# Table of Contents

Executive Summary ................................................................. 1

Introduction .................................................................................. 7

Factors Contributing to the Rise of Substandard Rental Properties in Indiana ........... 9
   A. Declining Quality of Indiana's Rental Housing Stock .................................. 9
   B. The Social, Health, and Socioeconomic Vulnerabilities of Indiana Tenants ...... 10
   C. Bad Actors: The Link Between Substandard Rental Conditions and Evictions 11

Private Enforcement of Habitability .................................................. 14
   I. Indiana Law on Tenant Enforcement of Habitability .................................... 14
      A. Implied Warranty of Habitability in Indiana ............................................ 14
      B. Indiana’s Habitability Statute, and its Omissions .................................... 15
      C. Subsequent Caselaw Maintaining Bifurcated Proceedings and Independent Covenants .......................................................... 16
      D. Limited Tenant Right to Repair and Deduct in Indiana .......................... 17
   II. Rent Withholding in Other Jurisdictions ................................................ 20
      A. Repair and Deduct in Comparable States .............................................. 20
      C. Effectiveness of Rent Withholding in Other Jurisdictions ..................... 25
   III. Other Obstacles to Tenant Enforcement of Habitability in Indiana .......... 26
      A. Challenges of Small Claims Court Litigants in Indiana ......................... 26
   IV. Recommendations for Tenant Enforcement of Habitability in Indiana ........ 28
      ▪ End the Bifurcated Evictions Process in Indiana .................................... 28
      ▪ Provide Tenants with Avenues for Withholding Rent According to Best Practices 28
      ▪ Ensure Small Claims Courts Are a Tenant-Friendly Forum .......................... 30

Public Enforcement – Code Enforcement and Nuisance Law ................................. 31
   I. Sources of Indiana Code Enforcement Law ............................................. 31
      A. The Unsafe Building Law and Local Code Enforcement Agencies ............ 32
      B. Code Enforcement in Indianapolis: the Health and Hospital Corporation and the Department of Business and Neighborhood Services ......................... 34
      C. Public Litigation: Nuisance and Consumer Protection Suits .................... 35
   II. Challenges of Code Enforcement Agencies in Indiana ............................. 38
      A. System Overburden and Widespread Noncompliance ............................. 38
      B. Restrictions on Tenant Anti-Retaliation Measures ................................. 39
      C. Impact of Preemption from General Assembly ...................................... 41

Recommendations to Bolster Public Enforcement of Habitable Rental Housing ....... 43
- Remove Statutory Barriers to Municipal Code Enforcement, Particularly Proactive Enforcement ................................................................. 43
- Prioritize the Expeditious Mitigation of Tenants’ Habitability Issues ........ 43
- Clarify Public Nuisance Law to Compliment Traditional Code Enforcement ...... 43
- Integrate Public Enforcement and Tenant Enforcement Mechanisms .......... 44

**Epilogue: How Lakeside Pointe Happened** .................................................. 45

**Appendix: Additional Figures** ..................................................................... 46
  - Repair and Deduct: State to State ............................................................ 46
  - Rent Withholding Remedies by State ....................................................... 62
About the Health and Human Rights Clinic

The Health and Human Rights clinic engages in human rights advocacy in the Indianapolis community. Students in the Health and Human Rights Clinic participate in advocacy and litigation concerning the key social determinant of health that is access to safe, secure housing. Students directly represent, under faculty supervision, low-income clients from the community and engage in advocacy in the form of litigation, investigations and reports, negotiations, and public education.

Acknowledgements

This report would not have been possible without the dedication and expertise of many experts and practitioners, whose insights were sought out in the making of this report. Their names are noted below.

Fran Quigley, Clinical Professor, Indiana University Robert H. McKinney, and Director of the Health and Human Rights Clinic
Andrew Bradley, Policy Director, Prosperity Indiana
Brandon Beeler, Brandon Beeler, Attorney, ILS Housing Center Director 2019 – 2022
Chase Haller, Deputy Attorney General, Section Chief, Homeowner Protection Unit, Consumer Protection Division, Office of the Indiana Attorney General
Alan Mallach, Senior Fellow, Center for Community Progress
Elizabeth Benton, Associate Counsel to National Initiatives, Center for Community Progress
Judith Fox, Clinical Professor Emeritus, Notre Dame Law School
Shelley Gupta, Senior Counsel, Health Code Enforcement, Health and Hospital Corporation of Marion County
Deborah Law, City Prosecutor, Office of Corporation Counsel, City of Indianapolis
Andrew Thomas, Housing Resource Attorney, Indiana Legal Services
Deetta Steinmetz, Staff Attorney, Tenant advocate attorney, Indianapolis Legal Aid Society
Catherine Toppel, Deputy Director, Neighborhood Code Enforcement, City of Fort Wayne
Executive Summary

Burdened by an aging housing stock and widespread vacancy issues, Indiana is afflicted with an increasing number of substandard rental properties. This problem is perpetuated by landlords who fail to fix uninhabitable properties and evict a disproportionate share of tenants—all while still collecting tenants’ rents. In Indiana, the worst offenders are usually institutional landlords, or landlords using corporate law to avail themselves to enhanced protections. Institutional landlords are often large, out-of-state, corporations, trusts, or partnerships, often backed by investment funds and who may own several multifamily apartment complexes. These problem landlords operate complexes which have run afoul with authorities in cities all over the state, including in Evansville, Bloomington, South Bend, Hobart, and Indianapolis.

Indiana has two major systems of laws to address the problem of sub-standard living conditions: public and private enforcement of habitability standards. However, under Indiana’s current laws and practices, both fall short of providing necessary measures to protect tenants and remediate housing issues, particularly when addressing large problem landlords. Both public and private enforcement systems need broad systemic changes to remedy rental habitability issues in Indiana.

Private Enforcement in Indiana

Private enforcement methods typically involve tenants’ pursuing their rights under habitability laws implemented either by the courts or by statute. The legal principle that landlords should maintain minimum property standards is known as the implied warranty of habitability. Tenants across the United States generally enforce habitability through three methods: affirmative habitability claims, repair-and-deduct, and other rent withholding systems.

Affirmative habitability claims involve tenants suing their landlord and asking courts to either compel their landlord to fix conditions or pay damages. Conversely, rent withholding laws, in general, allow tenants to stop paying their rent in certain situations until their landlord restores habitable conditions. Repair-and-deduct laws allow tenants to make repairs themselves, then deduct costs incurred from their rent. States have a variety of other rent withholding approaches. Rent escrow laws require a tenant to pay either some or all of their rent to the court, instead of their landlord, until their landlord

---


makes necessary repairs. Similarly, rent abatement jurisdictions return rent to tenants automatically when conditions are noncompliant.

Indiana’s statutory law requires landlords to maintain habitable conditions, but it only authorizes one of these methods to enforce them: tenant affirmative claims. Affirmative claims in isolation are insufficient to maintain habitability because they put the burden of enforcing conditions on tenants, who are often low-income and usually without counsel. Further, these claims are complicated by the necessity of proving damages, which often requires an expert witness. Indiana appellate courts have established a very narrow iteration of repair-and-deduct, but its parameters are so limited that it has little application in practice. Indiana law has never allowed rent withholding or rent escrow. In practice, this leaves tenants with very few options when presented with uninhabitable conditions.

Traditionally, the implied warranty of habitability allows tenants to assert substandard conditions as a defense for nonpayment of rent. However, this is not a feasible option in many Indiana trial courts hearing housing cases. This legal gap is largely attributable to Indiana’s bifurcated eviction process, which divides evictions into two hearings: a possession hearing and a damages hearing. First, in the possession hearing, Indiana courts almost always grant preliminary possession—and sometimes permanent possession—to the landlord. Next, unit habitability issues are then only addressed in a subsequent damages hearing, typically weeks later, after the tenant has already been evicted. The Indiana Supreme Court has concluded the statutory basis for this process is located in Indiana Code § 32-30-3-2. Even though Indiana mandates habitable premises, many Indiana trial courts have concluded that the bifurcated process effectively requires a tenant to pay rent, regardless of their unit’s conditions.

Private Enforcement in Other Jurisdictions

The vast majority of states have a repair-and-deduct statute. Additionally, the majority of states have a repair and deduct or other rent withholding statute, with rent escrow and repair and deduct statutes being the most common.

Rent escrow actions can be divided into two major types: counterclaims, and affirmative claims. A plurality of state statutes that provide a rent escrow remedy allow tenants to assert it as a counterclaim, meaning a tenant withholds rent, then when a landlord attempts to evict for nonpayment of rent, the tenant counterclaims and instead pays their rent into the court, pending restoration of habitable conditions. Examples of this approach, outlined in more detail in the body of this report, include Alaska, Arizona, Indiana, and Michigan.

---

3 IND. CODE § 32-31-8-5.
4 Ind. Code § 32-31-8-6.
7 Id.
Colorado, Hawaii, Iowa, Kansas, Kentucky, Montana, Nebraska, Nevada, Oregon, and Rhode Island.

Conversely, affirmative claim structures, like those in Ohio, require a tenant to post rent to the court proactively, instead of withholding rent. This policy can have the unintended consequence of causing tenants who intuitively withhold rent to effectively waive their right to withhold rent. Finally, some jurisdictions, like Delaware and New Mexico, build in liquidated damages provisions for tenants. Delaware’s statute in particular is innovative, because it automatically refunds money sent by tenants when habitability violations occur.

Public Enforcement in Indiana

Public enforcement methods involve municipalities’ interventions, typically in the form of code enforcement and nuisance suits. Municipalities most often conduct code enforcement in Indiana with powers provided by the Unsafe Building Law. In Marion County, two agencies administer code enforcement: the Health and Hospital Corporation and the Department of Metropolitan Development, generally with the former addressing occupied structures and the latter addressing unoccupied structures. Municipalities may also bring public nuisance suits against property owners.

Code enforcement agencies in Indiana struggle to combat widespread noncompliance from landlords, particularly out-of-state landlords. Crucially, fining out-of-state landlords seldom motivates fixing properties, because often these landlords simply do not pay fines, milking properties for short-term gain then selling to other owners, leaving Indiana municipalities with few other remedies. Further, Indiana law limits licensure, which allows municipalities to proactively addressing housing conditions before they become unsafe or harmful to tenants. While Indiana municipalities can require landlords to attain a permit, they cannot attach conditions to those permits, such as mandating periodic inspections. Additionally, they can only charge a $5 permit fee for each rental unit community, and landlords can ask tenants to reimburse them for such fees.

---

9 IND. CODE § 36-7-9-1 et seq.
10 The Health and Hospital Corporation and the Department of Metropolitan Development delegate code enforcement activities to subsidiary organizations, the Marion County Public Health Department and the Department of Business and Neighborhood Services, respectively.
11 See Ruth Elizabeth Metzger, Substandard Rental Housing in the Promise Zone of a Mid-Sized U.S. City 167, WALDEN U. (2018), https://scholarworks.waldenu.edu/cgi/viewcontent.cgi?article=6382&context=dissertations.
12 IND. CODE § 36-1-20-3.5(b).
13 IND. CODE § 36-1-20-3.5(c).
14 IND. CODE § 36-1-20-5 (crucially, a “rental unit community” as defined in IND. CODE § 36-1-20-1.5 can encompass an entire multifamily apartment complex with one owner, which could comprise hundreds of units).
15 IND. CODE § 36-1-20-2.
Further, in 2017, the Indiana General Assembly passed Public Law 266-2017, which prevented municipalities from enforcing any ordinance, rule or regulation that imposes a penalty against a tenant, landlord, or owner for requests for “law enforcement assistance or other emergency assistance.” The Indiana judiciary interpreted this as disallowing the use of calls to law enforcement as evidence of public nuisance. This has severely undermined public nuisance suits, which are typically demonstrated through calls to law enforcement, fire, and code enforcement.

Public Enforcement in Other Jurisdictions

Other jurisdictions almost exclusively enforce rental housing conditions at the municipal level. Generally speaking, other states award municipalities more flexibility to engage in code enforcement, particularly proactive enforcement.

Traditionally, code enforcement has been reactive, where tenants file complaints that are then investigated. However, other jurisdictions have implemented code enforcement models that preemptively inspect and address housing proactively. Typically, this involves inspections on a periodic basis, or with a change in tenancy. Proactive rental inspection programs have been used to great effect in Cleveland, Ohio to target lead, and Greensboro, North Carolina and Sacramento, California to target dangerous properties. Most jurisdictions allow municipalities to create and administer proactive rental inspection programs. However, some jurisdictions, including Arizona, Georgia, and Tennessee have effectively preempted proactive inspections by restricting interior inspections.

Recommendations:

- **Amend Indiana Code § 32-30-3 to end Indiana’s bifurcated eviction process.**

  Indiana’s eviction statute should explicitly specify that all defenses and claims of the parties, including those related to the habitability of the premises, should be adjudicated in a single hearing. This would allow tenants to assert habitability breaches as a defense for nonpayment of rent and assert the implied warranty of habitability.

- **Allow tenants to comprehensively enforce the implied warranty of habitability.**

  Indiana lawmakers should consider implementing multiple systems where tenants may withhold their rent to enforce habitable conditions, including repair-and-deduct and both affirmative and defensive rent escrow systems. Affirmative claim rent escrow models may allow savvy tenants to avoid eviction proceedings, whereas counterclaim rent escrow statutes may allow tenants to withhold rent as a logical response to landlords’ failure to provide habitable conditions. Policymakers should explore policies combining the benefits of both rent escrow systems to best protect tenants.

---

16 Codified as **Ind. Code § 32-31-1-22.**
17 See **City of Indianapolis v. Towne & Terrace Corp., 106 N.E.3d 507, 509 (Ind. Ct. App. 2018).**
- **Integrate public and private habitability enforcement mechanisms.**

Currently, systems of public and private enforcement do not work together substantively. Indiana lawmakers should explore methods of integrating code enforcement and tenant enforcement systems. Housing courts accomplish this most comprehensively and can work with landlords and tenants alike in a cooperative fashion. Two promising housing court models include the Toledo Municipal Housing Court, which takes a comprehensive approach, and the District of Columbia’s Housing Conditions Court, which utilizes an affirmative claims model.

- **Remove Statutory Barriers to Code Enforcement, Particularly Proactive Code Enforcement Methods**

Indiana lawmakers should consider amending all provisions of Ind. Code § 36-1-20 to allow municipalities to charge more realistic rental permit fees, grant municipalities latitude to impose conditions of inspection and habitability for attaining rental permits, and free tenants from the requirement of reimbursing permit fees. Municipalities should enact rigorous landlord registration systems and withhold or retract registration for landlords who fail to maintain habitable conditions. Further, municipalities can tailor incentives in these programs to target bad actors, and reward good landlords.

- **Clarify Indiana nuisance law to complement traditional code enforcement.**

Large-scale noncompliance strains limited code enforcement resources. Nuisance suits are a powerful remedy for municipalities to compel compliance from landlords who violate habitability laws on a large scale. Indiana Code § 32-31-1-22 should be amended to clarify which calls for emergency service are precluded. More broadly, Indiana law should empower municipalities to penalize property owners for habitability and public safety problems, not limit them.

- **Prioritize the expeditious mitigation of substandard rental housing.**

Code enforcement agencies remedy rental habitability issues far too slowly. Municipalities operating under the Unsafe Building Law have broad abatement and receivership powers. Municipalities should utilize these powers more quickly, particularly when addressing properties of out-of-state landlords, who are less likely to make repairs or be motivated by fines. This will remedy tenants’ conditions, and avoid situations where tenants wait for months for repairs while their landlord fails to act.

- **Reduce tenant reliance on expert witnesses.**

Indiana’s current habitability statute allows affirmative claims, but still fails to provide adequate remedies, despite providing actual damages, consequential damages, and attorney’s fees. Namely, for tenants to prove damages to their mental or physical health or even loss of the value to them of the rental home, many courts will require them to summon an expert witness to testify as to physical or mental harms that result from substandard housing. This is highly unfeasible for the vast majority of low-income
Indiana tenants, who almost always are not represented by counsel. Indiana should adopt a system of liquidated damages for habitability violations, similar to that of Delaware, where the court can automatically grant damages if a landlord fails to meet certain conditions.\textsuperscript{18}

- **Provide Indiana tenants the right to counsel in eviction hearings**

Analyses examining implied warranty of habitability show that its effectiveness decreases considerably when tenants are unrepresented. Indiana should consider requiring, as a matter of state law, that all tenants be represented in eviction hearings, a requirement that has recently been established in several other jurisdictions.

\textsuperscript{18} \textsc{Del. Code Ann.} tit. 25, § 5308.
Introduction

In all regions of Indiana, in communities of all sizes, tenants are living in egregious, uninhabitable rental conditions. In Evansville, tenants have been struggling to remediate conditions at the Martin Park Apartment complex, where the new property management company has insufficiently responded to vermin infestation, structural issues, and public safety issues. In Bloomington, some residents struggle with mold infestation, even in high-priced student housing. In South Bend, tenants struggled for years with black mold, leaks, holes in the wall, and broken windows, before the city initiated a $2.6 million project to try to improve conditions. Even in the city of Hobart, dozens of tenants were displaced when housing inspections showed dangerous, uninhabitable conditions. These stories are not isolated incidents, but instead indicate a pervasive trend of substandard rental housing in Indiana.

Perhaps the most heartbreaking example of substandard housing is the infamous Lakeside Pointe Apartment complex in north Indianapolis. Residents were predominantly low income, some even being refugees, and could not afford to move elsewhere. Residents fought for years to remediate conditions at the infamous Lakeside Pointe Apartment complex, which racked up more than 3,000 housing code violations over a five-year period before 2021. Eventually, a unit with twenty code violations, including a dangerous exposed electrical splice, caught fire, causing the displacement of at least twenty-five residents.

Eventually, the troubled apartment complex was sold to a new owner, who has been making improvements. However, this was only after years of neglect, and

---


25 Id.
intervention from the Mayor and Indiana Attorney General. The question must be asked: how could these injustices have persisted so long, despite consistent media attention, impassioned advocacy from local leaders, and constant intervention from local officials and eventually the Office of the Indiana Attorney General? This report attempts to answer that question by holistically analyzing the systems that generate and perpetuate unsafe rental housing in Indiana.

Other works have highlighted the many consequences of tenants living in substandard housing, including poor physical and mental health and public safety issues, as well as how those issues disproportionately affect some populations. This work will focus on the legal infrastructure currently in place to combat substandard rental housing in Indiana, examining (1) the sociological factors driving substandard rental properties, (2) public enforcement by state and local governments, and (3) private enforcement by tenants and housing courts.

---

28 See Elizabeth Tobin Tyler, Black Mothers Matter: The Social, Political and Legal Determinants of Black Maternal Health Across the Lifespan, 25 J. Health Care L. & Pol'y 49, 78 (2022); see also Leech, Tamara G. J. et. al, Inequitable Chronic Lead Exposure: A Dual Legacy of Social and Environmental Injustice, 39(3) Family and Community Health 151 (Sept. 2016).
Factors Contributing to the Rise of Substandard Rental Properties in Indiana

A number of causes contribute to the rise of substandard housing issues. Crucially, the increasing supply of substandard properties and decreasing rental vacancy rates in Indiana and elsewhere, along with the weakened bargaining power of vulnerable tenants, creates a lack of incentive for property owners to fix properties, resulting in a proliferation of substandard rental properties. Finally, bad actors take advantage of these trends and fail to mitigate substandard conditions while simultaneously evicting large numbers of tenants.

A. Declining Quality of Indiana’s Rental Housing Stock

The stories of tenants’ experiences with substandard housing are told in media stories throughout the state as well as in official data. Those data show a housing stock which is both aging and experiencing declines in quality.

Indiana, like many states in the east and Midwest in particular, has an aging rental housing stock. Forty-two percent of Indiana’s rental housing units were constructed prior to 1970, and fifteen percent were constructed prior to 1939. Moreover, in 31 of Indiana’s 92 counties, over fifty percent of rental units were constructed prior to 1970.

The increasing age of Indiana’s rental housing stock is reflected in estimates of rental housing quality. In 2011, the American Housing Survey conducted by the United States Census Bureau uncovered startling gaps in rental habitability in the Indianapolis Metro area. For starters, 13,100 rental units, or over five percent, had mold in the 12 months predating the survey. Over the same time period 27,000 rental units had signs of rodents, and an estimated 12,000 had

![Percent of Rental Housing Built Prior to 1970](image)

29 U.S. Census Bureau, American Community Survey 2020 5-year estimates, Table B25036.
30 Id.
31 U.S. Census Bureau, American Housing Survey (2011), [https://www.census.gov/programs-surveys/ahs/data/interactive/ahstablecreator.html](https://www.census.gov/programs-surveys/ahs/data/interactive/ahstablecreator.html?s_areas=26900&s_year=2011&s_tablename=TABLE17&s_bygroup1=1&s_bygroup2=1&s_filtergroup1=1&s_filtergroup2=1).
signs of cockroaches. An estimated 14,400 had open cracks or holes. Of the 172,900 units that needed work in 2011, work started quickly on only 145,400, and management solved the problem quickly in 161,100 units.

However, despite Indianapolis data being present, there is little statewide information on the state of rental housing stock for Indiana tenants. This lack of data belies the lack of focus substandard rental housing often receives. Traditionally, Indiana municipalities have been far more concerned with addressing vacant and abandoned problem properties. For example, the municipal governments of Indianapolis, Gary, South Bend, and Evansville have commissioned official reports analyzing vacant properties in the city. Comparatively, Indiana municipalities have devoted fewer resources to tackling occupied problem properties, particularly rental properties than abandoned properties.

**B. The Social, Health, and Socioeconomic Vulnerabilities of Indiana Tenants**

The vulnerabilities and disadvantages of Indiana tenants lessen their bargaining power, often forcing them to accept substandard rental housing and allowing landlords to perpetuate substandard conditions without suffering economic consequences. Many commentators—and even some judges—inquire why tenants living in horrendous conditions do not simply find another place to live. The answer is multifaceted.

First, economic trends have lessened tenants' bargaining power substantially over the past decades. Nationally, tenants have increasingly less bargaining power, due, in part, to a “perfect storm” of economic trends, including an increasing number of households seeking rental housing, a diminishing proportion of affordable rental units, and declining vacancy rates for rental properties. As a result, rents have increased, without corresponding increases in housing quality. The simultaneous decrease in

32 Id.
33 Id.
34 Id.
41 Id.
rental vacancy rate and increase in gross rent is observable in Indiana-specific data as well. From 2010 to 2021, rental vacancy rates in Indiana have decreased from 11.8 percent in 8.4 percent. In that same time period, median gross rent in Indiana increased from $841 to $1,163. These trends alone put tenants at a major disadvantage.

Other factors put tenants at an even greater disadvantage. Namely, tenants frequently lack the ability to move away from uninhabitable rental properties due to systemic disadvantages and vulnerabilities. It is undisputed that moving to a new home is very expensive and time-consuming. Further, Indiana tenants are almost six times more likely to be below the poverty level than Indiana homeowners. Twenty-seven percent of Indiana tenants are living in a home with at least one child, with six percent having a child under the age of six. These factors discourage many tenants from finding new homes, even in the face of uninhabitable conditions.

Finally, many tenants are unable to find alternative housing due to other reasons, including housing segregation and discrimination, subpar credit, or a previous eviction or criminal conviction in their history. Further, many tenants live in subpar environments because they are fleeing domestic violence, have been newly evicted, and cannot find alternatives. The confluence of these factors creates a gross inequity in bargaining power, which a small number unscrupulous landlords in Indiana exploit.

C. Bad Actors: The Link Between Substandard Rental Conditions and Evictions

In Indiana, a shocking fact that pervades any analysis of rental housing is that large, institutional landlords account for a shockingly high percentage of evictions. First, a 2018 investigation from the Indy Star concluded that 88 percent of evictions filed in Marion County were filed by large, institutional landlords. Further, the investigation concluded that 100 properties were responsible for forty-one percent of all eviction filings. At least one-third of these 100 properties belonged to property managers and

---

43 U.S. Census Bureau, American Community Survey 2020 5-year estimates, Table B25064, Median Gross Rent (Dollars).
44 U.S. Census Bureau, American Community Survey 2020 5-year estimates, Table B17019, Poverty Status in the Past 12 Months of Families by Household Type by Tenure (25.4% of Indiana families in renter-occupied housing had an income in the last 12 months below the poverty rate, as opposed to 4.3% of homeowners).
45 U.S. Census Bureau, American Community Survey 2020 5-year estimates, Table B25012, Tenure by Families and Presence of Own Children.
46 Sabbath, supra note 39, at 107.
47 Id.
landlords located outside of Indiana.\textsuperscript{49} Most shockingly, six of the top ten complexes in eviction filings had more than sixty housing code violations since January 2019.\textsuperscript{50}

---

\textbf{BOTH EVICTIONS AND CODE VIOLATIONS IN INDIANA ARE DISPROPORTIONATELY CAUSED BY INSTITUTIONAL, OUT-OF-STATE LANDLORDS OWNING LARGE NUMBERS OF UNITS.}

These findings were corroborated later in an August 2022 study by SAVI, which found that evictions and code enforcement violations were even more concentrated when tracking by property owners, instead of individual properties.\textsuperscript{51} Examining six months of data 2022, the report uncovered that the top fifty landlords in eviction filings in Indianapolis accounted for fifty-five percent of all filings.\textsuperscript{52} Examining the relationships between complaints to the Marion County Public Health Department and eviction filings, the report came to a startling conclusion: as a cohort, the 93 properties with more ten or more complaints in 2021, despite representing a small fraction of all Indianapolis rental properties, contributed to roughly one third of complaints and one fifth of all evictions.\textsuperscript{53}

<table>
<thead>
<tr>
<th>Number of Complaints</th>
<th>Eviction Filings</th>
<th>Properties</th>
<th>Eviction Filings per 100 Properties</th>
</tr>
</thead>
<tbody>
<tr>
<td>Zero complaints</td>
<td>4,039</td>
<td>74,286</td>
<td>5</td>
</tr>
<tr>
<td>1-2 complaints</td>
<td>1,825</td>
<td>2,006</td>
<td>91</td>
</tr>
<tr>
<td>3-9 complaints</td>
<td>2,154</td>
<td>459</td>
<td>469</td>
</tr>
<tr>
<td>10+ complaints</td>
<td>2,336</td>
<td>93</td>
<td>2,512</td>
</tr>
</tbody>
</table>

As seen in the table above, the SAVI report further concluded that as the number of complaints increased, the eviction filings increased exponentially.\textsuperscript{54} While this conclusion is possibly skewed by the large number of units in complexes with more than ten complaints, it nonetheless indicates the vast disproportionality of both Indiana’s eviction crisis and its habitability crisis. The SAVI report concluded that large evictors fell into three categories: multifamily investors, rental home aggregators, and institutional owners of mobile home communities, with most evictions coming from large multifamily developments.\textsuperscript{55} In sum, a small group of corporate owners, who tend to be located out

\textsuperscript{49} Id.
\textsuperscript{50} Id.
\textsuperscript{52} Id.
\textsuperscript{53} Id.
\textsuperscript{54} Id.
\textsuperscript{55} Id.
of state, own large numbers of multifamily properties, and contribute to both a highly disproportionate share of Indianapolis’’s habitability problems and its evictions. As the next two sections will demonstrate, multiple areas of Indiana law enable this behavior at the expense of Indiana tenants.
Private Enforcement of Habitability

Indiana is one of only six states that does not allow rent withholding in virtually any capacity to enforce habitable rental conditions.\(^{56}\) While allowing for one avenue of affirmative claims for tenants, Indiana law thoroughly discourages tenants from attaining habitable conditions, both due to shortcomings in Indiana law and practical disadvantages tenants face in housing court.

I. **Indiana Law on Tenant Enforcement of Habitability**

While almost all states set standards for appropriate rental conditions, collectively known as the implied warranty of habitability, states differ in the extent of protection they provide to tenants. One study noted that Indiana was one of five “very late adopters” of the implied warranty of habitability, alongside Alabama, Colorado, Louisiana, and Virginia.\(^{57}\) Traditionally, the implementation of the implied warranty of habitability has been realized through three types of policies: repair and deduct, various rent withholding methods, and affirmative habitability claims.\(^{58}\) In nearly all aspects, Indiana law lags behind other states in its implementation of the implied warranty of habitability, at great expense to Indiana tenants.

---

**INDIANA IS ONE OF SIX STATES THAT DOES NOT ALLOW TENANTS TO WITHHOLD RENT TO FORCE THEIR LANDLORD TO REPAIR UNINHABITABLE CONDITIONS**

---

A. **Implied Warranty of Habitability in Indiana**

The Implied warranty of habitability is a legal doctrine established first in the landmark 1970 case *Javins v. First National Realty Corporation* in the Court of Appeals for the District of Columbia Circuit. *Javins* held that “a warranty of habitability . . . is implied by operation of law into leases of urban dwelling units,” and that if landlords failed to uphold that warranty, tenants could withhold their obligation to pay rent.\(^{59}\) After *Javins*, states began adopting the implied warranty of habitability either through statute or

---

\(^{56}\) See discussion *infra* Section II. Rent Withholding in Other Jurisdictions.

\(^{57}\) Nate Willis II et al., *Examining the Strength of State Habitability Laws Across the United States of America*, 17 INT’L J. OF HOUS. POL’Y (No. 4) 541, 552 (2017).

\(^{58}\) See generally Paula A. Franzese et al., *The Implied Warranty of Habitability Lives: Making Real the Promise of Landlord-Tenant Reform*, 69 RUDGERS U. L. REV. 1, 7–9 (2017). These remedies are not exclusive of the traditional contract law remedies of damages, reformation and recission.

caselaw, and today, Arkansas remains the only state which has not recognized the implied warranty of habitability.\(^60\)

In 1970, the National Committee for Uniform Laws devised the Uniform Residential Landlord Tenant Act (URLTA), which built upon the framework in *Javins*. In section 2.104(a), the act establishes a landlord’s six responsibilities: “(1) complying with building and housing code requirements materially affecting health and safety, (2) make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition, (3) keep common areas clean and safe, (4) maintain in good and safe working order and condition facilities and appliances supplied or required to be supplied by the landlord, (5) provide and maintain receptacles for waste and arrange for their removal, and (6) supply running water and reasonable amounts of hot water and heat.”\(^61\) This serves as the underlying basis for many states’ laws, and even parallels Indiana’s habitability statute; nonetheless, Indiana’s habitability statute has several shortcomings.

**B. Indiana’s Habitability Statute, and its Omissions**

Indiana, unlike a vast majority of politically diverse states, did not elect to adopt a mechanism for tenants to withhold rent.\(^62\) Instead, in 2002, the Indiana General Assembly, through the Landlord Tenant Act, finally imposed a manifestation of the implied warranty of habitability.\(^63\)

The law provided three major substantive changes. First, it established that landlords had to “deliver the rental premises in a safe, clean and habitable condition,” and also “comply with all health and housing codes applicable.”\(^64\) Second, it provided that rental agreements could not waive these requirements.\(^65\) Finally, it supplied the primary avenue for enforcement of this provision: tenants could bring a civil action, following notice to a landlord of needed repairs, to recover “actual and consequential damages, injunctive relief, and attorney’s fees.”\(^66\)

While Public Law 92–2002 appeared to finally give Indiana tenants the legal remedies needed to advocate for habitable conditions, it contained three major omissions. First, its affirmative claim structure created a de facto requirement for expert witnesses. In practice, an expert witness is often required to prove “actual and

---


\(^{64}\) *Ind. Code* § 32-31-8-5.

\(^{65}\) § 32-31-8-4.

\(^{66}\) § 32-31-8-6.
consequential damages” in court. Requiring expert witnesses to effectively utilize Indiana’s habitability statute creates an insurmountable barrier for many low-income tenants seeking to use Indiana’s habitability statute. Second, it did not provide tenants with any rights to withhold rent, in any capacity. Third, it failed to state that a tenant’s payment of rent was a dependent covenant of the landlord’s duty to maintain the premises. Subsequent Indiana case law following the passage of the Landlord Tenant Act did not clearly clarify whether dependent covenants existed, and instead formed a “jurisprudential stew” of ambiguity.67

C. Subsequent Caselaw Maintaining Bifurcated Proceedings and Independent Covenants

In this ambiguity, the bifurcated method—a relic of Indiana law prior to the recognition of the implied warranty of habitability—continues to be utilized by many Indiana courts. The bifurcated method divides the adjudication of claims into two hearings, the first being one over possession.68 This most often occurs in an eviction action, where a landlord seeks possession; as a practical matter, Indiana courts almost always grant possession to the landlord.69 If a tenant mentions their unit has habitability issues, that matter is usually tabled, pending a damages hearing that typically occurs weeks later.70

Litigants have asserted that this procedure is a violation of due process rights. However, the Indiana Supreme Court affirmed the bifurcated process, even after the passage of the 2002 Landlord Tenant Act, in Morton v. Ivacic. The Morton Court reasoned that a small claims judge’s failure to consider the exculpatory affidavit provided by a tenant in a possession hearing violated the tenant’s rights under Indiana Code section 32-30-3-2.71 Nevertheless, the Court upheld the bifurcated process.72 The Indiana Court of Appeals also had an opportunity to reexamine the Constitutionality of the bifurcated process, in Reynolds v. Capps, but declined to decide the case on these grounds.73 Because the bifurcated process still persists, tenants in most Indiana trial courts find that they cannot present habitability violations as a defense against nonpayment of rent.

68 Id. at 321.
70 Id.
72 Id. at 1199, n.1.
In sum, while the Landlord Tenant Act of 2002 establishes a landlord’s duty to keep premises habitable and allows tenants to make an affirmative claims to enforce that duty, tenants usually lack the ability to use the implied warranty of habitability as a defense to eviction. In practice, the inaccessibility of these remedies often creates independent covenants of a tenant’s duty to pay rent and a landlord’s duty to maintain habitable premises.

D. Limited Tenant Right to Repair and Deduct in Indiana

While Indiana’s bifurcated process establishes that the duties for tenants to pay rent and their landlord’s duties to keep habitable premises are independent, there is one narrow exception to this principle. Three Indiana cases have posited that tenants could, after providing adequate notice, make minor repairs to the premises and deduct that amount from their rent payment.

i. Relevant Indiana Caselaw on Repair and Deduct

First, in 1942, the Indiana Court of Appeals examined a dispute between a landlord and tenant in a recovery of rent action. The landlord brought an action to recover rent, but the tenant counterclaimed, claiming the landlord’s failure to patch the roof resulted in property damage. The Olinger Court ruled in favor of the landlord, concluding that the tenant had a right to make repairs, when “the cost of . . . repair would have been small” and then “offset the cost against any rent due for the premises.” However, the tenant in this case failed to do so, and therefore was precluded from seeking damages. The Olinger Court’s reasoning was utilized later in Rene’s Restaurant Corp. v. Fro-Du-Co Corp; however, crucially, this action was for possession of the property, similar to modern Indiana eviction actions. In the case, a lease contract for the purpose of a restaurant was negotiated, with one of the alleged terms being the landlord’s duty to repair the entryway, which eventually fell into disrepair. The restaurant owner made repairs, then sent the difference in rent owed. The court referenced its holding in Olinger and concluded if the tenant could demonstrate the landlord had a duty to repair, this would be a permissible action.

Finally, in Sigsbee v. Swathwood, 419 N.E.2d 789 (Ind. Ct. App. 1981), the Indiana Court of Appeals determined that tenants had a right to make limited repairs and

75 Id.
77 Id. at 386, 137 Ind.App. at 562,
78 Id., 137 Ind.App. at 561.
79 Id. at 387, 137 Ind.App. at 563.
subsequently deduct that amount from their rent. However, the Sigsbee Court, however, added a restriction: “the repair cost [must be] slight with respect ot the decrease in the value of the ‘bargained for’ premises.”\(^8^0\) This was a consequential departure from the Rene’s Restaurant Corp. Court, which allowed a tenant to deduct the cost of repairs that totaled almost eighty percent of the rent due.\(^8^1\) This holding limited the applicability of the defense for residential tenants. In order to invoke it, tenants would risk going to eviction court to recoup less than $100 in their total value. Therefore, Sigsbee effectively deprived tenants of one avenue for enforcing the implied warranty of habitability.

Today, the practice of repair-and-deduct is most often at the discretion of small claims judges and appears to be underutilized. For example, while two Marion County small claims judges of those interviewed by IU McKinney Law students indicated that they allow repair-and-deduct defenses to proceed, students never actually observed judges considering these defenses in practice.\(^8^2\) Further, under Sigsbee and its preceding caselaw, it is unclear what the monetary limits of this defense are. Unfortunately, the Indiana Small Claims Court manual sets arguably a different set of standards from Sigsbee and later Indiana statute, declaring that “[i]f a landlord fails to make agreed repairs within a reasonable time after notice, the tenant may have them completed and deduct the cost from rent, BUT ONLY FOR ESSENTIAL REPAIRS THAT THE LANDLORD HAS AGREED TO MAKE, AND ONLY IF A PRIOR REQUEST HAS BEEN MADE.”\(^8^3\) These required standards limit the defense, requiring—in contrast to the explicit wording in Indiana Code section 32-31-8-5—that the repairs must be agreed-upon.

\textit{ii. Subsequent Legislative Efforts to Establish Repair and Deduct}

Indiana lawmakers recently attempted to pass Senate Bill No. 230 (SB 230) codifying repair-and-deduct rights for tenants, which broadened the applicability of the procedure.\(^8^4\) SB 230 allows tenants, after providing notice to their landlord, to withhold their entire rent and spend that sum on repairs, then forward the remaining money to their landlord.\(^8^5\) SB 230 also enhances Indiana’s statutory habitability protections, by providing that classes of “essential services” including electricity, gas, heat, water, or any other services needed to make the conditions habitable should be fixed upon notice within twenty-four hours.\(^8^6\) Finally, SB 230 grants Indiana courts discretion over the

\begin{footnotesize}
\begin{enumerate}
\item See Rene’s Restaurant Corp., 210 N.E.2d at 386.
\item BRIENNE DELANEY & FLORENE WAGMAN ROISMAN, REPORT #1 ON LANDLORD-TENANT COURT PROCEEDINGS IN INDIANA 14 (Feb. 2012), https://mckinneylaw.iu.edu/instructors/roisman/report_1_landlord_tenant_proceedings_in_indiana.pdf.
\item QADDOURA, SENATE BILL 230, SECOND REGULAR SESSION OF THE 122ND GENERAL ASSEMBLY (2022), https://iga.in.gov/static-documents/6/2/a/e/62aec674/SB0230.01.INTNTR.pdf.
\item Id.
\item Id.
\end{enumerate}
\end{footnotesize}
amounts tenants receive in repair-and-deduct actions that are subsequently litigated.\textsuperscript{87} However, SB 230 was sidelined, and sent to a summer study session in June of 2022.

In sum, Indiana tenants must usually pay rent, regardless of whether conditions are habitable, unless they can make an affirmative claim under Indiana’s habitability statute. Further, Indiana’s common law repair-and-deduct procedure is far more limited than that of any other state and does not provide other means of protection for tenants.

\textsuperscript{87} Id.
II. Rent Withholding in Other Jurisdictions

Across the United States, tenants can pursue habitability enforcement through other methods. These policies generally can be summarized into two broad categories: repair and deduct remedies, and other rent withholding laws.

<table>
<thead>
<tr>
<th>Rent Withholding Laws in All 50 States</th>
</tr>
</thead>
<tbody>
<tr>
<td>Both Repair and Deduct and Other Rent Withholding Remedies</td>
</tr>
</tbody>
</table>

\[i\] - Common law repair and deduct remedy (Indiana is not included, due to the uncertainty of its common law repair and deduct caselaw and its lack of recognition from the Indiana Supreme Court).

\[ii\] - Other common law rent withholding remedy

In twenty-six states, tenants have access to both repair and deduct and other rent withholding remedies, implemented either via statute or common law. Repair and deduct remedies, recognized in a total of thirty-five states, are relatively similar, whereas the “other” rent withholding methods represent a catchall of state policies, including rent withholding, rent abatement, and rent escrow (both affirmative and defensive). These states’ approaches are discussed in the following sections.

A. Repair and Deduct in Comparable States

Fourteen states have no repair and deduct law, or a lack a broadly observed common law equivalent. Repair and deduct laws are relatively similar, generally falling into three categories: Uniform Residential Landlord Tenant Act (URLTA) states, states with other repair and deduct statutes not based on URLTA, and finally common law repair and deduct states. As previously noted, Indiana, despite some caselaw indicating theoretical recognition of repair and deduct, falls into this category.
URLTA provides for two separate repair and deduct remedies, which states have adopted and modified slightly. The first remedy, URLTA § 4.103, is for “minor repairs” and generally has a lower monetary limit. Conversely, the second remedy, URLTA § 4.101(a), becomes applicable when a landlord (usually willfully or negligently) fails to provide essential services, and tenants are then authorized to procure “reasonable amounts” of services and then deduct the amount of those services from their rent.

---

88 See appendix for comparison of repair and deduct statutes.
90 Id.
total, thirteen jurisdictions have adopted statutory language that specifically mirrors URLTA repair and deduct provisions, with seven adopting both repair and deduct remedies. Other states have opted to enact non-URTLA versions of repair and deduct.

States’ statutes establishing repair and deduct generally vary upon four lines: (1) time given for landlord compliance, (2) notice requirements, (3) limitations on the remedy, and (4) monetary limits of the remedy. Most commonly, states give landlords two weeks to repair conditions following proper notice before tenants may initiate repair and deduct remedies, as is the case in Illinois, Kentucky, Montana, Massachusetts, Missouri, Nevada, Oklahoma, and Virginia.91 On the lower end, Colorado gives landlords only 24 to 96 hours to complete repairs before the ability to repair and deduct becomes available.92 On the upper end, California, Mississippi and Vermont provide 30 days.93

Second, states vary in notice requirements. While all states require tenants to notify landlords of the condition, then provide time for cure, some also impose other requirements. For instance, Maine requires tenants to (a) notify landlord of “intention to correct the condition at the landlord’s expense by certified mail, then if landlord fails to perform repairs in time, the tenant may (b) hire professional to make repairs, then (c) send an itemized statement to landlord. If a tenant fulfills all of these requirements, they may then deduct the amount in the statement from their rent.94 Other states impose far fewer requirements on tenants before they may deduct repair costs from their rent.

Third, almost all states with repair and deduct remedies impose a restriction on tenants’ use of the remedy if a tenant or their guest caused the condition.95 One common restriction on repair and deduct remedies is the limitation on tenants’ using other remedies in addition to repair and deduct, in states with multiple remedies.96 Additionally, many states require that tenants have work completed “in a workmanlike manner.”97 Some states only allow tenants to invoke repair and deduct protections a limited number of times per year.98

Finally, states vary widely in the monetary limits of the defense. Notably, a plurality of states with repair and deduct statutes do not impose a set monetary limit, instead basing the amount as a percentage of rent, usually being either one-half month’s rent,99 or one month’s rent.100 On the lowest end, Rhode Island only allows repair and

---

91 765 ILL. COMP. STAT. § 742/5; KY. REV. STAT. ANN. § 383.635; ME. REV. STAT. ANN. tit. 14, § 6026; MASS. GEN. LAWS ANN. ch. 111, § 127L; MO. ANN. STAT. § 441.234; NEV. REV. STAT. ANN. § 118A.360; OKLA. STAT. ANN. tit. 41, § 121; VA. CODE ANN. § 55.1-1244.1.
92 COLO. REV. STAT. § 38-12-507.
93 CAL. CIV. CODE § 1942; MISS. CODE ANN. § 89-8:15; VT. STAT. ANN. tit. 9, § 4459.
94 ME. REV. STAT. ANN. tit. 14, § 6026.
95 See, e.g., KY. REV. STAT. ANN. § 383.635.
96 See, e.g., S.C. CODE ANN. § 27-40-630.
97 See, e.g., 765 ILL. COMP. STAT. § 742/5.
98 See, e.g., HAW. REV. STAT. § 521-64(b).
99 See, e.g., ARIZ. REV. STAT. ANN. § 33-1363.
100 See, e.g., MONT. CODE ANN. §§ 70-24-406.
deduct actions for repairs up to $125.\textsuperscript{101} Conversely, some states, such as Massachusetts, allow tenants to deduct up to four months’ rent cumulatively over the course of a year.\textsuperscript{102}

**B. Other Rent Withholding Statutes**

“Pure” rent withholding statutes, which do not require a tenant to deposit their rent into the court are definitively a minority policy. Although they are the closest to the original conception of the implied warranty of habitability established by Javins, most states have moved away from this model, and have imposed rent escrow requirements aimed to protect landlords from bad-faith habitability claims.\textsuperscript{103}

States that do not mandate depositing withheld rent into escrow accounts. California has a rent withholding statute, which provides that tenants may withhold rent when a unit is declared substandard, and does not impose escrow requirements.\textsuperscript{104} Nevertheless, official government authorities advise California tenants to deposit the money for rent into a separate account and provide evidence to their landlord and the court.\textsuperscript{105} Courts in California look much more favorably upon claims where a tenant does so.\textsuperscript{106} Therefore, while possessing a greater degree of informality, rent withholding statutes arguably do not differ substantially from defensive rent escrow actions as a functional matter.

**i. Rent Escrow**

Rent escrow laws constitute arguably the most common form of rent withholding in the United States. Laws function differently across states but have several mechanisms in common. One key difference in rent escrow laws is the process tenants utilize their rent. Some statutes require tenants to deposit their rent at the time of withholding, whereas others require tenants to deposit their rent when a determination is made in an eviction proceeding—this marks the primary distinction between affirmative and defensive rent escrow actions.

The most common form of rent escrow statutes are defensive, “counterclaim” laws. In “counterclaim” jurisdictions, tenants generally withhold their rent, and expect their landlord to either fix the conditions or attempt to evict them for nonpayment of rent. The court then considers the tenant’s counterclaim and, if a claim is meritorious, orders funds to be placed in escrow with the court, pending the restoration of habitability. Many states employ very similar language in their escrow statute, including

\textsuperscript{101} R.I. GEN. LAWS § 34-18-30.  
\textsuperscript{102} MASS. GEN. LAWS ANN. ch. 111, § 127L.  
\textsuperscript{104} CAL. CIV. CODE § 1942.4 (West, 2022).  
\textsuperscript{106} Id.
Alaska, Arizona, Colorado, Hawaii, Iowa, Kansas, Kentucky, Montana, Nebraska, Nevada, Oregon, and Rhode Island.\(^{107}\) Some states allow escrow to be used as a defense for nonpayment of rent but build in other provisions. For example, New Hampshire provides for an expedited timeline for landlords to correct habitability violations of fourteen days.\(^{108}\) Additionally, Pennsylvania’s rent escrow statute precludes a tenant from being evicted “for any reason whatsoever while rent is deposited in escrow.”\(^{109}\)

Other jurisdictions lack defensive rent escrow actions, and tenants must act proactively to pay their rent into the court or another escrow account instead of their landlord. For example, in Ohio, if a landlord fails to fix substandard condition within a “reasonable time considering the severity of the condition and the time needed to remedy it, or within thirty days, whichever is sooner,” a tenant can deposit rent with the court for several options.\(^{110}\) The tenant can then apply for (1) a court order to fix the dwelling, (2) a reduction in their rent, (3) or permission to use their rent to fix the condition.\(^{111}\) Maryland utilizes a scheme whereby tenants utilize affirmative claims or defensive rent escrow actions, and judges are afforded considerable discretion.\(^{112}\)

Statutes like Ohio’s may allow tenants to potentially avoid eviction proceedings altogether; however, these statutes can have unintended consequences. Some scholars argue that requiring tenants post their entire rent before a hearing violates due process but is nonetheless still very common in rent escrow systems across the states.\(^{113}\) Worse, failing to abide by affirmative structures can result in eviction if tenants withhold rent instead of depositing it with the court.\(^{114}\)

\textit{ii. Other Approaches to Rent Withholding}

One novel approach is that of Delaware and New Mexico, which build liquidated damages into its habitability statute. Delaware’s rent withholding statute provides that a tenant is only obligated to pay one-third per diem rent for the period when a landlord fails to provide “essential services,” which include “utility services, including gas, heat, electricity, and any other obligations imposed upon the landlord which materially affect the health and safety of the tenant.”\(^{115}\) Notably, Pennsylvania’s rent escrow statute also


\(^{108}\) \textit{Id.}

\(^{109}\) \textit{Id.}

\(^{110}\) \textit{Id.}

\(^{111}\) \textit{Id.}


\(^{114}\) Nicole Summers, \textit{The Limits of Good Law: A Study of Housing Court Outcomes}, 87 U. Chi. L. Rev. 145, 164 (2020) (noting “[m]any tenants are unaware of requirements of rent escrow actions, and it dooms their case.”)

\(^{115}\) \textit{Del. Code Ann. tit. 25 § 5308 (2022).}
has a limited liquidated damages provision. Pennsylvania’s statute provides that if a landlord does not fix habitability issues with a dwelling within six months, the tenant may keep any funds deposited into the escrow account, minus money used for making the dwelling habitable or paying utility bills.\(^{116}\)

South Dakota has a hybrid repair-and-deduct and rent withholding statute.\(^{117}\) Specifically, the statute allows a tenant to repair-and-deduct for repairs totaling up to one month’s rent in cost.\(^{118}\) However, if the cost is greater, they are then, after providing notice to their landlord that specifically names the necessary repair, allowed to deposit their full rent into another bank account and withhold that amount until the landlord makes the necessary repairs.\(^{119}\) The tenant must also provide evidence to their landlord that they deposited their rent into a separate account.\(^{120}\)

C. Effectiveness of Rent Withholding in Other Jurisdictions

Despite the aforementioned innovations implemented by states, some studies of the implied warranty of habitability in other jurisdictions have noted that, for most tenants, it is far from an optimal remedy.\(^{121}\) Multiple factors complicate its effectiveness, including judges’ failure to comprehensively consider tenants’ claims, tenants’ lack of access to counsel, and perquisites for remedies of which tenants are unaware.

i. Judges’ Lack of Scrutiny, and Impact of Access to Counsel

For example, a study of affirmative rent escrow actions in Baltimore small claims court concluded that 58 of the 59 cases involved a tenant with a meritorious claim, but only a few resulted in rent abatements.\(^{122}\) Even though Baltimore’s rent escrow law allowed for judges to lower the amount tenants had to post into an escrow account to reflect conditions, judges demanded tenants post rent almost every time.\(^{123}\) Further, judges, in lieu of varying times for varying times for when repairs were due, simply gave most landlords thirty days to remediate conditions.\(^{124}\)

Another study of nonpayment of rent eviction cases in New York City concluded that the vast majority of tenants with meritorious claims did not receive rent abatements.\(^{125}\) Further, New York small claims judges overwhelmingly did not reference code enforcement data, despite its availability.\(^{126}\) These studies suggest that small

\(^{118}\) \textit{Id.}
\(^{119}\) \textit{Id.}
\(^{120}\) \textit{Id.}
\(^{123}\) \textit{Id.} at 65–67.
\(^{124}\) \textit{Id.} at 68.
\(^{125}\) Summers, supra note 121, at 149–50.
\(^{126}\) \textit{Id.} at 203–204.
claims judges, too often inundated with evictions and other housing cases, fail to critically examine the merits of tenants claims.

This problem—tenants not receiving an optimized chance to be heard in spite of favorable laws—is propelled and exacerbated by tenants’ lack of access to counsel. The New York City study, controlling for tenants with meritorious habitability claims, concluded that tenants who were represented by counsel were at least nine times more likely to receive rent abatements.127

ii. Impact of Limitations on Asserting Rent Escrow Claims

Many tenants who withhold rent do not do so with foreknowledge that they are invoking the implied warranty of habitability. Instead, they believe as a matter simple fairness that they should not be required to pay their rent if habitable premises are not maintained.128 Some states impose arduous written notice requirements for habitability actions, particularly for escrow actions.129 For example, to assert a claim in Ohio’s rent escrow statute, a tenant must have a landlord that is not complying with statutory obligations, provide written notice specifying the details of noncompliance, provide adequate time to remedy conditions, reassess based on the landlord’s response, then the tenant must make sure they are also up to date on rent payments.130 Time period requirements for renters to deposit money into escrow have a similar effect, with tenants not comprehending that they have waived their right to a habitability defense by not having deposited their rent already.131

III. Other Obstacles to Tenant Enforcement of Habitability in Indiana

Indiana legal professionals and social workers have documented a similar phenomenon of tenants withholding their rent to try and compel their landlord to make repairs.132 However, Indiana small claims judges are still very reluctant to take arguments that poor conditions preclude eviction seriously.133 Tenants’ general inability to invoke the implied warranty of habitability is not the only ways that their rights are undermined in small claims court. The small claims forum in Indiana still has multiple weaknesses.

A. Challenges of Small Claims Court Litigants in Indiana

Landlord-tenant proceedings take place in small claims courts in almost all of Indiana’s 92 counties; these courts also have jurisdiction over debt-collection matters and miscellaneous civil suits where the amount in controversy is under $10,000.134 The

127 Id. at 205.
128 Serge Martinez, Revitalizing the Implied Warranty of Habitability 34 NORTRE DAME J.L ETHICS & PUB. POL’Y 239, 253 (2020).
129 Id. at 257.
130 Id. (see f.n. 105, discussing Chernin v. Welchans, 844 F.2d 322, 324 (6th Cir. 1988)).
131 Summers, supra note 121, at 163.
132 Fox, supra note 69, at 182–83.
133 Id.
134 IND. CODE § 33-28-3-4.
adjudication of landlord-tenant matters in small claims court on the ground thoroughly disadvantages tenants and perpetuates habitability problems in rental properties.

Like other jurisdictions, the overwhelming majority of Indiana tenants are unrepresented in eviction proceedings, and tenants may have only two or three minutes to present defenses.135 This leaves many tenants feeling anxious and overwhelmed. Further, resources that are provided in small claims courts, such as the Small Claims Manual, are often only located online, creating accessibility problems for low-income defendants.136 In totality, despite Indiana small claims court being conceived as an ideal forum for non-lawyers, the process is often confounding for them.

As previously noted, many landlord-tenant proceedings appear to be thoroughly biased against tenants. A specific passage from Morton v. Ivacic exemplifies the undue skepticism that many small claims judges have against tenants’ claims. In the case, a landlord attempted to evict a tenant for, in part, violating provisions of his lease, allegedly allowing another person to live in his unit. The tenant attempted to present evidence in his defense, attempting to provide the court a notarized letter from the person in question stating she did not live there.137 However, the court then refused to accept this defense, and the judge stated the following:

“Ultimately he’s going to get possession of the property. So I would suggest to you that you make some agreement with him to pick a date certain to move out. Otherwise I’m just going to enter an order for—make a preliminary determination and set the bond. And if he posts the bond, you’ll have to move. That’s just where we are [sic]. That’s just where we are [sic].”138

When the tenant once again denied lease violations, the court continued: “Sir, where there’s smoke there’s fire. I mean he isn’t making this up. He’s a substantial citizen. He’s not making this up.”139 Similar stories of unjustified skepticism surrounding tenants’ claims have emerged from the Court Watch program established by Notre Dame Professor Judith Fox, with tenants being evicted in Elkhart County despite “virtually no evidence [being] presented.”140

135 Fox, supra note 69, at 185–86.
136 Id. at 187.
138 Id.
139 Id. at 1197.
140 Fox, supra note 69, at 187.
IV. **Recommendations for Tenant Enforcement of Habitability in Indiana**

- **End the Bifurcated Evictions Process in Indiana**

Indiana’s bifurcated evictions process denies tenants their due process rights under the Indiana Constitution by denying them the opportunity to allow them to present legally cognizable defenses.\(^{141}\) Even without explicitly recognizing a new statutory remedy for tenants, establishing that there are dependent covenants of a tenant’s duty to pay rent and a landlord’s duty to maintain the premises would likely allow tenants to assert habitability-based defenses in Indiana.

- **Provide Tenants with Avenues for Withholding Rent According to Best Practices**

Indiana tenants have virtually no means to assert their right to habitable premises, aside from the ability to make affirmative habitability claims against their landlords and a highly constrained common law right to repair-and-deduct. Many states provide many options for tenants to assert their rights to habitable premises, and Indiana should integrate the following best practices:

  - **Require Landlords to Restore Habitable Premises on an Expedited Timeline**

Habitability violations—even those not considered “emergency” violations by the law—take a massive toll on tenants’ physical and mental health. Despite this, repair and deduct laws other states often default to a providing 30-day window for non-emergency repairs before a tenant can validly withhold rent.\(^{142}\) Other states, including Montana,\(^{143}\) Minnesota\(^{144}\), New Hampshire,\(^{145}\) and Nevada\(^{146}\) strike a fair compromise, specifying a two-week window in which landlords must make repairs following notice, or sooner in the case of emergencies.

Indiana law should reflect the urgency with which these repairs should be addressed and establish that if landlords fail to remediate conditions within two weeks of receiving notice (or sooner if justice requires), tenants may pursue repair-and-deduct or rent escrow remedies. Additionally, Indiana policymakers should consider amending Indiana’s current habitability statute, which provides landlords a “reasonable” period to make repairs before initiating an affirmative claim,\(^{147}\) should be similarly modified to reflect this expedited repair window.

  - **Reduce Tenant Reliance on Expert Witnesses to Prove Damages**

Proving and valuating damages in tenants’ habitability claims is difficult and is often very burdensome for low-income, unrepresented tenants. Many Indiana courts require that

---

\(^{141}\) Roisman, *supra* note 67, at 328.


\(^{144}\) *Minn. Stat.* 504B.385 (2022).


\(^{147}\) *Ind. Code* § 32-31-8-6.
defendants produce expert witnesses to testify as to damages. Indiana Lawmakers should consider two models to reduce reliance on expert witnesses.

First, Indiana legislators could utilize language which adopts a “percentage reduction” approach. This approach is used by habitability statutes in at least five states, including Florida, Maryland, Minnesota, Texas and Wisconsin. Second, Indiana legislators could consider building in liquidated damages provisions. For example, legislators should consider the Delaware model, which refunds two-thirds rent per diem to a tenant when the court finds that habitable premises has not been maintained.

These approaches could not only be utilized in rent withholding but could also be added to Indiana’s current affirmative claims habitability statute. Further, clarifying these rules would allow for the speedy resolution of claims, an interest of many small claims courts in Indiana.

- **Codify Repair-and-Deduct, with a Higher Upper Limit and Decreased Notice Requirements**

Indiana’s common law right to repair-and-deduct is extremely limited and nebulously defined. Therefore, it fails to provide substantial relief to tenants struggling with serious habitability issues. Indiana should codify and expand its common law right to repair-and-deduct. Many states with no other mechanisms for rent withholding—such as Mississippi, Oklahoma, and Texas—allow for tenants to make repairs costing up to one month’s rent, then deduct that cost from their rent. Allowing tenants to repair conditions up to one month’s rent will broaden the applicability of the doctrine greatly. Further, reducing the onerous notice requirements of many states, such as Maine, would make the remedy more accessible for tenants.

- **Allow Tenants to Bring Rent Escrow Actions Affirmatively and Defensively**

Affirmative claim rent escrow models, while allowing defendants to potentially avoid a nonpayment of rent eviction suit, can result in the unintended consequence of tenants failing to abide by the notice and escrow requirements in most jurisdictions. Conversely, counterclaim rent escrow statutes sometimes do not allow a tenant to avoid an eviction proceeding. Policymakers should explore combining the benefits of both policies by providing tenants avenues to either proactively or defensively initiate rent escrow actions. For example, Maryland law specifies that tenants may invoke the protections of rent escrow both affirmatively and defensively. Indiana should allow tenants both options.

---

148 FLA. 96 STAT. ANN. § 83.56 (“an amount in proportion to the loss of rental value caused by the noncompliance.”); MD. CODE ANN., REAL PROP. § 8-211 (“fair and equitable to represent the existence of the conditions and defects”); MINN. STAT. § 504B.425 (“the extent to which any uncorrected violations impair the residential tenants’ use and enjoyment of the property”); TEX. PROP. CODE ANN. § 92.0563 (“in proportion to the reduced rental value”); WIS. STAT. ANN. § 704.07 (“to the extent the tenant is deprived of the full normal use of the premises”).

149 MD. CODE ANN., REAL PROP. § 8-211 (West, 2021).
Ensure Small Claims Courts Are a Tenant-Friendly Forum

Tenants’ rights cannot be bolstered and enforced in small claims courts if largely unrepresented tenants must delve through pleadings filled with legalese and face skeptical judges. Tenants are not always aware of their habitability rights, and often even less aware of how to best assert those rights. Policymakers should consider enacting policies that better guide tenants through invoking habitability protections.

Right to Counsel for Tenants in Eviction Proceedings

Tenants receive much better outcomes when represented. Evictions are far more consequential to the physical and mental health of citizens than other small claims actions. Recognizing that fact, states and municipalities have passed laws and ordinances guaranteeing the right to counsel, the most notable example being Washington. Indiana lawmakers should consider passing a similar provision.

Enhanced Pleading Requirements for Evictions

Indiana courts, by often refusing to consider tenants’ complaints about the premises at the initial possession hearing, do not adequately address tenants’ habitability defenses. However, even in jurisdictions with stronger habitability protections, tenants often struggle to be heard in eviction hearings. Indiana lawmakers should consider enacting procedural safeguards to ensure tenants’ habitability concerns are addressed.

One approach recommended by Professor Serge Martinez of the University of New Mexico School of Law is establishing heightened pleading standards requiring landlords to plead that there are no habitability violations in order to evict a tenant. This would ensure that habitability issues are addressed in each eviction hearing and would give tenants the opportunity to dispute the state of the premises. Additionally, some jurisdictions have considered a similar “clean hands” requirement for a landlord seeking eviction. Either of these approaches would ensure that tenants’ claims are better heard and adjudicated in eviction proceedings.

---

150 Summers, supra note 121, at 205.
152 Martinez, supra note 128, at 272–73.
Public Enforcement – Code Enforcement and Nuisance Law

Public enforcement in Indiana consists of several mechanisms, including primarily code enforcement and special litigation—often in the form of nuisance complaints—conducted by municipalities. Nationally, code enforcement schemes are typically administered at the municipal level, with only a few exceptions.\textsuperscript{154} Code enforcement schemes differ considerably by municipality, contingent on local governance structures and the powers states grant to municipalities. However, there are several philosophical and methodological differences by which code enforcement schemes vary.

Given these theoretical and structural differences in code enforcement systems, where does Indiana fall in addressing code enforcement schemes? Indiana code enforcement systems are primarily conceived and utilized to combat blight over mitigating individual housing hazards. For instance, General Assembly’s legislative findings indicate that the Unsafe Building Law (discussed in more detail below in Section II(B)(1)) was conceived and enacted to curtail the problems vacant buildings created in the community.\textsuperscript{155} Additionally, in 1986, the Indiana General Assembly, through Public Law 59-1986, authorized the removal of trash and weeds as part of the Unsafe Building Law. Further, Indianapolis recently convened a task force to analyze the effectiveness of weed abatement.\textsuperscript{156} This indicates a willingness to utilize enforcement resources to combat signs of disarray.

Additionally, Indiana code enforcement systems almost exclusively act in a reactive manner, with very few proactive elements. Next, as seen in the discussion of the Unsafe Building Law and the Health and Hospital Corporation, Indiana has both a sanction and abatement track, but primarily relies on the sanction track to bring rental properties into compliance. Municipalities appear to utilize the abatement track inconsistently due to complexities of state law. Finally, Indiana code enforcement operates utilizing both the quasi-judicial system and civil enforcement systems.

I. Sources of Indiana Code Enforcement Law

Indiana law on code enforcement, despite its effectiveness in some aspects, is ad hoc in nature. Indiana has at least four separate sources of law that allow local municipalities—and occasionally state government entities—to enforce housing codes

\textsuperscript{154} A\textsc{my} A\textsc{ckerman} E\textsc{t} a\textsc{l}.\textsc{,} A G\textsc{uide to P}ro\textsc{active} R\textsc{ental} I\textsc{nspection} P\textsc{rograms}, C\textsc{h\textsc{ange}}\textsc{lab} S\textsc{olutions} 6 (Feb. 4, 2014), \url{https://www.changelabsolutions.org/sites/default/files/Proactive-Rental-Inspection-Programs_Guide_FINAL_20140204.pdf}.

\textsuperscript{155} Ind. Code § 36-7-9-4.5(k) (stating “In recognition of the problems created in a community by vacant structures, the general assembly finds that vigorous and disciplined action should be taken to ensure the proper maintenance and repair of vacant structures and encourages local governmental bodies to adopt maintenance and repair standards appropriate for the community in accordance with this chapter and other statutes”).

\textsuperscript{156} See Office of Audit and Performance, Report to the Department of Business and Neighborhood Services and the Marion County Public Health Department, High Weed and Grass Abatement (Dec. 2017), \url{https://citybase-cms-prod.s3.amazonaws.com/c239186306ec4a499e0863748b970dc1.pdf}.
and habitability standards. These primarily include local health departments, which have a limited power to abate nuisances that threaten the health of citizens, and code enforcement agencies, which typically operate under the Unsafe Building Law. The Marion-County-specific Health and Hospital Corporation and its subsidiary, the Marion County Public Health Department, operates as a code enforcement agency, but without powers granted under the Unsafe Building Law. Finally, municipalities can bring nuisance suits to attempt to enforce habitable or safe rental conditions.

A. The Unsafe Building Law and Local Code Enforcement Agencies

The second entity consists of local code enforcement agencies, usually at the city level, deriving their powers from prescriptive state laws. In 1973, facing an increasing problem addressing abandoned properties, the then-Indianapolis Division of Code Enforcement drafted an expansive code enforcement law which was subsequently adopted by the General Assembly in Public Law 181-1973.\footnote{157 A\textsc{bandoned} h\textsc{ouses} w\textsc{ork} g\textsc{rp.}, \textit{r\textsc{eclaiming} a\textsc{bandoned} p\textsc{roperty in i\textsc{n}d\textsc{ianapolis} p\textsc{rivate} 5-6 (Sept. 2004), https://xmaps.indy.gov/ODP/Download/DMD/Zoning/2004-ReclaimingAbandonedProperty.pdf.} The statute, then known as the Enforcement of Building Standards Act, was amended over the subsequent decades, and eventually became known as the “Unsafe Building Law.”\footnote{158 Id. at 8.} The Unsafe Building Law applies automatically to first-class cities (i.e. Indianapolis and Marion County) but can also be adopted by other municipalities via local ordinance.\footnote{159 I\textsc{nd.} c\textsc{ode} § 36-9-7-3.} However, the Indiana Court of Appeals has concluded that municipalities, after adopting the Unsafe Building Law, are strictly limited to abide by its administrative processes as a result of Indiana’s Home Rule Law.\footnote{160 City of Charlestown v. Charlestown Pleasant Ridge Neighborhood Ass’n, 111 N.E.3d 199, 206–207 (Ind. Ct. App. 2018), citing Ind. Code § 36-1-3-4(b) (“[i]f there is a constitutional or statutory provision requiring a specific manner for exercising a power, a unit wanting to exercise the power must do so in that manner”).} In sum, municipalities can adopt the Unsafe Building Law, fund code enforcement agencies to utilize it, and wield its broad powers, but only in the manner prescribed by state law.

i. Municipalities’ Powers Under the Unsafe Building Law

Once a municipality can address a building’s conditions, the Unsafe Building Law has a robust administrative process, featuring both an “abatement” track and a “sanction” track. In the “sanction” track provided by the Unsafe Building Law, the enforcement authority can initially, upon the discovery of violations, order repairs to restore habitable standards, the sealing of a building, or the demolition of a building.\footnote{161 I\textsc{nd.} c\textsc{ode} § 36-7-9-5(a).} Orders to vacate or demolish a structure, in light of their more permanent and consequential nature, must be reviewed in a hearing with the hearing authority (the judicial officer with the power to adjudicate claims) within 10 days, at which the authority can either affirm, rescind, or modify the order.\footnote{162 I\textsc{nd.} c\textsc{ode} § 36-7-9-7(d).} Conversely, if the owner is noncompliant and fails to make necessary repairs in the time allocated in the order, the
enforcement authority can impose a civil penalty of up to $2,500.\textsuperscript{163} If noncompliance continues, the hearing authority may impose additional civil penalties of up to $1,000 every 90 days.\textsuperscript{164} Finally, the most substantial penalty the hearing authority can impose is in the instance of the authority finding that an owner has willfully failed to meet the order’s requirements, which is a maximum of $5,000.\textsuperscript{165}

The abatement track, conversely, is only available to municipalities after an owner received proper service, received a hearing (or did not request one), but has still failed to comply with an order from the hearing authority.\textsuperscript{166} When these conditions are met, the enforcement authority can hire personnel to seal buildings, exterminate vermin, and remove trash, without giving any further notice to the owner.\textsuperscript{167} If any other action is ordered—and affirmed by the hearing authority, if required—such as interior habitability repairs, the court must provide ten days’ notice if repairs will be less than $10,000.\textsuperscript{168} The enforcement authority can then bill the owner to recoup the costs.\textsuperscript{169} Additionally, the enforcement authority can also take emergency action and move forward without notice.\textsuperscript{170} Arguably the most drastic action a municipality can take to improve conditions under the abatement track is to seek receivership of a property, which is possible in two ways using the Unsafe Building Law.\textsuperscript{171} Generally speaking, courts apply receiverships very rarely, citing concerns about the limitation on a citizen’s property rights.\textsuperscript{172}

\textbf{INDIANA’S UNSAFE BUILDING LAW PROVIDES BROAD AUTHORIZATION FOR CODE ENFORCEMENT AGENCIES TO ACT ONCE UNINHABITABLE CONDITIONS ARISE, BUT DOES NOT AUTHORIZE PREVENTATIVE INSPECTIONS.}

In short, the sum of these powers provides sweeping authority for code enforcement agencies to mitigate substandard conditions once they arise. However, Unsafe Building Law does not allow municipalities to proactively target anticipated hazards; instead, the property in question must already be in a state of disrepair before municipalities may act.

\textsuperscript{163} Id.
\textsuperscript{164} IND. CODE § 36-7-9-7.5.
\textsuperscript{165} IND. CODE § 36-7-9-7(e).
\textsuperscript{166} Id.
\textsuperscript{167} IND. CODE § 36-7-9-10(a).
\textsuperscript{168} IND. CODE § 36-7-9-10(b).
\textsuperscript{169} IND. CODE § 36-7-9-11.
\textsuperscript{170} IND. CODE § 36-7-9-9.
\textsuperscript{171} IND. CODE § 36-7-9-20; § 36-7-9-20.5.
\textsuperscript{172} Schrenker v. State, 919 N.E.2d 1188, 1192 (Ind. Ct. App. 2010) (noting “[t]he appointment of a receiver is a statutorily granted authority that must be strictly construed, and it cannot be sustained unless proper statutory grounds for the appointment are sufficiently shown”).
B. Code Enforcement in Indianapolis: the Health and Hospital Corporation and the Department of Business and Neighborhood Services

Indianapolis has a unique status among Indiana cities as the only city whose government is consolidated with the its county government.\footnote{IND. CODE § 36-4-1-1.} Indiana law grants each consolidated city-county government a municipal corporation to administer health matters with the ability to make and adopt appropriate ordinances, regulations, orders, rules, and resolutions, known as a Health and Hospital Corporation.\footnote{IND. CODE § 16-22-8-6.} The Health and Hospital Corporation of Marion County has a division of public health, containing all the “powers and duties conferred by law upon local departments of health.”\footnote{IND. CODE § 16-22-8-28.} Pertinently, the Health and Hospital Corporation has a division of public health is known as the Marion County Public Health Department,\footnote{IND. CODE § 16-22-8-28.} which is tasked, in part, with regulating conditions for occupied structures.\footnote{GRAZIANI & KREIS, supra note 35 at 25.}  

The Health and Hospital Corporation has a housing code, detailing its policies and procedures for addressing substandard housing.\footnote{See generally Health and Hospital Corporation of Marion County & Marion County Health Department, Housing and Environmental Standards (Oct. 2014), https://hhcorp.org/images/HHCcode/Housing_Code_Rev_oct14.pdf.} In particular, the Health and Hospital Corporation has both a civil and an administrative route of enforcement that differs in structure from the Unsafe Building Law. Pertinently, the Health and Hospital Corporation supplies enforcement methods utilizing abatement methods but does not possess receivership powers.\footnote{Id. at 39.} Further, unlike code enforcement agencies operating under the Unsafe Building Law, the Health and Hospital Corporation cannot recover costs of code enforcement fees or penalties through special tax assessments.\footnote{Id. (citing IND. CODE § 36-1-6-2).}

i. Jurisdictional Gaps and Marion County Code Enforcement

Because Marion County has the unique status of being a consolidated city-county government, it remains the only county in Indiana with both a Health and Hospital Corporation authorized to abate health nuisances and a Department of Metropolitan Development, authorized to apply to the Unsafe Building Law. This creates a unique structure, with the Marion County Public Health Department conducting inspections of occupied structures, and the Department of Business and Neighborhood Services addressing vacant structures.\footnote{GRAZIANI & KREIS, supra note 35, at 22–23.}

However, the two code enforcement bodies have an asymmetrical distribution of powers authorized by state statute. First, while providing for abatement powers, the Health and Hospital Corporation code does not supply receivership powers. This removes
a powerful remedy to counter large-scale noncompliance from negligent landlords and forces the Marion County Public Health Department to expend disproportionate enforcement resources a few bad actors. For example, the Lakeside Pointe, at one point, had a designated Marion County Public Health Department inspector. Further, unlike code enforcement agencies utilizing the Unsafe Building Law, unpaid bills simply become a lien on the property, instead of a special tax assessment.

In 2021, the Health and Hospital Corporation of Marion County was forced to drop court cases against noncompliant owners due to a unit becoming unoccupied 126 times.

Crucially, the Health and Hospital Corporation’s powers to address most substandard housing issues are solely pursuant to their authorization to improve citizens’ health. In other words, the Health and Hospital Corporation can only act when a habitability issue poses a health hazard. Therefore, when a property or apartment becomes vacant—which can frequently occur when tenants’ living conditions go unimproved for a prolonged period, and a tenant voluntarily moves out—the Health and Hospital Corporation loses its statutory authority to enforce housing conditions. In 2021, the Marion County Health and Hospital Corporation was forced to drop court cases against noncompliant owners due to a unit becoming unoccupied 126 times. This arrangement prevents specific deficits in rental housing from being remediated.

This jurisdictional confusion is likely not an unavoidable legal reality. In fact, until 2014, the Marion County Public Health Department had the authority to apply the Unsafe Building Law. There appears to be no independent statutory basis for denying the Marion County Public Health Department the powers of both bodies of law.

C. Public Litigation: Nuisance and Consumer Protection Suits

In addition to more traditional models of municipal code enforcement, where an agency addresses substandard housing in a systematic fashion, Indiana has other avenues of enforcement available to local governments. Public litigation can encompass any type of lawsuit that a municipality may bring to try to enforce housing conditions. The most broadly utilized litigation method is through public nuisance suits, which can

---

183 GRAZIANI & KREIS, supra note 35177, at 24–25.
184 Data request from the Health and Hospital Corporation of Marion County, on file with author.
185 GRAZIANI & KREIS, supra note 35 at 21.
be brought by individuals or municipalities in Indiana. Indiana law codified its nuisance law in 2002, and under Indiana law, a nuisance consists of anything that is “injurious to health[,] indecent[,] offensive to the senses[,] or an obstruction to the free use of property as to interfere with the comfortable enjoyment of property.”

Pertinently, Indiana municipalities have utilized public nuisance suits to try to mitigate conditions on negligently maintained apartment complexes and businesses. For example, Indianapolis utilized nuisance suits to attempt to compel an improvement in conditions dozens of times from 2011 to 2015, filing nuisance suits against eight apartment complexes, a few landlords renting homes, and proprietary establishments such as bars and stores. City officials generally prioritized addressing rental properties with pervasive public safety issues, defined by excessive police, fire and other public safety officer responses.

i. Undermining of Public Nuisance Actions

As noted above, public nuisance can provide a strong mechanism to address large-scale noncompliance among individual bad actors. However, in 2017, the Indiana General Assembly passed Public Law 266-2017 (codified as Indiana Code § 32-31-1-22), putting these suits in jeopardy. Public Law 266-2017 prevents municipalities from enforcing any ordinance, rule or regulation that imposes a penalty against a tenant, landlord or owner for requests for “law enforcement assistance or other emergency assistance.” Due to the clear ambiguity in this language, it was unclear to what extent this law would preclude public nuisance suits.

FOLLOWING THE TOWNE & TERRACE DECISION IN 2018, INDIANA MUNICIPALITIES ARE UNSURE OF WHETHER THEY WILL BE ABLE TO SUCCESSFULLY BRING PUBLIC NUISANCE ACTIONS AGAINST NEGLIGENT LANDLORDS.

However, the Indiana Court of Appeals clarified this in 2018—but at the expense of Indiana tenants—with its decision in City of Indianapolis v. Towne & Terrace Corporation. In Towne & Terrace, Indianapolis officials attempted to bring a public nuisance suit against the Towne & Terrace Corporation, attempting to recoup the costs the city spent on a disproportionate number of law enforcement responses at the complex. The

186 IND. CODE § 32-30-6-7.
187 IND. CODE § 32-30-6-6.
189 Id.
190 IND. CODE § 32-31-1-22.
Indiana Court of Appeals concluded that IC § 32-31-1-22(d) precluded the lawsuit, because the city could not use disproportionate law enforcement calls originating from the complex to impose a penalty.\textsuperscript{192} What the court did not define, and what remains unclear following \textit{Town & Terrace}, is which local government responses constitute “other emergency assistance.” Responses from the Indianapolis Fire Department would likely meet this definition, but could an inspection from the Marion County Public Health Department? What if the inspection yielded an emergency enforcement action? Then, would only some code enforcement actions be subject to Indiana law’s ban on using calls for emergency assistance?

Following \textit{Towne & Terrace I}, city officials throughout Indiana are in limbo regarding their ability to use public nuisance law to address substandard housing conditions.\textsuperscript{193} In fact, Indianapolis has even moved to hire outside counsel to bring litigation clarifying the extent of Indiana Code § 32-31-1-22(d).\textsuperscript{194} In summary, public nuisance lawsuits are useful in countering widespread noncompliance from singular bad actors. However, recent changes in Indiana law have undermined their power and effectiveness and thrown their utilization into doubt.

\textbf{ii. Indiana Consumer Protection Statutes, the Attorney General’s Office and Lakeside Pointe}

In the face of some of these uncertainties about the scope of municipalities’ public nuisance powers, the Office of the Indiana Attorney General was spurred to action. Unlike local municipalities, the Office of the Attorney General cannot utilize Indiana’s public nuisance statues, and instead relied upon state-level consumer protection statutes. In 2021, the Office of the Indiana Attorney General invoked alleged violations of the Indiana Nonprofit Corporations Act, Indiana Deceptive Consumer Sales Act, or the Indiana Home Loan Practices Act, and seeking the appointment of a receiver for the Lakeside Pointe at Nora property.\textsuperscript{195} However, the claim was dismissed, with the judge concluding the claims failed as a matter of law.\textsuperscript{196} Typically, in the absence of fraud, duress, or

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{192} \textit{Id.} at 511–512.
\item \textsuperscript{193} Ko Lyn Cheang, \textit{Indianapolis Threatens to Sue Lakeside Pointe at Nora Owner for Nuisance}, \textit{INDY STAR} (Jan. 22, 2022), \url{https://www.indystar.com/story/news/real-estate/2022/01/25/indianapolis-threatens-sue-lakeside-pointe-owner-nuisance/9204782002/} (noting “[d]eputy Mayor Jeff Bennett said that this ‘test case’ will help clarify existing discrepancies and a lack of clarity within state law on this question, and help the city in the long term to hold other bad actors landlords accountable”).
\item \textsuperscript{196} \textit{Id.}
\end{itemize}
\end{footnotesize}
coercion, the Office of the Attorney General cannot get involved utilizing consumer protection measures.\(^{197}\)

Eventually, their combined efforts with other stakeholders—including the City of Indianapolis and Citizens Energy—paid off, and the mounting legal pressure forced the sale of Lakeside Pointe apartment complex.\(^{198}\) Attorney General Todd Rokita has acknowledged that, despite this outcome, Indiana’s laws are “fairly weak” in allowing the Attorney General to protect tenants from dangerous conditions.\(^{199}\)

II. Challenges of Code Enforcement Agencies in Indiana

Despite some positive elements, Indiana public enforcement mechanisms encounter many roadblocks in their efforts to make problem properties habitable for tenants. First, code enforcement agencies in cities all over Indiana must contend with widespread substandard and abandoned properties. Frequently, this is worsened by widespread noncompliance from property owners. Additionally, Indiana law has preempted some of the most effective solutions utilized in other jurisdictions. In Marion County, the complex arrangement of code enforcement powers creates unintended consequences. Finally, unscrupulous landlords can evade the scrutiny of code enforcement agencies through adopting complex corporate structures that complicate enforcement.

A. System Overburden and Widespread Noncompliance

Local governments frequently struggle with a lack of funding, and code enforcement agencies are no exception. Historically, code enforcement departments in small to mid-sized—and even some large cities—have had very few code enforcement officers.\(^{200}\) Gary, Indiana is a prominent example. Despite experiencing vast challenges with problem properties, with over thirty percent of properties being vacant, Gary’s code enforcement department in 2011 could only be staffed with a total of six inspectors to cover a city of over 70,000.\(^{201}\) A survey of 58,235 Gary parcels found that of 33,114 parcels with a structure, 4,738, or around fourteen percent, were in poor or dangerous


\(^{199}\) Id.

\(^{200}\) Marilyn L. Uzdavines, *Barking Dogs: Code Enforcement Is All Bark and No Bite (Unless the Inspectors Have Assault Rifles)*, 54 Washburn L.J. 161, 170 (2014) (noting “In Lexington, Kentucky the population exceeds 300,000, and yet there are only two staff members to address code enforcement issues. In Cincinnati, Ohio, one inspector had a caseload of 600 properties. Billings, Montana employed five code enforcement staff members, and documented 1,662 violations between January and June, 2013. Cleveland, Ohio, and Detroit, Michigan, have both cut their code enforcement personnel in half since the mid-2000s during a period when the number of abandoned homes has dramatically increased”).

\(^{201}\) Abdelazim & Graziani, *supra* note 36, at 6, 37.
Without significant increases in staffing and resources, cities like Gary face an insurmountable quantity of problem properties.

Additionally, owner compliance with orders from Indiana code enforcement agencies can be discouragingly low. For example, a 2016 review of the Indianapolis Department of Code Enforcement (now known as the Department of Business and Neighborhood Services) uncovered that in DCE’s property owners complied with orders only twenty-seven percent of the time. Data from the Marion County Public Health Department further validates this point. In 2021, the Department conducted 1,964 initial housing inspections, but this number was absolutely dwarfed the number of reinspections at 15,673. This indicates that a sizeable portions of owners cited for housing violations were not complying for substantial periods of time.

The combination of system overburden and widespread noncompliance results in poor outcomes from Indiana tenants. First and foremost, both of these factors influence the speed of resolution of habitability issues. Frequently, Indiana tenants have to live with habitability issues for months before issues are fixed. Tenants whose habitability issues have persisted for months elect to leave their apartment, creating a very stressful and disruptive event, and resulting in unintended consequences discussed in the next section. However, system overburden and owner noncompliance would not nearly be as pervasive if not for other limitations.

**B. Restrictions on Tenant Anti-Retaliation Measures**

One of the largest reasons that many tenants often do not report habitability violations to local code enforcement authorities is fear of retaliatory eviction. Even the filing of an unmeritorious eviction claim can hurt tenants’ chances at finding future housing. Retaliatory evictions are unfortunately common in Indiana; for example, in 2020, Indiana Legal Services estimated that 25 to 35 of the over 200 eviction cases handled through a city-funded initiative were retaliatory in nature.

Indiana’s antiretaliation statute, Indiana Code section 32-31-9-8, only provides that landlords may not retaliate against tenants solely for engaging in protected activities (such as alerting code enforcement officials of habitability violations). For tenants, proving sole motivations is unduly burdensome. Further, unlike many comparable tenant antiretaliation statutes in the United States, Indiana’s statute does not contain a

---

202 Id. at 7.
203 GRAZIANI & MATTHEW KREIS, supra note 35, at 22.
204 Data request from Marion County Health and Hospital Corporation, on file with author.
rebuttable presumption that a landlord engaged in retaliation if they evict a tenant within a certain amount of time after the tenant engages in a protected activity.

However, recently, tenants’ rights to be free from retaliation have been contracted significantly. In 2020, the Indiana General Assembly preempted the passage of tenant anti-retaliation protections with the passage of SEA 148. The bill was initially vetoed by the Governor, but the Indiana House subsequently voted to override the veto.207 The bill itself prevented municipalities from regulating and enforcing virtually any element of the landlord-tenant relationship via ordinance.208 In a subsequent “trailer bill,” HB 1541 removed the most expansive clause “any other aspects of the landlord tenant relationship.”209 However, the enumerated classes of items still broadly preempt municipalities from enacting antiretaliation ordinances for tenants.

This level of preemption of local municipalities is virtually unparalleled by other states. For example, a recent analysis concluded Indiana’s laws preempted landlord-tenant relations more than comparable laws in Georgia, Illinois, Iowa, Michigan, Missouri, Pennsylvania, Tennessee West Virginia, and Wisconsin.210 The analysis concluded that Kentucky and Ohio were the only states in the region that had similar preemption regimes, preventing municipalities from implementing solutions to address substandard conditions.211

Further, while providing some protections against retaliations, the other provisions of HB 1541 which offer anti-retaliation protections are still insufficient. For example, the bill only protects tenants against retaliation for reporting issues that “materially affect health and safety.”212 Therefore, tenants could believe in good faith that a habitability issue materially affected their health and safety, but if a court disagreed, they would not be protected from a retaliatory eviction for choosing to report. Additionally, the bill provides several exceptions to the retaliatory evictions, including when “[c]ompliance with an applicable building or housing code requires alteration, remodeling, or demolition of the rental premises.”213 This effectively allows landlords to claim that

210 INDIANA HOUSING PREEMPTION OVERVIEW, LOCAL SOLUTIONS SUPPORT CENTER, PUBLIC RIGHTS PROJECT (Last updated Apr. 22, 2021), https://static1.squarespace.com/static/5ce4377caeb1ce00013a02fd/t/60916e9129910517f6c1da2b8/1620143762372/IndianaHousingPreemption.pdf
211 Id. Kentucky’s comparable statute is KY. REV. STAT. ANN. § 383.500, whereas Ohio’s is OHIO REV. CODE Tit. 53, ch. 5321.
212 IND. CODE § 32-31-8.5-2(1).
213 § 32-31-8.5-4.
compliance requires the eviction of a tenant, and then evict a tenant who reported to
code enforcement.

C. Impact of Preemption from General Assembly

Indiana law denies code enforcement agencies essential enforcement mechanisms
that code enforcement agencies in other states can wield and has recently curtailed
existing powers. Additionally, the current statutory organization of code enforcement
systems in Indianapolis creates unforeseen issues.

i. Constraints on Proactive Methods of Code Enforcement

Indiana’s code enforcement systems operate almost primarily in a reactive
manner, whereby a resident reports housing issues to code enforcement bodies. By
contrast, proactive methods of code enforcement aim to catch potentially harmful
housing conditions before tenants live in them, by requiring inspections—and the
remediation of harmful conditions if found—at regular intervals. This yields a more
systemic approach to improving tenants’ housing conditions, because not all tenants are
equally likely to call code enforcement. Further, it allows administrators to make
strategic decisions about properties.

Proactive rental inspection programs methods typically require three elements:
periodic inspections, enforcement, and licensure or registration. In order to promote
effective code enforcement, it is essential to gain the participation of between eighty and
ninety percent of landlords be registered or licensed. Licensure is distinguishable from
registration in that registration only is for the purpose of tracking landlords, whereas
licensure imposes conditions that must be met in order to legally operate.

Licensure is an essential enforcement mechanism, because fines alone often will
not motivate landlords, particularly out-of-state, institutional landlords. Often, these
landlords will simply elect not to pay code enforcement-related fines, and those
statements will either be (a) assessed as a special tax statement, or (b) as a lien on the
property. Further, corporate landlords, in particular, are able to utilize Limited
Liability Corporations to engage in strategic default, whereby they sell and effectively
absolve themselves of liability. Licensing systems, in some cases, not only prevent

214 Amy Ackerman et al., A Guide to Proactive Rental Inspection Programs, Changelab Solutions 4 (Feb. 4,
2014), https://www.changelabsolutions.org/sites/default/files/Proactive-Rental-Inspection-
215 Id.; Uzdavines, supra note 200, at 164.
216 Allan Mallach, Raising the Bar: Linking Landlord Incentives and Regulation Through Rental Licensing, A
Short Guide for Local Government Officials, Center for Community Progress (Nov. 2015),
and-Regulation-through-Rental-Licensing.-Mallach.pdf.
217 Id.
218 Id.
219 Id.
220 James Horner, Code Dodgers: Landlord Use of LLCs and Housing Code Enforcement, 37 Yale Pol’Y & L.
Rev. 647, 653 (2019).
landlords from operating without first complying with the housing code, they also can prevent evictions. For example, a Maryland court held that landlords that do not meet the conditions of licensure can lose the ability to evict tenants.221

Indiana has enacted language that can complicate municipalities’ attempts to enact proactive rental inspection programs. First, while Indiana municipalities are allowed to require landlords to register, Indiana municipalities cannot mandate that landlords “participate in a class or government program as a condition for leasing the rental unit.”222 Further, Indiana municipalities can only charge a registration fee of five dollars for each rental community, a term which can encompass complexes with hundreds of rental units.223 Taken alongside the aforementioned prohibitions on municipalities regulating the landlord-tenant relationship present in SEA 148 and HB 1541, municipal leaders are often in limbo as to their true powers to promote habitable conditions. For example, West Lafayette’s building commissioner Chad Spitznagle noted that he and others officials similar to him “have to walk that fine line on, ‘Are we getting ourselves in trouble with the Indiana code on getting involved in a contract [with a landlord].’”224

Other states have preempted proactive rental inspection programs by passing laws that prohibit internal inspections. For example, North Carolina prevents municipalities from conducting an inspection unless they have “reasonable cause” to believe that substandard conditions reside there.225 Arizona,226 Georgia,227 Tennessee,228 and Wisconsin all have similar prohibitions. While Indiana law does not hamper municipalities’ attempts to establish proactive rental inspection programs to this extent, the litany of rules it imposes on municipalities stymies innovative approaches to Indiana’s habitability problem, nonetheless.

States that do not preempt proactive rental inspection programs have attained impressive results in improving rental housing stock. Proactive rental inspection programs proved very successful in Greensboro, North Carolina, despite aforementioned preemption, where their inspection program addressed 8,700 rental properties, bringing them to habitable standards in just four years’ time.229 Similarly, Sacramento, California reduced its dangerous building cases by twenty-two percent utilizing its Rental Housing Inspection Program.230 Finally, Cleveland has used rental inspection as a vessel to

222 Ind. Code § 36-1-20-3.5(b).
223 Ind. Code § 36-1-20-2.
229 ACKERMAN ET AL., supra note 214, at 5.
230 Id.
identify and mitigate properties with dangerous amounts of lead.\textsuperscript{231} Indiana lawmakers should consider giving municipalities greater power to pursue similar innovative strategies, by removing preemptive laws.

**Recommendations to Bolster Public Enforcement of Habitable Rental Housing**

- **Remove Statutory Barriers to Municipal Code Enforcement, Particularly Proactive Enforcement**

Existing Indiana code enforcement systems, despite allocating substantial enforcement powers, operate almost exclusively in a reactive manner. This results in an ad hoc approach and leaves many vulnerable tenants unable or afraid to call for housing inspections living in substandard conditions. Indiana lawmakers should consider repealing Indiana Code Section 36-1-20, which contains several preemptive restrictions that limit municipalities’ flexibility in designing code enforcement programs. Allowing for effective licensure would be the first step to allowing municipalities to form comprehensive proactive rental inspection schemes.

Sustaining code enforcement—particularly proactive rental inspection programs—requires a substantial commitment of monetary resources. Indiana municipalities should view code enforcement as an investment in citizens’ health, wellbeing, and public safety, and fund and staff it appropriately.

- **Prioritize the Expeditious Mitigation of Tenants’ Habitability Issues**

The current system of resolving habitability issues in rental properties moves far too slowly to provide effective relief for tenants. In many cases, a “reasonable” time period for landlords to act defaults to thirty days.\textsuperscript{232} However, under Indiana law, the time period could be far shorter. In most cases, for non-emergency repairs under the Unsafe Building Law, it can be as short as ten days.

Further, municipalities should contemplate utilizing the Unsafe Building Law to directly abate tenants’ concerns after any sustained noncompliance and should utilize the Unsafe Building Law’s receivership powers more. One benefit of receivership, unlike fines and fees, is that code enforcement agencies do not need the presence of absentee owners to initiate enforcement.\textsuperscript{233} This allows code enforcement agencies to combat absentee landlords effectively.

- **Clarify Public Nuisance Law to Compliment Traditional Code Enforcement**

Lawmakers should consider amending Indiana Code Section 32-31-1-22 to clarify what constitutes “other emergency services.” Moreover, Indiana’s laws should ensure

\begin{itemize}
\item \textsuperscript{232} See GRAZIANI & KREIS, supra note 35, at 25–26, discussing Marion County Public Health Department’s timeframes for compliance.
\item \textsuperscript{233} ABANDONED HOUSES WORK GRP., supra note 157, at 12.
\end{itemize}
municipalities are granted automatic standing to bring nuisance suits whenever citizens’ rights to habitable housing rights are threatened. Nuisance laws are particularly important for more rural municipalities, which may not possess the resources to fund comprehensive code enforcement.

- **Create and Promote Tenant Relocation Services to Accompany Proactive Inspection Systems**

While moving to a proactive rental inspection model would benefit Indiana tenants as a whole through the creation of a better housing stock, certain tenants would experience displacement. Tenant relocation programs are essential to ensure that tenants do not face unintended consequences from the condemnation of unsafe housing. For example, the implementation of the South Bend Rental Safety Verification Program created displacement of tenants, which officials countered through a partnership of the City of South Bend, Notre Dame Legal Aid Clinic, and St. Vincent DePaul. Other municipalities should consider implementing similar programs.

- **Integrate Public Enforcement and Tenant Enforcement Mechanisms**

One striking problem is how siloed public enforcement systems are from private enforcement, with evictions occurring in small claims court and code enforcement actions occurring in other courts. Indiana should authorize municipalities to adopt comprehensive housing courts. Indiana policymakers could address this most comprehensively by allowing municipalities to adopt consolidated housing courts, which link code enforcement with courts that adjudicate housing issues.

A more comprehensive approach would be to adopt a framework similar to the Toledo Municipal Housing Court, which hears all cases on housing conditions. Conversely, a more limited approach to this model would be that of the District of Columbia in the Housing Conditions Court, which exclusively dealt with affirmative tenant claims. The model provided several designated housing inspectors, who the court could dispatch to independently investigate tenants’ habitability complaints. This approach would not require many substantive changes to Indiana law, or even the establishment of dependent covenants.

---

234 Fox, *supra* note 69, at 184.
Epilogue: How Lakeside Pointe Happened

Lakeside Pointe tenants suffered for years at the hands of negligent management, persisting with widespread uninhabitable and outright dangerous rental conditions.\textsuperscript{236} Despite intervention from city officials, impassioned advocacy from local residents, and eventually the intervention of the Attorney General, these horrible conditions persisted for years, culminating in a destructive fire that displaced dozens of residents.

Lakeside Pointe unjustly persisted with abhorrent conditions for years for many reasons, all of which coalesced to wreak havoc on the lives of tenants there. Tenants were low-income, and disproportionately immigrants, and often unable to move away. A large, out-of-state, institutional landlord saw them as easy targets. Systemic overburden of code enforcement agencies, due to widespread landlord noncompliance, lengthened the amount of time that tenants had to live in abhorrent conditions.

Tenants at Lakeside Pointe did not have the right to withhold their rent to force repairs, deposit money into a court instead of their landlord, and were unable to make repairs themselves then deduct the difference from their rent on major repairs. Tenants who did attempt to withhold their rent were evicted, finding all that mattered in the initial possession phase of their eviction was whether they had paid rent. Even if tenants were able to use the existing Indiana habitability statute to make an affirmative damages claim, they would have to prove damages. Absent health bills or property damages, they would probably be unable to prove damages without an expert witness. Additionally, the Indiana General Assembly prevented municipalities from providing additional tenant protections.

The issuance of fines did not motivate Lakeside Pointe’s management for years, and Indiana preempted municipalities’ ability to attach conditions to Lakeside Pointe’s rental registrations. Additionally, the Health and Hospital Corporation lacked the receivership powers necessary to take control of the complex after it was clear ownership would never improve conditions. Further, the Indiana General Assembly weakened public nuisance laws, depriving the city of Indianapolis a powerful remedy to target large-scale individual violators. Finally, the Attorney General’s Office could not utilize existing consumer protection laws to enforce habitable conditions.

It is crucial to note that if any one of these factors had not been present, immeasurable human suffering could have been prevented and thousands of taxpayer dollars could have been saved. For the sake of tenants, and Indiana communities everywhere, it is essential that the Indiana lawmakers consider measures to improve both the public and private enforcement mechanisms of habitability laws.

\textsuperscript{236} See Ko Lyn Cheang, \textit{supra} note 24.
It is the responsibility of Indiana legislators and policymakers to explore all avenues available to prevent the suffering of future Indiana tenants, who will inevitably fall victim to similar wrongdoing if laws and systems do not change.

Appendix: Additional Figures

**Repair and Deduct: State to State**

<table>
<thead>
<tr>
<th>State and Applicable Law</th>
<th>Repair and Deduct Allowed?</th>
<th>Period for Landlord to Fix Premises</th>
<th>Notice Requirements</th>
<th>Limitations on Remedy</th>
<th>Monetary Limit of Remedy</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama Ala. Code § 35-9A-164</td>
<td>No</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Alaska Alaska Stat. § 34.03.180</td>
<td>Yes</td>
<td></td>
<td>Tenant must initially provide: (1) written notice of need for repairs (2) following period for landlord to fix premises, written notice of intent to repair and deduct</td>
<td>▪ Only for “running water, hot water, heat, sanitary facilities” and “other essential services” ▪ Landlord must “deliberately or negligently” fail to supply services ▪ Tenant using this remedy cannot also seek recission of rental agreement under AS 34.03.100</td>
<td>Tenant may procure “reasonable amounts” of essential services.</td>
</tr>
<tr>
<td>Arizona Ariz. Rev. Stat. Ann. § 33-1363</td>
<td>Yes</td>
<td>10 days, or as promptly thereafter as conditions require</td>
<td>Tenant must initially provide, at least 10 days: (1) written notice of conditions, and (2) tenant’s intent to “correct the condition at the landlord’s expense” Then, if landlord fails to remedy conditions, tenant must: (3) submit itemized statement of repairs and</td>
<td>▪ Tenant must cause work to be done by “licensed contractor” ▪ Tenant may not proceed if they or their invitee caused the conditions</td>
<td>$300 or one-half monthly rent, whichever is greater</td>
</tr>
<tr>
<td>State</td>
<td>Statute</td>
<td>Yes/No</td>
<td>Reasonable Notice</td>
<td>Duration</td>
<td>Additional Conditions</td>
</tr>
<tr>
<td>---------------</td>
<td>--------------------------</td>
<td>--------</td>
<td>-------------------</td>
<td>----------</td>
<td>----------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Arkansas</td>
<td>No statute</td>
<td>No</td>
<td></td>
<td></td>
<td>Tenant must provide reasonable notice to landlord specifying the breach</td>
</tr>
<tr>
<td>California</td>
<td>Cal. Civ. Code § 1942</td>
<td>Yes</td>
<td></td>
<td>One month’s rent</td>
<td>Tenant may not use “reasonable amounts” of essential services.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Tenant may not use more than twice per twelve month period</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Tenant may not use this remedy if caused by tenant’s negligence (under Section 1929 or 1941.2 of California Civil Code)</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Tenant may procure “reasonable amounts” of essential services.</td>
</tr>
</tbody>
</table>

- Yes (remedy #2)
- Tenant must provide reasonable notice to landlord specifying the breach
- Only for “hot water or heat, air-conditioning or cooling, where such units are installed and offered” and “essential services”
- Landlord must “deliberately or negligently” fail to supply services
- These rights specifically do not encompass the right to repair the premises, merely to pay delinquent utility bills
- Tenant may procure “reasonable amounts” of essential services.

- If a tenant provides 30 days’ notice before acting to repair and deduct, they are presumed to have acted reasonably. However, a tenant may repair after shorter notice if required by circumstances
- Tenant must provide “written or oral notice” to landlord or landlord’s agent
- Tenant may not use more than twice per twelve month period
- Tenant may not use this remedy if caused by tenant’s negligence (under Section 1929 or 1941.2 of California Civil Code)
| **Colorado**  
Colo. Rev. Stat. § 38-12-507 | Yes | Landlord's failure to fix premises after 24 or 96 hours' proper notice, pursuant to § 38-12-503(b)  
Tenant must initially:  
1. provide written or electronic notice of conditions  
2. tenant must provide written notice specifying intent to repair and deduct, specifying:  
   a. name of landlord/property manager,  
   b. property address,  
   c. condition that needs repair,  
   d. date tenant initially provided notice, and  
   e. a copy of a good faith estimate from a licensed professional.  
3. Then tenant must keep copy  
4. if landlord fails to perform repairs,  
   tenant must provide written notice specifying intent to repair and deduct, specifying:  
   a. name of landlord/property manager,  
   b. property address,  
   c. condition that needs repair,  
   d. date tenant initially provided notice, and  
   e. a copy of a good faith estimate from a licensed professional.  
   Then landlord subsequently has four business days to obtain good faith estimates from other professionals.  
   If landlord elects not to do so, tenant may proceed to deduct costs  
   Then, if landlord fails to perform repairs,  
   tenant must provide written notice specifying intent to repair and deduct, specifying:  
   a. name of landlord/property manager,  
   b. property address,  
   c. condition that needs repair,  
   d. date tenant initially provided notice, and  
   e. a copy of a good faith estimate from a licensed professional.  
   Then tenant must keep copy  
   Then, landlord subsequently has four business days to obtain good faith estimates from other professionals.  
   If landlord elects not to do so, tenant may proceed to deduct costs  
   Tenant may not use this remedy if they or their guests are the cause of the habitability violation  
   Tenant cannot use this remedy if “residential premises was constructed, acquired, developed, rehabilitated, or maintained with” federal or state housing program funding  
   A tenant who deducts costs from one or more rental payments cannot utilize other habitability remedies  
   If tenant wrongfully deducted rent, court will award amount deducted to landlord, with damages doubled and eviction if tenant is found to have operated in bad faith | Multiple months’ rent |
| **Connecticut**  
Conn. Gen. Stat. Ann. § 47a-13(a) | Yes | Tenant must provide “reasonable written or oral notice to the landlord”  
Only for “failure to supply heat, running water, hot water, electricity, gas or other essential service[s]”  
Tenant cannot use remedy if the condition was caused | Tenant may procure “reasonable amounts” of essential services. |
<table>
<thead>
<tr>
<th>State</th>
<th>Code or Statute</th>
<th>Allows Tenant to Use</th>
<th>Landlord’s Responsibility</th>
<th>Tenant’s Responsibility</th>
<th>Other Conditions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Delaware</td>
<td>Del. Code Ann. Tit. 25, §§ 5307, 5308</td>
<td>Yes</td>
<td>Landlord must initiate “corrective measure” within 10 days of notice, and complete repairs within 30 days</td>
<td>Tenant must provide notice to landlord in writing</td>
<td>▪ Tenant must have work done “in a professional manner” ▪ A tenant who is delinquent in rental payments cannot use this remedy ▪ Tenant cannot use this remedy if the tenant ▪ Tenant is liable for damages caused by person repairing premises</td>
</tr>
<tr>
<td>Delaware</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Not more than $400 or one-half rent, whichever is less</td>
</tr>
<tr>
<td>Florida</td>
<td>Fla. Stat. Ann. § 83.60</td>
<td>No</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Hawaii</td>
<td>Haw. Rev. Stat. § 521-64(b)</td>
<td>Yes</td>
<td>Landlord must commence repairs within five business days, and has good faith requirement to complete repairs as soon as possible</td>
<td>Landlord must receive (1) written notification by the department of health or other state or county agencies that there is a health or safety violation. Then, if landlord fails to perform repairs, (2) tenant can immediately seek remedy, then (3) submit receipts to landlord</td>
<td>▪ Tenant cannot charge for repairs exceeding three months’ rent over a six month period ▪ Tenant cannot use this remedy if conditions were caused by tenant or guest ▪ Before correcting conditions affecting more than one unit, tenant must notify all other tenants sharing facilities of tenant’s plans</td>
</tr>
<tr>
<td>Hawaii</td>
<td>Haw. Rev. Stat. § 521-64(c) (Remedy #2)</td>
<td></td>
<td></td>
<td></td>
<td>$500 or one month’s rent, whichever is greater</td>
</tr>
<tr>
<td>State</td>
<td>Statute Code</td>
<td>Yes/No</td>
<td>Landlord Requirements</td>
<td>Tenant Requirements</td>
<td>Tenant's Remedy</td>
</tr>
<tr>
<td>--------</td>
<td>--------------</td>
<td>--------</td>
<td>------------------------</td>
<td>---------------------</td>
<td>-----------------</td>
</tr>
<tr>
<td>Idaho</td>
<td>No statute</td>
<td>No</td>
<td>Landlord must commence repairs within five days, with good faith requirement that repairs be completed as soon as possible. If repairs involve electrical, plumbing, or other facilities, landlord must commence repairs within three days.</td>
<td>Tenant must initially (1) notify landlord of defective conditions with oral or in writing. Then, if landlord fails to perform repairs, (2) tenant can immediately seek repairs, then (3) submit receipts to landlord.</td>
<td>Tenant’s remedy under § 521-64(b)(2) is omitted.</td>
</tr>
<tr>
<td>Illinois</td>
<td>765 Ill. Comp. Stat. § 742/5</td>
<td>Yes</td>
<td>Landlord must repair within 14 days, or more promptly in the case of emergencies.</td>
<td>Tenant must initially (1) notify landlord in writing of need for repairs by certified mail or other restricted delivery service to the landlord or agent. Then, if landlord fails to perform repairs, (2) tenant may repair conditions, but must (3) submit to the landlord a bill from the repair with the name, address, and phone number of the person who did the work.</td>
<td>Tenant cannot charge for repairs exceeding three months’ rent over a six month period. If a tenant fails to name a condition they know or should have known, they waive its repair. Tenant cannot use this remedy if conditions were caused by tenant or guest. Before correcting conditions affecting more than one unit, tenant must notify all other tenants sharing facilities of tenant’s plans.</td>
</tr>
</tbody>
</table>

Tenant cannot charge for repairs exceeding three months’ rent over a six month period.

If a tenant fails to name a condition they know or should have known, they waive its repair.

Tenant cannot use this remedy if conditions were caused by tenant or guest.

Before correcting conditions affecting more than one unit, tenant must notify all other tenants sharing facilities of tenant’s plans.

Tenant cannot charge for repairs exceeding three months’ rent over a six month period.

If a tenant fails to name a condition they know or should have known, they waive its repair.

Tenant cannot use this remedy if conditions were caused by tenant or guest.

Before correcting conditions affecting more than one unit, tenant must notify all other tenants sharing facilities of tenant’s plans.

$500 or one month’s rent, whichever is greater.

$500 or one-half of monthly rent, whichever is less.
<table>
<thead>
<tr>
<th>State</th>
<th>Statute</th>
<th>No/Yes</th>
<th>Telephone number for the tradesperson or supplier who made repairs</th>
</tr>
</thead>
<tbody>
<tr>
<td>Indiana</td>
<td>No statute</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Iowa</td>
<td>Iowa Code Ann. § 562A.23</td>
<td>Yes</td>
<td></td>
</tr>
</tbody>
</table>
|            | Tenant must give landlord written notice specifying the conditions | | - Only for “running water, hot water, or heat, or essential services”
|            | | | - If a tenant proceeds with repair-and-deduct statute, they cannot similarly proceed under a rent escrow statute
|            | | | - Tenant or tenant’s guest cannot have caused conditions
<p>| Kansas     | No statute | No | |
|            | Landlord must restore conditions within 14 days, or more quickly if required | | |
|            | Tenant must initially (1) notify landlord of intention to correct qualifying condition at landlord’s expense Then, if landlord fails to perform repairs in time, (2) tenant may hire professional to repair conditions, then (3) send itemized statement to landlord | | |
|            | Tenant cannot repair at landlord’s expense if tenant or tenant’s guest deliberately or negligently caused conditions | | |
|            | $100 or one-half month’s rent, whichever is greater | | |</p>
<table>
<thead>
<tr>
<th>State</th>
<th># of Remedies Available</th>
<th>Must Provide Reasonable Notice to Landlord</th>
<th>Tenant Rights</th>
<th>Landlord Obligations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Louisiana</td>
<td>Yes</td>
<td>Tenant must provide reasonable notice to landlord specifying the breach</td>
<td>Only for “hot water or heat, air-conditioning or cooling, where such units are installed and offered” and “essential services”</td>
<td>Tenant must “deliberately or negligently” fail to supply services</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>These rights do not encompass the right to repair the premises, merely to pay delinquent utility bills</td>
<td></td>
</tr>
<tr>
<td>Maine</td>
<td>Yes</td>
<td>Tenant may procure “reasonable amounts” of essential services.</td>
<td>Tenant may deduct repair costs from rent, but “only to the extent that the repair was necessary and the expended amount reasonable”</td>
<td></td>
</tr>
<tr>
<td>Louisiana</td>
<td>Yes</td>
<td>Tenant may procure “reasonable amounts” of essential services.</td>
<td>Tenant may deduct repair costs from rent, but “only to the extent that the repair was necessary and the expended amount reasonable”</td>
<td></td>
</tr>
<tr>
<td>Maine</td>
<td>Yes</td>
<td>Tenant may procure “reasonable amounts” of essential services.</td>
<td>Tenant may deduct repair costs from rent, but “only to the extent that the repair was necessary and the expended amount reasonable”</td>
<td></td>
</tr>
<tr>
<td>Maryland</td>
<td>No</td>
<td>Tenant may procure “reasonable amounts” of essential services.</td>
<td>Tenant may deduct repair costs from rent, but “only to the extent that the repair was necessary and the expended amount reasonable”</td>
<td></td>
</tr>
</tbody>
</table>

**Legal References**

- **Louisiana**
  - Yes
  - Tenant must provide reasonable notice to landlord specifying the breach
  - Tenant may procure “reasonable amounts” of essential services.

- **Maine**
  - Yes
  - Tenant must initially (1) notify landlord of "intention to correct the condition at the landlord's expense" by certified mail
  - Tenant may deduct repair costs from rent, but “only to the extent that the repair was necessary and the expended amount reasonable”

- **Maryland**
  - No
<table>
<thead>
<tr>
<th>State</th>
<th>Statute Details</th>
<th>Tenant Requirements</th>
<th>Landlord Requirements</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Massachusetts</strong></td>
<td>Yes; Landlord or landlord’s agent must begin repairs within five days after notice, and complete them after 14 days, unless a local code enforcement agency or court has ordered sooner.</td>
<td>Tenant (or possibly a health inspector) must notify landlord of violations. Once notified, landlord has a duty to begin repairs within five days, and substantially complete repairs within 14 days of notice, unless an enforcement authority (code enforcement, board of health, court) establishes a shorter period.</td>
<td>Landlord or landlord’s agent has been notified in writing either by (1) tenant or (2) governmental entity tasked with inspections.</td>
</tr>
<tr>
<td><strong>Michigan</strong></td>
<td>Yes; common law remedy</td>
<td>Four months’ rent over the course of one year. Such amount shall be computed on the basis of the highest monthly rent during tenant’s occupancy.</td>
<td>Tenant must provide written notice of specific and material defect.</td>
</tr>
<tr>
<td><strong>Minnesota</strong></td>
<td>No statute</td>
<td>One month’s rent</td>
<td>Landlord must repair within 30 days of notice.</td>
</tr>
<tr>
<td><strong>Mississippi</strong></td>
<td>Yes; Tenant cannot exercise this remedy more than once in a six month period. Tenant may not be reimbursed in excess of one month’s rent. Before correcting a condition affecting common facilities, tenant must provide notice to other tenants.</td>
<td>Mississippi Miss. Code Ann. § 89-8-15</td>
<td>Tenant must provide written notice of specific and material defect.</td>
</tr>
<tr>
<td>State</td>
<td>Law Details</td>
<td>Yes/No</td>
<td>Action by Landlord</td>
</tr>
<tr>
<td>---------</td>
<td>------------------------------------------------------------------------------</td>
<td>--------</td>
<td>--------------------</td>
</tr>
<tr>
<td>Missouri</td>
<td>Mo. Ann. Stat. § 441.234</td>
<td>Yes</td>
<td>Landlord must remedy conditions within 14 days, or faster if emergency.</td>
</tr>
<tr>
<td>Montana</td>
<td>Mont. Code Ann. §§ 70-24-406 (Remedy #2)</td>
<td>Yes</td>
<td>Landlord has “reasonable time” to make repairs.</td>
</tr>
<tr>
<td>Montana</td>
<td>Mont. Code Ann. §§ 70-24-408 (Remedy #2)</td>
<td>Yes (remedy #2)</td>
<td>Tenant must give notice to landlord.</td>
</tr>
<tr>
<td>State</td>
<td>Statute Details</td>
<td>Yes/No</td>
<td>Tenant Notice Requirement</td>
</tr>
<tr>
<td>-----------</td>
<td>-----------------</td>
<td>-----------------</td>
<td>----------------------------</td>
</tr>
<tr>
<td>Nebraska</td>
<td>Neb. Rev. Stat. § 76-1427</td>
<td>Yes</td>
<td>Tenant must give written notice to landlord specifying the breach</td>
</tr>
<tr>
<td>Nevada</td>
<td>Nev. Rev. Stat. Ann. § 118A.360</td>
<td>Yes</td>
<td>Landlord must use best efforts to comply within 14 days, or as promptly as required in case of an emergency. Tenant must initially: (1) Provide landlord with notice of breach and notify the landlord of their intention to repair condition at landlord’s expense. (2) Tenant may have repairs done, then (3) give landlord an itemized statement, and (4) deduct cost from rent. ▪ Tenant must “cause work to be done in a workmanlike manner” ▪ Tenant cannot repair at landlord’s expense if condition “was caused by the deliberate or negligent act or omission of the tenant” or the tenant’s guest.</td>
</tr>
<tr>
<td>Nevada</td>
<td>Nev. Rev. Stat. Ann. § 118A.380 (Remedy #2)</td>
<td>Yes (remedy #2)</td>
<td>Tenant must give landlord notice specifying the breach</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>No statute</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>New Jersey</td>
<td>Marini v. Ireland, 265 A.2d 526 (1970)</td>
<td>Yes; common law remedy</td>
<td>Tenant must give written notice to landlord specifying the breach</td>
</tr>
<tr>
<td>State</td>
<td>Statute Status</td>
<td>Legal Basis</td>
<td>Description</td>
</tr>
<tr>
<td>---------------</td>
<td>----------------</td>
<td>-------------</td>
<td>-------------</td>
</tr>
<tr>
<td>New Mexico</td>
<td>No statute</td>
<td></td>
<td>No statute</td>
</tr>
<tr>
<td>North Carolina</td>
<td>No statute</td>
<td></td>
<td>No statute</td>
</tr>
<tr>
<td>North Dakota</td>
<td>N.D. Cent. Code §§ 47-16-13</td>
<td>Yes</td>
<td>Tenant must provide notice but does not have to give written notice. Pfeifle v. Tanabe, 620 N.W.2d 167 (N.D. 2000).</td>
</tr>
<tr>
<td>Ohio</td>
<td>No statute</td>
<td></td>
<td>No statute</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>Okla. Stat. Ann. tit. 41, § 121; Okla. Stat. Ann. tit. 41, § 121 (Remedy #2)</td>
<td>Yes</td>
<td>Tenant must have repairs done in &quot;a workmanlike manner&quot;</td>
</tr>
<tr>
<td></td>
<td>Yes (remedy #2)</td>
<td></td>
<td>Tenant only can use remedy if landlord’s noncompliance with habitability statute “materially affects health and safety”</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Remedy is not available if conditions were caused by “deliberate or negligent act or omission” of tenant or tenant’s guest</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Tenant may “procure reasonable amounts of heat, hot water, running water, electric, gas or other...”</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Tenant may “procure reasonable amounts of heat, hot water, running water, electric, gas or other...”</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>One month's rent</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Initially, tenant must: (1) provide notice of conditions and intent to repair after 14 days</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Then, if landlord fails to make repairs in time, (2) tenant may have repairs done, and (3) submit an itemized statement to landlord</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Tenant must give notice specifying the breach</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Remedy is not available if conditions were caused by “deliberate or negligent act or omission” of tenant or tenant’s guest</td>
</tr>
<tr>
<td>Landlord must make repairs within seven days’ notice</td>
<td>Tenant must give written notice to landlord specifying the breach</td>
<td><strong>essential service</strong></td>
<td></td>
</tr>
<tr>
<td>-----------------------------------------------------</td>
<td>---------------------------------------------------------------</td>
<td>---------------------</td>
<td></td>
</tr>
<tr>
<td>Initially, tenant must: (1) give notice to landlord (a) specifying habitability defect, and (b) stating tenant’s intention to repair defect then deduct cost from rent if landlord fails to make repairs within a certain date. Finally, (c) notice and delivery must comply with requirements in Or. Rev. Stat. § 90.1155. Then, if landlord fails to make repairs by specified date, (2) tenant may have work done by professional</td>
<td>Tenant must give written notice to landlord specifying the breach</td>
<td>Only applies to minor habitability defects</td>
<td></td>
</tr>
<tr>
<td>▪ Applies only to essential services</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>▪ Landlord is not considered to be intentionally or negligent</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>▪ Tenant may “procure reasonable amounts” or</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>▪ Landlord may specify the people to perform the repair work if the landlord’s specifications are reasonable</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>▪ Tenant cannot use this remedy if (1) landlord substantially repairs the defect, (2) tenant prevented landlord from making repairs, (3) defect was caused by deliberate or negligent act or omission of tenant or a tenant’s guest, (4) tenant knew of the defect for more than six months, or (5) tenant previously used this remedy</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>▪ If tenant proceeds under this section, tenant may not use other remedies except those specified by Or. Rev. Stat. § 90.360(1)</td>
<td>Tenant may “procure reasonable amounts” or</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Not more than $300</td>
<td></td>
</tr>
</tbody>
</table>

**Oregon**
Or. Rev. Stat. § 90.365
Or. Rev. Stat. § 90.385 (Remedy #2)
<table>
<thead>
<tr>
<th>State</th>
<th>Relevant Case or Statute</th>
<th>Adequacy of remedy</th>
<th>Reasonable costs of repairs</th>
<th>Additional considerations</th>
</tr>
</thead>
</table>
| **Pennsylvania**  
*Pugh v. Holmes*, 405 A.2d 897 (1979) | Yes; common law remedy | negligently failing to supply essential services, if: (a) landlord substantially supplies services, or (b) landlord is making a reasonable, good faith effort to supply essential services but fails to due to factors beyond landlord’s control | essential services | |
| **Rhode Island**  
R.I. Gen. Laws § 34-18-30  
R.I. Gen. Laws § 34-18-31 (Remedy #2) | Yes | Initially, tenant must:  
(1) notify landlord of intent to repair at landlord’s expense  
Then, if landlord fails to make repairs,  
(2) tenant may repair conditions, then  
(3) tenant must submit an itemized statement to the landlord of the “fair and reasonable value of the repairs made”  
- Repairs must be “done in a skilled manner”  
- Tenant may not repair at landlord’s expense if condition was “caused by the deliberate or negligent act or omission” of tenant or tenant’s guest | Reasonable cost of repairs is less than $125 | |
| Yes (remedy #2) | Tenant must give reasonable notice to the landlord specifying the breach  
- Applies only to willful or negligent failure to supply “heat, running water, hot water, electric, gas, or other essential service[s]”  
- Tenant must take “reasonable and appropriate measures” to secure essential services  
- Tenant may not repair at landlord’s expense if “condition was | Tenant may only secure “reasonable amounts” of essential services | |
<table>
<thead>
<tr>
<th>State</th>
<th>Code Reference</th>
<th>Yes/No</th>
<th>Landlord's Obligation</th>
<th>Tenant's Obligation</th>
<th>Note</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>South Carolina</strong></td>
<td>S.C. Code Ann. § 27-40-630</td>
<td>Yes</td>
<td>Landlord must act within a reasonable time</td>
<td>Tenant must provide written notice to the landlord specifying the breach. ▪ Applies only to essential services, not physical repairs ▪ If a tenant proceeds with this remedy, tenant cannot pursue other withholding remedies ▪ Tenant may not pursue this remedy if “condition was caused by the deliberate or negligent act or omission of the tenant” or a tenant’s guest</td>
<td>Tenant may only “procure reasonable amounts” of essential services.</td>
</tr>
<tr>
<td><strong>South Dakota</strong></td>
<td>S.D. Codified Laws Ann. § 43-32-9</td>
<td>Yes</td>
<td>Lessor has reasonable time after notice to make repairs</td>
<td>Lessee must provide notice. ▪ Landlord must “deliberately or negligently fail to supply essential services” ▪ Tenant who pursues this remedy cannot other remedies</td>
<td>One month's rent</td>
</tr>
<tr>
<td><strong>Tennessee</strong></td>
<td>Tenn. Code Ann. § 66-28-502</td>
<td>Yes</td>
<td>Landlord must give written notice to landlord specifying breach</td>
<td>Tenant must initially (1) provide notice of condition to the person to whom rent is normally paid. Then, if landlord fails to make repairs after a reasonable time, (2) tenant must provide subsequent written notice to repair or remedy condition. ▪ Tenant cannot use this remedy if tenant is behind on rent payments ▪ Lease must contain language in underlined or bold print that informs the tenant of the remedies available under this section and others</td>
<td>Tenant may procure &quot;essential services&quot;</td>
</tr>
<tr>
<td><strong>Texas</strong></td>
<td>Tex. Prop. Code Ann. §§ 92.056, 92.0561</td>
<td>Yes</td>
<td>Landlord must make diligent effort to repair or remedy condition in a reasonable time after receiving notice, with a rebuttable presumption that seven days is a reasonable time</td>
<td>Tenant must initially (1) provide notice of condition to the person to whom rent is normally paid. Then, if landlord fails to make repairs after a reasonable time, (2) tenant must provide subsequent written notice to repair or remedy condition. ▪ Tenant cannot use this remedy if tenant is behind on rent payments ▪ Lease must contain language in underlined or bold print that informs the tenant of the remedies available under this section and others</td>
<td>One month's rent or $500, whichever is greater. However, if a tenant’s rent is subsidized, fair market rent, not the rent tenant pays applies</td>
</tr>
<tr>
<td>State</td>
<td>Code</td>
<td>Yes/No</td>
<td>Details</td>
<td></td>
<td></td>
</tr>
<tr>
<td>-------</td>
<td>------</td>
<td>--------</td>
<td>---------</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Utah</td>
<td>Utah Code Ann. § 57-22-6</td>
<td>Yes</td>
<td>Landlord either has number of days specified in rental agreement, or 10 days to make repairs. Then, if landlord does not comply, (2) tenant may have condition remedied, and (3) must maintain all receipts documenting the amount renter paid to correct deficient condition, and (4) provide a copy of receipts within five days of next rental period.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Tenant must initially:
1. Provide notice to landlord that fulfills the following: (a) specifies the deficient conditions, (b) states the corrective period landlord has to fix conditions in number of days, (c) states the remedy that renter has chosen to use if not fixed in that time, (d) provides owner permission to enter, and (e) is served pursuant to conditions in rental agreement or state statute.
2. Tenant may initially: (1) provide notice via USPS mail or a private mail delivery service.
3. Tenant must initially:
   - Landlord either has number of days specified in rental agreement, or 10 days to make repairs.
4. Renter must comply with all statutory duties of renters to utilize remedy.
5. Two month's rent.
| **Vermont**  
| Vermont  
| Vt. Stat. Ann. tit. 9, § 4459 | Yes | Landlord must repair within 30 days of notice | Tenant must provide notice of conditions | ▪ Applies only to minor repairs  
▪ Tenant may not proceed with this remedy if conditions were caused by “negligent or deliberate act or omission of the tenant or a person on the premises with the tenant’s consent” | One-half month’s rent |

| **Virginia**  
| Virginia  
| Va. Code Ann. § 55.1-1244.1 | Yes | Landlord must repair within 14 days’ notice | Tenant must provide notice of conditions within writing | ▪ Tenant may contract a third-party contractor licensed by Board for Contractors  
▪ Tenant may not use remedy if tenant or tenant’s guest caused conditions  
▪ Tenant may not deny entry to landlord | Not more than one month’s rent, or $1,500, whichever is greater |

| **Washington**  
| Washington  
| Wash. Rev. Code Ann. §§ 59.18.070, 59.18.100 | Yes | Landlord must repair within: (1) 24 hours when tenant is deprived of hot or cold water, heat, or electricity, or is imminently hazardous; (2) 72 hours, when tenant is deprived of refrigerator, range and oven, or a major plumbing fixture, and (3) 10 days in all other cases | Tenant must provide notice pursuant to Wash. Rev. Code Ann. § 59.18.070, specifying: (1) the premises involved, the owner’s name, and (3) the “nature of the defective condition” | ▪ Tenant must wait for opportunity for inspection from landlord  
▪ Tenant must have repairs done “in a workmanlike manner”  
▪ Repairs are limited to defects within leased premises  
▪ Tenant may not deduct more than two month’s rent over 12 months | One month’s rent |

| **West Virginia**  
| West Virginia  
| No statute; Teller v. McCoy, 253 S.E.2d 114 (W.Va. 1978) | No | Landlord must repair within 30 days of notice | Tenant must provide notice of conditions within writing | ▪ Applies only to minor repairs  
▪ Tenant may not proceed with this remedy if conditions were caused by “negligent or deliberate act or omission of the tenant or a person on the premises with the tenant’s consent” | One-half month’s rent |
## Rent Withholding Remedies by State

<table>
<thead>
<tr>
<th>State and Applicable Law</th>
<th>Rent Withholding Allowed?</th>
<th>Rent Withholding Type</th>
<th>Affirmative, Defensive, or Both?</th>
<th>Relevant Provisions</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Alabama</strong>&lt;br&gt;Ala. Code § 35-9A-164</td>
<td>No</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Alaska</strong>&lt;br&gt;Alaska Stat. §§ 34.03.100, 34.03.180(a)(3), 34.03.190</td>
<td>Yes</td>
<td>Rent escrow, URLTA language</td>
<td>Defensive</td>
<td>Tenant must counterclaim in an action for possession based upon nonpayment of rent.</td>
</tr>
<tr>
<td><strong>Arkansas</strong>&lt;br&gt;Ark. Code § 18-17-502</td>
<td>No</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>California</strong>&lt;br&gt;Cal. Civ. Pro. Code § 1174.2; Green v. Superior Court, 10 Cal. 3d 616 (1974)</td>
<td>Yes</td>
<td>Rent withholding</td>
<td>Defensive</td>
<td>Tenant must raise an affirmative defense a breach of landlord’s obligation. Court determines whether breach of habitability occurred. Court may order landlord to repair conditions, shall order monthly rent be limited to value of the premises.</td>
</tr>
<tr>
<td><strong>Colorado</strong>&lt;br&gt;Colo. Rev. Stat. § 38-12-507</td>
<td>Yes</td>
<td>Rent escrow, URLTA language</td>
<td>Defensive</td>
<td>Tenant must file an answer asserting habitability breaches in an action for possession based upon nonpayment of rent. Upon tenant’s assertion, court shall order them to pay into court’s registry all of their rent, unless tenant (1) has spent money on repairs or (2) is indigent.</td>
</tr>
<tr>
<td><strong>Connecticut</strong>&lt;br&gt;Conn. Gen. Stat. Ann. §§ 47a-14a to -14h</td>
<td>Yes</td>
<td>Rent escrow</td>
<td>Affirmative-linked with code enforcement systems</td>
<td>Tenant must file under oath with clerk of court, (1) their name, (2) their landlord’s name, (3) the address of the premises, (4) the nature of the alleged habitability violation, (5) the dates when rent is due under the rental agreement, and (6) must certify</td>
</tr>
</tbody>
</table>
they complained to a municipal agency enforcing the housing code.

<table>
<thead>
<tr>
<th>State</th>
<th>Statute</th>
<th>Yes/No</th>
<th>Defense</th>
<th>Detail</th>
</tr>
</thead>
<tbody>
<tr>
<td>Delaware</td>
<td>Del. Code Ann. tit. 25, § 5308(b)(3)</td>
<td>Yes</td>
<td>Rent abatement</td>
<td>Tenant is authorized to withhold 2/3 per diem rent automatically and can withhold more. Landlord can file for summary possession, claiming wrongful withholding to recoup amount wrongfully withheld. Tenant must pay unfavorable judgment within 10 days.</td>
</tr>
<tr>
<td>Florida</td>
<td>Fla. Stat. Ann. § 83.60</td>
<td>Yes</td>
<td>Rent withholding (for habitability issues), rent escrow (for other claims)</td>
<td>Tenant may raise defense of material noncompliance with § 83.51 (habitability statute) for habitability violations if they provided written notice to the landlord, then seven days elapsed without compliance. For other defenses, such as defective notice, tenants must pay into the court the accrued rent within five days of the proceeding.</td>
</tr>
<tr>
<td>Hawaii</td>
<td>Haw. Rev. Stat. § 521-78</td>
<td>Yes</td>
<td>Rent escrow</td>
<td>Request for escrow can be made either by tenant or the landlord in any court proceeding in which payment or nonpayment of rent is in dispute. Tenant must pay rent into court to avoid waiving all habitability-based defenses.</td>
</tr>
<tr>
<td>Idaho</td>
<td>No statute</td>
<td>No</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Illinois</td>
<td>765 Ill. Comp. Stat. §§ 735/2, 735/2.2</td>
<td>No</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Indiana</td>
<td>No statute</td>
<td>No</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Iowa</td>
<td>Iowa Code Ann. § 562A.24</td>
<td>Yes</td>
<td>Rent escrow, URLTA language</td>
<td>Tenant must be able to state a counterclaim under § 562A.21(a), asserting a breach of landlord’s duties under § 562A.15, in an action for possession based upon nonpayment of rent.</td>
</tr>
<tr>
<td>State</td>
<td>Statute Description</td>
<td>Policy</td>
<td>Language Model</td>
<td></td>
</tr>
<tr>
<td>-------------</td>
<td>-------------------------------------------------------------------------------------</td>
<td>----------</td>
<td>----------------</td>
<td></td>
</tr>
<tr>
<td>Louisiana</td>
<td>No statute</td>
<td>No</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Maryland</td>
<td>Md. Code Ann. [Real Prop.] §§ 8-211, 8-211.1</td>
<td>Yes</td>
<td>Rent escrow, Both</td>
<td></td>
</tr>
<tr>
<td>Massachusetts</td>
<td>Mass. Gen. Laws Ann. ch. 239, § 8A</td>
<td>Yes</td>
<td>Rent escrow, Defensive</td>
<td></td>
</tr>
</tbody>
</table>

To time may order the tenant to pay into court all or part of the rent accrued and thereafter accruing, and shall determine the amount due to each party.”

In an action for possession based upon nonpayment of rent, tenant may counterclaim for any amount recoverable under the rental agreement under Ky. Rev. Stat. Ann. § 383.565. If an escrow is established, tenant must pay into court all or part of rent accrued and thereafter accruing.

Implied ability of court to abate rent in eviction actions and tenant’s affirmative claims against landlords. Court may rebate tenants any money paid in excess of the value given habitability issues. However, tenants may effectively waive the warranty of habitability if conditions which violate it reflect a stated reduction in rent.

Tenant can raise issue either as an action of rent escrow, and pay into the court, or tenant may refuse to pay rent and raise the existence of asserted defects or conditions as an affirmative defense. The court may order the rent be reduced in an amount determined by the court to be fair and equitable to represent the existence of the conditions or defects.

To assert defense, (1) tenant must show their landlord (or his agent) knew about the conditions before the tenant withheld; (2) tenant must show conditions were not caused by tenant; (3) the premises were not situated in a hotel/motel; and (4) the landlord cannot show that the conditions should be remedied by vacating the premises. Proof that premises are in violation of housing codes creates a presumption that they are
<table>
<thead>
<tr>
<th>State</th>
<th>Code</th>
<th>Requirement</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Michigan</td>
<td>Mich. Comp. Laws § 125.530</td>
<td>Yes</td>
<td>Rent escrow, Affirmative, linked with code enforcement systems</td>
</tr>
<tr>
<td>Minnesota</td>
<td>Minn. Stat. Ann. § 504B.385</td>
<td>Yes</td>
<td>Rent escrow, Affirmative, linked with code enforcement systems</td>
</tr>
<tr>
<td>Mississippi</td>
<td>No statute</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Missouri</td>
<td>Mo. Ann. Stat. §§ 441.570, 441.580</td>
<td>Yes - rent receivership escrow, and rent withholding</td>
<td>Rent receivership escrow, and rent withholding, Affirmative</td>
</tr>
<tr>
<td>Montana</td>
<td>Mont. Code Ann. § 70-24-421</td>
<td>Yes</td>
<td>Rent escrow, URLTA language</td>
</tr>
<tr>
<td>State</td>
<td>Statute Information</td>
<td>Yes/No</td>
<td>Landlord Obligations</td>
</tr>
<tr>
<td>------------</td>
<td>--------------------------------------------------------------------------------------</td>
<td>--------</td>
<td>-------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Nebraska</td>
<td>Neb. Rev. Stat. § 76-1428</td>
<td>Yes</td>
<td>Rent escrow, URLTA language</td>
</tr>
<tr>
<td>Nevada</td>
<td>Nev. Rev. Stat. Ann. §§ 118A.380, 118A.490</td>
<td>Yes</td>
<td>Rent withholding, rent escrow (remedy #2)</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>N.H. Rev. Stat. Ann. § 540:13-d</td>
<td>Yes</td>
<td>Rent Escrow</td>
</tr>
<tr>
<td>New Jersey</td>
<td>N.J.S.A. 2A:42-85; Berzito v. Gambino, 63 N.J. 460 (1973)</td>
<td>Yes</td>
<td>Receivership rent escrow, and rent withholding</td>
</tr>
<tr>
<td>State</td>
<td>Statute</td>
<td>Rent Abatement</td>
<td>Conditions</td>
</tr>
<tr>
<td>------------</td>
<td>--------------------------------------</td>
<td>----------------------</td>
<td>--------------------------------</td>
</tr>
<tr>
<td>New Mexico</td>
<td>N.M. Stat. Ann. § 47-8-27.2</td>
<td>Yes</td>
<td>Defensive</td>
</tr>
<tr>
<td>North Carolina</td>
<td>No statute</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>North Dakota</td>
<td>No statute</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Ohio</td>
<td>Ohio Rev. Code Ann. § 5321.07</td>
<td>Yes</td>
<td>Rent escrow</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>Okla. Stat. Ann. tit. 41, § 121</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Oregon</td>
<td>Or. Rev. Stat. § 90.365</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>Yes</td>
<td>Rent escrow</td>
<td>Affirmative, linked with code</td>
</tr>
<tr>
<td>State</td>
<td>Statute Reference</td>
<td>Yes/No</td>
<td>Enforcement Systems</td>
</tr>
<tr>
<td>-----------------------</td>
<td>--------------------------------------------------------</td>
<td>--------</td>
<td>---------------------</td>
</tr>
<tr>
<td>35 Pa. Cons. Stat. Ann. § 1700-1</td>
<td>rent to landlord ceases, and the tenant is to pay rent into an escrow account in a bank or trust company approved by the city or county. If landlord fails to fix conditions within six months, the tenant may recoup rent not used to fix premises. Finally, a tenant cannot be eviction for any reason while rent is escrowed.</td>
<td></td>
<td>enforcement systems</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>R.I. Gen. Laws § 34-18-32</td>
<td>Yes</td>
<td>Rent escrow, URLTA language</td>
</tr>
<tr>
<td>South Dakota</td>
<td>S.D. Codified Laws Ann. § 43-32-9</td>
<td>Yes</td>
<td>Rent withholding</td>
</tr>
<tr>
<td>Tennessee</td>
<td>Tenn. Code Ann. § 68-111-104</td>
<td>Yes</td>
<td>Rent escrow</td>
</tr>
<tr>
<td>Texas</td>
<td>No statute</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Utah</td>
<td>No statute</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>State</td>
<td>Code</td>
<td>Rent withholding</td>
<td>Defense</td>
</tr>
<tr>
<td>---------</td>
<td>-----------------------------</td>
<td>------------------</td>
<td>-------------</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Vermont**: Tenant may withhold rent if after receiving actual notice from either the tenant, a governmental entity or a qualified independent inspector, the landlord fails to make repairs within a reasonable time. If landlord sues for possession based on nonpayment, tenant may assert habitability violations as a defense.

**Virginia**: Tenant may initiate action if tenant can show that prior to commencement of the action, the landlord or landlord’s agent refused or failed to remedy conditions in a reasonable period. There is a presumption that longer than 30 days’ delay is unreasonable. The court may abate the rent required to be posted in escrow on account of conditions. Additionally, court may order an investigation and report of investigations. If conditions are not fully remedied by six months, and landlord has not made reasonable attempts to remedy conditions, the court shall award all money accumulated in escrow to the tenant.

**Washington**: If a landlord fails to perform duties set by § 59.18.060, the tenant may deliver written notice to the person who collects their rent or their representative. If a landlord fails to remedy conditions within a reasonable time, they can request a local government official conduct an inspection within five days of the request. The local government official can certify whether conditions specified do exist and whether they make the premises inhabitable. After this declaration, the tenant must make a good faith determination that they are unable to repair the conditions described in the certification using repair and deduct remedies. Tenant will then pay rent into court instead of landlord for as long as noncompliance continues.
<table>
<thead>
<tr>
<th>Location</th>
<th>Decision</th>
<th>Method of Rent Abatement</th>
<th>Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>West Virginia</td>
<td>Yes</td>
<td>Rent withholding common law</td>
<td>If a landlord fails to comply with their statutory duties, tenant may provide notice of noncompliant conditions, and abate rent based on diminution of value. However, the statute does not allow rent to be withheld in full if the tenant remains in possession.</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>Yes</td>
<td>Rent abatement</td>
<td>Defensive</td>
</tr>
<tr>
<td>Wyoming</td>
<td>No</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>