Glenn
Grothman
STATE REPRESENTATIVE
59TH ASSEMBLY DISTRICT

Office:
Room 125 West, State Capitol • Post Office Box 8952
Madison, Wisconsin 53708 • (608) 264-8486
E-Mail: uswlsswk@ibmmail.com • Toll-Free: 1 (800) 362-9472

Home:
111 South 6th Avenue
West Bend, Wisconsin 53095
(414) 338-8061

CHANGES TO LRB 4442/1 (TENANT-LANDLORD BILL) AS REFLECTED IN LRB 4442/2

●*Penalties, Double Damages, and Attorney Fees are Affirmatively Protected:* Through a complex interaction between the tenant-landlord rules contained in ATCP 134 of the Administrative Code and Chapter 100 of the statutes, the "teeth" of current tenant-landlord law are provided. Current law provides for a variety of civil penalties against scofflaw landlords who violate ATCP 134, as well as double damages and reasonable attorney fees to tenants who successfully sue their landlords in court. Due to legitimate disagreement in the legal community about the effect of this bill on those penalties and civil remedies, LRB 4442/2 writes those protections directly into the statutes.

●*The Exception to Security Deposit Rules for Rent Payments in Advance is Limited:* The original bill would allow landlords to request advance rent payments at the beginning of a lease as additional security for tenants with bad credit or eviction histories. In order to prevent abuses of this new change, LRB 4442/2 limits the amount which may be exempt from the security deposit requirements to 4 months' rent.

●*The Amount Which May Be Withheld From Earnest Money Deposits is Limited:* The original bill would allow landlords to keep the actual costs of a background check from the earnest money of a potential tenant if the credit check reveals a lie or omission so substantial that it disqualifies the applicant. Because some were concerned that landlords might use this as an excuse to take large amounts of money for credit checks, LRB 4442/2 limits the maximum withholding under this provision to $25.

●*Landlords Will Be Required To Provide Promises to Repair In Writing:* Under our original bill, only promises to repair which are issued by landlords in writing are enforceable. In order to assure that landlords do not evade the promises to repair law by simply refusing to issue written promises, LRB 4442/2 provides that landlords must respond to a tenant's written requests for repair with a written promise to repair within 7 days.

●*Tenants are Protected From Signing Away Their Legal Rights:* Under **current law**, a tenant could inadvertently sign away such important rights as the right to a habitable unit, the right to unit maintenance once tenancy has begun, and the like. LRB 4442/2 will make any such provisions in a lease legally unenforceable.

●*The Right of a Landlord to Enter a Unit for Repairs Without Notice is Limited:* Under our original bill, a landlord could enter a unit during working hours to make repairs if the tenant requested the repairs without providing the 12-hour notice for entry provided by law. LRB 4442/2 will limit that right of entry to the first two weeks after the request for repairs is made.

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TALKING POINTS ON THE TENANT-LANDLORD OMNIBUS BILL (4442/2)

What This Proposal Will Do:

●*It establishes a firm, solid date for the beginning of the 21-day time period in which landlords must return security deposits at the end of a lease.* One of the grounds upon which landlords frequently are assessed huge judgments in court is the failure to return the security deposit within 21 days of the end of a lease. Unfortunately, current law does not spell out when the 21-day clock begins. Does it begin on the last day of the lease? When the tenant moves out, even if that is halfway through the last month of the lease and the landlord doesn't know about it? What if the tenant is evicted? Our changes will start the 21-day countdown at the end of the written lease. It contains an exception for leases discharged early -- in which case, a tenant will receive the security deposit 21 days after the end of the month in which the tenant pays all rents and other charges, and vacates the unit. This provides simple, easily-identifiable benchmarks for landlords, tenants, and judges.

●*It will tighten up the "promises to repair" section of the tenant-landlord code.* Frequently, tenants will catch their landlord in the hallway as he or she is on the way to another task, and will request a specific repair. Just as often, the landlord will say something like, "I'll try to do it next week." When it doesn't get done, lawsuits follow. Violations of the "promises to repair" section of the code are one of the most-used grounds for suits against landlords. Our changes will give the force of law only to those repair promises delivered to the tenant in writing. The landlord will be required to respond to a tenant's written request for repairs with his or her own written promise to repair within 7 days. This gives the tenant firm proof of the existence of a promise to repair in the case of a landlord breach. It also gives the busy landlord an out for a passing comment made in the hallway during a hectic period.

●*It will allow landlords to admit repair personnel to an apartment if the tenant had previously requested the repairs in question.* Frequently, a tenant might request of a landlord a repair requiring the services of a professional, such as a plumber. If the plumber shows up too soon for the twelve-hour entry notice to be given to the tenant, however, the plumber must be turned away -- at the cost of the landlord. This change will simply permit the landlord to admit such a person for repair purposes, provided the tenant has given prior consent for the repair, and the repair is to done during regular work hours. This exemption applies only for the first two weeks after the repair request is made by the tenant.

●*It will allow landlords to perform the actual removal of the tenant after an eviction writ has been granted by the court.* Under current law, landlords who have obtained eviction orders from the court must hire a bonded mover to perform the move. In some cases, this can cost a landlord $1000 or more in essentially unrecoverable costs. Our change will allow the landlord to perform the actual moveout if he or she wishes, under the supervision of the sheriff, and only after the judicial process has been followed.

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●*It will tighten the definition of a "form provision" in the law, to protect both tenants and landlords.* Form provisions are a tricky trap for many landlords. A form provision, under current law, is any part of the lease agreement which is not a part of the lease proper. A separate, typewritten sheet containing house rules against loud partying at night might qualify. Form provisions are frequently ruled invalid in court because they are not considered a part of the lease itself. Our change will specify that the term "form provision" not apply to handwritten or typewritten sheets which are separate from the lease if the tenant signs the separate sheet.

●*It creates a "rebuttable presumption" that damages occurring to a dwelling unit during a tenancy are the responsibility of the tenant.* Under current law, the assessment or eviction of tenants for damage to the property often becomes a tricky matter; such actions may not be upheld in court unless the landlord presents "witnesses" to the actual infliction of the damage. For example, a tenant holds a wild party at which the toilet is smashed, holes are knocked in walls, and windows are broken. Unless the landlord can present someone who will testify that the damage resulted from the tenant's party, the landlord may be unable to assess the tenant for those damages. Our change will establish a "rebuttable presumption" as described above -- that is, the tenant is assumed to have inflicted any damage to his or her unit during the tenancy unless he or she can prove otherwise. Particularly in cases of severe or ongoing damage, this is a common-sense measure.

●*It will eliminate the requirement that a list of damages withheld from the previous tenant's security deposit be automatically supplied to each new tenant.* The current law requires that every new tenant automatically receive a copy of the withholdings from the last tenant's security deposit. This rule is not often followed and, in most cases, the new tenant does not want the information anyway. Our change will require the landlord to provide this information only if the tenant requests it in writing. Tenant rights are preserved, and a little-followed law is removed from the books.

●*It will remove a trap by which some landlords suffer unfair judgments in court.* Under current law, landlords are required to physically show all existing building code violations to a prospective tenant, no matter how minor. In past cases, tenants have defended themselves against justified eviction actions by countersuing on the grounds of nondisclosure of very minor building code violations. In some cases, this has even resulted in huge monetary judgments against landlords who were trying to evict tenants for major violations of the lease. Our change will require landlords to make written disclosure of existing building code violations which substantially affect habitability. This will assure that tenants are given knowledge of violations which affect the livability of an apartment, while freeing landlords from such nuisance countersuits.

●*It removes jail time from the penalties for violation of the tenant-landlord code by landlords.* The only mention of imprisonment for a tenant violation of the code is for absconding without paying rent. Statewide, almost no tenant has served time under that law among those found guilty of violating it. There are substantial civil penalties which exist for the violation of tenant-landlord law by landlords, as well as judicial remedies for aggrieved parties. Jail time is an unfair and excessive punishment in the vast majority of tenant-landlord disputes. Tenants who are unhappy with their surroundings are ultimately free to vote with their feet and move elsewhere.

●*It maintains and protects the tenant's ability to pursue legal redress for grievances against the landlord:* The current law relies on general references to the ATCP 134 administrative code chapter in s. 100.20 of the statutes to provide for the civil prosecution of landlords, as well as double damages and attorney fees which can be awarded to a successful plaintiff in a court case involving tenant-landlord law. In response to the concerns of tenant advocates who feared that such protections would be lost under this bill, this draft directly writes these protections into statute. This will guarantee that these remedies will continue to exist.

●*It will protect landlords from abuses of the thermal performance requirements, while assuring that tenants have operating heating systems.* Current law provides that a heating system in a dwelling unit be able to maintain the unit at 67 degrees Fahrenheit. In some cases, this standard could be abused by inspectors who would measure the temperature right up against a window on a bitter cold day. Our changes require the landlord to inform a prospective tenant if the heating system in a dwelling unit cannot maintain a temperature of at least 67 degrees Fahrenheit in the center of a room when the outdoor temperature is above -10 degrees Fahrenheit. This is the standard used in the Milwaukee building code.

●*It will allow landlords to withhold the cost of background and credit checks from earnest money paid for consideration of a rental application in certain cases.* "Earnest Money" is the equivalent of a small deposit on something one intends to buy a short time later. Under current law, some landlords collect earnest money as a means of sorting serious applicants for apartments out from less-committed prospects. In some cases, landlords will reject a rental application because it contains lies or omissions which were ferreted out by a background and credit check. In those cases, the landlord must return the whole earnest money deposit, including the cost for performing the background and credit check. Our change will allow the landlord to withhold the costs of a credit and background check from the earnest money deposit *only if the applicant is rejected because of omissions or falsifications on the application*. These costs would not be withheld in the cases where an applicant is approved, or in which an applicant is rejected because of inability to pay or other legal reasons. In no case will a landlord be able to withhold more than $25 under this change.

●*It will treat advance rent payments differently than security deposits.* Currently, all money collected from tenants in excess of one month's rent is considered a security deposit. As a result, landlords who might otherwise rent to bad credit risks by requesting several months' rent up front do not because they would be unable to keep the money if the tenant breaks the lease. Our change will open to some tenants the ability to enter into leases despite a bad credit or eviction history. Landlords will be limited to the sum of 4 rent payments under this provision.

●*It will make government-owned and managed buildings subject to the same tenant-landlord laws as everyone else.* Current law exempts government-owned and -operated buildings from tenant/landlord laws. This makes no sense, and places government operators above the law. This will rectify that situation.

●*It will allow court commissioners to hear eviction proceedings.* In some jurisdictions, overburdened judges do not have the time to dispose of evictions in a prompt manner once they are filed. This change will retain the right of a tenant subject to eviction to due process, while speeding up the process for landlords pursuing justified evictions.

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CHANGES TO LRB 4442/1 (TENANT-LANDLORD BILL) AS REFLECTED IN LRB 4442/3

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●*The Exception to Security Deposit Rules for Rent Payments in Advance is Limited:* The original bill would allow landlords to request advance rent payments at the beginning of a lease as additional security for tenants with bad credit or eviction histories. In order to prevent abuses of this new change, LRB 4442/2 limits the amount which may be exempt from the security deposit requirements to 4 months' rent.

●*The Amount Which May Be Withheld From Earnest Money Deposits is Limited:* The original bill would allow landlords to keep the actual costs of a background check from the earnest money of a potential tenant if the credit check reveals a lie or omission so substantial that it disqualifies the applicant. Because some were concerned that landlords might use this as an excuse to take large amounts of money for credit checks, LRB 4442/2 limits the maximum withholding under this provision to $25.

●*Tenants are Protected From Signing Away Their Legal Rights:* Under **current law**, a tenant could inadvertently sign away such important rights as the right to a habitable unit, the right to unit maintenance once tenancy has begun, and the like. LRB 4442/2 will make any such provisions in a lease legally unenforceable.

●*The Right of a Landlord to Enter a Unit for Repairs Without Notice is Limited:* Under our original bill, a landlord could enter a unit during working hours to make repairs if the tenant requested the repairs without providing the 12-hour notice for entry provided by law. LRB 4442/2 will limit that right of entry to the first two weeks after the request for repairs is made.

●*The Language Relating to Return of Security Deposits is Further Fine-Tuned:* Some people had concerns that our original language would have allowed a landlord to keep a security deposit until the middle of February on a lease which expired on January 5. The language in the current draft of the bill starts the 21-day clock for the return of a security deposit "on the day that the tenant is last liable for rent." In our example above, this would assure that a tenant whose lease ended on January 5 would have his or her deposit back before the month's end. I have also included an exception for leases terminated early by the tenant, provided the tenant prepays all rents and other charges for which he or she is liable, as well as vacates the unit and provides proper notice.

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●*It will tighten up the "promises to repair" section of the tenant-landlord code.* Frequently, tenants will catch their landlord in the hallway as he or she is on the way to another task, and will request a specific repair. Just as often, the landlord will say something like, "I'll try to do it next week." When it doesn't get done, lawsuits follow. Violations of the "promises to repair" section of the code are one of the most-used grounds for suits against landlords. Our changes will give the force of law only to those repair promises delivered to the tenant in writing. This gives the tenant firm proof of the existence of a promise to repair in the case of a landlord breach. It also gives the busy landlord an out for a passing comment made in the hallway during a hectic period.

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these protections into statute. This will guarantee that these remedies will continue to exist.

●*It will protect landlords from abuses of disclosure requirements related to the performance of the furnace, while assuring that tenants have operating heating systems.* Current law provides that a landlord disclose to a prospective tenant if the furnace is unable to keep the unit at 67 degrees Fahrenheit. In some cases, this standard could be abused by inspectors who would measure the temperature right up against a window on a bitter cold day. Our changes require the landlord to inform a prospective tenant if the heating system in a dwelling unit cannot maintain a temperature of at least 67 degrees Fahrenheit in the center of a room when the outdoor temperature is above -10 degrees Fahrenheit. This is the standard used in the Milwaukee building code. Neither current law nor this bill address the temperature of the unit *once occupied*; that is the province of other state and local building and housing codes.

●*It will allow landlords to withhold the cost of background and credit checks from earnest money paid for consideration of a rental application in certain cases.* "Earnest Money" is the equivalent of a small deposit on something one intends to buy a short time later. Under current law, some landlords collect earnest money as a means of sorting serious applicants for apartments out from less-committed prospects. In some cases, landlords will reject a rental application because it contains lies or omissions which were ferreted out by a background and credit check. In those cases, the landlord must return the whole earnest money deposit, including the cost for performing the background and credit check. Our change will allow the landlord to withhold the costs of a credit and background check from the earnest money deposit *only if the applicant is rejected because of omissions or falsifications on the application*. These costs would not be withheld in the cases where an applicant is approved, or in which an applicant is rejected because of inability to pay or other legal reasons. In no case will a landlord be able to withhold more than $25 under this change.

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●*It will allow court commissioners to hear eviction proceedings.* In some jurisdictions, overburdened judges do not have the time to dispose of evictions in a prompt manner once they are filed. This change will retain the right of a tenant subject to eviction to due process, while speeding up the process for landlords pursuing justified evictions. This is already done in Dane and Milwaukee counties; our change will give other counties firm legal ground on which to proceed.

State of Wisconsin
Tommy G. Thompson, Governor

Department of Agriculture, Trade and Consumer Protection
Alan T. Tracy, Secretary

2811 Agriculture Drive
Madison, Wisconsin 53704-6777

PO Box 8911
Madison, WI 53708-8911

March 11, 1996

The Honorable Glen Grothman,
State Representative
Room 125 West
State Capitol
Madison, WI 53702

The Honorable Mark Green
State Representative
Room 115 West
State Capitol
Madison, WI 53702

Dear Representatives Grothman and Green:

I am writing to follow up on the February 29 public hearing on LRB 4442, the residential rental practices legislation, and your proposed changes to this legislation.

We distributed testimony and written attachments at the hearing of the Assembly Housing Committee which included a list of concerns about LRB 4442. We also expressed concerns about the "process" used to amend the current landlord-tenant law which affects the homes and livelihoods of millions of Wisconsin residents.

Thank you for sending me the proposed changes submitted to the Legislative Reference Bureau. I believe they improve the current legislative draft, but I continue to oppose creating a whole separate body of law which acts to substitute for current administrative rules.

I am willing to consider a process for reviewing and possibly revising ch. ATCP 134 if there are serious, well documented concerns with the current landlord-tenant rule.

Clearly, the substance of your legislative proposal is aimed at revising the current residential rental practices code via the statutes. The Department has yet to receive concise information from income property owners, detailing their concerns in relation to the unfair trade practices prohibited under the current rule. If you are willing to incorporate criminal penalties and private remedies as enforcement provisions under Chapter 704, then I don't see a clear purpose in pursuing legislation.

The Legislature could choose to create a Legislative Council study committee to analyze and separate those residential rental practice

issues which can be addressed by statute, and those which can be more appropriately handled through rule revisions.

In lieu of further legislative action to modify Chapter 704 of the Statutes, I am willing to have the Department consider reviewing suggestions for changes to ch. ATCP 134. We would need to have the income property owners clearly identify the problems they face with respect to the current rule. In addition, I would want to limit the rulemaking process to specific issues and practical problems.

Attached are Department comments to the original "talking points" on the proposed legislation, as well as our responses to the proposed redrafting instructions.

Thank you for the opportunity to comment further on this issue.

Sincerely,

Alan T. Tracy
Secretary

cc: Assembly Housing Committee members

DEPARTMENT OF AGRICULTURE, TRADE AND CONSUMER PROTECTION
COMMENTS TO PROPOSED CHANGES TO THE LANDLORD-TENANT BILL

The Department of Agriculture, Trade and Consumer Protection (DATCP) has reviewed Representative Grothman's proposed changes to the legislative draft on residential rental practices law (LRB 4442/1), and can offer the following comments. There are many other provisions of the proposal which remain troublesome to the Department and which are not being addressed through redrafting changes. DATCP also objects to the general approach of addressing administrativer rule concerns (ch. ATCP 134, Wis. Adm. Code) through statutory revisions.

1. Return of Security Deposits

LRB 4442/1 requires landlords to return all security deposits within 21 days "after the last day of the last month in which a tenant is liable for rent." Ch. ATCP 134 refers to "21 days after surrender of the premises." The proposed change to LRB 4442 would start the countdown for return of the security deposit on the last day of the written lease, or the last day of the month in which the tenant has prepaid all rents and other charges for which the tenant is legally liable.

DATCP is aware that a definition of "surrender of premises" in ch. ATCP 134 is needed as a result of previous court interpretations. The redrafting instructions do not adequately address the situation where a tenant vacates the premises prior to the end of the lease, yet is still entitled to a full return of the security deposit within 21 days after the tenant's departure. When a lease is broken by the tenant, the landlord is required to make reasonable attempts to rent the premises. If the landlord succeeds in this effort, he or she has mitigated any economic losses unless the landlord can demonstrate other damages as a result of the previous tenancy. Under the proposed revision, the landlord would not be required to return the security deposit until 21 days after the last day of the written lease. For many tenants, this could mean months after the tenant has actually vacated the premises and a new tenant has moved in.

The Department's other concern relates to addressing the definition of "surrender of premises" by statute. This issue is directly tied to language relating to security deposits which is currently detailed in ch. ATCP 134. It is unlikely that the term "surrender" can be defined in the statutes to resolve landlord concerns without incorporating the various provisions related to security deposits. This has always been an issue addressed solely by DATCP rules and not by statute. As written, the proposed legislative draft and the changes will seriously impair current tenant protections governing security deposits in current rules. Although more appropriate language defining "surrender" is possible and perhaps warranted, this should be accomplished as a revision to DATCP rules.

2. Ability of the Landlord to Enter the Premises

The redrafting instructions add language to allow landlords to admit repair personnel to an apartment without notice to the tenant within two weeks of the request for repairs by the

tenant. The proposed change is an improvement to the legislative draft, but DATCP is unclear on the problems which have generated the proposed language. If a landlord currently wishes to enter the premises during the normal work week, the landlord must currently provide the tenant with a 12-hour notice, or receive the tenant's consent. In an emergency situation, there is no advance notice requirement. The proposed changes still provide landlords with unnecessary authority to enter rental units at unannounced times in non-emergency situations, thus jeopardizing the privacy rights of tenants.

3. Penalties

The redrafting instruction would incorporate the penalties, double damages and attorney fee provisions under Chapter 100 of the Statutes for violations of proposed Subchapter I of Chapter 704. This would address some of the concerns expressed at the public hearing, but would create an awkward and uncertain legal framework. If the penalties are the same as for current DATCP rules, why create a duplicative and potentially conflicting body of law? The Department believes that any needed regulatory revisions should be adopted and amended pursuant to the Department's existing authority under s. 100.20, Stats., and should not be repeated in the statutes. Adding the penalty provisions to Chapter 704 may also have legal and administrative ramifications that could impact on the ability of the courts to effectively adjudicate contested eviction orders.

4. Protections to Tenants From Presumptions of Guilt Related to Damages to Common Areas

The redrafting instructions partially correct one of the serious flaws in the current legislative draft. The term "premises" is also used in proposed s. 704.935(3)(a) and requires a similar change to "dwelling unit" to maintain consistency with the intent of your language.

5. Written Requests for Repairs by Landlords

The redrafting instructions would require a landlord who has received a written request for repairs from a tenant to provide a written promise to repair within 7 days of the request for repairs appears reasonable. What if the landlord does not agree to make the repairs (e.g., because the request is unreasonable)? Current DATCP rules do not require written promises to repair by the landlord if agreements to make repairs have been entered into after the rental agreement has been signed by the tenant. Thus, this provision in LRB 4442 seems unnecessary.

6. Form Provisions

The redrafting instructions propose to delete "by means of a form provision" from s. 704.945(6) of the draft. DATCP does not object to this change, but it fails to address the inconsistent definitions of "form provision" in ch. ATCP 134 and proposed s. 704.915(4). The "form provision" issue should be addressed through the rulemaking process, and not through statutory changes.

7. Earnest Money Deposits

The redrafting instructions are insufficient to resolve the major policy concerns and potential landlord abuses associated with earnest money deposits by tenants. Although proposed changes limit the amount of earnest money deposits that may be withheld by a landlord to $25, there will be little to prevent a landlord from withholding portions of earnest money deposits as a standard practice, even though the landlord is incurring only partial costs associated with requesting credit checks on tenants. DATCP believes that the current DATCP rule provides a fairer approach by allowing landlords to deduct for actual costs and damages if the prospective tenant backs out of an accepted lease agreement. This restriction is no different than current restrictions on the use of "good faith" money deposits associated with real estate transaction agreements.

8. Definition of Security Deposits

The redrafting instructions would allow a landlord to collect up to four months prepaid rent without having to account for that prepayment as a "security deposit." The Department believes that this would invite widespread abuse. The current DATCP rule defines "security deposit" as "the total of all payments and deposits given by a tenant to the landlord as security for performance of the tenant's obligations, and includes all rent payments in excess of one month's prepaid rent." Security deposit issues represent one of the most frequent consumer complaints received by DATCP. DATCP opposes any changes at this time to the current ch. ATCP 134 definition of "security deposit." However, the Department is willing to consider changes to the current rules based on well-reasoned arguments and a clear documentation of problems that can command broad-based support from affected groups.

DEPARTMENT OF AGRICULTURE, TRADE AND CONSUMER PROTECTION
Response to Rep. Grothman's Talking Points on LRB 4442

1. *Establishes a firm date for the beginning of the 21-day time period to return security deposits or provide an accounting.* The current law starts the 21-day clock as of the date of "surrender of the premises." This has been defined by the courts as the date the landlord knew, or should have known that the tenant has vacated. LRB 4442 extends the time requirement a landlord must meet when returning the security deposit to the tenant, even in cases where tenants must abandon the property due to uninhabitablity or other justifiable reasons. This could be as much as a 12-month wait for the return of security deposits for tenants vacating early in the lease period. The likely result would be the legal return of far fewer security deposits to former tenants.

2. *Tightens up promise to repair provisions.* Current Administrative Code (ATCP 134.07) and the draft (s. 704.94) are functionally identical and the Department sees no reason for this provision to be repeated in the statutes.

3. *Allows landlords to enter without 12 hour notice for tenant requested repairs.* The proposed draft would add language allowing entry without advance notice where "the tenant requests specified repairs and the repairs are made during normal working hours." The Department believes that this is too open-ended and would like to see language which more narrowly focuses the "window" for entry. Additionally, the draft language would need to contain a provision that a tenant reporting a building code violation to proper authorities does not, itself, constitute a "request for repairs" which would allow entry without notice.

4. *Allows landlords to perform evictions after execution of a writ by the court.* The Department strongly opposes this provision because it provides for movement and storage of tenant property by persons unknown (landlords relatives, friends), who may be non-bonded, potentially uninsured, and without proper equipment. Also, it increases the threat of personal confrontation between the landlord or their mover and the tenant, with those attendant risks in an emotionally charged situation. It also places the tenants property in the position of being held hostage during an ongoing dispute, giving the landlord unfair leverage in reaching a settlement. The Department understands that this is an area of significant cost to income property owners, and would welcome discussions to find a better solution to this issue.

5. *Tightens the definition of a "form provision."* Form provisions have been the subject of many court opinions and are a complex issue. Current law was enacted because of abuses in the industry where leases often had multiple page form provisions packed with "fine print" clauses which often contained prohibited practices under the law. Also, many pre-printed form provisions were given to prospective tenants as part of "the package" who were told that this was "standard in the industry." Tenants often did not understand the lease provisions to which they were agreeing, yet frequently agreed to onerous provisions without adequate explanation or discussion or negotiation by the property owner. DATCP is willing to work to clarify the definition of a form provision to reduce the possibility of landlords inadvertently being held accountable in court for violating this part of the law. But we have a duty to ensure that tenants do not unknowingly negotiate away their rights, and to require full disclosure when negotiating a lease. However, this should occur as part of the rulemaking process.

6. *Creates a "rebuttable presumption" of tenant responsibility for damage.* Current law allows landlords to withhold security deposits for tenant damage, waste, or neglect. Landlords can also establish a "check in" procedure to document conditions at the start of tenancy so that damages during tenancy are presumed to be caused by the tenant. We are unconvinced at this time that an additional legal burden on the tenant is necessary or deserved. This also doesn't address damages caused by landlord neglect, acts of God, or unknown third parties.

7. *Eliminates notification to prospective tenants of previously withheld damages unless requested in writing.* Many tenants are unaware of their rights under the law which currently serves the purpose of notifying tenants of potential problems with a property. Tenants may then inspect the property and determine if the items for which damages were withheld were corrected. This provision also serves to identify repetitive security deposit deductions, providing a basis for determining potential defects. The Department believes that rule changes, if any, should be accomplished by rule amendments, not statutory changes.

8. *Removes a "trap" of "unfair" court judgments for failure to disclose outstanding building code violations.* There is no reason why uncorrected building code violations should not be disclosed to a prospective tenant unless the landlord is attempting to hide them. The courts have upheld the Department's determination that failure to disclose is an unfair business practice. Building code violations, by definition, materially and substantially affect the safety and habitability of a dwelling. Tenants should not be placed in a "buyer beware" position of having to determine whether there may be problems with a dwelling that may not be apparent unless examined by an expert. Full disclosure is a landlord's best defense in case of lawsuits at a later date on other issues, and the current law protects landlords more fully if they comply with it's provisions.

9. *Removes jail time for violations of ATCP 134.* The Department strongly supports current penalties of double damages, plus attorney fees, and criminal penalties, including possible jail sentences, for violations of ch. ATCP 134. DATCP strongly opposes the proposed legislation that would remove these penalties. There is no reason to create a special, exempt class of businesses which are not subject to criminal sanction, including jail time, for the most egregious cases. As the Milwaukee County Assistant District Attorney testified, his office criminally prosecutes more tenants than landlords on an annual basis, so there is a balance in enforcement. The proposed removal of criminal penalties for violations of s. 100.20, Stats., is a clear attempt to remove DATCP's tri-agency prosecutorial agreements which were established in Milwaukee and Brown Counties to address flagrant abuses by landlords.

10. *Changes disclosure requirements for minimum dwelling temperature.* The legislation changes how minimum heating temperature disclosure is calculated. In Wisconsin, temperatures often fall below -10 degrees Fahrenheit. The legislation would remove the landlord's responsibility to provide adequate disclosure of inadequate heating capacity for the full range of climatic conditions experienced in the state. Current DATCP rules do not require that dwellings be heated to a certain minimum temperature, but only require disclosure to prospective tenants if inadequate heating exists. The tenant is then free to determine if they want to enter a lease or go elsewhere.

11. *Allows landlords to deduct costs of background checks from rejected applicants from earnest money.* The legislation allows charging application fees against earnest money deposits if the landlord rejects the tenant. It also adds conditions for rejection such as "omissions or falsifications" on the tenant application that are ambiguous. Credit checks have traditionally been considered a "cost of doing business." If this part of the law is changed, it should reflect the actual cost of a credit check as opposed to a predetermined amount. DATCP is also concerned that credit check costs may be inflated, or may not be conducted in all cases despite routine chargebacks on earnest money deposits as a standard practice.

12. *Treats advance rent payments differently than security deposits.* The legislation creates a new definition of "security deposit" which removes advance rent payments from current consumer protections. The bill would create a new category of money exchanged between landlord and tenant, often several months rent in the case of students renting campus apartments. It opens the door for significant abuse, such as extortionary ($5000 - 10,000) security deposits offered to tenants as a rent reduction option. The proposal also removes the 21- day requirement for return of this money in the event of early termination of tenancy. Since Wisconsin does not require security deposits to be placed in escrow, or to accrue interest for the tenant (as in many other states), the proposed legislation serves only as a revenue generating tool for property owners. Advance rent should be treated no differently than a down payment for a home improvement contract, placed in trust with the landlord, but belonging to the tenant until it is applied to the job.

13. *Brings government owned and managed buildings under this law.* DATCP cannot regulate government-owned property under its current authority. Even if the legislation were to change state law to regulate government-owned properties, that legislation may be preempted by federal law as it relates to federally subsidized housing. Finally, the issue which the legislation attempts to address is largely moot in light of current federal housing policies. These policies are swiftly shifting away from federally subsidized housing projects and toward federal housing vouchers.

14. *Allows court commissioners to hear eviction proceedings.* The legislation allows potential conflicts of interest because some court commissioners are attorneys who represent property owners. The Department applauds the effort to speed the judicial process. However, additional safeguards are needed to ensure that both landlords and tenants have the opportunity to be heard before a judge if desired, and to ensure impartiality by the commissioner hearing the case.

Glenn
Grothman
STATE REPRESENTATIVE
59TH ASSEMBLY DISTRICT

Office:
Room 125 West, State Capitol · Post Office Box 8952
Madison, Wisconsin 53708 · (608) 264-8486
E-Mail: uswlsswk@ibmmail.com · Toll-Free: 1 (800) 362-9472

Home:
111 South 6th Avenue
West Bend, Wisconsin 53095
(414) 338-8061

MEMORANDUM

To: **All Legislative Colleagues**

From: **Representative Glenn Grothman**

Date: **March 14, 1996**

Re: **Tenant-Landlord Omnibus Reform Bill**

It is my pleasure to inform you that the tenant-landlord bill has been introduced into the Assembly. **It is now known as Assembly Bill 1038.**

I have attached the most recent, introduced version of the bill, along with amended talking points for your use in communications with constituents. Please do not rely on previous versions of the talking points; certain provisions of the bill have changed, and previous talking points sheets would not address those changes.

If you have any questions, please feel free to contact me.

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Glenn Grothman
STATE REPRESENTATIVE
59TH ASSEMBLY DISTRICT

Office:
Room 125 West, State Capitol · Post Office Box 8952
Madison, Wisconsin 53708 · (608) 264-8486
E-Mail: uswlsswk@ibmmail.com · Toll-Free: 1 (800) 362-9472

Home:
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West Bend, Wisconsin 53095
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TALKING POINTS ON THE TENANT-LANDLORD OMNIBUS BILL (AB 1038)

What This Proposal Will Do:

●*It establishes a firm, solid date for the beginning of the 21-day time period in which landlords must return security deposits at the end of a lease.* One of the grounds upon which landlords frequently are assessed huge judgments in court is the failure to return the security deposit within 21 days of the end of a lease. Unfortunately, current law does not spell out when the 21-day clock begins. Does it begin on the last day of the lease? When the tenant moves out, even if that is halfway through the last month of the lease and the landlord doesn't know about it? What if the tenant is evicted? Our changes will start the 21-day countdown on the day that the tenant is last liable for rent (the end of the lease, in most cases). It contains an exception for leases discharged early -- in which case, a tenant will receive the security deposit 21 days after the end of the month in which the tenant pays all rents and other charges, and vacates the unit. This provides simple, easily-identifiable benchmarks for landlords, tenants, and judges.

●*It will tighten up the "promises to repair" section of the tenant-landlord code.* Frequently, tenants will catch their landlord in the hallway as he or she is on the way to another task, and will request a specific repair. Just as often, the landlord will say something like, "I'll try to do it next week." When it doesn't get done, lawsuits follow. Violations of the "promises to repair" section of the code are one of the most-used grounds for suits against landlords. Our changes will give the force of law only to those repair promises delivered to the tenant in writing. This gives the tenant firm proof of the existence of a promise to repair in the case of a landlord breach. It also gives the busy landlord an out for a passing comment made in the hallway during a hectic period.

●*It will allow landlords to admit repair personnel to an apartment if the tenant had previously requested the repairs in question.* Frequently, a tenant might request of a landlord a repair requiring the services of a professional, such as a plumber. If the plumber shows up too soon for the twelve-hour entry notice to be given to the tenant, however, the plumber must be turned away -- at the cost of the landlord. This change will simply permit the landlord to admit such a person for repair purposes, provided the tenant has given prior consent for the repair, and the repair is to done during regular work hours. This exemption applies only for the first two weeks after the repair request is made by the tenant.

●*It will allow landlords to perform the actual removal of the tenant after an eviction writ has been granted by the court.* Under current law, landlords who have obtained eviction orders from the court must hire a bonded mover to perform the move. In some cases, this can cost a landlord $1000 or more in essentially unrecoverable costs. Our change will allow the landlord to perform the actual moveout if he or she wishes, under the supervision of the sheriff, and only after the judicial process has been followed.

●*It will tighten the definition of a "form provision" in the law, to protect both tenants and landlords.* Form provisions are a tricky trap for many landlords. A form provision, under current law, is any part of the lease agreement which is not a part of the lease proper. A separate, typewritten sheet containing house rules against

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loud partying at night might qualify. Form provisions are frequently ruled invalid in court because they are not considered a part of the lease itself. Our change will specify that the term "form provision" not apply to handwritten or preprinted sheets which are separate from the lease if the tenant signs the separate sheet.

●*It creates a "rebuttable presumption" that damages occurring to a dwelling unit during a tenancy are the responsibility of the tenant.* Under current law, the assessment or eviction of tenants for damage to the property often becomes a tricky matter; such actions may not be upheld in court unless the landlord presents "witnesses" to the actual infliction of the damage. For example, a tenant holds a wild party at which the toilet is smashed, holes are knocked in walls, and windows are broken. Unless the landlord can present someone who will testify that the damage resulted from the tenant's party, the landlord may be unable to assess the tenant for those damages. Our change will establish a "rebuttable presumption" as described above -- that is, the tenant is assumed to have inflicted any damage to his or her unit during the tenancy unless he or she can prove otherwise. Particularly in cases of severe or ongoing damage, this is a common-sense measure.

●*It will eliminate the requirement that a list of damages withheld from the previous tenant's security deposit be automatically supplied to each new tenant.* The current law requires that every new tenant automatically receive a copy of the withholdings from the last tenant's security deposit. This rule is not often followed and, in most cases, the new tenant does not want the information anyway. Our change will require the landlord to provide this information only if the tenant requests it in writing. Tenant rights are preserved, and a little-followed law is removed from the books.

●*It will remove a trap by which some landlords suffer unfair judgments in court.* Under current law, landlords are required to physically show all existing building code violations to a prospective tenant, no matter how minor. In past cases, tenants have defended themselves against justified eviction actions by countersuing on the grounds of nondisclosure of very minor building code violations. In some cases, this has even resulted in huge monetary judgments against landlords who were trying to evict tenants for major violations of the lease. Our change will require landlords to make written disclosure of existing building code violations which substantially affect habitability. This will assure that tenants are given knowledge of violations which affect the livability of an apartment, while freeing landlords from such nuisance countersuits.

●*It removes jail time from the penalties for violation of the tenant-landlord code by landlords.* The only mention of imprisonment for a tenant violation of the code is for absconding without paying rent. Statewide, almost no tenant has served time under that law among those found guilty of violating it. There are substantial civil penalties which exist for the violation of tenant-landlord law by landlords, as well as judicial remedies for aggrieved parties. Jail time is an unfair and excessive punishment in the vast majority of tenant-landlord disputes. Tenants who are unhappy with their surroundings are ultimately free to vote with their feet and move elsewhere.

●*It maintains and protects the tenant's ability to pursue legal redress for grievances against the landlord:* The current law relies on general references to the ATCP 134 administrative code chapter in s. 100.20 of the statutes to provide for the civil prosecution of landlords, as well as double damages and attorney fees which can be awarded to a successful plaintiff in a court case involving tenant-landlord law. In response to the concerns of tenant advocates who feared that such protections would be lost under this bill, this draft directly writes

these protections into statute. This will guarantee that these remedies will continue to exist.

●*It will protect landlords from abuses of disclosure requirements related to the performance of the furnace, while assuring that tenants have operating heating systems.* Current law provides that a landlord disclose to a prospective tenant if the furnace is unable to keep the unit at 67 degrees Fahrenheit. In some cases, this standard could be abused by inspectors who would measure the temperature right up against a window on a bitter cold day. Our changes require the landlord to inform a prospective tenant if the heating system in a dwelling unit cannot maintain a temperature of at least 67 degrees Fahrenheit in the center of a room when the outdoor temperature is above -10 degrees Fahrenheit. This is the standard used in the Milwaukee building code. Neither current law nor this bill address the temperature of the unit *once occupied*; that is the province of other state and local building and housing codes.

●*It will allow landlords to withhold the cost of background and credit checks from earnest money paid for consideration of a rental application in certain cases.* "Earnest Money" is the equivalent of a small deposit on something one intends to buy a short time later. Under current law, some landlords collect earnest money as a means of sorting serious applicants for apartments out from less-committed prospects. In some cases, landlords will reject a rental application because it contains lies or omissions which were ferreted out by a background and credit check. In those cases, the landlord must return the whole earnest money deposit, including the cost for performing the background and credit check. Our change will allow the landlord to withhold the costs of a credit and background check from the earnest money deposit *only if the applicant is rejected because of omissions or falsifications on the application*. These costs would not be withheld in the cases where an applicant is approved, or in which an applicant is rejected because of inability to pay or other legal reasons. In no case will a landlord be able to withhold more than $25 under this change.

●*It will treat advance rent payments differently than security deposits.* Currently, all money collected from tenants in excess of one month's rent is considered a security deposit. As a result, landlords who might otherwise rent to bad credit risks by requesting several months' rent up front do not because they would be unable to keep the money if the tenant breaks the lease. Our change will open to some tenants the ability to enter into leases despite a bad credit or eviction history. Landlords will be limited to the sum of 4 rent payments under this provision.

●*It will make government-owned and managed buildings subject to the same tenant-landlord laws as everyone else.* Current law exempts government-owned and -operated buildings from tenant/landlord laws. This makes no sense, and places government operators above the law. This will rectify that situation.

●*It will allow court commissioners to hear eviction proceedings.* In some jurisdictions, overburdened judges do not have the time to dispose of evictions in a prompt manner once they are filed. This change will retain the right of a tenant subject to eviction to due process, while speeding up the process for landlords pursuing justified evictions. This is already done in Dane and Milwaukee counties; our change will give other counties firm legal ground on which to proceed.

Glenn
Grothman
STATE REPRESENTATIVE
59TH ASSEMBLY DISTRICT

Office:
Room 125 West, State Capitol · Post Office Box 8952
Madison, Wisconsin 53708 · (608) 264-8486
E-Mail: uswlsswk@ibmmail.com · Toll-Free: 1 (800) 362-9472

Home:
111 South 6th Avenue
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CHANGES TO LRB 4442/1 (TENANT-LANDLORD BILL) AS REFLECTED IN LRB 4442/3 (AB 1038)

●*Penalties, Double Damages, and Attorney Fees are Affirmatively Protected:* Through a complex interaction between the tenant-landlord rules contained in ATCP 134 of the Administrative Code and Chapter 100 of the statutes, the "teeth" of current tenant-landlord law are provided. Current law provides for a variety of civil penalties against scofflaw landlords who violate ATCP 134, as well as double damages and reasonable attorney fees to tenants who successfully sue their landlords in court. Due to legitimate disagreement in the legal community about the effect of this bill on those penalties and civil remedies, LRB 4442/3 writes those protections directly into the statutes.

●*The Exception to Security Deposit Rules for Rent Payments in Advance is Limited:* The original bill would allow landlords to request advance rent payments at the beginning of a lease as additional security for tenants with bad credit or eviction histories. In order to prevent abuses of this new change, LRB 4442/3 limits the amount which may be exempt from the security deposit requirements to 4 months' rent.

●*The Amount Which May Be Withheld From Earnest Money Deposits is Limited:* The original bill would allow landlords to keep the actual costs of a background check from the earnest money of a potential tenant if the credit check reveals a lie or omission so substantial that it disqualifies the applicant. Because some were concerned that landlords might use this as an excuse to take large amounts of money for credit checks, LRB 4442/3 limits the maximum withholding under this provision to $25.

●*Tenants are Protected From Signing Away Their Legal Rights:* Under **current law**, a tenant could inadvertently sign away such important rights as the right to a habitable unit, the right to unit maintenance once tenancy has begun, and the like. LRB 4442/3 will make any such provisions in a lease legally unenforceable.

●*The Right of a Landlord to Enter a Unit for Repairs Without Notice is Limited:* Under our original bill, a landlord could enter a unit during working hours to make repairs if the tenant requested the repairs without providing the 12-hour notice for entry provided by law. LRB 4442/3 will limit that right of entry to the first two weeks after the request for repairs is made.

●*The Language Relating to Return of Security Deposits is Further Fine-Tuned:* Some people had concerns that our original language would have allowed a landlord to keep a security deposit until the middle of February on a lease which expired on January 5. The language in the current draft of the bill starts the 21-day clock for the return of a security deposit "on the day that the tenant is last liable for rent." In our example above, this would assure that a tenant whose lease ended on January 5 would have his or her deposit back before the month's end. I have also included an exception for leases terminated early by the tenant, provided the tenant prepays all rents and other charges for which he or she is liable, as well as vacates the unit and provides proper notice.

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Grothman 4442/3 landlord bill

State of Wisconsin
Tommy G. Thompson, Governor

Department of Agriculture, Trade and Consumer Protection
Alan T. Tracy, Secretary

2811 Agriculture Drive
Madison, Wisconsin 53704-6777

PO Box 8911
Madison, WI 53708-8911

March 21, 1996

The Honorable Glen Grothman
State Representative
Room 125 West
State Capitol
Madison, WI 53702

Dear Representative Grothman:

This letter is in response to your request for further comments on landlord-tenant legislation (LRB 4442/3), which was recently modified at your request. Department staff and I have met to review the most recent proposed changes.

If there are concerns related to current administrative rules under ch. ATCP 134, Wis. Adm. Code, we continue to believe that those concerns should more appropriately be addressed in the rules themselves rather than by creating a duplicative and potentially conflicting body of law. As to the specific policy changes incorporated in LRB 4442/3, we offer the following comments:

1. Penalties

The revised bill incorporates civil and criminal monetary penalties and injunctive relief under ss. 100.20 and 100.26, Stats., for violations of proposed subch. II of ch. 704, Stats. However, the bill continues to exclude landlords from jail terms. This will negate existing tri-agency agreements with county district attorneys and municipalities to prosecute egregious violations related to condemned and dangerous housing.

The current criminal penalties have not been abused, nor have they been used with great frequency. Prosecutors have sought jail terms only for the most egregious violations, when it appeared that landlords were unaffected by other remedies. The department opposes any changes in current law that would limit options currently available to courts and district attorneys.

2. Removal of Personal Property by Landlords or take along with tenant when he leaves the premises

The revised bill authorizes a landlord, rather than a bonded or insured mover, to remove a tenant's property from the premises following an eviction notice. We understand that use of a insured or bonded mover may entail higher costs for a landlord. But we are also concerned that "self help" removal by the landlord may result in conflicts over

alleged damage to a tenant's property, and may invite abuse in some cases.

One alternative, which we have not fully explored, may be to permit landlords to deduct, from a tenant's security deposit, costs which the landlord incurs for a bonded or insured mover to carry out a court-ordered eviction under the sheriff's supervision. This might provide some additional recompense for landlords, while minimizing conflicts associated with "self-help" evictions. We would be willing to consider such a change to current rules, subject to further analysis and discussion with affected groups.

3. Publicly Owned and Operated Rental Housing

The revise bill extends proposed ch. 704 amendments to dwelling units owned and operated by government. As you know, DATCP rulemaking authority extends only to persons engaged in "business," and does not extend to government institutions.

If the legislature wishes to regulate government-owned housing, it may wish to consider whether all of ch. 704, not just proposed subch. II, should be made explicitly applicable to that housing. We have not researched applicable law to determine whether legislation purporting to regulate government housing would be preempted by federal law.

As previously noted, we oppose the creation of subchapter II of ch. 704, to the extent that it duplicates (or conflicts with) our current rules for private landlords under ch. ATCP 134, Wis. Adm. Code. However, we would not necessarily oppose subchapter II if it applies only to government institutions which we do not regulate.

4. Definition of "Form Provision"

There is no purpose for this definition, except in the context of proposed subchapter II of ch. 704, which would duplicate (or conflict with) current department rules under ATCP 134. For that reason, we oppose it.

We are willing to consider changes to the current definition of "form provision" in ATCP 134, subject to further analysis and discussion with affected parties. However, we are not yet prepared to endorse the specific formulation which you have proposed.

ATCP 134 does not prohibit "form provisions." It merely says that landlords cannot use boilerplate "form provisions" to waive certain tenant rights that are otherwise guaranteed by law. If a tenant wishes to waive those rights, there must be some assurance that the waiver is specifically understood and negotiated, not just buried in the fine print. While we are open to suggestions on possible changes to our definition of "form provision," we think that the issue needs further discussion.

5. Definition of "Security Deposit"

The revised bill defines "security deposit" in a manner that is inconsistent with ATCP 134. Under ATCP 134, prepaid rent in excess of one month's prepaid rent is considered

a "security deposit" and is treated as such. A landlord may withhold from the deposit unpaid rent for which the tenant is legally liable. The landlord must account for any amounts withheld, and must return the remainder within 21 days after the tenant vacates.

We believe that the current security deposit provisions under ATCP 134 address documented abuses, and provide important protection for tenants. The department strongly opposes law changes which would undermine that protection.

There is no purpose for the proposed "security deposit" definition, except in the context of proposed subchapter II of ch. 704, which would duplicate (or conflict with) current department rules under ATCP 134. For that reason, we oppose it.

We also oppose the definition on its merits. By excluding up to 4 months' prepaid rent from the definition of "security deposit," the legislation would effectively eliminate any controls over the handling and disposition of large advance deposits which the landlord chooses to characterize as "prepaid rent." It would also authorize rent acceleration practices that are currently prohibited by law.

6. Heating Standard

The revised bill would require landlords to make a disclosure to tenants if heating facilities are not adequate to heat a dwelling unit to 67 degrees F. when outside temperatures are above minus 10 degrees F. This is different from ATCP 134, which currently requires a disclosure if heating facilities are not adequate to maintain 67 degrees F. "during all seasons of the year when the dwelling unit may be occupied."

The current ATCP 134 standard is arguably stricter in areas where temperatures go below minus 10 degrees F. DATCP does not necessarily impose the proposed provision on its merits. However, we would oppose it if it were included in a wholesale legislative rewrite or duplication of ATCP 134. We are willing to consider changes to the current disclosure standard under ATCP 134.

7. Earnest Money Deposits

The revised bill allows a landlord to withhold, from a tenant's "earnest money deposit," up to $25 for a credit check. The landlord could withhold this amount even if the landlord rejected the tenant's application, and even if the landlord could not actually document a $25 cost. We think this invites abuse, and imposes an unfair burden on poor tenants whom a landlord rejects for tenancy.

The purpose of an "earnest money" deposit is to reimburse the landlord for actual losses incurred when a rental applicant backs out of an application. It should not be used to reimburse a credit check on a tenant unless the tenant declines to rent, and unless the landlord actually incurs and documents the credit check cost.

We object to this provision because it conflicts with current rules under ATCP 134 which we consider appropriate.

8. Security Deposit Handling

The revised bill makes numerous changes to current rules related to security deposits. It also adds new language on "surrender of premises" which, in our view, will permit improper withholding of prepaid rent following early termination of lease agreements. The department objects to these provisions.

Issues related to security deposits and "surrender of premises" are complex. If changes are needed, they should be implemented by rule after careful study.

9. Promises to Repair

The revised bill adds language specifying what constitutes an "unavoidable delay" in making repairs. The department acknowledges that its rules in this area may need clarification. But we do not necessarily agree with the language proposed in the bill. Again, we believe that this issue can best be addressed by rule.

10. Prohibited Rental Agreement Provisions

The revised bill deletes the words "by means of a form provision" under proposed s. 704.945(6). The department has no objection to this change, although we do object to the creation of s. 704.945(6) and other provisions which duplicate current DATCP rules. We would be willing to revise ATCP 134 to incorporate the language now proposed for s. 704.945(6).

11. Prohibited Practices

The revised bill allows unauthorized entry by a landlord to fulfill tenant requests to repair, provided that repairs are made during normal working hours within 2 weeks after a tenant's request. The department opposes this provision, which raises significant "privacy" and security issues for many tenants. We believe that the current rules under ATCP 134 are reasonable, although we are willing to discuss possible changes.

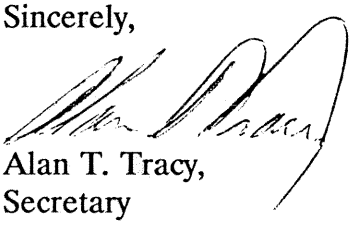
12. Court Commissioners

The revised bill allows, but does not require, court commissioners to participate in eviction disputes. The department has no objection to this change.

Although I appreciate your efforts to revise the proposed landlord-tenant legislation to respond to opposing concerns, there remain a number of problems and concerns with the proposal. The department believes that the process by which the landlord-tenant concerns should be addressed is through rulemaking.

Thank you again for the opportunity to comment again on this issue. I hope this letter sufficiently addresses your request for additional information.

Sincerely,



Alan T. Tracy,
Secretary

cc: Assembly Housing Committee Members

I-Signed on to the letter

Representative Glenn Grothman
Room 125 West, State Capitol
608-264-8486

Representative Frank Urban
Room 13 West, State Capitol
608-266-9175

Dear Legislative Colleagues:

Attached, please find a letter that we have authored to Secretary Alan Tracy, of the Department of Agriculture, Trade, and Consumer Protection.

As you may recall, hearings were held earlier this year on Assembly Bill 1038, which would have modified the administrative rules governing tenant-landlord relations in Wisconsin. While this legislation did not make it to the floor for a vote, it did inspire some dialogue about problems with the current Code, and opened the lines of communication necessary to accomplish true, balanced, and fair reform.

In negotiations prior to the committee hearing on AB 1038, and at the hearing itself, the Department offered to begin the process of modification of these rules in light of the attention they were receiving. The attached letter requests that this process begin soon.

If you are interested in co-signing this letter, please contact Steve in Representative Grothman's office (4-8486) or Sara in Representative Urban's office (6-9175). Please inform us of your decision by July 10, 1996. Thank you for your attention and time.

Sincerely,

Glenn

Glenn Grothman
State Representative
59th Assembly District

Frank

Frank Urban
State Representative
99th Assembly District

June 27, 1996

Alan Tracy, Secretary
Department of Agriculture, Trade and Consumer Protection
Prairie Oak State Offices
2811 Agriculture Drive
Madison, WI 53708

Dear Secretary Tracy:

We, the undersigned, request the Department of Agriculture, Trade and Consumer Protection (DATCP) to update ATCP Chapter 134 Adm. Code, Residential Rental Practices, as adopted under s. 100.20, Stats.

These rules were promulgated in 1980, and have undergone no serious level of scrutiny or change since then. As you are aware, the Legislature has expressed its interest in rectifying the many serious problems with ATCP 134 via the introduction of AB 1038 earlier this year. While that legislation did not pass, it did expose the multitude of deficiencies which exist in the current code and create the beginnings of a dialogue aimed at repairing them.

At public hearings on AB 1038, Department spokespeople argued that the proposal was out of line because it abrogated the standard rulemaking process. Department officials offered to accelerate the review process for changes to this set of rules in exchange for a postponement of legislative action on AB 1038. We are prepared to take the Department up on that offer.

We thank you in advance for your consideration in this matter. We look forward to your response.

Sincerely,

State of Wisconsin
Tommy G. Thompson, Governor

Department of Agriculture, Trade and Consumer Protection
Alan T. Tracy, Secretary

2811 Agriculture Drive
Madison, Wisconsin 53704-6777

PO Box 8911
Madison, WI 53708-8911

August 15, 1996

The Honorable Frank Urban
State Representative
99th Assembly District

Dear Representative Urban:

Thank you for your request to update Chapter ATCP 134, Residential Rental Practices.

During the hearing on Assembly Bill 1038, the Department of Agriculture, Trade and Consumer Protection offered to initiate a process of reviewing ATCP 134, which could result in revision of areas where we can achieve consensus and common ground.

This process would serve to answer many previously stated concerns, represent the interests of all concerned parties. I propose to create an *ad hoc* advisory group, chaired by Elmer Prenzlow, Regional Manager for our Milwaukee consumer protection office, who testified with me at the hearing on AB 1038 last March. The group would also include the following representatives, at a minimum: DATCP staff and legal counsel, SE Wis. Apt. Owners Assn., Wis. Apt. Owners Assn., Madison Apt. Owners Assn., NE Wis. Apt. Owners Assn., Legal Action of Wis., Community Advocates, Madison Tenant Resource Center. One or two other groups could be added to achieve additional balance and oversight, if necessary, while maintaining a workable group size of less than twelve members. Hopefully, their first meeting can be scheduled for September.

I would seek to enter into this process with the following goals:

1. This group will be chartered to bring to the table major problem areas from their individual perspectives in the current rule, or guiding statutes. Once on the table, these discussion items could be examined, redefined if necessary, and rule or statutory language developed by consensus as much as possible.

2. The desired work product of this group would be draft rule language amending Chapter ATCP 134. Recommended changes to ch.704, Stats., would be forwarded to legislative sponsors for appropriate action.

3. DATCP would then take rule-related items forward through the rule revision process to DATCP's Board with the agreement and understanding that Chapter ATCP 134 would be opened for amendment on those items where consensus was reached.

I believe that this process can narrow the distance between the positions of interested parties and achieve a satisfactory, balanced agreement, which would best serve the interests of income property owners and tenants alike. The process needs to be entered into carefully, so that both statute and rule can operate coherently.

Thank you for your interest in this matter.

Sincerely,

Alan T. Tracy
Secretary

cc: The Honorable Glenn Grothman
State Representative
59th Assembly District

The Honorable Scott Gunderson
State Representative
83rd Assembly District

The Honorable David Ward
State Representative
37th Assembly District

The Honorable Mary Lazich
State Representative
84th Assembly District

The Honorable Carol Owens
State Representative
53rd Assembly District

The Honorable Luther Olsen
State Representative
41st Assembly District

The Honorable Scott Walker
State Representative
14th Assembly District

The Honorable Frank Lasee
State Representative
2nd Assembly District

The Honorable Lolita Schneiders
State Representative
24th Assembly District

The Honorable Robert T. Welch
State Senator
14th Senate District

The Honorable Peggy Rosenzweig
State Senator
5th Senate District

State of Wisconsin
Tommy G. Thompson, Governor

Department of Agriculture, Trade and Consumer Protection
Alan T. Tracy, Secretary

2811 Agriculture Drive
Madison, Wisconsin 53704-6777

PO Box 8911
Madison, WI 53708-8911

Public Hearing Testimony
Assembly Housing Committee
Room 328 NW, State Capitol

February 29, 1996

Chairperson Owens and Committee Members:

The Department of Agriculture, Trade and Consumer Protection (DATCP) is testifying this afternoon in opposition to LRB 4442, relating to residential rental practices.

More than 1.4 million Wisconsin residents, including about one-half of all Madison and Milwaukee residents, live in rental housing. Thousands of rental transactions occur in Wisconsin annually. It is important to both tenants and landlords that these transactions be conducted fairly, and the rental agreements be carried out honorably.

Section 100.20, Stats., known as Wisconsin's "Little FTC Act", prohibits unfair trade practices and methods of competition in business, and gives authority to DATCP to adopt rules and special orders prohibiting business practices deemed to be unfair and deceptive. Under this statutory authority, the Department adopted ch. ATCP 134, Wis. Adm. Code, relating to Residential Rental Practices, in 1980.

Prior to the adoption of ch. ATCP 134, the issue of fairness in the landlord-tenant relationship had become an increasing concern to the Wisconsin Legislature. During the mid to late 1970s, numerous bills were introduced in the Legislature aimed at a comprehensive overhaul of Wisconsin's landlord-tenant law, Chapter 704 of the Statutes. In each case, however, the bills failed to win necessary legislative approval.

Thereafter, the Legislature directed DATCP to undertake a study of the nature and extent of landlord-tenant problems in the state, and to determine whether there was justification for regulation in this area. During the fall of 1978, DATCP held extensive public informational hearings on the issue, and obtained additional information from two supplementary reports -- A Survey of Tenants in Six Wisconsin Cities (by Arthur Young and Company), and a Survey of Selected Small Claims Courts in Wisconsin (by the Center for Public Representation). The current Residential Rental Practices Code addresses rental abuses documented by the Department, has helped to clarify current landlord-tenant law, and has worked to resolve a highly contentious legislative debate.

Since its enactment in 1980, ch. ATCP 134 has provided a fair and sensible balance between the rights and responsibilities of both landlords and tenants. While no rule is perfect, we

believe the current Residential Rental Practices Code has worked well. Neither landlords nor tenants have made a serious effort to change it for nearly two decades. Through the years, it has remained as one of the most important rules administered by DATCP, and has addressed the largest source of consumer complaints in Wisconsin.

In 1995 alone, the Department's Consumer Protection Bureau received more than 32,000 landlord-tenant inquiries and over 1,850 written complaints. Landlord-tenant complaints also ranked in the top five complaint categories for the Department of Justice from 1980 through 1994.

The Department has serious concerns with both the direct and indirect impacts of the policy changes proposed under LRB 4442.

The most troubling result of the proposed legislation is the removal of civil and criminal sanctions available to consumers and the Department for enforcement of current landlord-tenant rules.

The proposed removal of criminal penalties for violations of s. 100.20, Stats., related to residential rental practices, is a clear attempt to eliminate the Department's tri-agency prosecutorial agreements which we have established in Milwaukee and Brown Counties to address repeating offender landlords.

Particularly in Milwaukee, this prosecutorial agreement between the District Attorney's Office and the City Department of Building Inspection has led to stiff fines and county jail sentences for numerous large-scale income property owners who have routinely rented condemned and dangerous housing in violation of city building codes and state residential rental practices regulations, and who have viewed the small municipal fines as merely a cost of doing business. Since adoption of this tri-agency agreement in 1991, a total of 12 prosecution requests have been filed by the Consumer Protection Bureau's Milwaukee regional office with the District Attorney's Office. All 12 requests led to landlord convictions or no-contest pleas.

By revising and incorporating the provisions of ch. ATCP 134 in Chapter 704 of the Statutes, LRB 4442 also threatens private remedies available to consumers for violations of residential rental practice rules adopted under s. 100.20, Stats.,

Currently, the purpose of Chapter 704 of the Statutes is to lend legal support for an eviction or a defense to an eviction action by a landlord. There is no other enforcement authority or remedy specified in Chapter 704. Our concern is that current private remedies which include double damages, plus attorney fees (as prescribed in s. 100.20, Stats.), would no longer apply to violations of the Department's current Residential Rental Practices Code, especially to those provisions that conflict with Chapter 704 of the Statutes.

Attached to the Department's testimony is a list of policy concerns related to some of the more specific provisions of LRB 4442.

It is unfair to characterize LRB 4442 as a balancing of the interests of income property owners, tenants, and other public and special interest groups. For this reason and because of the provisions enumerated above, the Department cannot support the proposed residential rental practices legislation.

Current regulations under ch. ATCP 134, Wis. Adm. Code, have stood the test of time, and have established the foundation for good landlord-tenant relations which have prevented the furtherance of unfair trade practices within the rental housing industry. The current rules address documented and recurring problems in the rental housing industry, and reflect a delicate compromise between landlord and tenant concerns. That compromise should not be lightly discarded. Nor should the Legislature hastily change the rules that affect the home and family environment of over 1.4 million Wisconsin residents. The Department urges this committee to drop further consideration of LRB 4442 at this time.

Revisions to Chapter 704 of the Statutes are unnecessary. Changes to the Department's landlord-tenant rules, if any, should reflect clearly documented concerns, and should be the product of broad-based discussions among all affected interests, including landlords, tenants and local governments. Hasty or one-sided changes which do not reflect a broad community consensus will only sow the seeds of discord, and destroy those past efforts to create a level playing field for landlords and tenants alike.

Thank you for the opportunity to testify this afternoon.

PROPOSED LANDLORD-TENANT LEGISLATION
SPECIFIC CONCERNS

* The proposed legislation provides a new definition of a "form provision" which allows the use of separate typed sheets. This is an expansion of the current definition could potentially allow provisions that would otherwise be prohibited unless individually negotiated with the tenant.

* The definition of "security deposit" removes all "advance" rent payments. This would create a new category of money exchanged between landlords and tenants, often several months of rent in the case of students renting campus apartments. The result is to exempt these additional rent payments from the security deposit return requirements under the current DATCP rules.

* The proposal changes how minimum heating temperature disclosure is calculated. In Wisconsin, where temperatures in some parts of the state easily fall to sub-zero temperatures, this provision would remove the landlord's responsibility to provide adequate disclosure of inadequate heating capacity for the full range of climactic conditions experienced in this state. The proposed language is too prescriptive. The Department believes that current provisions of ch. ATCP 134 adequately address the situation.

* The legislation removes the landlord's responsibility to know the condition of his or her property, and the status of utility connections.

* The bill allows landlords to deduct application fees and the costs of credit check against earnest money deposits even if the landlord rejects the tenant. Under ch. ATCP 134, earnest money can be withheld by a landlord only if the tenant refuses tenancy upon acceptance by the landlord.

* The bill requires tenants to request, in writing, a full accounting of any withheld earnest money deposits by the landlord.

* The proposal alters the burden of proof on damages to premises leased by a tenant. Under the proposed changes, any damage to the rental unit occurring during the tenancy is rebuttably presumed to be caused by tenant negligence.

* The legislation requires tenants to request, in writing, any disclosure of previous deductions or withholdings from security deposits of previous tenants. This changes the current obligation of landlords to disclose previous deductions when accepting the new tenant's security deposit. The purpose of the current code provision is to inform a tenant of security deposit withholdings made previously to prevent the same withholding for the same purpose for the subsequent tenant.

* The proposal extends the time requirements which must be met by a landlord when returning security deposits to tenants, even in cases where the tenant must abandon the property due to its uninhabitability.

* The legislation allows landlords to withhold security deposits if they have "a reasonable basis for withholding." This provision essentially legalizes the improper withholding of security deposits from tenants by giving landlords an open ended defense in small claims court. DATCP's current rule provides a clearer standard.

* The proposal excuses landlords from promises to make repairs due to shortages of labor or materials, unseasonable weather conditions, or "other causes beyond the landlord's control." This language makes promises to repair by landlords largely unenforceable.

RESIDENTIAL RENTAL PRACTICES
Chapter ATCP 134, Wis. Adm. Code

SUMMARY OF CHAPTER ATCP 134

Nearly 1.4 million Wisconsin residents live in rental housing. Chapter ATCP 134 protects tenants against unfair rental practices by landlords. Chapter ATCP 134 applies to nearly all of the 600,000 rental units in the state. Chapter ATCP 134 includes the following provisions:

Rental Agreements

The landlord must give the tenant a copy of any written rental agreement. (The rule does not require a written agreement.) Certain rental agreement provisions are prohibited.

Disclosure to Tenants

A landlord must disclose:

- The name and address of the landlord or the landlord's authorized agent.
- All uncorrected building code or housing code violations.
- Specified defects related to water supply, plumbing, heating or electricity.
- Structural or other conditions which pose a substantial hazard to tenant health or safety.

Earnest Money Deposits

- Landlord must give tenant a receipt for earnest money deposit.
- Landlord must refund deposit if landlord rejects rental application.
- If parties enter into rental agreement, landlord must return or credit deposit.
- If prospective tenant backs out, landlord must try to mitigate damages. Landlord may only deduct actual costs and damages, and must return remainder.
- If requested to do so, landlord must account in writing for any deductions.

Security Deposits

- Landlord must give tenant a receipt for deposit.
- Landlord must disclose damages which caused deduction from previous tenant's security deposit.
- New tenant has 7 days to document preexisting conditions.
- Within 21 days after tenant vacates premises, landlord must return security deposit or account for all amounts withheld.
- A landlord may deduct only for damages, or for unpaid rent or utilities.

Repair Promises

- If landlord promises to make specific repairs or improvements, landlord must specify intended completion date or time period.
- Promises made before the rental agreement must be in writing.
- Landlord must complete repairs or improvements on time, or explain any unavoidable delays.

Prohibited Practices

A landlord may not:

- Advertise or rent condemned premises.
- Enter tenant's dwelling unit except for authorized purposes and with 12 hours prior notice. (There are limited exceptions.)
- Enforce an automatic lease renewal unless the landlord reminds the tenant of the upcoming renewal.
- Confiscate or prevent access to a tenant's personal property.
- Evict a tenant because the tenant has reported a rule or housing code violation, joined a tenant association, or asserted any right specifically guaranteed to tenants by law.
- Fail to deliver possession to a new tenant, except for reasons beyond the landlord's control.

Chapter ATCP 134 does NOT....

Chapter ATCP 134 does NOT do any of the following:

- Regulate rent levels.
- Establish required standards of maintenance. (Chapter ATCP 134 is not a statewide housing code.)
- Reallocate maintenance responsibilities.
- Authorize tenants to withhold rent or "repair and deduct." (Section 704.07, Stats., gives tenants a qualified right to move out or partially withhold rent for conditions affecting habitability.)
- Require written rental agreements.

STATUTORY AUTHORITY FOR CHAPTER ATCP 134

Chapter ATCP 134 is a general order (rule) adopted under Wisconsin's "Little FTC Act," s. 100.20, Stats.

HISTORY OF CHAPTER ATCP 134

- Chapter ATCP 134 was adopted effective 5/1/80 (DATCP Administrative Docket No. 1408)

- Before it adopted ATCP 134, DATCP conducted a major landlord-tenant study at the request of the Legislature. DATCP published its findings in a "Landlord-Tenant Report" dated December 1, 1978.

RELATED LAWS

Chapter 704, Stats.

Chapter 704, Stats., is Wisconsin's basic landlord-tenant law. Chapter 704 defines the general landlord-tenant relationship, including:

- Types of tenancy:
  - A "lease" (an oral or written agreement for a definite term, such as one year).
  - A "periodic tenancy" (e.g., a month-to-month tenancy which continues until properly terminated by either party).
  - A "tenancy at will" (e.g., a tenant holding over with the landlord's permission after a lease termination date).
- How tenancy may be terminated.
- Maintenance responsibilities.
- Other general duties of landlords and tenants.

Within the general limits established by ch. 704, Stats., the rental agreement establishes the terms of tenancy. Chapter ATCP 134 prohibits certain rental terms, and limits a landlord's power to impose oppressive rental terms by means of "form" agreements.

DATCP does not enforce ch. 704, Stats. The landlord's primary remedy is to terminate tenancy. The tenant has a qualified right to move out or partially withhold rent for conditions affecting the health or safety of the tenant. Either party may sue for damages. Chapter ATCP 134 augments the remedies available to tenants (see below).

Local Housing Codes

Many municipalities have adopted housing codes which establish maintenance standards for existing housing, including rental housing. About 75% of Wisconsin tenants live in municipalities which have adopted housing codes. There is no statewide housing code.

A housing code is different from a building code, which applies to new construction. The objective of a housing code is to maintain the housing stock over the long term. Code enforcement may or may not address the problems of individual tenants. Housing codes are enforced by local inspectors.

Chapter ATCP 134 is not a housing code. However, ch. ATCP 134 reinforces local housing codes in the following ways:

- It prohibits landlords from renting condemned premises.
- It requires landlords to disclose uncorrected housing code violations and other conditions which threaten tenant health or safety.
- It prohibits landlords from evicting tenants in retaliation for reporting housing code violations.
- It prohibits rental provisions which purport to waive the landlord's maintenance obligations.

Some landlords may flout local housing codes, which only carry civil penalties. But violations of ATCP 134 may result in court injunctions or criminal penalties. In Milwaukee County and elsewhere, DATCP has worked with prosecutors and housing code officials to obtain criminal fines and jail sentences against "slumlords" who flout local housing codes.

Eviction Law

Eviction is a court process for removing a tenant once tenancy is terminated. Tenancy must be properly terminated according to ch. 704, Stats. If the tenant fails to leave after the tenancy is terminated, the landlord may go to small claims court to get an eviction order. The court procedure is spelled out in ch. 799, Stats. The court's eviction order is enforced by the county sheriff.

The eviction procedure is designed to provide for speedy removal of a properly terminated tenant, so that the landlord is not tempted to resort to a "lockout" or other self-help procedures. "Self-help" evictions are strongly discouraged, but not clearly prohibited under current law. Chapter ATCP 134 restricts "self-help" evictions in the following ways:

- It prohibits rental agreements which purport to authorize "self-help" eviction.
- It prohibits a landlord from confiscating or preventing access to a tenant's personal property.
- It prohibits unauthorized access to a tenant's dwelling unit during the term of tenancy, except as provided in the rule.

Housing Discrimination Laws

Chapter ATCP 134 does not address the issue of housing discrimination. However, housing discrimination is prohibited under state and federal law:

- Federal Law: The Civil Rights Act of 1866 (42 USC 1982) prohibits discrimination based on race. A complainant may bring a lawsuit in court. There is no administrative enforcement.

- Federal Law: Title VIII of the Civil Rights Act of 1968 (42 USC 3601 et seq.) prohibits discrimination based on race, color, religion, sex, national origin, handicap or family status. A complainant may bring a lawsuit in court or complain to the United States Department of Housing and Urban Development.

- State Law: The Wisconsin Open Housing Law (s. 101.22, Stats.) prohibits discrimination based on sex, race, color, handicap, religion, national origin, sex or marital status of the person maintaining the household, lawful source of income, age, ancestry or sexual orientation. A complainant may bring a lawsuit in court or file a complaint with the Equal Rights Division, Wisconsin Department of Industry, Labor and Human Relations.

- Local Ordinances: Some municipalities have adopted ordinances prohibiting housing discrimination.

ENFORCING CHAPTER ATCP 134

Private Remedy

A tenant who suffers a monetary loss because of a landlord's violation of ch. ATCP 134 may sue the landlord under s. 100.20(5), Stats., and may recover twice the amount of the loss, together with costs and attorneys fees.

Injunction and Restitution

The department may seek a court order under s. 100.20(6), Stats., enjoining violations of ch. ATCP 134 and ordering the landlord to pay restitution to tenants. The Department of Justice (or a district attorney) normally represents the department.

Civil Forfeiture

Under s. 100.26(6), Stats., the Department of Justice or any district attorney may commence a civil forfeiture action against a landlord who violates ch. ATCP 134. The court may impose civil forfeitures of up to $10,000 per violation.

Criminal

Under s. 100.26(3), Stats., a landlord who violates ch. ATCP 134 may be fined up to $5,000 or sentenced to as much as a year in jail, or both.

SELECTED COURT CASES

Armour v. Klecker, 169 Wis. 2d 692 (Wis. Court of Appeals, 1992).

- A landlord may withhold a security deposit only if the withholding is justified under ch. ATCP 134. If the withholding is not justified under ATCP 134, it is no defense that the landlord thought it was justified.

- If a court determines that landlord violated ch. ATCP 134 by improperly withholding a security deposit, the court must award double damages (twice the amount improperly withheld), plus costs and attorneys fees.

Moonlight v. Boyce, 125 Wis. 2d 298 (Wis. Court of Appeals, 1985).

- Under ch. ATCP 134, landlord was required to return tenant's security deposit (or a statement of claims against the deposit) within 21 days after tenant vacated premises, even though tenant failed to leave forwarding address as required by lease.

- If a landlord fails to return a security deposit in compliance with ch. ATCP 134, the tenant is entitled to recover twice the amount of the deposit pursuant to s. 100.20(5), Stats., regardless of the amount of damages the landlord may recover on a counterclaim.

- Attorneys fees awarded under s. 100.20(5) include fees incurred in proving claim under ch. ATCP 134, as well as fees incurred in litigating appeal of trial court decision on that claim. However, they do not include fees incurred in litigating landlord's separate counterclaim for damages.

Paulik v. Coombs, 120 Wis. 2d 431 (Wis. Court of Appeals, 1984).

- A tenant who prevails on a claim under ch. ATCP 134 is entitled to double damages and reasonable attorneys fees related to that claim, pursuant to s. 100.20(5), Stats., even if the tenant does not prevail on counterclaims for damages brought by the landlord.

- The fact that a tenant prevails on a claim against a landlord under ch. ATCP 134 does not prevent the landlord from asserting a counterclaim against the tenant.

Shands v. Castrovinci, 115 Wis. 2d 352 (Wis. Supreme Court, 1983).

- Section 100.20(5), Stats., which provides for double damages and attorneys fees, is intended to encourage attorneys to pursue tenant claims under ch. ATCP 134 where monetary recovery would not otherwise justify legal action. In addition to enforcing individual rights, private actions deter impermissible conduct by landlords and augment limited state enforcement resources.

- Attorneys fees under s. 100.20(5), Stats., include fees for appellate court litigation as well as trial court litigation.

- Tenants are entitled to attorneys fees under s. 100.20(5), Stats., even if they are represented at no charge by legal services organization. Legal services attorneys should be compensated at the same rate as private attorneys.

Cacchione v. DATCP, Dane County Circuit Court, Case No. 81-CV-2467 (1981).

- Section 100.20, Stats., is not an unconstitutional delegation of legislative authority.

- DATCP had authority, under s. 100.20, Stats., to adopt ch. ATCP 134, Stats.