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Meirav Furth-Matzkin
Harvard Law School
SJD Candidate

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Harvard Law School
Cambridge, MA 02138

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Meirav Furth-Matzkin

Harvard Law School
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Meirav Furth-Matzkin

Abstract: Today, most of the contracts we sign, or click "I agree" to, are standardized take-it-or-leave-it agreements that we typically do not read, let alone understand. While some of us may assume that these non-negotiable contracts often include one-sided terms, most of us do not realize that many of their provisions are misleading or even legally invalid.

In recent decades, several scholars have pointed out that unenforceable clauses are frequently included in standard form contracts and have endeavored in explaining why they persist, yet this issue has gained little empirical attention. This paper seeks to take a first step in filling this gap, by presenting an in-depth empirical study of the persistence of unenforceable and misleading terms in one of the most important consumer markets — the residential rental market, whose participants constitute 35 percent of the U.S. population, and whose annual revenues exceed $149 billion.

The paper undertakes the first systematic content-based analysis of unenforceable and deceptive provisions in residential rental leases. The database consists of 70 leases from the Boston Metropolitan Area, and was established especially for the purposes of this research. The study analyzes the provisions of each lease in the sample in light of the mandatory rules regulating the content of residential leases in Massachusetts. These rules pertain, *inter alia*, to landlord's liability for loss or injury, maintenance and repair obligations, the warranty of habitability, payments and fees, termination of tenancy, and eviction. The paper documents whether the residential leases in the sample comply with these mandatory rules, contradict them, or misrepresent the legal state-of-affairs.

The study's findings are striking: 68 out of 70 leases in the sample, constituting 97 percent, contain at least one unenforceable clause. Perhaps more remarkable is the finding that all of the leases in the sample contain at least one misleading clause. Unlike invalid terms, which explicitly conflict with the law, misleading terms selectively disclose the legal state-of-affairs and misinform tenants of their legal rights and remedies. Building on insights from traditional and behavioral law and economics, the paper goes on to suggest that unenforceable and misleading terms persist in residential leases as they benefit the landlords who use them. Tenants, like most consumers, often do not read their residential leases prior to signing them, yet they are likely to read them *ex post*, once a dispute arises. At that point in time, they will plausibly perceive the lease's provisions as enforceable and binding, and consequently forgo valid legal claims.

The continued use of unenforceable and misleading terms is harmful from a social welfare perspective and raises distributional concerns. In light of the social costs associated with this practice, the paper offers preliminary policy prescriptions and estimates their effectiveness and desirability. The paper examines both private and public enforcement mechanisms. It concludes that since private enforcement relies on tenants to bring claims to court, it will not be sufficient in overcoming this market failure. Thus, the paper calls for the adoption of public enforcement tools, and proposes different alternatives, ranging from disclosure obligations to more coercive tools like statutory form leases and mandatory pre-approval requirements.

I. Introduction

Imagine that you live in a rented apartment in Boston. Now consider the following scenarios:

(1) One sunny day, the refrigerator in your rented apartment stops working. You are about to call your landlord, as you hope that she will agree to cover the expenses of the refrigerator's repair. Before calling her, you decide to check what your lease, which you signed without reading a few months ago, has to say about such situations. You take out the lease from the drawer, and you notice a "maintenance and repair" provision which reads as follows:

> "The lessee shall at all times keep and maintain the leased premises and all equipment and fixtures therein or used therein repaired, reasonable wear and tear only excepted. If lessee fails within a reasonable time, or improperly makes such repairs, then and in any such event or events, the lessor may (but shall not be obligated to) make such repairs and the Lessee shall reimburse the Lessor for the reasonable cost of such repairs in full, upon demand."

What would you do next? Will you call your landlord or will you simply incur the repair expenses yourself? Now suppose that you do call your landlord, and she refuses to make the necessary repairs, while referring you to your written lease. What would you do in that case?

(2) You move into a new apartment in Boston. At the commencement of your lease you give your landlord a security deposit. When the lease ends, your landlord returns the deposit without interest. You look at your lease, and it only mentions that the landlord should return the deposit (minus any lawful deductions) after the termination of the lease, without mentioning an obligation to pay interest. What would you do? Would you contact your landlord and ask for

interest? Now suppose that you do ask your landlord to pay interest, and she answers that she has no such obligation under the lease. What would your response be then?

(3) You are ten days late in your monthly rent's payment. Your landlord tells you that you now also have to pay a "late fee" of $150, in accordance with your lease. You look at your lease and you discover a provision, titled "late fee", which stipulates as follows:

> "If the rent or any other charges are not received by the Landlord on or before ten days after the rent due date, tenant must pay a late fee of $150 in addition to the rent."

What would you do? Will you pay the late fee? Will you risk being evicted or sued by your landlord?

These three scenarios share a common feature: they all describe a situation in which a tenant encounters a standard form lease provision that conflicts with the law.[1] These scenarios are hypothetical, yet — as this study reveals — unenforceable provisions like the ones at hand are included in standard form leases more often than we would like to believe and without our being aware of it.

Given the "take-it-or-leave-it" nature of standardized forms (also known as contracts of adhesion), it is not at all surprising that they often include one-sided terms.[2] As Professor Todd Rakoff points out, lawyers are driven to include one-sided terms in their clients' boilerplates so as "to protect the client from every imaginable contingency. The real needs of the business are

[1] It is noteworthy that whereas the vast majority of residential leases are standard form contracts, some leases are negotiated and drafted by specific parties with regards to a specific transaction, and are thus not considered "standard form leases." As these are a small minority, and usually even such leases are greatly influenced by the "typical" standard form lease terms, the paper refers to all residential leases as "standard form leases."

[2] *See, e.g.*, Omri Ben-Shahar *Preface or: a boilerplate introduction, in* BOILERPLATE: THE FOUNDATION OF MARKET CONTRACTS x (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 4 (Omri Ben-Shahar ed., 2007); Florencia Marotta Wurgler, *Competition and the Quality of Standard Form Contracts: An Empircial Analysis of Software License Agreements*, 5 J. EMPIRICAL LEGAL STUD. 447 (2008); OREN BAR-GILL, SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS 1 (2012); MARGARET J. RADIN, BIOLERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW 9 (2013).

left behind; the standard is the latitude permitted by law."[3] The goal of this paper is to empirically examine the possibility that standard form leases not only include biased terms favoring the landlord, but also terms which exceed the leeway permitted by law.

In recent decades, several scholars have suggested that employers, sellers, and landlords continuously use legally invalid terms in standard form contracts and leases.[4] Yet little empirical investigation of the use of such terms in standardized contracts has been conducted. The few empirical works that have been published in this field are mostly anecdotal and dated.[5] In the context of residential leases, the primary empirical study was conducted in the 1970's by Curtis J. Berger.[6] Berger surveyed landlord-tenant cases decided over a two-year period from 1970 to 1972, finding that residential landlords continued to use standard form leases that had lost over sixty per cent of the cases involving the standardized agreements. For the purposes of his research, Berger analyzed sixteen standard form leases from sixteen cities in different parts of the country, finding that most of them were "consistently somewhat or strongly pro-landlord."[7] While this study serves as a significant starting point for the current research, it focused on whether residential leases were imbalanced in favor of landlords, rather than on whether they

[3] Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1222 (1984).

[4] Bailey Kuklin, *On the Knowing Inclusion of Unenforceable Contract and Lease Terms*, 56 U. CIN. L. REV. 845 (1988); Charles A. Sullivan, *The Puzzling Persistence of Unenforceable Contract Terms*, 70 OHIO ST. L. J. 1127 (2009); Julliet P. Kostritsky, *Illegal Contracts and Efficient Deterrence: A Study in Modern Contract Theory*, 74 IOWA L. REV. 115 (1988); David Slawson, *Mass Contracts: Lawful Fraud in California,* 48 S. CAL. L. REV. 1, 49-51 (1974); Kurt E. Olafsen, Note, *Preventing the Use of Unenforceable Provisions in Residential Leases*, 64 CORNELL L. REV. 522, 524-527 (1978); RADIN, *supra* note 2, at 220.

[5] *See, e.g.*, Michael J. Wisdom, *An Empirical Study of the Magnuson-Moss Warranty Act*, 31 STAN. L. REV. 1117, 1133 (1978-1979) (examining the effect of the Magnuson-Moss Warranty Act on sellers' warranty practices, finding that two of the sixty-four warranties in the study included unenforceable disclaimers of implied warranties); Alan Schwartz, *The Private Law Treatment of Defective Products in Sales Situations*, 49 IND. L.J. 8 (1973) (examining the appropriate legal treatment of defective products, finding that sellers continue to use warranty disclaimers that have been invalidated by the courts in their sales contracts); Sullivan, *supra note* 3, 1137 n.34 (presenting preliminary limited empirical evidence that employers in fact often draft noncompetition clauses that are not enforceable as written).

[6] Curtis J. Berger, *Hard Leases Make Bad Law*, 74 COLUM. L. REV. 791, 791-92 (1974). *See also* Allen R. Bentley, *An Alternative Residential Lease*, 74 COLUM. L. REV. 836, 841 fn 18 (1974) (proposing an alternative lease. For this purpose, Bentley examined seven traditional standard form leases in New York, finding that they are out-of-date and seldom revised notwithstanding regulatory shifts in landlord and tenant law).

[7] Berger, *supra* note 6, at 835.

conformed to the law or misstated it.[8] Furthermore, it was conducted more than 40 years ago and covered only a small sample of leases.

The dearth of empirical research in the context of standardized contracts, and residential leases in particular, is surprising. Standard form contracts have become an integral part of our daily lives: almost all of the contracts we sign (or click "I agree" to) are standardized fine-prints.[9] In fact, it has been estimated that 99 percent of all commercial contracts are standardized forms.[10] Given the tremendous practical significance and relevance of such contracts, it is puzzling that very little empirical research in this area has so far been conducted.

The shortage of empirical work concerning the continuous use of unenforceable and misleading clauses (hereinafter: UMCs) in standard form contracts is all the more puzzling when considering the possible social costs and welfare implications of this phenomenon for consumers. For if a consumer believes that her contractual provisions are enforceable when they are not, she might relinquish her legal rights or behave in way which is detrimental to her well-being.[11] In light of the social importance of the use of unenforceable terms in standardized contracts, one could expect that "empirical theories dealing with the use and abuse of contract behavior in the shadow of contract law and beyond" will be developed as soon as initial signs of such an abuse emerge.[12] A comprehensive analysis of the content of standardized contracts, and

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[8] Berger, *supra* note 6, at 822 (stating that the objective of the analysis described in the appendix to his study was "to quantify – using objective indices – the imbalance" between landlord's rights and remedies on one hand and tenant's rights and remedies on the other hand).

[9]

> If you are like most US consumers, you enter into "contracts" daily without knowing it, or at least without being able to do anything about it. The purported contracts come in the form of paperwork that you receive and are asked to sign, or that contain terms supposedly binding without your signature […] This paperwork is boilerplate, or, less colloquially, standardized form contracts.

RADIN, *supra* note 2, at 8-9 .

[10] 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).

[11] Sullivan, *supra* note 4, at 1139-1144; Kuklin, *supra* note 4, at 847-855; Olafsen, *supra* note 4, at 524-527.

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

residential leases in particular, is thus long overdue, and its results could better inform continuing policy debates.

This paper presents an in-depth empirical study of the persistence of unenforceable or misleading terms in the residential rental market, whose consumers constitute 35 per cent of the U.S. population and whose revenues exceed $149 billion.[13] The paper undertakes the first systematic content-based analysis of the scope and extent of unenforceable and misleading terms in standardized leases, using a database of 70 residential rental agreements, established especially for the purposes of this research.

Four inter-related questions lie at the heart of this research. The first three questions are descriptive: How frequently are unenforceable and misleading provisions included in residential leases? Why do leases include such provisions? And how do these provisions affect tenants' perceptions and behavior? The last question is prescriptive: what should policymakers do to combat this phenomenon?

Through statistical analysis of 70 lease agreements from the Boston Housing Market Area, this research reveals a disheartening picture: 94 percent of the leases in the sample include at least one unenforceable clause. Perhaps more remarkable is the finding that 100 percent of the leases include at least one misleading term. As opposed to legally invalid provisions, misleading clauses are not unenforceable *per se*. At most, they are unenforceable-as-written. Yet, by misrepresenting the legal state-of-affairs, they are likely to produce a similar psychological effect on tenants. For example, some leases contain "maintenance and repair" clauses which list all the tenant's obligations, without even mentioning the landlord's duties, even though the State Sanitary Code places the burden of maintaining the premises in safe and habitable condition

[13] As of September 2014, more than 104 million U.S. residents live in rental housing. *Quick Facts: Resident Demographics (2014)*, NATIONAL MULTIFAMILY HOUSING COUNCIL (NMHC), https://nmhc.org/Content.aspx?id=4708 (last visited May 5, 2015).

almost entirely on the landlord. Reading these terms, a tenant who is ignorant of the law is likely to get the impression that the law is much more favorable to the landlord than it actually is, and consequently surrender her legal rights without even knowing it.

Building on insights from both traditional and behavioral law and economics, the paper goes on to suggest that UMCs are continuously inserted in standard form leases, as they benefit the landlords who use them.[14] Tenants (like most consumers) often do not read their residential leases prior to signing, yet they are likely to read them *ex post*, once a dispute arises. At this point in time, they are likely to perceive the lease's provisions as enforceable and binding, and consequently forgo valid legal claims.[15]

Leaving the moral and ethical concerns that are raised by this phenomenon aside,[16] the continued use of unenforceable and misleading terms generates a behavioral market failure. This market failure is undesirable from an economic perspective, as it produces social welfare costs and raises distributional concerns. First, this practice shifts costs from landlords to tenants. Second, as tenants are heterogeneous, the costs of the inclusion of such clauses might not spread evenly among them. It is plausible that educated and informed consumers will not be influenced by the inclusion of invalid or misleading terms, whereas other, less knowledgeable, consumers

[14] There are many sources that provide a general overview of the behavioral law and economics literature. *See, e.g.*, Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998); DANIEL KAHNEMAN & AMOS TVERSKY, CHOICES, VALUES, AND FRAMES (2000); RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008); There are also sources that specifically discuss bounded rationality. *See, e.g.*, Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the rationality assumption from law and economics*, 88 CAL. L. REV. 1075 (2000); DAN ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS (2010); MADELINE L. VAN HECKE, BLIND SPOTS. WHY SMART PEOPLE DO DUMB THINGS (2007); ROBERT BURTON, ON BEING CERTAIN: BELIEVING YOU ARE RIGHT EVEN WHEN YOU'RE NOT (2008); CORDELIA FINE, A MIND OF ITS OWN: HOW YOUR BRAIN DISTORTS AND DECEIVES (2008); JOSEPH T. HALLINAN, WHY WE MAKE MISTAKES (2010).

[15] *See, e.g.*, 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 (1997) (suggesting that exculpatory clauses have a deterrent effect on consumers); Olafsen, *supra* note 4, at 522; Warren Mueller, *Residential tenants and their leases: an empirical study*, 69 MICH. L. REV. 247 (1970).

[16] For an elaborate discussion about the moral, ethical, and deontological concerns raised by such practice, see Kuklin, *supra* note 4, at 847-860.

will be adversely affected by this practice. Consequently, the more ignorant tenants might cross-subsidize the sophisticated and knowledgeable tenants.[17]

Given the social costs generated by this practice, the paper discusses possible policy prescriptions and assesses their effectiveness and desirability. Policymakers could fight the inclusion of unenforceable terms, for example by requiring landlords to obtain an *ex ante* approval of standard form leases by an authorized tribunal or agency and by imposing harsher sanctions on landlords that knowingly use invalid clauses, as well as on the lawyers who draft them.

The paper proceeds in nine parts. Part II describes the residential rental market and its economic and social significance. Part III provides a brief overview of the revolution in tenant and landlord law. Part IV describes the empirical research: the sample and the methodology used. Part V presents and analyzes the results. Part VI examines the possible factors underlying the inclusion of UMCs in residential leases, and Part VII examines the welfare costs of this practice. In light of these welfare costs, Part VIII proposes various normative prescriptions and applies the papers' empirical findings to shed light on the desirability of these options. Part IX concludes. The annex of this paper includes the code-book used for the coding of the leases in the sample.

[17] About the heterogeneity in consumers' imperfect rationality and misperceptions, see EDWARD L. GLAESER, PSYCHOLOGY AND THE MARKET 8 (National Bureau of Economic Research Working Paper Series no. 10203, Dec. 2003), *available at* http://www.nber.org/papers/w10203.pdf.

II. The Residential Rental Market

A. The Social and Economic Significance of the Residential Rental Market

Rental housing is an important socio-economic phenomenon: as of September 2014, more than 104 million U.S. residents and 40 million households, constituting 35 percent of the U.S. population, live in rental housing.[18] Renting has become more appealing to individuals in all ages and from all socio-economic backgrounds.[19]

The Residential Rental industry in the United States is continuously and rapidly growing, both in response to urbanization processes and as a result of the subprime mortgage crisis. While raising the barriers to homeownership, the financial downturn generated a surge in demand for rental units, consequently reviving rental markets across the country.[20] Additionally, the economic recession highlighted the risks of homeownership and resulted in renewed appreciation of the advantages of renting.[21] Rental housing allows for flexibility given the relative ease of moving and provides a solution for those who cannot afford to own a house.[22]

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[18] *See Quick Facts: Resident Demographics (2014)*, NATIONAL MULTIFAMILY HOUSING COUNCIL (NMHC), https://nmhc.org/Content.aspx?id=4708 (last visited May 5, 2015). Housing has always been viewed as one of the necessities of life: a crucial component of the "food, clothing, and shelter" trio. *See* JOINT CENTER FOR HOUSING STUDIES OF HARVARD UNIVERSITY, AMERICAS' RENTAL HOUSING: EVOLVING MARKETS AND NEEDS 2 (2013); RACHEL G. BRATT ET AL., A RIGHT TO HOUSING: FOUNDATION FOR A NEW SOCIAL AGENDA 2, 3 (2006).

[19] MAKSIM SOSHKIN, IBISWORLD INDUSTRY REPORT 53111: APARTMENT RENTAL IN THE U.S. (Sept. 2014), *available at* http://clients1.ibisworld.com/reports/us/industry/default.aspx?entid=1349 (click Archive, then search for Sept. 2014 report)[hereinafter: IBIS REPORT].

[20] *Id.* at 6-8; 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; 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 [hereinafter: AMERICA'S RENTAL HOUSING].

[21] AMERICA'S RENTAL HOUSING, *supra* note 20.

[22] Judith Yates, *Towards a Reassessment of the Private Rental Market*, 11 HOUSING STUD. 35 (1996); AMERICA'S RENTAL HOUSING, *supra note* 20, at 9-10; NATIONAL LOW INCOME HOUSING COALITION, OUT OF REACH 2014, *available at* http://nlihc.org/oor/2014.

With the widespread increase in rental demand, the 2000's marked the strongest decade of growth in renter households over the past half-century.[23] The rental housing market recovered from the economic downturn, witnessing lower vacancies, higher rents, and higher construction levels in the vast majority of markets.[24] Industry revenue not only recovered, but also exceeded its height prior to the recession. It has increased at an annualized rate of 2.5 percent to $139 billion in the five years between 2009 and 2014, and is further expected to rise, at an annualized rate of 2 percent, up to $153.4 billion in the five years leading to 2019.[25] Profit margins also went up, from 31 percent in 2009 to approximately 33.6 percent in 2014. According to estimations of the Joint Center for Housing Studies, the number of renter households is likely to increase by between 4 and 4.7 million in the years 2013-2023.[26] While this is a "considerable slowdown from the current rate", growth is still expected to "outstrip increases in both the 1960's and 1990's."[27]

B. Market Structure

The Apartment Rental Industry in the U.S. primarily consists of individual landlords and sole proprietorships that lease single units. Such individual non-employers, usually those who rent out their own residential property or manage small buildings, are expected to account for about 89 percent of establishments as of 2014.[28] However, more than half of the industry's revenue is generated by larger firms, including limited liability companies and partnerships.[29]

[23] AMERICA'S RENTAL HOUSING, *supra* note 20, at 1.
[24] *Id.* at 4.
[25] IBIS REPORT, *supra* note 19, at 9.
[26] AMERICA'S RENTAL HOUSING, *supra* note 20, at 2.
[27] *See Id.*
[28] IBIS REPORT, *supra* note 19, at 20.
[29] *Id.* at 7.

Such firms dominate the ownership of large apartment complexes: they own 42 percent of all 50+ unit properties.[30]

C. The Boston Metropolitan Area Market

This research focuses on the residential rental market in the Boston Metropolitan Area (BMA). The BMA, as defined by the U.S. Department of Housing and Urban Development, consists of five counties in Massachusetts: Essex, Middlesex, Norfolk, Plymouth, and Suffolk.[31] As of 2014, its' estimated population size is 4.7 million people.[32] The rental housing market in BMA is characterized by an increased rental demand.[33] Growth in student enrollment during the past decade contributed to the increase in the demand and to low vacancy rates throughout the BMA.[34] *Table 1* shows the rental rates and number of renters in the different counties in BMA.

***Table 1*: The rental rates in the BMA Counties (2014)**

	Essex	**Middlesex**	**Norfolk**	**Plymouth**	**Suffolk**
percentage of renters	38.16%	38.29%	32.55%	24.62%	65.79%
Number of renters	111,840	230,158	86,107	45,516	201,716

[30] IBIS REPORT, *supra* note 19, at 25.
[31] Michael J. Murphy, *Overview*, *in* U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (OFFICE OF POLICY DEVELOPMENT AND RESEARCH) HOUSING MARKET PROFILES: BOSTON-CAMBRIDGE-NEWTON, MASSACHUSETTS-NEW HAMPSHIRE 1 (February 1, 2014), *available at* http://www.huduser.org/portal/periodicals/USHMC/reg/BostonMA_HMP_Feb14.pdf; U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (OFFICE OF POLICY DEVELOPMENT AND RESEARCH), COMPREHENSIVE MARKET ANALYSIS: BOSTON, MASSACHUSETTS 1 (July 1, 2013), *available at* http://www.huduser.org/portal/publications/pdf//BostonMA_comp_2013.pdf [hereinafter: HUD MARKET ANALYSIS].
[32] HUD MARKET ANALYSIS, *supra* note 31, at 5.
[33] *Id.* at 1.
[34] *See Id.*

III. The Revolution in Residential Tenant and Landlord Law

A. A Brief Overview

Since the 1960's (and especially from 1968 to 1973), the United States has experienced a revolution in residential landlord and tenant law.[35] This revolution, which brought to the enhancement of tenants' rights through legislative and judicial law-making, was inspired by the rise of the civil rights movement and by developments in consumer protection law.[36] The revolution was rapid and pervasive: almost all jurisdictions have adopted major reforms in landlord and tenant law.[37] In many states, legislative reform preceded and often hastened the shifts in the case-law; in others, statutes codified judicial precedents. Some of these statutes focused mainly on establishing new remedies for the landlord's failure to abide by housing regulations. Others limited themselves to according new rights to tenants, leaving it to the courts to decide upon the remedies.[38] The development of new judicial and statutory doctrines in this field resulted in the drafting of the Model Code and to the subsequent enactment of the Uniform Residential Landlord and Tenant Act (URLTA), which — as of 2014 — has been adopted by 21 states.[39] Many other states have enacted variations of URLTA or its predecessor, the Model Code.[40]

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[35] Samuel B. Abbott, *Housing Policy, Housing Codes and Tenant Remedies: An Integration*, 56 B.U.L. REV. 1 (1976) (Abbott was the first to term the transformation in tenant-landlord law 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 the landlord-tenant relations have shifted from being based on "contract" to being based on "status").

[36] Rabin, *supra* note 35, at 554; Glendon, *supra* note 35.

[37] Rabin, *supra* note 35, at 521.

[38] Glendon, *supra* note 35, at 523.

[39] Unif. Residential Landlord & Tenant Act Refs & Annos (2014).

[40] Glendon, *supra* note 35, at 523.

The changes in landlord and tenant law were at the heart of the landlord-tenant relationship, both in legal and practical terms.[41] One of the major changes in landlord and tenant law pertained to the implied warranty of habitability.[42] Before 1969, the law in most jurisdictions was simple: *caveat lessee*. The landlord was generally not responsible to repair defects in the premises, notwithstanding if they existed at the time 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), regardless of when they emerge, and notwithstanding any agreement to the contrary.[43] Rent Control ordinances, limiting the landlord's common law right to set the price of the rental unit as she wished, also dramatically increased in the 1970's.[44]

Another fundamental change occurred in the area of landlord's liability in torts. By 1976, more than twenty state legislatures had determined that exculpatory clauses in residential leases, purporting to waive the landlord's negligence liability for personal injuries or damage to property, are void and unenforceable.[45] ULTRA followed this approach.[46] Other changes included anti-discrimination laws; regulation of landlord's power to evict tenants at the termination of the lease; prohibition on reprisals; limitation of landlord's remedies upon tenant's breach of the contract; regulation of security deposits; and miscellaneous increased protections of tenants.[47]

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[41] Rabin. *supra* note 35, at 521.
[42] Glendon, *supra* note 35, at 524-528; Rabin, *supra* note 35, at 521.
[43] Rabin, *supra* note 35, at 522; 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) (summarizing and citing legislation and judgments); R. SCHOSHINSKY, AMERICAN LAW OF LANDLORD AND TENANT § 3: 13 (1980).
[44] Rabin, *supra* note 35, at 527; MONICA R. LETT, RENT CONTROL: CONCEPTS, REALITIES AND MECHANISMS (1976) (describing the history of modern rent control legislation).
[45] Rabin, *supra* note 35, at 530.
[46] URLTA §1.403(a)(4) (1972); Rabin, *supra* note 35, at 530.
[47] Rabin, *supra* note 35, at 531-539.

Even though Massachusetts has not officially adopted the URLTA, its landlord and tenant laws largely follow the URLTA's approach. Massachusetts General Laws include a variety of pro-tenant rules, including limitations on landlord's ability to waive liability for loss or damage, anti-discrimination rules, limitation of landlord's remedies upon tenant's breach of the contract, regulation of security deposits and advanced payments, and other protections of tenants; and the MA Sanitary Code imposes various maintenance and repair obligations on the landlord.[48]

B. The Debate over the Desirability of the Regulatory Reform

The revolution in tenant-landlord law has triggered a rigorous debate over the desirability of the regulation of the contractual relations between landlords and tenants.[49] Opponents of the revolution argued that imposing pro-tenant mandatory terms would hurt tenants more than it would benefit them, as it would result in increased rental prices. The argument was that landlords would shift the costs of increased protection back to tenants, the consumers of rental housing.[50] Some scholars have therefore estimated that low-income tenants, who are unable or unwilling to pay additional rent, would be worse off as a consequence.[51]

On the other side of the debate, some scholars have maintained that the pro-tenant laws, and specifically the regulation of the slum housing market, could improve housing conditions

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

[49] *See, generally,* Bratt et al., *supra* note 21, at 8 and citations there; Rabin, *supra* note 35; Duncan Kennedy, *The Effect of the Warranty of Habitability on Low Income Housing: "Milking" and Class Violence*, 15 FLA. ST. U. L. REV. 486 (1987); Bruce Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 YALE L.J. 1093 (1971); Neil K. Komesar, *Return to Slumville: A Critique of the Ackerman Analysis of Housing Code Enforcement and the Poor*, 82 YALE LJ. 1175 (1973); Bruce Ackerman, *More on Slum Housing and Redistribution Policy.- A Reply to Professor Komesar*, 82 YALE L.J. 1194 (1973); Richard S. Markovitz, *The Distributive Impact, Allocative Efficiency, and Overall Desirability of Ideal Housing Codes: Some Theoretical Clarifications*, 89 HARV. L. REV. 1815 (1976).

[50] *See, e.g.*, Rabin, *supra* note 35, at 558; Lawrence H. Summers, *Some Simple Economics of Mandated Benefits*, 79 AM. ECON. REV. 177, 180-181 (1989); Charles L. Meyers, *The Covenant of Habitability and the American Law Institute*, 27 STAN. L. REV. 879 (1975); Berger, *supra* note 4, at 749 ("To a great extent the laws are self-defeating. It is likely that as a result of them there will be less rental housing and that certainly means higher rents.")

[51] Meyers, *supra* note 50, at 879-893; Rabin, *supra* note 35, at 559-560.

without leading to increased rent,[52] and that governmental enforcement of a minimum standard of living is generally desirable from a redistributive perspective.[53] The influence of the housing codes and the pro-tenant mandatory provisions on the rental prices has also been examined empirically by Hirsch, Hirsch & Margolis.[54] Their research examined the impact of pro-tenant provisions on rent levels, finding that some laws (but not all of the examined provisions) are significantly associated with higher rents.[55]

The debate over the desirability of the revolution in landlord and tenant law echoes the debate over the desirability and social costs of regulating the content of contracts in general.[56] Legal economists argue that the imposition of mandatory contract terms reduces the parties' welfare, since it operates as an effective tax on their transaction.[57] In recent years, however, behavioral law & economics scholars have suggested that mandatory terms may be efficient in light of people's bounded rationality.[58] Proponents of such regulation usually stress the desirable distributional outcomes of such measures, as well as the need to intervene in cases of market failures.[59]

This paper does not seek to stake out new grounds in the rich and multifaceted debate on the costs and benefits of regulating the content of residential leases, nor does it attempt to make a stance with regards to the larger debate on the desirability of mandatory contract terms. As described above, these issues have been discussed elsewhere. Rather, this paper suggests that an

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[52] *See infra* note 49.
[53] Markovitz, *supra* note 49.
[54] Werner Z. Hirsch et al., *Regression Analysis of the Effects of Habitability Laws Upon Rent: An Empirical Observation on the Ackerman-Komesar Debate*, 63 CAL. L. REV. 1098 (1975).
[55] Id. at 1139.
[56] *See* Jolls et al., *supra* note 14, at 1505.
[57] RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (5th ed. 1998); Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 954-55 (1984); Meyers, *supra* note 50, at 890.
[58] Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1505-1508 (1997); Richard Craswell, *Passing on the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships*, 43 STAN. L. REV. 361, 388-390 (1991); Korobkin, *supra* note 130, at 1244-1252 (suggesting that in light of consumers' bounded rationality, mandatory terms may be desirable).
[59] *See, e.g.*, Bratt et al., *supra note* 21, at 9.

important aspect related to these debates has been generally overlooked. While the academic discourse has focused its attention on the normative desirability of content-regulation of standard form leases, the question whether these mandatory rules are actually being followed by the drafting parties had been largely ignored. In other words, the literature has failed to examine if the mandatory regulation actually matters in practice, or if it is being overreached by the drafting parties. This study seeks to find out whether landlords use contracts which comply with the mandatory rules governing them and accurately reflect those rules, or continue to use invalid and misleading terms in their residential leases. To this empirical inquiry the paper shall now turn.

IV. The Empirical Research: Sample and Methodology

A. Sample

This study explores whether landlords use standard form leases which comply with, and accurately reflect, landlord and tenant law, or continue to include unenforceable and misleading clauses in their leases. For the purpose of this research, a database of 70 residential leases in the Boston Metropolitan Area was established. The author of the paper approached tenants (more than 200 residents), brokers, private landlords, and residential rental companies by e-mail, telephone, and through web-based social networks. Most of the leases in the database were received from tenants, whereas some of them were transferred to the author from private landlords, real estate agents, and lawyers who specialize in housing law. Residential Companies who were asked to send their leases for research purposes have refused to cooperate. Out of the tenants who transferred their leases, almost 33 percent were students (mostly Harvard affiliated).

There are 70 different landlords in the sample. Out of the 65 landlords whose identity is known, 38 percent (25 landlords) are companies (including one University who rents housing

units to its students), and 62 percent (40 landlords) are private individuals. The companies in the sample include some of the biggest residential companies and property management firms in the BMA, including: (1) Winn Residential Company – ranked as the sixth largest property management firm in the U.S., operating more than 87,500 units;[60] (2) Peabody Properties Management Company – a private company operating more than 10,000 units in the BMA (annual sales of $5 million)[61]; (3) The Hamilton Company – a private company operating more than 5200 units in the BMA (annual sales of $0.8 million)[62]; and (4) Investment Limited – a private company operating more than 3,000 units in the BMA (annual sales of $4.3 million).[63]

The vast majority of the collected leases are standard form contracts. Some of them could be downloaded from the internet, either for free or at a certain cost. 41 percent of the leases in the sample use one of six standard forms offered by the Greater Boston Real Estate Board (GBREB), which represents owners and managers of more than 120,000 multifamily units across Massachusetts.[64] *Table 2* shows the different types of standard form leases found in the sample. Leases that do not explicitly use any of these standard forms are coded as "others."

***Table 2*: Types of Standard Forms**

Lease's Form Type	Frequency	percent	Cum.
EZ Landlord Forms	3	4.29	4.29
GBREB (FN:RH 220)	1	1.43	5.71
GBREB (ID 216)	1	1.43	7.14
GBREB (ID RA900)	4	5.71	12.86
GBREB (ID RH201)	17	24.29	37.14
GBREB (ID RH206)	5	7.14	44.29

[60] *2014 NMHC 50: 50 Largest U.S. Apartment Managers*, NATIONAL MULTIFAMILY HOUSING COUNCIL (NMHC), http://www.nmhc.org/Content.aspx?id=8188 (last visited 5.6.2015).
[61] AVENTION, ONE-STOP REPORT: PEABODY PROPERTIES, INC. (21 January 2015).
[62] AVENTION, ONE-STOP REPORT: HAMILTON CO. (21 January 2015).
[63] EXPERIAN INFORMATION SOLUTIONS, EXPERIAN POWER BUSINESS REPORT: INVESTMENT LIMITED (December 8, 2014).
[64] These forms deviate in different respects. *See* http://www.gbreb.com/rha.aspx. The forms that appear in the sample are: RH 220; RH 221; RA 900; RH 206; RH 201; and RH 216.

GBREB (ID RH221)	1	1.43	45.71
MA Association of Realtors	1	1.43	47.14
Nolo	2	2.86	50
Section 8 Model Lease	1	1.43	51.43
National Apartment Association	1	1.43	52.86
Others (unnamed leases)	33	47.14	100
Total	70	100	

The leases in the sample are from three counties in the Boston Metropolitan Area: Suffolk, Middlesex, and Norfolk. *Table 3* shows the representation of counties in the sample, and *Table 4* shows the distribution of leases between different cities.

***Table 3*: County Representation in the Sample**

	Middlesex	**Norfolk**	**Suffolk**
percentage of leases	75.71	12.86	11.43
Number of leases	53	9	8

***Table 4*: Cities Representation in the Sample**

City	Freq.	percent
Arlington	1	1.43
Boston	7	10
Brookline	9	12.86
Cambridge	18	25.71
Concord	1	1.43
Lexington	1	1.43
Lowell	10	14.29
Medford	1	1.43
Nattick	1	1.43
Newton	4	5.71
Revere	1	1.43
Somerville	10	14.29
Watertown	5	7.14
Wincester	1	1.43
Total	70	100

Table 5 reports some key product summary statistics of the apartments 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 5*: Summary Statistics of the Apartments in the Sample**

				Quantiles				
Variable	**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
Length	70	13.10	5.97	6	12	12	12	43
Provisions	69	33.65	11.07	12	26	34	39	63

B. Methodology

This research is based on a *content analysis* of the leases in the sample (for a detailed description of the coding methodology and the code-book used – see Annex I).[65] 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 MA General Laws and in the State Sanitary Code, prohibit a landlord from including provisions that are deemed as against public policy and void in residential leases.[66]

[65] The research does not include a survey of the physical characteristics of the leases (*i.e*, 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. Each lease could not be read and fully understood by a lay person without legal assistance. The combination of unfriendly fine-print and complex legal framework plausibly contributes to tenants' general reluctance to read these standard leases.

[66] MASS GEN. LAWS ch. 186. 105 MASS. CODE. REGS. 410.000 ((the code sets minimum standards of fitness for human habitation in residential properties). The Code of Massachusetts Regulations determines that the inclusion of an unenforceable term in a rental agreement constitutes an "unfair or deceptive act or practice" under the Consumer Protection Act, and that upon finding that an owner knowingly or willfully engaged in an unfair or deceptive act, the

For the purpose of this research, the provisions mandated by MA laws were divided into seven main categories: (1) Landlord's liability for loss or damage; (2) The Warranty of Habitability and the Covenant on Quiet Enjoyment (3) Maintenance and Repair; (4) Payments and Fees; (5) Termination of Tenancy and Eviction; (6) Miscellaneous – tenant's rights; and (7) Landlord's Right of Entry.

Within each category, this study examines whether the relevant lease provisions comply with the applicable mandatory rules, contradict them, or misrepresent the legal state-of-affairs. The lease provisions are accordingly coded as enforceable, unenforceable *per se*, or misleading.[67] As distinct from unenforceable terms, misleading terms are not legally invalid. Rather, they misinform tenants of their legal rights and remedies, while emphasizing the landlords' rights and remedies.[68] Misleading terms typically present the law in a way which favors the landlord when compared to the legal benchmark.

Since Massachusetts' landlord-tenant law is mostly based on statutes which set forth clear-cut rules rather than ambiguous standards, they provide relatively objective criteria for determining whether a lease provision complies with the law. Except for the warranty of habitability, this study did not address judge-made rules: only statutory rules pertaining to landlord and tenant relations. Still, the coding decisions required a certain amount of discretion. Sometimes it is uncertain whether a certain provision, by its language and context, is enforceable

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Court may award the injured tenant damages. MASS GEN. LAWS ch. 93A, §9(3), provides for recovery of "actual damages or twenty-five dollars, whichever is greater".

[67] For instance, a lease term that purports to waive the landlord's liability for loss or damage to the tenant caused by landlord's negligence is coded as unenforceable *per se*, as it conflicts with MASS GEN. LAWS ch. 186, §15, which prohibits the landlord from waiving liability for negligence.

[68] I am aware of the pejorative connotations of the term "misleading." It may be argued that the use of this term insinuates that the clauses are there to actively deceive tenants, whereas the fact that a term does not disclose a certain legal right or remedy granted by law to the tenant does not necessarily mean that. A more neutral term, like "selective disclosure" clauses, could be adopted instead. Yet, I believe that such terms are actually meant to deceive tenants. Even if certain landlords are unaware of such terms' existence, the drafters of these terms were, I suggest, well aware of the misleading effect of such clauses on tenants.

or void. This is an interpretative question, which could be difficult to answer. Thus, where possible, I tried to support my coding decisions in judicial decisions pertaining to the validity of the said lease terms.

The decision whether to code a provision as "unenforceable" or "misleading" requires even a larger amount of discretion. This is because the line between "unenforceable" and "misleading" clauses is sometimes blurry. Unenforceable clauses misstate the law by conflicting with it, whereas misleading clauses misstate the law by selectively disclosing only a certain part of it: the tenant's duties and the landlord's rights and remedies. Both unenforceable and misleading terms thus produce a similar effect on tenants' perceptions: they generate tenants' misperceptions concerning the applicable law. Indeed, as previously mentioned, the Code of Massachusetts Regulations (hereinafter: CMR) determines that the inclusion of an unenforceable term constitutes an "unfair or deceptive act." We could look at these categories as part of a continuum: at one end of the continuum, there are clauses that are clearly enforceable and accurately reflect the law. At the other end, there are clauses that are unequivocally invalid, and in between there are various shades of "misleading" clauses, which are on the crossroad between enforceability and invalidity. Still, this study draws a distinction between clauses which only tell a part of the story and clauses which are in direct and explicit conflict with the law. Clauses which selectively disclose the legal state-of-affairs are not unenforceable *per se*. They are, at most, *unenforceable-as-written*.

Two clarifications are in order. The first clarification is related to clauses that contain what I term "*legal fallback*" phrases, i.e., clauses that state that they are "subject to applicable law" or apply "to the extent permissible by law." When those phrases are included in a clearly unenforceable provision, such provision is coded as unenforceable *per se*. On the other hand,

when they are mentioned in a clause which selectively discloses the legal state-of-affairs, but then states that it is "subject to applicable law" or that "the landlord will comply with his obligations under applicable law", such clause is coded as misleading.

It is noteworthy that the question whether a "legal fallback" language might save an otherwise unenforceable clause from being invalidated has been examined by the Supreme Judicial Court of Massachusetts in *Leardi v. Brown*.[69] There, the Court examined a lease provision which stipulated that "THERE IS NO IMPLIED WARRANTY THE PREMISES ARE FIT FOR HUMAN OCCUPATION (HABITABILITY) except so far as governmental regulation, legislation or judicial enactment otherwise requires.." The landlord argued that the disclaimer of the warranty of habitability is rendered perfectly lawful by the inclusion of the "legal fallback", yet the Court dismissed his claim, determining that the clause is unenforceable and void as it purports to waive the unwaivable warranty of habitability. The Court reasoned that the clause, taken as a whole, "clearly tends to deceive tenants with respect to the landlord's obligation to deliver and maintain the premises in habitable condition", as it suggests that the implied warranty of habitability is "the exception and not the rule, if it exists at all."[70] The Court further found that the average tenant, presumably not well acquainted with the law concerning the warranty of habitability, is likely to interpret the provision as an absolute disclaimer of the implied warranty of habitability."[71] To conclude, the Court determined that a "legal fallback" clause cannot "save" an otherwise unenforceable clause from being invalidated.

The second clarification has to do with clauses that I term *unenforceable-as written*. These are clauses that the Court interprets as enforceable by reading something into them. For instance, MA General Laws determine that whenever a lease provides that the landlord may

[69] Leardi v. Brown, 474 N.E.2d 1094 (Mass. 1985).
[70] *Id.* at 1100.
[71] *Id*.

recover attorneys' fees and expenses resulting from the tenant's failure to perform her obligations, there shall be an implied covenant by the landlord to pay to the tenant the reasonable attorneys' fees and expenses resulting from landlord's breach.[72] In contrast to clauses which are unenforceable *per se*, a one-sided attorney's fees clause will be interpreted by the Court as a mutual attorney's fees clause and consequently enforced as such. Such a clause is thus not unenforceable *per se*. Its only possible effect is a psychological one: it might deceive a tenant into believing that she will not be entitled to recover attorney's fees resulting from landlord's failure to comply with her obligations. Hence, it is coded as "misleading."

I shall now turn to present the results of this empirical research.

V. Results

A. Landlord's Liability for Loss or Damage

G.L.c. 186, §15 prohibits a landlord from waiving her liability for injuries, loss or damage, caused to tenants or third parties by her negligence, omission, or misconduct.[73] Nonetheless, 7 percent of the leases in the sample (5 out of 70) include a clause which exculpates or indemnifies the landlord from any and all liability, for example, by providing that "the tenant shall indemnify and hold landlord harmless from any and all claims or assertions of every kind and nature." One lease out of the 70, constituting 1.4 percent, states that the landlord will only be liable for damages caused by her "*gross* negligence." 19 percent of the leases (13 out of 70) stipulate that the tenant will be solely liable to damage caused to her personal property in any

[72] MASS GEN. LAWS ch. 186, §20.
[73] *Id*. at §15; *See also* Norfolk & Dedham Mutual Fire Insurance Co. v. Morrison 924 N.E.2d 260, 266 (Mass. 2010). Landlords are also prohibited from waiving their liability for failure to exercise reasonable care to correct unsafe condition (MASS GEN. LAWS ch. 186, §19), for injuries due to defects in violation of the building code (G.L. c. 186, §15E), and for damages caused by unlawful eviction (MASS GEN. LAWS ch. 186, §15F). Any provision which purports to exempt the landlord from such forms of liability is void. However, none of the leases in the sample neither set forth nor waived any of these forms of liability.

part of the building within her control, or to any damage caused by her or a third party's negligence.[74]

53 percent of the clauses (37 out of 70) initially stipulate that the tenant agrees to indemnify and save the landlord harmless from "*all liability, loss or damage*", and only afterwards add that "the lessor shall not be liable for damage to or loss of property of any kind […] *unless caused by the negligence of the lessor*" [emphasis added, MF]. They were coded as misleading, as the first sentences seem to waive landlord's liability, and only the last sentence indicates that liability for negligence is not waived.

20 percent of the leases (14 out of 70) contain enforceable clauses, which exculpate the landlord from liability except for damages caused by the landlord's negligence. Yet, only one of the enforceable clauses, constituting 1.4 percent, positively provides that the landlord *will* be liable for damages caused by her negligence or misconduct, whereas the others simply exclude landlord's negligence from the scope of the exculpatory clause.

B. The Warranty of Habitability and the Covenant of Quiet Enjoyment

1. The Warranty of Habitability

In its landmark decision in *Boston Housing Authority v. Hemingway*, the Massachusetts Supreme Judicial Court determined that when a landlord rents a residential unit under a written or oral lease, she makes an "implied warranty that the premises are fit for human occupation."[75]

[74] The Supreme Judicial Court of MA 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, 924 N.E.2d at 266.

[75] 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.*). WARSHAW, *supra* note 48, at §16.

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."[76] In addition, the Court set forth remedies for breach of such warranty, while recognizing the tenant's right to withhold rent until the landlord fixes the said defects.[77]

In *Leardi v. Broan*, the Supreme Judicial Court upheld the lower court's decision to deem unenforceable a lease provision which provided 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."[78] This provision was described by the courts as "an unabashed attempt to annul or render less meaningful' rights guaranteed by the State sanitary code."[79] 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." [80]

The warranty of habitability is now an integral part of Massachusetts landlord-tenant law.[81] Nevertheless, 70 percent of the leases in the sample (49 out of 70) do not address the warranty of habitability at all. This is perhaps not surprising: landlords have no good reason to turn the implied warranty of habitability into an express one. Interestingly, however, 19 percent of the leases (13 out of 70) include an unenforceable disclaimer of the warranty. These leases

[76] Boston Housing Authority, 293 N.E.2d at 843. Such a waiver will constitute a violation of Mass. Gen. Laws ch. 93A (the Consumer Protection Law). *See* Leardi, 474 N.E.2d at 156-167.
[77] Boston Housing Authority, 293 N.E.2d at 844. The Court determined that "a lease is essentially a contract between the landlord and the tenant wherein the landlord promises to deliver and maintain the demised premises in habitable condition and the tenant promises to pay rent for such habitable premises. These premises constitute interdependent and mutual considerations. Thus, the tenant's obligation to pay rent is predicated on the landlord's obligation to deliver and maintain the premises in habitable condition."
[78] *Id.* at 156-160.
[79] *Id*.
[80] *Id*.
[81] *See*, *e.g.*, Feldman v. Jasinski, Mass. App. Ct. 243 (2009).

explicitly waive the warranty of habitability, 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." Only 11 percent of the leases (8 out of 70) include a warranty of habitability that accurately reflects the legal state-of-affairs.

2. The Covenant of Quiet Enjoyment

The covenant of quiet enjoyment provides that so long as the tenant is in possession, she shall not be disturbed in the enjoyment of the premises by the landlord's act or failure to act.[82] According to the Supreme Judicial Court of Massachusetts in *Simon v. Solomon*, the phrase 'quiet enjoyment' signifies "the tenant's right to freedom from serious interferences with his tenancy — acts or omissions that 'impair the character and value of the leased premises."[83] G.L.c.186, §14 penalizes any landlord who willfully fails to furnish water, hot water, heat, light, power, gas or other services, as required by law or contract; who directly or indirectly interferes with the furnishing of utilities or services or with the quiet enjoyment of any occupant in the premises; or who attempts to regain possession of such premises by force without judicial process. The section also prohibits a landlord from taking reprisals against a tenant who reports or issues proceedings against a breach of the covenant of quiet enjoyment. Eviction by the landlord, whether actual or constructive (i.e., any violation of landlord's duties which effectively

[82] 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.*, Blackett v. Olanoff, 358 N.E.2d 817 (Mass.1977); 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."). The interference need not arise directly from the landlord's conduct. A landlord may be liable as a result of the conduct of third parties if serious interference with a tenancy is a "natural and probable consequence of what the landlord did, what he failed to do, or what he permitted to be done." Blackett v. Olanoff, 358 N.E.2d 817 at 819; Andover Housing Authority v. Shkolnik, 820 N.E.2d 815 (2005); WARSHAW, *supra* note 48, at 564-581.

[83] Simon v. Solomon, 431 N.E.2d 556 (Mass. 1982), quoting Winchester v. O'brien, 164 N.E. 807 (Mass. 1929).

deprives the tenant of her enjoyment of the premises), constitutes a breach of the covenant of quiet enjoyment.[84] Such a breach will entitle the tenant to triple damages or three months' rent (whichever is greater), as well as costs and attorney's fees.[85] This covenant cannot be waived by the parties.[86]

Similarly to the warranty of habitability, the Covenant of Quiet enjoyment is seldom mentioned in the leases: 89 percent of the leases (62 out of 70) do not include such a covenant. Interestingly, the remaining 11 percent (8 out of 70) that do expressly provide for the covenant of quiet enjoyment condition its application 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."

Even though G.L.c.186, §14 does not explicitly prohibit the conditioning of the covenant of quiet enjoyment upon the fulfillment of tenant's obligations, such a narrow interpretation of the covenant runs against its object and purpose: to secure the tenant's ability to quietly enjoy the premises. If the tenant fails to pay rent, the landlord may lawfully terminate the tenancy by giving the tenant a 14-days' notice to quit and by obtaining permission from a court to legally take possession of the premises upon the tenant's failure to cure the non-payment by the due date. The landlord cannot, however, breach the covenant of quiet enjoyment in response to tenant's failure to pay rent or perform her obligations under the lease. Thus, clauses which subject the covenant to tenant's fulfillment of her duties were coded as unenforceable.

[84] ROBERT S. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT 97-101 (1980).
[85] MASS. GEN. LAWS ch.186, §14.
[86] *Id*.

C. Maintenance and Repair

The landlord's and tenant's maintenance and repair responsibilities are mandated by the State Sanitary Code. The Code places most of the burden of providing and maintaining the premises in safe and habitable condition on the landlord, while imposing only minimal maintenance obligations on the tenant.[87] The landlord's duties include, *inter alia*, providing and maintaining in good operating condition the water-heating facilities, electrical facilities, drinkable water, toilet and a sewage disposal system, and locks on entry doors. The landlord further bears responsibility to maintain structural elements in "good repair and in every way fit for the use intended"; and to install and "maintain free from leaks, obstructions or other defects" sinks, bathtubs, toilets, gas and water pipes, and other fixtures supplied by the landlord. Lastly, the landlord has an obligation to exercise reasonable care to ensure that the common areas under her control are reasonably well maintained.[88] The tenant, on the other hand, only needs to "maintain free from leaks, obstructions and other defects" all "occupant owned and installed equipment"[89]; to maintain "in a clean and sanitary condition […] that part of the dwelling which he exclusively occupies or controls"[90]; and to "exercise reasonable care" in the use of the structural elements of the dwelling.[91]

Tenant's benefits, as set forth by the State Sanitary Code, cannot be waived under any residential lease.[92] Finally, the State Sanitary Code includes a "repair and deduct" statute, aimed

[87] 105 MASS. CODE. REGS. 410.000. The Code explicitly provides that "no person shall occupy as owner-occupant or let to another for occupancy any dwelling, dwelling unit […] or rooming unit […] which does not comply with the requirements of 105 C.M.R. 410.000." *See* MASS. GEN. LAWS ch. 111, §127 et seq.; Boston Housing Authority, 293 N.E.2d at 831; WARSHAW, *supra* note 48, 546; Commonwealth v. Hadley, 222 N.E.2d 681 (Mass. 1966).
[88] 105 MASS. CODE. REGS. 410.180-500.
[89] *Id.* at 410.352.
[90] *Id.* at 410.602
[91] *Id.* at 410.505.
[92] MASS. GEN. LAWS ch. 111, §127K; McKenna v. Begin, 362 N.E.2d 548 (Mass. App. Ct. 1977).

at enabling tenants to enforce landlords' compliance with the Code.[93] It offers the tenant the ability 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 reasonable time.[94] These benefits cannot be waived by the parties.[95]

Maintenance and repair responsibilities are addressed in 99 percent of the leases in the sample (69 out of 70). However, only 21 percent of the leases contain an enforceable maintenance and repair clause, whereas 39 percent of the leases contain an unenforceable clause, and 39 percent contain a misleading clause.

Some of the leases which contain unenforceable clauses simply provide that: "[the] tenant will, at its sole expense, keep and maintain the Premises and appurtenances in good and sanitary condition and repair" or that "[the] tenant agrees to be responsible and to pay, in addition to rent, for all damage above wear and tear or unavoidable casualty."

Other leases subject the landlord's and tenant's obligations to applicable law, after misstating the division of duties by placing all of the repair duties on the tenant. For instance, the GBREB (ID RA900) form stipulates that:

> "*Subject to applicable law*, Tenant shall keep and maintain the leased premises and all equipment and fixtures therein or used therewith repaired, […] reasonable wear and tear and damage by unavoidable casualty only excepted. 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

[93] MASS. GEN. LAWS ch. 111, §127L.

[94] MASS. GEN. LAWS ch. 111, §127L provides that "when violations of the standards of fitness for human habitation […] may endanger or materially impair the health, safety or well-being of a tenant […], and if the owner 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 repair the defects or conditions constituting the violations. The tenant may subsequently deduct from any rent due an amount necessary to pay for such repairs. 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."

[95] MASS. GEN. LAWS ch. 111, §127L. However, a covenant in any lease of two years' duration not counting any renewal periods, in which the tenant undertakes to make certain defined repairs or renovations in consideration for a substantially lower rent, shall not be against public policy nor void

> Landlord for the reasonable cost of such repairs in full, as additional rent, upon demand" [emphasis added – MF].

The misleading clauses typically list the tenant's obligations, while neglecting to state the landlord's duties. Some simply stipulate that the landlord will comply with her duties under the law. For instance, the EZ landlord form contains 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."

The NOLO form contains a similar clause, stipulating 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 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."

The Clause does not mention the landlord's duties at all.

Interestingly, even the clauses that were coded as enforceable emphasize tenant's obligations, and only briefly discuss the landlord's obligations, while conditioning them upon tenant's compliance with her duties. For instance, the "Repair and Maintenance" clause from one of the GBREB forms (ID-206) 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* to make sure that the Apartment is livable and fit for human habitation" [emphasis added – MF]

Perhaps not surprisingly, only one lease explicitly refers to tenant's right to repair and deduct the costs of repair from the rent, by providing that "Substantial violations of the State Sanitary Code shall constitute grounds for abatement of rent." In contrast, many leases stipulate that "Landlord may (but shall not be obligated to) make […] repairs and Tenant shall reimburse the Landlord for the reasonable cost of such repairs in full, as additional rent, upon demand."

D. Payments and Fees

1. Advanced Payments

MA statutes prohibit landlords from requiring, at or prior to the commencement of the tenancy, any amount in excess of the first month's rent, the 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.[96] Failure to comply with this provision constitutes "unfair or deceptive act."[97] Out of the 37 leases which include an advanced payments clause, 19 percent (7 leases) contain unenforceable clauses, which either require a security deposit in an amount higher than the first month's rent, or include "extra fees" (such as: "move-in" and "move-out" non-refundable fees, a cleaning deposit, and a "one-time" fee).

[96] 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.
[97] *See* Dolben Co., Inc. v. Friedman (Mass. App. Div. 1 2008) (charging "application fee" is an unfair and deceptive practice, in violation of §15B and G.L.c.93A).

2. Interest for the Last Month's Rent

The rules on the payment of interest for the last month's rent are pretty straightforward: a landlord who receives rent in advance for the last month of the tenancy is obliged to give the tenant a receipt, and a statement indicating that the tenant is entitled to interest on the said rent payment.[98] If the landlord fails to pay interest on the last month's rent, the tenant is entitled to damages.[99] Notwithstanding the rules' simplicity, out of the 30 percent (21 out of 70) of the leases that require advanced payment, only 14 percent (3 leases) provide that the landlord will give a receipt and pay interest as set forth in the law. The remaining 86 percent (18 leases) do not mention the landlord's said duties.

3. Security Deposit

Traditionally, landlords relied on security deposits to protect themselves from any loss of rent or damage to the premises resulting from a tenant's default.[100] Without a specific agreement, a landlord was under no obligation to pay interest on the deposit or to set it aside in an escrow account.[101] Through a series of enactments, the Massachusetts legislature embarked to regulate the holding and return of security deposits.[102] The landlord is required, *inter alia*, to provide the tenant with a receipt; to deposit and hold the funds in a separate, interest-bearing, account; and 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 expenses listed in the statute,[103]

[98] MASS. GEN. LAWS ch. 186, §15B (2)(a); WARSHAW, *supra* note 48, at 615.
[99] MASS. GEN. LAWS ch. 186, §15B (2)(a).
[100] Schoshinsky, *supra* note 43, at §10:12; Rabin, *supra* note 35, at 539.
[101] WARSHAW, *supra* note 48, at 600.
[102] *Id.* at 600; Hampshre Village Associates v District Court of Hampshire, 480 N.E.2d 830 (1980); The common law rules concerning security deposits were modified in many jurisdictions during the 1970's. URLTA also limits the amount of security deposit that a landlord can require, and sets forth punitive damages and attorney's fees for a tenant whose landlord unlawfully fails to return her deposit (although it does not oblige landlords to pay interest on the deposit). *See* URLTA §2.101(a), (c) (1972).
[103] The expenses for which the landlord may use the deposit are: unpaid rent, taxes (provided that there is a valid tax escalation clause), and a "reasonable amount necessary to repair any damage" caused by the tenant, her family or

and pursuant to furnishing to the tenant an itemized list of the damages.[104] Failure to "state fully and conspicuously in simple and readily understandable language" one of these issues is an "unfair or deceptive practice."[105]

In light of these stringent obligations, it is perhaps not surprising that only 57 percent of the leases in the sample (40 out of 70) require a security deposit. Out of these leases, 10 percent (4 leases) include enforceable clauses, 10 percent (4 leases) include unenforceable clauses, and 80 percent (32 leases) include misleading clauses.

The unenforceable clauses include provisions that allow the landlord to use the security deposit to pay for purposes other than those prescribed by law (for example: attorney's fees);[106] provisions that waive tenant's right to "have the security deposit in any specialized custodial or beneficiary account, as opposed to an ordinary interest bearing bank account"[107]; and provisions stipulating that the deposit will be returned to the tenant without interest. One such provision stated that "the unused portion of the deposit shall be returned to Resident without interest, *according to law*" [emphasis added, M.F.].

Out of the misleading clauses, 48 percent (15 leases out of 70) fail to disclose *all* of the landlord's obligations with regards to the security deposit; 7 percent (2 leases) fail to mention only some of the landlord's obligations, while mentioning the main obligations (i.e., the obligations to keep the deposit in a separate, interest-bearing, account, to pay interest, and to

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guests, to the premises (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"); WARSHAW, *supra* note 48, at 606.

[104] The landlord cannot deduct from the security deposit for any damage which was listed in the separate written statement of condition or any damage listed in any separate list submitted by the tenant and signed by the owner or his agent.

[105] MASS. CODE. REGS §3.17. Additionally, if the landlord fails to return the tenant's security or makes the deduction improperly, she will be liable to the tenant for three times the amount that should have been retuned, together with interest and reasonable attorney's fees.

[106] This example is taken from an EZ landlord form.

[107] This example is taken from a form used by a private landlord.

deduct only for specific purposes); and 45 percent (14 leases) fail to mention some or all of the central issues.

4. Late Payment Fees

MA landlord and tenant laws do not prohibit or cap late charges or interest in a residential lease, but require that such fees will be imposed only after the default has lasted for at least 30 days.[108] 39 percent of the leases (27 out of 70) indeed include a late payment penalty clause. Out of these 27 leases, 41 percent (11 leases) include an unenforceable clause, requiring late fees or interest to be paid before 30 days have passed.

5. Attorney's Fees

MA General Laws provide that if a residential lease entitles the landlord to recover attorney's fees and expenses if when prevailing in a suit, the tenant shall have the same right if she prevails against the landlord.[109] In other words, the courts are required by statute to interpret one-sided attorney's fees clauses as a mutual obligation to pay the costs of the prevailing party. Any lease agreement that waives the right of the tenant to recover attorney's fees and expenses in these circumstances is void and unenforceable.[110]

43 percent of the leases (30 out of 70 leases) contain a provision concerning attorney's fees. Out of the attorney's fees clauses, only 21 percent are enforceable, whereas 79 percent are *unenforceable-as-written* (one-sided attorney's fees clauses). For instance, some leases provide that:

> "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"

[108] MASS. GEN. LAWS ch. 186, §15B(1)(c).
[109] MASS. GEN. LAWS ch. 186, §20
[110] *Id*.

The MA Association of Realtor's form lease provides that:

> "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."

E. Termination of Tenancy

Before 1969, a tenancy could be terminated at any time and in any manner that the parties saw fit.[111] Since 1969, a landlord is required to give a 14 days' notice in writing before terminating the lease due to non-payment of rent.[112] A landlord is also prohibited from waiving the tenant's right to cure the nonpayment by paying the amount owed within the statutory reinstatement period.[113]

The vast majority of the leases in the sample (84 percent; 59 out of 70 leases) contain a clause concerning notice to quit. Out of these clauses, only five percent (3 leases) contain an enforceable clause which fully discloses the tenant's rights. Twelve percent (9 leases) contain an unenforceable provision, which either reduces or entirely eliminates the 14-days' notice requirement. Most leases (83 percent; 47 leases), however, mention the 14-days' notice requirement without disclosing the tenant's right to cure the non-payment. For instance, the GBREB (ID RH201) form stipulates, under a provision titled "Non-Performance or Breach by Lessee", that "the Lessor […] may (subject to the Lessee's rights under applicable law) terminate this lease by: […] a fourteen day written notice to the Lessee to vacate said leases premises", without mentioning the lessee's right to cure the breach by paying rent. Similarly, the GBREB

[111] WARSHAW, *supra* note 48, at 150-151.
[112] MASS. GEN. LAWS ch. 186, §11, §11A, §15A.
[113] WARSHAW, *supra* note 48, at 170-173.

(ID RH206) form merely states that in the case of tenant's failure to pay rent, "the termination will become effective fourteen days after the notice is given."

F. Miscellaneous: Tenants' Rights

The statutes confer various unwaivable rights on tenants. Such rights include tenants' right to a jury trial;[114] the prohibition on limiting occupancy of children;[115] the prohibition on reprisals against tenants for bringing judicial or administrative claims against their landlords;[116] landlords' disclosure obligations (for example, regarding insurance information)[117]; landlords' obligations towards tenants who are victims of domestic violence, rape, sexual assault or stalking[118]; and the prohibition on discriminatory restriction of occupancy.[119] These rights are seldom mentioned in any of the leases in the sample (see annex I for further detail).

G. Landlord's Right of Entry to the Premises

The MA Legislature chose to restrict the landlord's right of access to the premises for the limited purposes set forth in the statute: to inspect the premises, make repairs, or show them to a prospective tenant, purchaser, mortgagee or its agents.[120] The statute renders any provision in conflict with the said limitations unenforceable.[121]

93 percent of the leases include an enforceable provision that limits landlord's right of entry as set forth in the law, with negligible extensions (compared to the purposes allowed by

[114] MASS. GEN. LAWS ch. 186, §15F.
[115] *Id*. at §16.
[116] *Id*. at 18.
[117] *Id.* at §21; . MASS. GEN. LAWS ch. 175, §99, Clause 15A.
[118] MASS. GEN. LAWS ch. 186, §24-28
[119] MASS. GEN. LAWS ch. 184, §23B. *See also Id. at* §23D (any restriction, reservation, condition, exception, or covenant in a lease which would permit residential use of property but would prohibit a community residence for disabled persons, is void).
[120] MASS. GEN. LAWS ch. 186, §15B(1)(a). A landlord may also enter such premises in accordance with a court order; if the premises appear to have been abandoned by the lessee; or to inspect, within the last thirty days of the tenancy or after either party has given notice to the other of intention to terminate the tenancy, the premises for the purpose of determining the amount of damage which would be deducted from the security deposit.
[121] MASS. GEN. LAWS ch. 186, §15B(8).

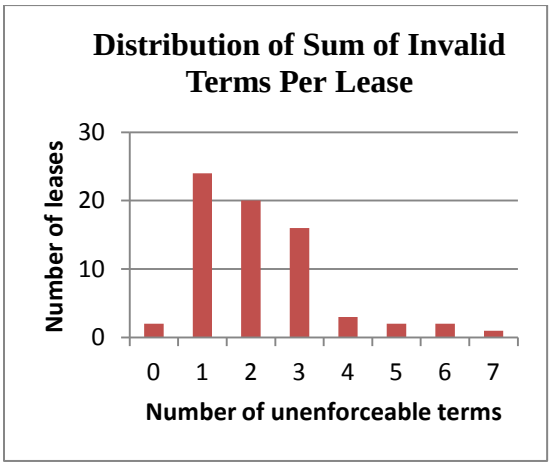
law). One lease in the sample, constituting 1.43 percent, includes an unenforceable provision, stating that the landlord has the right to enter the premises "for any purpose." The other 6 percent of the leases do not mention the landlord's right of entry to the premises.

H. Summary Statistics

68 of the 70 leases in the sample, constituting 97 percent, include at least one unenforceable clause, and 100 percent of the leases in the sample contain at least one misleading clause. The mean number of unenforceable clauses per lease is 2.18, while the minimum is 0, the maximum is 7, and the median is 2. The mean number of misleading clauses per lease is 3.63, while the minimum is 1, the maximum is 9, and the median is 3. *Table 6* illustrates the summary statistics of the results. Figure 1 shows the distribution of the leases by sum of unenforceable terms per lease.

***Table 6*: Results – Summary Statistics**

Number of provisions per lease (n = 70)			Quantiles				
Provision Type	**Mean**	**S.D.**	**Min**	**.25**	**Mdn**	**.75**	**Max**
Unenforceable	2.18	1.39	0	1	2	3	7
Enforceable	4.64	2.14	1	3	4	6	11
Misleading	3.63	2.08	1	2	3	5	9



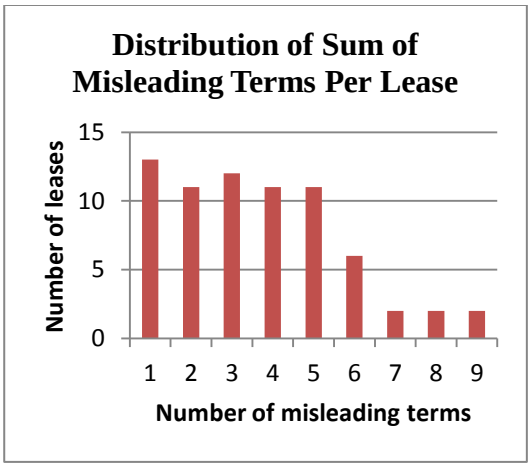


Table 7 shows the percentage of unenforceable, misleading, and enforceable provisions, while referring to the five most common provisions mandated by MA landlord and tenant law (these are the provisions that appear in 80 percent of the leases or more): (1) Landlord's liability for loss or damage; (2) Maintenance and Repair obligations; (3) Termination due to non-payment of rent (the notice requirement); (4) Utilities' payment; and (5) Landlord's right of entry to the property. With relation to each issue, the table also shows the percentage of leases that do not include such a provision at all.

***Table 7*: The five most common lease terms — percentage of unenforceable, misleading, and enforceable provisions**

	Liability	*Repair*	*Termination of lease*	*Utilities*	*Entry*
Percentage of leases in which the issue is *not mentioned*	0	1.43	15.71	5.71	5.71
Percentage of leases that include an *enforceable* provision	20	21.43	4.29	51.43	91.43

Percentage of leases that include an *unenforceable* provision	27	38.57	10	21.43	2.86
Percentage of leases that include a *misleading* provision	53	38.57	70	21.43	0

I. Summary of the Results

The results reveal that the standard form leases, commonly used by both individual landlords and companies, include both provisions which directly conflict with the law and provisions which misinform tenants of their rights and remedies. Information pertaining to the tenant's statutory rights and the landlord's respective duties seldom appears in most leases and is often misstated when it does. 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. On the other hand, leases are packed with waivers of liability, disclaimers of warranty, and qualifications.

Standard form leases, if read by lay persons, are likely to create the impression that the tenant has almost no legal rights on the one hand, and bears almost all of the responsibilities concerning the leased properties on the other. This is far from being true. In fact, MA landlord and tenant law confers a variety of legal rights and remedies on tenants, while placing most of the responsibilities on the landlord. Moreover, residential leases almost always contradict,

misstate or misrepresent the law with regards to the most important allocations of costs and responsibilities between the landlord and the tenant.[122]

The conclusion stemming from these empirical findings is that standard form leases misstate the law, misinform tenants of their most basic rights and remedies, and include terms which are simply invalid.

VI. Possible Explanations for the Inclusion of UMCs in Residential Leases

Why do residential leases so often contain invalid and misleading clauses? Invalid provisions could be included by mistake, as landlords do not realize that they have been invalidated by courts or by statutes, or in the hope or expectation that the law will change.[123] Another possible explanation is that landlords *intentionally* include UMCs in their leases, trusting that they could profit from inserting such terms. UMCs are likely to mislead tenants into believing that they reflect the legal state-of-affairs. If the tenant believes that the lease she signed reflects the law, or at the very least does not conflict with it, she is likely to be deterred from claiming her rights once a dispute arises.[124]

The inclusion of UMCs in residential leases is not likely to influence tenants' renting decisions *ex ante*. Most tenants, like most consumers, plausibly rarely read the terms in their

[122] In future research it is recommended to create an index which indicates the importance of the issue, as well as the magnitude of the invalidity or misleading effect of the clause.

[123] *See, e.g.*, Sullivan, *supra* note 4, at 1133-1134 (suggesting that the insisting party may understand that it is very likely that the clause is unenforceable, but still believe that "the chance of enforceability, while low, is nevertheless worth the gamble"); Kuklin, *supra* note 1, at 879 ("The unenforceable term may be inserted in the legitimate belief that the rule is ripe for change.")

[124] See, Sullivan, *supra* note 4, at 1136 ("at least in some contexts the insisting party might reinforce the clause's implicit message that it is enforceable as written"); Olafsen, *supra* note 4, at 522 ("a clause with no legal effect can still have tremendous practical effect if the tenant believes that it is binding. The tenant who looks to his lease to ascertain his rights could be deceived into foregoing valid claims or defenses against his landlord"). The potential influence of consumers' misperceptions about the law on their behavior has gained limited scholarly attention, but some insights are available. See: Oren Bar-Gill & Kavin Davis, (Mis)perceptions of Law in Consumer Markets 1(May 6, 2015)(unpublished manuscript)(on file with authors).

standard form leases before signing.[125] If they do, they often do not understand them.[126] Mueller's experimental findings support these assumptions: after surveying 100 participants belonging to a highly educated sample population in Michigan, Mueller found that half of them never, in any meaningful sense, read the leases presented to them for signature, chiefly because of the "their 'take-it-or-leave-it' nature and legal jargon."[127] Consequently, many of the tenants were unconscious of the inclusion of various key provisions in their leases. Only 50 percent of the tenants were able to answer simple questions posed about typical lease terms.[128] It is noteworthy that tenants might be perfectly rational in deciding not to invest time and money in trying to read or understand their lease terms. This is especially the case in the context of residential leases, given tenants' lack of bargaining power and the incredible uniformity of the content of leases in the residential rental market.[129] It is also noteworthy that some tenants probably *do* read, understand, and even negotiate their lease terms. Some landlords, particularly private individuals, may be ready to negotiate their lease terms with potential tenants.

Yet, even the tenants that actually read, understand, and negotiate their lease terms are probably not significantly influenced by their contact terms while making renting decisions. Rather, it is plausible that lease clauses play a negligible role in such decisions, paling in

[125] Oren Bar-Gill & Kavin Davis, *supra* note 124, at 1; Yannis Bakos et al., *Does Anyone Read the Fine Print? Testing a Law and Economics Approach to Standard Form Contracts*, 43 J. LEGAL STUD. (2014); Ian Ayres and Alan Schwartz, *The No-Reading Problem in Consumer Law*, 66 STAN. L. REV. 545 (2014) (suggesting that the state should oblige firms to increase the salience of the terms that consumers rarely read, but still misperceive as more favorable to them than they actually are).

[126] Stolle & Slain, *supra* note 15, at 92; M. E. J. Masson & M. A. Waldron, *Comprehension of legal contracts by non-experts: effectiveness of plain language redrafting*, 8 APPLIED COGNITIVE PSYCHOL. 67 (1994); The leases' complexity and use of legal terminology make it even harder and costlier for tenants to understand their lease provisions and might deter them from reading the form in the first place. Additionally, in light of the disparity in bargaining power between residential tenants and landlords, these provisions are typically not open to negotiation. As most standard form leases remarkably resemble one another, tenants' incentive to read the lease in an attempt to "shop" for a better one is eliminated. *See, e.g.*, Bar-Gill & Davis, *supra* note 124, at 1.

[127] Warren Mueller, *Residential tenants and their leases: an empirical study*, 69 MICHI. L. REV. 247, 277 (1970).

[128] *Id.*

[129] Steven A. Arbittier, Note, *The Form 50 Lease: Judicial Treatment of an Adhesion Contract*, 111 U. PA. L. REV. 1197 (1963) ("since landlords are unwilling to modify a form whose terms strongly favor them, many tenants have no choice but to sign the lease or reject the entire transaction"). Bentley, *supra* note 4, at 841.

comparison to the other, more salient, attributes of the transaction (such as the apartment's monthly rent, location, number of rooms, etc.).[130] Standardized contract terms will usually be overlooked during consumers' decision-making process, especially when the decision is a complicated one, as decision-makers "will tend to adopt simpler choice strategies to cope with that complexity."[131]

Although UMCs will plausibly have no effect on tenants' renting decisions *ex ante*, they are likely to influence tenants' perceptions and behavior *ex post*, when a problem occurs or a dispute with the landlord arises. At this point in time, tenants are likely to perceive the lease's provisions as enforceable and binding. Consequently, they are likely to behave in accordance with their responsibilities under the lease, while unknowingly relinquishing some of their legal rights and remedies. As Kurt Olafsen points out, "a clause with no legal effect can still have tremendous practical effect if the tenant believes that it is binding. The tenant who looks to his lease to ascertain his rights could be deceived into foregoing valid claims or defenses against his landlord."[132] Mueller's study illustrates this point: the majority of the subjects in the study believed that the exculpatory clauses included in their mock residential leases were enforceable, although in fact, they were unlikely to be upheld by the court.[133] Participants did not appear to question the validity of their lease terms. Three subjects even went on to express their astonishment that a provision could be other than 'valid and

[130] Russell Korobkin, *Bounded Rationality and form contracts*, 70 U. CHI. L. REV. 1203, 1226 (2003) (suggesting that "relative to other product attributes, form terms are particularly likely to be non-salient because their usual content makes them unlikely to attract buyers' voluntary or involuntary attention").
[131] *Id*. at 1226. Psychological research supports this proposition, suggesting that the "the essence of consumer response to information load is selectivity". As Oren Bar-Gill points out, "the imperfectly rational consumer deals with complexity by ignoring it" (Bar-Gill, *supra* note 2, at 18).
[132] Olafsen, *supra* note 4, at 522.
[133] Mueller, *supra* note 127, at 247.

enforceable' when appearing in an executed lease.[134] Mueller thus suggested that a tenant may find it "difficult to see any logic in filling a lease form with *legally* worthless verbiage."[135] Yet a "*legally* worthless verbiage" can have a significant *psychological* effect on tenants' perceptions, decisions, and behavior.

Stolle and Slain's experimental study, conducted in 1997, offers further evidence of the effect of unenforceable clauses on consumers' perceptions and behavior. It shows that exculpatory clauses, if read, have a deterrent effect on consumers' tendency to seek legal remedies.[136] Even when a tenant knows or suspects that a clause is invalid, she might be deterred from breaching the lease provisions to which she "voluntarily agreed" (as "evidenced" by her signature). Additionally, she might be discouraged from claiming her rights in court, in light of the *in terrorem* effect produced by the mere existence of the invalid provision in the lease.[137] This *in terrorem* effect is exacerbated by the American rule, which

[134] Mueller, *supra* note 127, at 277 n. 120. These findings are consistent with psychological evidence illustrating that people are generally ignorant about laws that determine their rights as buyers or employees, and tend to over-estimate the extent of legal protection granted to them. See Bar-Gill and Davis, *supra* note 124, at 4; Stewart Macaulay, *Lawyers and Consumer Protection Laws*, 14 L. & SOC'Y REV. 115 (1979) (finding that even lawyers were poorly informed about consumer protection law); 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, believing, for example that an at-will employee could not be fired in light of personal dislike); 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); Zev Eigen, *The Devil in the Details: The Interrelationship among Citizenship, Rule of Law and Form-Adhesive Contracts*, 41(2) CONN. L. REV. 381, 381 (2008) ("preliminary evidence suggests that less educated, lower skilled and lower paid subjects with greater employment dependency are more likely to feel bound by the terms of form adhesive agreements that restrict their resort to law than more educated, higher skilled and higher paid subjects with less employment dependency").

[135] Mueller, *supra* note 127, at 274.

[136] Stoll and Slain, *supra* note 15, at 91 (noting that "the effect for presence of an exculpatory clause is […] consistent with previous research suggesting that consumers' contract schema includes a general belief that written contract terms are enforceable"). *See also* Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 682-83 (1960) (intimidation imposed by covenants, regardless of enforceability, restricts employee mobility).

[137] Sullivan, *supra* note 4, at 1137. This can be true even if tenants are completely rational: if the net cost of pursuing a claim in court exceeds the anticipated gain from such action, tenants will choose to refrain from resorting to courts and incur the expenses in accordance with their written agreement.

requires each litigant to bear her own attorney's fees and expenses.[138] Under some statutes, tenants are entitled to attorney's fees, but they might not be aware of these statutes. Hence, they may be reluctant to expend resources necessary to defend their rights and remedies, and may fear the (even slight) chance that the court will refrain from invalidating a certain lease provision. In the end of the day, tenants might succumb to the written agreement, even if they assume that it contains invalid clauses.[139]

Residential companies and other sophisticated landlords, being rational, are likely to realize that they can leverage their better acquaintance with the law and their bargaining power by drafting leases that are likely to influence tenants' behavior.[140] They are thus incentivized to insert unenforceable clauses into their leases, so as to take advantage of the fact that these terms are non-salient to tenants *ex ante*, but produce a psychological effect on

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[138] *Id*.

[139] The mere fear of a potential lawsuit was recognized as having an adverse effect despite the invalidity of the legal claim in other areas of the law. In the context of employment agreements, several scholars have suggested that unenforceable non-compete clauses might influence employees to forgo job offers from competitors, as they wish to avoid the risk of a lawsuit. *See, e.g.*, Sullivan, *supra* note 3, at 1138; Blake, *supra* note 136, at 632-37 ("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 they 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 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.")

[140]

> Firms will always be rational profit maximizers with a correct understanding of the market model, as in standard theory. On the other hand, consumers will depart from the standard model. The primary justification for this simplistic dichotomy is that a firm is more likely to conform to the standard model, in the sense that it focuses its attention, intelligence, and internal organization on a small set of markets. In contrast, consumers devote a fraction of their attention and intelligence to any individual market. Firms 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. Firms deliberately apply systematic reasoning, relying on experts and statistical data, whereas consumers often rely on intuition. These are essentially asymmetries in *rationality*.

RAN SPIEGLER, BOUNDED RATIONALITY AND INDUSTRIAL ORGANIZATION 2-3 (2011). *See also* Larry D. Clark, Note, *Landlord-Tenant Reform: Arizona's Version of the Uniform Act*, 16 Ariz. L. Rev. 79, 95-6 (1974).

tenants *ex post*. This hypothesis goes hand in hand with a line of literature illustrating that sellers knowingly exploit consumers' misperceptions through advertising, marketing, and designing techniques.[141]

It is important to distinguish between two main groups of landlords: private individuals on the one hand, and companies, partnerships, and trusts on the other. Individual landlords are lay persons who own one or more apartments and rent them, either independently or through an intermediary, usually as a secondary source of income. It is plausible that most individual landlords are ignorant of tenant and landlord law and simply use standard form leases they downloaded from the internet or have been using for years. In contrast, sophisticated and repeated players like residential companies and real-estate trusts are likely to be acquainted with changes in tenant and landlord law.[142] Such players engage in the business of renting apartments, and are typically assisted by law firms or in-house counsel. They are thus likely to have a relatively good understanding of the market and the

[141] Bar-Gill, *supra* note 1, at 8; Spiegler, *supra* note 140 (analyzing several theoretical models that examine whether sellers could profit from offering pricing menus that exploit consumers' misperceptions, 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 will 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).

[142] Olafsen, *supra* note 4, at 524 ("a landlord in the business of renting dwelling units is likely to know of changes in landlord-tenant law"); Kuklin, *supra* note 4, at 845; Sullivan, *supra* note 4, at 1129. *See also* Broadley v. Mashpee Neck Marina, Inc., 471 F.3d 272, 276 (1st Cir. 2006) (striking down an overbroad exculpatory clause without narrowing it to include only negligence, stating that "any competent lawyer could write a straightforward exclusion of liability for negligence that we would sustain"); Fisk, *supra* note 139, at 782-83; 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").

law regulating it. It is highly unlikely that they include invalid clauses out of ignorance of the law.

This distinction is important, as it indicates that if UMCs persist in standard form leases used by residential firms, it is unlikely that the firms are unaware of their lease terms' invalidity or deceptive effect. It is far more likely that if such terms persist in a firm's residential lease, they are deliberately included so as to benefit the firm. On the other hand, the same could not be said with respect to individual landlords, who are likely to be unfamiliar with the law. Although such landlords probably do not deliberately include unenforceable or misleading terms, they may still commonly use such terms, without knowing about their invalidity or deceptive effect. This is because they may still commonly use standard form leases drafted by landlords' associations or commercial publishers. Publishers are motivated to increase their market share by designing pro-landlord leases. Landlords' associations are probably even more interested in drafting terms that will benefit landlords, *inter alia* by exploiting tenants' imperfect information and misperceptions.[143] The few individual landlords who do not use these forms and write the forms themselves are sometimes simply unaware of the law. In such situations they might draft one-sided terms which have been invalidated by the court or by statute without even knowing it.

VII. Welfare Costs

Leaving the moral and ethical concerns raised by the inclusion of UMCs aside, this practice is undesirable from a social welfare perspective.[144] The residential rental market is

[143] Kuklin, *supra* note 4, 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.")

[144] For an elaborate discussion about the moral, ethical, and deontological concerns raised by such practice, see Kuklin, *supra* note 4, at 847-860. As explained in Section III(B), this analysis does not address the desirability of mandatory regulation of residential leases, nor does it examine whether the MA landlord and tenant law stirkes an

characterized by asymmetric and imperfect information. Landlords (and specifically sophisticated landlords like residential companies) typically know more about the contract terms and the law that regulates them than tenants do. If instead of disclosing such information to the tenants, landlords misrepresent the legal state-of-affairs in their contracts, most tenants will likely rely on the deceptive and selective information provided to them in the contract instead of obtaining information, as they will assume that their leases represent the law accurately.[145]

This, in turn, might create a *behavioral market failure*, as it enables landlords to pass along to tenants certain costs that are non-salient to them at the transaction stage. Tenants typically consider the rental price and rarely read their lease terms, let alone understand them. Landlords, on the other hand, can estimate their payoffs from misleading tenants to rely on the unenforceable terms *ex post*, after a contract is signed.[146] They can thus save costs without adjusting the rental price accordingly.[147] Such a market failure is not only welfare-reducing: it also raises distributional concerns, as all the costs are borne by tenants, whereas landlords enjoy all the gains.[148]

Several scholars have suggested that sellers keep self-serving terms in standard form contracts in order to protect themselves from opportunistic consumers, but selectively enforce these pro-seller terms, in light of reputational considerations.[149] Johnston terms such policy as

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appropriate balance between the rights and obligations of the landlords and tenants. It is possible that the law is imbalanced and inefficient, and that the parties contract around it as a result. This is a topic for future research. This section analyzes possible policy implications under the assumption that the continued use of unenforceable and misleading terms is undesirable and should be overcome.

[145] See Kuklin, *supra* note 4, at 860-866.

[146] *Id*. at 866-868.

[147] *See* Bar-Gill, *supra* note 2, at 3.

[148] As tenants are heterogeneous, the costs might not spread evenly. The more ignorant tenants will subsidize the sophisticated and knowledgeable tenants who are familiar with the law, and are thus not affected by the inclusion of unenforceable and misleading terms, but can enjoy the reduction in the rental price.

[149] 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); Jason Scott Johnston,

"tailored forgiveness."[150] Although this may mitigate the concern regarding the effect of biased and one-sided terms in standard form contracts on consumers' welfare, it is irrelevant in the context of unenforceable or misleading clauses. Such clauses could not be enforced by landlords in any event, as they are either invalid or misleading about the legal state-of-affairs. Yet the fact that landlords cannot enforce these clauses does not rule out the concern that they are likely to influence tenants' perceptions and behavior. To the contrary: the source of the problem in the case of UMCs is that notwithstanding their legal insignificance, they will likely have a psychological effect on tenants, consequently leading them to relinquish legal claims or bear costs that are to be borne by landlords according to the law.

Given that the continuous use of UMCs in residential leases is undesirable, the question that follows is what could be done about it. The next part offers preliminary normative prescriptions to policy makers that wish to combat this phenomenon.

VIII. Policy Implications and Normative Prescriptions

Tenants suffer from an informational disadvantage. As they are typically ignorant of the law of landlord and tenant, they often harbor misperceptions with respect to the enforceability and validity of certain lease terms. They could thus overcome this problem by obtaining information about the applicable tenant and landlord law. This could be achieved either by learning from other tenants' experience or by obtaining legal advice about the enforceability of their lease provisions.[151] In reality, however, tenants rarely consult legal counsel. As Allen Bentley points out, "only a minority of tenants seek and are able to obtain

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Cooperative Negotiations in the Shadow of Boilerplate, in: BOILERPLATE: THE FOUNDATION OF MARKET CONTRACTS 12 (Omri Ben-Shahar ed., 2007).

[150] Johnston, *supra* note 149.

[151] Bar-Gill, *supra* note 2, at 26-32.

legal advice on lease-related problems."[152] Even fewer tenants obtain information about changes in landlord-tenant law through witnessing the experience of others.[153]

Market solutions could only partially help to correct this market failure, as landlords lack the incentive to educate tenants and mitigate their misperceptions. The persistence of a market failure supports considering governmental intervention. The policy discussion in the remainder of this section examines different forms of regulatory intervention, while highlighting their relative strengths and weaknesses.

A. Type of Regulation

1. Disclosure

Since tenants suffer from asymmetric information, imposing disclosure obligations on landlords could potentially alleviate the problem.[154] The effectiveness of disclosure requirements has been recently challenged by several scholars, *e.g.* Omri Ben-Shahar and Carl Schneider.[155] However, disclosure mandates have been found to be effective in increasing consumer knowledge in several contexts, including consumer credit and mortgage loans.[156] Additionally, some of the problems associated with disclosure mandates could be addressed under a thoughtful regulatory design. For instance, one challenge is that disclosure is often too burdensome and complex, and could lead to information overload.[157] This problem could be overcome by focusing on *simple disclosure*, while highlighting only the most important provisions in landlord

[152] Bentley, *supra* note 4, at 857; Mueller, *supra* note 127, at 274.
[153] Olafsen, *supra* note 4, at 526.
[154] *Id.* at 533-537 (suggesting the use of a "yellow sticker to inform the tenant, in nontechnical language, of lease provisions prohibited by law.")
[155] OMRI BEN-SHAHAR & CARDL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE (2014).
[156] *See, e.g.*, Bar-Gill, *supra* note 2, at 106.
[157] *See, e.g.*, Bar-Gill, *supra* note 2, at 36.

and tenant law. For example, the regulator could require landlords to include a notice in their lease, which states the following:

> "(1) Your landlord cannot waive its liability in 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 distinguish the disclosed information from the fine-print, the disclosed data could be displayed in a salient format, like the "warning box" recently proposed by Ian Ayres and Alan Schwartz.[158] Hopefully, disclosure regulation in the context of landlord and tenant law could enhance tenants' awareness of their rights and remedies under the law.

2. Mandates: Statutory Form Leases or Mandatory Lease Provisions

Instead of demanding landlords to disclose information, the regulator could adopt a statutory form lease or mandatory lease provisions.[159] Precedent for statutory form contracts can be found in statutes regulating insurance policy forms.[160] In the context of residential agreements, Allen R. Bentley has suggested the adoption of an "alternative form lease": a lease that "places reasonable duties on both parties, advises them of applicable law, and anticipates the problems they routinely face."[161] According to Bentley, "statutes voiding particular lease clauses will have slight effect if leases nonetheless continue to include them." [162] In such circumstances, he believes that "the legislature may turn to a more drastic remedy": the enactment of a statutory

[158] Ayres & Schwartz, *supra* note 125.
[159] Olafsen, *supra* note 4, at 529; Bentley, *supra* note 4, at 836.
[160] Bentley, *supra* note 4, at 879-880; Olafsen, *supra* note 4, at 530.
[161] Bentley, *supra* note 4, at 839.
[162] *Id.* at 879.

form lease.[163] Similarly, David V. Kirby believes that prohibiting the inclusion of certain terms or using the unconscionability doctrine to invalidate unfair lease provisions is insufficient, since the problem "is not that the form is a form, but that it is promulgated by parties on one side of the transaction and reflects their needs."[164] He thus views the enactment of a statutory form lease as a way to "equalize the tenant's positions vis-à-vis the landlord", as well as to provide "a much needed measure of consistency and certainty in landlord-tenant law."[165]

While this solution, if enforced, may solve the problem of the continued use of unenforceable and misleading terms, it is not problem-free. The solution's main flaw is that it will not allow for variation in the content of residential leases, and will severely impede the parties' ability to innovate or design the lease according to their specific preferences and needs. As Kurt E. Olafsen points out, "because it is unlikely that a statutory form lease could accommodate all residential lessors and lessees, legislatures should hesitate to limit the parties' flexibility."[166] Furthermore, as leases are often relational contracts, it is even more pertinent to allow for tractability and enable the parties to modify the agreement according to their evolving needs and changing circumstances.[167] These problems could be lessened by adopting several statutory leases that landlords could use, rather than only one statutory lease. Lastly, the drafting of a statutory form lease is likely to be accompanied by pressures from various interest groups, including landlords' associations, which possess political power disproportionate to their portion in the population.[168] Such pressures might influence the legislature to draft a form lease which is tilted towards the interests of one group at the expense of the other.

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[163] *Id*.
[164] David V. Kirby, *Contract Law and the Form Lease: Can Contract Law Provide the Answer?*, 71 NW. U. L. REV. 204, 237 (1976).
[165] *Id*. at 235-236.
[166] Olafsen, *supra* note 4, at 530.
[167] *See, e.g.*, Ian R. Macneil, *Relational Contract: What We Do and Do Not Know*, WIS. L. REV. 483 (1985).
[168] Olafsen, *supra* note 4, at 530-531.

3. Pre-Approval of Standard Form Leases

Another potential solution to the problem of continued use of unenforceable and misleading lease provisions is to require pre-approval of standard form leases. Such a solution could be achieved by establishing a special tribunal authorized to pre-approve standard form leases or, alternatively, an administrative agency with a similar regulatory power.[169] Landlords using leases that had not received administrative or judicial approval could be subjected to relatively high sanctions. On the other hand, landlords who use contracts that have been pre-approved could so indicate on their forms, and their leases could consequently enjoy a strong presumption of enforceability (or even immunity from judicial intervention).[170] The law could additionally permit governmental actors to seek administrative or tribunal invalidation of allegedly unenforceable or misleading terms in residential leases.

In the U.S. insurance market, multiple States require pre-approval of certain policy forms by the regulator.[171] 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.[172]

Even though a pre-approval requirement surpasses the flexibility problem which is inherently attached to the adoption of a statutory form lease, such a solution has shortcomings of its own. First, the state will have to incur the costs of administrative or judicial review. This means that policymakers should examine whether the expected net gains from a pre-approval process justify the net costs (in comparison to alternative solutions). Second, such a pre-approval

[169] See, *e.g.*, RADIN, *supra note* 2, at 147; Clayton P. Gillette, *Pre-Approved Contracts for Internet Commerce*, 42 HOUS. L. REV. 975 (2005); Olafsen, *supra* note 4, at 531.
[170] In Israel, pre-approved standard form contracts are immune from judicial invalidation for a period of up to five years. Gillette, *supra* note 169, at 475.
[171] *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).
[172] *See, e.g.*, Sinai Deutch, *Controlling Standard Contracts: The Israeli Version*, 30 MCGILL L.J. 458, 473-475 (1985).

process inevitably means that the authorized tribunal or agency will exercise discretion in deciding which clauses to invalidate and which to uphold. Such a wide discretion necessarily entails the risk of judicial errors in discerning between unenforceable, misleading, and enforceable provisions.[173] This problem could be moderated by complementing the pre-approval process with clear-cut statutory rules determining which clauses are to be invalidated by the court or agency.

4. Consumer Protection Laws

According to MA consumer protection laws, the inclusion of an unenforceable term in a rental agreement constitutes an "unfair or deceptive act or practice" under the Consumer Protection Act, and upon finding that an owner knowingly or willfully engaged in an unfair or deceptive act, the Court may award the injured tenant actual damages or twenty-five dollars, whichever is greater.[174] As we have seen in this study, landlords continue to use UMCs in their residential leases notwithstanding this legislation. This may be attributed to the relatively low sums of damages provided under the statute. Moreover, in 2013 the MA Supreme Judicial Court held that "a plaintiff bringing an action for damages […] must allege and ultimately prove that she has, as a result, suffered a distinct injury or harm that arises from the claimed unfair or deceptive act itself."[175] This holding bars tenants from pursuing claims against their landlords for the inclusion of unenforceable terms in their leases, unless they can prove an actual damage. Given that the tenant will typically not be able to prove actual

[173] Olafsen, *supra* note 4, at 531-532; Kuklin, *supra* note 4, at 882.
[174] MASS. GEN. LAWS ch. 93A, §9(3).
[175] Tyler v. Michaels Stores, Inc., 984 N.E.2d 737 (2013) (overturning the Court's previous ruling in Leardi, according to which: "the tenants comprising the plaintiff class have been "injured" by the use of deceptive and illegal clauses in the defendants' standard apartment lease, despite the fact that the plaintiffs were unaware of, and the defendants have never attempted to enforce, these illegal provisions").

damages resulting from the inclusion of such clauses, the incentive to file a claim against one's landlord in court is relatively low.

This obstacle could be overcome by changing the judicial approach towards such claims, so as to allow tenants to bring claims on the basis of probabilistic, rather than actual, harm or, alternatively, obtain statutory awards without having to prove harm. Additionally, the statute could be modified so as to allow for punitive damages, in order to increase deterrence. In fact, the URLTA already follows this approach, by exposing landlords who knowingly use prohibited provisions in their leases to penalties.[176]

5. Tort-Based Solutions

As this paper argues, the use of unenforceable and misleading terms generates tenants' misperceptions about the legal state-of-affairs. Terms that misrepresent the law may deceive tenants with regard to their legal rights and remedies. From this description immediately follows the possibility of treating the intentional inclusion of unenforceable and misleading terms as a tort. Relief could be sought under either the common law action of deceit or by using the "intentional tort" paradigm. Bailey Kuklin advocates both of these options and analyzes them thoroughly.[177] In a similar vein, Margaret J. Radin proposes to consider a new tort: the "intentional deprivation of basic legal rights."[178] According to her proposal, a firm that imposes "severe remedy deletion of rights" in its mass-market boilerplate could be liable under this new tort.[179]

[176] URLTA, §1.403(b) ("If a landlord deliberately uses a rental agreement containing provisions known by him to be prohibited, the tenant may recover in addition to his actual damages an amount up to 3 months' periodic rent and reasonable attorney's fees").
[177] Kuklin, *supra* note 4, at 896-912.
[178] RADIN, *supra* note 2, at 211.
[179] *Id*.

In the context of tort-based solutions, it is important to draw a distinction between deliberate inclusion of unenforceable terms and an unknowing use of such terms. As previously discussed, whereas sophisticated landlords like residential companies are likely to be familiar with landlord and tenant law, or at least are expected to have legal counsel who is familiar with the law, the same does not apply to individual landlords who rent one or two apartments as a secondary source of income. Such landlords, just like tenants, might be ignorant of the law. Whereas it seems justified to hold sophisticated landlords liable for a deliberate use of unenforceable or misleading terms, it appears somewhat unfair to place such liability on individual landlords who unknowingly use leases that contain unenforceable or misleading terms. On the other hand, holding landlords strictly liable for using unenforceable or misleading terms has its advantages. Under a strict liability regime, landlords will be incentivized to be informed about the law or to obtain legal advice and tenants will not have the burden of proving the landlord's actual knowledge or intent. The question whether to impose strict liability for the use of unenforceable terms or to require knowledge and intent before placing such liability on landlords is not within the scope of this paper. It is, however, important to notice that a distinction between a knowing and unknowing use of unenforceable and misleading terms could be warranted.

Lastly, it is desirable to grant remedy not only to the tenant who brought the case to court, but to every tenant who signed a lease containing the relevant UMCs. Once a Court determines that the use of a certain clause is deceptive or fraudulent, the clause should be struck down in all of the leases used by the landlord, and tenants should be notified and awarded damages (similarly to "recall" in cars).

6. Sanctioning Lawyers

The "discussion draft" of the Model Rules of Professional Conduct initially prohibited lawyers from drafting contracts containing "legally prohibited terms", or terms that "would be held to be unconscionable as a matter of law."[180] In light of the legal community's strong opposition, this provision was eliminated, leaving the current Model Rules without any reference to a lawyer's responsibilities as a drafter of contracts. Nonetheless, several scholars argue that lawyers should be sanctioned for including unenforceable terms in standard form contracts.[181]

William T. Vukowich, for instance, maintains that "requiring that lawyers refrain from including unenforceable terms in form contracts is the fairest and most effective means for protecting the public against the unfair use of standard form contracts."[182] Likewise, Kuklin believes that the consumer, employee or tenant should be able to sue the lawyer who drafted the contract directly for deceit or other torts, whether she is an agent or an independent contractor, stipulating that:

> "The attorney's liability, direct or indirect, is not unfairly burdensome. Already he or she is held to high standards in advising clients of the law; the legal "advice" to the client's adversary requires no additional knowledge by the attorney. It is simply a matter of expressing that knowledge nonfraudulently."[183]

This analysis could be further applied to landlords' associations and publishers of standard form leases as well, as they typically obtain legal counsel and are probably aware of the effect of UMCs on tenants' perceptions and behavior.[184]

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[180] William T. Vukowich, *Lawyers and he Standard Form Contract System: A model rule that would have been,* 6 GEO. J. LEGAL ETHICS 799 (1993).
[181] Kuklin, *supra* note 4; Vukowich, *supra* note 180, at 709; Stolle & Slain, *supra* note 15, at 85; Christina L. Kunz, *The Ethics of Invalid and Iffy Contract Clauses*, 40 LOY. L. A. L. REV. 487 (2006); GEOFFREY C. HAZARD & W. WILLIAM HODES, THE LAW OF LAWYERING §5.12, illus. 5-13 (3d ed., 2001-2005).
[182] Vukowich, *supra* note 180, at 800.
[183] Kuklin, *supra* note 4, at 897-898.
[184] *Id.* at 899.

B. Public v. Private Enforcement

Some of the solutions proposed above depend on tenants' initiatives, without providing a means for informing tenants of their legal rights. A tenant who mistakenly relies on her lease provisions is not likely to realize that some of them are invalid. Thus, remedies alone cannot overcome the problem of tenants' asymmetric information, and will not optimally deter landlords from knowingly using invalid provisions.[185] Deterrence is only achieved when sanctions are enforced;[186] and as long as tenants remain uninformed about their legal rights, a solution which relies on tenants to bring these violations to court is doomed to fail for lack of sufficient enforcement.

Public enforcement may provide the optimal solution for this problem. For instance, section 5 of the Federal Trade Commission Act (FTC Act) authorizes the Federal Trade Commission (FTC) to take appropriate action when unfair or deceptive acts or practices are discovered, and sets forth the FTC's investigative powers and enforcement authority.[187] The FTC is authorized to enforce the requirements of consumer protection law through both administrative and judicial means. The FTC (or an equivalent State-level agency) could thus be authorized, in the same vein, to ensure landlords' compliance with the regulatory requirements aimed to combat the inclusion of UMCs. Public enforcement mechanisms could also overcome collective action and free rider problems, to which private enforcement systems are typically susceptible. On the other hand, public officers often lack sufficient incentives to optimally enforce the law, and sometimes suffer from imperfect information

[185] *See*, *e.g.*, Olafsen, *supra* note 4, at 527-529.
[186] STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 479-489 (2004); A.M. Polinsky & S. Shavell, *The theory of public enforcement of law*, *in*: HANDBOOK OF LAW AND ECONOMICS 405 (2007); Daniel S. Nagin & Raymund Paternoster, *The Effects of Perceived Risk of Arrest: testing an expanded conception of deterrence*, 29 CRIMINOLOGY 561, 580 (1991).
[187] Federal Trade Commission Act of 1914, 15 U.S.C. §§ 41-58 (2012).

about the market or specific contract terms. Thus, it is desirable to allow for both public and private enforcement of the regulation aimed at preventing the inclusion of UMCs in residential leases.[188]

C. Integrating solutions

So far, several normative solutions have been discussed separately. It is noteworthy that policymakers can integrate several solutions, so as to create a combined effect. For instance, they could demand pre-approval of standard form leases, apply consumer protection laws on the intentional use of deceptive provisions in residential leases, and sanction lawyers for knowingly inserting such clauses into their clients' leases.

IX. Conclusion

This research has focused on an empirical inquiry. It aimed at shedding light on the persistence of unenforceable and misleading contractual terms in an important consumer market: the residential rental market. The findings of this study are quite alarming: residential leases almost always contain UMCs.

The continued use of provisions which either misrepresent or flatly contradict the law is the result of a market failure. As tenants are usually ignorant of landlord-tenant law and barely read or take into account the leases they sign, landlords are incentivized to continuously use UMCs in their leases. Whereas UMCs are not expected to influence tenants' renting decisions *ex ante*, they are likely to have a significant effect on their perceptions and behavior *ex post*, when a problem emerges. In such circumstances, tenants, who are likely to believe that the contracts

[188] *See, e.g.,* FABRIZIO CAFAGGI & HANS-WOLFGANG, NEW FRONTIERS OF CONSUMER PROTECTION: THE INTERPLAY BETWEEN PRIVATE AND PUBLIC ENFORCEMENT (2009).

they signed are enforceable and accurately reflect the law, may relinquish valid legal claims and incur costs that the law deliberately imposes on landlords. The market failure identified in the study harms tenants and decreases the aggregate social welfare. In light of its adverse effects, the paper seeks to provide a preliminary guidance for optimal regulatory intervention. As market forces alone cannot correct this failure, legal intervention is warranted.

This research will hopefully pave the way for future research aimed at providing a wider and clearer picture of the problem and its possible solutions. Three directions for future study are especially desirable: first, more types of standard form contracts in different markets should be analyzed; second, more states and countries with varying legal frameworks should be covered; and third, more regulatory schemes should be contemplated and devised. Future studies in these directions will enhance our understanding of the factors influencing the use of UMCs, and will enable us to better assess the desirability of a wide range of policy tools.

This paper is primarily aimed at exploring an overlooked market practice, advancing the scholarly understanding of its scope and theoretical foundations, and devising workable policy solutions in light of its empirical findings. Hopefully, this is another step towards a better understanding of the world of consumer contracts, the world we live in.

X. Annex I – The Code Book

Issue	Applicable law	Coding	Results
Entrance to premises	G.L. c. 186, §15B(1)(a); 940 C.M.R. §3.17(6)(e). The landlord has a right to enter premises only to inspect the premises, make repairs, or show them to a prospective tenant, purchaser, mortgagee or its agents; Otherwise, landlord can enter only pursuant to a Court order, if the premises appear to have been abandoned, or to inspect the premises during the last 30 days of he tenancy to determine if there are damages that would lead to reduction in the return of the security deposit. Any provision which conflicts with this section is void and unenforceable. Failure to comply with these provisions constitutes "unfair or deceptive act."	Is the issue mentioned in the lease? 0 = no If it is mentioned: Does the landlord have a wider right of entry than permitted by law (i.e., is landlord allowed to enter for purposes other than those permitted by law)? 1 = no = provision is enforceable 2= yes = provision is unenforceable *per se* [Minor deviations from the purposes set forth in the statute (for instance, entering the property to remove alterations made by tenants in breach of the lease, or in order to display "for sale" or "for rent" signs) are also coded as enforceable.]	93 percent of the leases include an enforceable provision that limits landlord's right of entry as set forth in the law, with negligible extensions (compared to the purposes allowed by law). One lease in the sample, constituting 1.43 percent, includes an unenforceable provision, stating that the landlord has the right to enter the premises "for any purpose." The other 6 percent of the leases do not mention the landlord's right of entry to the premises.
Limitations on liability (exculpatory clauses or	G.L. c. 186, §15. The purpose of this statute is to preclude a landlord from shifting responsibility for	Does the lease contain an exculpatory clause/indemnification clause? 0 = no	53 percent of the leases contain a misleading clause. 20 percent of the leases contain an

indemnification clause)	its own negligence to its tenants (see: *Norfolk v. Morrison*, 266; citing *Young v. Garwacki*). The inclusion of any provision whereby the tenant agrees to indemnify the landlord, or hold him harmless, or precludes him 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 lessor on or about the leased or rented premises or on or about any elevators, stairways, hallways or other appurtenance used in connection therewith, is prohibited. Such a provision is considered to be against public policy and void.	If it is mentioned, is liability for landlord's negligence waived? 1 = no, loss caused by landlord's negligence is excepted = enforceable. 2 = yes = unenforceable *per se* (including: clauses exculpating or indemnifying landlord from any and all liability; clauses stating that tenant will be solely responsible for damages to personal property; clauses stating that tenant will be solely responsible for damages caused by his or a third party's negligence; and clauses excepting only liability for damages caused by gross negligence of the landlord). 3 = misleading (for example, by stating that the tenant will be solely responsible for losses caused by his or his family's negligence, and/or for damages to personal property in parts of the building within his control, but adding a phrase that contains the "subject to applicable law" language and precludes liability for negligence from the waiver).	enforceable clause, and 27 percent contain an unenforceable clause.
Late payment	G.L. c. 186, §15B (1)(c); G.L.c.93A, §2;	Is the issue mentioned in the	39 percent of the leases

penalty clause	940 C.M.R. §3.17(6)(a). Landlords are prohibited from imposing any interest or penalty for failure to pay rent until 30 days after such rent shall have been due. The inclusion of a penalty clause which is not in conformity with these provisions is deemed "unfair or deceptive act or practice."	lease? 0 = no If it is mentioned, is the late payment penalty clause imposing any interest or penalty for failure to pay rent before the 30 days' minimum set forth by law? 1 = no = enforceable 2 = Yes = unenforceable *per se*	(27 out of 70) include a late-payment penalty clause. 59 percent of these leases (16 leases) include an enforceable late-payment penalty clauses, and 41 percent (11 leases) include an unenforceable clause
Security Deposit	G.L. c. 186, §15B (2), (3), (4); C.M.R. § 3.17 Important Case-Law: *Karaa v. Kuk Yim*, 86 Mass.App.Ct. 71420 N.E.3d 943 (2014); *Taylor v. Beaudry*, 75 Mass. App. Ct. 411, 914 N.E.2d 931 (2009); A security deposit continues to be the property of the tenant making such deposit. It should be held in a separate, interest-bearing account in a bank, and should not be subject to claims of any creditor of the lessor. The tenant should be entitled to receive five per cent interest per year, or the amount paid by the bank in which the money was deposited (§15B(1)(e)). The interest should be paid at the end of each	<u>First Column</u> Does the lease require a security deposit? 0 = no If it is required, is there a deviation from applicable law? 1 = no, and the clause accurately reflects landlord's duties with regards to holding and returning the security deposit 2 = yes (for example, a provision that allows landlord to use the security deposit for purposes other than those prescribed by law) = unenforceable *per se* 3 = no, but the provision is misleading.	57 percent of the leases (40 out of 70) require a security deposit. Out of these leases, 10 percent (4 leases) include enforceable clauses, 10 percent (4 leases) include unenforceable clauses, and 80 percent (32 leases) include misleading clauses. The unenforceable clauses include provisions that allow the landlord to use the security deposit to pay for purposes other than those prescribed by law (for

	year, and within 30 days after the tenants moves out. The lessor should give tenant a receipt once the money is handed to her, and a written statement of the condition of the leased premises within 10 days. Landlord should give tenant another receipt with the details of the bank and the account number in which the deposit is held. Every lessor who accepts a security deposit must maintain a record of all such security deposits received which contains information as specified in the section. Landlord and tenant can agree to use the deposit to pay for rent or to repair any damage caused by the tenant or her guest. Lessor shall, within 30 days after the termination of the tenancy, return to the tenant the security deposit or any balance thereof. At the end of the tenancy, landlord may deduct the following expenses from the security deposit: (1) any unpaid rent (unless legally withheld); (2) any unpaid increase in real estate taxes for which tenant is responsible under a valid tax escalator clauses; and (3) a "reasonable amount necessary to repair any damage"	<u>Second Column: which type of "misleading"?</u> 3= misleading since it fails to mention <u>*all*</u> of these issues (selective disclosure): 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. 4 = it fails to mention <u>*some*</u> of	example: attorney's fees); provisions that waive tenant's right to "have the security deposit in any specialized custodial or beneficiary account, as opposed to an ordinary interest bearing bank account"; and provisions stipulating that the deposit will be returned to the lessee without interest. One such provision states that "the unused portion of the deposit shall be returned to Resident without interest, according to law." Out of the misleading clauses, 48 percent (15 leases) fail to disclose *all* of the landlord's obligations with regards to the security deposit; 7 percent (2 leases) fail to mention only some of the landlord's obligations, while mentioning the main obligations (i.e., the obligations to keep the deposit in a separate, interest-bearing, account,

	caused by the tenant, her family or guests, reasonable wear and tear excepted. Landlord needs to furnish to tenant an itemized list of said damages within 30 days after the termination of the tenancy. 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."	these issues, <u>but</u> *mentions a separate account, interest, and purposes of deposit.* 5= It fails to mention <u>*some of these (main) issues,*</u> including interest, and/or separate account, and/or purposes.	to pay interest, and to deduct only for specific purposes); and 45 percent (14 leases) fail to mention some of the relevant issues, including some or all of the central issues.
Tax Escalation Clause	G.L. c. 186, §15C; The landlord may require the tenant to pay increased rent on account of an increased real estate tax (levied during the term of the lease), 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; (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 reasonable attorney's fees, shall be refunded to the tenant.	Does the lease contain a tax escalation clause? 0 = no If it is mentioned, does the tax escalation clause include all three parts required by law? 1= yes = enforceable 2 = no = unenforceable *per se*	90 percent of the leases do not include a tax escalation clause. Out of the remaining 10 percent (7 leases), only one lease includes an unenforceable tax escalation clause. This clause does not mention the landlord's obligation to refund the tenant upon obtaining an abatement of the tax, nor does it mention that the tenant is only required to pay that proportion of such increased tax as the leased unit bears to the entire real estate being taxed.

	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."		
Maintenance and Repairs	The MA Sanitary Code, Chapter II. 105 C.M.R. §410.010(a); 940 C.M.R. §3.17(1). Boston Housing Auth. v. Hemingway, 363 Mass. 184, 218 (1973). See also Crowell v. McCaffery, 377 Mass. 443 (1979). This would be a violation of G.L. c. 93A (the Consumer Protection Law). See *Leardi v. Brown*, 394 Mass. 151, 156-67 (1985). <u>Landlord's main duties</u>: Lessor should provide and maintain in good operating condition the facilities capable of heating water; electrical facilities and lighting; a supply of potable water; toilet and a sewage disposal system; all means of egress, locks on entry doors; and provide clean and sanitary condition free of garbage in the common areas. Lessor should also maintain structural elements (such as the foundation, floors, walls, doors, windows, ceilings, roof, staircases, porches, and chimneys) in "good repair and in every way fit for the	<u>First column</u> Is the issue mentioned in the lease? 0 = no If it is mentioned, does it accurately reflect the allocation of responsibilities as set forth in the law? 1 = yes (it describes the allocation of responsibilities in a symmetric way) = enforceable and accurately reflects the law 2 = no, it contradicts the law (for example, by shifting some, or all, of the repair responsibilities to the tenant; including when shifting and then adding "under applicable law") = unenforceable *per se* 3 = no, it selectively discloses the legal state-of-affairs, while mentioning tenants' obligations and failing to mention some, or	Maintenance and repair responsibilities are addressed in 99 percent of the leases in the sample (69 out of 70). However, only 21 percent of the leases contain an enforceable maintenance and repair clause, whereas 39 percent of the leases contain an unenforceable clause, and 39 percent contain a misleading clause.

	use intended." Lessor should ensure installation, and "maintain free from leaks, obstructions or other defects", the sinks, washbasins, bathtubs, showers, toilets, water-heating facilities, gas pipes, heating equipment, water pipes, owner-installed equipment and fixtures; Tenant's main duties: Tenant should exercise reasonable care in the use of structural elements of the dwelling; maintain "free from leaks, obstructions and other defects" all "occupant owned and installed equipment"; and maintain "in a clean and sanitary condition and free of garbage, rubbish, other filth or causes of sickness that part of the dwelling which he exclusively occupies or controls. Tenant's remedies: If landlord fails to correct an unsafe condition which "endangers or materially impairs" the wealth, safety, or well-being of the occupants, tenant has a right to withhold rent (*Berman & Sons, Inc. v. Jefferson*, 379 Mass. 196 (1979)). Under certain conditions, tenants may also make repairs and deduct up to four months' rent to pay for them (G.L.c111, §127L; 940 C.M.R. §3.17(1)(h)). Finally, if there are major Sanitary Code violations or seriously defective conditions in the leased premises, and the	all, of the landlords' duties = misleading [Some leases include provisions, known as "yield-up" clauses, that state that "the lessee shall maintain the premises in good condition", and "at the termination of the lease, deliver up the leased premises and all property belonging to the Lessor in good, clean and tenantable order and condition." Courts have interpreted such covenants as meaning that the tenant shall turn over the premises in rentable condition, but maintained that "such a covenant does not impose upon a tenant the duty to keep the premises in rentable repair during the lease, and is fulfilled by vacating the premises in that condition" (see: *Ryan v. Boston Housing Auth.*, 322 Mass. 299, 301 (1948)). In light of the Court's reading of these provisions, I do not code them as unenforceable or misleading with regards to the tenant's maintenance or repair obligations, even though they might mislead tenants with	

	tenant has notified the landlord or a housing inspector of the violations or conditions, and the landlord has not repaired them, the tenant can legally end the lease (*Boston Housing v. Hemingway*).	regards to their maintenance and repair obligations, and might be considered "unenforceable-as-written."]	
Warranty of Habitability	Common Law (see: *Boston Housing Authority v. Hemingway*; 363 Mass. 184, 218 (1973); *Crowell v. McCaffery*, 377 Mass. 443 (1979)). The landlord warrants providing and maintaining residential premises in a habitable condition, i.e.: 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). See: *Leardi v. Brown*, 394 Mass. 151, 156-167 (1985).	Is the "warranty of habitability" mentioned in the lease? 0 = no If it is mentioned, does it accurately reflect the law? 1 = yes = enforceable 2 = no = warranty of habitability is waived / tenant "acknowledges that it accepts the unit in its "as is" condition / tenant warrants that the apartment is in a habitable condition = unenforceable *per se* *A merger clause/ which stipulates that "the landlord has made no warranties, representations or covenants, express or implied, other than those expressly set forth herein", is not necessarily void – and was thus coded as enforceable.	70 percent of the leases in the sample do not address the warranty of habitability at all. Out of the leases that do refer to such a warranty, 19 percent include an unenforceable disclaimer of the warranty, and only 12 percent include a warranty of habitability that accurately reflects the legal state-of-affairs. None of the leases in the sample contain a disclaimer which clearly states that "there is no warranty of habitability", and only one of the disclaimers subjects itself to applicable law, by stating that "resident accepts the premises "AS IS" except for any repairs

			that landlord is required to make by applicable laws."
Attorneys' Fees and expenses	G.L. c. 186, §20. "Whenever a lease provides that the landlord may recover attorneys' fees and expenses incurred as the result of the tenant's failure to perform his obligations, there shall be an implied covenant by the landlord to pay to the tenant the reasonable attorneys' fees and expenses incurred as the result of the landlord's failure to perform her obligations, or in the successful defense of any action or summary proceeding commenced by the landlord."	Is the issue of "attorneys' fees and expenses" mentioned in the lease? 0 = no If it is mentioned, does the provision accurately reflect the law (by mentioning that the prevailing party shall recover attorneys' fees and expenses)? 1 = yes = enforceable 2 = no, and it conflicts with the law, by allowing landlord to recover attorneys' fees, while waiving the tenant's respective right as established in §20 = unenforceable *per se*. 3 = no, the provision simply mentions landlord's right to recover attorneys' fees, without mentioning tenant's respective right = misleading (unenforceable-as-written) * *This is treated as misleading, even though the law – by determining that a lease which includes landlord's right to recover attorneys' fees and	43 percent of the leases (30 out of 70 leases) contain a provision concerning attorney's fees. Out of the attorney's fees clauses, only 21 percent are enforceable, whereas 79 percent are misleading (one-sided attorney's fees clauses).

		expenses, will be interpreted as including tenant's respective right, supposes that landlords will not include a two-way indemnification clause.	
Termination of lease because of non-payment of rent	G.L. c. 186, §11, §15A. 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 interest and costs of suit, on or before the answer date.	Is the issue mentioned in the lease? 0 = no If it is mentioned, can landlord end tenancy for non-payment by giving a 14 days' notice? 1 = yes, and the provision also mentions that tenant can cure the non-payment by paying rent = enforceable and accurately reflects the law 2 = no, landlord can end tenancy for non-payment without a 14 days' notice / yes, a notice is given, but the provision states that after 14 days tenant must vacate the apartment = unenforceable *per se* 3 = misleading – selective disclosure: (a) the provision mentions the 14 days' notice, but fails to mention tenant's ability to cure by paying the rent due <u>or</u> (b) the provision does not mention the 14 days' notice, but states that landlord may initiate	84 percent of the leases (59 out of 70) contain a clause concerning notice to quit. Out of these clauses, only 5 percent (3 leases) contain an enforceable clause which fully discloses the tenant's rights. 12 percent (9 leases) contain an unenforceable provision, which either reduces or entirely eliminates the 14-days' notice requirement (for instance, by stipulating that "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", or by stating that "You will be in default under this lease if you do not make a payment of rent

		legal proceedings "as permitted by law / in accordance with local and state regulations." (c) both.	within ten days after it is due." 83 percent of the leases include a "misleading" clause. However, only 4 percent out of these leases fail to mention the 14-days' notice requirement, whereas the rest 96 percent mention the notice requirement, without disclosing the tenant's right to cure the non-payment.
The Covenant of Quiet Enjoyment	G.L. c. 186, §14; C.M.R., §3.17. 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, shall be punished by fine or imprisonment, and liable for actual and consequential damages or three	Is the issue mentioned in the lease? 0 = no If it is mentioned, does it accurately reflect the law? 1 = yes = enforceable 2= no = the tenant's right is waived or conditioned upon the fulfillment of its obligations = unenforceable *per se*	The Covenant of Quiet enjoyment is seldom mentioned in the leases: 89 percent of the leases do not include such a covenant. The remaining 11 percent that do expressly provide for the covenant of quiet enjoyment subject its application to cases where the tenant performs all of her obligations under the lease, and are thus unenforceable *per se*.

	month's rent, and the costs of the action, including attorneys' fees. Failure to comply with this provision constitutes "unfair or deceptive act."		
Payments in advance	G.L. c. 186, §15B(1)(a), (b); C.M.R. 3.17 The lessor is prohibited from requiring a tenant (or a prospective 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. 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). Failure to comply with this provision constitutes "unfair or deceptive act."[see: *Dolben Co., Inc. V. Friedman* (2008 Mass. App.Div.1) (charging "application fee" is an unfair and deceptive practice, in violation of §15B and G.L.c.93A)].	Is the issue mentioned in the lease? 0 = no Does the lease include fees beyond the amount permitted by law? 1 = no, it includes only some/all of the permitted fees = enforceable 2 = yes (for example, extra fees such as "holding deposits", "rental fees." "pet fees", "cleaning fees", or "application fees" or security deposit that is higher than the first month's rent) = unenforceable *per se*	53 percent of the leases include a clause requiring advanced payments. Out of these 37 leases, 19 percent (7 leases) contain unenforceable clauses, and 81 percent (30 leases) contain enforceable clauses. Three out of the seven unenforceable clauses require a security deposit in an amount higher than the first month's rent. The other four leases include "extra fees"
Last month's rent payment and landlord's responsibilities	G.L. c. 186, §15B(2)(a). Any lessor who receives rent in advance for the last month of tenancy should give tenant a **receipt** and, beginning with the first day of tenancy, **pay interest at the rate of five per cent per year or other**	Was last month paid in advance? 0 = no – section is not applicable If last month was paid in advance, did lease include the obligation to give a receipt and pay interest, and the required rate	70 percent of the leases (49 out of 70) do not require an advanced payment of the last month's rent. Out of the 30 percent that do require such payment, only 14

	such lesser amount of interest as has been received from the bank where the deposit has been held. **At the end of each year** of tenancy, such lessor shall give or send to the tenant from whom rent in advance was collected a statement which shall indicate the amount payable by such lessor to the tenant. The lessor shall at the same time give or send to such tenant the interest which is due or shall notify the tenant that he may deduct the interest from the next rental payment of such tenant.	and procedure? 1 = yes = enforceable and accurately reflects the law 2= no, the lease includes a provision that conflicts with the law (for exp., determining that no interest or receipt is due / interest is lower than required by law / procedure is not as required by law) = unenforceable *per se*t 3 = the lease does not accurately reflect the law, for exp., does not mention the obligation to give receipt, the obligation to pay interest, the interest rate required, or the procedure = misleading.	percent (3 leases) include an enforceable clause, providing that the landlord will give a receipt and pay interest as set forth in the law. The remaining 86 percent (18 leases) are misleading, as they do not mention the landlord's said duties.
Injuries due to defects in violation of the building code	G.L. c. 186, §15E. An owner of a building is precluded from raising as a defense in an action brought by a tenant who sustained an injury caused by a defect in a 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 deemed against public policy and void.	Is the issue mentioned in the lease? 0 = no If it is mentioned, does it accurately reflect the law? 1 = yes = enforceable 2 = no, it purports to waive landlord's liability in such situations = unenforceable *per se*	Landlord's liability is neither set forth nor waived in any of the leases in the sample.
Restriction of litigation (tenant's right to	G.L. c. 186, §15F. A provision whereby a tenant agrees to	Is tenant's right to a jury trial mentioned in the lease? 0 = no	Only one lease, constituting 1.43 percent of the leases in the

a jury trial)	waive his right to a jury trial in any subsequent ligation with the landlord shall be deemed to be against public policy and void.	If it is mentioned, does it comply with the law? 1= yes = enforceable and accurately reflect the law 2 = no, it purports to waive tenant's right to a jury trial = unenforceable *per se*	sample, contains an unenforceable waiver of the tenant's right to a jury trial (stating that "recognizing that jury trials are both time consuming and expensive, owner and resident hereby waive their right to a trial by jury on any matter arising out of this agreement"), whereas all the other leases simply do not disclose that the tenant has such a right.
Constructive Eviction: Landlord's liability in case of failure to act	G.L. c. 186, §15F. A provision whereby a tenant agrees that no action or failure to act by the landlord shall be construed as a constructive eviction shall be deemed to be against public policy and void.	Is the issue of "constructive eviction" mentioned in the lease? 0 = no If it is mentioned, does it comply with the law? 1 = yes = enforceable and accurately reflect the law. 2 = no, it determines that no action/failure to act by the landlord shall be construed as constructive eviction = unenforceable *per se*	No lease in the sample contains such a clause.
Landlord's liability for damages caused by unlawful eviction	G.L. c. 186, §15F; 940 C.M.R. § 3.17(5); If a tenant is removed from the premises by the landlord except pursuant to a valid court order, the tenant may recover	Is the issue of unlawful eviction mentioned in the lease? 0 = no If it is mentioned, does the	Landlord's liability for damages caused by unlawful eviction is neither set forth nor waived in any of the

	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 any liability imposed by this section shall be deemed to be against public policy and void. (Summary process must be used to regain possession. See: G.L.c.184, §18, G.L.c. 266, §120). An unlawful eviction constitutes an "unfair or deceptive act."	provision comply with the law? 1= yes, the provision mentions that the landlord can only evacuate tenant pursuant to a valid court order, and that tenant may recover possession/terminate the agreement, and in either case recover damages including reasonable attorneys' fees in case of unlawful eviction = enforceable and accurately reflect the law 2= no, the provision allows to landlord to evict tenant without a valid court order, or purports to exempt the landlord from liability for damages caused by unlawful eviction = unenforceable *per se*	leases in the sample.
Limitations on occupancy of children	G.L. c. 186, §16. 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 deemed to be against public policy and void.	Is the issue of occupancy of children mentioned in the lease? 0 = no If it is mentioned, does the relevant provision comply with the law? 1 = yes, the lease determines that tenants and their children could occupy the apartment = enforceable 2 = no, the lease provides that the landlord may terminate the	The occupancy of children is mentioned in 21 percent of the leases (15 out of 70). In most of these leases, it is explicitly stated that "the apartment may be occupied only by the tenant, the husband or wife of the tenant, and any children […] born to the tenant after this lease is signed".

		lease if the tenant has or shall have children = unenforceable *per se*	
Prohibition on reprisals for reporting violations of the law	G.L.c. 186, §18, §19; C.M.R §3.17 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 would be void and unenforceable. Failure to comply with this provision constitutes "unfair or deceptive act."	Is the issue of reprisals mentioned in the lease? 0 = no If it is mentioned, does the relevant provision comply with the law? 1 = yes, the provision prohibits reprisals against tenants = enforceable 2 = no, the provision waives tenants' rights for damages in case of reprisals = unenforceable *per se*	The prohibition on reprisals against tenants who bring a claim against their landlord is acknowledged in 47 percent of the leases (33 out of 70), and is not mentioned in the rest.
Duty to exercise reasonable care to repair unsafe conditions	G.L. c. 186, §19. 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 have a right of action against the landlord for tort damages.	Is the issue mentioned in the lease? 0 = no If it mentioned, does the relevant provision comply with the law? 1 = yes, the provision maintains that a landlord should exercise reasonable care to correct unsafe condition, and that failure to do so will expose landlord to liability in torts = enforceable 2 = no, the provision waives landlord's liability for such failure = unenforceable *per se* 3 = the provision only mentions	Landlord's liability is neither set forth nor waived in any of the leases in the sample.

		that tenant is obliged to inform landlord of an unsafe condition as soon as he learns about it, without mentioning landlord's duty to exercise reasonable care to correct the unsafe condition within a reasonable time = misleading. If misleading – which type of misleading: 1 = selective disclosure 2= legal fallback ("subject to applicable law"/"as permitted by law") (making the general rule sound like an exception) 3= both.	
landlord's obligation to disclose insurance information	G.L. c. 186, §21. 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.	Is the issue mentioned in the lease? 0 = no If it mentioned, does the relevant provision comply with the law? 1 = yes, the provision stipulates that landlord, upon tenant's written request, code or law enforcement official, shall disclose within 15 days the name of his insurance company and other details concerning the insurance = enforceable 2 = no, the provision conflicts with landlord's disclosure	None of the leases in the sample mention the landlord's disclosure obligations with regards to insurance information.

		obligation = unenforceable *per se*	
Rights of tenants who are victims of domestic violence, rape, sexual assault or stalking	G.L. c. 186, §24-28. 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, Section 24 provides that a tenant may terminate a rental agreement and quit the premises upon written notification to the owner 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. A waiver of the victim's right to terminate the lease without financial penalty or to request that locks be changed, except as otherwise provided by law, is void and unenforceable (§28).	Are the rights of said victims mentioned in the lease? 0 = no. If they are mentioned, are they in compliance with the law? 1 = yes = enforceable 2 = no, the lease waives any or all of the victim's said rights (for exp., right to terminate the lease without financial penalty or to request that locks be changed) = unenforceable *per se* 3 = the victims' rights are not mentioned, but the lease states that "unless allowed by law, tenants will not be released from the contract" – selective disclosure.	99 percent of the leases (69 out of 70) do not mention the statutory rights conferred to tenants who are victims of domestic violence, rape, sexual assault or stalking. The only lease that does mention the tenant's right to terminate the tenancy in such circumstances is a "section 8 Housing choice Voucher Program Model Dwelling Lease", which states that "the tenant may terminate the tenancy only […] when there is good cause demonstrated by a verifiable threat to the life or safety of a household member (such as victims of hate crimes, rape, sexual assault, domestic violence or stalking)", but does not mention other rights conferred to such victims under the law.
Prohibition on discriminatory	MA GL, Ch. 184, §23B.	Is the prohibition on discriminatory restriction of	96 percent of the leases simply do not address this

restriction of occupancy	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	occupancy mentioned in the lease? 0 = no If it is mentioned, does the relevant provision comply with the law? 1 = yes 2 = no, the lease includes a provision restricting/forbidding occupancy or the use for occupancy (including right of entry) on the basis of race, color, religion, national origin or sex = unenforceable *per se*	issue at all. One of the leases addresses the prohibition on discriminatory restriction of occupancy only in passing, by stating that the landlord's consent to assign or sublease the apartment to a third party "will not be unreasonably withheld", and one lease explicitly stipulates that the landlord shall not "discriminate against resident in the provision of services or in any other manner".
Notice prior to 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 record is void and unenforceable.	Is this issue mentioned in the lease? 0 = no. If it is mentioned, does the relevant provision comply with the law? 1 = yes = enforceable 2 = no, the provision waives tenant's said right to receive a notice prior to shutting off water or cutting off gas/electricity = unenforceable *per se*	The notice requirement is not mentioned or waived in any of the leases in the sample.
Fire Insurance – relocation benefits	M.G.L.A.c.175, §99, Clause 15A. Waiver of relocation benefits under the	Is this issue mentioned in the lease? 0 = no.	90 percent of the leases do not mention tenant's right to relocation

	landlord's fire insurance policy in multi-unit residential dwellings is unenforceable.	If it is mentioned, does the relevant provision comply with the law? 1 = yes = enforceable 2 = no, the provision waives tenant's said right of relocation benefits = unenforceable *per se*	benefits.
Disclosure of insurance information concerning loss by fire	M.G.L.A.c.175, §99, Clause 15A. The waiver of the duty of the landlord in multi-resident's dwellings 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.	Is this issue mentioned in the lease? 0 = no. If it is mentioned, does the relevant provision comply with the law? 1 = yes = enforceable 2 = no, the provision waives landlord's said disclosure duty = unenforceable *per se*	None of the leases in the sample mention the landlord's disclosure obligations with regards to insurance information.
Restriction on installation or use of solar energy system	M.G.L.A.c.184, §23C. Provision which forbids or unreasonably restricts the installation or use of a solar energy system is void	Is this issue mentioned in the lease? 0 = no. If it is mentioned, does the relevant provision comply with the law? 1 = yes = enforceable 2 = no, the provision forbids/ unreasonably restricts said installation/use = unenforceable *per se*	This is not mentioned in any of the leases in the sample.
Community residence of	M.G.L.A.c.184, §23D.	Is this issue mentioned in the lease?	This is not mentioned in any of the leases in the

disabled persons	Any restriction, reservation, condition, exception, or covenant in a lease which would permit residential use of property but would prohibit a community residence for disabled persons, is void.	0 = no. If it is mentioned, does the relevant provision comply with the law? 1 = yes = enforceable 2 = no, the provision forbids/restricts community residence for disabled persons = unenforceable *per se*	sample.
Right of tenant to reimbursement for certain repairs or to treat lease as abrogated	Tenants' right to deduct from the rent the amount necessary to pay for repairs of unsafe conditions (M.G.L.A.c.111, §127L): "When violations of the standards of fitness for human habitation as established in the state sanitary code, or of other applicable laws, may endanger or materially impair the health, safety or well-being of a tenant, and if the owner 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 repair the defects or conditions constituting the violations. The tenant may subsequently deduct from any rent due an amount necessary to pay for such repairs. The tenant may, alternatively in such cases, treat the lease as abrogated, pay only the fair value of	Is this issue mentioned in the lease? 0 = no. If it is mentioned, does the relevant provision comply with the law? 1 = yes = enforceable 2 = no, the provision waives tenant's said benefits = unenforceable *per se*	Only one lease refers to tenant's right to repair and deduct the costs of repair from the rent, by providing that "Substantial violations of the State Sanitary Code shall constitute grounds for abatement of rent".

	their use and occupation and vacate the premises within a reasonable time." Any provision of a residential lease which waives these benefits shall be against public policy and void.		
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 this issue mentioned in the lease? 0 = no. If it is mentioned, does the relevant provision comply with the law? 1 = yes = enforceable 2 = no, the provision waives tenant's said benefits = unenforceable *per se*	The right to a stay of judgment is not mentioned in any of the leases in the sample.
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? 0 = no. If it is mentioned, does the relevant provision comply with the law? 1 = yes = enforceable 2 = no, the provision waives tenant's said right = unenforceable *per se*	The right to assertion of claims and defenses in summary process is not mentioned in any of the leases in the sample.
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.	Is this issue mentioned in the lease? 0 = no. If it is mentioned, does the	Landlord's duty to deliver a copy of the lease to the tenant appears in 56 percent of the leases (39 out of 70).

	A landlord who violates this obligation can be fined up to $300 (G.L. c. 93A, §1).) Failure to comply with this provision may make the lease voidable by the tenant, and constitutes "unfair or deceptive practice."	relevant provision comply with the law? 1 = yes = enforceable 2 = no, the provision waives landlord's duty to provide a copy of the lease within 30 days = unenforceable *per se*	
Utilities' Payments	G.L. c. 186, §22; 105 C.M.R. §410.354(A)-(C). Landlord is required to pay for electricity and gas. Unless there is a meter that separately calculates the tenant's electricity/gas use and the agreement sets forth that the tenant is responsible to pay for these utilities. Landlord is required to pay for water, unless there is a meter that separately calculates the tenant's water use, the unit has low flow fixtures, and there is a written agreement that "clearly and conspicuously provides for such separate charge and that fully discloses in plain language the details of the water submetering and billing arrangement between the landlord and the tenant."	Does the lease include a provision about utilities' payment (gas, electricity, and/or water)? 0 = no If it does, does it require the tenant to pay for gas/electricity/water? 1 = yes, while mentioning that the said utilities are separately metered or no, the landlord must pay for such utilities = enforceable, and accurately reflects the law 2 = yes, while neglecting to fully disclose the details of submetering and billing arrangement with regards to water = unenforceable *per se* 3= yes, while neglecting to fully disclose the details of submetering and billing arrangement with regards to	94 percent of the leases (66 out of 70) refer to utilities' payments. Out of these leases, 56 percent (37 leases) include enforceable clauses (which either state that the utilities are separately metered or place the duty to pay for them on the landlord), 21 percent (15 leases) include unenforceable clauses, and 20 percent (14 leases) include misleading clauses.

		gas/electricity = misleading (selective disclosure)	
Failure to Supply Utilities	The MA sanitary Code, for example in 410.090, stipulates that "the owner shall provide and maintain in good operating condition the facilities capable of heating water," for example, and failure to comply with the sanitary code subjects the lessor to liability and to fines.	Is the issue mentioned in the lease? 0 = no If it is, is the lessor's liability in case of failure to supply utilities (such as hot and cold water) waived? 1 = no / no, only penalties (above actual loss) for failure to supply utilities as a result of restrictions are waived = enforceable 2 = yes = unenforceable *per se* 3 = yes, but only "subject to/ in accordance with applicable law" = misleading (3 = legal fallback).	42 per cent of the leases (29 out of 70) contain unenforceable clauses which limit or exempt landlord from liability for failure to supply utilities for reasons beyond her control (for instance, by stating that landlord's failure to provide utilities, such as reasonable heat and hot and cold water, for reasons beyond her control, should not form a basis of any claim for damages against her). Additionally, 54 percent of the leases in the sample (38 out of 70) include unenforceable clauses which limit or waive landlord's liability for failure to perform her obligations (including repair) or supply services due to reasons "beyond Lessor's reasonable control". 97 percent (28 out of 29) of the liability waivers for failure to supply utilities, and 61

			percent (23 out of 38) of the liability waivers for landlord's failure to comply with her obligations, state that they are "subject to applicable law". 16 percent of the liability waivers for landlord's failure to comply with her obligations deny penalties (above actual loss) for failure to fulfill landlord's obligations, and are thus enforceable, as they do not waive the tenant's right to damages for her actual loss.
Rent Acceleration Clause	G.L. c. 186, §15B; 940 C.M.R. §3.17(3)(a)(3). Subsequent to the commencement of the lease, the landlord is not allowed to demand rent in advance in excess of the current month's rent or a security deposit in excess of the first month's rent. A rent acceleration clause is a clause that stipulates that immediately upon termination of the lease, the tenant must pay all rent due for the remainder of the term of the lease (*Commissioner of Ins. v. Massachusetts Accident Co.*, 310 Mass. 769,	Despite the Courts' overall hostility towards acceleration clauses, such clauses are not coded in this study, since they are not categorically prohibited, and may be enforced in certain circumstances.	

	771 (1942); Warshaw, *supra note* **Error! Bookmark not defined.**, 221-224). Such clauses are not favored by the courts, as they are typically perceived as penalty clauses, in violation of the said provision. If the landlord can find a new tenant and collect rent from her, the Court will likely invalidate the acceleration clause. For an acceleration provision to be enforceable, it should be aimed at compensating for damages rather than serving as a penalty, and the damages should be calculated to reasonably compensate the injured party for her loss (Warshaw, *supra note* **Error! Bookmark not defined.**, 223).		
Lessee's Covenants in Event of Termination Clause	*Bridges v. Palmer*, Boston Housing Court, 07326 (May 24, 1979); *Grumman v Barres*, Boston Housing Court, 06334 (March 1, 1979); *Gagne v. Kreinest*, Hampden Housing Court, 92-SC1569 (December 6, 1991) A residential lease may include a clause that holds the tenant responsible for paying the landlord for losses she may suffer as a result of an early termination of the lease (such as the cleaning and repainting costs, loss of rent etc.). A landlord, must, however, use reasonable diligence and mitigate damages in the case of an early termination.	Is the issue mentioned in the lease? 0 = no If it is mentioned, does it include landlord's obligation to mitigate damages? 1 = yes = enforceable and accurately reflects the law 2 = no, it stipulates that landlord does not have to mitigate damages = unenforceable *per se* 3 = no = misleading (selective disclosure): the provision fails to mention landlord's duty.	71 percent of the leases include a provision concerning the lessee's covenants in the event of an early termination of the lease. Out of these leases, 84 percent do not disclose the landlord's duty to mitigate damages in such circumstances, and only 16 percent of the leases include a clause which discloses the landlord's said duty. Interestingly, some of the clauses that do disclose landlord's duty to mitigate damages

			mention the said duty only in the context of the landlords' right to increase her damages above the rent which would have been payable throughout the rest of the lease term. Such clauses state that such an increase will be possible "so long as the Landlord has made a reasonable attempt to find a suitable new Tenant" (See, for example, the GBREB forms (ID 216 and ID 206), section 21).