

ON THE SURPRISING USE OF UNENFORCEABLE AND MISLEADING CLAUSES IN CONSUMER CONTRACTS: EVIDENCE FROM THE RESIDENTIAL RENTAL MARKET

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This paper is the first to empirically explore a puzzling phenomenon: the persistence of unenforceable and misleading terms in consumer contracts. Taking the residential rental market as a test-case, the study systematically analyzes a hand-collected sample of 70 residential leases in light of the mandatory rules governing the relations between landlords and tenants. The paper's findings are striking: landlords frequently use legally dubious—as well as clearly invalid—provisions in their contracts. Ninety-nine percent of the sampled leases (69 out of 70) contain at least one unenforceable or misleading clause. Building on insights from economic and psychological theories, the paper suggests that unenforceable and misleading clauses persist in residential leases because they benefit landlords. When a rental problem arises, tenants are likely to rely on their lease agreement. While mistakenly perceiving their lease provisions as enforceable and binding, they may forgo rights that cannot be overridden by contract, bearing costs that the law deliberately imposes on landlords. The paper proceeds to offer preliminary evidence in support of this theoretical account through a survey-based study of 300 tenants, conducted on Amazon Mechanical Turk. Lastly, in light of the social costs associated with the use of unenforceable and misleading clauses, the paper offers preliminary policy prescriptions, ranging from disclosure obligations to statutory form leases, and estimates their effectiveness and desirability.

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1 INTRODUCTION

This study takes a first step at investigating a puzzling phenomenon: the use of legally invalid clauses and misleading terms in consumer contracts. The persistence of such clauses in contracts is perplexing, for why would sellers use legally meaningless or inaccurate terms, which are unlikely to be enforced by courts, in their contracts? Yet, as this paper reveals, at least in the domain of residential leases, unenforceable and misleading clauses are surprisingly common.

Residential rental contracts do not only fail to meet mandatory disclosure obligations, but also frequently contain clauses that shift responsibilities and liabilities from landlords to tenants, restrict or waive tenants' mandatory rights and remedies, and so on. When tenants' rights and remedies are finally mentioned in these contracts, they are often inaccurately described to the detriment of tenants, in what seems as an attempt to restrict or limit them above and beyond what is permitted by law.

The mere existence of such a phenomenon is bewildering, but more astonishing is its pervasiveness, as illustrated by the research. The vast majority of the leases examined in this study included unenforceable and misleading clauses. How could these findings be explained?

Unenforceable and misleading clauses may persist in the market by mistake, out of landlords' ignorance of the law or their hope that the law will change. Yet, the very scope and frequency with which such clauses are inserted—as revealed by this study—calls this possibility into question. Moreover, the study shows that residential rental companies (which usually have in-house counsel), and not only individual landlords, use

contracts that contain such terms, making it implausible that they are included merely by mistake.

Economic and psychological insights may shed light on this query. Economic theories suggest that sellers (and more particularly, landlords) may actually be incentivized to include such terms in their contracts, for there is much to be gained and little to be lost as a consequence. Given that consumers are typically uninformed about the mandatory rules governing their transactions, they are likely to assume that their contracts contain clauses which are both accurate and legally binding. When a problem or a dispute with the seller (or landlord) arises, they are thus likely to rely on their contracts for determining their rights, remedies and obligations. If these contracts contain unenforceable and misleading clauses, shifting responsibilities from the landlord to the tenant and limiting the tenant's mandatory rights and remedies, tenants who are unfamiliar with the law are likely to relinquish valid legal rights and claims upon coming across such clauses, bearing costs that the law deliberately and explicitly imposes on landlords.

Based on this logic, in the last two decades several scholars have cautioned against the possible use of unenforceable clauses in consumer contracts, a problem one of them has termed 'morally disquieting'.² Yet, so far—there has been no direct empirical evidence on this practice.

² Bailey Kuklin, *On the Knowing Inclusion of Unenforceable Contract and Lease Terms*, 56 U. CIN. L. REV. 845, 846, 1129 (1988); Charles A. Sullivan, *The Puzzling Persistence of Unenforceable Contract Terms*, 70 OHIO ST. L. J. 1127, 1127-1129 (2009); Juliet P. Kostritsky, *Illegal Contracts and Efficient Deterrence: A Study in Modern Contract Theory*, 74 IOWA L. REV. 115 (1988); Kurt E. Olafsen, Note, *Preventing the Use of Unenforceable Provisions in Residential Leases*, 64 CORNELL L. REV. 522, 524-527 (1978); MARGARET J. RADIN, *BIOLERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* 9, 220 (2013).

The paucity of empirical research into the use of unenforceable and misleading contractual clauses (hereinafter: UMCs) is peculiar when one considers the possible social costs and welfare implications of this phenomenon. As previously suggested, if consumers believe that their contractual provisions are enforceable and legally accurate when they are not, they are likely to behave in an inefficient manner and against their own well-being. Given the social importance of the use of such provisions in consumer contracts, one might expect that “empirical theories dealing with the use and abuse of contract behavior in the shadow of contract law and beyond” would be developed as soon as initial signs of such abuse emerged.³ A comprehensive analysis of the scope and frequency of this practice is thus long overdue, and its results could better inform continuing policy debates.

This study seeks to contribute to our understanding of the problem, its scope and implications, while relying on the residential rental market as a test-case. The paper presents two interlinked empirical studies, based on different quantitative methodologies. The first study comprises of a systematic content-based analysis of the persistence of UMCs in residential rental contracts. Building on a database of 70 residential leases from Massachusetts, established for the purposes of this research, the study examines and reports whether the sampled contracts comply with, and accurately reflect, the mandatory rules governing tenant-landlord relations. The second study is based on a survey of 300 tenants from Massachusetts. It explores whether, and to what extent, tenants rely on their leases to ascertain their rights and duties as renters, and how unenforceable and misleading lease clauses affect their understanding of their

³ Richard E. Speidel, *Afterword: The shifting domain of contract*, 90(1) NW. U. L. REV. 254, 254–255 (1995).

rights and duties. Experimental studies testing the effect of UMCs on tenants' decisions and behavior are outside the scope of this paper, and are left for future research.

The residential rental market is a fertile ground for researching the use of UMCs in consumer contracts. The role that residential rental contracts play in modern urban society continuously increases, along with the rapid growth of the residential rental industry. Additionally, in light of the perceived gap in bargaining power between landlords and tenants, the vast majority of states in the U.S., including Massachusetts, have adopted regulation armoring tenants with a variety of mandatory rights and remedies that cannot be waived under any lease agreement.⁴ These rules prohibit landlords from inserting provisions that are deemed to contravene public policy into their residential leases. Alongside these substantive requirements, some rules also establish disclosure requirements, obliging landlords to disclose information about their substantive mandatory obligations to the tenants.⁵

Legislative regulation of content (in the form of mandates or bans on specific contract terms) is probably the most pervasive in the residential rental market, and therefore could serve as an important test-case for other markets, where it is currently gaining increased popularity.⁶ In light of the growing realization that consumer markets

⁴ The Uniform Residential Landlord and Tenant Act (URLTA), has been adopted by 21 states as of 2015. Many other States, including Massachusetts, have enacted variations of URLTA, or its predecessor, the Model Code. In Massachusetts, these protective rules include curbs on landlord's ability to deny liability for loss or damage; anti-discrimination rules; restrictions to landlord's remedies upon tenant's breach of the contract; regulation of security deposits and advanced payments, and other protections of tenants.

⁵ MASS GEN. LAWS ch. 186; 105 MASS. CODE. REGS. 410.000.

⁶ Currently, substantial regulation of content exists in the insurance market (see, *e.g.*, Daniel Schwarcz, *Reevaluating Standardized Insurance Policies*, 78 U. CHI. L. REV. 1263 (2011)). The CARD Act of 2009 has introduced substantive restrictions, including price caps and other bans, into the Credit Card market as well (see OREN BAR-GILL, *SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS* 1, 105 (2012)).

are prone to, and often suffer from, both traditional and ‘behavioral’ market failures,⁷ there is a developing trend towards broader substantive regulation of consumer contracts around the globe.⁸ This case-study can therefore assist policy-makers in designing and enforcing substantive regulation in other consumer markets, in this critical juncture for regulatory reform.

The study’s findings are alarming: they demonstrate that residential leases not only frequently omit various rights and remedies that the law bestows upon tenants, but also include unenforceable clauses that conflict with the law and misleading clauses that misrepresent it. As I show below, 99% of the leases in the sample (69 out of 70) include at least one unenforceable or misleading clause. These drafting practices, if intentional, could be seen as an attempt to alter the statutory scheme, by inserting clauses that are inconsistent with the law, or selectively represent it.

The survey’s findings indicate that this phenomenon is, at the very least, troubling. They reveal that tenants mainly—and sometimes solely— rely on their leases to ascertain their rights and obligations as renters, and only rarely seek legal advice or turn to other sources when a rental problem or a dispute with the landlord arises. The survey results also demonstrate that UMCs consistently misinform tenants about their most basic rights, and suggest that further research into the implications of the use of UMCs in contracts is warranted.

⁷ The term *behavioral market failure* was coined by Professor Bar-Gill. See: Bar-Gill, *supra* note 6, at 32.

⁸ For a review of the shift towards substantive regulation of consumer contracts in the U.S., see, *e.g.*, Jean Braucher, *Form and Substance in Consumer Financial Protection*, 7 BROOK. J. CORP. FIN. & COM. L. 107 (2012).

Leaving aside the moral and ethical concerns that are raised by this practice,⁹ the survey results support the supposition that the persistent use of UMCs plausibly shifts to tenants costs that the law explicitly imposes on landlords. Given the social costs of this practice, this paper discusses possible policy prescriptions and assesses their effectiveness and desirability.

The paper proceeds as follows. Part II presents the residential rental market—the test-case of the present study, as well as the legal framework on which the analysis is based: landlord and tenant law in Massachusetts. Part III presents the study’s hypotheses and their theoretical basis, and surveys previous research on this issue. Parts IV and V are the core of this paper: they present the empirical studies themselves. Part IV begins by providing an account of the sample and the methodology used in the first study, and proceeds by presenting and analyzing the results. Part V turns to present the survey-based study, conducted in order to examine whether, and to what extent, tenants read and rely on their contracts, and to explore the impact of the inclusion of UMCs on tenants’ understanding of their rights and duties. Part VI discusses the implications of the studies’ findings. In light of the welfare costs discussed in Part VI, Part VII puts forward various preliminary policy prescriptions, and applies the paper’s empirical findings to shed light on the desirability of these options. Part VIII concludes. The appendixes of this paper include the codebook used for coding the leases in the sample and the survey questionnaire.

⁹ For a more extensive discussion of the moral, ethical, and deontological concerns raised by such practice, see Kuklin, *supra* note 2, at 847–860.

2 THE TEST-CASE: RESIDENTIAL RENTAL CONTRACTS

2.1 The Residential Rental Market

The residential rental market in the United States is constantly and rapidly growing, both in response to urbanization trends and as a consequence of the subprime mortgage crisis. While it raised the barriers to homeownership, the financial downturn also created a surge in demand for rental units, which has revived rental markets across the country.¹⁰ The economic recession highlighted the risks of homeownership, and gave rise to a renewed appreciation of the advantages of renting.¹¹ As of September 2015, more than 110 million U.S. residents (or more than 43 million households)—representing 35 percent of the U.S. population—live in rental housing.¹² In Massachusetts alone, there are more than 800,000 renters, constituting 12.5% of the entire population, as of September 2015.¹³

The residential rental market consists primarily of individual landlords who rent out single units on their own residential property or in small buildings. However, over half of the market's revenue is generated by larger firms, including residential rental companies and real-estate trusts, which dominate the ownership of large apartment complexes.¹⁴ As of October 2015, the market's annual revenues exceed \$165 billion.¹⁵

¹⁰ MAKSIM SOSHKIN, IBISWORLD INDUSTRY REPORT 53111: APARTMENT RENTAL IN THE U.S. (Oct. 2015), *available at* <http://clients1.ibisworld.com/reports/us/industry/default.aspx?entid=1349> (click "View all reports", then on "Real Estate and Rental and Leasing in the US", then on "Apartment Rental in the US: Market Research Report"); JOINT CENTER FOR HOUSING STUDIES OF HARVARD UNIVERSITY, AMERICAS' RENTAL HOUSING: EVOLVING MARKETS AND NEEDS 1 (2013), *available at* <http://www.jchs.harvard.edu/americas-rental-housing>; Mark Obrinsky, *Shake, Rally, and Roll*, in NATIONAL MULTIFAMILY HOUSING COUNCIL (NMHC), NHMC 50: A SPECIAL ADVERTISING SECTION TO MULTIFAMILY EXECUTIVE 8 (April 2014), *available at* https://nmhc.org/uploadedFiles/Landing_Page/NMHC50_2014.pdf.

¹¹ AMERICAS' RENTAL HOUSING, *supra* note 10, at 1.

¹² See *Quick Facts: Resident Demographics (2014; updated 9/2015)*, NATIONAL MULTIFAMILY HOUSING COUNCIL (NMHC), <https://nmhc.org/Content.aspx?id=4708> (last visited December 7, 2015);

¹³ *Id.*

¹⁴ IBIS REPORT, *supra* note 10, at 20-25.

¹⁵ *Id.*

2.2 Landlord and Tenant Law: A Brief Overview

2.2.1 Landlord and Tenant Law in the U.S.

In the 1960s and early 1970s, the United States has experienced a revolution in residential landlord and tenant law.¹⁶ This revolution, which has enhanced the rights of tenants through legislative and judicial law-making, was inspired by the rise of the Civil Rights Movement and by developments in consumer protection law. It has been rapid and pervasive, with almost all jurisdictions adopting major reforms in landlord and tenant law.¹⁷

In many states, legislative reform preceded and often hastened shifts in case-law; in others, statutes codified judicial precedents. Some of these statutes focused mainly on establishing new remedies for a landlord's failure to abide by housing regulations. Others limited themselves to granting tenants with new rights, and left it to the courts to decide upon the remedies.¹⁸ The development of new judicial and statutory doctrines in this field resulted in the drafting of the Model Code and the subsequent enactment of the Uniform Residential Landlord and Tenant Act (URLTA), which (as of 2015) has been adopted by 21 states.¹⁹ Many other states have enacted variations of URLTA, or its predecessor, the Model Code.

¹⁶ Samuel B. Abbott, *Housing Policy, Housing Codes and Tenant Remedies: An Integration*, 56 B.U.L. REV. 1 (1976) (Abbott was the first to refer to the transformation in tenant-landlord law as a "revolution"); Edward H. Rabin, *The Revolution of Tenant and Landlord Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 520–521 (1984); Mary A. Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C.L. REV. 503, 575 (1982) (suggesting that landlord-tenant law "escaped from the realm of private ordering, in which the stronger party typically has the advantage, and has become subject to regulation 'in the public interest'"); Roger A. Cunningham, *The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status*, 16 URB. L. ANN. 3 (1979) (suggesting that landlord-tenant relations have shifted from being based on "contract" to being based on "status").

¹⁷ Rabin, *supra* note 16, at 521.

¹⁸ Glendon, *supra* note 16, at 523.

¹⁹ Unif. Residential Landlord & Tenant Act Refs & Annos (2015).

The changes in landlord and tenant law lie at the crux of the landlord-tenant relationship, both in legal and in practical terms. It is not within the scope of this paper to discuss these changes in length. However, some of the major changes are worth noting, as they are relevant for this study. One such reform concerns the implied warranty of habitability: before 1969, the law in most jurisdictions was simple—*caveat lessee*. The landlord was generally not responsible for repairing defects in the premises—regardless of whether they were present when the premises were leased or occurred thereafter—unless the parties agreed otherwise. Today, most jurisdictions follow the opposite rule: the landlord is obliged to repair *all* defects (patent and latent), irrespective of when they emerge, and notwithstanding any agreement to the contrary.²⁰ Rent Control ordinances limiting the landlord's common-law right to set the price of the rental unit as they saw fit also dramatically increased in the 1970s.²¹

Another fundamental change concerned the landlord's liability in torts. By 1976, over twenty state legislatures had determined that exculpatory clauses in residential leases, that purportedly waived the landlord's negligence liability for personal injuries or damage to property, are void and unenforceable, and the URLTA adopted this approach.²² Other changes included anti-discrimination laws; regulation of landlord's power to evict tenants at the end of a lease; limitations on the landlord's remedies in

²⁰ Francis S. L'Abbate, Note, *Recovery Under the Implied Warranty of Habitability*, 10 FORDHAM L. REV. 285, 292 (1981); Mara J. Bresnick, Note, *Knight v. Hallsthammar: The Implied Warranty of Habitability Revisited*, 15 LOY. L. A. L. REV. 353, 354 n. 4 (1982); R. SCHOSHINSKY, AMERICAN LAW OF LANDLORD AND TENANT § 3: 13 (1980).

²¹ Rabin, *supra* note 16, at 527; MONICA R. LETT, RENT CONTROL: CONCEPTS, REALITIES AND MECHANISMS (1976) (describing the history of modern rent control legislation).

²² URLTA §1.403(a)(4) (1972); Rabin, *supra* note 16, at 530.

cases of breach of contract by the tenant; regulation of security deposits; and various other measures aimed at providing tenants with enhanced protection.²³

2.2.2 Landlord and Tenant Law in Massachusetts

Although Massachusetts has not officially adopted the URLTA, its landlord and tenant laws largely follow the URLTA model. Massachusetts' General Laws include a variety of pro-tenant rules, including curbs on landlord's ability to deny liability for loss or damage; anti-discrimination rules; restrictions on landlord's remedies upon tenant's breach of the contract; regulation of security deposits and advanced payments; various protections of tenants' rights and access to court; and the imposition of various maintenance and repair obligations on the landlord.²⁴

3 RESEARCH HYPOTHESES AND BACKGROUND LITERATURE

The research hypotheses draw from previous theoretical literature, suggesting that sellers are likely to use unenforceable clauses in their contracts, as they may gain, and have almost nothing to lose, from the inclusion of such terms.²⁵ They can profit from using such clauses despite their legal invalidity, in light of their potential effect on consumers. Even though the latter hardly read, understand, or take into account the terms of the fine-print before making a purchasing decision,²⁶ they are likely to look at these contracts when a problem or question arises concerning their rights and

²³ Rabin, *supra* note 16, at 531–539.

²⁴ See, e.g., CATHERINA F. DOWNING ET AL., RESIDENTIAL & COMMERCIAL LANDLORD-TENANT PRACTICE IN MASSACHUSETTS (2009); 11 GEORGE WARSHAW, MASSACHUSETTS LANDLORD-TENANT LAW (2nd ed. 2001); G. EMIL WARD, MASSACHUSETTS LANDLORD-TENANT PRACTICE: LAW AND FORMS (1996).

²⁵ Kuklin, *supra* note 2; Sullivan, *supra* note 2; Olafsen, *supra* note 2.

²⁶ Yannis Bakos, Florencia Marotta-Wurgler & David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard Form Contracts*, 43 J. LEGAL STUD. 9 (2014)

obligations as buyers or renters. When this happens, consumers (including tenants) are likely to perceive their contractual provisions as enforceable and binding. Consequently, they might unknowingly relinquish mandatory rights and remedies and bear costs that the law inflicts on sellers.²⁷

This theoretical account can be illustrated by an example: Massachusetts law prohibits landlords from waiving their liability for loss or damage caused to tenants or third parties as a result of their negligence. Now assume that a tenant reads a lease provision stating that the landlord is not liable for any loss or damage caused to the tenant or to third parties. Such a clause may mislead the tenant into believing that the landlord's liability in negligence has been validly disclaimed.

Consumers (including tenants) are likely to assume that the terms in their contracts are enforceable and accurately reflect the law simply because they may see no other reason for the well-informed seller or landlord to use legally meaningless clauses. Warren Mueller's 1970 study corroborates this point: most participants in the study believed that the exculpatory clauses in their mock residential leases were enforceable, when in fact they were unlikely to be upheld in court. In general, the participants appeared not to question the validity of their lease terms—indeed, some of them expressed astonishment that a provision in an executed lease could be anything other than “valid and enforceable.”²⁸ Mueller therefore suggested that—

It is possible that the tenant, who may not be acquainted with the practice of legal draftsmen or shrewd (or, more generously, legally uninformed) lessors of inserting clauses in leases purely for their persuasive or *in terrorem* effect,

²⁷ Kuklin, *supra* note 2, at 846-847; Sullivan, *supra* note 2, at 1127-1129; Olafsen, Sullivan, *supra* note 2, at 524-527.

²⁸ Warren Mueller, *Residential Tenants and Their Leases: An Empirical Study*, 69 MICH. L. REV. 247, 277 n. 120 (1970).

finds it difficult to see any logic in filling a lease form with *legally* worthless verbiage.²⁹

Such “*legally* worthless verbiage” can, however, significantly affect consumers’ and tenants’ perceptions, decisions, and behavior. Stolle and Slain’s experimental study in 1997 offers insight into this effect: it showed that exculpatory clauses, if read, often deter consumers from seeking legal remedies.³⁰ Even when a consumer knows or suspects that a clause is unenforceable, she might be deterred from breaching the contractual provisions to which she had “voluntarily agreed”, if she does not know that the law is mandatory and cannot be overridden by a contract. Moreover, she might be discouraged from claiming her rights in court, given the *in terrorem* effect produced by the mere appearance of the unenforceable provision in the contract.³¹

The deterrent effect of the fear of a potential lawsuit or losing in trial—despite the unenforceability of the contractual provision in question—has been recognized in various contexts. In the case of employment agreements, for example, several scholars have suggested that unenforceable non-compete clauses can induce employees to turn down job offers from competitors, to avoid the risk of a lawsuit.³² This effect is

²⁹ Mueller, *supra* note 28, at 274.

³⁰ Dennis P. Stolle & Andrew J. Slain, *Standard Form Contracts and Contract Schemas: A Preliminary Investigation of the Effects of Exculpatory Clauses on Consumers’ Propensity to Sue*, 15 BEHAV. SCI. L. 83, 91 (1997).

³¹ Sullivan, *supra* note 2, at 1137. This can be true even if consumers and tenants are completely rational: if the net cost of pursuing a claim in court exceeds the anticipated gain from such action, consumers and tenants will opt to avoid legal action.

³² Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 632-37 (1960) (“For every covenant that finds its way to court, there are thousands which exercise an in terrorem effect on employees who respect their contractual obligations and on competitors who fear legal complications if they employ a covenantor, or who are anxious to maintain gentlemanly relations with their competitors.”); Catherine L. Fisk, *Reflections on the New Psychological Contract and the Ownership of Human Capital*, 34 CONN. L. REV. 765, 782-83 (2002) (noting employers’ use of covenants not to compete in California, where such clauses are prohibited by statute, “presumably counting on the in terrorem value of the contract when the employee does not know that the contract is unenforceable.”); Stewart E. Sterk, *Restraints on the Alienation of Human Capital*, 79 VA. L. REV. 383, 410 (1993) (observing that, “by limiting the number of attractive alternatives available to

exacerbated by the American rule that every litigant must bear their own attorney's fees and expenses.³³ Ultimately, consumers and tenants might succumb to the written contracts they signed (or clicked 'I agree' to), even if they suspect that the clauses they contain will not be upheld by the court.

In light of this evidence, it may be assumed that in the absence of sufficient sanctions and effective enforcement mechanisms to deter landlords from using unenforceable clauses in their contracts, rational profit-maximizers will use such clauses frequently, as they could only profit from this practice.³⁴ Furthermore, landlords that do not intentionally use unenforceable terms but are simply uninformed about the applicable law may lack the incentive to ensure that their contracts meet the regulatory requirements. Thus, residential leases may sometimes include unenforceable clauses not as a result of landlords' intention to mislead tenants, but merely as a result of the landlords' mistakes or ignorance of the law.

Leases may also include contractual clauses that are not unenforceable *per se*, but are still likely to mislead consumers and tenants about the legal state-of-affairs. In other words, such clauses— albeit not in direct conflict with the law— are nonetheless likely to generate a similar (if not identical) psychological effect on tenants. They may, for example, selectively disclose the law, while misinforming tenants about their legal rights

an employee, a restrictive covenant may . . . 'coerce' that employee to remain with his initial employer."); Charles A. Sullivan, *Revisiting the "Neglected Stepchild": Antitrust Treatment of Postemployment Restraints of Trade*, 1977 U. ILL. L.F. 621, 622–23 ("The mere existence of noncompete clauses must also induce many employees—unwilling to choose among changing careers, moving to a new location, or litigating—not to leave their employment to begin with.")

³³ Under some statutes, tenants are entitled to attorney's fees, but even if they are aware of these, they may be reluctant to expend the necessary resources to defend their rights and remedies, for fear of the risk (however slight) that the court would refuse to strike down the objectionable lease provision.

³⁴ The remaining section is also applicable to sellers and consumers more generally, but the analysis will focus on the study's case-study: landlords and tenants.

and remedies. They may emphasize the landlord's rights and remedies while neglecting to mention the tenant's mandatory rights and remedies, or present the law in a way which favors the landlord when compared with the legal benchmark. The distinction between unenforceable and misleading clauses is an important one, which (to the author's knowledge) has not been introduced in the literature thus far. This distinction will be further developed throughout the paper.

At this point it may go without saying that we should not assume that landlords will voluntarily disclose their substantive obligations and the tenants' substantive protections, rights, and remedies if they are not legally required to do so. For example, if sellers and landlords are not legally obliged to disclose to buyers or tenants that they are subject to implied warranties under the law, we should not expect to see disclosure of such information in the contracts.

Consumers and tenants will be influenced by the abovementioned practices only to the extent that they are unfamiliar with the legal state-of-affairs. For if they are informed about the mandatory rules that govern their transactions, they will realize that their contractual provisions are unenforceable or misleading when encountering such clauses. They will also not be affected by the drafters' failure to disclose information about their legal rights and remedies. Yet, we should not be so optimistic as to assume that consumers and tenants are typically informed about the laws governing their relations with sellers and landlords. In fact, there is strong evidence to suggest that consumers and tenants are often ignorant about the various legal rules that apply with

regards to their transactions, and frequently harbor misperceptions about the law.³⁵ The decision not to become informed about the multiple aspects of the different laws that govern consumer transactions may be a perfectly rational one. Obtaining and processing such information might be costly and time-consuming, and consumers and tenants may rationally choose not to engage in such endeavors, at least as long as small stakes are involved. Yet, is it rational for them to assume that their contractual provisions are legally accurate and valid?

It appears that a perfectly rational consumer or tenant would, in circumstances of imperfect and asymmetric information, expect sellers and landlords to include unenforceable and misleading UMCs in their contracts, so as to enhance their profits, so long as the expected benefit from including such clauses exceeds the expected costs. Rational consumers and tenants could therefore expect sellers and landlords not to include such clauses, only to the extent that they believed that the latter are sufficiently deterred from inserting them into their contracts. In other words, rational consumers and tenants may assume that the regulator adequately protects them from such deceptive practices, by effectively monitoring the content of their contracts.

Whether these are rational expectations or not, empirical evidence suggests that people indeed overestimate the extent to which the law protects them, as well as the

³⁵ Oren Bar-Gill & Kevin Davis, (Mis)perceptions of Law in Consumer Markets 1, 4 (May 6, 2015) (unpublished manuscript, on file with authors). These findings are also consistent with psychological evidence that people are generally ignorant about laws governing their rights as employees. See, e.g., Pauline T Kim, *Bargaining With Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105 (1997) (finding that unemployed survey participants generally overestimated the legal protections granted to employees); Lauren Edelman et al., *Professional Construction of Law: The Inflated Threat of Wrongful Discharge*, 26 LAW & SOC'Y REV. 47 (1992) (finding that professionals exaggerate the risk of liability under state wrongful discharge laws).

extent to which it is enforced.³⁶ Particularly, there is evidence to suggest that people believe in the enforceability of contracts, as part of their more general belief in the rule of law and in the state's ability to enforce its laws.³⁷

Lastly, consumers' and tenants' optimism bias and other related psychological phenomena may enhance or exacerbate their beliefs in the accuracy and validity of the contracts that sellers and landlords use, as well as in the ability of the regulator to ensure that the latter meet the requirements imposed by the law.³⁸ If consumers and tenants mistakenly believe that regulation is effectively enforced, or optimistically assume that sellers and landlords are not likely to engage in unfair or deceptive practices, they are likely to misperceive such clauses as enforceable and binding.

But are landlords likely to include such clauses intentionally? Whereas at least some individual landlords might be ignorant of landlord and tenant law, residential companies and real-estate trusts are likely to be well acquainted with the law, since they are in the business of renting out apartments, and are typically assisted by law firms or by in-house counsel. If they include invalid clauses in their rental leases, it is unlikely, therefore, that they do so out of ignorance of the law, or because they are unaware of the invalidity or deceptive effect of some of their lease terms. It seems more likely that such clauses have been *deliberately* inserted for the firm's benefit. As rational entities, residential companies and other sophisticated landlords plausibly realize that they can

³⁶ Bar-Gill & Davis, *supra* note 35; Kim, *supra* note 35.

³⁷ Zev Eigen, *The Devil in the Details: The Interrelationship among Citizenship, Rule of Law and Form-Adhesive Contracts*, 41 CONN. L. REV. 381 (2008).

³⁸ The literature about optimism bias and other related psychological phenomena is very broad. See generally TALÍ SHAROT, *THE OPTIMISM BIAS: A TOUR OF THE IRRATIONALLY POSITIVE BRAIN* (2011). For applications of these phenomena to law and public policy, see, e.g., Linda Babcock & George Loewenstein, *Explaining Bargaining Impasse: The Role of Self-Serving Biases*, 11 J. ECON. PERSPECTIVES 109 (1997); Christine Jolls, *Behavioral Economics Analysis of Redistributive Legal Rules*, 51 VAND. L. REV. 1653, 1659 (1998); Cass R. Sunstein, *Empirically Informed Regulation*, 78 U. CHI. L. REV. 1349 (2011).

leverage their superior acquaintance with the law and their bargaining power by drafting leases that are likely to influence tenants' behavior.³⁹ They are thus incentivized to insert UMCs into their leases, to exploit the fact that these terms are not salient to tenants during their renting decisions, but generate misperceptions about the law when a problem emerges. This hypothesis is consistent with the many examples in the literature of sellers knowingly exploiting consumers' misperceptions, through advertising, marketing, and designing techniques.⁴⁰

As for individual landlords—although they probably do not include UMCs in their leases *deliberately*, they may still do so, unaware that such clauses are legally invalid or deceptive. In addition, some landlords— either individual apartment owners or companies—use standard form leases drafted by landlords' associations or commercial publishers. Publishers are motivated to increase their market share by designing pro-landlord leases, and landlord associations are even more interested in drafting terms that benefit landlords, *inter alia* by exploiting tenants' imperfect information and misperceptions.⁴¹

³⁹ Larry D. Clark, Note, Landlord-Tenant Reform: Arizona's Version of the Uniform Act, 16 ARIZ. L. REV. 79, 95–6 (1974).

⁴⁰ Bar-Gill, *supra* note 6, at 8; RAN SPIEGLER, BOUNDED RATIONALITY AND INDUSTRIAL ORGANIZATION (2011) (analyzing several theoretical models that examine whether sellers could profit from offering pricing menus that exploit consumers' misperceptions, and finding that pricing menus sometimes exceed a rational consumer's willingness to pay); Paul Heidues & Botond Koszegi, *Exploiting Naivete about Self-control in the Credit Market*, 100 AMER. ECON. REV. 2279 (2010) (proposing that sellers in the credit card market would exploit consumers' optimism bias and present bias, by including a late payment fee); Michael D. Grubb, *Selling to Overconfident consumers*, 99 AMER. ECON. REV. 1770 (2009) (presenting a model that explains how cellular companies exploit consumers' under-estimation of their use patterns); Jon D. Hanson and Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation* 74 NYU L. REV. 632 (1999) (suggesting that the presence of unyielding cognitive biases makes individual decision-makers susceptible to manipulation by those able to influence the context in which decisions are made).

⁴¹ Kuklin, *supra* note 2, at 899 (“As for the publisher, presumably offerors purchase the forms more commonly than offerees, and thus the publisher is motivated to increase marketability by ‘stacking the deck’ in favor of the offeror. For the trade association, the motivation to slant the form is obvious.”)

Under this theoretical account, in cases of insufficient deterrence, we should expect to see unenforceable and misleading clauses in consumer contracts, and residential leases in particular. Yet, so far, other than anecdotal evidence, there has been empirical investigation into this issue. The current study addresses exactly this deficiency, as will be shown in the next sections.

4 CONTENT-BASED ANALYSIS OF RESIDENTIAL LEASES

4.1 Sample

This study is based on a sample of 70 residential leases from Massachusetts, which was established by approaching tenants, real-estate agents, and residential rental companies, through emails, telephone calls, and web-based social networks. Most of the leases in the database were provided by tenants, and the rest by real-estate agents.⁴² Residential companies that were asked to send their leases for research purposes refused to cooperate.

Out of the 70 residential leases in the sample, there are 25 leases used by residential rental companies, 40 used by individual landlords, and 5 whose landlords' type is unknown. The companies in the sample include residential companies and property management firms that operate thousands of apartments, some of which are among the largest firms in the U.S. Residential Rental Market.

Interestingly, 36 of the sampled leases are based on commercial standard forms, and one lease uses the Section 8 Model Lease (which is drafted by the U.S. Department of

⁴² Of the tenants who provided copies of their leases, almost 33 percent were students (mostly Harvard-affiliated).

Housing and Urban Development). The commercial forms are drafted by landlords' and realtors' associations, representing owners and managers of thousands of residential units across Massachusetts. The forms, some of which were available for download online, were typically filled in writing, and sometimes certain provisions were amended, added or struck down.

The study does not discuss the leases' physical characteristics (such as number of words, font size, spacing, etc.). However, as a general observation, the forms in the sample were mostly unfriendly to the reader, both in terms of length, font size, and spacing, and in terms of the language used. The leases could not be read and easily understood by a layperson without legal assistance. The combination of unfriendly fine-print and complex legal framework was a common and dominant feature of the sampled leases.

Table 2 reports several key product summary statistics of the apartments and leases in the sample. The mean number of bedrooms in the sample is 2.37; the mean rental payment is ~\$2060; the mean length of lease is 12 months; and the mean number of lease provisions in the sample is ~34.

Table 2: Summary Statistics of the Apartments and Leases in the Sample

Variable	Quantiles							
	n	Mean	SD	Min	.25	Mdn	.75	Max
Bedrooms	43	2.37	0.90	1	2	2	3	5
Rent (\$)	67	2059.61	864.77	800	1550	1930	2575	6250
Rental Period (months)	70	13.10	5.97	6	12	12	12	43
Lease Provisions	69	33.65	11.07	12	26	34	39	63

4.2 Methodology

This paper presents a content-based analysis of the leases in the sample (for a detailed description of the coding methodology and the codebook used—see Appendixes IV and V). The provisions of each lease in the sample are analyzed in light of the mandatory rules regulating the content of residential leases in Massachusetts. Those rules, set forth in the Massachusetts General Laws and in the State Sanitary Code, prohibit a landlord from including provisions that are deemed to contravene public policy and to be void in residential leases.⁴³ According to Massachusetts Consumer Protection Law, an intentional inclusion of unenforceable clauses constitutes an unfair or deceptive act or practice and entitles the tenant to damages.⁴⁴

Alongside these substantive requirements, some rules also establish disclosure requirements, obliging the landlord to disclose information about her substantive mandatory obligations to the tenant. In certain cases, a provision that fails to meet the disclosure requirements as set forth in the statutes is unenforceable and void; and failure to meet these requirements may constitute an unfair or deceptive act or practice.

This study examines whether the sampled leases include unenforceable or misleading terms. Put differently, it examines whether these contracts comply with the applicable substantive regulation, or whether they contradict, misrepresent or misinform tenants about their rights and remedies.

For the purposes of the study, the mandatory requirements under Massachusetts landlord and tenant law were divided into fourteen categories according to subject-

⁴³ MASS GEN. LAWS ch. 186; 105 MASS. CODE. REGS. 410.000 (sets minimum standards of fitness for human habitation in residential properties).

⁴⁴ MASS. GEN. LAWS ch. 93A, §9(3); 940 Code of Massachusetts Regulations 3.17.

matter. Each such category regulates a different dimension of the tenant and landlord's relationship, such as: maintenance and repair, advanced payments, and the hold and return of a security deposit. The fourteenth category, "Miscellaneous: Tenant's Rights", consists of 18 different rights granted to the tenant under Massachusetts Tenant and Landlord Law (such as the right to a stay of judgment in summary process the right to recover damages in case of unlawful eviction, certain rights granted to tenants who are victims of domestic violence, and so on).

Each sampled lease is examined in light of all of these categories. Under each category, I note whether the lease contains a provision that complies with and adequately reflects the law (enforceable provision); directly conflicts with the law (unenforceable provision); selectively discloses the law, while misinforming tenants of their rights and remedies (misleading provision); or no provision at all (total omission). I accordingly code the sampled lease as including an *enforceable* provision, an *unenforceable* provision, a *misleading* provision or *total omission* in each category.⁴⁵

This classification is based on the theoretical assessment presented earlier. In particular, the coding relies on the notion that residential rental contracts could contain not only clauses that are unenforceable *per se*, but also misleading provisions that are

⁴⁵ It was usually the case that different categories were addressed in separate lease clauses. However, in leases that contained several clauses belonging to the same category, the latter were coded when seen as a whole. For example, when a lease contained more than one clause concerning maintenance and repair obligations, they were examined together in light of the mandatory rules governing them. If, when read together, they conflicted with the law or misstated it, they were coded as an unenforceable or misleading 'maintenance and repair' provision. Additionally, when one clause referred to more than one category, it was seen as consisting of several separate provisions. For example, if one clause addressed both maintenance obligations and landlord's liability, it was broken into two provisions for the purposes of the research, and the two provisions were coded separately under each issue. In this case, one clause could consist of an enforceable maintenance provision and an unenforceable liability waiver, and coded accordingly.

likely to generate tenants' misperceptions with respect to their legal rights and obligations.

Although the paper has pointed out that landlords have an incentive to include UMCs in their leases, the coding of a provision as 'misleading' or 'unenforceable' does not imply anything with respect to the *mens rea* of the contract's drafter, nor does it suggest anything about the intention of the landlord who uses it. Rather, a clause is classified as unenforceable or misleading based on its *potential impact on the tenant*. If a tenant who is unfamiliar with the legal state-of-affairs is likely to be misled by a certain term upon coming across it (typically because it selectively discloses the applicable law), the provision is classified as either unenforceable or misleading.

Notably, both unenforceable and misleading terms are likely to produce a similar (if not identical) psychological effect on tenants, in that they generate their misperceptions about the applicable legal framework. Indeed, the Code of Massachusetts Regulations (hereinafter: CMR) stipulates that the inclusion of an unenforceable term constitutes an "unfair or deceptive act." Still, the distinction that the study draws between clauses that tell only a part of the story, and those that are in direct and explicit contravention of the law, is an important one. Whereas unenforceable clauses misstate the law by contravening it outright, misleading clauses misstate the law by selectively disclosing only a particular part of it—namely, the tenant's duties or the landlord's rights and remedies. Rather than view this coding as a hard and fast classification, we might think of it as a spectrum—with clauses that are clearly enforceable and accurately reflect the law at one end, clauses that are unequivocally

invalid at the other, and various shades of “misleading” clauses in between, that lie on the cusp between enforceability and invalidity.

Lastly, the study seeks to capture not only the inclusion of provisions that are likely to mislead tenants about the legal state-of-affairs, but also the exclusion of some of the tenant’s rights and remedies from the lease’s scope. In these cases, the tenant is not misled to believe that her rights are limited or more restricted than the law provides, but simply never learns of her rights in the first place. In other words, residential leases may often entirely omit some of the tenant’s mandatory rights and remedies. These cases differ from the inclusion of UMCs: whereas unenforceable clauses conflict with the law and misleading provisions misrepresent or fail to accurately reflect the law, some of the tenant’s mandatory rights and remedies are simply not mentioned in the lease at all. These instances are therefore coded as ‘total omissions’.⁴⁶

To conclude, the study draws a distinction between different phenomena, all of which are likely to produce a similar psychological effect on tenants’ perceptions, albeit probably to varying degrees. Therefore, the paper distinguishes between the inclusion of unenforceable clauses, misleading clauses, and total omissions.

Since Massachusetts’ landlord-tenant law is based mostly on statutes that establish clear-cut rules rather than ambiguous standards, they provide relatively objective criteria for determining whether a lease complies with the law, conflicts with

⁴⁶ Not all categories have total omissions, as some of the categories refer to arrangements that are not mandatory. For example, the landlord could choose not to demand a security deposit or last month’s rent to be paid in advance. In such cases, failure to mention the landlord’s obligations concerning the hold and return of a security deposit or the last month’s rent is not a total omission, but merely a natural result of the landlord’s decision not to require these payments at all.

it, misstates it, or fails to mention it.⁴⁷ Nonetheless, the coding decisions used here required a certain degree of discretion. Thus, where possible, I tried to support my coding decisions in judicial rulings concerning the validity of particular lease terms.

Deciding whether to code a certain provision as *misleading* typically required a greater degree of discretion. Unlike the decision whether to code a provision as enforceable or unenforceable, which solely involved the comparison of the said clause to the legal benchmark, the decision whether to code a certain provision as ‘misleading’ inevitably required an estimation of the potential impact of such clause on the tenant who encounters it. In order to maintain a reasonable degree of objectivity and reliability, a survey on Amazon Mechanical Turk was conducted. The survey tested the effect of certain clauses classified as UMCs on tenants’ perceptions and behavior. As will be shown in section V, the results supported the coding, revealing that more than 70 percent of participants were misled by such clauses.

It must be admitted that although the coding method presented above achieves a reasonable degree of objectivity, it has its limitations. First, it does not capture the extent to which the clauses in each category deviate from applicable law or misrepresent it. Second, this approach leaves out differences in the relative importance of the different lease terms. In future research, these limitations could be mitigated by creating an ‘unenforceability and deceptiveness’ index, which assigns different scores to different terms, as well as to different degrees of deviations from the law. Such an index can be inspired by the ‘bias index’ developed by Florencia Marotta-Wurgler in her

⁴⁷ With the exception of the warranty of habitability, this study does not address judge-made rules—only statutory rules pertaining to landlord and tenant relations. Today, the warranty of habitability is also set forth in the Massachusetts Sanitary Code, which sets minimum standards of fitness for human habitation in residential properties.

empirical research of EULA's.⁴⁸ For the modest purposes of the current research, mainly to take a first step towards exploring the use of UMCs in consumer contracts, I chose the current— simpler and more objective—coding method.

A final clarification is in order. Certain UMCs contain what I term *legal fallback phrases*—i.e., phrases that state that they are “subject to applicable law” or apply “to the extent permissible by law.” Such legal fallback phrases do not render an unenforceable clause enforceable, nor do they turn a misleading clause into an accurate one. A similar conclusion has been reached by the Supreme Judicial Court of Massachusetts in *Leardi v. Brown*. There, the Court determined that a ‘legal fallback’ clause cannot “save” an otherwise unenforceable disclaimer of the warranty of habitability from being invalidated.⁴⁹

I shall now turn to present the fourteen categories and to briefly explain how I code the provisions within a small sub-sample of categories (the full coding scheme, as well as the code-book, can be found in Appendixes IV and V). Overall results will follow.

4.2.1 The Categories

(1) LANDLORD'S LIABILITY FOR LOSS OR DAMAGE

Massachusetts law strictly prohibits a landlord from renouncing liability for injuries, loss or damage, caused to tenants or third parties through her negligence, omission, or misconduct.⁵⁰

⁴⁸ See Florencia Marotta-Wurgler, *What's in a Standard Form Contract? An Empirical Analysis of Software License Agreements*, 4 J. EMPIRICAL LEGAL STUD. 677, 678 (2007).

⁴⁹ See *Leardi v. Brown*, 474 N.E.2d 1094 (Mass. 1985).

⁵⁰ MASS GEN. LAWS ch. 186, §15; See also *Norfolk & Dedham Mutual Fire Insurance Co. v. Morrison* 924 N.E.2d 260, 266 (Mass. 2010).

(2) THE WARRANTY OF HABITABILITY

The tenant is entitled to a safe and habitable living environment throughout the tenancy. The tenant's said right is guaranteed under the warranty of habitability, the landlord's implied warranty that the leased premises are fit for human occupation.⁵¹ This warranty, which cannot be overridden by contract, is based on the minimum standards of housing set forth in the State Sanitary Code and local health regulations.⁵² If the landlord breaches the warranty by failing to comply with the requirements laid down in the Sanitary Code, the tenant has the right to withhold rent and the landlord shall be subject to the penalties stated in the Code.⁵³

(3) COVENANT OF QUIET ENJOYMENT

Under Massachusetts law, the landlord makes an implied covenant not to disturb the tenant in the enjoyment of the premises.⁵⁴ The law penalizes any landlord who willfully fails to furnish hot water, heat, light, and other services as required by law or contract; who directly or indirectly interferes with the furnishing of utilities or with the quiet enjoyment of any tenant; or who attempts to regain possession of the premises by force. It also prohibits a landlord from taking reprisals against a tenant who reports a

⁵¹ *Boston Housing Authority v. Hemingway*, 293 N.E.2d, 843 (Mass. 1973). Such a warranty means that "at the inception of rental, there are no latent or patent defects in facilities vital to use of premises for residential purposes and that such facilities will remain during the entire term in a condition which makes the property livable" (*Id.*). The warranty of habitability is now an integral part of Massachusetts landlord-tenant law..

⁵² *Boston Housing Authority*, 293 N.E.2d at 843. The Court asserted that "such warranty, insofar as it is based on the State Sanitary Code and local health regulations, cannot be waived by any provision of the lease or rental agreement." Such a waiver would constitute a violation of Mass. Gen. Laws ch. 93A (the Consumer Protection Law). *See also* Leardi, 474 N.E.2d at 156–167; *Feldman v. Jasinski*, Mass. App. Ct. 243 (2009).

⁵³ *Boston Housing Authority*, 293 N.E.2d at 844. The Court determined that "the tenant's obligation to pay rent is predicated on the landlord's obligation to deliver and maintain the premises in habitable condition".

⁵⁴ MASS. GEN. LAWS ch.186, §14 (imposing liability on "any lessor or landlord who directly or indirectly interferes with the quiet enjoyment of any residential premises by the occupant"). *See, e.g., Doe v. New Bedford Hous. Auth.*, 630 N.E.2d 248, 255 (Mass. 1994) ("[t]he covenant of quiet enjoyment protects a tenant's right to freedom from serious interference with [her] tenancy—acts or omissions that impair the character and value of the leasehold.").

breach of the covenant of quiet enjoyment.⁵⁵ Any violation of landlord's duties that effectively deprives the tenant of her enjoyment of the premises—constitutes a breach of the covenant, and entitles the tenant to triple damages, or three months' rent (whichever is greater), as well as costs and attorney's fees.⁵⁶

(4) MAINTENANCE AND REPAIR

The Massachusetts Sanitary Code places most of the burden of providing and maintaining the premises in a safe and habitable condition on the landlord, while imposing only minimal maintenance obligations on the tenant.⁵⁷ The landlord is required to ensure the installation and maintenance of all facilities, fixtures and 'owner-installed optional equipment' in the apartment and the common areas under her control.⁵⁸ The tenant, on the other hand, only bears maintenance and repair responsibilities with respect to 'occupant-owned and installed equipment', and is required to maintain in a clean and sanitary condition the part of the residence which she exclusively occupies.⁵⁹ The Code also includes a "repair and deduct" statute, which enables the tenant, under certain circumstances, to make repairs and lawfully deduct the cost incurred from the rent, or to treat the lease as abrogated and vacate the premises within a reasonable time.⁶⁰ These benefits cannot be waived by the parties.⁶¹

(5) ADVANCED PAYMENTS

Massachusetts statutes prohibit landlords from requiring—at the start of the tenancy or prior to it—any amount in excess of the first month's rent, the last month's

⁵⁵ MASS. GEN. LAWS ch.186, §14.

⁵⁶ SCHOSHINSKY, *supra* note 20, 97–101 (1980); MASS. GEN. LAWS ch.186, §14.

⁵⁷ 105 MASS. CODE. REGS. 410.000; MASS. GEN. LAWS ch. 111, §127 et seq.

⁵⁸ 105 MASS. CODE. REGS. 410.180-500.

⁵⁹ 105 MASS. CODE. REGS. 410.505, 410.602.

⁶⁰ MASS. GEN. LAWS ch. 111, §127L.

⁶¹ *Id.*

rent, a security deposit equal to the first month's rent, and the purchase and installation cost for a key and lock.⁶² A clause that conflicts with these statutes is void and unenforceable, and failure to comply with this provision constitutes an "unfair or deceptive act."⁶³

(6) LAST MONTH'S RENT

A landlord who receives rent in advance for the last month of the tenancy is obliged to pay interest on the said rent payment.⁶⁴

(7) SECURITY DEPOSIT

Massachusetts Landlord and Tenant Law comprehensively regulates the holding and return of security deposits. It requires a landlord, *inter alia*, to hold the funds in a separate, interest-bearing, account; and to return the deposit with interest, minus lawful deductions, within 30 days of the tenancy's termination. Additionally, the landlord may deduct from the deposit only the expenses listed in the statute, after providing the tenant with an itemized list of the damages.⁶⁵ Failure to "state fully and conspicuously in simple and readily understandable language" any one of these issues in the lease constitutes an "unfair or deceptive practice" under Massachusetts Consumer Protection Law.⁶⁶

⁶² MASS. GEN. LAWS ch. 186, §15B(1)(a), (b). The only extra charge that the law allows is a "finder's fee," charged by a licensed real estate broker or salesperson. *See* MASS. GEN. LAWS ch. 112, §87D.

⁶³ *See* Dolben Co., Inc. v. Friedman (Mass. App. Div. 1 2008) (charging an "application fee" is an unfair and deceptive practice, in violation of §15B and G.L.c.93A).

⁶⁴ G.L. c. 186, §15B (2)(a).

⁶⁵ MASS. GEN. LAWS ch. 186, §15B). *See, e.g.,* Karaa v. Kuk Yim, 71420 N.E.3d 943 (2014)(determining that "failure to establish a separate, interest-bearing account or to provide a tenant with an appropriate receipt" represents a failure to comply with the subsection, and entitles the tenant to "immediate return of the security deposit").

⁶⁶ MASS. CODE. REGS §3.17.3(b)(3).

(8) LATE PAYMENT FEES

Massachusetts landlord and tenant law does not prohibit or cap late charges in a residential lease, but requires that such fees be imposed only after the default has lasted for at least 30 days.⁶⁷

(9) ATTORNEY'S FEES

According to Massachusetts law, whenever a lease provides that the landlord may recover attorneys' fees and expenses resulting from the tenant's failure to perform her obligations, there is an implied covenant by the landlord to reimburse the tenant for reasonable attorneys' fees and expenses resulting from the landlord's breach.⁶⁸ Any lease agreement that waives the right of the tenant to recover attorney's fees and expenses in these circumstances is void and unenforceable.⁶⁹

(10) TAX ESCALATION

Landlords may require tenants to make payments in light of an increase in real estate tax, only if the lease expressly discloses: (1) that the tenant shall be obligated to pay only that proportion of such increased tax as the leased unit bears to the entire real estate being taxed; (2) the exact percentage of the increase which the tenant is required to pay; and (3) that if the landlord obtains an abatement of the real estate tax, she should refund to the tenant a proportionate share of such abatement, less reasonable attorney's fees.⁷⁰

(11) UTILITIES' PAYMENT

The State Sanitary Code requires the landlord to pay for electricity, gas, and water, unless there is a meter that separately calculates the tenant's use and the agreement sets

⁶⁷ MASS. GEN. LAWS ch. 186, §15B(1)(c).

⁶⁸ MASS GEN. LAWS ch. 186, §20.

⁶⁹ *Id.*

⁷⁰ G.L. c. 186, §15C.

forth that the tenant is responsible to pay for these utilities. With respect to water supply, the lease should “clearly and conspicuously’ provide for a separate charge and fully disclose “the details of the water submetering and billing arrangement.”⁷¹

(12) TERMINATION OF TENANCY AND EVICTION DUE TO NON-PAYMENT

According to Massachusetts law, a landlord is required to give a 14 days’ notice in writing before terminating a residential lease due to non-payment of rent. A landlord is also prohibited from denying the tenant’s right to cure the non-payment by paying the amount owed within the statutory reinstatement period.⁷²

(13) RESTRICTIONS ON LANDLORD’S RIGHT OF ENTRY

Massachusetts legislation restricts the landlord’s right of access to the premises to the limited purposes set forth in the statute—namely, to inspect the premises, to make repairs, or to show them to a prospective tenant, purchaser, mortgagee or its agents.⁷³ The statute renders unenforceable any provision contravening these limitations.⁷⁴

(14) MISCELLANEOUS: TENANT’S RIGHTS AND LANDLORD’S LIABILITIES

The Massachusetts statutes confer certain inalienable rights on tenants. These include the tenant’s right to a jury trial;⁷⁵ the right to damages in case of constructive or unlawful eviction⁷⁶; the right to stay of summary judgment; the prohibition of reprisals against tenants for bringing claims against their landlords;⁷⁷ the prohibition of

⁷¹ G.L. c. 186, §22(f)

⁷² MASS. GEN. LAWS ch. 186, §11, §15A.

⁷³ MASS. GEN. LAWS ch. 186, §15B(1)(a).

⁷⁴ *Id.* at §15B(8).

⁷⁵ MASS. GEN. LAWS ch. 186, §15F.

⁷⁶ G.L. c. 186, §15F; 940 C.M.R. § 3.17(5);

⁷⁷ *Id.* at 18.

discriminatory restriction of occupancy and on discrimination in housing;⁷⁸ the right to receive a copy of the written lease within 30 days;⁷⁹ the right to repair and deduct the cost of repair from the rent;⁸⁰ the right to receive relocation benefits under the landlord's insurance policy;⁸¹ and the landlord's obligations toward tenants who are victims of domestic violence, rape, sexual assault or stalking.⁸²

4.2.2 The Coding Scheme in a Nutshell

This section provides a glimpse into the coding scheme, by presenting the coding method and results for three different categories. The entire coding scheme could be found in Annexes II and III.

(1) Landlord's Liability

a. Coding Scheme

Clauses that acknowledge that the landlord is liable in negligence for injuries, loss or damage to tenants or third parties were coded as enforceable. Clauses that exclude or indemnify the landlord from such liability were coded as unenforceable; and leases that fail to address the landlord's said liability were coded as total omissions.⁸³

b. Results

Sixteen percent of the leases in the sample (11 leases) did not include a clause pertaining to landlord's liability at all. Tenants that look at these leases are thus not likely to learn that the landlord is liable for damages caused by her negligence. Perhaps more

⁷⁸ MASS. GEN. LAWS ch. 184, §23B; MASS. GEN. LAWS ch. 151B, §4.

⁷⁹ G.L. c. 186, §15D.

⁸⁰ M.G.L.A.c.111, §127L.

⁸¹ M.G.L.A.c.175, §99, Clause 15A.

⁸² MASS. GEN. LAWS ch. 186, §24-28

⁸³ In this category, none of the clauses were coded as misleading, as in the leases that contained clauses pertaining to landlord's liability in negligence, such liability was either waived or acknowledged.

disturbing is the finding that 27 percent of the leases that *do* contain a clause concerning landlord's liability for loss or damage (16 out of 59 leases) include an *unenforceable* provision that exculpates the landlord from liability in negligence.

The remaining 43 leases include an enforceable clause. Notably, most of these clauses (72 percent) begin by relieving the landlord of all liability for loss or damage, and only subsequently, in a separate sentence, go on to add that the landlord shall not be liable for damage or loss unless caused by the landlord's negligence.⁸⁴

(2) Warranty of Habitability

a. Coding Scheme

A provision that acknowledges the warranty of habitability is coded as enforceable. On the other hand, a provision that disclaims it, for example by stating that "there is no implied warranty of habitability," or that "the tenant acknowledges that it accepts the unit in its 'AS IS' condition," is coded as unenforceable.⁸⁵

Provisions that do not disclaim the warranty, but rather condition its application upon tenant's fulfillment of her own obligations, are coded as misleading. These provisions are, in effect, unenforceable-as-written: they are likely to create the false

⁸⁴ Such clauses stipulate that "The Lessee agrees to indemnify and save the Lessor harmless from all liability, loss or damage arising from any nuisance made or suffered on the leased premises by the Lessee, his family, friends [...] or servants or from any carelessness, neglect or improper conduct of any such persons. All personal property in any part of the building within the control of the Lessee shall be at the sole risk of the Lessee. The Lessor shall not be liable for damage to or loss of property of any kind [...] or for any personal injury unless caused by the negligence of the lessor."

⁸⁵ This coding is consistent with the Massachusetts case-law. In *Leardi v. Brown*, the Massachusetts Supreme Judicial Court upheld the lower court's decision to deem unenforceable a lease provision stipulating that "[u]nless Tenant shall notify landlord to the contrary within two days after taking possession of the premises, the same and the equipment located therein shall be conclusively presumed to be in good, tenantable order and condition in all respects, except as any aforesaid notice shall set forth." This provision was described by the courts as "an unabashed attempt to annul, or render less meaningful, rights guaranteed by the State sanitary code." The Supreme Court upheld the lower judge's conclusion that the provision was "deceptive and unconscionable," particularly when viewed in the context of "the fundamental nature of the implied warranty of habitability." *Id.* at 156–160.

impression that the tenant's right to habitable housing is dependent on her behavior, rather than absolute. Finally, if the warranty is not mentioned in the lease at all, it is coded as a 'total omission' under this category.

b. Results

Even though the warranty of habitability is now an integral component of Massachusetts Landlord and Tenant Law, 70 percent of the leases in the sample (49 out of 70) do not mention it at all. This is perhaps not surprising: landlords do not have an incentive to turn the implied warranty of habitability into an express one. Interestingly, however, 64 percent of the leases that *do* mention the warranty (14 out of 22) go as far as to include an unenforceable *disclaimer* of the tenant's said right.

Six leases out of the 22, or 27 percent, include a misleading warranty of habitability, conditioning landlord's obligation to ensure that the apartment is livable and fit for human habitation upon the tenant's fulfillment of her maintenance and repair obligations under the lease. Only two of the 22 leases that mention the warranty include an enforceable clause that accurately reflects the absolute nature of the landlord's obligation, for example by stipulating that the landlord "shall keep the premises [and] appliances [...] fit for habitation during the tenancy and shall comply with any enactment respecting standards of health, safety or housing". Finally, only one lease discloses that 'substantial violations of the State Sanitary Code shall constitute grounds for abatement of rent'.

(3) Maintenance and Repair

a. Coding Scheme

Clauses that accurately state the division of maintenance and repair responsibilities between the landlord and the tenant are coded as enforceable, whereas provisions that shift the maintenance and repair duties from the landlord to the tenant are coded as unenforceable. Clauses that fail to mention the landlord's mandatory maintenance and repair obligations, while mentioning the tenant's, are coded as misleading because they selectively disclose the law in a manner likely to mislead tenants about the mandatory division of maintenance and repair duties under the law. Leases that do not include a repair and maintenance provision are coded as total omissions.

b. Results

Maintenance and repair responsibilities are addressed in 99 percent of the leases in the sample (69 out of 70). However, in 20 leases, or 29 percent of the leases containing such a clause, the maintenance and repair provision is unenforceable. Most of the unenforceable clauses do not only place the burden of maintenance and repair on the tenant, but also go as far as adding that if the tenant fails to make repairs, the landlord may make such repairs and recuparate the costs as additional rent, whereas the law sets forth the opposite arrangement.⁸⁶ Twenty-three leases, or 33 percent, include a misleading clause, which fails to articulate any of the landlord's duties while enumerating the tenant's responsibilities.⁸⁷

⁸⁶ Such clauses typically stipulate that "If tenant fails within a reasonable time, or improperly makes such repairs, then and in any such event or events, Landlord may (but shall not be obligated to) make such repairs and Tenant shall reimburse the Landlord for the reasonable cost of such repairs in full, as additional rent, upon demand" [emphasis added – MF].

⁸⁷ For example, some clauses state that "The tenant shall keep and maintain the leased premises and all equipment and fixtures therein or used therewith repaired. *The Lessor and the Lessee agree to comply with*

Notably, even the 26 leases whose clauses were classified as enforceable almost always emphasize the tenant's obligations, and only briefly discuss the landlord's duties, while making the latter contingent upon tenant's compliance with her own responsibilities. For instance, the "Repair and Maintenance" clause in one of the GBREB forms states that—

Both the Landlord and the Tenant have responsibility for the repair and maintenance of the Apartment. If the Landlord permits the Tenant to install the Tenant's own equipment [...], the Tenant must properly install and maintain the equipment and make all necessary repairs. The Tenant is also required to keep all toilets, wash basins, sinks, showers, bathtubs, stoves, refrigerators, and dishwashers in a clean and sanitary condition. The Tenant must exercise reasonable care to make sure that these facilities are properly used and operated. In general, the Tenant will always be responsible for any defects resulting in abnormal conduct by the Tenant. Whenever the Tenant uses the Apartment or any other part of the Building, the Tenant must exercise reasonable care to avoid damage to floors, walls, doors, windows, ceiling, roof, staircases, porches, chimneys, or other structural parts of the Building. As long as the Tenant complies with all of these duties, the Landlord will make all required repairs at the Landlord's expense [...]"⁸⁸

any responsibility which any may have under applicable law to perform repairs upon the leased premises. If tenant fails within a reasonable time, or improperly makes such repairs, then and in any such event or events, Landlord may (but shall not be obligated to) make such repairs and Tenant shall reimburse the Landlord for the reasonable cost of such repairs in full, as additional rent, upon demand" [emphasis added – MF].

⁸⁸ Other leases contain the following "Repair and maintenance" clause:

It is the responsibility of the tenant to promptly notify the landlord of the need for any repair of which the tenant becomes aware. If any required repair is caused by the negligence of the tenant and/or tenant's guests, the tenant will be fully responsible for the cost of the repair. The tenant must keep the leased premises clean and sanitary at all times and remove all rubbish, garbage, and other waste, in a clean tidy and sanitary manner; Tenant must abide by all local recycling regulations; The tenant shall properly use and operate all electrical, cooking and plumbing fixtures and keep them clean and sanitary.

Similarly, some contracts stipulate that—

tenant will: (1) keep the premises clean, sanitary, and in good condition and, upon termination of the tenancy, return the premises to Landlord in a condition identical to that which existed when Tenant took occupancy, except for ordinary wear and tear; (2) immediately notify Landlord of any defects or dangerous conditions in and about the premises [...]; (3) reimburse Landlord, on demand by Landlord, for the cost of any repairs to the premises damaged by Tenant or Tenant's guests or business invitees through misuse or neglect.

These clauses are enforceable, but *highly selective*, in a manner which prevents the tenant from learning about the landlord's maintenance and repair responsibilities from the lease itself. In this sense, they function almost as 'total omissions', in the effect that they produce on the tenant.

4.3 Findings

4.3.1 Main Discoveries

The study reveals that residential leases almost always contain unenforceable and misleading clauses, and systematically fail to disclose the vast majority of the tenant's rights and remedies. Sixty-nine leases— constituting ~99 percent of the sample— contain at least one unenforceable or misleading clause, and all of the leases in the sample contain 19 total omissions or more. Fifty-one of the sampled leases, constituting 73 percent, include at least one unenforceable clause, and 65 leases, constituting 93 percent, include at least one misleading clause. Forty-seven of the leases, or 67 percent, include both types of provisions. *Table 3* shows the summary statistics of the results, revealing that on average leases contain 1.39 unenforceable clauses, 1.59 misleading clauses, and 24.29 total omissions.

Table 3: Summary Statistics

	Mean (SD)	Minimum	Median	Maximum
Enforceable Clauses	5.76 (1.95)	1	6	10
Unenforceable Clauses	1.39 (1.32)	0	1	6
Misleading Clauses	1.59 (0.91)	0	1	4
Total Omissions	24.29 (2.06)	19	24	29
Observations	70			

Interestingly, the two categories containing the highest rate of unenforceable clauses are 'maintenance and repair' provisions and 'liability limitation' clauses. Unenforceable maintenance and repair clauses, purporting to shift the responsibilities

for maintenance and repair from the landlord to the tenant, appear in ~29 percent (20 out of 70) of the sampled leases, and liability disclaimers, supposedly waiving landlord's liability in negligence for loss or damage caused to the tenant or third parties, appear in ~23 percent (16 out of 70) of the sampled leases. This is perhaps not surprising: in these two categories, the law imposes considerably high costs and risks on the landlord. Abiding by the law in these instances might be very costly, and including enforceable clauses is therefore considerably painful to the landlord. Consequently, residential leases often purport to waive these mandatory responsibilities and liabilities.

Where the law allocates responsibilities, it is also relatively easy to selectively disclose it in a way which reveals only the tenant's duties. The maintenance and repair clauses that are not unenforceable *per se* are often drafted in this misleading technique: they selectively disclose only the tenant's maintenance and repair obligations, while failing to mention the landlord's duties. Such clauses misinform tenants about the law, which places the onus of maintenance and repair duties on the landlord. They appeared in almost a third (23 out of 70) of the sampled leases.

High rates of misleading clauses were also observed in the context of attorney's fees clauses. The Massachusetts landlord and tenant law instructs courts to interpret a one-sided attorney's fees provision (stipulating that the tenant will be liable to pay the landlord's attorney's fees and expenses resulting from the tenant's failure to perform her obligations) as a mutual obligation to pay the attorney's fees of the prevailing party. This rule is aimed to take the sting out of one-sided attorney's fees clauses, by reading a mutual obligation into them. Such clauses are therefore, in effect, unenforceable-as-written. Yet, as shown in the survey-based study below, their inclusion in contracts is

likely to mislead tenants about the legal state-of-affairs. Tenants that read these clauses are likely to believe that they have an obligation to pay the landlord's attorney's fees and expenses, whereas the landlord owes them no such obligation if they prevail in trial. This is particularly disquieting in light of the fact that one-sided attorney's fees provisions are relatively common in residential leases: 80 percent (24 out of the 30) of the sampled leases that contained attorney's fees clauses included a one-sided provision.

It is noteworthy that the law does not oblige landlords to disclose the tenant's right to recover her attorney's fees and expenses whenever an attorney's fees clause is inserted into the lease. Rather, it sets an interpretive rule—instructing courts to interpret one-sided provisions as mutual obligations. Remarkably, however, even when the law imposes disclosure requirements, residential leases often fail to meet them. For example, 80 percent (32 out of 40) of the sampled leases requiring the tenant to provide a security deposit fail to fully disclose the landlord's obligations concerning the hold and return of the said deposit. Similarly, 86 percent (18 out of 21) of the leases demanding advanced payment of the last month's rent fail to disclose the landlord's obligation to pay interest for this payment.

It should now come as no surprise that when the law does not clearly set forth disclosure obligations, but simply grants unwaivable rights to tenants, leases almost never mention them. In fact, 13 out of the 18 rights grouped under the category: "Miscellaneous: Tenant's Rights", or 72 percent, are not mentioned even once in any of the leases. Some of the tenant's rights, or landlord's respective obligations, such as the

prohibition on reprisals and on restricting the occupancy of children, are sometimes mentioned, yet only in a small subset of leases.

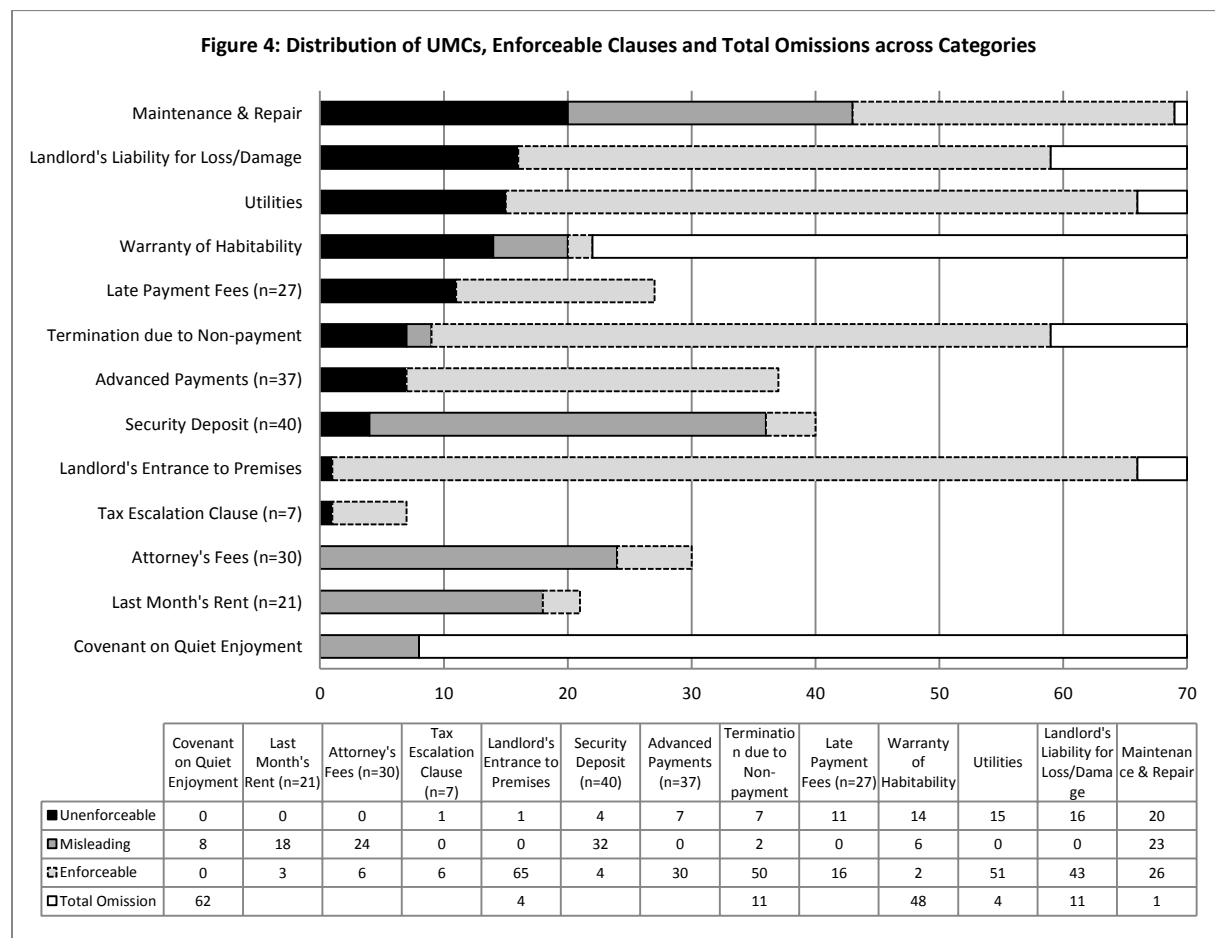
Similarly, landlord's warranties and covenants are rarely mentioned in the leases. In fact, 48 out of 70 leases, or 69 percent, fail to mention landlord's warranty of habitability, and 62 out of 70 leases, or 89 percent, fail to refer to landlord's covenant on quiet enjoyment. As previously noted, this is to be expected: landlords simply lack the incentive to turn implied warranties into express ones. When the leases *do* mention these warranties or covenants, they usually purport to make them contingent upon the tenant's behavior.

It should be noted, however, that none of the sampled leases explicitly waives the landlord's covenant of quiet enjoyment or any of the miscellaneous tenant's rights (except for tenant's right to a jury trial, which is waived in one of the leases). This may be attributed to the fact that such clauses will not only be undoubtedly invalidated by the court and expose landlords to sanctions, but may also induce tenants' suspicions as to their enforceability. It is more efficient, therefore, from the landlord's point of view, to simply refrain from mentioning these rights altogether or, alternatively, to include clauses purporting to condition the tenant's rights upon the fulfillment of her own obligations.

Interestingly, provisions pertaining to tenant's payments and fees (such as clauses regulating advanced payments, utilities' payment, or the termination of the lease due to non-payment of rent) are usually enforceable. This may be ascribed to two main factors: the salience of these issues to both landlords and tenants, which makes them informed of the law that governs them; and the clear-cut rules that govern these issues.

For example, the law clearly lists the payments that the landlord is allowed to demand in advance, and thus it is very easy to identify leases that overreach this obligation.

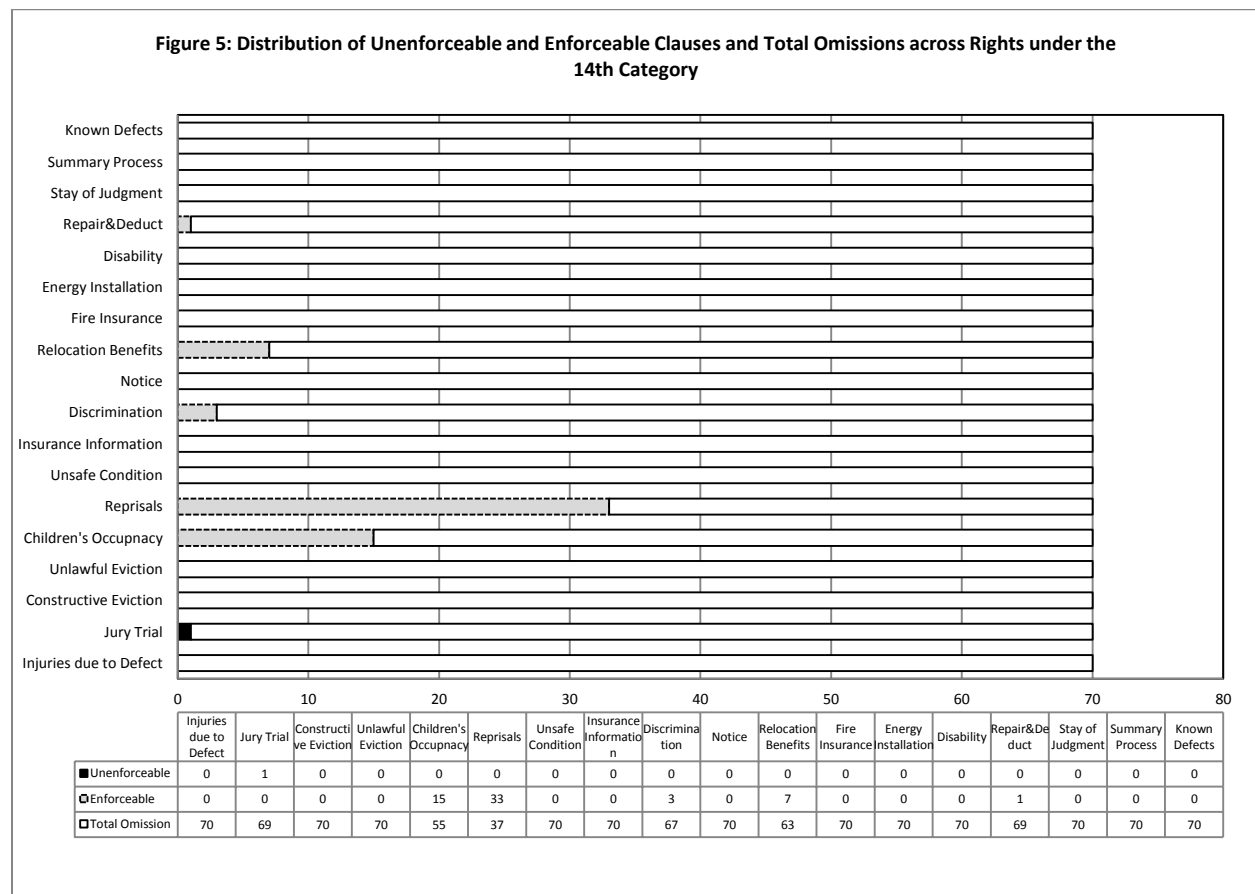
Figure 4 shows the distribution of the different types of clauses and total omissions across the different categories.



The 'total omissions' column is blank in categories which refer to arrangements that are not mandatory. For instance, the landlord could choose not to demand a security deposit or last month's rent to be paid in advance. In such cases, failure to mention the landlord's obligations concerning the hold and return of a security deposit or the last month's rent is not a total omission, but merely a natural result of the

landlord’s decision not to require these payments at all. The number of sampled leases that contain clauses pertaining to each category is stated in parenthesis.

As recalled, the fourteenth category: “Miscellaneous: Tenant’s Rights”, consists of eighteen different rights granted to the tenant under Massachusetts Tenant and Landlord Law. Figure 5 breaks this category into these eighteen different rights and shows the distribution of unenforceable clauses, enforceable provisions, and total omissions. As manifested in the figure, the vast majority of rights are systematically absent from residential leases.



4.3.2 Do Landlord's Identity and the Type of Form Matter?

The results reveal that both companies and individual landlords use leases that contain UMCs and fail to disclose many of the tenant's rights and remedies. In fact, 96 percent of the sampled companies (24 out of 25) and 92.5 percent of the sampled individual landlords (37 out of 40) have at least one misleading clause in their lease; and 73 percent of both private landlords and companies have at least one unenforceable clause in their lease. Interestingly, however, there is a statistically significant difference between leases used by private landlords and those used by companies, in terms of the mean number of unenforceable and enforceable clauses. Residential companies use on average relatively less unenforceable clauses and more enforceable clauses than individual landlords.⁸⁹ As an illustration, four percent of the leases used by companies contain more than two unenforceable clauses, whereas ~23 percent of the leases used by individual landlords include three unenforceable clauses or more.

Interestingly, there is also a statistically significant difference between commercial and non-commercial lease forms: on average, commercial forms include less unenforceable clauses and more enforceable clauses.⁹⁰ As an illustration, only 5.6 percent of the sampled commercial leases contain more than two unenforceable provisions, whereas 30 percent of the non-commercial leases contain three

⁸⁹ Table 1 and Figure 1 in Appendix III show these results. As shown in the table, the mean number of unenforceable clauses in leases used by companies (1.04) is smaller than the mean number of unenforceable clauses in leases used by private landlords (1.48). In a t-test analysis, this difference proved statistically significant at the 10 percent level, but not at the 5 percent level. The difference between the mean number of enforceable clauses in companies' leases (6.52) versus private landlord' leases (5.35) was statistically significant at the 1 percent level.

⁹⁰ Table 2 and figure 2 in Appendix III show these results. The difference in the rate of unenforceable clauses was statistically significant at the 1 percent level, under a t-test analysis, whereas the difference in the rate of enforceable clauses was statistically significant at the 10 percent level.

unenforceable clauses or more. The rate of misleading clauses and total omissions, on the other hand, is essentially the same.⁹¹ Interestingly, 60 percent of the private landlords (24 out of 40) and almost 50 percent of the companies in the sample (12 out of 25) use commercial forms.⁹²

A possible explanation for these findings is that commercial forms are designed by landlords' associations or by commercial companies that are well-informed of the law, and are plausibly assisted by legal counsel. They are thus likely to include a lower number of unenforceable clauses, possibly because they are more informed about the law. Still, we see that such forms include unenforceable terms, but at a lower rate. Misleading clauses, on the other hand, equally persist in both commercial and non-commercial forms, possibly because the drafters (justly) assume that these clauses are not likely to expose the landlord to sanctions.

A similar explanation can elucidate the finding that companies use, on average, less unenforceable and more enforceable clauses than individual landlords, whereas misleading clauses and total omissions are used at a similar rate. Residential companies and real-estate trusts are sophisticated repeat players, and they are plausibly well-acquainted with the law of landlord and tenant. Therefore, they are plausibly more cautious than individual landlords, who may be ignorant of the law of landlord and tenant, and insert unenforceable clauses by mistake. Yet, such companies use misleading clauses and total omissions as

⁹¹ The relationship between the landlord's type (private individual or company) and lease type (commercial standard form or non-commercial lease) is also interesting to note: whereas 50 percent of the companies in the sample use commercial forms, 60 percent of individual landlords use such forms, and 40 percent of them use non-commercial leases. In a z-test analysis, this difference was not found statistically significant (even at the 10 percent level).

⁹² This difference is not statistically significant at the 10, 5 or 1 percent levels.

frequently as private landlords, as such clauses may only benefit them without exposing them to potential sanctions.

4.3.3 Summary of Results

The study's findings uncover that residential leases frequently include provisions that flatly contravene the law, misinform tenants as to their rights and remedies—or both. Information about the tenant's statutory rights and the landlord's duties seldom appears in most leases, and when it does, it is often misstated. The vast majority of leases fail to disclose the tenant's rights and remedies, while overstating the tenant's obligations and the landlord's corresponding rights and remedies.

5 **THE SURVEY-BASED STUDY**

5.1 **Background Motivation**

The above content-based study established that UMCs persist in residential leases. In order to assess the policy implications of this phenomenon, however, it is first important to explore whether, and to what extent, these contractual clauses actually play a role in tenants' decisions and behavior. The supposition that the persistence of UMCs in residential leases adversely affects tenants' welfare is based on three key assumptions that should be empirically tested.

The first assumption is that whereas tenants do not necessarily read their leases before deciding to rent an apartment, they are likely to look at their leases when seeking to verify their rights and duties, typically as a problem occurs or a dispute with the landlord arises. The second premise is that in such circumstances, tenants are likely to

be misled by the inclusion of UMCs in their leases. Lastly, it is also assumed that tenants are likely to relinquish some of their legal rights and remedies as a result. The paper's second study sets out to test these assumptions through surveying tenants, using Amazon Mechanical Turk

5.2 Sample

The survey's sample consisted of 300 Massachusetts residents, out of whom 279 participants were residential tenants.

5.3 Survey Design

The survey, whose questionnaire is shown in Appendix I, consisted of two parts. The first part was targeted at exploring the hypothesis that tenants are likely to rely on their contracts as their main source of information about their rights and duties as renters. The second part was targeted at examining the assumption that UMCs are likely to misinform tenants about their rights and remedies. Although the survey's findings offer some empirical evidence to support the third assumption, according to which tenants are likely to relinquish valid legal rights and claims as a result of the use of UMCs, this evidence is limited: it only indicates that tenants usually adhere to their contracts when a problem arises, but it does not prove that they do so when UMCs are involved. The third assumption should thus be further tested in future research.

In the first part of the survey, participants were asked whether they experienced any issue or problem during their rental period (*e.g.*, a maintenance and repair problem, a problem with their security deposit, and the like), and those that answered affirmatively were asked what they did as a consequence and how the issue was solved.

Subsequently, participants were asked if they read their leases during the rental period, and if so— under what circumstances.

Through these questions the study sought to examine: (a) if tenants rely on their leases when they experience a problem or wish to learn about their rights and duties; (b) whether tenants seek other—alternative or complementary—sources of information, such as legal, or web-based, advice; and (c) how rental problems are ultimately solved. These questions are important, since they have a direct and crucial bearing on the impact of UMCs on tenants' perceptions and decisions.

In the second part, participants were presented with one of five provisions which were coded as either misleading or unenforceable in the study. They were subsequently asked questions about their understanding of their rights and remedies according to the clause they had just read. This part was targeted at examining the effect of UMCs on tenants' perceptions. For example, in the 'maintenance and repair' condition, tenants were presented with the following lease provision and question:

Maintenance and Repair: The Tenant shall keep and maintain the leased premises and all equipment and fixtures therein or used therewith repaired. The Lessor and Lessee agree to comply with any responsibility which any may have under applicable law to perform repairs upon the leased premises. If tenant fails within a reasonable time, or improperly makes such repairs, then Landlord may (but shall not be obligated to) make such repairs and Tenant shall reimburse the Landlord for the reasonable cost of such repairs in full, as additional rent, upon demand.

According to the clause you now read, who is responsible to make repairs in the apartment?

- 1) The landlord
- 2) The tenant
- 3) Both tenant and landlord share this burden equally
- 4) Both tenant and landlord have responsibilities, but most of them are placed on the tenant

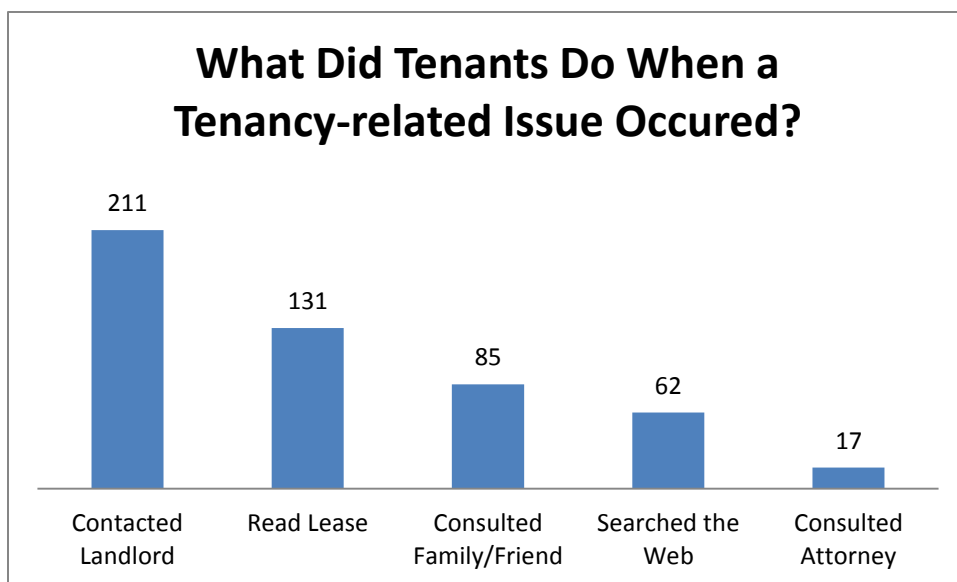
- 5) Both tenant and landlord have responsibilities, but most of them are placed on the landlord

The other conditions are available in Appendix I. I now turn to present the survey's results.

5.4 Results

5.4.1 Part I

The vast majority of the survey's participants (258 participants, or 92.5 percent of the tenants) reported that they had experienced at least one issue or problem in connection with their tenancy during their rental period. Out of these participants, 51 percent (131 subjects) reported looking at their lease as a result. Only 6 percent (17 participants) reported consulting an attorney, 33 percent (85 subjects) reported consulting a family member or a friend, and 21 percent (62 subjects) reported searching the internet or other sources. The majority of participants—82 percent (or 211 out of 258 subjects)— reported contacting their landlord as a result of the problem.



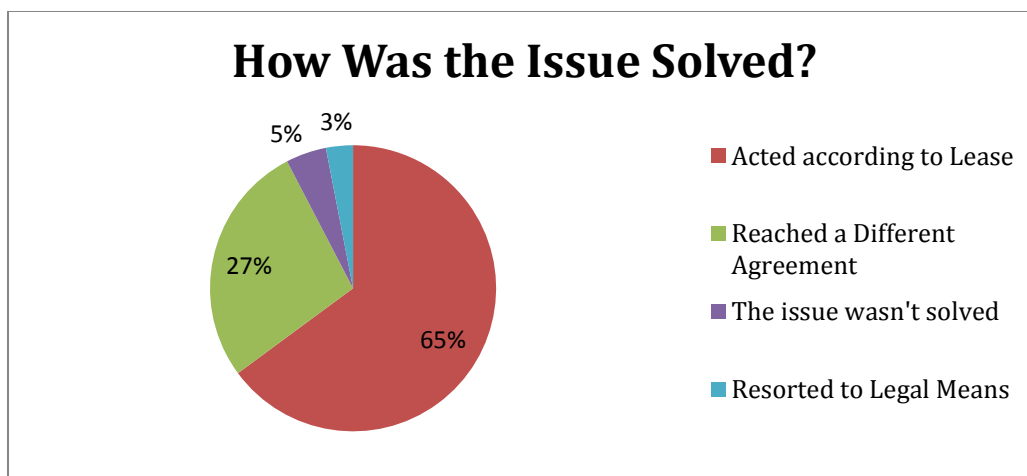
Out of the 131 tenants who reported to have read their leases, only 9 participants also consulted an attorney, 45 also searched the web, and 59 also consulted a friend or a family member. To sum, tenants usually contact their landlord when a problem occurs, and often read their leases in such situations. Yet, only a small subset of tenants searches the web or obtains legal counsel in relation with a tenancy-related problem.

The participants were next asked if they had looked at their leases during the rental period, and if so, for what reason. Overall, 234 out of 258 participants (or ~90%), reported looking at their leases either when a problem occurred or when seeking to ascertain their rights and duties, as well as the landlord's.⁹³

Lastly, the subjects who reported reading their leases when a problem emerged were asked how the problem was ultimately solved.⁹⁴ Answering this question, sixty-five percent of the respondents (85 out of 131) reported that they had acted according to their lease, whereas twenty-seven percent (36 out of 131) reported that they had reached a different agreement with their landlord, three percent (4 out of 131) reported that they resorted to legal action or at threatened to do so, and the remaining five percent (6 out of 131) reported that the issue was not solved, that they failed to reach an agreement with the landlord, or the like.

⁹³ For example, see the following responses: Participant #187: "[I] looked to see what it said about repairs"; participant #159: "I wanted to see if I could hang pictures on the wall. I ended up not hanging pictures because it was stated in the lease not to"; participant #101: "I looked at my lease any time I had an issue with the rental because I knew the landlord was going to say it wasn't their job"; Participant #283: "I looked at the lease to confirm what they would fix and not fix"; Participant #69: "what was covered for repair"; participant #96: "to be sure that I understood it and whether my issue could be solved by it"; participant #297: "I was going through a rough time and wanted to know what fees I'd incur if I broke my lease"; participant #105: "when I had a problem or question, to clarify what I could do about it"; participant 347: "to check the landlord and my own responsibility".

⁹⁴ Participants could choose one of the following answers: (1) I acted in accordance with the lease; (2) My landlord and I reached a different agreement; (3) Other (open text).



These results indicate that most tenants who read their leases when a problem occurs subsequently act according to it. Yet, are tenants likely to be misled by the inclusion of UMCs in their lease agreements? The second part of the study was set to shed light on this question.

5.4.2 Part II

In all five conditions, more than seventy percent of the participants were misled about their rights or duties as renters. On average, eighty percent of participants were misled about their rights and duties after reading a UMC. For example, whereas the law imposes the onus of maintenance and repair obligations on the landlord, 86 percent of participants (or 49 out of the 57) that were presented with the misleading ‘maintenance and repair’ clause answered that the tenant was either solely or mostly responsible for repairs according to the clause they had read.

Here are the overall results:

Clause Type	The Question Presented in the Survey	Percentage of Misled Subjects
Repair	Who is responsible to make repairs?	90%
Attorney's Fees	Who is entitled to recover attorney's fees incurred as a result of enforcing the lease terms?	76%
Security Deposit	Is the landlord required to return the security deposit with interest?	80%
Covenant on Quiet Enjoyment	Is landlord's covenant on quiet enjoyment conditioned upon the tenant's payment of rent and fulfillment of tenant's other obligations?	83%
Liability	Is landlord liable for any loss or damage caused to the Tenant or his family on the leased premises as a result of landlord's negligence?	74%
		80.6%

6 DISCUSSION AND IMPLICATIONS

Leaving aside the moral and ethical concerns raised by the inclusion of UMCs, this practice is welfare-reducing.⁹⁵ The residential rental market is characterized by asymmetric and imperfect information: even though both parties may be imperfectly informed, landlords typically know more about their contract terms and the attendant regulatory rules than their tenants.⁹⁶ If landlords misrepresent the law in their contracts

⁹⁵ For a more extensive discussion of the moral, ethical, and deontological concerns raised by such practice, see Kuklin, *supra* note 2, at 847–860.

⁹⁶ Donald E. Clocksin, *Consumer Problems in the Landlord-Tenant Relationship*, 9 REAL PROP. PROB. & TR. J. 572, 572 (1974) (“the landlord is very often in the business of renting that property. It is a full-time occupation for that person. It is not a full-time occupation for a tenant to rent a dwelling. Therefore, it is more likely that the landlord is going to understand the details of the law, understand his or her rights and obligations, and draft an agreement that is most favorable to the landlord’s position”). See also SPIEGLER, *supra* note 40, at 2-3 (“firms will always be rational profit maximizers with a correct understanding of the market model, as predicted in standard theory, because they focus their attention, intelligence, and internal organization on a small set of markets. Consumers, on the other hand, will often deviate from the standard model, because they

instead of disclosing such information to tenants, most tenants are likely to rely on the selective information provided to them in the contract, instead of obtaining information themselves—on the assumption that their leases accurately represent the law.

In recent years, several scholars have suggested that sellers retain self-serving terms in standard form contracts to protect themselves from opportunistic consumers, but only selectively enforce these terms, for reputational considerations—an approach that Johnston has termed *tailored forgiveness*.⁹⁷ Although this might mitigate concerns about the effect of biased and one-sided terms in standard form contracts on consumers' welfare, it is irrelevant in the context of UMCs. The latter could not be enforced by landlords in any event, but are still likely to influence tenants' perceptions and behavior. In fact, the main problem with UMCs is that, despite their legal invalidity or inaccuracy, they have a psychological impact on tenants, in that they induce them to relinquish legal claims or to bear costs that, according to law, should be borne by the landlord.

To sum, the continued use of UMCs in residential leases is undesirable from a social welfare perspective: it is likely to generate tenants' misperceptions concerning their rights and duties, consequently affecting their behavior in detrimental ways. While the impact of UMCs on tenants' decisions and behavior should be further investigated, the survey's findings illustrate that tenants mainly, and sometimes solely, rely on their contracts to determine their rights and duties, and that UMCs, when included in contracts, misinform tenants about their said rights and responsibilities. It is reasonable

devote only a fraction of their attention and intelligence to any individual market. Firms also interact repeatedly with the market and therefore have many opportunities to learn its regularities. In contrast, consumers often have limited opportunities to learn the market model and the market equilibrium”).

⁹⁷ Jason Scott Johnston, *Cooperative Negotiations in the Shadow of Boilerplate*, in: *BOILERPLATE: THE FOUNDATION OF MARKET CONTRACTS* 12 (Omri Ben-Shahar ed., 2007); Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, in: *BOILERPLATE: THE FOUNDATION OF MARKET CONTRACTS* 3 (Omri Ben-Shahar ed., 2007).

to infer that if read, UMCs may adversely affect not only tenants' perceptions, but also their decisions, consequently shifting substantial costs and burdens from landlords to tenants. In light of these concerns, the paper offers preliminary guidelines to policymakers seeking to combat the use of UMCs in residential leases.

7 PRELIMINARY POLICY PRESCRIPTIONS

7.1 General

As we have seen, UMCs persist in the vast majority of residential leases, despite the relatively weighty substantive regulation set forth in Massachusetts Landlord and Tenant Law. Two main conclusions stem from these findings. First, if we seek to ensure that tenants are informed of their rights and do not relinquish them unknowingly, banning landlords from including certain terms which are deemed unenforceable is not enough. The regulator should also prevent landlords from using terms that misstate the legal state-of-affairs or from omitting the tenant's rights and remedies from the lease, thereby generating tenants' misperceptions. Second, regulation without appropriate enforcement is simply insufficient. If we choose to regulate consumer contracts, we should enforce compliance. Otherwise, UMCs will persist, as long as the benefits to the landlords who use them in their contracts exceed the expected costs of including them in the leases.

These conclusions stem from the premise that the objective of Landlord and Tenant Law is not only to arm tenants with unwaivable rights that they could enforce in court, but also to ensure that the tenants are aware of these rights and could ensure that landlords comply with them. If this is indeed one of the law's objectives, regulators

should ensure that landlords are deterred from including UMCs or from omitting important rights from their leases. In other words, the law should impose disclosure obligations on top of substantive requirements, and ensure that the information is disclosed in an adequate and understandable, rather than selective and misleading, manner.

The following sections will address each of these conclusions separately. First, I will examine ways to prevent landlords from misleading tenants about the legal state-of-affairs, mainly by employing disclosure requirements in an effective way. Second, I will examine ways to increase deterrence and ensure the enforcement of the mandatory obligations imposed on landlords.

7.2 Regulation targeted at informing tenants about their rights

As we have seen, merely prohibiting the inclusion of certain terms is not enough to ensure that tenants are adequately informed of their rights and remedies under the law. Landlords can misinform tenants about their rights without breaching the law, either by including provisions that selectively disclose it or by omitting certain mandatory rights and remedies from the residential lease. The problem with misleading provisions and total omissions is that even though they are not prohibited, they are likely to deceive tenants about their mandatory rights and remedies. Yet, misleading clauses and total omissions can only affect tenants who suffer from imperfect information about their rights and remedies under the law. Imposing disclosure obligations on landlords may therefore alleviate the problem.

There is increasing evidence that disclosure has been effective in enhancing consumer knowledge in various contexts, for example in the area of consumer credit.⁹⁸ Yet, disclosure can be, and often is, too burdensome and complex, and may lead to information overload or simply deter consumers from reading it.⁹⁹ This problem could be solved by thoughtful design: regulators could focus on *simple disclosure*, requiring landlords to highlight in their leases only the most important rights and remedies granted to the tenants under applicable law. This list could be informed by this study's findings, to include first and foremost those issues that have been identified as prone to high rates of unenforceability and deceptiveness. For example, the regulator might require landlords to include a notice in their leases that states the following:

- (1) Your landlord cannot waive his/her liability for loss or damage caused to you or to a third party as a result of the landlord's negligence.
- (2) If your lease requires you to pay attorney's fees, you are entitled to receive attorney's fees if you prevail in trial.
- (3) Your landlord bears most of the maintenance and repair duties, as set forth in the State's Sanitary Code, and those cannot be waived under the lease.

In order to differentiate the disclosed information from the fine print and increase the likelihood that tenants will read it, regulators could require landlords to display the information in a salient format, such as the "warning box" recently proposed by Ian Ayres and Alan Schwartz.¹⁰⁰

An even milder intervention would be to introduce a special type of "simple language" rules in the context of residential leases. In recent decades, legislatures have made efforts to mandate the use of plain language through statutes in various types of

⁹⁸ See, e.g., Bar-Gill, *supra* note 6, at 106.

⁹⁹ See, e.g., OMRI BEN-SHAHAR & CARDL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE (2014).

¹⁰⁰ Ian Ayres and Alan Schwartz, *The No-Reading Problem in Consumer Law*, 66 STAN. L. REV. 545 (2014).

consumer contracts, such as insurance contracts.¹⁰¹ A similar legislation could be adopted in the context of residential leases, requiring that lease provisions will not only be written in a clear and plain language, but will also accurately reflect the law, without selectively disclosing only a part of it. This intervention is softer than requiring landlords to include a disclosure-box, as it does not dictate the content of the disclosed information, but rather instructs landlords to draft clauses that are both simple to understand and legally accurate. On the other hand, the enforcing agency will necessarily have more discretion in determining what constitutes a simple and accurate provision.

Lastly, instead of disclosure requirements or ‘simple-language’ rules that grant landlords a considerable amount of discretion in designing and drafting their leases, the regulator can dictate the exact content and language of the lease, either by requiring landlords to use one of several approved statutory form leases or by obliging landlords to insert specific mandatory provisions into their leases.¹⁰²

Precedent for statutory form contracts can be found in statutes that regulate insurance policy forms. The main advantage of this regulatory technique is that it will enhance certainty and consistency in the domain of landlord and tenant law.¹⁰³ This proposal should be seriously considered, as it could greatly enhance welfare, at a relatively low administrative cost.

¹⁰¹ See, e.g., ee, e.g., N.Y GEN. OBLIG. LAW § 5-702 (McKinney 1989 & Supp. 1994) ("Requirements for the use of plain language in consumer transactions"); George H. Hathaway, An Overview of the Plain English Movement for Lawyers, 62 MICH. B.J. 945, 946 (1983); Michael S. Friman, *Plain English Statutes: Lond Overdue or Undone?* 7 LOY. CONSUMER L. REV. 103 (1995).

¹⁰² Olafsen, *supra* note 2, at 529; Allen R. Bentley, *An Alternative Residential Lease*, 74 COLUM. L. REV. 836 (1974).

¹⁰³ David V. Kirby, *Contract Law and the Form Lease: Can Contract Law Provide the Answer?*, 71 NW. U. L. REV. 204, 237 (1976).

7.3 How to ensure compliance? Possible Enforcement Mechanisms

Public Enforcement

This paper reveals that mandatory rules prohibiting the inclusion of certain terms in residential leases are not sufficient without adequate deterrence. Yet, deterrence is only achieved when sanctions are enforced, and as long as tenants remain uninformed about their legal rights, a solution that solely relies on them to bring landlords' violations to court is doomed to fail for lack of sufficient enforcement. This enforcement deficit could potentially be overcome either by ensuring that tenants are informed about their rights and are optimally incentivized to bring claims to court or by establishing public enforcement mechanisms instead of relying on tenants' initiatives. The paper will address two such public enforcement instruments: pre-approval mechanisms and prosecuting mechanisms.

Pre-approval Mechanisms

One solution to the problem of the continued use of UMCs is to require pre-approval of standard form leases. This could be achieved by establishing a special tribunal that is authorized to pre-approve standard form leases—or, alternatively, an administrative agency with a similar regulatory power.¹⁰⁴ Landlords using leases without administrative or judicial approval could then be subject to relatively high sanctions. Conversely, landlords who use contracts that have been pre-approved could

¹⁰⁴ See, e.g., RADIN, *supra* note 2, at 147; Clayton P. Gillette, *Pre-Approved Contracts for Internet Commerce*, 42 HOUS. L. REV. 975 (2005).

so indicate on their forms, thereby bestowing upon their leases the benefit of a strong presumption of enforceability (or even immunity from judicial intervention).¹⁰⁵

In the U.S. insurance market several states require pre-approval of certain policy forms by the regulator.¹⁰⁶ A pre-approval process of standard form contracts also exists in Israel: the Israeli Standard Contract Law of 1982 allows sellers to submit a standard form contract for pre-approval by a special tribunal, established pursuant to this law.¹⁰⁷ In addition, the law could permit governmental actors to seek administrative or tribunal invalidation of allegedly unenforceable or misleading terms in residential leases.

Although a pre-approval requirement may prove effective in combatting the inclusion of UMCs, it has several considerable shortcomings. First, the state would incur the costs of administrative or judicial review. Second, such a pre-approval process inevitably means that the authorized tribunal or agency will exercise discretion in deciding which clauses to invalidate and which to uphold. This process thus inevitably entails the risk of judicial errors in discerning between UMCs and valid provisions. This problem might be mitigated by complementing the pre-approval process with clear-cut statutory rules that clarify which clauses should be invalidated by the authorized court or agency.

Prosecuting Mechanisms

Another public enforcement mechanism is to allow agencies to file claims against landlords who violate landlord and tenant law by using UMCs in their leases. If agencies

¹⁰⁵ In Israel, pre-approved standard form contracts are immune from judicial invalidation for a period of up to five years. See Gillette, *supra* note 104, at 984-5.

¹⁰⁶ See, e.g., Spencer L. Kimball & Werner Pennigstorf, Legislative and Judicial Control of the Terms of Insurance Contracts: A Comparative Study of American and European Practice, 39 Ind. L. J. 675 (1964).

¹⁰⁷ See, e.g., Sinai Deutch, *Controlling Standard Contracts: The Israeli Version*, 30 MCGILL L. J. 458, 473-475 (1985).

could bring claims to court on behalf of tenants, the problem of the latter's imperfect information and misperceptions will be circumvented. Such a solution is not visionary. Section 5 of the Federal Trade Commission Act already authorizes the Federal Trade Commission (FTC) to take appropriate action when unfair or deceptive acts or practices are discovered, and sets out the FTC's investigative powers and enforcement authority.¹⁰⁸ The FTC is authorized to enforce the requirements of consumer protection laws by both administrative and judicial means. In a similar vein, the FTC (or an equivalent state-level agency) could be authorized to ensure landlords' compliance with the substantive requirements under landlord and tenant law.

Public enforcement mechanisms could overcome collective action and free-rider problems that private enforcement systems are typically susceptible to, as will be explained below. Yet, solely relying on public enforcement raises two main concerns. First, there is always a risk of regulatory capture, that is: the fear that the public agencies will promote the interests of the landlords and their associations rather than that of the tenants that they are supposed to protect. Second, governmental agencies may simply lack the optimal incentives to ensure that the mandatory rules are being enforced, and might sometimes suffer from imperfect information about the market. In light of the risks associated with an absolute reliance on public enforcement, it is desirable to complement it with private enforcement mechanisms.

¹⁰⁸ Federal Trade Commission Act of 1914, 15 U.S.C. §§ 41–58 (2012).

8 CONCLUSION

This empirical inquiry shed light on a perplexing phenomenon: the persistence of UMCs in the residential rental market. The findings are a cause for concern: residential leases frequently contain UMCs, and systematically fail to disclose the vast majority of the mandatory rights that the law confers upon tenants.

The continuous use of UMCs is socially undesirable, as it adversely affects tenants' decisions and behavior. Tenants are usually ignorant of landlord-tenant law, and rely on their rental contracts to affirm their rights and duties as renters. UMCs are thus likely to have a significant impact on tenants' perceptions and behavior (and especially on their wallets) when a problem arises. When this happens, tenants, who are likely to believe that the contracts they have signed are enforceable and accurately reflect the law, may relinquish valid legal claims, and incur costs that the law explicitly imposes on landlords. Landlords therefore have an incentive to continue including UMCs in their leases. At the very least, they lack sufficient incentives to verify that their leases meet the regulatory requirements. To remedy these adverse effects, preliminary guidelines for regulatory intervention have been proposed. Such legal intervention is warranted because market forces alone cannot correct this failure.

The present study aims to pave the way for future research targeted at providing a broader and clearer picture of the general problem of the use of UMCs in consumer contracts and its possible solutions. Three directions for future study are especially warranted: (a) analyzing consumer contracts in additional markets; (b) covering more states and countries; and (c) further exploring both the social costs and policy implications of the empirical findings, for example by testing the causal link between the use of UMCs

and tenants' behavior. Future studies in these directions may enhance our understanding of the factors affecting the use of UMCs, and enable us to assess more accurately the desirability of a wide range of policy tools.

9 APPENDIX I: THE SURVEY QUESTIONNAIRE

9.1 Part I

1. Have you ever lived in rental housing?

- 1) Yes
- 2) No

2. When you lived in rental housing, did you have a written lease?

- 1) Yes
- 2) No [if “no” is selected, the questionnaire automatically skips to the second part]

3. Have you ever experienced any of the following issues during your rental period? Please choose all that applies:

- 1) Something in the apartment needed repair.
- 2) I incurred a late-payment fee.
- 3) I wanted to terminate the lease early.
- 4) I wanted to sublet the apartment.
- 5) I wanted to bring pets into the apartment.
- 6) Someone was injured or incurred a loss in the rented apartment.
- 7) I had a problem concerning the security deposit.
- 8) I had a problem or a dilemma concerning payment of rent (for example, I considered paying rent late).
- 9) I had a problem with respect to utilities.
- 10) I discovered some defect or an unsafe condition in the apartment.
- 11) I had a tax-related issue
- 12) The landlord tried to evict me

13)The landlord tried to end the lease early

14)I entered into a disagreement with my landlord:_____

15)I had some other problem: _____

16)I did not have any problem whatsoever during the rental period

4. What did you do as a consequence? Please choose all that applies:

1) I contacted my landlord.

2) I looked at my lease.

3) I consulted an attorney.

4) I checked the web or other sources in order to understand what the law says about the issue

5) I consulted a family member or a friend

6) Other: _____

5. [only for participants who reported looking at their lease in question “4”] How was the issue solved?

1) I acted in accordance with the lease.

2) My landlord and I reached a different agreement.

3) Other: _____

6. Did you look at your lease during the rental period [for participants who did not report looking at their lease in question “4”] or did you look at your lease during the rental period for any other reason? [for participants who reported looking at their lease in question “4”]

1) Yes

2) No

7. If yes – Please explain when and why you looked at your lease

9.2 Part II

Participants were presented with one of the following five provisions and were subsequently asked questions related to the provision that they had read.

Option I: Maintenance and Repair Clause

2. Please read the following lease provision:

Maintenance and Repair: The Tenant shall keep and maintain the leased premises and all equipment and fixtures therein or used therewith repaired. The Lessor and Lessee agree to comply with any responsibility which any may have under applicable law to perform repairs upon the leased premises. If tenant fails within a reasonable time, or improperly makes such repairs, then Landlord may (but shall not be obligated to) make such repairs and Tenant shall reimburse the Landlord for the reasonable cost of such repairs in full, as additional rent, upon demand.

According to the clause you now read, who is responsible to make repairs in the apartment?

- 1) The landlord
- 2) The tenant
- 3) Both tenant and landlord share this burden equally
- 4) Both tenant and landlord have responsibilities, but most of them are placed on the tenant
- 5) Both tenant and landlord have responsibilities, but most of them are placed on the landlord

3. Is the tenant allowed to make repairs and deduct their cost from the rent?

- 1) Yes
- 2) No

Option II: Attorney's Fees Clause

1. Please read the following lease provision:

Attorney's Fees: "In the event that the LANDLORD reasonably requires services of an attorney to enforce the terms of the Lease or to seek to recover possession or damages, the TENANT shall pay the LANDLORD the reasonable attorney's fees incurred and all costs, whether or not a summary process action or other civil action is commenced or judgment is obtained."

According to the clause you now read, who is entitled to recover attorney's fees and expenses incurred as a result of enforcing the terms of the lease?

- 1) The landlord may recover attorney's fees and expenses from the tenant
- 2) The tenant may recover attorney's fees and expenses from the landlord
- 3) Both tenant and landlord may recover attorney's fees and expenses they incurred as a result of enforcing the terms of the lease on the other party
- 4) Other: _____

Option III: Security Deposit

1. Please read the following lease provision:

Security Deposit: On signing this agreement, Tenant will pay to Landlord a security deposit equal to the first month's rent. Within 30 days after Tenant has vacated the premises, Landlord will give Tenant an itemized written statement of the reasons for, and the dollar amount of, any of the security deposit retained by Landlord, along with a check for any deposit balance.

Is the landlord required to return the security deposit with interest?

- 1) Yes
- 2) No
- 3) Other: _____

2. Is the landlord required to keep the deposit in a separate account?

- 1) Yes
- 2) No
- 3) Other: _____

Option IV: Covenant on Quiet Enjoyment

1. Please read the following lease provision:

Quiet Enjoyment: The Landlord covenants that on paying the Rent and performing the covenants contained in this Lease, the Tenant will peacefully and quietly have, hold, and enjoy the Property for the agreed term.

Is landlord's covenant not to disturb the tenant in the enjoyment of the Property conditioned upon the tenant's payment of rent and fulfillment of tenant's other obligations?

- 1) Yes
- 2) No
- 3) Other: _____

Option V: Landlord's Liability

1. Please read the following lease provision:

Indemnification: Landlord shall not be liable for any damage or injury of or to the Tenant, Tenant's family, guests, invitees, agents or employees or to any person entering the Premises or the building of which the Premises are a part or to goods or equipment, or in the structure or equipment of the structure of which the Premises are a part, and Tenant hereby agrees to indemnify, defend and hold Landlord harmless from any and all claims or assertions of every kind and nature

Is landlord liable for any loss or damage caused to the Tenant or his family on the leased premises as a result of landlord's negligence?

- 1) Yes
- 2) No
- 3) Other: _____

10 APPENDIX II: DETAILED CODING SCHEME & RESULTS PER CATEGORY

(1) Landlord's Liability

Coding Scheme

Clauses that acknowledge that the landlord is liable in negligence for injuries, loss or damage to tenants or third parties were coded as enforceable. Clauses that exclude or indemnify the landlord from such liability were coded as unenforceable; and leases that fail to address the landlord's said liability were coded as total omissions.¹⁰⁹

Results

Sixteen percent of the leases in the sample (11 leases) did not include a clause pertaining to landlord's liability at all. Tenants that look at these leases are thus not likely to learn that the landlord is liable for damages caused by her negligence. Perhaps more disturbing is the finding that 27 percent of the leases that *do* contain a clause concerning landlord's liability for loss or damage (16 out of 59 leases) include an *unenforceable* provision that exculpates the landlord from liability in negligence.¹¹⁰

The remaining 43 leases include an enforceable clause. Notably, most of these clauses (72%) begin by relieving the landlord of all liability for loss or damage, and only

¹⁰⁹ In this category, none of the clauses were coded as misleading, as in the leases that contained clauses pertaining to landlord's liability in negligence, such liability was either waived or acknowledged.

¹¹⁰ Out of these leases, 31 percent (5 leases) include a clause that exculpates or indemnifies the landlord from any and all liability, and the rest either provide that landlord will only be liable for damages caused by her *gross* negligence or that the tenant will be solely liable for damage caused to her personal property in any part of the building within her control, or to any damage caused by her or a third party's negligence. The Supreme Judicial Court of Massachusetts determined in *Norfolk v. Morrison* that a provision which states that the tenant is responsible for injuries arising out of the use, control, or occupancy of the leased premises, except those resulting from the "*sole*" negligence of the landlord, violates the statute and is void, because it shifts to the tenant responsibility for injuries and damage that might arise from negligent acts for which the landlord may be partially but not solely responsible (*see Norfolk & Dedham Mutual Fire Insurance Co. v. Morrison* 924 N.E.2d 260, 266 (Mass. 2010)). Thus, clauses which hold the tenant 'solely liable' for damage to personal property caused by his or a third party's negligence are clearly unenforceable, as they shift to tenants liability for damage for which the landlord might be partially, albeit not solely, responsible.

subsequently, in a separate sentence, go on to add that the landlord shall not be liable for damage or loss unless caused by the landlord's negligence.¹¹¹

(2) Warranty of Habitability

Coding Scheme

A provision that acknowledges the warranty of habitability is coded as enforceable. On the other hand, a provision that disclaims it, for example by stating that “there is no implied warranty of habitability,” that “the tenant acknowledges that it accepts the unit in its ‘AS IS’ condition,” or that the “tenant warrants that the apartment is in a habitable condition,” is coded as unenforceable. This coding is consistent with the Massachusetts case-law. In *Leardi v. Brown*, the Massachusetts Supreme Judicial Court upheld the lower court's decision to deem unenforceable a lease provision stipulating that—

[u]nless Tenant shall notify landlord to the contrary within two days after taking possession of the premises, the same and the equipment located therein shall be conclusively presumed to be in good, tenantable order and condition in all respects, except as any aforesaid notice shall set forth.

This provision was described by the courts as “an unabashed attempt to annul, or render less meaningful, rights guaranteed by the State sanitary code.” The Supreme Court upheld the lower judge's conclusion that the provision was “deceptive and

¹¹¹ Such clauses stipulate that “The Lessee agrees to indemnify and save the Lessor harmless from all liability, loss or damage arising from any nuisance made or suffered on the leased premises by the Lessee, his family, friends [...] or servants or from any carelessness, neglect or improper conduct of any such persons. All personal property in any part of the building within the control of the Lessee shall be at the sole risk of the Lessee. The Lessor shall not be liable for damage to or loss of property of any kind [...] or for any personal injury unless caused by the negligence of the lessor.”

unconscionable,” particularly when viewed in the context of “the fundamental nature of the implied warranty of habitability.”¹¹²

Provisions that do not disclaim the warranty, but rather condition its application upon tenant’s fulfillment of her own obligations, are coded as misleading. Although these provisions are not unenforceable *per se*, they are likely to create the false impression that the tenant’s right to habitable housing is dependent on her behavior, rather than absolute. These clauses are, in effect, unenforceable-as-written. Finally, if the warranty is not mentioned in the lease at all, it is coded as a “total omission” under this category.

Results

Even though the warranty of habitability is now an integral component of Massachusetts Landlord and Tenant Law, 70 percent of the leases in the sample (49 out of 70) do not mention it at all. This is perhaps not surprising: landlords do not have an incentive to turn the implied warranty of habitability into an express one. Interestingly, however, 64 percent of the leases that choose to mention the warranty (14 out of 22) go as far as to include an unenforceable *disclaimer* of the tenant’s said right.

Six leases out of the 22, or 27 percent, include a misleading warranty of habitability, conditioning landlord’s obligation to ensure that the apartment is ‘livable and fit for human habitation’ upon the tenant’s fulfillment of her maintenance and repair obligations under the lease. Only two of the 22 leases that mention the warranty include an enforceable clause that accurately reflects the absolute nature of the landlord’s obligation, for example by stipulating that the landlord “shall keep the premises,

¹¹² *Id.* at 156–160.

appliances, plumbing, heating and electrical systems [...] fit for habitation during the tenancy and shall comply with any enactment respecting standards of health, safety or housing”. One lease even goes as far as to disclose that ‘substantial violations of the State Sanitary Code shall constitute grounds for abatement of rent’.

(3) Covenant of Quiet Enjoyment

Coding Scheme

A clause that acknowledges the landlord’s covenant of quiet enjoyment is coded as enforceable, whereas a provision that waives the covenant is coded as unenforceable. Similarly to the coding method applied in the context of the warranty of habitability, if the provision makes the covenant contingent upon tenant’s fulfillment of her obligations, it is coded as misleading (as it is unenforceable-as-written, and is likely to mislead tenants into believing that the covenant is not absolute). If the covenant is not mentioned in the lease at all, the lease is coded as a total omission under this category.

Results

As with the warranty of habitability, the covenant of quiet enjoyment is seldom mentioned in the leases: 89 percent of the leases (62 out of 70) omit it entirely; and the remaining 11 percent (8 out of 70) mention the covenant only to make it contingent upon the tenant’s performance of all of her obligations under the lease—for example, by stipulating that:

Tenant, upon payment of all of the sums referred to herein as being payable by Tenant and Tenant’s performance of all Tenant’s agreements contained herein and Tenant’s observance of all rules and regulations, shall and may peacefully and quietly have, hold and enjoy said Premises for the term hereof.

Or that:

The Landlord covenants that on paying the Rent and performing the covenants contained in this Lease, the Tenant will peacefully and quietly have, hold, and enjoy the Property for the agreed term.

(4) Maintenance and Repair

Coding Scheme

Clauses that accurately state the division of maintenance and repair responsibilities between the landlord and the tenant are coded as enforceable, whereas provisions that shift all the maintenance and repair duties from the landlord to the tenant are coded as unenforceable. Clauses that state that both the landlord and tenant have responsibilities to perform repairs, but fail to mention the landlord's mandatory maintenance and repair obligations, while mentioning the tenant's, are coded as misleading. Leases that do not include a repair and maintenance provision are coded as total omissions.

Results

Maintenance and repair responsibilities are addressed in 99 percent of the leases in the sample (69 out of 70). However, in 20 leases, or 29 percent of the leases containing such a clause, the maintenance and repair provision is unenforceable. Most of the unenforceable clauses do not only place the burden of maintenance and repair on the tenant, but also go as far as adding that if the tenant fails to make repairs, the landlord may make such repairs and recuperate the costs as additional rent, whereas the law sets forth the opposite arrangement.¹¹³ Twenty-three leases, or 33 percent, include a misleading

¹¹³ "If tenant fails within a reasonable time, or improperly makes such repairs, then and in any such event or events, Landlord may (but shall not be obligated to) make such repairs and Tenant shall reimburse the Landlord for the reasonable cost of such repairs in full, as additional rent, upon demand" [emphasis added – MF].

clause, which stipulates that “The Lessor and the Lessee agree to comply with any responsibility which any may have under applicable law to perform repairs upon the leased premises”, but fails to articulate any of the landlord’s duties.¹¹⁴

Notably, even the 26 leases whose clauses were classified as enforceable almost always emphasize the tenant’s obligations, and only briefly discuss the landlord’s duties, while making the latter contingent upon tenant’s compliance with her own responsibilities. For instance, the “Repair and Maintenance” clause in one of the GBREB forms states that—

Both the Landlord and the Tenant have responsibility for the repair and maintenance of the Apartment. If the Landlord permits the Tenant to install the Tenant’s own equipment [...], the Tenant must properly install and maintain the equipment and make all necessary repairs. The Tenant is also required to keep all toilets, wash basins, sinks, showers, bathtubs, stoves, refrigerators, and dishwashers in a clean and sanitary condition. The Tenant must exercise reasonable care to make sure that these facilities are properly used and operated. In general, the Tenant will always be responsible for any defects resulting in abnormal conduct by the Tenant. Whenever the Tenant uses the Apartment or any other part of the Building, the Tenant must exercise reasonable care to avoid damage to floors, walls, doors, windows, ceiling, roof, staircases, porches, chimneys, or other structural parts of the Building. As long as the Tenant complies with all of these duties, the Landlord will make all required repairs at the Landlord’s expense [...]

Other leases contain the following “Repair and maintenance” clause:

It is the responsibility of the tenant to promptly notify the landlord of the need for any repair of which the tenant becomes aware. If any required repair is caused by the negligence of the tenant and/or tenant’s guests, the tenant will be fully responsible for the cost of the repair. The tenant must keep the leased premises clean and sanitary at all times and remove all rubbish, garbage, and

¹¹⁴ For example, some clauses stated that “The tenant shall keep and maintain the leased premises and all equipment and fixtures therein or used therewith repaired. *The Lessor and the Lessee agree to comply with any responsibility which any may have under applicable law to perform repairs upon the leased premises.* If tenant fails within a reasonable time, or improperly makes such repairs, then and in any such event or events, Landlord may (but shall not be obligated to) make such repairs and Tenant shall reimburse the Landlord for the reasonable cost of such repairs in full, as additional rent, upon demand” [emphasis added – MF].

other waste, in a clean tidy and sanitary manner; Tenant must abide by all local recycling regulations; The tenant shall properly use and operate all electrical, cooking and plumbing fixtures and keep them clean and sanitary.

Similarly, some contracts stipulate that—

tenant will: (1) keep the premises clean, sanitary, and in good condition and, upon termination of the tenancy, return the premises to Landlord in a condition identical to that which existed when Tenant took occupancy, except for ordinary wear and tear; (2) immediately notify Landlord of any defects or dangerous conditions in and about the premises [...]; (3) reimburse Landlord, on demand by Landlord, for the cost of any repairs to the premises damaged by Tenant or Tenant's guests or business invitees through misuse or neglect.

These clauses are enforceable, but *highly selective*, in a manner which prevents the tenant from learning about the landlord's maintenance and repair responsibilities from the lease itself. In this sense, they function almost as 'total omissions', in the effect that they produce on the tenant.

(5) Advanced Payments

Coding Scheme

Clauses that meet the abovementioned requirements are coded as enforceable, whereas clauses that require either a security deposit in an amount higher than the first month's rent, or "extra fees", in excess of the fees permitted under the law, are coded as unenforceable. This category does not contain total omissions (as landlords are allowed not to demand advanced payments) or misleading clauses.

Results

A little more than half of the leases (37 out of 70) include an advanced payments clause. Out of these leases, 19 percent (7 leases) contain an unenforceable clause that either requires a security deposit in an amount higher than allowed by law or demands

payment of “extra fees”, such as non-refundable “move-in” and “move-out” fees, a “cleaning deposit”, or a “one-time” fee. The rest contain an enforceable clause, which does not includes payment exceeding the ones allowed by law.

(6) Last Month’s Rent

Coding Scheme

Provisions that acknowledge the landlord’s obligation to pay interest are coded as enforceable, whereas clauses that waive the tenant’s right to receive interest are coded as unenforceable. Provisions which require the tenant to pay the last month’s rent in advance, but do not recognize the landlord’s obligation to pay interest for the last month’s rent, are coded as misleading. Here, none of the leases were coded as ‘total omissions’, as those that did not include a provision pertaining to last month’s rent were the leases that did not require the last month’s rent to be paid in advance.

Results

None of the leases in the sample contain an unenforceable clause that purports to waive the landlord’s obligation to pay interest for the last month’s rent. However, only 3 out of the 21 leases which require payment of last month’s rent mention landlord’s obligation to pay interest on the said rent, whereas the other 18 leases (86 percent) fail to mention the said obligation, and were thus coded as misleading.

(7) Security Deposit

Coding Scheme

Provisions that fully disclose the landlord’s obligations with respect to the hold and return of a security deposit, as required by law, are coded as enforceable. In contrast, provisions that waive any or all of these requirements are coded as

unenforceable.¹¹⁵ Provisions that fail to disclose some, or all, of the landlord's obligations, are coded as misleading. Such clauses are not unenforceable *per se*, but are considered 'deceptive' under the Consumer Protection Law, and are thus coded here as misleading rather than unenforceable. Here, again, none of the leases were coded as 'total omissions', as those that did not include a provision pertaining to security deposits were the leases that did not require such deposit in the first place.

Results

Given the stringent obligations that the law imposes on landlords with respect to the hold and return of security deposits, it is perhaps not surprising that only 57 percent of the leases in the sample (40 out of 70) require such a deposit. Of these leases, 10 percent (4 leases) include enforceable clauses and the same percent include unenforceable clauses. These include a provision allowing the landlord to use the security deposit for purposes other than those prescribed by law; a provision that purports to waive the tenant's right to have the security deposit kept in in a separate account, and provisions stipulating that the deposit will be returned to the tenant without interest. The same proportion of leases includes enforceable clauses, accurately stating landlord's obligations with respect to keeping and returning the deposit.

The remaining 80 percent (32 leases) contain misleading clauses, which fail to mention some, or all, of the landlord's statutory obligations. Of these, 16 leases fail to disclose *any* of the landlord's obligations concerning the security deposit.

¹¹⁵ These include, *inter alia*, provisions allowing the landlord to use the security deposit to pay for purposes other than those prescribed by law, waive the tenant's right to have the security deposit held in an escrow account, or stipulating that the deposit will be returned to the tenant without interest.

(8) Late Payment Fees

Coding Scheme

Provisions that require late fees to be paid after at least 30 days have elapsed are coded as enforceable, whereas clauses that demand the charge to be paid before the 30 days' period are coded as unenforceable.

Results

39 percent of the leases (27 out of 70) include a late payment penalty clause—of these, 41 percent (11 leases) include a clearly unenforceable clause, requiring late fees to be paid before 30 days have elapsed.

(9) Attorney's Fees

Coding Scheme

Provisions that stipulate that both landlord and tenant will be able to recover attorney's fees and expenses resulting from the other party's breach are coded as enforceable. On the other hand, clauses that allow the landlord to recover attorney's fees and expenses, but waive the tenant's right to recover such fees are coded as unenforceable, and one-sided attorney's fees clauses are coded as misleading. It is noteworthy that such clauses are not unenforceable *per se*. In fact, the Court is instructed to interpret them as a mutual obligation to pay the costs of the prevailing party, and consequently enforce them as such. Yet, they are likely to mislead tenants into believing that they will not be entitled to recover attorney's fees resulting from the landlord's breach.

Results

Forty-three percent of the leases in the sample (30 out of 70) contain a provision concerning attorney's fees. Of these, 80 percent (24 leases) include one-sided attorney's fees clauses. Here are some examples:

"Should it become necessary for Landlord to employ an attorney to enforce any of the conditions or covenants hereof [...], tenant agrees to pay all expenses so incurred, including a reasonable attorneys' fee"

"In the event that the LANDLORD reasonably requires services of an attorney to enforce the terms of the Lease or to seek to recover possession or damages, the TENANT shall pay the LANDLORD the reasonable attorney's fee incurred and all costs, whether or not a summary process action or other civil action is commenced or judgment is obtained."

The remaining 20 percent (6 leases) include an enforceable provision, explicitly stipulating that the obligation to pay the other party's attorney's fees and expenses is a mutual one.

(4) Tax Escalation Clause

Coding Scheme

Tax escalation clauses that meet and disclose all three requirements are coded as enforceable, whereas provisions that fail to meet or disclose any or all of these requirements are coded as unenforceable.

Results

Only ten percent of the leases in the sample (7 out of 70) include a tax escalation clause. Out of these, only one lease includes an unenforceable clause that fails to meet the disclosure requirements set forth by the law.

(5) Utilities

Coding Scheme

Leases that provide either that the landlord shall pay for the said utilities or that the tenant shall pay, while disclosing the details of the watering submetering and billing arrangement are coded as enforceable, whereas leases obliging the tenant to pay for water without disclosing these details are coded as unenforceable. Leases that do not contain any clause concerning utilities' payments are coded as 'total omissions' under this category, as in effect, this means that the landlord is responsible to pay for the utilities, but the tenant cannot learn about the landlord's said duty from the lease.

Results

Almost all leases: 66 out of 70, include a utilities' payment clause. Out of these leases, 23 percent (15 leases) include an unenforceable clause pertaining to the payment of water bills, whereas the remaining 77 percent (51 leases) include an enforceable clause which fully discloses the water submetering and billing arrangement.

(6) Termination of Tenancy and Eviction

Coding Scheme

Clauses that disclose the 14-days' notice requirement in the event of termination of the lease due to non-payment of rent are coded as enforceable. On the other hand, provisions that either reduce or entirely eliminate the 14-days' notice requirement are coded as unenforceable. Provisions that set forth the landlord's right to terminate the tenancy due to non-payment of rent, while neglecting to mention the 14-days' notice requirement, are coded as misleading. Lastly, leases that do not contain provisions referring to the termination of the lease at all are coded as total omissions.

Results

Eleven leases, constituting 16 percent (11 leases) of the sampled leases, do not refer to termination of the lease at all. Out of the 59 leases (84 percent) that do contain such a clause, 12 percent (7 leases) contain an unenforceable provision that either reduces or entirely eliminates the 14-days' notice requirement (for example, by stipulating that the "lessee may, within ten days of being served with a notice of termination, deliver to the lessor all the rent due as of that date, whereupon the notice shall be void").

Three percent of these leases (2 leases out of 59) are misleading, as they set forth the landlord's right to terminate the tenancy and evict the tenant due to non-payment, while neglecting to mention the 14-days' notice requirement. The remaining 50 leases, or 85 percent of the leases that mention the issue, contain a clause which refers to the 14-days' notice requirement, and was thus coded as enforceable. Interestingly, however, 47 out of these leases fail to mention the tenant's right to cure the breach and prevent the termination of the lease by paying the rent due during the 14-days' period.

(7) Restrictions on Landlord's Right of Entry

Coding Scheme

Clauses that limit the landlord's right of entry as set forth in the law are coded as enforceable, whereas clauses that enable the landlord to enter the premises for other purposes are coded as unenforceable. Leases that do not contain provisions concerning landlord's entry to the premises are coded as total omissions.

Results

Not surprisingly, landlord's right to enter the premises during the rental period is set forth in 94 percent of the leases (66 out of 70). Yet, only one lease includes an

unenforceable provision, allowing the landlord to enter the premises for any purpose. All the others include an enforceable provision that limits landlord's right of entry as set forth in the law, often with arguably negligible extensions.

(8) Miscellaneous (Tenant's Rights)

Coding scheme

These rights were divided into 18 sub-categories. Under each category, clauses that accurately set forth the tenant's right were coded as enforceable, clauses that waived her right were coded as unenforceable, and leases that did not mention the said right at all were coded as total omissions.

Results

An unenforceable waiver of one of the tenant's said rights, the right to a jury trial, was found in only one lease. Yet, other than this one unenforceable waiver, the sampled leases did not include any unenforceable waivers of the said rights. In fact, the vast majority of the abovementioned rights were not mentioned in any of the sampled leases. Exceptional in this regard were the right to receive a copy of the lease and the prohibition on reprisals, which appeared in 39 and 33 of the sampled leases respectively. Except for these two rights, a few rights were mentioned in a small number of leases: the prohibition on discrimination (which was set forth in three of the sampled leases), the prohibition on restricting occupancy of children (which was mentioned in 15 leases), the right to repair and deduct (which was mentioned in one lease) and the right to receive relocation benefits under the landlord's insurance policy (which was mentioned in seven leases).

The average proportion of total omissions in the sampled leases across these different rights is 67 out of 70, and the average proportion of enforceable clauses is 3 out of 70. As only one lease included one unenforceable clause pertaining to one out of the 20 rights, the proportion of unenforceable clauses in this category is negligible (less than one percent).

12 APPENDIX III: THE CODE BOOK

Issue	Applicable law	Coding
Landlord's liability for loss or damage	<p>G.L. c. 186, §15.</p> <p>The inclusion of any provision that precludes the landlord from liability to the tenant or third party for any injury, loss, damage or liability arising from any omission, fault, negligence or other misconduct of the landlord on or about the rented premises or the common areas, is prohibited.</p> <p>Such a provision is considered to be against public policy and void.</p>	<p>Does the lease contain a clause concerning landlord's liability for loss or damage caused to the tenant or third parties?</p> <ul style="list-style-type: none"> • No = total omission • Yes, and landlord's liability in negligence is not waived = enforceable • Yes, and the clause waives landlord's liability in negligence = unenforceable <p>[note: in this category, none of the clauses are coded as misleading]</p>
Warranty of Habitability	<p><i>Boston Housing Authority v. Hemingway</i>, 293 N.E.2d, 843 (Mass. 1973); 105 MASS. CODE. REGS. 410.000 (Massachusetts Sanitary Code).</p> <p>The landlord warrants providing and maintaining the residential premises in a habitable condition, <i>i.e.</i>: fit for human occupation, and this implied warranty may not be waived. Such a waiver will constitute a violation of G.L.c.93A (the Consumer Protection Law).</p>	<p>Is the warranty of habitability mentioned in the lease?</p> <ul style="list-style-type: none"> • No = total omission • Yes, and landlord's warranty of habitability is acknowledged = enforceable • Yes, and the warranty is disclaimed = unenforceable • Yes, and the clause states that the warranty is conditioned upon tenant's fulfillment of her own obligations = misleading
The Covenant of Quiet Enjoyment	G.L. c. 186, §14; C.M.R., §3.17.	Is the covenant of quiet enjoyment

Issue	Applicable law	Coding
	<p>Tenants have a right to quiet enjoyment – the right to be free from unreasonable interference with the use of their home. A landlord who is required to furnish utilities and services, and who willfully or intentionally fails to furnish such services, interferes with their furnishing, transfers the responsibility for payment to the tenant without his knowledge or consent, interferes with the tenant’s quiet enjoyment of the residential premises, or attempts to regain possession of such premises by force will be susceptible to the sanctions set forth by the law.</p> <p>Failure to comply with this provision constitutes “unfair or deceptive act.”</p>	<p>mentioned in the lease?</p> <ul style="list-style-type: none"> • No = total omission • Yes, and the covenant is acknowledged = enforceable • Yes, and the covenant is waived = unenforceable • Yes, and the provision makes the covenant contingent upon tenant’s fulfillment of her obligations = misleading
Maintenance and Repair	<p>The Massachusetts Sanitary Code, Chapter II. 105 C.M.R. §410.010(a); 940 C.M.R. §3.17(1)</p> <p>The Massachusetts Sanitary Code places most of the burden of providing and maintaining the premises in a safe and habitable condition on the landlord, while imposing only minimal maintenance obligations on the tenant.</p> <p>The Code also includes a “repair and deduct” statute, which enables the tenant, under certain circumstances, to make repairs and lawfully deduct the cost incurred from the rent or, alternatively, to treat the lease as abrogated and vacate the premises within a</p>	<p>Does the lease contain a clause concerning maintenance and repair?</p> <ul style="list-style-type: none"> • No = total omission • Yes, and it accurately describes the allocation of responsibilities between landlord and tenant = enforceable • Yes, and it shifts repair responsibilities onto the tenant = unenforceable • Yes, and it states that both landlord and tenant have responsibilities to perform repairs, but fails to mention the landlord’s mandatory

Issue	Applicable law	Coding
	reasonable time.	maintenance and repair obligations, while mentioning the tenant's = misleading
Advanced Payments	<p>G.L. c. 186, §15B(1)(a), (b); C.M.R. 3.17; G.L.c.93A</p> <p>The landlord is prohibited from requiring a tenant to pay any amount in excess of the first month's rent, last month's rent, a security deposit equal to the first month's rent, and the purchase and installation cost for a key and lock.</p> <p>The only extra charge that the law allows is a "finder's fee," charged by a licensed real-estate broker or salesperson (G.L.c112, §87D).</p> <p>Failure to comply with this provision constitutes "unfair or deceptive act."</p>	<p>If the lease requires advanced payments, does it lease include fees beyond the amount permitted by law?</p> <ul style="list-style-type: none"> • No, it includes only some or all of the permitted fees = enforceable • Yes, it includes extra fees = unenforceable
Last Month's Rent	<p>G.L. c. 186, §15B (2)(a)</p> <p>A landlord who receives rent in advance for the last month of the tenancy is obliged to pay interest on the said rent payment.</p>	<p>If the lease requires the tenant to pay the last month's rent in advance, does it acknowledge the landlord's obligation to pay interest on the said rent?</p> <ul style="list-style-type: none"> • Yes = enforceable • No, it waives the landlord's said obligation = unenforceable • No, it fails to mention this obligation = misleading
Security Deposit	G.L. c. 186, §15B (2), (3), (4)	If the lease requires a security

Issue	Applicable law	Coding
	<p>Landlord is required: (a) to provide the tenant with a receipt; (b) to deposit and hold the funds in a separate, interest-bearing, account (and to pay interest at an annual rate of five per cent, or at a lesser rate as paid by the bank in which the money is held); (c) to provide the tenant with a notice of the bank and account number and with a statement of the present condition of the premises; (d) to maintain records of deposits and repairs; and (e) to return the deposit with interest, less lawful deductions, within 30 days after the termination of the tenancy. The landlord may only deduct from the deposit for the following expenses: unpaid rent, taxes (provided that there is a valid tax escalation clause –see below), and a “reasonable amount necessary to repair any damage” caused by the tenant, her family or guests, to the premises.</p> <p>According to C.M.R. § 3.17, failing to “state fully and conspicuously in simple and readily understandable language” one of these issues (except for the 5th, which is not explicitly mentioned there) is an “unfair or deceptive practice.”</p>	<p>deposit to be paid, does it fully disclose the landlord’s obligations with respect to the hold and return of a security deposit, as required by law?</p> <ul style="list-style-type: none"> • Yes = enforceable • No, it waives one of the landlord’s said obligations = unenforceable • No, it fails to mention any or all of these obligations = misleading
Late Payment Fees	<p>G.L. c. 186, §15B (1)(c); G.L.c.93A, §2; 940 C.M.R. §3.17(6)(a).</p> <p>Landlords are prohibited from imposing any interest or penalty for failure to pay rent until 30 days after such rent shall have been</p>	<p>If the lease includes a late payment penalty clause, does it impose any penalty for failure to pay rent before the 30 days’ minimum has passed?</p> <ul style="list-style-type: none"> • No = enforceable • Yes = unenforceable

Issue	Applicable law	Coding
	due. The inclusion of a penalty clause which is not in conformity with these provisions is deemed “unfair or deceptive act or practice.”	
Attorneys’ fees	<p>G.L. c. 186, §20.</p> <p>Whenever a lease provides that the landlord may recover attorneys’ fees and expenses resulting from the tenant’s failure to perform her obligations, there is an implied covenant by the landlord to reimburse the tenant for reasonable attorneys’ fees and expenses resulting from the landlord’s breach or from the successful defense of any action or summary proceeding initiated by the landlord</p>	<p>If the lease contains an attorney’s fees clause, does it include a mutual obligation to pay the prevailing party’s fees and expenses resulting from the other party’s breach?</p> <ul style="list-style-type: none"> • Yes = enforceable • No, it allows the landlord to recover attorneys’ fees, while waiving the tenant’s respective right = unenforceable • No, only mentions landlord’s right to recover attorneys’ fees, without mentioning tenant’s respective right = misleading
Tax Escalation	<p>G.L. c. 186, §15C;</p> <p>The landlord may require the tenant to pay increased rent on account of an increased real estate tax, only if the lease expressly sets forth: (1) that the tenant shall be obligated to pay only that proportion of such increased tax as the unit leased by him bears to the whole of the real estate so taxed;</p> <p>(2) the exact percentage of any such increase which the tenant shall pay, and (3) that if the landlord obtains an abatement of the real estate tax levied on the whole of the real estate of which the unit leased is a part, a proportionate share of such abatement, less</p>	<p>If the lease contains a tax escalation clause, does it meet the disclosure requirements set forth by the law?</p> <ul style="list-style-type: none"> • Yes = enforceable • No = unenforceable

Issue	Applicable law	Coding
	<p>reasonable attorney's fees, shall be refunded to the tenant.</p> <p>Any provision in violation of this section is void and unenforceable. The inclusion of a tax escalation clause which is not in conformity with these provisions is deemed "unfair or deceptive act or practice."</p>	
Utilities' Payment	<p>G.L. c. 186, §22; 105 C.M.R. §410.354(A)-(C).</p> <p>The landlord is required to pay for electricity, gas, and water, unless there is a meter that separately calculates the tenant's use and the agreement sets forth that the tenant is responsible to pay for these utilities. With respect to water supply, the lease should "clearly and conspicuously" provide for a separate charge and fully disclose "the details of the water submetering and billing arrangement."</p>	<p>Does the lease include a provision about utilities' payment (gas, electricity, and/or water)?</p> <ul style="list-style-type: none"> • No = total omission • Yes, and it provides that the landlord shall pay for utilities or that the tenant shall pay, while disclosing the details of the watering submetering and billing arrangement = enforceable • Yes, and it provides that the tenant shall pay for water without disclosing the necessary details = unenforceable
Termination of Tenancy and Eviction Due to Non-Payment	<p>G.L. c. 186, §11, §15A.</p> <p>A landlord is required to give a written 14 days' notice in writing in order to terminate the tenancy in light of the tenant's failure to pay the rent due. Tenant can prevent the termination of the lease (and subsequent eviction) by paying the rent due, with</p>	<p>Does the lease include a provision concerning termination of tenancy due to non-payment of rent?</p> <ul style="list-style-type: none"> • No = total omission • Yes, and the clause discloses the 14-days' notice requirement = enforceable • Yes, and the clause waives

Issue	Applicable law	Coding
	<p>common area, that the defect existed at the time of the letting of the property, if said defect was, at the time of the injury, a violation of the building code of the relevant city or town. A provision purporting to waive the landlord's liability in such situations is unenforceable.</p>	<p>recognized = enforceable</p> <ul style="list-style-type: none"> • Yes, and liability is waived = unenforceable
	<p>Landlord's liability in case of constructive eviction</p> <p>G.L. c. 186, §15F.</p> <p>A provision whereby a tenant agrees that no action or failure to act by the landlord shall be construed as a constructive eviction is unenforceable.</p>	<p>Is landlord's liability in case of constructive eviction mentioned in the lease?</p> <ul style="list-style-type: none"> • No = total omission • Yes, and liability is recognized = enforceable • Yes, and the clause determines that no action or failure to act by the landlord shall be construed as constructive eviction = unenforceable
	<p>Landlord's liability for damages caused by unlawful eviction</p> <p>G.L. c. 186, §15F; 940 C.M.R. § 3.17(5); G.L.c.184, §18, G.L.c. 266, §120</p> <p>If a tenant is removed from the premises by the landlord except pursuant to a valid court order, the tenant may recover possession or terminate the rental agreement and, in either case, recover a specified sum of damages, including reasonable attorneys' fees. Any agreement or understanding which purports to exempt the landlord from such liability is unenforceable.</p> <p>An unlawful eviction constitutes an "unfair</p>	<p>Is landlord's liability in case of unlawful eviction mentioned in the lease?</p> <ul style="list-style-type: none"> • No = total omission • Yes, it is acknowledged = enforceable • Yes, but it is waived = unenforceable

Issue	Applicable law	Coding
	<p>Restrictions on the occupancy of children</p> <p>G.L. c. 186, §16.</p> <p>Any provision of a lease, which terminates or provides that the landlord may terminate the lease if the tenant has or shall have children is unenforceable.</p>	<p>Is the right to raise children in the apartment mentioned in the lease?</p> <ul style="list-style-type: none"> • No = total omission • Yes, the lease determines that tenants and their children can occupy the property = enforceable • Yes, the lease provides that the landlord may terminate the lease if the tenant has or shall have children = unenforceable
Miscellaneous: Tenant's Rights and Landlord's Liabilities (continued)	<p>Prohibition of reprisals for reporting violations of the law</p> <p>G.L.c. 186, §18, §19; C.M.R §3.17</p> <p>Landlords are prohibited from reprisals against tenants for bringing judicial or administrative claims against them. If landlords retaliate, they can be held liable for damages. A lease provision may not waive the rights of tenants in this regard, and any such waiver is unenforceable. Failure to comply with this provision constitutes "unfair or deceptive act."</p>	<p>Is the prohibition of reprisals mentioned in the lease?</p> <ul style="list-style-type: none"> • No = total omission • Yes, the provision prohibits reprisals against tenants = enforceable • No, the provision waives tenants' rights for damages in case of reprisals = unenforceable
	<p>Duty to exercise reasonable care to repair unsafe conditions</p> <p>G.L. c. 186, §19.</p> <p>A landlord should, within a reasonable time following receipt of a written notice from a tenant of an unsafe condition, exercise reasonable care to correct the unsafe condition. If the tenant or a third party is injured as a result of the failure to correct such conditions, the injured person shall</p>	<p>Is the duty to correct unsafe conditions mentioned in the lease?</p> <ul style="list-style-type: none"> • No = total omission • Yes, the provision acknowledges landlord's said duty and stipulate that failure to do so will expose landlord to liability in torts = enforceable

Issue	Applicable law	Coding
	have a right of action against the landlord for tort damages.	<ul style="list-style-type: none"> No, the provision waives landlord's liability for such failure = unenforceable
Miscellaneous: Tenant's Rights and Landlord's Liabilities (continued)	<p>Landlord's obligation to disclose insurance information</p> <p>G.L. c. 186, §21.</p> <p>The landlord, upon the written request of any tenant, code or law enforcement official, shall disclose within 15 days the name of his insurance company and other details concerning the insurance. Whoever violates this provision shall be punished by a fine.</p>	<p>Is landlord's obligation to disclose insurance information mentioned in the lease?</p> <ul style="list-style-type: none"> No = total omission Yes, and the clause acknowledges landlord's said duty = enforceable Yes, and the clause purports to waive the said duty = unenforceable
	<p>Rights of tenants who are victims of domestic violence, rape, sexual assault or stalking</p> <p>G.L. c. 186, §24-28.</p> <p>The law sets forth various obligations that a landlord has towards a tenant who is a victim of domestic violence, rape, sexual assault or stalking. For instance, according to §24, a tenant may terminate a rental agreement and quit the premises upon written notification to the landlord that a member of the household is a victim of domestic violence, rape, sexual assault or stalking, given that different conditions are met. Section 25 prohibits landlords from refusing to rent an apartment to a tenant who left his previous apartment based on termination of the agreement according to §24. Section 26 obliges a landlord to change the lock and keys to an apartment upon the tenant's request, etc.</p> <p>A waiver of the victim's right to terminate the lease without financial penalty or to</p>	<p>Are the rights of said victims mentioned in the lease?</p> <ul style="list-style-type: none"> No = total omission Yes, and the clause acknowledges tenant's said rights (e.g., the right to terminate the lease without financial penalty or to request that locks be changed) = enforceable Yes, and the lease waives any or all of the victim's said rights = unenforceable

Issue	Applicable law	Coding
	request that locks be changed, except as otherwise provided by law, is unenforceable (§28).	
Miscellaneous: Tenant's Rights and Landlord's Liabilities (continued)	Prohibition of discriminatory restriction of occupancy of MA GL, Ch. 184, §23B. Any provision which forbids or restricts the occupancy or lease of the property to persons of a specified race, color, religion, national origin, or sex is void. Any condition, restriction or prohibition, including a right of entry, which directly or indirectly limits the use for occupancy of real property on the basis of race, color, religion, national origin or sex shall be void, excepting a limitation on the basis of religion on the use of real property held by a religious or denominational institution	Is the prohibition of discriminatory restriction of occupancy mentioned in the lease? <ul style="list-style-type: none"> • No = total omission • Yes, the lease mentions the said prohibition = enforceable • Yes, and the lease restricts/forbids occupancy or the use for occupancy on a discriminatory basis = unenforceable
	Community residence of disabled persons M.G.L.A.c.184, §23D. Any restriction, reservation, condition, exception, or covenant in a lease which prohibits a community residence for disabled persons, is unenforceable.	Is the right of disabled persons to establish community residence mentioned in the lease? <ul style="list-style-type: none"> • No = total omission • Yes, the lease acknowledges the said right = enforceable • No, the lease forbids/restricts community residence for disabled persons = unenforceable
	Notice before shutting off water, gas and electricity M.G.L.A.c.165, §11E; M.G.L.A.c.164, §124D. Any waiver in a lease of the notice provisions and procedures as to shutting off water to non-customer occupants in residential buildings or cutting off gas and electric service to a tenant who is not a customer of	Is the said notice requirement mentioned in the lease? <ul style="list-style-type: none"> • No = total omission • Yes, the notice requirement is acknowledged = enforceable • Yes, and the lease waives

Issue	Applicable law	Coding
	record is unenforceable.	tenant's right to receive notice prior to shutting off water or cutting off gas/electricity = unenforceable
	<p>Fire Insurance – M.G.L.A.c.175, §99, Clause 15A.</p> <p>relocation benefits</p> <p>Waiver of relocation benefits under the landlord's fire insurance policy is unenforceable.</p>	<p>Is this issue mentioned in the lease?</p> <ul style="list-style-type: none"> • No = total omission • Yes, and tenant's right to relocation benefits is acknowledged = enforceable • Yes, and the provision waives tenant's said right of relocation benefits = unenforceable
Miscellaneous: Tenant's Rights and Landlord's Liabilities (continued)	<p>Disclosure of insurance information about loss by fire</p> <p>M.G.L.A.c.175, §99, Clause 15A.</p> <p>The waiver of the duty of the landlord to notify the tenant of law enforcement officials as to the name of the company and the amount of the insurance as to loss or damage by fire cannot be waived by a lease provision to the effect.</p>	<p>Is this issue mentioned in the lease?</p> <ul style="list-style-type: none"> • No = total omission • Yes, and the landlord's said duty is acknowledged = enforceable • Yes, and the landlord's said duty is waived = unenforceable
	<p>Restriction on the installation or use of a solar energy system</p> <p>M.G.L.A.c.184, §23C.</p> <p>Provision which forbids or unreasonably restricts the installation or use of a solar energy system is unenforceable.</p>	<p>Is this issue mentioned in the lease?</p> <ul style="list-style-type: none"> • No = total omission • Yes, and tenant's right to install or use a solar energy system is acknowledged = enforceable • Yes, and the provision forbids/ unreasonably restricts said installation or use = unenforceable
	<p>Tenant's right to reimbursement for</p> <p>M.G.L.A.c.111, §127L</p>	<p>Is the tenant's right to repair and deduct mentioned in the lease?</p>

Issue	Applicable law	Coding
	certain repairs or to treat lease as abrogated The tenant has a right to deduct from the rent the amount necessary to pay for repairs of unsafe conditions if the landlord has been notified in writing of the existence of the violations and has failed to begin all necessary repairs within five days after such notice, and to substantially complete all necessary repairs within fourteen days after such notice. The tenant may, alternatively in such cases, treat the lease as abrogated, pay only the fair value of their use and occupation and vacate the premises within a reasonable time. Any provision of a residential lease which waives these benefits is unenforceable.	<ul style="list-style-type: none"> • No = total omission • Yes, the tenant's right is acknowledged = enforceable • Yes, and the provision waives tenant's right = unenforceable
Miscellaneous: Tenant's Rights and Landlord's Liabilities (continued)	Stay of judgment and execution in summary process M.G.L.A.c.239, §12. Any provision of a residential lease, whereby a tenant waives the benefits of law, which permits a stay where tenancy has been terminated without fault of the tenant, is void.	Is the tenant's right mentioned in the lease? <ul style="list-style-type: none"> • No = total omission • Yes, the tenant's right is acknowledged = enforceable • Yes, and the provision waives tenant's right = unenforceable
	Tenants' assertion of claims and defenses in summary process M.G.L.A.c.239, §8A. Any provision which waives the right of a tenant to assert claims and defenses in summary process cases is void.	Is this issue mentioned in the lease? <ul style="list-style-type: none"> • No = total omission • Yes, the tenant's right is acknowledged = enforceable • Yes, and the provision waives tenant's right = unenforceable
	Landlord's duty to deliver a copy of the lease G.L. c. 186, §15D; C.M.R., § 3.17 The landlord must provide a copy of the lease within 30 days of signing it. A landlord	Is the landlord's said duty mentioned in the lease? <ul style="list-style-type: none"> • No = total omission • Yes, the landlord's duty is

Issue	Applicable law	Coding
	<p>who violates this obligation can be fined up to \$300 (G.L. c. 93A, §1).) Failure to comply may make the lease voidable by the tenant, and constitutes “unfair or deceptive practice.”</p>	<p>acknowledged = enforceable</p> <ul style="list-style-type: none"> • Yes, and the provision waives this duty = unenforceable