SHARED METER SETUPS: A HARMFUL GAP IN TEXAS LANDLORD-TENANT LAW THAT NEEDS TO BE FILLED

Comment*

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* Selected for the M. Penn L. Award for the best researched and summated student article chosen for publication. This award was made possible by an endowment through the Texas Tech School of Law Foundation.

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I. INTRODUCTION: RENTING IN TEXAS, A NIGHTMARE WAITING TO HAPPEN

Imagine a new tenant, Alice, moved into her first apartment. Her excitement about finally living on her own was quickly dashed after receiving the first month's electricity bill. The bill seemed high for such a tiny one-bedroom apartment, but she shrugged it off and carried on attending school full time. Over the next few weeks, she noticed the hot water lasted for about ten minutes, so she had to take quick showers. She also noticed

how the electric water heater was noisy and constantly kicked on and off to heat more water, so she complained to maintenance. The apartment complex explained that this was completely normal.

The situation continued for months with her electricity bills remaining unusually high, even during winter break when Alice left and stayed at her parents' home for an entire month. After the break, Alice's electricity bill spiked to double the normal amount without explanation, and the period of hot water dropped to less than five minutes. Puzzled and frustrated, Alice complained, and the apartment complex sent out a maintenance worker, Henry, who replaced a part of the appliance. Henry asked Alice if she had inquired into whether her water heater was shared. Shocked and confused, Alice asked, "What do you mean shared? Like with another apartment?" Henry answered in the affirmative and indicated that the apartment manager had a "notebook of which apartments have shared water heaters."

Looking into the matter further, the apartment complex gave Alice the run-around, but eventually the apartment manager reluctantly confirmed that the water heater was shared with the rental unit behind hers and that the water heater was connected to only Alice's electricity meter. Unsurprisingly, Alice's lease disclosed nothing about this shared utility setup. Because the electricity service was in Alice's name, she paid for all of the electricity to heat any water used by the water heater. In essence, she paid for any and all hot water used by the other tenant.

One day while studying, Alice could not take the noise of the water heater and shut the electricity off to the appliance at the circuit box. Forgetting about the circuit breaker, Alice left for school for the day. Upon returning home hours later, Alice found a notice on her door that maintenance had entered her apartment and flipped the breaker switch on due to a tenant's complaint of cold water. Alice contacted the apartment manager again and requested that the landlord fix the shared utilities setup, but the landlord refused to remedy the situation.

What can a tenant like Alice do in the State of Texas?[1] Unfortunately, not much can be done.[2] Several statutes and court rulings govern Texas landlord-tenant law, but current law does not cover situations like Alice's.[3] Most of the respective rights of landlords and tenants are contained in the lease agreement, and in Texas, lease agreements may be written or oral.[4]

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1. *See generally* TEX. YOUNG LAWYERS ASS'N & STATE B. OF TEX., TENANTS' RIGHTS. HANDBOOK (2014), http://www.tyla.org/tyla/assets/File/Tenants%20Rights%202014.pdf.

2. *See generally id.*

3. TEX. PROP. CODE ANN. §§ 91–92 (West 2017); *see Tenant Rights*, CONSUMER PROTECTION OFF. TEX. ATT'Y GEN. KEN PAXTON, https://www.texasattorneygeneral.gov/cpd/tenant-rights (last visited Sept. 4, 2017) [hereinafter *Tenant Rights*].

4. *See* TEX. PROP. § 92.001(3).

According to the Texas Attorney General, the most important factor in determining landlord-tenant rights is the lease agreement.[5]

In some situations, the law governing the landlord-tenant relationship in Texas is clear, but in other instances (like Alice's situation), the Property Code is silent. Thus, tenants are left at the mercy of their landlords to willingly disclose certain information, such as the shared water heater and shared electric meter.[6] This Comment will focus on Texas landlord-tenant law governing residential tenancies under § 92 of the Property Code, specifically, a gap in the Property Code concerning shared meter setups. This Comment will posit that the current Property Code is insufficient to protect tenants against landlords who may use the gap in the law to the detriment of their tenants. Further, this Comment will discuss how other states, such as New York, California, and Minnesota, have handled the shared utility setup issue.[7] Finally, this Comment will argue that additional amendments and reforms are needed in order to put the tenant in a better bargaining position to be more equal with the landlord and to protect tenant rights.

II. BACKGROUND OF TEXAS LANDLORD-TENANT LAW

A. Texas Common Law Landlord-Tenant Rights

Prior to the enactment of the Property Code, Texas followed common law in regard to the landlord-tenant relationship.[8] Under common law, Texas courts followed the doctrine of *caveat emptor* (let the buyer beware), so that "[t]he mere relation of landlord and tenant creates no obligation on the part of the landlord to repair or keep in repair the leased premises. The tenant takes the premises as he finds them."[9] The law required the landlord merely to deliver the right of possession to the tenant, and the tenant's duty to pay rent remained independent of the landlord's duty to repair, absent an agreement or statute to the contrary.[10] As a result, a tenant who remained in possession of the property would still be required to pay rent even if the building was destroyed or became uninhabitable.[11] Such a doctrine clearly

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5. *See Tenant Rights*, *supra* note 3.

6. *See generally id.*

7. *See supra* Part IV. When referencing the issue of "shared meter" or "shared utility" setups in residential buildings, the Author means only to include electricity services as measured through a shared utility meter, and although the state laws may include other utility services under their respective shared meter laws, the Author is only analyzing the electric portion of the laws.

8. *See* Morton v. Burton-Lingo Co., 150 S.W.2d 239, 240–41 (Tex. 1941); *see* JUDON FAMBROUGH, TEX. A&M UNIV. REAL ESTATE CTR., LANDLORDS AND TENANTS GUIDE: SPECIAL REPORT NO. 866 iii (rev. Sept. 2016), https://assets.recenter.tamu.edu/Documents/Articles/866.pdf.

9. *Morton*, 150 S.W.2d at 241.

10. *See* FAMBROUGH, *supra* note 8.

11. *See id.*

favored the landlord and left many tenants without remedy and at the mercy of their landlords.[12]

B. Texas Supreme Court Adopts the Implied Warranty of Habitability in Kamarath

The first relief to the harshness of the long-held common law rule came in 1978 in *Kamarath v. Bennett*, wherein the tenant, Kamarath, sued for economic damages caused by latent defects[13] in his residential apartment.[14] After Kamarath moved in, various problems arose within the apartment, including "faulty electrical wiring," water pipes that burst and deprived him of hot water, and bricks which fell off the building.[15] None of these defects were visible to Kamarath during his pre-move-in inspection of the premises.[16]

On June 24, 1975, city building inspectors investigated Kamarath's complaints, determined the building conditions violated city ordinance, and confirmed the nondiscoverability of the defects.[17] Between June and November 1975, the city inspected the premises about ten times, each time finding the building in violation of the city's housing code.[18] Shortly after the first inspection in June 1975, the city notified the landlord that he must either repair the violating conditions or the occupants must vacate the premises.[19] In turn, the landlord notified Kamarath he must vacate the premises, but rather than vacating, "Kamarath stopped paying rent in July 1975, claiming uninhabitability as an excuse."[20] Kamarath remained until September 1975 and sued the landlord for damages for the breach of implied warranty of habitability.[21]

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12. *See id.*

13. *Black's Law Dictionary* defines latent defect as "[a] product imperfection that is not discoverable by reasonable inspection and for which a seller or lessor is generally liable if the flaw causes harm." *Latent Defect*, BLACK'S LAW DICTIONARY (10th ed. 2014).

14. Kamarath v. Bennett, 568 S.W.2d 658, 658–59 (Tex. 1978), *superseded by statute*, Act of May 28, 1979, 66th Leg., R.S., ch. 780, §§ 1–18, 1979 TEX. GEN. LAWS 1978 (current version at TEX. PROP. CODE §§ 92.001–.061), *as recognized in* Phila. Indem. Ins. Co. v. White, 490 S.W.3d 468 (Tex. 2016).

15. *Id.* at 659.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*; *see* BRIAN D. SHANNON & GERRY W. BEYER, SKILLS & VALUES: PROPERTY LAW 73 (1st ed. 2012) (discussing that under the doctrine of implied warranty of habitability, "a landlord has a duty to maintain leased premises in a habitable condition [throughout the lease term] . . . and [this duty] is imposed to assure that the premises meet minimum conditions for being fit for human habitation . . . . [T]he implied warranty cannot be waived by a clause in the lease").

Following a bench trial, the trial court denied Kamarath's habitability claim and ordered that Kamarath take nothing.[22] The trial court concluded that the landlord did not breach the contract with Kamarath, nor did the landlord "violate any duty in law owed to [Kamarath] concerning the state of repair of the premises."[23] Subsequently, the court of appeals affirmed the trial court's verdict because absent "fraud or deceit, there is no implied warranty on the part of the [landlord] that premises leased for residential purposes are suitable for their intended use."[24]

The Texas Supreme Court disagreed.[25] In *Kamarath*, the Texas Supreme Court recognized, for the first time, that an implied warranty of habitability existed between a residential landlord and a tenant, holding that:

> [I]n a rental of a dwelling unit, whether for a specified time or at will, there is an implied warranty of habitability by the landlord that the apartment is habitable and fit for living. This means that at the inception of the rental lease there are no latent defects in the facilities that are vital to the use of the premises for residential purposes and that these essential facilities will remain in a condition which makes the property livable.[26]

The Court also noted how the function of an apartment lease had evolved from the creation of "a tenurial relationship between the parties" to the arrangement of "the leasing of a habitable dwelling."[27] In other words, the lease was no longer merely a transfer of possession of the property from the landlord to the tenant—the lease imposed an implied duty on the landlord to not only provide habitable premises in the initial transfer, but to also maintain the livable conditions of the property throughout the lease term, regardless of whether the lease stated such a duty.[28]

In a short, four-page opinion, the Texas Supreme Court noted several public policy reasons for requiring a landlord to repair and maintain livable conditions of the leased premises.[29] First, the Court pointed out how the state legislature in Texas, as well as in many other states, "[had] recognized that the public welfare may require . . . [rental dwellings to] . . . be in a safe condition and fit for human habitation."[30] In 1978, the state legislature adopted laws granting municipalities the power to adopt and enforce local ordinances establishing minimum housing standards for the health, safety,

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22. *Kamarath*, 568 S.W.2d at 658–59.
23. *Id.* at 659.
24. *Id.*
25. *Id.* at 659–61.
26. *Id.* at 660–61.
27. *Id.* at 660.
28. *Id.* at 661.
29. *See id.* at 659–61.
30. *Id.* at 660 (citing TEX. REV. CIV. STAT. ANN. art. 1175, § 35 (West 1978)).

and welfare of the public, highlighting the public desirability of habitable conditions.[31] Second, the Court concluded that the implied warranty of habitability arises due to the unequal relationship of the landlord and tenant and the superior position of the landlord to be aware of the conditions of the premises.[32] According to the Court, common experience shows that the landlord's superior position allows the landlord to have better knowledge of the conditions of the leased premises, and any violations of housing code requirements are known, or should be made known, to the landlord.[33] Third, because the landlord retains ownership over the premises, the landlord should pay for the costs of repairs to make the premises safe and habitable.[34] Lastly, in regard to the landlord-tenant relationship, the landlord's superior bargaining power could cause "the rental of poor housing and violation of public policies."[35] Thus, absent such habitability requirements, the tenant would be forced to accept whatever housing he could afford, in whatever condition the landlord provided it, similar to what happened under common law.[36]

C. Legislative Response after Kamarath

1. Implied Warranty of Habitability Is Short-Lived in Texas

Unfortunately, the doctrine of implied warranty of habitability did not last long in Texas.[37] In 1979, shortly after the Texas Supreme Court decided *Kamarath*, the state legislature enacted Subchapter B of § 92 of the Property Code.[38] This Subchapter specifically abrogates the doctrine of implied warranty of habitability, stating that "[t]he duties of a landlord and the remedies of a tenant . . . are in lieu of existing common law and other statutory law warranties and duties of landlords for maintenance, repair, security, habitability, and nonretaliation."[39] Thus, the legislature superseded what the Texas Supreme Court had adopted under *Kamarath*, and under Subchapter B, the legislature replaced any and all other prior case law and statutes that dealt with the habitability of rental dwellings.[40] In regard to habitability, this

31. *Id.*
32. *Id.* (citing Marini v. Ireland, 265 A.2d 526 (1970)).
33. *Id.*
34. *Id.*
35. *Id.*
36. *See id.*
37. Act of May 28, 1979, 66th Leg., R.S., ch. 780, §§ 1–18, 1979 TEX. GEN. LAWS 1978 (current version at TEX. PROP. CODE ANN. §§ 92.001–.061 (West 2017)).
38. *Id.*
39. TEX. PROP. § 92.061.
40. *Id.*

Subchapter imposes on the landlord a limited duty to repair or remedy, which is addressed in § 92.052 of the Property Code.[41]

2. What Is Different from the Habitability Doctrine under the Property Code?

Under § 92.052(a), a residential landlord must make repairs or remedy a condition which is caused by normal wear and tear[42] if the following conditions are met:

> (1) the tenant specifies the condition in a notice to the person to whom or to the place where rent is normally paid;
> (2) the tenant is not delinquent in the payment of rent at the time notice is given; and
> (3) the condition:
> (A) materially affects the physical health or safety of an ordinary tenant; or
> (B) arises from the landlord's failure to provide and maintain in good operating condition a device to supply hot water of a minimum temperature of 120 degrees Fahrenheit.[43]

Before the statutory abrogation, the implied warranty of habitability *automatically* required the landlord to make the premises habitable *throughout* the lease term, meaning the tenant had no duty to act in order to make the landlord perform.[44] Under the present legislative standard, however, the tenant must act first, making the landlord's duty to repair dependent upon the tenant's responsibilities, including the responsibility of the tenant to not be delinquent in rent.[45] The tenant must first be up to date in rental payments, and the tenant must *notify* the landlord of a problem, either in writing, if required by the lease, or by certified mail with return receipt requested.[46] Further, the condition must affect the tenant's *physical* health or safety in order to trigger the landlord's obligation to repair.[47] Absent such conditions, the landlord has the discretion of whether or not to repair the premises.[48]

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41. *Id.* § 92.052.
42. *Id.* § 92.052(b)(1)–(4) (providing that a landlord must repair conditions caused by normal wear and tear and will not be liable for any conditions caused by the tenant or the tenant's guests).
43. *Id.* § 92.052(a)(1)–(3).
44. *See* FAMBROUGH, *supra* note 8, at 1.
45. TEX. PROP. §§ 92.052(a)(2), .056(a)–(b). The tenant bears the burden of proof to enforce a right in a judicial proceeding resulting from the landlord's failure to repair or remedy of a condition under § 92.052. *Id.* § 92.053(a).
46. *Id.* §§ 92.052(d), .056(a)(3).
47. *Id.* § 92.052(a)(3)(A).
48. *Id.* § 92.052(a)–(b).

Also, the form of the lease is important to the landlord's duty to repair.[49] In Texas, a rental lease may be oral or written.[50] With respect to the requirement of notice by the tenant, subsection (d) of § 92.052 provides that "[t]he tenant's notice under [s]ubsection (a) must be in writing only if the tenant's lease is in writing and requires written notice."[51] Accordingly, if a written lease provides that a repair notice must be in writing for a landlord to have any duty to repair, the tenant is first obligated to give *written* notice of the problem.[52] Furthermore, if the landlord fails to remedy the condition within a reasonable time,[53] the tenant must make a *subsequent* written request to the landlord in order to trigger any remedies for the tenant should the landlord fail to repair.[54]

Thus, in the absence of proper notice from the tenant, a landlord has no duty to repair and is not liable to the tenant.[55] Many tenants are unaware of their rights and all of the statutory notice requirements, and therefore do not provide the proper notice as required under the Property Code.[56] Texas law places the burden on the tenant to prove that the landlord failed to remedy such a condition that materially affects the tenant's physical health and safety; if the tenant does not submit the repair request in writing, the tenant might have an even harder time meeting that burden of proof.[57] This arguably breeds an environment where the landlord can take advantage of naïve or ignorant tenants, especially poorer tenants who might be late or behind on their rent.[58]

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49. *See Tenant Rights*, *supra* note 3.

50. TEX. PROP. § 92.001(3); *see Tenant Rights*, *supra* note 3.

51. TEX. PROP. § 92.052(d).

52. *Id.*

53. *Id.* § 92.056(d) (stating that "there is a rebuttable presumption that seven days is a reasonable time"). That presumption may be rebutted by the following factors: (1) "the date [that] the landlord receive[s] the tenant's notice, [(2)] the severity and nature of the condition, and [(3)] the reasonable availability of materials and labor and [the reasonable availability] of utilities from a utility company." *Id.*

54. *Id.* § 92.056(b)(1)–(3). But if the first notice is provided via certified mail with return receipt requested, the tenant is not required to provide a second notice. *Id.*

55. *See* FAMBROUGH, *supra* note 8, at 2–3.

56. Eric Dexheimer, *Booming Rental Market Makes it Easier for Neglectful Landlords to Ignore Poor Living Conditions*, MYSTATESMAN (Oct. 19, 2013, 7:44 PM), http://www.mystatesman.com/news/booming-rental-market-makes-easier-for-neglectful-landlords-ignore-poor-living-conditions/SkRRlicReTwuA3x3rVlyAK/ ("State law, for example, requires that a tenant demanding repairs send two letters by regular mail, or one certified letter, detailing the fixes—requirements that, while familiar to landlords, often don't occur to tenants."); *see* FAMBROUGH, *supra* note 8, at 8.

57. TEX. PROP. § 92.053(a).

58. *See* Dexheimer, *supra* note 56.

D. What Does the Property Code Say about Tenant Rights in Shared Utility Setup Situations?

Many changes made over the years have affected the landlord-tenant relationship in Texas,[59] but overall, Texas landlord-tenant law favors the landlord.[60] While some amendments have been positive for tenants, others have been more advantageous for landlords.[61] Due to the number of recent amendments, many sections of the Property Code affecting the landlord-tenant relationship lack case law to construe and clarify meaning and application where the law is unclear.[62] The absence of Texas higher court rulings on these sections has left lower court officials to apply the statutes and interpret the meaning of unclear law without the guidance of the higher courts.[63] Thus, many situations, like the one experienced by Alice, are left up in the air for the lower courts to decide, that is, if a tenant ever decides to take the issue to trial.[64] When statutes and case law remain silent in a particular area or on a particular issue, landlords are free to construe the meaning of many of these laws, often to the detriment of their tenants.[65] The costs both in time and money, along with the emotional drain of litigation, are important factors in deciding whether to prolong the matter in court.[66] One can understand why many tenants choose not to enforce their rights against their landlords in court, especially when it is uncertain which side will prevail.[67]

1. What Exactly Does Section 92.052(a)(3)(B) Require of the Landlord?

Section 92.052 may apply to Alice's situation, but it does not offer any remedies for her landlord-tenant problem.[68] Specifically, § 92.052(a)(3)(B) is important to Alice's situation because it involves the landlord's duty to provide and maintain a tenant's access to hot water.[69] Subsection (a)(3)(B)

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59. *See, e.g.*, TEX. PROP. §§ 92.151–.170 (replacing Subchapter D with new provisions requiring the installation of certain security devices in residential units and allowing tenants to unilaterally terminate a lease if a landlord fails to comply after tenant's written request).

60. Dexheimer, *supra* note 56 (describing how "[m]any states offer renters more protections than Texas . . . [and] rules favor landlords in more subtle ways").

61. TEX. PROP. § 92.052(c)(1)–(2) (stating that landlords are not required to provide utilities if utility lines are not reasonably available and are not required to provide security guards—both of which are arguably more beneficial to landlords than tenants).

62. *See* FAMBROUGH, *supra* note 8.

63. WILLIAM R. BROWN & MARK WARDA, LANDLORDS' RIGHTS & DUTIES IN TEXAS 5–7 (2d ed. 2000).

64. *Id.*

65. *Id.* at 7.

66. *Id.*

67. *Id.*

68. TEX. PROP. CODE ANN. § 92.052 (West 2017).

69. *Id.* § 92.052(a)(3)(B).

states that the landlord must "provide and maintain in good operating condition a device to supply hot water of a minimum temperature of 120 degrees Fahrenheit."[70] But the Property Code does not specify how the landlord must provide the hot water, how much hot water the landlord is required to provide, or that the landlord must provide hot water to tenants individually.[71]

Section 92.052(a)(3)(B) requires only that the landlord provide the tenant with a device capable of heating water to 120 degrees Fahrenheit.[72] This seems like a common sense requirement that a landlord should provide a tenant with access to hot water and maintain such access, but interestingly, this duty was not specified clearly until the state legislature amended the Property Code to include subsection (a)(3)(B) in 2007, almost thirty years after the initial enactment of Subchapter B.[73] Prior to the amendment in 2007, the landlord only had a duty to make repairs to or remedy conditions that materially affected the physical health or safety of an ordinary tenant.[74] One can imagine how many landlords took advantage of such an absence of statutory language requiring the landlord to provide the tenant with hot water.

2. So What? Were Landlords Not Already Providing Hot Water to Tenants?

As noted in the legislative history of House Bill 177, the supporting legislators intended "to require a landlord to make a diligent effort to repair or remedy a condition that arises from the landlord's failure to provide and maintain in good operating condition a device to supply hot water of a minimum temperature of 120 degrees Fahrenheit."[75]

Explaining H.B. 177's sponsors' intent, the legislature noted that:

> Currently, landlords are not required to provide tenants with hot water, nor are they required by statute to remedy a case in which the device that heats the water is broken.
>
> There have been situations where a tenant entered a lease agreement and before the lease was terminated the hot water in the unit failed. Since it is not required that the landlord remedy this particular situation, the landlord refused to do so, leaving the tenant locked in a lease with no hot water.

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70. *Id.*

71. *Id.*

72. *Id.*

73. Act of June 15, 2007, 80th Leg., R.S., ch. 600, § 1, sec. 92.052(a)(3), 2007 TEX. GEN. LAWS 600 (current version at TEX. PROP. CODE § 92.052(a)(3)(B)).

74. *See* TEX. PROP. § 92.052(a) (original version at Act of May 28, 1979, 66th Leg., R.S., ch. 780, §§ 1–18, 1979 TEX. GEN. LAWS 1978 (1979)).

75. House Comm. on Bus. & Commerce, Bill Analysis, Tex. H.B. 177, 80th Leg., R.S. (May 14, 2007).

> There have also been situations in which a tenant entered a lease agreement under the impression that the unit had hot water and upon moving in the unit discovered that the unit did not have hot water with the landlord refusing to remedy the situation. This is an issue that affects sanitation and hygiene. H.B. 177 specifies that a landlord is responsible for the repair and/or remedy of the device used to supply hot water.[76]

The legislative history is important here because it highlights how landlords were taking advantage of tenants due to the absence of statutory language.[77] In this amendment, the legislature enhanced tenant rights to a habitable rental space, requiring access to hot water as a duty imposed on the landlord to provide.[78] The landlord no longer had the discretion of whether or not to provide hot water, or if he or she did initially provide hot water, to continue providing it to the tenant.[79] It is also significant that the legislature based the amendment on sanitation and hygiene reasons, so a landlord denying tenants access to hot water goes against public policy, echoing the reasoning in *Kamarath*.[80]

III. DID THE TEXAS LEGISLATURE GO FAR ENOUGH TO PROTECT TENANTS UNDER THE PROPERTY CODE?

A. Tenants Are Left Wanting . . .

The state legislature can and needs to do more to protect tenants from landlords who abuse their power under current Texas law. As noted in *Kamarath*, the state legislature has granted municipalities the power to adopt and enforce their own housing codes.[81] Some local ordinances are more specific than others.[82] For example, the City of Dallas recently amended its housing codes to combat the abuse of vulnerable tenants by dishonest landlords.[83] Some of the new minimum housing standards for Dallas rental dwellings include "more stringent air-conditioning requirements, better

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76. *Id.*

77. *See generally id.*

78. *See* Tex. PROP. § 92.052(a)(3)(B).

79. *See* House Comm. on Bus. & Commerce, Bill Analysis, Tex. H.B. 177, 80th Leg., R.S. (May 14, 2007).

80. *Id.*

81. Kamarath v. Bennett, 568 S.W.2d 658, 660 (Tex. 1978) (citing TEX. REV. CIV. STAT. ANN. art. 1175 § 35 (West 1978)), *superseded by statute*, Act of May 28, 1979, 66th Leg., R.S., ch. 780, §§ 1–18, 1979 TEX. GEN. LAWS 1978 (current version at TEX. PROP. §§ 92.001–.061), *as recognized in* Phila. Indem. Ins. Co. v. White, 490 S.W.3d 468 (Tex. 2016).

82. *See generally* Tristan Hallman, *Dallas Makes Rules Tougher on Landlords with New Housing Standards*, DALLASNEWS (Sept. 28, 2016), http://www.dallasnews.com/news/dallas-city-hall/2016/09/28/dallas-get-tough-landlords-improves-standards-renters.

83. *Id.*

contact information for landlords and tougher code inspection rules."[84] Dallas renters can hope to see some beneficial changes in their apartments because of these local changes to the housing code standards, but depending on the local ordinances, a Texas tenant might not have any legal remedy for a condition in his or her rental dwelling.[85] If the local ordinances and the state property codes are both silent about such housing conditions as Alice experienced, a tenant might be left to the mercy of a dishonest landlord. The current Property Code leaves the tenant vulnerable and wanting in regard to legal remedies for hidden shared utility setups.

B. The Property Code Is Insufficient and Unspecific

Because the legislature does not require uniformity across the state in housing codes, the Property Code does not go far enough to protect tenants at the state level. Further, as noted above, § 92.052(a)(3)(B) does not specify how the landlord must provide the hot water, nor does it specify that the landlord must supply to tenants individually.[86] Also, the Property Code does not specify how much hot water the landlord must provide.[87] The section does not specify that the landlord must install separately metered water heaters inside each and every rental dwelling.[88] Nor does the section limit whether a landlord may install one single-metered water heater to supply several rental units at the same time.[89] As the section is currently written, the state legislature left these questions open to interpretation, and as a result, landlords can take advantage of tenants.[90]

Section 92.052(a)(3)(B) says that the landlord must "provide and maintain in good operating condition a device to supply hot water of a minimum temperature of 120 degrees Fahrenheit."[91] It does not say that the landlord must pay for the hot water (that is, that the water heater must be powered at the expense of the landlord); it does not specify the required size of the supply of hot water, nor that the supply of hot water must be exclusive to one rental dwelling.[92] As a result, landlords are able to interpret the statute

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84. *Id.*

85. *See, e.g.*, Dave Harmon, *Code Violations Plentiful at Austin Apartments, but Tickets and Fines Rare*, MYSTATESMEN (Nov. 23, 2013, 10:05 PM), http://www.mystatesman.com/news/code-violations-plentiful-austin-apartments-but-tickets-and-fines-rare/RsKSJhqOIx88etN43wgEhM/.

86. TEX. PROP. § 92.052(a)(3)(B).

87. *See id.* The section does not specify a reasonable amount of hot water. *Id.* What is reasonable? Five minutes of hot water? Ten minutes? The Author argues that this should be specified clearly in the statute to set a minimum amount of hot water that a Texas landlord must provide in rental dwellings.

88. *See id.*

89. *See id.*

90. *See id.*

91. *Id.*

92. *See id.*

to suit their own desires and will do so in how and when they provide the supply of hot water to the tenant.

C. What Is a Reasonable Supply of Hot Water?

Many courts have required that the landlord provide "hot water . . . in reasonable amounts at reasonable times."[93] Thus, landlords in Texas are free to decide what is reasonable in how they will provide that water, the amount of water, and the number of recipient tenants without first disclosing such arrangements to such tenants.[94] Consequently, tenants like Alice may be forced to pay for the utilities of other tenants unknowingly and involuntarily.[95] Even if the tenant becomes aware of the shared utility setup, Texas law does not offer much direction in regard to how the tenant can acquire a remedy or to what remedy, if any, the tenant is entitled.[96] Under current law, a dishonest landlord is free to trick his or her tenants into sharing utilities, such as electricity, and a tenant has no other options but to stay and pay for another's utilities, or break his or her lease and find a rental dwelling under a more honest landlord.[97]

IV. HOW ARE OTHER STATES HANDLING THE SHARED UTILITY SETUP?

A. New York

1. What Is a Shared Meter Setup in New York?

In 1991, New York enacted its shared meter law to combat the shared utilities problem, such as the one Alice experienced.[98] In New York, a "[s]hared meter" is "any utility meter that measures gas, electric or steam service provided to a tenant's dwelling and also measures such service to areas outside that dwelling and such tenant pays charges for the service to areas outside the dwelling measured through such meter."[99] In other words, if a tenant's utility meter measures electricity consumption both inside *and* outside the tenant's dwelling, the tenant has a shared meter.[100]

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93. MARCIA STEWART ET AL., EVERY LANDLORD'S LEGAL GUIDE 177 (Robert Wells eds., 9th ed. 2008).

94. *See* TEX. PROP. § 92.052(a)(3)(B).

95. *See generally id.*

96. *See id.*

97. *See generally id.*

98. *See* N.Y. PUB. SERV. LAW § 52 (McKinney 2017).

99. *Id.* § 52(1)(b).

100. *Id.*; NEW YORK'S PUBLIC UTILITY PROJECT, NEW YORK SHARED METER LAW 1 (6th ed. 2013), http://utilityproject.org/wp-content/uploads/2013/12/Shared-Meter-Law-1231131.pdf.

2. How Do Shared Utility Setups Arise?

Oftentimes, shared meter conditions are a result of an accident due to electrical wiring being attached to a tenant's meter during building renovations or during system upgrades.[101] On the other hand, someone in the building may intentionally create a shared meter condition by connecting his or her usage to a meter serving another tenant.[102] Frequently, shared meter conditions result when buildings are converted from single-family homes to apartments without installing separate meters in each apartment.[103]

3. An Illustration of a Shared Utility Setup

Utility service outside a tenant's residence may include service to equipment that is used for the benefit of the entire building.[104] To illustrate one example, tenant A's apartment has a hot water heater located inside.[105] This hot water heater provides hot water to tenants B and C's apartments, as well as to common areas of the building.[106] In contrast, the hot water heater may be located outside tenant A's apartment.[107] Regardless of the location of the hot water heater in each example, the electric service used to power the hot water heater is connected solely to tenant A's electric utility meter.[108] In each of these examples, there is an illegal shared utility setup, and tenant A is paying for electricity usage *outside* of tenant A's apartment.[109]

4. What Does the Shared Meter Law in New York Require?

As of October 24, 1991,[110] residential tenants are only required to pay for the utility service used inside their apartments and for any areas that are under the tenants' exclusive use and control.[111] New York's shared meter law requires landlords to eliminate any shared meter condition or to place the utility service in the landlord's name:

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101. *See* NEW YORK'S PUBLIC UTILITY PROJECT, *supra* note 100.

102. *Id.*; *see also* Peter Kelly-Detwiler, *Electricity Theft: A Bigger Issue Than You Think*, FORBES (Apr. 23, 2013, 9:50 AM), http://www.forbes.com/sites/peterdetwiler/2013/04/23/electricity-theft-a-bigger-issue-than-you-think/#490482072ef2.

103. NAT'L FUEL, UNDERSTANDING SHARED METERS 1 (2017), http://www.natfuel.com/forhome/publications/SharedMeter.pdf; *see* NEW YORK'S PUBLIC UTILITY PROJECT, *supra* note 100.

104. *See* N.Y. PUB. SERV. § 52(1)(c); NEW YORK'S PUBLIC UTILITY PROJECT, *supra* note 100.

105. *See* NAT'L FUEL, *supra* note 103.

106. *See id.*

107. *See id.*

108. *See id.*

109. *See id.*

110. N.Y. PUB. SERV. LAW § 52 (McKinney 2017); *see* NAT'L FUEL, *supra* note 103.

111. *See* NAT'L FUEL, *supra* note 103.

> [Landlord's] responsibility for service measured through a shared meter. (a) [A landlord] shall eliminate any shared meter condition or, in the alternative, establish an account in the [landlord's] name for all the shared area charges for service measured through a shared meter effective six years prior to the discovery of or determination that a shared meter condition exists, or the first day of the tenancy, or the date the shared meter condition began, or the sixtieth day after the [landlord] knew or should have known that third party involvement exists, or the date the [landlord] assumed title to the dwelling, whichever is most recent in time and for all future service measured by the shared meter. The [utility provider] shall, upon [a landlord's] application, open such an account and bill the [landlord] for all applicable shared area charges and all future service measured by the shared meter through such account.[112]

Further, landlords, tenants, and utility providers may not waive the provisions of the shared meter law, and the law only applies to leases effective after October 24, 1991.[113] Any lease renewals after such date are considered new leases subject to the requirements of the law.[114]

5. Notice Is Required under New York's Shared Meter Law

As of December 1, 1995, New York's shared meter law requires every utility provider to give annual notice to tenants and landlords summarizing the requirements of the law "that apply to [landlords], shared meter [tenants] and [utility providers] . . . and shall include the department's address and phone number for questions and complaints."[115] The notice is further subject to the approval of the Public Service Commission (Commission).[116] Also, the notice must be mailed separately from the utility provider's bill for service.[117] Under this subsection, each utility provider must also implement an outreach program, subject to the Commission's approval, to advise its customers of the protections under the shared meter law.[118]

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112. N.Y. PUB. SERV. § 52(2)(a); *see also* NEW YORK'S PUBLIC UTILITY PROJECT, *supra* note 100, at 1–2.

113. N.Y. PUB. SERV. § 52(3)(a)–(b).

114. *Id.* § 52(3)(a).

115. *Id.* § 52(9). Under the shared meter law, a utility is "any gas, electric and steam corporation and/or municipality providing service to residential customers." *Id.* § 52(1)(d). When referring to a utility, the Author will use "utility provider" and "utility company" interchangeably.

116. *Id.* § 52(9).

117. *Id.*

118. *Id.*; *see* NEW YORK'S PUBLIC UTILITY PROJECT, *supra* note 100, at 2.

6. What If a Shared Meter Condition Is Suspected?

In New York, if a tenant suspects a shared meter setup, the tenant must contact and notify the utility provider.[119] Once the utility provider receives either verbal or written notice of a complaint, it must provide written notice to the landlord of the received complaint, and the utility provider is required by law to investigate.[120] The notice must also explain what the landlord's responsibilities are under the shared meter law.[121] Even if the tenant contacts the wrong utility company, there will not be a problem with getting the shared meter condition investigated.[122] Under the law, the utility provider that received the complaint must notify the proper utility provider of the shared meter complaint.[123]

7. What Happens During an Investigation?

Under New York's shared meter law, the utility provider "shall investigate and determine whether such service is or is not measured by a shared meter."[124] If a utility provider fails to investigate or provide a determination within the required period of thirty business days, the Commission must investigate and issue a written determination upon the landlord or tenant's request.[125] In making such a determination, the utility provider may decide:

> [I]f separate metering or rewiring or repiping is possible and shall provide the [landlord] with information describing how shared meter conditions can be eliminated. The investigation shall include, but not be limited to, conducting appropriate tests, an examination of wiring, piping, meters and heating equipment in the building as may be needed, an estimate of gas, electricity or steam used in the shared meter [tenant's] dwelling and in areas outside the dwelling, and a review of billing records.[126]

New York landlords must take care not to ignore a utility provider's notice of the received complaint and any subsequent requests from the utility

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119. N.Y. PUB. SERV. § 52(4)(a).

120. *Id.* Landlords may also request an investigation, or an investigation may be prompted upon the utility provider's receipt of information indicating that a shared meter condition may exist. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* ("If such utility [provider] is not the utility [provider] in ownership or control of the meters and related pipes, fittings, wires and other apparatus associated with the establishment and measurement of service to such [tenant's] dwelling, notice shall also be provided to such metering utility [provider].").

124. *Id.* § 52(4)(a).

125. *Id.* § 52(4)(b).

126. *Id.* § 52(4)(a).

provider during the investigation.[127] For example, landlords who refuse to comply with the investigating utility provider's reasonable requests or who hinder the investigating utility provider's access to common areas in the building will receive an *automatic* determination that a shared meter condition exists.[128] Thus, ignoring such requests or hindering a utility provider's investigation will only result in a negative outcome for a landlord.[129] A complaining tenant should use the same caution, because if the complaining tenant refuses to provide the utility provider with access to the residential unit or refuses other reasonable requests, the investigating utility provider will consider the tenant's actions "to be a failure to cooperate" and will suspend its investigation completely.[130] In either scenario, the investigating utility provider will not be liable to the landlord or the tenant for any subsequent claims for monetary damages.[131]

8. What Happens If a Shared Meter Condition Is Found?

If an investigation is conducted and a shared utility setup is found, an investigating utility provider must provide written notice to the complaining tenant, the landlord, any other tenants affected by the shared meter setup, and any other utility provider which provides service through the shared meter within thirty business days of the complaint date.[132] Also, the investigating utility provider's determination provided to the landlord may include whether separate metering, rewiring, or repiping is possible and must describe the available options for eliminating the shared meter condition.[133] The written determination must include:

> [A] description of the specific areas outside the dwelling served by the shared meter, the nature of the uses of the service, and the proportional amount of service registered on the shared meter that is provided to the shared meter [tenant's] dwelling and to areas outside the dwelling. A notice shall be included with the determination informing the recipients of the availability of the commission's complaint handling procedures, and

127. *See id.* § 52(4)(c).
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.* ("A utility [company] duly acting under this paragraph is entitled to make the determinations provided for and shall be held harmless from any subsequent monetary claim by [a landlord] that the dwelling was not served by a shared meter or by a shared meter [tenant] that the dwelling was served by a shared meter.").
132. *Id.* § 52(4)(b).
133. *Id.* § 52(4)(a).

> providing the department's address and telephone number for filing objections to such determination.[134]

If a complaining tenant or landlord is not satisfied with the utility provider's determination, he or she may use the Commission's complaint handling procedures to complain, either verbally or in writing, to the Office of Consumer Services within forty-five days of receiving such determination in order to obtain a written departmental determination.[135]

9. Landlord's Duties after a Shared Meter Setup Is Found

The New York statute specifies what actions the utility provider must take after a final determination is made that the tenant's dwelling is served by a shared meter in violation of the shared meter law.[136] The utility provider must verify that within 120 days of such determination a landlord has done one of the following: (1) eliminated the shared meter condition by rewiring or repiping as needed; (2) entered into a mutually acceptable written agreement with the tenant, and if necessary with a third party,[137] for apportionment of the shared meter charges;[138] or (3) placed the utility service in the landlord's name.[139]

If a New York landlord or tenant can demonstrate that the existence of the shared meter condition was caused by and benefitted a third party, "the [landlord or tenant is] entitled respectively to recover the charges billed by the [utility company] to the [landlord's] account, or to the [tenant's] account, . . . in a civil action against the third party in a court of competent jurisdiction."[140]

Such a situation occurred in *Quintyne v. Hall*.[141] In *Quintyne*, for fifty-four months, a tenant, David Quintyne, "unwittingly paid the electric utility charges, as recorded by a shared meter for a basement apartment occupied by [the landlords'] niece."[142] The tenant sued the landlords in small claims court in order to recover his overpayment of electricity charges.[143] The small claims court awarded the tenant $2,043.36, and the landlords

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134. *Id.* § 52(4)(b).

135. *Id.* § 52(4)(d).

136. *Id.* § 52(5)(a).

137. *Id.* § 52(1)(h)(i) (defining "[t]hird party involvement" as a situation in which "a third party whose utility service was to be measured through another meter had caused or benefitted from a shared meter condition").

138. *Id.* § 52(5)(a).

139. *Id.* § 52(2)(a).

140. *Id.* § 52(7).

141. Quintyne v. Hall, No. 2002–298 K C, slip op. 50840(U), 2003 WL 21050245, at *1 (N.Y. App. Term Apr. 1, 2003).

142. *Id.*

143. *Id.*

subsequently appealed.[144] Based on the tenant's unrebutted proof that he had overpaid for fifty-four months for electricity usage charged to his shared utility meter, the appellate court unanimously affirmed that the tenant was entitled to reimbursement for the portion of the charges not attributable to his own use, assessed at a uniform monthly rate based on the utility provider's apportionment of the parties' electricity consumption.[145] Like the *Quintyne* tenant, Alice could prove that a third party benefited from the shared utility setup, namely the other tenant.[146] Thus, if Texas had such a shared meter law, she could sue the other tenant to recover her portion of the electricity used to heat the hot water utilized by the other tenant.[147]

10. What If a Shared Meter Condition Cannot Be Eliminated?

a. Mutual Agreement with the Tenant

Under New York's shared meter law, the landlord is not obligated to eliminate the shared meter condition in three situations, but may instead enter into a written mutual agreement with the tenant (and any affected third parties) for apportionment of the cost of the shared meter service.[148] For example, the landlord is not obligated to eliminate a shared meter condition if: (1) a legal impediment exists; [149] (2) it would amount to an extraordinary cost;[150] or (3) the extra utility usage amounts to minimal use.[151]

If a New York landlord is not obligated to remedy the shared meter condition due to any of the above three circumstances, then the landlord must negotiate and execute a written mutual agreement with the shared meter tenant (and any necessary third party, such as an affected tenant) apportioning how the shared meter usage will be paid, so that in the future the tenant will

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144. *Id.*

145. *Id.*

146. *See generally id.*

147. *See generally id.*

148. N.Y. PUB. SERV. LAW § 52(2)(b)(i) (McKinney 2017).

149. *Id.* § 52(1)(g) (defining "[l]egal impediment" as a "restriction which prevents separate metering, rewiring, or repiping"). A legal impediment may arise due to zoning ordinances, due to the historical significance of the structure, or due to other legal restrictions as determined by Commission rules. *Id.* (describing how zoning ordinances may limit the number, type, or location of meters in a building).

150. *Id.* § 52(1)(f) (defining "[e]xtraordinary cost" as "the cost, as determined by a qualified professional, of installing equipment necessary to eliminate a shared meter in a dwelling or portion thereof which is in excess of the amount of rent for four months rental of such dwelling").

151. *Id.* § 52(8) (stating that "the commission shall determine an appropriate quantity of service on a shared meter that is utilized outside of the [tenant's] dwelling which is to be considered minimal in commission rules and regulations"); N.Y. COMP. CODES R. & REGS. tit. 16, § 11.30(d) (2017) (defining "[m]inimal service" as "less than 10 percent of the total monthly consumption recorded on the meter, based on average monthly service for the immediately preceding 12-month period (or if insufficient history is available, based on the best available information), or 75 kwh/month of electricity, five therms/month of gas or one mlb/month of steam, whichever is greater").

only have to pay for the amount of electricity he or she actually uses.[152] A copy of such written agreement must be provided to all affected parties, as well as to the utility provider.[153] Even if the tenant and landlord are unable to reach a mutually acceptable agreement, the tenant will not be without remedy, and the landlord cannot continue the shared meter condition without consequences.[154] In such a situation, the Commission may negotiate such an agreement or "order a remedy for a shared meter [tenant] that it deems fair and equitable based on costs incurred and benefits received by the various parties."[155]

b. Placing the Utility Account in the Landlord's Name

If the New York landlord is not obligated to physically eliminate a shared meter condition due to a legal impediment, extraordinary cost, or minimal use, the landlord must place the utility service measured by the shared meter, including all shared area charges, in his or her name.[156] The landlord's account will also be billed for all shared area charges measured through the shared meter, whichever is most recent in time:

> [S]ix years prior to the discovery of or determination that a shared meter condition exists, or the first day of the tenancy, or the date the shared meter condition began, or the sixtieth day after the [landlord] knew or should have known that third party involvement exists, or the date the [landlord] assumed title to the dwelling.[157]

New York's shared meter law requires that the utility provider confirm within 120 days of the shared meter determination that the landlord has acted, either to eliminate the shared meter condition, to enter into a mutual agreement with the tenant to apportion the shared meter charges, or to establish a utility service account in the landlord's name.[158] If the utility provider finds that the landlord has failed to perform any of the above remedial actions, then the shared meter law grants the utility provider the authority and obligation to establish an account in the landlord's name and to bill the landlord for the appropriate prior consumption shown on the shared meter and for future consumption.[159] Further, within 120 days of the shared meter determination, the utility provider must refund to the overpaying tenant

152. N.Y. PUB. SERV. § 52(2)(b)(i); N.Y. COMP. tit. 16, § 11.30(d).
153. N.Y. PUB. SERV. § 52(2)(c)(i).
154. *See id.* § 52(4)(d); N.Y. COMP. tit. 16, § 11.30(d).
155. N.Y. COMP. tit. 16, § 11.30(d).
156. N.Y. PUB. SERV. § 52(2)(a).
157. *Id.*
158. *Id.*
159. *Id.* § 52(5)(b).

all shared meter charges already paid, and it must cancel all shared meter charges billed but unpaid[160] for the shorter period between the time the shared meter condition existed or six years.[161] Then, up to twelve months of these charges are billed to the landlord.[162]

A tenant in New York, such as Alice, cannot be taken advantage of by a dishonest landlord without the landlord being subjected to legal consequences.[163] Thus, New York landlord-tenant law better protects tenants against dishonest landlords through specificity in its shared meter law, whereas Texas landlord-tenant law fails to protect tenants by not even addressing the shared meter issue.[164] New York is not the only state with a shared meter law.[165]

B. California

1. What Does California's Shared Meter Law Require?

In September 1989, California added § 1940.9 to its Civil Code which deals with the shared meter setup.[166] Section 1940.9 requires a landlord to provide separate electric meters for each tenant's dwelling unit so that a tenant's meter only measures the electric service to the tenant's dwelling.[167] If the landlord fails to provide separate meters to each dwelling, and the landlord or the landlord's agent has knowledge that the tenant's meter measures utility service to an area outside of the tenant's dwelling, § 1940.9 requires a landlord to *explicitly* "disclose the existence of this [shared meter] arrangement to all prospective tenants before they begin their tenancy."[168] Further, the landlord must do one of the following: (1) execute a written mutual agreement wherein the landlord agrees to pay for the utilities provided through the shared meter by placing the utilities in the landlord's name; (2) execute a written mutual agreement wherein the landlord agrees to place the utilities in the area outside the tenant's rental unit on a separate meter in the landlord's name; or (3) execute a written mutual agreement wherein the tenant agrees to pay for the utilities provided through the shared meter to

160. *Id.* § 52(5)(c).
161. *Id.* § 52(1)(h).
162. *Id.* § 52(5)(d).
163. *See generally id.* § 52.
164. *Compare id.* (providing explicit penalties for shared meter condition violations), *with* TEX. PROP CODE ANN. § 92 (West 2017) (providing no statutory guidance whatsoever for shared meter setups).
165. *See generally* CAL. CIV. CODE § 1940.9 (West 2017); MINN. STAT. ANN. § 504B.215 (West 2017).
166. CAL. CIV. § 1940.9(a).
167. *Id.*
168. Anky van Deursen, *Landlord Must Disclose if Tenants Share Utility Costs*, L.A. TIMES (Feb. 15, 2015, 5:00 AM), http://www.latimes.com/business/realestate/la-fi-rentwatch-20150215-story.html (citing CAL. CIV. CODE § 1940.9(a)).

areas outside the tenant's rental unit.[169] Thus, California law requires upfront disclosure of a shared meter setup and a subsequent written agreement between the landlord and tenant of how the utility charges measured by the shared meter will be paid.[170]

2. What If a Landlord Violates the Disclosure Requirement?

Section 1940.9 also authorizes the tenant to bring a civil action against the landlord if the landlord fails to comply with the code's provisions.[171] Some of the remedies a court may order include, but are not limited to, the following: (1) requiring the landlord to place the utility service in his or her name; and (2) ordering the landlord to reimburse the tenant for payments made for utility service to areas outside the tenant's residence.[172] A positive aspect to this reimbursement remedy is that it begins to accrue "from the date the obligation to disclose arose."[173] This way a California tenant who has been overpaying utility expenses due to a shared meter is able to receive all of his or her overpayment starting from day one, not just from the date that the tenant discovered the shared meter setup, and such accrual time is not limited to a certain number of years.[174]

Overall, California's shared meter law is concise and protects tenants against shared meter setups reasonably well.[175] California's law, however, lacks specificity and leaves several holes open.[176] For example, California's law does not specify any investigative procedure that should be used in order to make a shared meter determination.[177] California's law outlines no such procedure for what a tenant may do if he or she suspects a shared meter setup.[178] In order to obtain a remedy if a landlord violates the statute, a California tenant must take the landlord to court, and the court may order the landlord to put the utility service in his or her name, or the court may order the landlord to reimburse the tenant for the amount he or she overpaid for utility expenses due to the shared meter setup.[179] Obtaining such a remedy might not be so easy for the average tenant, as a tenant may decide it is not worth the time, money, and emotional toil of taking a landlord to court. Thus, California's law only works as long as landlords conduct business operations

169. CAL. CIV. § 1940.9(a).
170. *See generally id.*
171. *Id.* § 1940.9(b).
172. *Id.* § 1940.9(b)(1)–(2).
173. *Id.* § 1940.9(b)(2).
174. *Id.*
175. *See generally id.* § 1940.9.
176. *See generally id.*
177. *See id.*
178. *See id.*
179. *Id.* § 1940.9(b).

honestly and follow the law, or absent that, as long as tenants know and enforce their rights.[180]

Even though California's law is short and lacks complexity, it has some positive aspects. Rather than require a landlord to physically eliminate a shared meter condition under the law, California's law creates a duty to *explicitly* disclose the shared meter setup to any prospective tenants *before* the tenancy begins.[181] If a landlord obeys the law, a tenant will be informed about the shared meter setup before he or she signs the lease.[182] In addition to the duty to disclose, California's law requires a landlord to enter into a mutually acceptable written agreement with the tenant specifying how the utilities will be divided.[183] Thus, California's law starts to protect a tenant before the lease is signed.[184] Further, California's law does not limit the period for which a shared meter tenant is entitled to a refund for overpayment for shared meter charges.[185] California's law specifies that any reimbursement a shared meter tenant is entitled to begins to accrue the day the landlord should have disclosed the shared meter arrangement.[186] Thus, if a tenant takes his or her landlord to court for violating the shared utility disclosure requirement, a tenant is entitled to reimbursement of payments for utility services to areas outside the tenant's dwelling starting from day one, even if the shared meter setup is discovered many years later.[187]

Overall, California's law offers basic protection for tenants like Alice, and although it lacks specificity and complexity, the law offers other protections against dishonest landlords by requiring explicit disclosure of shared meter setups before the tenancy begins and offering remedies for the tenant should the landlord violate the disclosure requirement.[188] In California, although a tenant such as Alice might still experience the shared utility setup if a landlord is dishonest, California's law makes Alice's situation much less likely than having no law at all and provides a tenant with some legal recourse.[189] Minnesota is another state with a shared meter statute.[190]

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180. *See generally id.*
181. *Id.* § 1940.9(a).
182. *Id*.
183. *Id.*
184. *Id.*
185. *Id.* § 1940.9(b).
186. *Id.* § 1940.9(b)(2).
187. *Id.*
188. *See id.* § 1940.9(a)–(b).
189. *See generally id.*
190. *See* MINN. STAT. ANN. § 504B.215 (West 2017).

C. Minnesota

1. What Does Minnesota's Shared Meter Law Require?

Minnesota law governs situations in which there are shared utility meters for one or more utilities: water, sewer, natural gas, and electricity.[191] Shared meters are common in small structures, like apartment buildings and duplexes.[192] In Minnesota, landlords are permitted to rent residential buildings with a single utility meter if they comply with all the conditions in the law.[193] For example, Minnesota law requires the landlord to pay the bill for a shared meter.[194] The landlord of a residential building served by a single-meter must place the utility service in his or her name, and the landlord must advise the utility company that the building is served by a single meter.[195]

For landlords who bill their tenants separately for utilities and rent, Minnesota law includes additional requirements.[196] The landlord "must provide prospective tenants notice of the total utility cost for the building for each month of the most recent calendar year."[197] Also, the landlord must have an equitable method for dividing the utility bill, and the method for apportioning the bill and billing tenants must be put in writing in all leases.[198] Further, the lease must include a provision that "upon a tenant's request, the landlord must provide a copy of the actual utility bill for the building along with each apportioned utility bill."[199] If a tenant makes a request, the landlord must provide copies of actual utility bills for any time a tenant has received a divided bill.[200] Under the law, the landlord must retain copies of utility bills for the previous two years or from the time the landlord bought the building, whichever is more recent.[201] The landlord may, as long as the tenant and landlord agree, provide tenants who have a one-year or longer lease term the option to pay utility bills under an annualized budget plan, which provides for level monthly payments based on good faith estimations of the yearly bill.[202]

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191. *Id.*

192. *See generally* Mid-Minnesota Legal Aid, *Shared Utility Meters* 1 (2017), http://www.lawhelpmn.org/files/1765CC5E-1EC9-4FC4-65EC-957272D8A04E/attachments/442786A1-8E3C-4198-9075-D02E47514BCE/h-8-shared-utility-meters.pdf.

193. MINN. STAT. § 504B.215, subdiv. 2a.

194. *Id.*

195. *Id.* § 504B.215, subdiv. 2.

196. *Id.* § 504B.215, subdiv. 2a.

197. *Id.* § 504B.215, subdiv. 2a(a)(1).

198. *Id.* § 504B.215, subdiv. 2a(a)(2).

199. *Id.* § 504B.215, subdiv. 2a(a)(3).

200. *Id.*

201. *Id.*

202. *Id.* § 504B.215, subdiv. 2a(a)(4).

2. What Happens If a Landlord Violates Minnesota's Shared Meter Law?

If a Minnesota landlord violates any of the requirements, it is considered a violation of the landlord's duty to keep the property fit for its intended use, a duty which cannot be waived.[203] Further, if a landlord fails to comply with this law, the tenant is not required to pay the utility bill or to reimburse the landlord for paying the utility bill.[204] If a tenant's name is on the utility bill for a shared meter rather than the landlord's, the tenant can sue the landlord for reimbursement.[205] A violation of Minnesota's law can include a penalty of five hundred dollars or three times what the tenant overpaid for utilities, whichever is the greater amount.[206] The tenant can also request a judge to order the landlord to take over responsibility for payment of the utility bill for the shared meter.[207] Such strict penalties arguably encourage landlords to comply with the requirements of the law. For a Minnesota landlord, complying with the law's requirements would be better than paying for a tenant's entire utility bill or paying at least five hundred dollars as a civil penalty.[208]

Overall, Minnesota's law protects the tenant before the lease is signed, but in cases of hidden shared meter conditions, the law is lacking.[209] In contrast to Texas's complete silence on the matter, however, a tenant in Alice's situation would be better protected in Minnesota.[210] She would have had notice of the shared meter setup before she signed the lease, and in the event of the landlord's failure to disclose such information, Alice would have some recourse under the law and in the courtroom, whereas in Texas the law is not on her side.[211]

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203. *See generally id.* §§ 504B.215, 504B.161, subdiv. 1, 504B.221(b).

204. *See* Mid-Minnesota Legal Aid, *supra* note 192, at 2.

205. *See id.*

206. MINN. STAT. § 504B.221. Section 504B.221(a), which authorizes an award of treble damages and attorney fees, does not apply to a violation of § 504B.215, subdiv. 2a. Kutscheid v. Emerald Square Props., Inc., 770 N.W.2d 529, 533 (Minn. Ct. App. 2009).

207. *See* Mid-Minnesota Legal Aid, *supra* note 192, at 2.

208. *See generally id.*

209. *Compare supra* Section II.D.1 (discussing the lack of remedies for individual tenants in Alice's situation), *with supra* Section IV.C.1 (explaining the variety of tenant rights based on rental type and payment structure).

210. *Compare supra* Section II.D.1 (highlighting the limited Texas requirement that landlords need only provide tenants with a device capable of heating water to 120 degrees), *with supra* Section IV.C.1 (examining a Minnesota landlord's responsibility to provide incoming tenants with notice of shared meter setups and the consequences of a landlord's failure to comply).

211. *Compare supra* notes 196–98, 203–07 and accompanying text (exploring a landlord's duty to provide tenants with notice of total utility costs for the building, an equitable method for dividing the bill among tenants, and the consequences for a landlord's failure to comply), *with supra* Section II.D.1 (noting that a Texas landlord need only provide a tenant with a device capable of heating water to a specified temperature).

D. The Three Bears: How Do These States Compare to Each Other?

Although these three states have enacted statutes covering the same issue of shared meter setups in residential buildings, New York, California, and Minnesota have taken separate routes to achieving the same thing—protecting tenants from shared meter setups.[212] Whereas New York's law is lengthy and complex, California's law is simple and concise, and Minnesota's law falls somewhere in between.[213] If Goldilocks compared the laws of these Three Bears, however, she may not find one that is "just right."

Although California's law is short and clear, it lacks the specificity of New York's shared meter law and leaves several holes open that New York has closed.[214] Whereas New York's law specifies that a suspected shared meter condition should be reported to the utility company, which is required by law to investigate within a certain period, California's law fails to include any such procedure.[215] Even though California's law is short and lacks the complexity of New York's law, it has some positive aspects that New York's law lacks.[216] Rather than require a landlord to physically eliminate a shared meter condition under the law as New York does, California's law requires explicit disclosure of shared meter setups before the tenant signs the lease.[217] If a California landlord obeys the law, a tenant will know about the shared meter setup before the tenancy begins.[218] In addition to the disclosure requirement, California's law requires the landlord and tenant to enter into a mutually acceptable written agreement apportioning the utility charges.[219] In this manner, California's law starts to protect a tenant before the lease is signed, whereas the New York law does not begin to protect the tenant until he or she requests an investigation.[220] Further, New York's law limits the period a shared meter tenant is entitled to a refund for overpayment for utility service charges measured through a shared meter, with the highest period

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212. *See supra* Part IV (explaining all three statutes).

213. *See* CAL. CIV. CODE § 1940.9(b) (West 2017)*;* MINN. STAT. ANN. § 504B.215, subdiv. 2 (West 2017); N.Y. PUB. SERV. LAW § 52(10)(c) (McKinney 2017).

214. *See generally* CAL. CIV. § 1940.9(b); N.Y. PUB. SERV. § 52(10)(c).

215. *Compare* N.Y. PUB. SERV. § 52(4) (detailing that a tenant must notify the utility provider of suspected shared meter setups, after which the utility provider will notify the landlord and an investigation will occur), *with* CAL. CIV. § 1940.9 (providing that a landlord must notify a tenant of shared meter conditions either before he or she moves in or upon discovery of the condition, whichever is later; the landlord and tenant must then execute an agreement related to utility payment obligations; and that, among other things, a tenant may request that the landlord be the customer of record with the utility provider or may seek reimbursement).

216. *See generally* CAL. CIV. § 1940.9; N.Y. PUB. SERV. § 52.

217. *Compare* N.Y. PUB. SERV. § 52 (providing elimination of the shared meter setup among a variety of available remedies), *with* CAL. CIV. § 1940.9 (requiring disclosure of shared meter setup prior to the inception of the tenancy or when it is discovered that such a setup exists).

218. CAL. CIV. § 1940.9(a).

219. *Id.* § 1940.9(a)(1)–(2).

220. *See id.* § 1940.9; N.Y. PUB. SERV. § 52.

being six years.[221] Unfortunately, a New York tenant may only receive a refund for a portion of the time he or she overpaid due to a shared meter setup.[222] In contrast to New York's stricter time guidelines, California's law places no such time limit on refunds, and a California tenant may recover overcharges beginning from the date the landlord's duty to disclose arose, even if discovery of the shared meter setup occurs years later.[223]

In comparison to the two previous states, Minnesota's shared meter law is less comprehensive and specific than New York, but slightly more complicated than California.[224] Whereas the main thrust of New York's law is to require a landlord to eliminate a shared meter condition (where possible), and California's major requirement is pre-lease disclosure of shared meter arrangements, Minnesota's law pointedly allows landlords to rent single-metered residential buildings, but absolutely requires that a landlord: (1) place the utilities in his or her name; (2) notify the utility company of the building's single-meter status; and (3) disclose such an arrangement to prospective tenants.[225]

Also, Minnesota law requires landlords who charge utilities measured by shared meters separate from rent to include how the utilities will be paid and who is responsible for payment in the lease.[226] This is similar to the option in the New York law for the landlord and tenant to enter into a mutual written agreement to apportion shared meter charges, but Minnesota's law differs in that it does not outline any procedure for an aggrieved tenant to contest the fairness of such apportionment.[227] As the Minnesota law is currently written, the landlord decides how each utility bill is apportioned with "an equitable method," and the prospective tenant can either accept the proposed utility arrangement based on the cost of utilities for the whole building or the prospective tenant can reject the proposed arrangement and seek lodgings elsewhere.[228] Arguably, a landlord of a single-metered residential building in Minnesota can take advantage of prospective tenants

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221. N.Y. PUB. SERV. § 52(10)(c) (specifying that "where a shared meter [tenant] is entitled, following a final determination of a shared meter condition, to a refund or cancellation of shared meter charges and title to the dwelling has been transferred to a new [landlord], . . . for the period of time effective six years prior to the discovery of or determination that a shared meter condition exists, or the first day of the tenancy, or the date the shared meter condition began, whichever is most recent in time").

222. *Id.* For example, if a New York tenant has lived in a building with a hidden shared meter setup for five years, and if title to a tenant's building is transferred to a new owner in year five, the tenant will only be entitled to a refund for overpayment of shared meter charges starting on the day title was transferred to the new landlord, not from the beginning of the tenancy. *Id.*

223. CAL. CIV. § 1940.9(b)(2).

224. *See id.* § 1940.9; MINN. STAT. ANN. § 504B.215 (West 2017); N.Y. PUB. SERV. § 52.

225. CAL. CIV. § 1940.9(b); MINN. STAT. § 504B.215, subdiv. 2; N.Y. PUB. SERV. § 52(10)(c).

226. MINN. STAT. § 504B.215, subdiv. 2a.

227. *Id.* § 504B.215.

228. *Id.* § 504B.215, subdiv. 2a.

who have no other options, especially in areas where rental units are in high demand.[229]

Unlike New York and similar to California, Minnesota's law does not include any requirement that the landlord eliminate the shared meter condition.[230] This also creates the potential for tenants in single-metered buildings to have their utilities cut off due to the landlord's failure to pay the utility costs which are required by law to be under his or her name.[231] Because of this increased possibility, Minnesota's law includes a provision outlining the procedure such disadvantaged tenants must follow in order to reestablish suspended utility service.[232] Similar to the California law, Minnesota's law protects the tenant against shared meter conditions before the commencement of the tenancy, but once the tenancy begins, a tenant typically must enforce his or her rights against the landlord in a courtroom.[233]

Looking at the pros and cons of these laws, Texas may be able to learn a thing or two from other states. Although none of these laws are perfect, a tenant in New York, California, or Minnesota is better protected against overpaying for electric charges due to shared meter setups than a tenant in Texas.[234] Had Alice lived in one of these states, she would have had some recourse under the law. Unfortunately, Texas has yet to address Alice's situation in the Property Code, leaving tenants like Alice hanging in legal limbo and paying for electricity that is not their responsibility.

V. HOW TO ADDRESS THE "SHARED UTILITY METER" GAP IN TEXAS LANDLORD-TENANT LAW

As discussed above, other states have addressed the shared meter setup issue in different ways, each with their respective pros and cons.[235] Texas has yet to address the issue and has a unique opportunity to expand its landlord-tenant law to be more specific and inclusive of significant issues that affect Texas tenants. Because other states have already done so, Texas

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229. Such landlord-on-tenant predation has already occurred in Texas cities, such as Austin, where supply and demand can drive down standards of habitable conditions of rental properties. *See generally* Dexheimer, *supra* note 56 (describing how "the laws of supply and demand have tilted the playing field dramatically in favor of landlords, who face little in the way of repercussions for ignoring substandard living conditions in their buildings").

230. MINN. STAT. § 504B.215.

231. *Id.*

232. *See id.* § 504B.215, subdiv. 3.

233. *See* Mid-Minnesota Legal Aid, *supra* note 192, at 1–2; *see also* CAL. CIV. CODE § 1940.9(a) (West 2017) (providing protection for tenants prior to the inception of the tenancy).

234. *See* CAL. CIV. § 1940.9; MINN. STAT. ANN § 504B.215; N.Y. PUB. SERV. LAW § 52 (McKinney 2017).

235. *See generally* CAL. CIV. § 1940.9; MINN. STAT. § 504B.215; N.Y. PUB. SERV. § 52.

should take note of what works for other states and what does not in drafting its own shared meter law.[236]

A. Shared Meter Elimination Requirements: The First Line of Defense against Shared Meter Setups in Texas

Under current Texas landlord-tenant law, the issue of shared meter setups for electric service is not addressed in the Property Code.[237] For this reason, Texas has the opportunity to enact a statute from scratch. Taking a page from New York's playbook, Texas should include a provision requiring a landlord of a shared meter residential building to eliminate any shared meter conditions, as well as include other language from the California and Minnesota statutes.[238] An example of such a provision, as drafted by the Author, is as follows:

> Texas Property Code Sec. 92.356. LANDLORD'S RESPONSIBILITY FOR SERVICE MEASURED THROUGH A SHARED METER.
>
> (a)(i) If the landlord does not provide separate electric meters for each tenant's dwelling unit so that each tenant's meter measures only the electric service to that tenant's dwelling unit and the landlord or his or her agent has knowledge that electric service provided through a tenant's meter serves an area outside the tenant's dwelling unit, the landlord shall eliminate any shared meter condition or, in the alternative, the landlord shall be the bill payer responsible, and shall be the customer of record contracting with the utility provider for all the shared area charges for electric service measured through a shared meter effective from the date of discovery of or determination that a shared meter condition exists, or the first day of the tenancy, whichever is latest in time, and for all future service measured by the shared meter.
>
> (ii) The landlord must advise the utility provider that the electric services apply to a shared meter residential building. The utility provider shall, upon a landlord's application, open such an account and bill the landlord for all applicable shared area charges and all future service measured by the shared meter through such account.
>
> (iii) The provisions of this section may not be waived by the landlord, tenant, or utility provider by contract or otherwise.

It is important that the shared meter statute require a landlord to first eliminate a shared meter condition so that a landlord will not be able to unfairly pass off utility costs to a tenant through a shared meter. With fewer

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236. *See generally* CAL. CIV. § 1940.9; MINN. STAT. § 504B.215; N.Y. PUB. SERV. § 52.

237. TEX. PROP. CODE ANN. § 92 (West 2017).

238. CAL. CIV. § 1940.9(b); MINN. STAT. § 504B.215; N.Y. PUB. SERV. § 52.

shared meter setups, tenants in Texas will be better protected and will less likely be forced to pay for electric service that is not attributable to their own usage.[239]

Further, a landlord of a shared meter building must be required to place the electric bill in his or her name so that the tenant will not be forced to pay for any electric service that is attributable to service in an area outside the tenant's rental unit. The landlord must notify the utility provider that utility service is for a single-metered residential building as an additional safeguard to prevent against hidden shared meter arrangements. If a tenant is not in control over an area that the shared meter is measuring service to, the tenant should not be required to pay for the service to that area outside of his or her control.[240] That common area is the responsibility of the landlord and should not be passed off to a tenant.

Also, the effective date is important in this provision as well. Rather than limit the period for which the landlord is responsible for charges measured through the shared meter, the tenant would be better protected by allowing for a broader period. This way a landlord will be responsible for shared meter charges from at least the beginning of the tenancy. There is potential for landlords to hide shared meter setups in violation of the law, and if a tenant never discovers such a setup, the landlord could continue to take advantage and force the tenant to pay for shared meter charges. By specifying that a landlord is responsible for a shared meter setup from day one of the tenancy, the law will better protect a tenant, especially tenants who are unknowingly paying for shared meter charges.[241]

By specifying that the provisions of this section may not be waived, the statute highlights the compulsory nature of the provisions for all parties involved. This way the landlord may not take advantage of tenants who are unaware of their rights by waiving the requirements in a lease provision, and tenants may not unadvisedly waive their rights in exchange for a lower rent rate, for example.[242] The utility provider is also held responsible under the statute and required to follow the applicable provisions.[243] By requiring all parties involved to fulfill their obligations, the statute safeguards against the possibility of hidden shared meter setups.[244]

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239. *Cf.* CAL. CIV. § 1940.9; MINN. STAT. § 504B.215; N.Y. PUB. SERV. § 52 (protecting tenants from the cost of utilities they did not use).

240. *See* NAT'L FUEL, *supra* note 103.

241. *See* CAL. CIV. § 1940.9; van Deursen, *supra* note 168.

242. *See* N.Y. PUB. SERV. § 52(3)(a)–(b).

243. *See id.* § 52(2)(a).

244. *See id.* § 52.

B. Explicit Shared Meter Disclosures Requirement and Alternatives to Elimination: The Second Line of Defense

In order to be fair to landlords who may be unable to comply with such a requirement due to either financial or legal hindrances, the statute should include reasonable alternatives if elimination is not possible:[245]

> Texas Property Code Sec. 92.356. LANDLORD'S RESPONSIBILITY FOR SERVICE MEASURED THROUGH A SHARED METER.
>
> . . . .
>
> (b)(i) In the event that a legal impediment or extraordinary cost prevents elimination of a shared meter condition, the landlord, as an alternative to eliminating the shared meter condition, shall do the following:
>
> (1) explicitly disclose the shared meter condition to a prospective tenant prior to the inception of the tenancy and include such disclosure as a lease provision in all leases;
>
> (2) enter into a mutually acceptable written agreement with the shared meter tenant and where applicable, a third party, for equitable apportionment of the charges for electric service measured through the shared meter;
>
> (3) provide a copy of such negotiated and executed agreement to the utility provider, the shared meter tenant, and where applicable, a third party; and
>
> (4) include a lease provision that, upon a tenant's request, the landlord must provide a copy of the actual electric bill for the building along with each apportioned electric bill. Upon a tenant's request, a landlord must also provide copies of actual electric bills for any period of the tenancy for which the tenant received an apportioned electric bill. Past electric bills must be provided for the preceding three years or from the time the current landlord acquired the building, whichever is most recent.
>
> (ii) If the interested parties are unable to negotiate a mutually acceptable written agreement, the public utility commission or its designee, upon a complaint by the tenant or landlord, shall order a remedy, consistent with the relief provided in this section, as it deems proper. The commission or its designee shall have the authority to apportion estimated charges for electric service

245. *See id.*; CAL. CIV. § 1940.9(a); MINN. STAT. ANN. § 504B.215 (West 2017). The Author relied heavily on New York, California, and Minnesota shared meter statutes when drafting the proposed subsections.

> measured by a shared meter among the landlord, tenant, and where applicable, third party.[246]

Unlike New York's shared meter law, which includes minimal cost to the shared meter tenant as a third exception to the elimination requirement, Texas should not include such an exception.[247] A tenant should not be forced to pay any additional amount in electric service that is not directly attributable to his or her own usage. Even if the minimal use amounts to the tenant paying an extra dollar in electric service, that additional dollar is not the tenant's responsibility and should be the responsibility of the landlord.[248] Further, by limiting the number of potential exemptions from the elimination requirement, the statute would encourage more landlords to eliminate shared meter conditions and better protect tenants from paying for electric service that is not due to their own usage.[249]

Also, following California's example, requiring a landlord to explicitly disclose a shared meter condition to a prospective tenant before the commencement of the tenancy is necessary to protect tenants from hidden shared meter conditions.[250] By requiring explicit disclosures prior to the commencement of a tenancy, tenants will be protected before they sign the lease.[251] Mandatory disclosures will encourage landlords to be more forthcoming and honest in dealings with tenants, and further requiring the disclosures to be included as a lease provision in all leases ensures that a tenant will be clearly notified of the shared meter condition *before* he or she signs the lease.[252] Although the ultimate decision whether to sign or not sign the lease is up to the tenant, providing for pre-lease protection increases the likelihood that a tenant will not be forced to pay for the electric charges of another tenant through a shared meter.

Because the electric service provided through a shared meter will be required to be in a landlord's name, it follows that the landlord and tenant must reach an agreement about how the charges will be apportioned. Unlike Minnesota, which allows the landlord to solely determine an equitable method of apportionment prior to the inception of the tenancy, Texas's provision should require the tenant's participation.[253] A Minnesota tenant, for example, might be faced with a landlord's take it or leave it offer, with no

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246. *See generally* CAL. CIV. § 1940.9(a); MINN. STAT. § 504B.215; N.Y. PUB. SERV. § 52.

247. N.Y. PUB. SERV. § 52(2)(b)(i).

248. *But see id. See also generally* N.Y. COMP. CODES R. & REGS. tit. 16, § 11.30(d) (2017).

249. *See generally* N.Y. PUB. SERV. § 52(2)(b)(i); N.Y. COMP. tit. 16, § 11.30.

250. CAL. CIV. § 1940.9.

251. *See id.* § 1940.9(a); van Deursen, *supra* note 168.

252. *See supra* Section IV.B.1 (explaining California's shared meter law and a landlord's obligation to disclose).

253. MINN. STAT. ANN. § 504B.215 (West 2017).

room for negotiation.[254] By requiring both parties to participate in the agreement, the mutually acceptable written agreement would protect both the landlord and the tenant.[255] Requiring the agreement to be in writing and to be equitable would provide proof of the obligations of both parties and would prevent one of the parties from unilaterally changing the terms of the agreement later.[256]

Further, requiring the landlord to provide a copy of the agreement to both the tenant and the utility provider protects tenants from landlords deviating from the agreement. Such a requirement ensures that the parties know their respective obligations and that the landlord, as well as the tenant and the utility provider, will have proof of the agreement. Including a provision that permits the participation of the utility provider to negotiate an agreement is also important. If the landlord and tenant are unable to reach a mutually acceptable agreement, it will not mean a tenant will be forced to accept a landlord's offer or find somewhere else to live. The tenant or landlord may request the Texas Public Utility Commission to negotiate a more equitable apportionment, which would better protect a tenant from being forced to accept an unfair offer from a landlord, or vice versa in the event that a tenant offers a landlord unreasonable terms.[257]

C. Investigation Requirements: The Third Line of Defense

A significant obstacle that a tenant such as Alice faces in Texas is that the tenant may have a difficult time proving that a shared meter condition exists. Especially if a landlord is intentionally hiding a shared meter condition, he or she is not likely to freely divulge such information. Notably, New York's shared meter statute provides for an investigative procedure where a shared meter setup is suspected, and Texas should include a similar procedure in its statute.[258] Such a provision, as drafted by the Author, is as follows:

> Texas Property Code Sec. 92.356. LANDLORD'S RESPONSIBILITY FOR SERVICE MEASURED THROUGH A SHARED METER.
>
> . . . .
>
> (c) Upon a tenant's verbal or written complaint that a shared meter is measuring service to the tenant's dwelling and that the tenant is responsible for the charges for such service or upon receipt of other

254. *See id.*; *supra* Section IV.C.2 (discussing Minnesota's shared meter law).

255. *See* CAL. CIV. § 1940.9; N.Y. PUB. SERV. LAW § 52(2)(b)–(c) (McKinney 2017).

256. *See supra* Section IV.A.10.a (describing written mutual agreements between landlords and tenants).

257. *See generally* N.Y. PUB. SERV. § 52(2)(b)–(c); N.Y. COMP. CODES R. & REGS. tit. 16, § 11.30(d) (2017).

258. N.Y. PUB. SERV. § 52(4)(a)–(d). The Author relied heavily on New York's shared meter statute when drafting the proposed subsections.

information indicating that a shared meter may exist, a utility provider shall notify the landlord in writing of the landlord's responsibilities under this section, that a complaint was received or information obtained that a shared meter may exist, and that the utility provider is required to conduct an investigation. If such utility provider is not the utility provider in ownership or control of the meters and related pipes, fittings, wires and other apparatus associated with the establishment and measurement of service to such tenant's dwelling, notice shall also be provided to such metering utility provider. Upon the request of a landlord or upon a complaint by a tenant or upon receipt of information indicating that a shared meter may exist, such metering utility provider shall investigate and determine whether such service is or is not measured by a shared meter. Such metering utility provider may determine if separate metering or rewiring or repiping is possible and shall provide the landlord with information describing how shared meter conditions can be eliminated. The investigation shall include, but not be limited to, conducting appropriate tests, an examination of wiring, piping, meters, and heating equipment in the building as may be needed, an estimate of electricity used in the shared meter tenant's dwelling and in areas outside the dwelling, and a review of billing records.

(d) The determination shall be provided in writing, within thirty business days of the date of the complaint or receipt of information or landlord's request, to the tenant, the landlord, and any other tenants receiving service measured by the shared meter. Such written determination shall include a description of the specific areas outside the dwelling served by the shared meter, the nature of the uses of the service, and the proportional amount of service registered on the shared meter that is provided to the shared meter tenant's dwelling and to areas outside the dwelling. A notice shall be included with the determination informing the recipients of the availability of the commission's complaint handling procedures, and providing the department's address and telephone number for filing objections to such determination.

(e) Failure of a landlord to provide access to any common area in the building or to cooperate with any reasonable request made by the investigating utility provider shall result in a determination that the tenant's dwelling is served by a shared meter, specifying the landlord's action that such utility provider understood to be a failure to cooperate. Failure of a tenant making a shared meter complaint to provide access to a dwelling controlled by the tenant

> or to cooperate with any reasonable request made by the investigating utility provider shall cause the utility provider to suspend the investigation and to notify in writing the tenant and the landlord that the investigation is suspended, specifying the tenant's action that such utility provider understood to be a failure to cooperate. A utility provider duly acting under this paragraph is entitled to make the determinations provided for and shall be held harmless from any subsequent monetary claim by a landlord that the dwelling was not served by a shared meter or by a shared meter tenant that the dwelling was served by a shared meter.
>
> (f) Any tenant filing a complaint under this section or landlord who disagrees with a utility provider's determination may utilize the commission's complaint handling procedures to obtain a written departmental determination by complaining to the department within forty-five days after receipt of the utility provider's determination. In the event that the utility provider fails to provide a determination on a complaint under this section within the required time period, the department shall investigate, upon the shared meter tenant's or landlord's request, and issue a written determination. The commission or its designee shall have the authority to apportion estimated charges for service measured by a shared meter among the landlord, shared meter tenant, and any third party.[259]

If Texas landlord-tenant law is going to protect tenants against dishonest landlords, this investigative procedure provision is absolutely necessary to establish what is required by the utility provider, the landlord, and the tenant. A provision that requires a utility provider to investigate a suspected shared meter setup is crucial to protecting tenants against shared meter conditions, especially hidden shared meter setups such as what Alice experienced. By providing an investigative procedure in the statute, tenants will be able to find out whether there is a hidden shared meter setup without having to rely on the landlord's honesty.

Regardless of whether the landlord is intentionally or unintentionally hiding a shared meter setup, this investigative procedure acts as a backstop protection for tenants in the event that the landlord fails to disclose the shared meter condition to the tenant. Further, it is important to include the portions that lay out the obligations of the tenant and the landlord. Because a landlord's failure to grant an investigating utility provider access to the required areas creates an automatic presumption of a shared meter setup, a

259. *See id.*

landlord cannot hinder an investigation in order to continue to hide the shared meter condition.[260] On the other hand, a tenant has the same responsibility to allow an investigating utility provider access to the required areas if he or she wants the investigation to be completed.[261] This is important to include to prevent false claims of shared meter setups, which would only waste time and resources.

Further, specifying how much time a utility provider has to investigate a suspected shared meter setup ensures that such complaints will be handled quickly.[262] The longer a tenant must wait for the shared meter setup to be resolved, the more money the tenant will be forced to pay for the shared meter charges. Because time is money, quicker is better, and a tenant who is subjected to a shared meter setup may find relief in a statute that requires investigations to be handled within a reasonable amount of time.

Requiring the utility company to provide the tenant and landlord with a written determination of the investigation is also important to protect both the landlord and the tenant.[263] Because all of the parties involved will receive a written determination of the utility provider's investigation, the parties will be made aware of any further obligations they may have as required by the law, and if necessary, the parties will be able to move forward to resolve the shared meter setup. In addition, if the investigating utility provider determines a shared meter condition exists, a written determination serves as proof for when the tenant seeks a remedy against the landlord.

Lastly, providing for an alternative process in the instance that a utility company fails to investigate within the required period or in the instance the landlord or tenant wishes to challenge a utility provider's determination protects both the landlord and the tenant.[264] Such a requirement protects against a utility provider's failure to follow the law and act within the allotted time, as well as against a utility provider's failure to properly investigate if the Commission's determination is contrary to the utility company's final determination.[265] For this reason, landlords and tenants are both protected against such failures on the utility provider's end.

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260. *See, e.g.*, *supra* Section IV.A.7 (explaining the consequences of a landlord's failure to cooperate with the New York statute's investigative procedure).

261. *See* N.Y. PUB. SERV. § 52(4)(c).

262. *See id*. § 52(4)(a).

263. *See id*. § 52(4)(a)–(b).

264. *See generally id.* § 52(4)(d).

265. *See generally id.*

D. A Tenant's Remedies in Case of a Landlord's Violation: The Final Protection against Shared Meter Setups

For a tenant in Alice's situation, the tenant's last resort is to seek a remedy under the law. Texas's current Property Code does not address shared meter setups, and as a result, tenants who discover a shared meter condition have no equitable remedy.[266] Therefore, Texas must include adequate remedies for tenants against landlords who violate the shared meter provisions in regard to elimination and disclosure.[267] The remedies subsection, as drafted by the Author, is as follows:

> Texas Property Code Sec. 92.356. LANDLORD'S RESPONSIBILITY FOR SERVICE MEASURED THROUGH A SHARED METER.
>
> . . . .
>
> (g) If a landlord fails to comply with paragraphs (a) and (b) of this section, the aggrieved tenant is entitled to the following remedies:
>
> (1) Unilateral termination of the lease contract; and
>
> (2) Reimbursement for payments made by the tenant to the utility provider for service to areas outside the tenant's dwelling unit. Payments to be reimbursed pursuant to this paragraph shall commence from the date the obligation to disclose arose under paragraph (a).
>
> (h) In addition to the remedies under paragraph (g), if a landlord fails to comply with paragraphs (a) and (b) of this section, an aggrieved tenant may bring an action in a court of competent jurisdiction. The remedies a court may order shall include, but are not limited to, the following:
>
> (1) An order requiring the landlord to be made the customer of record with the utility provider for the tenant's electric meter;
>
> (2) An order directing the landlord to install a separate electric meter for the shared area outside of the tenant's dwelling unit;
>
> (3) A judgment against the landlord for a civil penalty of one month's rent plus $1,000, including attorney's fees and court costs; and
>
> (4) A judgment against the landlord for the amount of the tenant's actual damages.
>
> (i) Where a landlord or shared meter tenant demonstrates the existence of third party involvement, the landlord or shared meter customer shall be entitled respectively to recover the charges billed by the utility provider to the landlord's account, or to the shared

266. *See supra* Part I (detailing the gap in the Texas Property Code in regard to shared meter setups).

267. *See* CAL. CIV. CODE § 1940.9(b) (West 2017); MINN. STAT. ANN § 504B.215 (West 2017); N.Y. PUB. SERV. § 52(7). The Author relied heavily on New York, California, and Minnesota statutes when drafting the proposed remedy subsections.

> meter tenant's account, pursuant to this section in a civil action against the third party in a court of competent jurisdiction.
> (j) A landlord who knowingly and intentionally violates this section by hiding a shared meter condition is liable to the tenant for a civil penalty of $2,500, plus attorney's fees and court costs.

This remedy subsection must balance the interests of the tenant with the interests of the landlord. For example, the provision must be adequate to protect the tenant against shared meter setups and to reimburse the tenant who is subjected to the landlord's violation of the law, but such remedies cannot be so excessive as to prejudice the landlord. On the other hand, the remedy provision must also act as a deterrent for landlords who seek to violate the law, whether intentionally or unintentionally. In order to balance such competing interests, the statute should include remedies that the tenant is *automatically* entitled to if the landlord violates the section, including unilateral lease termination and reimbursement of what the tenant overpaid for shared area charges. Under the remedy provision, a landlord's failure to eliminate a shared meter condition or to disclose such setup in a lease risks the invalidation of the lease, a risk many landlords would not be willing to take.[268] Thus, it will encourage landlords to follow the law in order to avoid losing leases, and it will protect tenants by allowing the tenant to break the lease without having to take the landlord to court and without penalties for leaving before the lease term ends.

Further, the remedies subsection provides additional remedies a tenant may seek in a court of law. This will allow the courts to apply and interpret the meaning of the section, and a tenant will not be limited to only certain remedies under the law. Such flexibility will also protect the landlord. For example, a court of law may deem it proper to order a lighter penalty for slight violations of the law, whereas a court may order harsher penalties for more egregious violations. Also, providing for the option to recover utility charges from a third party who benefitted from the shared meter setup is necessary to protect both landlords and tenants. Under such a provision, either the landlord or Alice could sue the other tenant for reimbursement of the amount of utility charges that the other tenant used on the shared electric meter.[269] This way the landlord will not be stuck footing the entire reimbursement bill when third parties are involved.

Even with harsher penalties included, a landlord may still try to hide a shared meter setup. A tenant is not likely to voluntarily sign a lease agreement knowing he or she will be paying for electric charges he or she does not use, so a landlord's misrepresentation of the shared meter condition

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268. *See generally* CAL. CIV. § 1940.9; MINN. STAT. §§ 504B.161, subdiv. 1, 504B.221; N.Y. PUB. SERV. § 52(a).

269. *See supra* Section IV.A.9 (explaining a New York landlord's duties after a shared meter setup is found wherein a third party is involved).

requires a strict penalty. In order to protect tenants from dishonest landlords like Alice's, the penalty for intentionally hiding the shared meter setup must be harsh enough to deter a landlord from doing so. Thus, the law offers dishonest landlords the options of being honest or paying the piper.

VI. CONCLUSION

In Texas, the landlord-tenant relationship historically has been very one-sided and heavily favors the landlord over the tenant.[270] Despite substantial changes in the law over time, a significant gap exists in regard to shared meter setups.[271] Currently, nothing in the Property Code prohibits shared meter setups, whether hidden or conspicuous.[272] It is necessary for Texas to address this gap in order to protect tenants from landlords who are taking advantage of the Property Code's silence on the matter.[273] Tenants such as Alice are left vulnerable under the current Property Code, and landlords are able to use shared meter setups to force tenants to pay for electricity that they are not using and for which they should not be responsible.[274] Not only might a landlord force a tenant to knowingly pay for electricity used in areas outside of his or her dwelling, a Texas landlord can force a tenant to overpay unknowingly through a hidden shared meter setup like the one Alice experienced.[275]

Other states have already addressed this issue in their landlord-tenant statutes, some of which have been effective for decades.[276] Instead of continuing to lag behind other states in landlord-tenant law, Texas should take a page from the playbooks of other states, and weigh the pros and cons of these enacted statutes.[277] Because Texas's landlord-tenant law is silent on the matter of shared meter setups, Texas has the advantage to begin from scratch when drafting a shared meter statute.[278] In order to draft a statute that is "just right," Texas can incorporate provisions that have worked in other states and avoid including provisions that are problematic in order to better

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270. *See* FAMBROUGH, *supra* note 8; *supra* Parts II–III (detailing the history of landlord-tenant law in Texas). *See generally* Dexheimer, *supra* note 56 ("Everything seems to be stacked in favor of the landlord.").

271. *See supra* Part II.D (detailing the shared meter gap in the Texas Property Code).

272. *See supra* Part I (giving an example of when a shared meter gap exists in Texas).

273. *See supra* Part III.A (highlighting the current gap in the Texas Property Code in regard to shared meter setups).

274. *See supra* Parts III.B–C (discussing the gap in the Texas Property Code and its impact on unsuspecting tenants).

275. *See supra* Part I (showing an example of a shared meter setup).

276. *See supra* Part IV (explaining different statutes that address shared meter setups in New York, California, and Minnesota).

277. *See supra* Part V (considering an appropriate response to Texas's statutory gap).

278. *See supra* Part V (describing the statutory gap in regard to shared meter setups).

protect tenants without unfairly burdening landlords.[279] In drafting its shared meter law, Texas needs to include four major areas of protection in the new statute, which are as follows: (1) shared meter elimination with reasonable alternatives; (2) required pre-lease disclosures; (3) investigation requirements; and (4) adequate remedies in the event of a landlord's violation.[280] While Alice might have avoided experiencing the shared meter issue with her first landlord in a state like New York, current Texas landlord-tenant law failed to protect her.[281] Until Texas addresses this glaring gap in the Property Code and requires uniform shared meter requirements throughout the state, tenants all over Texas will remain vulnerable to falling prey to a landlord's shared meter trap, whether hidden or not.[282]

The Author proposes the following draft Texas house bill to enact a shared meter statute:

> Texas Property Code Sec. 92.356. LANDLORD'S RESPONSIBILITY FOR SERVICE MEASURED THROUGH A SHARED METER.
> (a)(i) If the landlord does not provide separate electric meters for each tenant's dwelling unit so that each tenant's meter measures only the electric service to that tenant's dwelling unit and the landlord or his or her agent has knowledge that electric service provided through a tenant's meter serves an area outside the tenant's dwelling unit, the landlord shall eliminate any shared meter condition or, in the alternative, the landlord shall be the bill payer responsible, and shall be the customer of record contracting with the utility provider for all the shared area charges for electric service measured through a shared meter effective from the date of discovery of or determination that a shared meter condition exists, or the first day of the tenancy, whichever is latest in time and for all future service measured by the shared meter.
>
> (ii) The landlord must advise the utility provider that the electric services apply to a shared meter residential building. The utility provider shall, upon a landlord's application, open such an account and bill the landlord for all applicable shared area charges and all future service measured by the shared meter through such account.
>
> (iii) The provisions of this section may not be waived by the landlord, tenant, or utility provider by contract or otherwise.

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279. *See supra* Part V (presenting an example of an adequate statute Texas could adopt to resolve this problem).

280. *See supra* Part V (discussing the areas in which the Texas Property Code is insufficient).

281. *See supra* Part III (highlighting the failure of the Texas Property Code to address the shared meter gap).

282. The Author has attached the draft Texas shared meter statute in its entirety.

(b)(i) In the event that a legal impediment or extraordinary cost prevents elimination of a shared meter condition, the landlord, as an alternative to eliminating the shared meter condition, shall do the following:

(1) explicitly disclose the shared meter condition to a prospective tenant prior to the inception of the tenancy and include such disclosure as a lease provision in all leases;

(2) enter into a mutually acceptable written agreement with the shared meter tenant and where applicable, a third party, for equitable apportionment of the charges for electric service measured through the shared meter;

(3) provide a copy of such negotiated and executed agreement to the utility provider, the shared meter tenant, and where applicable, a third party; and

(4) include a lease provision that, upon a tenant's request, the landlord must provide a copy of the actual electric bill for the building along with each apportioned electric bill. Upon a tenant's request, a landlord must also provide copies of actual electric bills for any period of the tenancy for which the tenant received an apportioned electric bill. Past electric bills must be provided for the preceding three years or from the time the current landlord acquired the building, whichever is most recent.

(ii) If the interested parties are unable to negotiate a mutually acceptable written agreement, the public utility commission or its designee, upon a complaint by the tenant or landlord, shall order a remedy, consistent with the relief provided in this section, as it deems proper. The commission or its designee shall have the authority to apportion estimated charges for electric service measured by a shared meter among the landlord, tenant, and where applicable, third party.

(c) Upon a tenant's verbal or written complaint that a shared meter is measuring service to the tenant's dwelling and that the tenant is responsible for the charges for such service or upon receipt of other information indicating that a shared meter may exist, a utility provider shall notify the landlord in writing of the landlord's responsibilities under this section, that a complaint was received or information obtained that a shared meter may exist, and that the utility provider is required to conduct an investigation. If such utility provider is not the utility provider in ownership or control of the meters and related pipes, fittings, wires and other apparatus associated with the establishment and measurement of service to

such tenant's dwelling, notice shall also be provided to such metering utility provider. Upon the request of a landlord or upon a complaint by a tenant or upon receipt of information indicating that a shared meter may exist, such metering utility provider shall investigate and determine whether such service is or is not measured by a shared meter. Such metering utility provider may determine if separate metering or rewiring or repiping is possible and shall provide the landlord with information describing how shared meter conditions can be eliminated. The investigation shall include, but not be limited to, conducting appropriate tests, an examination of wiring, piping, meters, and heating equipment in the building as may be needed, an estimate of electricity used in the shared meter tenant's dwelling and in areas outside the dwelling, and a review of billing records.

(d) The determination shall be provided in writing, within thirty business days of the date of the complaint or receipt of information or landlord's request, to the tenant, the landlord, and any other tenants receiving service measured by the shared meter. Such written determination shall include a description of the specific areas outside the dwelling served by the shared meter, the nature of the uses of the service, and the proportional amount of service registered on the shared meter that is provided to the shared meter tenant's dwelling and to areas outside the dwelling. A notice shall be included with the determination informing the recipients of the availability of the commission's complaint handling procedures, and providing the department's address and telephone number for filing objections to such determination.

(e) Failure of a landlord to provide access to any common area in the building or to cooperate with any reasonable request made by the investigating utility provider shall result in a determination that the tenant's dwelling is served by a shared meter, specifying the landlord's action that such utility provider understood to be a failure to cooperate. Failure of a tenant making a shared meter complaint to provide access to a dwelling controlled by the tenant or to cooperate with any reasonable request made by the investigating utility provider shall cause the utility provider to suspend the investigation and to notify in writing the tenant and the landlord that the investigation is suspended, specifying the tenant's action that such utility provider understood to be a failure to cooperate. A utility provider duly acting under this paragraph is entitled to make the determinations provided for and shall be held harmless from any subsequent monetary claim by a landlord that

the dwelling was not served by a shared meter or by a shared meter tenant that the dwelling was served by a shared meter.

(f) Any tenant filing a complaint under this section or landlord who disagrees with a utility provider's determination may utilize the commission's complaint handling procedures to obtain a written departmental determination by complaining to the department within forty-five days after receipt of the utility provider's determination. In the event that the utility provider fails to provide a determination on a complaint under this section within the required time period, the department shall investigate, upon the shared meter tenant or landlord's request, and issue a written determination. The commission or its designee shall have the authority to apportion estimated charges for service measured by a shared meter among the landlord, shared meter tenant, and any third party.

(g) If a landlord fails to comply with paragraphs (a) and (b) of this section, the aggrieved tenant is entitled to the following remedies:

(1) Unilateral termination of the lease contract; and
(2) Reimbursement for payments made by the tenant to the utility provider for service to areas outside the tenant's dwelling unit. Payments to be reimbursed pursuant to this paragraph shall commence from the date the obligation to disclose arose under paragraph (a).

(h) In addition to the remedies under paragraph (g), if a landlord fails to comply with paragraphs (a) and (b) of this section, an aggrieved tenant may bring an action in a court of competent jurisdiction. The remedies a court may order shall include, but are not limited to, the following:

(1) An order requiring the landlord to be made the customer of record with the utility provider for the tenant's electric meter;
(2) An order directing the landlord to install a separate electric meter for the shared area outside of the tenant's dwelling unit;
(3) A judgment against the landlord for a civil penalty of one month's rent plus $1,000, including attorney's fees and court costs; and
(4) A judgment against the landlord for the amount of the tenant's actual damages.

(i) Where a landlord or shared meter tenant demonstrates the existence of third party involvement, the landlord or shared meter tenant shall be entitled respectively to recover the charges billed by the utility provider to the landlord's account, or to the shared meter tenant's account, pursuant to this section in a civil action against the third party in a court of competent jurisdiction.

(j) A landlord who knowingly and intentionally violates this section by hiding a shared meter condition is liable to the tenant for a civil penalty of $2,500, plus attorney's fees and court costs.