that insufficient time does not explain shortcomings in the adjudication of cases that actually go before the court.<sup>89</sup>

However, that is not to say that time pressure does not play a substantial role in shaping how the court operates, even if there might appear to be adequate time to enforce the law in any given case. The large dockets burdening courts of this kind depend on the assumption that only a handful of cases will get significant judicial attention. If judges started granting large rent abatements to tenants, and word got

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86. See, e.g., Super, *supra* note 15, at 434-35.

87. *Williams v. Hous. Auth. of Baltimore City*, 361 Md. 143, 159 (2000) (the respondent-appellee "expresse[d] concern that the trial of warranty of habitability claims together with rent escrow actions would hamper the court's efficiency in handling the landlord-tenant dockets").

88. *Id.* at 159-60 ("Except for the period of time involved – the rent escrow case focusing on the current situation and the breach of warranty action looking backward for some period – the evidence necessary to establish a rent escrow claim will usually be the same evidence necessary to establish the warranty claim").

89. *Id.* at 159 (The Court of Appeals pointed out that only a "few of the cases" on the docket require "an actual adjudication of disputed facts or law").

around, it would encourage more tenants to insist on going before the judge and to use up valuable court time pleading their cases. This reality is likely to temper judges' enthusiasm for enforcing the law, and to be conducive to procedures and mores that keep the potential flood at bay.<sup>90</sup>

Many in the scholarly community suggest as a solution to the problems experienced by this tenant and others like her the provision of more free lawyers to handle their cases.<sup>91</sup> Yet adding more lawyers would have complicated effects. Tenants in rent escrow cases who had lawyers would presumably be able to seize the lion's share of the court's scarce resources, reducing the access to justice of those who remained unrepresented. And if enough lawyers were added to truly have an impact on the extent to which tenants' rights are prosecuted, then there would also need to be more judges to adjudicate the increased number of heavily-litigated cases. Any effort to provide counsel for all or even a large number of such unrepresented litigants is unlikely to succeed, because courts and legislatures are aware of the considerable expense involved, not only of paying for more lawyers but also for more judges.

Indeed, the provision of more free lawyers is an idea that is losing ground. The ratio of free lawyers to low-income litigants has declined over time,<sup>92</sup> and the U.S. Supreme Court recently shot down the latest effort to constitutionalize a right to counsel in civil cases.<sup>93</sup> State-level efforts to mandate more lawyers have similarly faltered.<sup>94</sup> It is quite

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90. See Super, *supra* note 15, at 415-17 (for a particularly thoughtful account of how different factors help shape courts' resistance to adequate enforcement of the warranty of habitability).

91. See, e.g., Andrew Scherer, *Why People Losing Their Homes in Legal Proceedings Must Have a Right to Counsel*, CARDOZO PUB. L., POLICY, & ETHICS J. 699 (2006); See also Brescia, *supra* note 81; see also Michael Millemann, *Mandatory Pro Bono in Civil Cases: A Partial Answer to the Right Question*, 49 MD. L. REV. 18 (1990) (recommending that the Court of Appeals issue a rule requiring private attorneys to represent the poor).

92. Compare Legal Services Corp., *Funding History*, LSC.GOV (Sept. 2013), <http://www.lsc.gov/congress/funding/funding-history> (In constant 2013 dollars, funding for the Legal Services Corporation has declined from a high of \$848 million in 1980 to \$340 million in 2013, the lowest level of funding in its history), with Terry Carter, *IOLTA programs find new funding to support legal services*, ABA JOURNAL (Mar. 1, 2013), [http://www.abajournal.com/magazine/article/iolta\\_programs\\_find\\_new\\_funding\\_to\\_support\\_legal\\_services/](http://www.abajournal.com/magazine/article/iolta_programs_find_new_funding_to_support_legal_services/) (funding provided by interest on lawyers' trust accounts (IOLTA), which has been used to fund lawyers for the poor, has also drastically declined, from \$371 million in 2007 to \$93.2 million in 2011). See also I. Glenn Cohen, *Rationing Legal Services*, 5 J. OF LEGAL ANALYSIS 221, 221-22 (2013) (describing cuts to Legal Services Corporation funding as well as reductions in other sources of funding for legal services to the poor).

93. *Turner v. Rogers*, 131 S. Ct. 2507 (2011).

94. See, e.g., *King v. King*, 174 P.3d 659 (Wash. 2007); see also *Frase v. Barnhart*, 840 A.2d 114 (Md. 2003); *Order in the Matter of the Petition to Establish a Right to*

possible in any event that there will never be enough free lawyers for low-income persons to all receive the legal assistance they need.<sup>95</sup> That plausible conclusion has led some to call for revision of the laws against UPL to allow non-lawyers to help meet the need, as a more cost-effective approach.<sup>96</sup>

For example, the UPL restrictions in Maryland law could be amended to permit tenants the same opportunity for non-lawyer representation and assistance that is available to landlords in rent escrow cases. Ordinarily, the organized bar fights against even minor incursions on their legal monopoly, perhaps out of a fear of a slippery slope leading to the elimination of all UPL restrictions. But the distinction made by the Maryland statute between landlords and tenants does not suggest an organized bar protecting its turf. Landlords more than tenants would be the likely consumers of paid lawyer services in this situation, and yet landlords are the ones entitled under the law to resort to non-lawyer assistance if they so desire. Indeed, it is not just the organized bar that resists the relaxation of UPL restrictions but also some advocates for

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Counsel in Civil Cases, 2012 WI 14 (2012), *available at* <http://www.wicourts.gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=78599> (Order of Supreme Court of Wisconsin, dated Feb. 24, 2012 denying petition to establish right to counsel in civil cases).

95. Professor Laurence Tribe of Harvard Law School pointed out to the attendees at the 2010 American Bar Association Pro Bono Publico Awards Luncheon that “even if all the lawyers in this room rededicated themselves to pro bono work, and we increased funding for civil legal services five-fold, we still wouldn’t have enough lawyers to meet all the needs of the poor and working class.” Speech, Laurence Tribe, American Bar Association Pro Bono Publico Awards Luncheon (August 9, 2010), <http://www.justice.gov/atj/opa/pr/speeches/2010/atj-speech-100809.html>. *See also* Greiner & Pattanayak, *supra* note 5, at 2209 (“Despite the best and continuing efforts of the civil Gideon and access to justice movements, and the need for greater funding for legal services provision, it may be time to face the fact that there will never be enough funding to provide a full attorney-client relationship with a competent lawyer to all low-income persons interacting with, or contemplating interaction with, the legal system.”).

96. *See, e.g.,* Sandefur, *supra* note 5, at 83 (recommending “a nationally present, nonlawyer advice sector that centers its work around substantive problems that people commonly confront...[T]hese advisors should be empowered to give legal advice.”); DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* 135-36 (2000) (footnote omitted) (“virtually no experts believe that current prohibitions [on nonlawyer assistance] make sense” and “[c]omparative research finds that...lay specialists can perform as effectively as attorneys”); Gillian Hadfield, *Making Legal Aid More Accessible and Affordable*, *THE WASHINGTON POST*, Mar. 12, 2010, at A17 (“[t]he United States urgently needs to expand capacity for non-lawyers to meet the legal needs of ordinary Americans in innovative and less costly ways.”); David C. Vladeck, *Hard Choices: Thoughts for New Lawyers*, 10 KAN. J.L. & PUB. POL’Y 351, 356 (Spring 2001) (footnotes omitted) (“...study after study has shown that trained lay advocates can effectively represent people in standardized legal proceedings – and even in complex ones when they are specially trained”).

low-income persons, who worry that the quality of assistance provided by non-lawyers will be unacceptably low or that allowing for non-lawyer assistance would itself be a slippery slope toward depriving low-income persons of any free lawyers at all.<sup>97</sup>

However, evidence does not support the conclusion that low-income persons would be worse off if they were assisted by non-lawyers in legal matters of this kind than if they received no assistance whatsoever. Bezdek, in fact, documented that tenants who got help from nonlawyers tended to do better in court than those who did not,<sup>98</sup> and many other studies have confirmed that nonlawyers can competently assist litigants in some types of cases.<sup>99</sup> The laws against UPL cannot in any event prevent unrepresented litigants from receiving aid from nonlawyers; rather, they only ensure that they will receive it from those least knowledgeable about the law. In addition, we are already on the slippery slope of rationing legal services to the poor<sup>100</sup>; UPL restrictions have not prevented that from happening. While it is possible that opening the door to non-lawyer legal assistance would lead to even more disinvestment in the public spending on such services, that is a hypothesis, while the harm resulting to low-income persons with legal problems who get no help is real and has endured for decades.

Small, incremental changes allowing for non-lawyer representation could be made, on a scale that could be easily turned back if the cure proved worse than the disease. For example, the Maryland legislature could amend its law to allow the provision of only *free* non-lawyer assistance to tenants in rent escrow cases, making it most likely that such assistance would come from non-lawyers at nonprofits where the motive

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97. See Robert Rubinson, *A Theory of Access to Justice*, 29 J. LEGAL PROF. 89, 142 (2004/2005) (describing even "incremental reforms" that allow greater use of paraprofessionals for less complicated legal matters as presenting "extraordinary dangers" and the potential to become "yet more ways to stack the deck against indigent disputants").

98. Bezdek, *supra* note 5, at 563.

99. *Id.*

100. See, e.g., Greiner & Pattanayak, *supra* note 5, at 2210 (recommending "triage" of legal services to focus on the cases that benefit the most from lawyer assistance); Michael Millemann, Nathalie Gilfrich & Richard Granat, *Rethinking the Full-Service Legal Representational Model: A Maryland Experiment*, 30 CLEARINGHOUSE REV. 1178 (1997) (recommending a "continuum" of services from lawyers, including the use of law students, to provide services from information only to full representation); Engler, *supra* note 15, at 42 (describing "hotlines, technological assistance, clinics, pro se clerks offices, 'lawyer-of-the-day' programs, and self-help centers, developed to provide assistance to litigants who otherwise would receive no help at all") (citations omitted); Mary Helen McNeal, *Having One Oar or Being Without a Boat: Reflections on the Fordham Recommendations on Limited Legal Assistance*, 67 FORDHAM L. REV. 2617 (1999) (examining "limited legal assistance" models).



would be to protect tenants' legal rights.<sup>101</sup> Such a change would result in something approaching parity between landlords and tenants in the capacity to obtain assistance and representation, and seems more likely to bring relief to tenants than the long-unrealized panaceas of increased funding for free lawyers, civil *Gideon*, or mandatory pro bono.

This case study suggests that the rent escrow action is basic enough that a small amount of training would enable non-lawyers to provide meaningful support to unrepresented tenants. As a summary proceeding meant to be accessible to the unrepresented, the rent escrow action is fairly simple—even if it is too difficult for most low-income tenants to navigate on their own. There is not a lot of relevant law for the non-lawyer to assimilate, mainly the local rent escrow law and two important case precedents, and most of the obstacles tenants experience seem to consist of knowing what they are entitled to under the law, actually asserting those claims, and getting the relevant facts on the record. In other jurisdictions, analogous proceedings might be similarly susceptible to non-lawyer assistance, although that could be determined more reliably by case studies in the jurisdictions in question.

Yet the problem of more heavily-litigated cases, whether handled by lawyers or such trained non-lawyers, is that the court still has very scarce judicial resources at its disposal. A possible lower-cost solution to that problem is for the court to employ parajudicial officers to do the work of developing and establishing the facts of these cases. Super has suggested that courts addressing warranty of habitability issues would have benefitted from adopting the kinds of parajudicial staff used in child support and criminal cases.<sup>102</sup> Such parajudicial officers would allow for the relevant facts to be developed and the litigants to truly receive

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101. It might not be enough to change the law in this respect, as Maryland once had a statute that seemingly exempted free legal assistance from UPL restrictions. However, the Maryland Court of Special Appeals interpreted this statute as still prohibiting such assistance. As quoted in *Ginn v. Farley*, 403 A.2d 858, 860 n. 6 (1979), the former version of the law, MD. ANN. CODE art. 10, § 1, stated that a person “may not practice the profession or perform the services of an attorney-at-law within this State without being admitted to the bar as hereinafter directed” and defined as an attorney “any person who shall give legal advice [or] represent any person in the trial of any case at law or in equity . . . for pay or reward” (emphasis added). In *Ginn*, a non-lawyer who assisted a group of persons with a zoning board appeal without charge was nonetheless found by the court to be engaging in UPL. The court did not explain how exactly she violated the statute but reasoned that “[i]f the lack of payment or reward is the determining factor, then she could, based on her reasoning, perform brain surgery without compensation and successfully contend that she was not practicing medicine.” *Id.* at 861. In addition, current statutory permissions involving representation in administrative proceedings are nonetheless interpreted by the Maryland Attorney General’s Office as forbidding non-lawyer representation. See also Cotton, *supra* note 25, at 209-13.

102. Super, *supra* note 15, at 451.

individualized determinations on the merits. The obstacle to such a measure is, of course, the cost. But as compared to providing more attorneys and more judges, the cost of allowing nonprofits to provide trained non-lawyer assistance and the adding parajudicial officers to the court system is considerably less expensive.

Even if these measures are not feasible because of the cost, there are still some cost-free or low-cost reforms that could improve the situation. For example, the form petitions provided by the court to unrepresented litigants could be made more understandable to the lay person. Under the law in Maryland, the District Court administrative judge prepares the forms used in rent escrow proceedings.<sup>103</sup> Since the rules do not require that forms be in technical language,<sup>104</sup> the administrative judge could put them into language that did more to apprise tenants of their rights. It is likely that forms in legalese are a problem in many jurisdictions. Better forms could provide a big bang for the buck, as they contain the text about the law that is most likely to be read by unrepresented litigants.

However, it should be acknowledged that the reason the forms are not user-friendly is probably to make it more difficult for tenants to bring their cases—again, providing a means of managing the docket. Evidence suggests that the petitions in Baltimore had at one time been more accessible before being put in their present obscurantist language.<sup>105</sup> In Detroit, when the court experimented with “plain English” forms, it did lead to more tenants claiming their legal rights,<sup>106</sup> and the court subsequently put the forms back into legalese.<sup>107</sup> It may thus be difficult to get simple improvement in the forms because of the anticipated drain on scarce court resources it is likely to create.

Nonetheless, it might be possible to come up with a form that is more understandable to tenants but that also addresses the court's concern with docket management by designing it to streamline the processing of cases. The current form is of little or no use to judges in efficiently determining the facts in rent escrow cases. A form petition that instead consisted of a series of questions, along the lines of those asked by judges in dealing with these cases, could reduce the time taken up in court with developing the basic facts. (Since the rent escrow petition is a sworn document, it has the same evidentiary value as sworn testimony.) Any hearing could then pick up where the petition left off,

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103. MD. CT. R. CIV. P. 3-303(a) states that “[a]s far as practicable, all pleadings shall be prepared on District Court forms prescribed by the Chief Judge of the District Court.”

104. MD. CT. R. CIV. P.3-303(b) states that “[e]ach averment of a pleading shall be simple, concise, and direct. No technical forms of pleadings are required.”

105. See *supra* note 36, and accompanying text.

106. See Rose & Scott, *supra* note 8, at 996-99 and 1014.

107. Super, *supra* note 15, at 412 n. 121.

instead of the judge having to develop each and every fact from square one. It may be that a form that guides tenants but also improves the efficiency of the operation of the court at the same time would be an easier sell as a reform.

As a related matter, the way in which these courts develop and document the facts of cases could be improved. In this case, and in the others we have seen, the judges do not develop the facts or find them in a consistent and efficient way. To help with that problem, the administrative judge of the court could mandate a rent escrow checklist to be used by all judges. Research has documented the benefits of checklists in enhancing the quality of performance in a number of fields, including aviation and medicine.<sup>108</sup> This mandated checklist would be based on the local law and relevant precedent, and set forth the specific determinations to be made by the trial court. Such a checklist, being based on the law, would not reduce the appearance of impartiality of the court, if that is indeed a factor discouraging judges from developing the record more fully in cases involving unrepresented litigants. It would also lessen the impact of personal predilections, as the judges would be implementing a more automatized process, rather than picking and choosing what to pay attention to.<sup>109</sup> Such a checklist would probably lengthen the average time spent on each contested case but should reduce time wastage overall, leading to more efficient use of court resources. Combined with a form petition that came close to establishing the tenant's *prima facie* case, such a checklist would allow the court's scarce resources, in time and energy, to be focused on the facts that are truly disputed or harder to develop.

It might also improve the quality of adjudication in these and other cases involving unrepresented litigants if the Maryland District Court were given a more meaningful role in the judicial system. While Bezdek criticizes the court for silencing unrepresented tenants, it is also true that the court itself has been silenced. It publishes no opinions, and many of its decisions can be reviewed by trial *de novo* in Maryland Circuit Court.<sup>110</sup> In other words, the Maryland District Court has no public voice or jurisprudence of its own, and does not even have the last word when it comes to the finding of facts. By contrast, the judges of New York City's

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108. See ATUL GAWANDE, *THE CHECKLIST MANIFESTO* (2009).

109. Super, *supra* note 15, at 462 (suggesting that when reforms are sought to benefit unrepresented tenants with warranty of habitability claims, "the system's operation should be as automatic as possible. Relying on low-income people to negotiate even fairly simple procedures, or on bureaucracies to empathize with them and adjudicate in their favor, all but guarantees a high failure rate").

110. See MD. CT. R. CIV. P. 7-102(A) and (B) (provides for a *de novo* trial on appeal for District Court cases where the amount in controversy is less than \$5000).

housing court regularly publish opinions in cases,<sup>111</sup> and their findings of fact are not generally subject to retrial by another court. The publication of opinions establishes legal norms and an evolving jurisprudence that likely improves the consistency and thoughtfulness of the court's decision-making. Further, the use of trials de novo as a form of appeal from District Court in Maryland means that little jurisprudence is developed on the law of rent escrow, as virtually all of the appellate reviews of the application of the law have to be obtained by cert. to the State's highest court. Without much appellate guidance and without its own jurisprudence, the Maryland District Court functions with some degree of uncertainty about the law and a great deal of variation among judges.

Like the litigants they serve, the Maryland District Court judges seem like the stepchildren<sup>\*</sup> of the system. Improving the court's role in that system would promote professionalism and seriousness of purpose among the judges of the court, which could enhance its performance. Elevation of the court's status would likewise recognize the importance of the claims of the litigants who come before it.

The various reform measures described here would leave some problems unaddressed and would admittedly make only partial improvements. And the marketplace and social realities that help make the relationship between landlords and low-income tenants so adversarial, and that undermine the power and influence of tenants, will persist. But these improvements are lower-cost than those usually recommended. They would still be a substantial step forward, and may be possible to achieve.

## X. CONCLUSION

It must be acknowledged that the empirical research on the warranty of habitability suggests that reform in this area is very hard to achieve. In the 1970's, after the warranty of habitability was widely adopted, researchers in Chicago and Detroit were already warning of the "miniscule in-court impact of the new legislation" and sounding alarms that tenants seemed little better off than when they had no enforceable

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111. The New York City Housing Court Reporter, available at <http://www.worldcat.org/title/new-york-city-housing-court-reporter/oclc/11742812>, has been publishing housing court case opinions since 1983 and is carried by many law libraries.

\* Editor's Note: While "stepchildren" is a common metaphor for an entity that is denied resources, the *Journal* advocates for the discontinuation of this usage in the legal profession, as it perpetuates a bias against stepfamilies. See, e.g., Linda R. Ryan et al., *Person Perception: Family Structure as a Cue for Stereotyping*, 48 J. OF MARRIAGE & THE FAMILY, 169, 170 (1986).

rights to livable housing.<sup>112</sup> And twenty years later, Bezdek's extensive empirical study of the enforcement of the warranty in Baltimore found that "[d]espite the enactment of tenant-protective legislation in the mid-1970s, the court operates in virtually the same manner as it did" prior to the enactment of that legislation, with tenants very seldom obtaining the relief available under the law.<sup>113</sup> More recently, Paris Baldacci observed that "[t]he plight of pro se litigants in New York City's Housing Court and the broad outlines of some solutions have been recognized for at least two decades," leading him to fear that his latest article on the subject would become "just one more...in a series...with little impact on the day-to-day experience of pro se litigants."<sup>114</sup> The consensus, as Super recently observed, is that the warranty of habitability has done little to aid tenants with substandard housing, in multiple jurisdictions across four decades.<sup>115</sup>

The new legal realists Erlanger et al. have suggested that we not give in to "a nihilist surrender to pure critique,"<sup>116</sup> which is, of course, tempting in this situation. Indeed, after Bezdek's extensive research effort involving the Baltimore District Court, over twenty years ago now, she herself presented no agenda for reform. Rather, she implied that the problems she documented needed to be solved through poor people recognizing their role as an exploited group and working together to bring about change.<sup>117</sup> Accordingly, she denounced even the standard

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112. Mosier & Soble, *supra* note 5, at 33 ("[l]andlord breach was available as a defense to tenants in nonpayment cases who were seeking to excuse all or part of the rent claimed, [t]enants had the entire rent claim excused in 0.7 percent of the contested nonpayment cases or 0.1 percent of the total nonpayment cases started, and had part of the rent claim excused in 11.9 percent of the contested nonpayment cases or 2.0 percent of the total nonpayment cases"); Birnbaum, Collins, & Fusco, *supra* note 5, at 109-11 (found even worse results in their sample. Although warranty of habitability defenses were raised in 41 percent of cases in which any defense was recorded, no tenants won on that defense and no full or partial rent abatements were awarded on the basis of the warranty.)

113. Bezdek, *supra* note 5, at 554 (finding "[t]enants obtained judgment and were excused of claims for rent and possession in just 3.5% of all cases. Rent was ordered into escrow for a later determination of the parties' claims in 4.3% of all cases." Further, "landlords avoided the imposition of rent abatement or damages for impaired habitability in 98.25% of all cases").

114. Baldacci, *supra* note 80, at 659-660 (footnotes omitted).

115. Super, *supra* note 15, at 394 and 423 ("The ensuing problems have resulted in extremely low rates of success for tenants with meritorious claims under the implied warranty of habitability."); *Id.* at 458 ("Although appealing in the abstract, the new regime of landlord-tenant law inaugurated four decades ago has failed at achieving any of its major goals").

116. Erlanger et al., *supra* note 2, at 345.

117. Bezdek, *supra* note 5, at 604.

recommendation of more attorneys for the unrepresented as “parentalistic and it lets us off the hook for our parts in the charade of legal entitlement and rights vindication.”<sup>118</sup> But as the new legal realists suggest, it may be possible to “chart[ ] a path between idealism and skepticism, by both remaining cognizant of hierarchies of power and the paradoxes they create for law, and also asking what can be done to work toward justice within the existing structures.”<sup>119</sup>

There are, in fact, grounds for cautious optimism. The recent uptick in scholarly work about unrepresented litigants in civil cases; the expression of increasing concern by government, the judiciary, and the organized bar, including the convening of access to justice commissions designed specifically to improve the lot of the unrepresented; and even recent impact litigation and legislative efforts undertaken in an attempt to establish a “civil Gideon,” indicate that now may be an especially propitious time to make efforts to improve the situation.<sup>120</sup> Further, the rise of the new legal realists provides support for the kind of empirical work that would facilitate reform.

This case, and the others in our research, suggest that the unrepresented party with less power seldom receives the full relief afforded by the law, and that the stronger party is able to keep the law under-enforced by dint of shortcomings in the process rather than by superior legal right. Of course, the claim that low-income litigants lack meaningful access to justice is not surprising, and it is also well-established that reform is difficult to achieve. Yet reform is nonetheless necessary for the justice system to be entitled to call itself by that name.<sup>121</sup>

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118. *Id.* at 538 n. 16.

119. Erlanger et al., *supra* note 2, at 345.

120. See Engler, *supra* note 15, at 41-45; Catherine R. Albiston & Rebecca L. Sandefur, Expanding the Empirical Study of Access to Justice, 2013 WISCONSIN L. REV. 101 (“Access to Justice research is in the midst of a renaissance.”).

121. District Court of Maryland, *About Maryland District Courts*, MDCourts.org, <http://www.mdcourts.gov/district/about.html#mission> (last visited Feb. 21, 2015) (The Mission Statement of the Maryland District Courts states that it will “provide equal and exact justice for all who are involved in litigation before the Court” and “ensure that every case tried herein is adjudicated expeditiously, courteously, and according to law ...,” and promises “unwavering and unyielding” commitment to these goals).

FIGURE 1

**DISTRICT COURT OF MARYLAND FOR Baltimore** ✓

Located at [REDACTED] City/County [REDACTED] Case No. 163-12

[REDACTED] vs. [REDACTED]

[REDACTED] Baltimore, MD 21206 [REDACTED] Randallstown, MD 21133

Serve By: ☐ Sheriff/Constable ☐ Certified Mail ☐ Private Process

**PETITION ☐ IN ACTION OF RENT ESCROW ☐ FOR INJUNCTION**

The Tenant respectfully states that:

1. ☒ he/she rents the property at [REDACTED] for the sum of \$ 850.00 per 12 month ☐ week

2. ☒ there exists conditions and defects on the leased premises shown above, which constitute, or if not promptly corrected will constitute, a fire hazard or serious threat to the life, health, and safety of occupants thereof, including but not limited to:

Fire Related

☒ lack of heat, ☐ lack of light, ☐ lack of electricity, ☐ lack of hot or ☐ cold running water (except if the property is a one-family dwelling, or a multi-family dwelling, where the Tenant is responsible for payment of the water charge and where the lack of such water is the direct result of the Tenant's failure to pay the water charge)

☐ lack of adequate sewage disposal

☐ rodent infestation (except if the property is a one-family dwelling)

☐ existence of flaking, loose or peeling lead paint, or lead paint which is accessible to child

☐ structural defect(s) presenting a serious and substantial threat to the physical safety of the occupants

☐ other health or fire hazard

3. ☐ and that the Landlord was notified by Tenant of the existence of the defects or conditions ☐ by certified mail or ☐ by actual notice of the defects or conditions or ☒ by written violation notice from an appropriate state, county, municipal agency on 02/01/12 10:28 540371 010147

4. ☒ The Landlord has not made the necessary repairs or corrected the condition complained of in the notice to the Landlord found by the Court to exist on [REDACTED] year, Case No. [REDACTED]

☒ WHEREFORE, the Tenant requests the Court to order ☐ that the Landlord repair the defects or correct the conditions alleged above by the Tenant

☐ that the amount of the rent be abated and reduced to \$ [REDACTED] per [REDACTED] and a rent escrow account be established by this court until the above conditions are corrected by the Landlord and approved as required

☐ that damages be awarded for breach of the covenant of quiet enjoyment or warranty of habitability in the amount of \$ [REDACTED]

☐ that the Landlord's action for ☐ non-payment of rent ☐ distress for rent, Case No. [REDACTED] be dismissed or that judgment be entered for the Tenant.

☐ At least one Defendant is in the military service.

☒ No Defendant is in the military service and the facts supporting this statement are: [REDACTED]

Specific facts must be given for the Court to conclude that each Defendant who is a natural person is not in the military.

☒ I am unable to determine whether or not any Defendant is in military service.

I solemnly affirm under the penalties of perjury and upon personal knowledge that the contents of the above Complaint are true and I am competent to testify to these matters.

2/1/12 [REDACTED] [REDACTED]

Signature of Attorney [REDACTED] Signature of Defendant [REDACTED]

Signer's Fictitious Number, if any [REDACTED] Signer's E-mail Address, if any [REDACTED]

**WRIT OF SUMMONS**

TO THE DEFENDANT (LANDLORD):

YOU ARE HEREWIT SUMMONED TO APPEAR FOR TRIAL ON 2/16/12 at 1:15pm in this Court to Answer an Action of Rent Escrow ☐ a Petition for Injunction at the suit of the Tenant in the above case.


2/1/12 Carolyn Adams

Date Signature

To request a foreign language interpreter or reasonable accommodation under the Americans with Disabilities Act, please contact the Court immediately. Possession and use of cell phones and other electronic devices may be limited or prohibited in designated areas of the court facility.

DC/CV 83 (Rev. 7/2011)

FIGURE 2



501 E. Fayette Street  
Baltimore, MD 21202  
410-578-8640

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**DISTRICT COURT OF MARYLAND**  
District Number 1

Landlord  
Name: [REDACTED]  
Address: \_\_\_\_\_ Rent Case Number: \_\_\_\_\_

Vs.

Tenant  
Name: [REDACTED] Escrow Case Number: 163-2012  
Address of leased property: [REDACTED]


**Order To Pay Rent Into Court**

The above entitled matter having come for a hearing on the defendant-tenant defense and the plaintiff-landlord's answer thereto, testimony having been taken, all papers in the proceedings having been read and considered, it is this 16th day of Feb, 20 12 by the District Court of Maryland for Baltimore City, ordered that the tenant shall pay into court the sum of \$ 2500 by 16th day of Feb, 20 12 (for the month/s of Nov. Dec Jan Feb) found by the court to be the amount of rent due and unpaid as of the 16th day of Feb, 20 12 after an abatement of \$ 900. The tenant is further ordered to pay \$ 850 ( ) weekly ( + ) monthly after an abatement of \$ — beginning on the 5th day of Mar, 20 12 all subject to further order of the court.

\_\_\_\_\_  
Judge  
Judge [REDACTED]



FIGURE 3



DISTRICT COURT OF MARYLAND FOR Baltimore City  
Located at [redacted] Case No. 1103-2012  
[redacted] Court Address [redacted]  
[redacted] [redacted]  
Address Baltimore, MD 21206 [redacted]  
City Baltimore State MD Zip 21206 [redacted]  
City Randallstown State MD Zip 2113

ORDER FOR DISBURSEMENT OF ESCROW FUNDS  
AND TERMINATION OF COURT ESCROW

In above entitled matter a hearing was held, testimony was taken, all papers in the proceedings have been read and considered, and it has been determined that the violation(s) and/or condition(s) previously complained of have been corrected or remedied, and it is

ORDERED that the clerk is hereby authorized and directed to pay  
☒ \$ 3350 to the Landlord  
☐ \$ \_\_\_\_\_ to the Tenant

from the escrow previously paid into Court by the Defendant-Tenant in these proceedings. If no appeal is taken from this Order and upon disbursement of this sum by the clerk, the amount so disbursed will be recorded in these proceedings by an appropriate docket entry. All future rent will be payable by the Defendant-Tenant directly to the Landlord or Landlord's duly authorized agent and Escrow will be terminated.

Court costs in the amount of \$ \_\_\_\_\_ to be paid by \_\_\_\_\_

Date 4/9/12 Judge [redacted]

We hereby waive our right to appeal in the case so disbursement can be made prior to expiration of appeal period.

Signature of Landlord \_\_\_\_\_ Signature of Tenant \_\_\_\_\_

FIGURE 4

Case # 010100001632012

Plaintiff:

vs. Defendant:

Address:

Rent Escrow Disposition

☐ Action for Escrow Dismissed

Date \_\_\_\_\_ Judge \_\_\_\_\_

☒ Escrow Established

Amount due account \$ 2500

First payment due by: 2/16/12 (date)

Amount due per month \$ 850

Due by 5th of each month

Date 2/16/12 Judge \_\_\_\_\_

☐ Escrow Vacated - amount due was not paid

Judge: \_\_\_\_\_

Date \_\_\_\_\_ Judge \_\_\_\_\_

☐ Escrow Continued: Disbursement \$ \_\_\_\_\_ to landlord

Date \_\_\_\_\_ Judge \_\_\_\_\_

\$ \_\_\_\_\_ to tenant

Date \_\_\_\_\_ Judge \_\_\_\_\_

☒ Escrow Terminated: Disbursement \$ 3750 to landlord

APR 09 2012

\$ \_\_\_\_\_ to tenant

Date \_\_\_\_\_ Judge \_\_\_\_\_

☐ Lease Terminated as of \_\_\_\_\_ (date)

Date \_\_\_\_\_ Judge \_\_\_\_\_

☐ Notice or Ejectment Action for \_\_\_\_\_ found to be Retaliatory

Date \_\_\_\_\_ Judge \_\_\_\_\_

Date \_\_\_\_\_ Judge \_\_\_\_\_

Case Action

2/16/12 L2/T Pres. 501 #1 @ 2x furn/water 2x  
 69 A-1 @ 4x 0601 4x  
 — no heat from Nov. move in to 2/14/12 62 A-1 @ 5x 0601 2x  
 — no hot water from Jan to 2/14/12 61 A-1 @ 5x 0601 5x  
 17x 13x  
 Judge \_\_\_\_\_