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Green v. Superior Court: A New Remedy for the California Tenant

Jane Rogers

Janis Rovner

GREEN v. SUPERIOR COURT: A NEW REMEDY FOR THE CALIFORNIA TENANT

With its decision in *Green v. Superior Court*,[1] the Supreme Court of California joined the District of Columbia and seven other states[2] in recognizing an implied warranty of habitability in residential leases. Besides legitimizing the doctrine in California, the court went further and recognized the landlord's breach of the warranty as a tenant's defense in an unlawful detainer action.[3] The decision may have a stunning impact on the tenants' rights movement in California.

The purpose of this comment is to trace the emergence of contractual concepts in landlord-tenant law and to pose some questions left unanswered by the *Green* decision.

DEVELOPMENT OF THE IMPLIED WARRANTY OF HABITABILITY

The implied warranty of habitability evolved as landlord-tenant law modernized, shifting its conceptual emphasis from property to contract principles in an effort to form legal concepts appropriate to changing social relationships. In early common law the lease was viewed primarily as an interest in land. The buildings thereon were incidental to the true object of the lease, the land. Rent was said to "issue from the land," and so long as the tenant remained in possession of the land, regardless of the condition of the structures on the land, he was bound to pay rent. If the tenant did not pay rent,

1. Green v. Superior Court, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974).

2. Javins v. First National Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970); Lemle v. Breeden, 51 Hawaii 426, 462 P.2d 470 (1969); Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972); Mease v. Fox, 200 N.W.2d 791 (Iowa 1972); Boston Housing Authority v. Hemmingway, 293 N.E.2d 831 (Mass. 1973); Kline v. Burns, 111 N.H. 87, 276 A.2d 248 (1971); Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970); Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961). Since the decision in *Green v. Superior Court*, the Supreme Court of Kansas has followed suit in Steele v. Latimer, 214 Kan. 329, 521 P.2d 304 (1974).

3. CAL. CODE OF CIV. PROC. § 1161 (West 1973).

he was not entitled to possession. The landlord had no implied duty to put leased property into any particular condition or to maintain it in a condition suitable for a particular use. The landlord was bound merely to disclose to the tenant latent defects known to him in the leased property and to keep any common areas in safe condition.[4] Further, even if the landlord had expressly assumed some duty to the tenant, the tenant would still have to pay rent despite the landlord's breach of this expressly-assumed duty. Viewed in contractual terms, these early property concepts dictated that the tenant's covenant to pay rent was independent of any express or implied covenants by the landlord.

As society developed, the courts began to grapple with the problem of restructuring landlord-tenant law to recognize the necessity of mutually dependent rights and duties between landlord and tenant.[5] The doctrine of constructive eviction evolved as a legal fiction as courts attempted to accommodate the law to changing social relationships. The doctrine was based on the landlord's covenant of quiet enjoyment which courts found implied by the lease agreement. Any acts or omissions by the landlord which deprived the tenant of the use and enjoyment of the premises were treated as breaches of the covenant of quiet enjoyment. In this situation the tenant was forced to vacate the premises in order to claim constructive eviction and to avoid further rental payments. Although the breach of the covenant of quiet enjoyment furnished justification for the tenant's moving out, the tenant's excuse from further rental payments was based not on the landlord's breach of the covenant of quiet enjoyment but on the tenant's quitting of the premises. While straining to formulate a modern tenant remedy for landlord misconduct, courts were still thinking in terms of traditional common law property and possessory concepts. It was possession of the premises which determined rental obligation, not the landlord's adherence to his duties under the rental agreement.

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4. *See, e.g.*, Bock v. Hamilton Square Baptist Church, 219 Cal. 284, 26 P.2d 7 (1933); Harris v. Joffe, 28 Cal. 2d 418, 170 P.2d 454 (1946); *see generally* 1 AM. LAW OF PROPERTY §§ 3.11, 3.78 (A.J. Casner ed. 1952).

5. *See* Ingalls v. Hobbs, 156 Mass. 348, 31 N.E.2d 286 (1892) (where tenant had rented a furnished vacation home for a short term, landlord held to implied warranty of habitability because tenant had bargained for a fit package of goods and services which he could not reasonably be expected to inspect); J.D. Young v. McClintic, 66 S.W.2d 676 (Tex. Com. App. 1933); Woolford v. Electric Appliances, Inc., 24 Cal. App. 2d 385, 75 P.2d 112 (1938) (holding builders to an implied warranty of habitability for leased premises which were not yet built when leased. The sole remedy available was to quit premises without being responsible for rent for the remainder of the term—a form of rescission of the rental contract).

That the doctrine of constructive eviction is of little practical advantage to tenants was recognized by the Supreme Court of Hawaii in *Lemle v. Breeden.*[6] In order to invoke the doctrine, a tenant must prove that his right to the quiet enjoyment of the premises has been substantially impaired through some act or omission of the landlord. Further, the tenant must show that he vacated the premises within a reasonable time. Given the housing shortage and the prevalence of substandard housing, the court in *Lemle* held abandonment to be impractical. It further reasoned that abandonment is always at the risk of establishing facts sufficient to constitute constructive eviction at a later time before a jury. If the tenant has wrongly invoked the doctrine, he will be liable for back rent and breach of the rental covenant.

Housing codes, first enacted in the early 1900's, reflected the desire of legislatures to codify the landlords' duties regarding tenants and to provide tenants with remedies for breaches of these duties. However, housing code enforcement by public agencies has also proven an inadequate remedy for the tenant. Enforcement of housing codes relies primarily upon the criminal process, usually misdemeanor prosecutions. Most housing codes generally provide for fines or imprisonment. Yet, fines have remained at minimal levels; and it is often financially desirable from the viewpoint of the landlord to pay the fines imposed rather than to make costly repairs. The imposition of heavy fines or jail sentences is rare perhaps because of courts' longstanding unwillingness to treat housing code violations as serious crimes.[7] Further, enforcement agencies are poorly staffed, necessitating enforcement only in cases of extreme violations.

The court in *Javins v. First National Realty Corporation*[8] implied a warranty of habitability based on housing code regulations. Observing that housing regulations "themselves are silent on the question," the court held that housing codes create privately enforceable duties and remedies. In so doing, the court acknowledged that "[o]fficial enforcement of housing codes has been far from effective."[9]

In agreement with many other states, the California legislature imposed statutory duties on landlords and gave corresponding reme-

6. Lemle v. Breeden, 51 Hawaii, 426, 462 P.2d 470 (1969).
7. *See* Grad, *New Sanctions and Remedies in Housing Code Enforcement*, 3 URBAN LAWYER 577 (1971); Gribetz, *Housing Code Enforcement in 1970—An Overview*, 3 URBAN LAWYER 525 (1971); Gribetz & Grad, *Housing Code Enforcement: Sanctions and Remedies*, 66 COLUM. L. REV. 1254 (1966); Levi, *Focal Leverage Points in Problems Relating to Real Property*, 66 COLUM. L. REV. 275 (1966).
8. Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970).
9. *Id.* at 1082.

dies to tenants. First passed in 1872, California Civil Code §§ 1941 and 1942[10] placed landlords under a duty to maintain leased premises in tenantable condition. These statutes allowed tenants, after timely notice ignored by the landlord, either to repair dilapidations themselves and deduct the repair costs from the rent, or to vacate the premises and be excused from further rental obligations. In response to the emergence of the tenants' rights movement of the late 1960's, the legislature substantially enlarged upon and clarified the rights of tenants under California Civil Code §§ 1941 and 1942.[11] The legislative changes included a definition of "tenantability" and standards with which tenants must comply in order to claim protection under the "repair and deduct" statutes. The "reasonable time" allowed a landlord to complete repairs was set at thirty days. The tenant could offer evidence to show that this period was "unreasonable" in a particular situation. Further, the legislature enacted a measure designed to limit a landlord's retaliatory action against a tenant who exercised his rights under the "repair and deduct" statutes.

However, in their amended form, the "repair and deduct" statutes still fail to provide the full range of protection essential to the needs of tenants. California Civil Code § 1942 significantly limits the tenant's "repair and deduct" remedy to once in every twelve-month period. Further, under conditions specified in California Civil Code § 1942.1, a tenant may be forced to waive the "repair and deduct" remedy.[12] The California Court of Appeals in *Hinson v. Delis*[13] aptly pointed to the inadequacies of the remedy provided by the "repair and deduct" statutes. Because the statutes allow a tenant to expend only up to one month's rent for repairs, the urban tenant cannot be expected to make major repairs which cost more

10. CAL. CIV. CODE §§ 1941, 1942 (enacted 1872) (based on FIELD'S DRAFT N.Y. CIV. CODE § 990).

11. Cal. Stats. 1970 ch. 1280 § 1 at 2314, codified at CAL. CIV. CODE § 1941.1 (West 1973) (definition of tenantable); Cal. Stats. 1970 ch. 1280 § 2 at 2315, codified at CAL. CIV. CODE § 1941.2 (West 1973) (compliance standards for tenant); Cal. Stats. 1970 ch. 1280 § 3 at 2315, codified at CAL. CIV. CODE § 1942 (West 1973) (definition of reasonable time for landlord repairs); Cal. Stats 1970 ch. 1280 § 5 at 2316, codified at CAL. CIV. CODE § 1942.5 (West 1973) (tenant's remedy for landlord retaliation).

12. CAL. CIV. CODE § 1942.1 (West Supp. 1954):

> Any agreement by a lessee of a dwelling waiving or modifying his rights under Section 1941 or 1942 shall be void as contrary to public policy with respect to any condition which renders the premises untenantable, except that the lessor and the lessee may agree that the lessee shall undertake to improve all or stipulated portions of the dwelling as part of the consideration for rental.

13. Hinson v. Delis, 26 Cal. App. 3d 62, 102 Cal. Rptr. 661 (1972).

than his monthly rental. This persuaded the *Hinson* court to hold the landlord to an implied warranty of habitability.[14]

Chronic housing shortages and the prevalence of substandard housing have made it painfully apparent that traditional common law landlord-tenant doctrines are outmoded. As a consequence of urbanization, the tenant's interest is no longer in the land, but in the dwelling:

> When American city dwellers, both rich and poor, seek 'shelter' today, they seek a well-known package of goods and services—a package which includes not merely walls and ceilings, but also adequate heat, light, and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance.[15]

Landlord-tenant concepts originated in a rural society when tenants were multi-skilled and independent and when buildings were simpler in construction and easier to repair. Today, it is likely that the average tenant lacks both the skills to make repairs and the money to pay for them. Indeed, if his or her apartment is part of a complex multi-unit dwelling, it is impossible for the tenant to take the initiative for repair of a unit without launching a rehabilitation program for the whole building. Common law landlord-tenant doctrines were equitably suited to English society when the heart of the system was the land and its possession. "Get away from the simplicities of the rural scene, however, and the old ideas get strangely and radically out of joint. What once made sense, now looks more like nonsense."[16]

The prevalence of substandard housing stands as a compelling social policy reason for change in landlord-tenant doctrines. It is estimated that there are 6.7 million substandard dwellings in the United States today.[17] California's Health and Safety Code[18] recognizes that there is an

> inadequate supply of safe and sanitary dwelling

14. *Id.* at 64-65, 102 Cal. Rptr. at 622. (tenant's monthly rent was $90 and the cost of repairs was estimated at $300).
15. Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1074 (D.C. Cir. 1970).
16. Quinn & Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future*, 38 FORDHAM L. REV. 225 (1969).
17. THE REPORT OF THE PRESIDENT'S COMMITTEE ON URBAN HOUSING: A DECENT HOME 44 (1968).
18. CAL. H. AND SAF. CODE § 33250 (West 1973).

> accommodations for persons and families of low income. This condition is contrary to public interest and threatens the health, safety, welfare, comfort and security of the people of the state.[19]

The housing shortage has also magnified the inequities of traditional landlord-tenant law. This urban housing shortage has created such unbalanced bargaining power between landlords and tenants that leases may be viewed as adhesion contracts:

> The inequality in bargaining power between landlord and tenant has been well documented. Tenants have very little leverage to enforce demands for better housing. Various impediments to competition in the rental housing market, such as racial and class discrimination and standardized form leases, mean that landlords place tenants in a take it or leave it situation. The increasingly severe shortage of adequate housing further increases the landlord's bargaining power and escalates the need for maintaining and improving the existing stock.[20]

The tenant is not operating in a free market and is in no position to make demands of the landlord. The tenant is usually offered a form lease including express waivers and exculpatory clauses, and the housing shortage renders him helpless to make a meaningful protest about these terms. Even if defects are apparent to the tenant upon inspection, he or she may have little choice but to accept the premises as is. Further, the housing shortage curtails the tenant's freedom to move when the premises become unhabitable. *Green* has attempted to modify the consequences of substandard housing and the housing shortage by applying a contract analysis to leases. The amount of rent due and owing is dependent upon the landlord's fulfillment of the warranty of habitability. Thus, the tenant is able to remain in possession while withholding rental payments if the landlord breaches the warranty.

THE DECISION IN GREEN

Roger Green attempted to defend an unlawful detainer action brought against him in small claims court by alleging that the land-

19. *See* Norvick, *The Physical and Mental Aspects of Housing Code Enforcement*, 3 URBAN LAWYER 538 (1971).
20. Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1079 (D.C. Cir. 1970).

lord failed to maintain the premises in a habitable condition. The landlord won possession of the premises and $225. Green appealed; and, on a trial de novo in Superior Court, he again attempted to defend on the grounds of the landlord's failure to maintain the premises, submitting a 1972 certified inspection report showing eighty housing code violations. Agreeing with the landlord, the trial court recognized no such defense to an unlawful detainer action and held Green's statutory "repair and deduct" remedy to be his sole recourse.[21]

Echoing the decisions of courts in other jurisdictions, the California Supreme Court in *Green* recognized that the factors discussed above have rendered traditional landlord-tenant doctrines grossly inequitable. The court noted the unequal bargaining position of tenants and the inadequacy of traditional tenant remedies in the modern urban setting. It further reasoned that the enactment of housing codes during the past century had evidenced a legislative desire to place a duty on landlords to maintain leased premises. Referring to cases in the field of products liability, the court also noted that the parallel development of implied warranties in the sale of new homes and consumer products has relevance to landlord-tenant relations. The urban tenant resembles the consumer of goods in that he or she is purchasing a package of housing which is expected to be fit for the purpose for which it was purchased—a living unit.[22] Recognizing that the time had come to impose an affirmative obligation on landlords, the court expressed agreement with the Court of Appeal in *Hinson* and adopted the implied warranty of habitability.

The landlord in *Green* contended that the "repair and deduct" statutes of the California Civil Code were the tenant's exclusive remedy, and, therefore, the court could not impose an additional duty upon the landlord. In rejecting this argument, the court reasoned that:

Although past cases have held that the Legisla-

21. 10 Cal. 3d at 621-22, 517 P.2d at 1171, 111 Cal. Rptr. at 707. The Supreme Court of California issued a writ of mandate staying execution of the $225 judgment against Green on the condition that he pay rents accrued since the judgment into the court. Green then moved out of the premises which according to the landlord rendered the case moot. The court chose to hear the case, based on the outstanding $225 judgment and the importance generally of the issues involved.

22. 10 Cal. 3d at 626-27, 517 P.2d at 1174-75, 111 Cal. Rptr. at 710-11. *See* Greenman v. Yuba Power Products Co., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962); Kriegler v. Eichler Homes, Inc., 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1969).

> ture intended the remedies afforded by section 1942 to be the sole procedure for enforcing the statutory duty placed on landlords by section 1941, no decision has suggested that the Legislature designed these statutory provisions to displace the common law in fixing the respective rights of landlord and tenant. On the contrary, the statutory remedies of section 1942 have traditionally been viewed as additional to, and complementary of, the tenant's common law rights.[23]

The limited nature of the "repair and deduct" statutes was regarded as persuasive proof by the court that these statutes were not meant to be the sole remedies available to tenants.

Citing the decision in *Knowles v. Robinson,*[24] the court held that any defense which went to the issue of possession could be raised in an unlawful detainer action. The court then relied on the emerging view that the tenant's rental covenant is dependent upon the landlord's covenant of habitability in the lease. Therefore, if the warranty of habitability is breached, there may be little or no rent due and owing. If there is no rent due and owing, then the landlord has no right to regain possession of the premises in the unlawful detainer action. Regarding the apportionment of rent, the court stated that:

> [I]f the trial court determines that the landlord's breach of warranty is total, and that the tenant owes no rent whatever, the court should, of course, enter judgment for the tenant in the unlawful detainer action. If the court determines, however, that the damages from the breach of warranty justify only a partial reduction in rent, the tenant may maintain possession of the premises only if he pays that portion of the back rent that is owing, as directed by the trial court. If the tenant fails to pay such sum, the landlord is entitled to a judgment for possession. Finally, of course, if the trial court finds that the landlord has not breached the warranty of habitability, it should immediately enter judgment in favor of the landlord.[25]

23. 10 Cal. 3d at 629-30, 517 P.2d at 1177, 111 Cal. Rptr. at 713.
24. Knowles v. Robinson, 60 Cal. 2d 620, 387 P.2d 833, 36 Cal. Rptr. 33 (1963).
25. 10 Cal. 3d at 639, 517 P.2d at 1184, 111 Cal. Rptr. at 720.

UNANSWERED QUESTIONS IN THE WAKE OF GREEN

What Constitutes a Breach of the Implied Warranty of Habitability?

In *Green*, the court indicates that the standard for the warranty of habitability will be "substantial compliance with those applicable building and housing code standards which materially affect health and safety," and that California Civil Code § 1941.1 may "also provide some helpful guidance in determining whether a landlord has satisfied the common law warranty of habitability."[26]

"Substantial compliance" is a common legal standard and has proven workable in various settings. Initially, however, the outer limits of what constitutes substantial compliance with applicable housing codes remains unknown. The core problem of how serious, in terms of severity and number, the violations must be in order to justify rent withholding is dealt with in little detail in *Green*. Thus, the court does not require that "a landlord ensure that leased premises are in perfect, aesthetically pleasing condition, but it does mean that 'bare living requirements' must be maintained."[27] It is clear that repeated litigation will be required in a variety of factual situations before clear lines are drawn as to what constitutes noncompliance sufficient to produce sanctions.[28]

Must there always be a radically large number of code violations? In *Green* there were eighty violations and in *Javins* there were fifteen hundred defects. Though there was not a large number of code violations in *Hinson*, the defects were blatant.[29] Some courts seem to have equated the implied warranty of habitability with the doctrine of constructive eviction.[30] If the same substantial defects are needed to prove both constructive eviction and a breach of the implied warranty, then it would seem that the decision in *Green* would be available and controlling only where the leased premises are rampant with code violations and nothing less.

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26. *Id.* at 637-38, 517 P.2d at 1183, 111 Cal. Rptr. at 719.
27. *Id.* The court also cites approvingly the following language from *Hinson v. Delis*:

> Minor housing code violations standing alone which do not affect habitability must be considered de minimis and will not entitle the tenant to reduction in rent.

28. *See* Posnanski v. Hood, 46 Wis. 2d 172, 181-82, 174 N.W.2d 528, 532-33 (1970) (court rejected theory of implied warranty of habitability because use of housing codes fails to provide sufficiently definite standards).
29. 26 Cal. App. 3d at 64-65, 102 Cal. Rptr. at 662 (large hole in bathroom floor plus further defects in bathroom, kitchen and front door).
30. Reste Realty Corp. v. Cooper, 53 N.J. 444, 461, 251 A.2d 268, 276-77 (1969).

Nor does the court address itself to whether code violations must be determined by an official inspection. The *Javins* court, in agreement with the decision in *Diamond Housing Corporation v. Robinson*,[31] affirmed that "[t]he tenant's private rights do not depend on official inspection or official finding of violation by the city government." Of course, for the sake of evidence at trial, it would be prudent for the tenant to have violations certified. Further, the court in *Hinson* indicates that the tenant must inform the landlord of the violations and allow a reasonable time for repairs to be made. This raises additional questions as to the meaning of proper notice and reasonable time.

Therefore, tenants and landlords will find themselves, at least initially, without adequate guidance in application of the *Green* decision. When a tenant makes the decision to withhold rent, he or she will do so at the risk of eviction for nonpayment should the court's conception of substantial violations differ from the tenant's. This possibility may have a chilling effect on the tenant's decision to use *Green* in the first place. Given the housing shortage, the tenant certainly does not want to risk eviction, for he may find himself with no place to go. The tenant might seek a declaratory judgment by the court, as was done in *Hinson*, but financial expense here could be prohibitive.

Can the Implied Warranty of Habitability be Waived?

The court in *Green* suggests that under certain circumstances an express waiver of the warranty of habitability by the tenant be binding.[32] The court indicates that landlords "generally" should not be able to demand express waivers of the warranty. Further, the "similar conclusion" reached by the California Legislature is that, under specifications set out in Civil Code § 1942.1, the "repair and deduct" statutes can be expressly waived. Several other jurisdictions have suggested that an express waiver would be upheld if voluntarily, knowingly, and intelligently made, although the District of Columbia Circuit Court unequivocally rejected this notion in *Javins*.[33]

The reasoning of the *Green* court would be best applied if express waiver were unequivocally prohibited. The landlord would then be forced to maintain the premises if he wished to receive rent.

31. Diamond Housing Corp. v. Robinson, 257 A.2d 492, 494 (D.C. App. 1969).
32. 10 Cal. 3d at 625 n.9, 517 P.2d at 1173-74 n.9, 11 Cal. Rptr. at 709-10 n.9.
33. 428 F.2d at 1081-82. *But see* Mease v. Fox, 200 N.W.2d 791, 797 (Iowa 1972); Kline v. Burns, 111 N.H. 87, 93, 276 A.2d 248, 252 (1971).

However, if express waivers would be upheld when made under certain circumstances, as the court's language suggests, the tenant would continue to be in an unequal bargaining position. He would be forced, because of the housing shortage, to accept express waivers in standardized leases. Thus, if the tenant is to be placed in a truly equal bargaining position, as *Green* purports to do, express waivers must be forbidden.

Whether a tenant may impliedly waive the warranty of habitability by remaining on the premises and acquiescing in housing code violations presents an entirely separate question. It is clear that housing codes cannot be waived;[34] but there remains the possibility that, as a result of his acquiescence, the tenant could be estopped from enforcing housing codes on a private basis (*i.e.*, claiming a breach of the implied warranty of habitability by the landlord). If a lease is treated as a contract, then a material breach of the lease can be impliedly waived, by receiving further performance from the landlord, with knowledge that the condition of furnishing and maintaining a habitable dwelling has not been performed.

How Broad an Application Will the Implied Warranty of Habitability Enjoy?

The courts which have adopted the implied warranty have stressed the residential nature of leases, the urban setting, and the inequality of bargaining position between tenant and landlord. Such discussions raise questions as to whether, for instance, commercial property could be covered by the implied warranty and whether the warranty arises in rural and small-town rentals where there is a better supply of housing.[35] Housing codes need enforcement there, as well; and in most cases, landlords will still be in the best position to assume the task of bringing buildings up to standard.

In the cases of luxury apartment buildings where the tenant and landlord are economically on a more equal footing, the question arises as to whether this closer proximity of bargaining positions would exempt these landlords from the implied warranty. On much the same consumer-oriented argument, it would seem that even here the tenant is bargaining for a package of goods and services which he is still powerless to maintain. However, in these instances, land-

34. Buckner v. Azulai, 251 Cal. App. 2d Supp. 1013, 1015, 59 Cal. Rptr. 806, 808 (1967) (attempted waiver of duty imposed by housing regulations invalid).
35. *See* Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969).

lords may only be required to bring the premises up to code standards. Extra frills, such as built-in furnishings, carpeting, view, and other special services may arguably not be covered by the implied warranty of habitability.

How Will the Historical Tenant Remedies be Applied in Light of Green*?*

Now that the *Green* decision has provided a new remedy for tenants, the usefulness of other tenant remedies is in question. The *Green* court summarized the inadequacies of constructive eviction, public enforcement of housing codes, and the "repair and deduct" statutes. However, can these remedies still be a practical tool for tenants; or does the *Green* decision subsume them all?

Nothing in the *Green* decision negates the tenant's option of choosing from available remedies on the basis of their practicality. For example, the "repair and deduct" remedy may still be quite useful in the case of one or two minor defects in one building. This may be more desirable to a tenant than potentially lengthy litigation.

On the other hand, though, the doctrine of constructive eviction may truly be dying. Doubtlessly referring to the housing shortage, the *Green* court recognized that this remedy "gives little help to the typical low-income tenant today because to avail himself of the doctrine a tenant must vacate the premises."[36] The *Lemle* court long ago recognized the death of constructive eviction in adopting the implied warranty of habitability:

> The doctrine of constructive eviction, as an admitted judicial fiction designed to operate as though there were a substantial breach of a material covenant in a bilateral contract, no longer serves its purpose when the more flexible concept of implied warranty of habitability is legally available.[37]

Some courts have, for the sake of consistency, found alternatives to the abandonment requirement by allowing for a declaration of constructive eviction in equity or by finding a partial constructive eviction.[38] These doctrines allow the tenant to remain on the

36. 10 Cal. 3d at 625 n.10, 517 P.2d at 1174 n.10, 111 Cal. Rptr. at 710 n.10.
37. 51 Hawaii at 434, 462 P.2d at 475.
38. *See, e.g.*, Barash v. Pennsylvania Terminal Real Estate Corp., 31 App. Div. 2d 342, 298 N.Y.S.2d 153 (1969); Johnson v. Pemberton, 197 Misc. 739, 97 N.Y.S.2d

premises even though he or she has been declared constructively evicted. The implied warranty of habitability would seem to entirely subsume these doctrines as it is appropriate to the emerging view of a lease as a contract and is not a strained judicial fiction.

How Will the Unlawful Detainer Proceeding be Affected?

The recognition of a breach of the implied warranty of habitability as a defense in an unlawful detainer action is bound to lead to more protracted litigation. Though the landlord in *Green* contended that recognition of the defense would undermine the speedy nature of the repossession proceeding, the court disagreed and adhered to the view that California has long permitted affirmative defenses which go to the issue of possession, citing as examples discriminatory motivation by the landlord and retaliatory eviction.[39] However, the determination of the nature, number, and seriousness of the violations along with other evidentiary matters will take some time. Thus, relatively swift repossession by landlords who elect to bring unlawful detainer actions seems destined to become a thing of the past.

Whether landlords who possibly are in breach of the implied warranty of habitability may so quickly and frequently elect to bring unlawful detainer actions is another question. If tenants are adequately counseled in their rights in light of *Green*, their landlords may elect to ignore non-payment of rent rather than risk an adverse judgment compelling them to make repairs. Therefore, the number of unlawful detainer actions brought may decline.

How Will Green *Affect Urban Landlord-Tenant Relationships?*

The decision in *Green* will have a substantial and immediate impact on the housing situation in the urban centers of California. Since it provides for legalized rent withholding, it could well be the basis for large-scale rent strikes by organized tenant unions or legal services groups. Of course, a tenant may withhold rent individually. This could compel landlords to rehabilitate their substandard buildings.

Faced with costs of major repairs in rehabilitating their buildings, landlords may no longer find it profitable to continue leasing

153 (1950); Majen Realty Corp. v. Glotzer, 61 N.Y.S.2d 195 (1946); Charles E. Burt, Inc. v. Seven Grand Corp., 340 Mass. 124, 163 N.E.2d 4 (1959).

39. 10 Cal. 3d at 632-34, 517 P.2d at 1178-79, 111 Cal. Rptr. at 714-15.

and instead may opt to have their buildings abandoned, which will eliminate even more space from an already shrinking housing market.[40] Alternatively, tenants who withhold rent can expect a substantial rent increase after rehabilitation of buildings by those landlords who chose repairs over abandonment.[41] Thus, *Green* may not be the salvation of tenants; and, in the end, by contributing to the housing shortage and to rent increases, it may worsen their plight!

It seems clear that a landlord could not claim unreasonable expense as a defense in order to avoid the effects of the implied warranty of habitability. In *Levengard v. District of Columbia,*[42] the court held that:

> [O]ne who chooses to use his property as a dwelling place for others to produce profit for himself cannot avoid compliance with the safety standards properly established for such use merely because it is expensive or difficult.[43]

Landlords might argue that such legislation by judicial fiat is not authorized by housing codes. The legislature has, after all, provided for enforcement of housing codes by public agencies and not by the tenant's own initiative. Even though the action in *Altz v. Lieberson*[44] was in tort, the reasoning employed by Judge Cardozo in extending liability based on code violations is pertinent to the theory of implied warranty based on housing codes:

> We may be sure that the framers of this statute when regulating tenement life, had uppermost in thought the care of those who are unable to care for themselves. The Legislature must have known that unless repairs in the rooms of the poor were made by the landlord, they would not be made by anyone. The duty imposed became commensurate with the need. The right to seek redress is not limited to the city or its officers. The right extends to all whom there was a purpose to protect.[45]

The Supreme Court of California, noted nationally as a progres-

40. Note, *Rent Withholding and the Improvement of Substandard Housing,* 53 CALIF. L. REV. 304, 320-22 (1965).
41. G. STERNLIEB, THE TENEMENT LANDLORD 234 (1966).
42. Levengard v. District of Columbia, 254 A.2d 728 (D.C. App. 1969).
43. *Id.* at 729.
44. Altz v. Lieberson, 233 N.Y. 16, 134 N.E. 703 (1922).
45. *Id.* at 19, 134 N.E. at 704.

sive body, was in some senses lagging behind the times in deciding *Green*. As has been mentioned before, eight jurisdictions were ahead of the court in recognizing the implied warranty, and some had applied it in the unlawful detainer context. The *Hinson* decision had laid out the policy arguments in favor of the implied warranty. However, by its decision, the *Green* court did more than just approve *Hinson*: it opened the door to rent withholding as a remedy for tenants in California.

Jane Rogers
Janis Rovner