IN THE COURT OF APPEALS OF IOWA

No. 3-255 / 12-1031
Filed May 30, 2013

BROOKE STALEY, et al.,
Plaintiffs-Appellants,

vs.

TRACY BARKALOW, et al.,
Defendants-Appellees.

Appeal from the Iowa District Court for Johnson County, Paul D. Miller, Judge.

Tenants appeal from the district court's order denying their motions for certification of a class and for partial summary judgment and declaratory judgment. **REVERSED AND REMANDED.**

Christopher Warnock, Iowa City, and Christine Boyer, Iowa City, for appellants.

Robert M. Hogg and James W. Affeldt of Elderkin & Pirnie, P.L.C., Cedar Rapids, for appellees.

Heard by Eisenhauer, C.J., and Potterfield and Tabor, JJ.

EISENHAUER, C.J.

Tenants appeal from the district court's order denying their motions for certification of a class and for partial summary judgment and declaratory judgment. They argue the key issue is whether tenants have a right to a legal lease, a lease free from prohibited provisions, under Iowa Code chapter 562A (2011), or whether landlords can include prohibited provisions in their leases so long as the prohibited provisions are not enforced. Tenants claim the trial court erroneously ruled "chapter 562A requires some type of enforcement before relief can be obtained by a tenant." We reverse and remand.

I. Background Facts and Proceedings.

In September 2011, residential tenant Brooke Staley filed a petition against Tracy Barkalow, TSB Holdings, LLC, and Big Ten Property Management, LLC (TSB). Staley alleged TSB's standard lease provisions applicable to a large number of tenants violated the Iowa Uniform Residential Landlord and Tenant Act (IURLTA), Iowa Code chapter 652A.[1] "The IURLTA generally defines the legal rights and obligations of a landlord and tenant." *Lewis v. Jaeger*, 818 N.W.2d 165, 178 (Iowa 2012). Subsequently, additional plaintiffs were added: Tyler Lammer[2] Shelby Burdette,[3] Dylan Thiemann, Dakota Thomas, and Bradley Pollpeter.

[1] Tenants also asserted violations of the Iowa City Housing Code and Iowa's implied warranty of habitability.

[2] Big Ten Property Management's small claims action against Tyler Lammer and guarantor Lisa Lammer for alleged damage to a leased apartment was consolidated with this case. The Lammers' small claims counterclaim contained similar tenant claims.

[3] Burdette is a current tenant.

A. Certification of a Class. On October 3, 2011, tenants filed a motion requesting certification of a class with plaintiffs Staley and Lammer serving as class representatives. The proposed class consisted of tenants with the TSB standard lease.

A district court may certify a class action if tenants meet four basic requirements: (1) numerosity—the class is so numerous or so constituted that joinder is impractical; (2) a common issue of law or fact exists; (3) certification should be permitted for the fair and efficient adjudication of the controversy; and (4) the representative parties will protect the class's interest fairly and adequately. Iowa R. Civ. P. 1.261, 1.262(2).

Tenants asserted class certification was appropriate to address TSB's standard leases'

> illegal indemnity and exculpatory clauses, clauses that illegally require tenants to pay for maintenance and repair of the premises, illegal automatic cleaning clauses, provisions that make tenants responsible for vandalism by third parties, and even clauses forcing tenants to pay rent when [TSB] has kept them out of the possession of the premises.

Tenants argued the *inclusion* of these lease provisions is illegal. Further, class certification would efficiently dispose of numerous claims "whose basis for recovery is almost identical, differing only in the amount of damages" with the key evidence being the standard lease, identical for all tenants, and the leases' identical violations of Iowa landlord tenant law.

In March 2012, TSB acknowledged: "Plaintiffs are all present or past tenants with essentially the same lease, and TSB currently has approximately [eighty] current tenants with the same or substantially similar leases." This lease

lists Tracy Barkalow as the manager, states "owner is an Iowa licensed real estate broker," and provides in paragraph "9. Tenant Obligation. Tenants shall . . . comply with all applicable building, housing, and zoning codes, and with Chapter 562A of the Code of Iowa (Residential Landlord Tenant Act)."

In its resistance to class certification, TSB argued because of the fact-specific nature as to how the allegedly illegal lease provision may have been *enforced* against the individual class members, common questions of law or fact do not predominate over individual issues. Specifically, the "inclusion of allegedly illegal provisions in the lease agreement, without enforcement, does not give rise to an action for damages."

TSB also argued tenants have failed to show a class action is the most appropriate means of adjudication because the IURLTA provides tenants with adequate remedies and easy access to small claims court. "Because Iowa Code section 562A.11(2) limits a tenant's damages to not more than three months periodic rent and reasonable attorney's fees in addition to actual damages, it would be the rare case where the damages . . . would exceed the small claims jurisdiction."

B. Partial Summary Judgment and Declaratory Judgment. Also on October 3, 2011, tenants filed a motion for partial summary judgment and declaratory judgment and asked the court to declare, as a matter of law, that the challenged lease provisions are illegal. Tenants argued the IURLTA protects the interests of tenants from the *inclusion* of illegal lease provisions and not just enforcement. Tenants relied on Iowa Code section 562A.9(1), stating "landlord

and tenant may include in a rental agreement, terms and conditions not prohibited by this chapter or other rule of law." Additionally, tenants quoted section 562A.11, entitled "prohibited provisions in rental agreements":

> 1. A rental agreement *shall not provide* that the tenant or landlord:
>
> a. Agrees to waive or to forego rights or remedies under this chapter . . . ;
>
> b. Authorizes a person to confess judgment on a claim arising out of the rental agreement;
>
> c. Agrees to pay the other party's attorney fees; or
>
> d. Agrees to the exculpation or limitation of any liability of the other party arising under law or to indemnify the other party for that liability or the costs connected therewith.
>
> 2. A provision prohibited by subsection 1 included in a rental agreement is unenforceable. *If a landlord willfully uses a rental agreement containing provisions known by the landlord to be prohibited,* a tenant may recover actual damages sustained by the tenant and not more than three months' periodic rent and reasonable attorney fees.

Iowa Code § 562A.11 (emphasis added). Tenants asserted the italicized language clearly makes the inclusion of prohibited provisions in a rental agreement actionable, even without enforcement, if the landlord's inclusion was willful and knowing.

Tenants argued support for their interpretation is found in the Iowa legislature's utilization of language similar to the Uniform Residential Landlord and Tenant Act's (URLTA) "prohibited provisions" section,[4] and in the comment to the URLTA's "prohibited provisions" section:

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[4] "In 1978, the general assembly enacted the IURLTA. The act was substantially adopted from the [URLTA.]" *Crawford v. Yotty*, 828 N.W.2d 295, 299 (Iowa 2013). Section 1.403 [Prohibited Provisions in Rental Agreements] of the URLTA states:

> (a) A rental agreement may not provide [Iowa—"shall not provide"] that the tenant [(1) waives or forgoes rights, (2) confesses judgment, (3) agrees to pay landlord attorney fees, (4) agrees to limit landlord's liability or agrees to indemnify landlord].

> Rental agreements are often executed on forms provided by landlords, and some contain adhesion clauses, the *use of which* is prohibited by this section . . . . The official comment to [section 2.415 of the Uniform Consumer Credit Code] states "This section reflects the view of the great majority of states in prohibiting authorization to confess judgment." Similarly, clauses attempting to exculpate the landlord from tort liability for his own wrong have been declared illegal by statutes in some states . . . . Such provisions, even though unenforceable at law, may nevertheless prejudice and injure the rights and interests of the uninformed tenant who may, for example, surrender or waive rights in settlement of an enforceable claim against the landlord for damages arising from the landlord's negligence.
>
> . . . The right to recover attorney's fees against the tenant . . . must arise under the statute, not by contract of the parties.

Unif. Residential Landlord & Tenant Act, § 1.403, comment (emphasis added).

Tenants also cited the Wisconsin Supreme Court's analysis of its comparable "prohibited provisions" section ("no rental agreement may require"). *See Baierl v. McTaggart*, 629 N.W.2d 277, 279-80 (Wis. 2001). The Wisconsin court ruled the "conduct of inserting the clause into a lease constitutes the violation." *Id*. at 281 (discussing clause requiring tenant to pay landlord's attorney fees). Wisconsin's law was enacted administratively, and the court ruled the Wisconsin Administrative Department's regulatory intent included prevention of "the chilling effect" created by the inclusion of the prohibited provision. *Id*. at 284. Specifically:

> [The] realm of residential landlord-tenant relations [is] an area fraught with consumer protection concerns. Courts have long acknowledged an inherent inequality of bargaining power [and our]

> (b) A provision prohibited by subsection (a) included in a rental agreement is unenforceable. If a landlord deliberately uses [Iowa—"willfully uses"] a rental agreement containing provisions known by him to be prohibited, the tenant may recover in addition to his actual damages an amount up to [3] months' periodic rent and reasonable attorney's fees.

Unif. Residential Landlord & Tenant Act, § 1.403 (1972).

> regulations are an attempt to alleviate the residential tenant's limited bargaining power.
>
> . . . .
>
> The [Wisconsin Administrative] Department placed emphasis on the following testimony:
>
> > The general problem with respect to lease provisions is not only the concessions that they force from tenants but also the extent to which they intimidate tenants from pursuing their rights. In other words, many lease provisions have been found to be void . . . but their existence in a lease continues to have an unjust effect because tenants believe them to be valid. As a result, tenants either concede to unreasonable requests of the landlords or fail to pursue their own lawful rights.
>
> The Department also noted testimony from some landlords who explained these objectionable provisions were not enforced, and therefore caused the tenant no serious problems. The Department concluded that this fact, if true, merely aggravated the unfairness of these objectionable provisions:
>
> > If [these provisions are not actually enforced], however, there can be no explanation for the inclusion of the provisions in the rental agreement, unless they are intended solely for the purpose of intimidation. This purpose, far from legitimizing the provisions, merely compounds the alleged unfairness.

Id. at 283-84 (citations omitted).[5]

Tenants' motion for partial summary judgment and declaratory relief specifically identified numerous allegedly illegal lease sections[6] in TSB's

[5] Tenants also argued TSB's lease provisions making tenants responsible for maintenance and repair, both inside and outside of their rental units, violate the Iowa City Housing Code and Iowa's implied warranty of habitability. The district court ruled whether tenants have a private right to state a claim pursuant to the Iowa City housing code was not adequately presented in the pending motions, and it instructed the parties to file separate motions if further adjudication is desired. We agree with the district court. The district court did not address tenants' implied warranty of liability argument, and we decline to do so for the first time on appeal.

[6] Tenants asserted the lease provision requiring them to agree to an *automatic deduction* from their security deposit even if their flooring is clean and undamaged violates Iowa Code section 562A.12 and section 562A.12(3)(b). Tenants filed: (1) TSB statement to Staley deducting $150 carpet cleaning fee from the security deposit and (2) TSB statement to Lammer deducting $150 carpet cleaning fee from the security deposit. TSB argued charges for professionally cleaning carpets at the end of a tenancy

standard lease. For example, paragraph seventy provides: "Tenants shall hold harmless and indemnify[7] the Landlord/Partners for all loss of property or injuries the Tenant sustains through theft, fire, rain, wind or otherwise." Tenants also identified allegedly illegal provisions requiring tenants to pay for common area damage by unknown vandals and provisions making tenants responsible for unit repairs.

TSB's resistance argued the tenants' motion is premature because courts do not decide abstract questions and uncertainty exists as to whether the tenants' rights *will be* invaded. TSB also argued Barkalow's affidavit shows disputed facts. This affidavit states:

> 2. When a tenant rents an apartment from TSB, the unit is professionally cleaned prior to occupancy. TSB expects the tenant to be responsible for leaving the unit in the same condition received, subject to ordinary wear and tear.
>
> 3. When a tenant vacates a unit, TSB will evaluate the condition of the unit to determine whether the unit needs cleaning. There is never an "automatic" charge for carpet or any other cleaning *notwithstanding any lease or policy language*. Any charge is based on the actual condition of the unit. There is never a charge for cleaning that is not done. Any withholding from a rental deposit is used to restore a unit to the condition it was when the tenant receives it, subject to ordinary wear and tear, as set forth in the lease.[8]

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is not prohibited and any "tenant can avoid carpet cleaning charge completely by having the unit professionally cleaned at the termination of the tenancy."

[7] Tenants identified several separate indemnification and exculpation clauses in TSB's standard lease that allegedly illegally shift liability and costs from the landlord to the tenant. For example, paragraph 32(e) (parking) states: "Tenants shall hold harmless and indemnify the Landlord for all loss of property, damages to vehicle, or personal injury sustained through theft, vandalism, or otherwise." Paragraph 39(c) states: "Tenants shall hold harmless/indemnify Landlord for all losses sustained due to such laundry equipment."

[8] Affidavit paragraphs four and five state:

> 4. Concerning carpet cleaning charges, if a tenant leaves a receipt showing the unit has [been] professionally cleaned, or if TSB determines it has been cleaned to professional standards, there is no deduction for carpet cleaning charges from a rental deposit. The fees TSB charges for

> . . . .
> 6. I am familiar with the Plaintiffs' claims that provisions in the TSB lease contain illegal hold harmless clauses. Although TSB did not draft the lease, TSB did not and does not intend to avoid any legal duty owed to its tenants. To date TSB has never had any complaints or issues necessitating reference to the provision mentioned in Plaintiff's lawsuit.

(Emphasis added.) TSB disputed tenants' "inclusion/enforcement distinction," arguing:

> While [tenants] accurately point out the legislative history concerning URLTA, the remedy section thereof does not explicitly state that inclusion, as opposed to enforcement, results in injury for purposes of permitting a cause of action. [Iowa Code] section 562A.11(2) states that if a landlord "willfully uses a rental agreement containing provisions known by the landlord to be prohibited," the landlord may be subject to statutory damages. The term "uses," in this context, implies some type of enforcement; the knowing and willful requirements would need to be proven in an enforcement action. The first sentence of section 562A.11(2) speaks in terms of enforcement. Iowa Code section 562A.7, which allows the court to refuse to enforce unconscionable provisions, requires some type of enforcement to obtain relief. These statutory remedies imply, if not require, enforcement of allegedly illegal provisions to obtain judicial relief.

TSB cited to the Illinois Court of Appeal's analysis of Chicago's "prohibited provision" ordinance in *VG Marina Management Corp. v. Wiener*, 882 N.E.2d 196, 203-04 (Ill. Ct. App. 2008). TSB acknowledged, however, the "language of the Chicago equivalent of Iowa Code section 562.A11(2) is slightly different." The Chicago section states:

> carpet cleaning are, in my opinion, and based on my experience, at or below what commercial cleaning companies charge for such services.
> 5. Brooke Staley and Tyler Lammer were both tenants of TSB. When they vacated their units, the carpet in both units did not appear to have been cleaned at all. TSB had the carpets professionally cleaned, and the charge therefor was the fair and reasonable price for such cleaning. The charge was reflected in the rental statement accounting sent to both.

> A provision prohibited by this section included in a rental agreement is unenforceable. The tenant may recover actual damages sustained by the tenant *because of enforcement* of a prohibited provision. If the landlord *attempts to enforce* a provision in a rental agreement prohibited by this section, the tenant may recover two month's rent.

Id. at 203 (emphasis added). In *Wiener*, the condominium landlord commenced an action for breach of a lease contract. The tenant asserted the lease's hold-over provision violated Chicago's "prohibited provision" section and sought to void the entire lease as unenforceable against public policy. *Id*. The *Wiener* court declined, stating:

> Thus, [the Chicago ordinance] specifically provides a remedy in the case of a lease provision that violates one or more portions of [this section]. Because [landlord] never attempted to assert against [tenant] the holdover-tenant lease provision, [tenant] has not been damaged by the inclusion of this allegedly illegal provision, and we decline his request to expand upon the explicit remedy provided by [this section]. The [ordinance] is clear in defining a tenant's remedy for the inclusion of prohibited lease provisions, and we decline [tenant's] invitation to void the lease as a matter of public policy.

Id. at 203-04.

TSB argued tenants' challenge lacks "any enforcement context" and summarized the landlord's position:

> There has been no enforcement or threatened enforcement of any allegedly illegal lease provisions either for standing purpose or for providing content for their interpretation. The challenged lease provisions cannot be shown to be illegal under all circumstances, if they are illegal at all. The request for declaratory judgment is premature at best. The request for summary declaratory relief should be denied in its entirety.

C. District Court Ruling. In May 2012, the district court declined to certify a class. The court ruled the numerosity requirement is met,[9] but found

[9] Neither party challenges this ruling on appeal.

tenants had not met their burden of showing (1) there is a question of law or fact common to the class, (2) a class action would provide for the fair and efficient adjudication of the case, and (3) Staley and Lammer, the representative parties, would protect the interests of the class.

The court denied the tenants' motion for partial summary judgment and declaratory judgment and addressed the tenants' contention "the mere existence of the allegedly illegal terms in the lease agreements is the loss that will occur or the right asserted that will be invaded" and ruled:

> In light of the language used in [Iowa Code] section 562A.7, which grants authority to a court to render a lease agreement unenforceable when provisions . . . are found to be unconscionable, the court concludes that some type of enforcement by the landlord of allegedly illegal provisions in a lease agreement is required before a tenant can obtain relief. If enforcement of an unconscionable provision of a lease is attempted, a court can decide, based on the specific facts of a case, that a lease agreement is unenforceable. If the landlords in these cases do not attempt to enforce the allegedly illegal provisions, there is no harm suffered by the tenants. The tenants in these cases have the ability to assert that lease provisions enforced against them are illegal/unconscionable, and thus the tenants have a remedy pursuant to section 562A.7 if the lease provisions in question are enforced against them.

Finally, the court discussed the Illinois and Wisconsin cases, stating: "Similarly to *Wiener*, the tenants in these cases have a remedy pursuant to Iowa Code section 562A.7 for the inclusion of allegedly illegal lease provisions, *if* such provisions are enforced[10] against them." The court distinguished the *Bairel* case and concluded, "chapter 562A requires some type of enforcement before relief

[10] The court ruled there are genuine issues of material fact regarding the leases' carpet cleaning provisions and the alleged "automatic charge for carpet cleaning" due to the reasoning behind the landlord's decision to clean the carpets as stated in the Barkalow affidavit.

can be obtained by a tenant. Therefore, the court finds no merit in tenants' argument the *Wiener* case is distinguishable . . . on the ground that the statutory language in Illinois differs from that used in Iowa."

This appeal followed.

II. Scope and Standards of Review.

We review the "district court's application and interpretation of statutes for errors at law." *Id*. "When determining whether to certify a class action, a district court is guided by Iowa Rules of Civil Procedure 1.261-1.263." *Anderson Contracting, Inc. v. DSM Copolymers, Inc.*, 776 N.W.2d 846, 848 (Iowa 2009). We review a district court's certification ruling for an abuse of discretion while recognizing the court's "broad" discretion. *Kragnes v City of Des Moines*, 810 N.W.2d 492, 498 (Iowa 2012). We will not find an abuse of discretion unless the court's discretion was exercised on grounds clearly untenable or clearly unreasonable. *Martin v. Amana Refrigeration, Inc.*, 435 N.W.2d 364, 367 (Iowa 1989). We review the district court's denial of tenants' motion for partial summary judgment for the correction of errors at law. *Walker v. State*, 801 N.W.2d 548, 554 (Iowa 2011).

III. Inclusion v. Enforcement in Iowa Code section 562A.11.

Tenants argue the key issue is whether they have a right to a lease free from prohibited provisions, under Iowa Code chapter 562A, or whether TSB can include prohibited provisions in the leases and escape accountability so long as the prohibited provisions are not enforced. Tenants assert inclusion of prohibited lease provisions can be illegal even without enforcement and the court erred in

failing to recognize Iowa Code section 562A.11(1) (stating "a rental agreement shall not provide") means the subsequently-listed prohibited provisions "shall not" be included in or made a part of a residential lease, whether or not the provisions are enforced.

Tenants recognize the first sentence of Iowa Code section 562A.11(2) states prohibited provisions are unenforceable. They argue, unlike the Chicago ordinance, no "enforcement" requirement or language is included in the second sentence of Iowa's law: "If a landlord willfully uses a rental agreement containing provisions known by the landlord to be prohibited, a tenant may recover [actual damages, rent, and attorney fees]." *See* Iowa Code § 562A.11(2). Tenants argue the second sentence subjects a landlord to the specified penalty if he *willfully uses* a rental agreement that he *knows* contains the prohibited provisions listed in the immediately-preceding section 562A.11(1). Finally, tenants also cite Iowa Code section 562A.9(1): "The landlord and tenant may include in a rental agreement, terms and conditions not prohibited by this chapter." They argue the district court erred in not recognizing that "conversely" TSB's lease may not include provisions prohibited by law.

Tenants urge us to find, as a matter of law, the trial court erred in ruling the tenants have suffered no injury unless prohibited provisions are enforced. They claim a landlord's willful and knowing inclusion of prohibited provisions, even without enforcement, is exactly the abuse the Uniform Act comments and the *Baierl* case warn against and is the abuse governed by the Iowa legislature's enactment of Iowa Code sections 562A.9 and 562A.11.

TSB, citing *Wiener*, replies the tenants overstate the effect of Iowa Code sections 562A.9 and 562A.11.[11] TSB argues Iowa Code section 562A.9 does identify what lease provisions are prohibited, nor does it provide any right of action separate from a tenant's rights under Iowa Code sections 562A.21 to 562A.26 (tenant remedies). TSB acknowledges section 562A.11(1) prohibits specific lease provisions, but "the remedy in the first sentence of section 562A.11(2)" makes the prohibited provision unenforceable. Therefore, enforcement is relevant. TSB admits, under section 562A.11(2), tenants have additional remedies "above what is provided by sections 562A.21 to 562A.26." TSB argues, however, these additional remedies [actual damages, rent, attorney fees] are applicable only if a landlord "willfully uses" a lease "containing provisions known by the landlord to be prohibited." TSB claims, however, "including a provision in a lease is not 'use.' More is required, i.e., enforcement."

We find the tenants' arguments more persuasive and conclude the trial court erred in interpreting chapter 562A to require the landlord's enforcement of a prohibited provision as a prerequisite to a tenant suffering injury or harm in all situations. Specifically, we decide "willfully uses," in Iowa Code section 562A.11(2), does not require "willful enforcement," but encompasses a landlord's "willful inclusion" of prohibited provisions. The Iowa language, "willfully uses," as compared to Chicago's language, "damages sustained by the tenant because of enforcement of a prohibited provision," shows the Iowa legislature recognized the

[11] We find no merit to TSB's claim the tenants did not preserve error on issues under sections 562A.9 and 562A.11 because they did not move to amend or enlarge the court's ruling to address those statutes. On decision pages fourteen and fifteen, the district court quoted sections 562.A.11 (prohibited provisions), 562A.7 (unconscionability), and 562.A.9 (may include terms not prohibited).

unequal bargaining positions of the parties and followed the URLTA and prevented tenants from being intimidated into giving up their legal rights as a result of landlords' willful inclusion of provisions known by landlords to be prohibited. *See* Unif. Residential Landlord & Tenant Act § 1.403 cmt.; *see also Crawford*, 828 N.W.2d at 303 (stating the IURLTA "was heavily based" on the URLTA). By using the phrase, "a landlord willfully uses," the legislature recognized a landlord's willful inclusion of prohibited clauses can have "an unjust effect because tenants believe them to be valid. As a result, tenants either concede to unreasonable requests . . . or fail to pursue their own lawful rights." *See Baierl*, 629 N.W.2d at 284; *see also Summers v. Crestview Apartments*, 236 P.3d 586, 593 (Mont. 2010) (stating damages for a tenant under Montana's Landlord and Tenant Act ("if a party purposefully uses a rental agreement containing provisions known by him to be prohibited") "would further counter the chilling effect" of prohibited lease provisions and "merely severing the prohibited rental provisions does not address the chilling effect that such provisions could continue to have on the exercise of tenants' statutory rights").

Accordingly, we hold a landlord's inclusion of a provision prohibited in Iowa Code section 562A.11(1) ("shall not provide"), even without enforcement, can be a "use" under Iowa Code section 562A.11(2): "If a landlord willfully uses a rental agreement containing provisions known by the landlord to be prohibited . . . . " *See* Unif. Residential Landlord & Tenant Act § 1.403 cmt. When read together, these subsections make a landlord liable for the inclusion of prohibited provisions in a rental agreement, even without enforcement, *if* the landlord's

inclusion was willful and knowing. *See* Iowa Code § 562A.11. In order to recover damages, the tenant has the burden of proving the landlord willfully used, i.e., willfully included, "provisions known by the landlord to be prohibited." *Id*. § 562A.11(2).

III. Class Certification.

Tenants assert the court abused its discretion in declining to certify a class action. TSB argues the tenants have not established the prerequisites for class certification. We agree with the tenants.

One of the purposes of class action procedures "is to provide small claimants an economically viable vehicle for redress in court." *Amana*, 435 N.W.2d at 366. "Class actions are also favored as achieving judicial economy while preserving . . . the rights of litigants." *Id*. Due to the remedial nature of our class action rules, these rules are "liberally construed" in favor of the maintenance of class actions. *Comes v. Microsoft Corp*., 696 N.W.2d 318, 320 (Iowa 2005).

A. Predominance of Common Questions of Law or Fact. The district court concluded the tenants had failed to meet their burden of showing a common question of law or fact, ruling:

> The tenants have based their claim for class certification . . . on the basis that there are illegal provisions in leases signed by the named Plaintiffs and the proposed class members. However, the nature of the actual claim . . . held by each proposed class member could be, and likely would be, based on different facts and *different applications of the lease provisions* to each proposed class member. There may be members of the proposed class *who never have had any allegedly illegal lease provision enforced against them*, and deductions made from the damage deposit of one proposed class member for carpet cleaning/replacement . . . may

> be based on an entirely different set of facts than deductions made from the damage deposit of another proposed class member. Further, *the tenants have not established that the lease provisions they challenge were included in the leases of every potential member of the class*. *Due to the different facts pertaining to the terms of and application of* the lease agreements to the potential class members, and due to the different types of claims each potential class member could bring against the landlords, the court finds . . . Plaintiffs have not met their burden of establishing a question of law or fact common to the class.

(Emphasis added.)

Under Iowa law, "[t]he appropriate inquiry is not the strength of each class member's personal claim, but rather, whether they, as a class, have common complaints." *Amana*, 435 N.W.2d at 367. Therefore, "the existence of individual issues is not necessarily fatal to class certification." *Comes*, at 322 (quoting *Howe v. Microsoft Corp*., 656 N.W.2d 285, 289 (N.D. 2003)). Further,

> [The test for predominance] is a pragmatic one, which is in keeping with the basic objectives of the [class action rule]. When common questions represent a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is a clear justification for handling the dispute on a representative rather than an individual basis . . . . [C]ourts have held that a [class action] can be brought . . . even though there is not a complete identity of facts relating to all class members, as long as a "common nucleus of operative facts" is present.

Id. (quoting *Luttenegger v. Conseco Fin. Servicing Corp*., 671 N.W.2d 425, 437 (Iowa 2003)). Our review of the record shows "a common nucleus of operative facts" is present. The district court misstated the record and erred in finding a failure of proof on the similarity of the tenants' lease terms. In March 2012, TSB admitted: "Plaintiffs are all present or past tenants with essentially the same lease, and TSB currently has approximately [eighty] current tenants with the same or substantially similar leases." Additionally, as detailed above, the district

court erred in requiring application/enforcement of prohibited lease provisions because the term "uses" in Iowa Code section 562A.11(2) encompasses inclusion of prohibited provisions.

Accordingly, when we consider the "substantially similar leases" and the "use/inclusion" factors, we conclude the district court abused its discretion because a common issue of liability under Iowa Code section 562A.11 predominates: whether TSB "willfully uses a rental agreement" with eighty tenants containing provisions known by TSB to be prohibited. *See Vignaroli v. Blue Cross*, 360 N.W.2d 741, 744-45 (Iowa 1985) (holding plaintiffs' reliance on employment manual's written provisions constituted the "gist of their claim"). Common issues of fact and law support the use of a class action procedure on the issue of TSB's liability under the commonality requirement of rule 1.261(2).

Second, tenants seek damages common to all class members—actual damages, three months' rent, and reasonable attorney fees. *See id*. Damages for three months' rent are based on the actual rent amounts and damages for attorney fees would be identical for the tenant class. We recognize the actual damages incurred could be individualized,[12] but the fact a "potential class action involves individual damage claims does not preclude certification when liability issues are common to the class." *City of Dubuque v. Iowa Trust*, 519 N.W.2d 786, 792 (Iowa 1994). Accordingly, TSB's claim the potential for differing damages renders the class uncertifiable is unpersuasive.

[12] One example would be Staley and Lammer's allegations of improper enforcement of the allegedly illegal automatic carpet cleaning lease provision.

B. Fair and Efficient Adjudication. A court may certify a class action if one "should be permitted for the fair and efficient adjudication of the controversy." Iowa R. Civ. P. 1.262(2)(b). Our rules contain a lengthy list of criteria to be considered in making this determination. *See* Iowa R. Civ. P. 1.263. "Basically, the criteria to be considered have two broad considerations: achieving judicial economy by encouraging class litigation while preserving, as much as possible, the rights of litigants-both those presently in court and those who are only potential litigants." *Vignaroli*, 360 N.W.2d at 744. Generally, a class action provides for the efficient resolution of many individual claims in a single action while it eliminates repetitious litigation and inconsistent adjudications of common questions. *Comes*, 696 N.W.2d at 320.

The district court ruled a class action would not provide a fair and efficient adjudication of each case and the small claims court would provide a prompt, efficient method "for tenants to obtain a remedy for alleged illegal enforcement of a lease, or for wrongful retention of a damage deposit." The court stated:

> Resolution of these actions often is reliant on photographs and testimony pertaining to the specific residential unit at issue . . . . While there may be some class members who have claims that are substantially similar with respect to an allegedly *illegal lease provision being enforced* against said members, there may be other class members who have claimed wrongs that fall within an entirely different section of the lease.

(Emphasis added.)

We reiterate Iowa Code section 562A.11(2) encompasses inclusion of prohibited lease terms and enforcement of prohibited provisions is not a prerequisite. Accordingly, any difference in enforcement is not dispositive of this

class-certification element. We, therefore, consider whether the intraclass conflict of the tenants is so fundamental as to preclude certification, and we conclude it is not. Class certification can efficiently dispose of numerous tenant claims with an identical basis for TSB liability (use/inclusion of prohibited lease terms) and an identical basis for the tenants' recovery of three months' rent and reasonable attorney fees. The key evidence, applicable to all class members, is the identical TSB standard lease and the leases' alleged identical violations of Iowa landlord tenant law entitling the class to damages *if they prove* TSB *willfully uses* a standard lease "containing provisions *known by* [TSB] to be prohibited."

If additional individualized damage determinations are necessary, for example, the landlord enforcing an automatic carpet cleaning deduction, those determinations "will arise, if at all, during the claims administration process after a trial of the liability and class-wide injury issues." *Anderson Contracting*, 776 N.W.2d at 851. While some variations in the individual damage claims is likely to occur, sufficient common questions of law or fact regarding TSB's liability predominates over questions affecting only individual class members such that the class should be permitted for the fair and efficient adjudication of this controversy.

We also recognize class actions establish "an effective procedure for those whose economic position is such that it is unrealistic to expect them to seek to vindicate their rights in separate lawsuits." *Comes*, 696 N.W.2d at 320. The individual tenants' claims are likely insufficient in the amounts or interests involved, in view of the complexities of the liability issue and the expenses of

litigation, to afford significant relief to the members of the tenant class without certification of the class. We conclude a class action offers the most appropriate means of adjudicating this controversy, and resolution in small claims court would be impracticable and may result in inconsistent adjudications. As recognized by the United States Supreme Court:

> The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.

Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)).

When all relevant factors are considered, we conclude the district court abused its discretion and a class action "should be permitted for the fair and efficient adjudication" of TSB's liability. *See* Iowa R. Civ. P. 1.262(2)(b).

C. Adequacy of Class Representation. Class representatives should "fairly and adequately . . . protect the interests of the class." Iowa R. Civ. P. 1.262(2)(c). In making this determination, courts consider whether: (1) the attorney for the named parties will adequately represent the interests of the class; (2) the named parties "do not have a conflict of interest in the maintenance of the class action"; and (3) the named parties "have or can acquire sufficient financial resources to guarantee that the class interests will not be harmed." Iowa R. Civ. P. 1.263(2). Here, the focus is on the test's second prong. In ruling Staley and Lammer are inadequate class representatives, the district court explained:

> While Staley and Lammer have alleged an improper deduction due to carpet damage, resolution of any action these tenants have against the landlords would be based on the claims and facts pertinent to the claims of Staley and Lammer, and such claims and facts may not be identical to each other, let alone to the rest of the proposed class members. There is also uncertainty regarding what effect the attempts of the named plaintiffs to state claims on behalf of all individuals who have signed leases with the landlords might have on the rights and potential claims held by each of the individual signatories to leases entered into with the landlords.

Iowa courts recognize it is unnecessary for plaintiffs' individual claims to be "carbon copies" of each other. *Vignaroli*, 360 N.W.2d at 745. Rather, the conflict must be "fundamental, going to the specific issues and controversies." *Kragnes*, 810 N.W.2d at 498. Even without complete identity of facts relating to all class members, a class action may be brought so "long as a 'common nucleus of operative facts' is present." *Vignaroli*, 360 N.W.2d at 745 (quoting 7A Charles Wright & Arthur Miller, Federal Practice and Procedure § 1778 (1972)).

We conclude the district court abused its discretion because its analysis fails to consider the specific issues showing a "common nucleus" relevant to protecting the interests of class members. Plaintiffs' petition alleges TSB's standard lease contains numerous provisions prohibited by the IURLTA. For example, plaintiffs' allege TSB violated Iowa Code section 562A.11 "by executing and using leases . . . that forgo Tenant's rights under" the IURLTA and "include indemnification and exculpation clauses." The damages awarded under section 562A.11 include three months' rent and reasonable attorney fees, showing a commonality among potential damages. This theory of liability and damages embraces common issues of fact and law affecting both the named plaintiffs and

the proposed class members irrespective of the varying fact patterns underlying any individual tenant claim for actual damages. The fact a potential class action involves some individual damage claims does not preclude certification under the circumstances presented here. *See id*. We conclude Staley's and Lammer's individual and fact-specific carpet cleaning claims do not prevent them from adequately representing the class, and the district court abused its discretion in so ruling. Staley and Lammer are asserting a liability claim identical to the claims asserted by the rest of the potential class members—that TSB willfully uses a standard lease with eighty tenants containing prohibited provisions known by TSB to be prohibited. *See* Iowa Code §§ 562A.9(1) (stating a lease "may include" terms "not prohibited by this chapter"), 562A.11(1) (stating a lease "shall not provide"). Accordingly, Staley and Lammer have a common interest with the remaining class members. Based on their common interest, Staley and Lammer would fairly and adequately represent the class.

D. Conclusion. After considering the remedial nature of our class action rules and the fact our rules are "liberally construed" in favor of the maintenance of class actions, we find the district court abused its discretion in failing to grant tenants' request for certification of a class, and we remand for further proceedings consistent with this opinion. *See Comes*, 696 N.W.2d at 320.

IV. Partial Summary Judgment and Declaratory Judgment.

"The purpose of a declaratory judgment is to determine rights in advance." *Bormann v. Bd. of Supervisors*, 584 N.W.2d 309, 312 (Iowa 1998). In a declaratory judgment action, "there must be no uncertainty that the loss will occur

or that the right asserted will be invaded." *Id*. The question "is whether there is a substantial controversy between parties having antagonistic legal interests of sufficient immediacy and reality to warrant declaratory judgment." *Farm & City Ins. Co. v. Coover*, 225 N.W.2d 335, 336 (Iowa 1975). Summary judgment is appropriate if the record shows there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Walker*, 801 N.W.2d at 554.

The use (inclusion) of certain provisions in a rental agreement is prohibited, even without enforcement, if the landlord "willfully uses a rental agreement containing provisions known by the landlord to be prohibited." Iowa Code § 562A.11(2). The district court did not address this issue because it erroneously ruled enforcement was required under chapter 562A. On remand, the district court should consider whether the challenged lease provisions are provisions that "shall not be included," and whether the inclusion was made willfully and knowingly. *See id*. § 562A.11; *see also Summers*, 236 P.3d at 593 (stating landlord's "provision requiring tenants to pay its attorney fees in any legal dispute is clearly prohibited by the Landlord and Tenant Act, and [landlord] should have known that from simply reading the Act").

V. Conclusion.

The term "uses" in Iowa Code section 562A.11(2) does not require a landlord's "enforcement," but rather encompasses a landlord's "inclusion" of prohibited lease provisions. After considering the remedial nature of our class action rules and the fact our rules are "liberally construed" in favor of the

maintenance of class actions, we conclude the district court abused its discretion in failing to grant plaintiffs' request for certification of a class. On remand, the district court should consider whether the challenged lease provisions are provisions that "shall not be included," and whether the use/inclusion was made willfully and knowingly. We remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.