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The Implied Warranty of Habitability: Louisiana Institution, Common Law Innovation

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ARTICLES

THE IMPLIED WARRANTY OF HABITABILITY: LOUISIANA INSTITUTION, COMMON LAW INNOVATION

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INTRODUCTION

The common law and the civil law have historically differed in their treatment of the landlord and tenant relationship. The common law conceives of a residential lease as a conveyance of real estate for a term of years.[1] Under the traditional understanding of this concept, the tenant owned the property for that term, and the landlord was only obligated to put the tenant in possession. This resulted in the landlord-tenant relationship being based upon the concepts of caveat lessee and independent lease covenants;[2] a plausible approach to the rent of a pasture but hardly appropriate for the lease of a unit in an urban apartment building.

Conversely, the civil law regards a lease as a contract comprised of mutually dependent covenants.[3] One party gives the other "the enjoyment of a thing" for a period[4] and is obligated "[t]o maintain the thing in a condition such as to serve for the use for which it is hired."[5]

From these contrasting notions of a residential lease, as a conveyance of real estate and as a contract for the enjoyment of property, sharply different rules developed concerning the obligations of the landlord for the habitability of the leased premises. At traditional common law, the landlord had no obligation to deliver premises in a condition fit for the tenant's use.[6] He gave no implied warranty to repair and no implied

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1. 2 R. Powell, The Law of Real Property, § 221[1] (1982).

2. Id. at § 234[1].

3. La. Civ. Code art. 2669; Love, Landlord's Liability for Defective Premises: Caveat Lessee, Negligence, or Strict Liability?, 1975 Wisc. L. Rev. 19, 93.

4. La. Civ. Code art. 2669.

5. La. Civ. Code art. 2692.

6. Franklin v. Brown, 118 N.Y. 110, 23 N.E. 126 (1889).

covenant against defects. Indeed, leases, like other real estate conveyances, contained no implied obligations at all.[7] If the landlord gave express warranties or other undertakings and subsequently breached them, judges applied the canons of the interpretation of real estate conveyances to the lease and held that all covenants were independent.[8] Thus, where the premises were unfit or the landlord failed to repair in breach of a covenant, the tenant might be entitled to sue for damages but not for cancellation of the lease.

In the Louisiana civilian tradition, the law imposes on the lessor the duty to deliver premises in good repair unless the parties stipulate otherwise.[9] The lessor must also maintain the premises free of defects.[10] Breach of these obligations by the lessor permits the tenant to cancel the lease,[11] to sue for damages,[12] or to repair and deduct from the rent.[13]

In the past fifteen years, the common law of landlord and tenant has undergone revolutionary changes, especially in the law relative to the condition of the leased premises. The product of this revolution is an alteration in the relationship between landlord and tenant such that in some jurisdictions their position is now fairly akin to the relationship between the Louisiana lessor and lessee. In certain respects the remedies which common law jurisdictions currently offer the tenant are more appropriate to the expectations of the parties, their relative bargaining power, and the sociological context of the contemporary urban lease than are the provisions of the Louisiana Civil Code.

This revolution has been change in search of a rationale, however, as common law judges and legislators struggle to fashion a law of consumer contracts from a battery of legal concepts developed in feudal times. These judges and legislators have adopted a number of precepts from the law of contacts, thereby increasing the similarity between the common and civil law of leases. However, they have also incorporated provisions of administrative law, explicitly adopting housing codes as

7. N.Y. Real Prop. Law § 251 (Consol. 1979): "A covenant is not implied in a conveyance of real property whether the conveyance contains any special covenant or not." New York began to imply covenants of quiet enjoyment in leases for terms of years in the last century. Burr v. Stanton, 43 N.Y. 462 (1871). In other jurisdictions, short term leases (e.g. three years) are not now considered to be conveyances. See, e.g., Wis. Stat. § 706.01 (1981).

8. 2 R. Powell, supra note 1, at § 221[1] n.11. The classic example of the application of this cannon of interpretation requires the tenant to continue paying rent if the premises are destroyed. New York modified this rule by statute in 1860. Suydan v. Jackson, 59 N.Y. 450 (1873); N.Y. Real Prop. Law § 227 (1979).

9. La. Civ. Code art. 2692.

10. La. Civ. Code art. 2693.

11. La. Civ. Code art. 2729.

12. La. Civ. Code art. 2695.

13. La. Civ. Code art. 2694.

standards of habitability.[14] Judges have also created remedies at administrative law by encouraging reports of housing code violations to local authorities and prohibiting eviction in retaliation for such complaints.[15] Consequently, the common law of landlord and tenant is now a mixture of real property, contract, and administration.

The common law's furthest advance from fuedal leasehold concepts is the warranty of habitability. This article will compare the current status of this warranty in three of the most advanced, urban common law jurisdictions with the status of analogous Louisiana law. New York, New Jersey, and the District of Columbia have been selected for comparison on the basis of the frequency with which their courts address landlord and tenant issues and the diversity of the solutions which they have generated. On the basis of this discussion, readers in common law jurisdictions may ascertain the extent of the development of their law towards a contract model of the lease. Louisiana readers may profit from this article's comparisons in two ways. First, those jurisdictions with the more advanced warranties provide a yardstick by which to measure the continuing adequacy of Louisiana law. Second, in those instances where the common law has surpassed the Louisiana law, these advances can be scrutinized with an eye towards transplanting desirable elements into Louisiana law. Such a comparison is especially appropriate as the Louisiana State Law Institute prepares to revise the Civil Code articles concerning leases.

I. The Background of the Common Law Revolution

The retreat from the feudal concept of leases as real estate conveyances developed slowly as judges began to develop exceptions to the general rule that the tenant alone was responsible for the condition of the premises. Initial exceptions made the landlord responsible for the condition of common areas when portions of a building were leased to different tenants, or for the entire premises under a lease of a furnished dwelling for a short term.[16] Eventually the landlord became responsible for premises leased for admission of the public, for latent defects known to him, for negligent repairs, for failure to make promised repairs, and for the condition of a building leased while under construction.[17] Although these exceptions injected a measure of equity into an otherwise harsh

14. See infra text accompanying notes 36 thru 42.

15. Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968), cert. denied, 393 U.S. 1016 (1969).

16. Davis & DeLaTorre, A Fresh Look at Premises Liability as Affected by the Warranty of Habitability, 59 Wash. L. Rev. 141, 152-53 (1984).

17. 2 R. Powell, supra note 1, at § 225[2]; Corodemus, Residential Landlord-Tenant Law, 21 Trial 34 (March 1985); Love, supra note 3.

body of law, it was not until the late 1960s that a variety of factors forced the courts and legislatures to reevaluate the fundamental concepts underlying the common law of lease. Reevaluation of feudal concepts was necessary in order to effect any significant change in this area of the law.

One of the factors which led to reexamination of the foundation of landlord and tenant law was the social atmosphere of the 1960s, including the racial unrest which was partially directed at urban slumlords.[18] In the 1960s society became concerned about the housing situation, and President Kennedy declared it a public policy that every person had a right to live in a decent home.[19] Against this sociological backdrop, many specific factors contributed to a realization that the analysis of a lease as a real estate conveyance was no longer applicable to modern urban society. One factor was the development of a body of consumer protection law.[20] Another was the housing shortage and the general decay of existing structures in certain areas of the country.[21] This shortage of decent housing together with the profuse use of standard form leases resulted in unequal bargaining power between landlord and tenant, so that the typical lease became a contract of adhesion which substantially benefitted the landlord.[22] Under these leases the tenant typically was responsible for repairs, even where he had not caused the defective conditions. Moreover, the tenant was not generally financially capable of making large repairs,[23] and often did not have access to defective plumbing, heating, elevators, and other equipment which was under the control of the landlord.[24] In addition to this recognition of

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18. See Dembling, The Landlord and Tenant in New Jersey: Toward Euality [sic] of Bargaining Power, 93 N.J.L.J. 805 (1970); Corodemus, supra note 17; Sax & Hiestand, Slumlordism as a Tort, 65 Mich. L. Rev. 869, 869-870 (1967).

19. Dembling, supra note 18; N.J. Stat. Ann. § 2A:42-85 (West Supp. 1984); see Quinn & Phillips, The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future, 38 Fordham L. Rev. 225 (1969).

20. 2 R. Powell, supra note 1, at § 225[2]; Comment, Implied Warranty of Habitability: An Incipient Trend in the Law of Landlord-Tenant?, 40 Fordham L. Rev. 123 (1971).

21. See Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970); Glendon, The Transformation of American Landlord-Tenant Law, 23 B.C.L. Rev. 503, 521-22 (1982); Schoshinski, Remedies of the Indigent Tenant: Proposal for Change, 54 Geo. L.J. 519, 520 (1966); Sax & Hiestand, supra note 18, at 869-70.

22. Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969); Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970); Trentacost v. Brussel, 82 N.J. 214, 412 A.2d 436 (1980); Schoshinski, supra note 21, at 520-21; Morbeth Realty Corp. v. Velez, 343 N.Y.S.2d 406, 73 Misc.2d 996 (N.Y. Civ. Ct. 1973) ("The blunt fact is that most people cannot rent apartments in our urban society without signing form leases that are simply grotesque in their one-sidedness").

23. Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970); Trentacost v. Brussel, 82 N.J. 214, 412 A.2d 436 (1980).

24. Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970); Quinn & Phillips, supra note 19, at 232.

the plight of urban tenants, public policy makers came to perceive the landlord as a businessman possessing a degree of expertise and the capital sufficient to undertake responsibility for his property.[25] At the same time, the growth of legal assistance programs and legal activism under President Johnson's "Great Society" opened the courts to impoverished tenants with leasehold complaints.[26]

Existing tenants' remedies were soon recognized to be inadequate. For example, the constructive eviction doctrine proved to be unduly harsh in application to the modern urban tenant. The tenant was permitted to cancel the lease only upon proof that the landlord had "constructively evicted" him by failing to remedy defects which he was obliged to repair and by further proof that this failure made the premises uninhabitable. The tenant assumed the risk of liability for rent if it was later held that the defects in the premises had not been sufficient to constitute constructive eviction.[27] An even more objectionable feature was the requirement that the tenant abandon the premises to claim any relief.[28] This requirement rendered the constructive eviction remedy essentially illusory to the urban tenant faced with a housing shortage which made it unlikely that he could timely find or afford a replacement dwelling.[29] Moreover, constructive eviction was effective in any case only as a defense to an action by the landlord for unpaid rent. In the same way that the constructive eviction remedy was seen as inadequate, other tenant remedies were also criticized, often on the grounds that they were also illusory because of the landlord's ability to retaliate, such as by eviction.[30]

In light of these inadequacies, judges and legislators undertook to revise the landlord's obligations regarding the quality of the premises. These revisions were generally based upon either previously enacted housing codes or judicial notions of public policy.[31] The basic revision was the creation of an implied warranty of habitability. This warranty is an implied covenant in every residential lease that the premises are

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25. See supra note 9.

26. Glendon, supra note 21, at 521.

27. Comment, supra note 20.

28. Gerwin, A Study of the Evolution and Potential of Landlord Tenant Law and Judicial Dispute Settlement Mechanism in the District of Columbia—Part I: The Substantive Law and the Nature of the Private Relationship, 26 Cath. U.L. Rev. 457 (1977); Note, 16 How. L.J. 366, 375 (1971); Comment, supra note 20; Millbridge v. Linden, 151 N.J. Super. 168, 376 A.2d 611 (Dist. Ct. 1977); Quinn & Phillips, supra note 19, at 235-36.

29. Comment, supra note 20; Amanuensis, Ltd. v. Brown, 65 Misc.2d 15, 318 N.Y.S.2d 11 (N.Y. Civ. Ct. 1971).

30. Goldberg, Landlord-Tenant Law Entirely Fair? A Reply, 93 N.J.L.J. 109 (1970). See Quinn & Phillips, supra note 19, at 239-42. (inadequacy of remedies under housing codes).

31. Love, supra note 3, at 101.

fit for habitation such that they meet certain minimum standards of safety and sanitation.[32]

This warranty was a significant blow to the doctrine of caveat lessee. Standing alone, however, the warranty of habitability would only have given the tenant an action for damages because covenants in leases were traditionally regarded as independent of one another. The warranty was made an effective remedy by construing the tenant's obligation to pay rent as dependent upon the landlord's performance of the covenant of habitability. Therefore, in order to change the law relative to responsibility for the condition of the premises, the common law jurisdictions which adopted a warranty of habitability altered the basic tenets of the common law regarding leases, incorporating contract principles into real estate transactions.

II. Development of The Warranties of Habitability

In order to understand the unique nature of the warranties of habitability in New York, New Jersey, and the District of Columbia, it will be helpful to discuss briefly the origins and history of each warranty.

A. *The District of Columbia*

The District of Columbia's warranty of habitability is a judicially created remedy. Housing conditions in the District in the late 1960s had become a public concern, and Congress had not responded to the problem.[33] This need for action, combined with the presence of an innovative federal court sitting as, in effect, the Supreme Court of the District, led to a body of jurisprudence which marked a significant departure from the common law.[34] The court's approach was at first incremental, offering piecemeal modification of the tenant's rights.

In the first of these cases, *Whetzel v. Jess Fisher Management Co.*,[35] the court indicated its willingness to utilize existing legislation to fashion private remedies for tenants. The court held that tort liability could be imposed upon a landlord who allowed his premises to violate housing regulations. The housing code also played a key role in *Edwards v. Habib*,[36] in which the court held that a tenant could not be evicted in retaliation for reporting housing violations to administrative authorities. The court further utilized administrative regulations in *Brown v. Southall*

32. See N.Y. Real Prop. Law § 235-b (Consol. 1984); 1980 Annual Survey of American Law 633; 2 R. Powell, supra note 1, at § 225[2][a].

33. Glendon, supra note 21, at 521-22; Schoshinski, supra note 21.

34. Id.

35. 282 F.2d 943 (D.C. Cir. 1960).

36. 397 F.2d 687 (D.C. Cir. 1968), cert. denied, 393 U.S. 1016 (1969).

Realty Co.,[37] in which it was held that violations of the regulations existing at the beginning of a lease term resulted in a lease being void as an illegal contract. The significance of *Brown* is in its implicit recognition of the dependency between "habitability" and the lessee's obligations.

However, the broad implications of *Brown* were soon narrowed by subsequent decisions. For example, *Saunders v. First National Realty Corp.*[38] narrowed *Brown* by holding that a lease would be considered void only if the landlord had knowledge of the housing regulation violations at the beginning of the lease term, and that violations existing after the inception of the lease would not void the lease.[39]

Following this piecemeal modification, the United States Court of Appeals for the District of Columbia undertook a fundamental revision of the common law concept of leases. In 1970 the court created an implied covenant in its now famous decision, *Javins v. First National Realty Corp.*[40] *Javins,* like its predecessors, utilized the housing regulations to fashion a private tenant remedy. The holding was broad and appeared to create a general warranty of habitability. The court indicated that a lease should be interpreted as a contract in which each party's obligations are mutually dependent.[41] Breach of any obligation by the landlord, express or implied, would then entitle the tenant to partial or complete rent abatement.

Although *Javins* promised a new era in landlord-tenant law, subsequent cases have narrowed *Javins* in several respects. The most significant retreat is the resurrection of the independent covenants doctrine. Although the tenant's obligation to pay rent is dependent upon the habitability of the premises as gauged by the housing regulations, the landlord's breach of other duties may not entitle the tenant to an abatement. *Winchester Management Corporations v. Staten*[42] held that breach of the landlord's express undertaking to provide air conditioning, an amenity not required by housing regulations, did not entitle the tenant

37. 237 A.2d 834 (D.C. Cir. 1968), cert. denied, 393 U.S. 1018 (1969); see Note, Tenant Remedies—The Implied Warranty of Fitness and Habitability, 16 Vill. L. Rev. 710 (1971).

38. 245 A.2d 836 (D.C. 1968).

39. Gerwin, supra note 28, at 478; Comment, Arbitration of Landlord-Tenant Disputes, 27 Am. U.L. Rev. 407, 413 (1978); Curry v. Dunbar House, Inc., 362 A.2d 686 (D.C. 1976).

40. 428 F.2d 1071 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970).

41. The *Javins* opinion was written by a Louisiana trained lawyer, J. Skelly Wright. Footnote 13 in the opinion states, "The civil law has always viewed the lease as a contract, and in our judgment that perspective has proved superior to that of the common law." See Glendon, supra note 21, at 525; Quinn & Phillips, supra note 19, at 252-54.

42. 361 A.2d 187 (D.C. 1976).

to an abatement of rent even though the court found that air conditioning represented a significant portion of the rent paid as consideration for the lease.

This case has been properly criticized as an undesirable restriction of *Javins*.[43] The limitation of the dependent covenant doctrine, so that the lessee's obligation to pay rent can only be excused by a violation of the housing regulations, will certainly limit the future expansion of the warranty in the District. Nevertheless, *Staten* has been followed in subsequent cases.[44]

B. *New Jersey*

New Jersey also has a judicially created warranty of habitability, but development of the New Jersey warranty has been more systematic than development of the D.C. warranty. The first indications of such a warranty in New Jersey were in *Reste Realty Corp. v. Cooper*.[45] In *Reste,* the New Jersey Supreme Court invalidated a commercial lease due to a latent defect which was undiscoverable by the tenant. The flooding caused by the defect was held to have breached the landlord's covenant of quiet enjoyment, constructively evicting the tenant. The court discussed the inadequacy of traditional common law tenant remedies, together with benefits of a doctrine of dependent covenants and a warranty of habitability. However, the case did not specifically create an implied warranty of habitability or adopt the doctrine of dependent covenants, and debate on the implications of the opinion waged among the commentators until the issue was settled in 1970.[46]

Eleven days after *Javins* was announced in the District of Columbia, the New Jersey Supreme Court decided the landmark case *Marini v. Ireland*.[47] In *Marini,* a residential tenant retained a plumber to repair a leaking toilet after unsuccessfully trying to induce the landlord to repair it. The tenant deducted the cost of the repairs from her monthly rent and the landlord responded with a summary eviction action. Holding

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43. Gerwin, supra note 28, at 491-92.

44. Curry v. Dunbar House, Inc., 362 A.2d 686 (D.C. 1976); Mahdi v. Poretsky Management, Inc., 433 A.2d 1085, 1090 (D.C. 1981).

45. 53 N.J. 444, 251 A.2d 268 (1969).

46. Griffinger, Landlord-Tenant Law: Urgent Need for Reform, 92 N.J.L.J. 417 (1969); Feldman, Landlord-Tenant Law: Entirely Fair. Use by Tenants Invited, 92 N.J.L.J. 641 (1969); Goldberg, supra note 30; Feldman, Effective Remedies for Tenants, 93 N.J.L.J. 481 (1970); Academy Spires, Inc. v. Jones, 108 N.J. Super. 395, 261 A.2d 413 (1970) (this case states that *Reste* created a warranty of habitability); Coleman v. Steinberg, 54 N.J. 58, 253 A.2d 167 (1969) (New Jersey Supreme Court ignores possible application of *Reste* warranty in discussion of duty to repair); The New Jersey Supreme Court officially adopted a warranty of habitability in Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970).

47. 56 N.J. 130, 265 A.2d 526 (1970).

that the tenant had acted properly, the court created a warranty of habitability with the following language:

> In a modern setting, the landlord should, in a residential letting, be held to an implied covenant against latent defects, which is another manner of saying, habitability and livability fitness. It is a mere matter of semantics whether we designate this covenant one "to repair" or "of habitability and livability fitness." Actually it is a covenant that at the inception of the lease, there are not latent defects in facilities vital to the use of the premises for residential purposes because of faulty original construction or deterioration from age or normal usage. And further it is a covenant that these facilities will remain in usable condition during the entire term of the lease.[48]

The *Marini* court altered the traditional common law in another significant manner by stating that lease covenants "are dependent or independent according to the intention of the parties and the good sense of the case."[49] While this was not a full adoption of the dependent covenants doctrine, it is illustrative of New Jersey's piecemeal approach to legal development regarding the condition of leased premises. Unlike the District of Columbia, where a broad decision like *Marini* would most likely be followed by a series of restrictive cases, the New Jersey courts slowly built upon the foundation provided by *Marini.* Three years later, *Berzito v. Gambino*[50] embraced the doctrine of dependent covenants. *Berzito* also made other important additions to the New Jersey warranty of habitability, as will be discussed below.

One factor which has had little impact upon the judicial development of the New Jersey warranty of habitability is the passage of legislation in 1971 providing for the maintenance of safe and sanitary housing.[51] This statutory warranty has been held to be coextensive with the judicially created warranty rather than a replacement for it,[52] and New Jersey tenants now have recourse under two warranties of habitability. Perhaps because the judicial remedy developed first and has greater potential for future equitable expansion, the statutory remedy is largely unused at the appellate level.

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48. Id. at 144, 265 A.2d at 534.

49. Id. at 145, 265 A.2d at 534.

50. 63 N.J. 460, 308 A.2d 17 (1973).

51. N.J. Stat. Ann. § 2A:42-88 (West Supp. 1984): "The public officer or any tenant occupying a dwelling may maintain a proceeding as provided in this act, upon the ground that there exists in such dwellings or in housing space thereof a lack of heat or of running water or of light or of electricity or of adequate sewage disposal facilities, or any other condition or conditions in substantial violation of the standards of fitness for human habitation established under the State or local housing or health codes or regulations or any other condition dangerous to life, health or safety."

52. Drew v. Pullen, 172 N.J. Super. 570, 412 A.2d 1331 (N.J. Super. Ct. App. Div. 1980); Berzito v. Gambino, 63 N.J. 460, 308 A.2d 17 (1973).

C. *New York*

In contrast to New Jersey and the District of Columbia, New York utilizes a statutory warranty of habitability. However, the New York courts had created such a warranty even before the legislature acted in 1975. As early as 1922, Chief Justice Cardozo recognized a public policy in favor of habitable dwellings, imposing tort liability upon a landlord who failed to maintain his leased premises.[53]

Subsequent cases from the civil courts of the County of New York, landlord-tenant courts of original jurisdiction, adopted the New Jersey and D.C. warranties to correct apparently outrageous abuse by landlords. In *Amanuensis, Ltd. v. Brown,*[54] for example, the tenant alleged that the landlord had intentionally allowed serious housing code violations to exist to coerce tenants to move away so that the building could be renovated. The civil court judge cited the leading case from the District of Columbia[55] and imposed a warranty of habitability upon the landlord. Many other decisions from courts of original jurisdiction followed the jurisprudence of D.C. and New Jersey, despite a lack of authority from the New York legislature or appellate courts.[56]

Appellate endorsement of this line of cases arrived in 1975 when an intermediate court held that a "warranty of habitability and fitness for the purpose intended (unless specifically excluded) should be implied from the very nature of a rental for residential purposes."[57] The legislature codified the holding of this case later that year,[58] adding that an attempt to waive the warranty is ineffective.[59] Subsequent jurisprudence has determined that the landlord breaches this warranty if the condition of the premises: (1) endangers life, health or safety, (2) renders it unfit for human habitation, or (3) is not in accordance with the use reasonably intended by the parties.[60] Moreover, the tenant's obligation to pay rent is dependent upon performance by the landlord of this implied covenant.[61]

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53. Altz v. Leiberson, 233 N.Y. 16, 134 N.E. 703 (1922); Corodemus, supra note 17.

54. 65 Misc.2d 15, 318 N.Y.S.2d 11 (N.Y. Civ. Ct. 1971).

55. Id. at 20, 318 N.Y.S.2d at 18.

56. Garcia v. Freeland Realty, Inc., 63 Misc.2d 937, 314 N.Y.S.2d 215 (N.Y. Civ. Ct. 1970); Jackson v. Rivera, 65 Misc.2d 468, 318 N.Y.S.2d 7 (N.Y. Civ. Ct. 1971); Morbeth Realty Corp. v. Rosenshine, 67 Misc.2d 325, 323 N.Y.S.2d 363 (N.Y. Civ. Ct. 1971); Mannie Joseph, Inc. v. Stewart, 71 Misc.2d 160, 335 N.Y.S.2d 709 (N.Y. Civ. Ct. 1972) (describing the apartment as a "chamber of horrors"); Kipsborough Realty Corp. v. Goldbetter, 81 Misc.2d 1054, 367 N.Y.S.2d 916 (N.Y. Civ. Ct. 1975).

57. Tonetti v. Penati, 48 A.D.2d 25, 29, 367 N.Y.S.2d 804, 808 (N.Y. App. Div. 1975).

58. N.Y. Real Prop. Law § 235-b(1) (Consol. 1984).

59. Note, New York's Search for an Effective Implied Warranty of Habitability in Residential Leases, 43 Alb. L. Rev. 661, 665 (1979).

60. Park West Management Corp. v. Mitchell, 47 N.Y.2d 316, 418 N.Y.S.2d 310, 391 N.E.2d 1288, cert. denied, 444 U.S. 992 (1979); Mantica R Corp. NV v. Malone, 106 Misc.2d 953, 436 N.Y.S.2d 797 (N.Y. Civ. Ct. 1981).

61. Geffner v. Phillips, 123 Misc.2d 127, 472 N.Y.S.2d 851 (N.Y. Civ. Ct. 1984).

III. The Scope of the Warranty of Habitability in Louisiana and Comparative Law

A. *Breach of the Warranty as a Basis for Damages*

The implied warranty of habitability adopted in New York, New Jersey, and the District of Columbia was originally a defensive remedy; it was a defense to a landlord's suit for rent or possession. Although each of these jurisdictions has expanded the scope of the warranty to include actions for damages, the process has been lengthy.

The experience of the District of Columbia is illustrative. *Javins,* the landmark case, limited the implied warranty to defensive use by a tenant in an action for non-payment of rent.[62] Subsequent cases applied this limitation quite literally, refusing to allow a tenant to assert the defense in an action for possession when the landlord did not attempt to recover unpaid rent.[63] The courts also refused to apply the warranty to cases involving notices to quit the premises.[64] It was not until 1983, thirteen years after *Javins,* that *George Washington University v. Weintraub*[65] held that the implied warranty of habitability "may be used as a sword (to collect damages) as well as a shield (to contest the obligation to pay rent)."[66] *Weintraub* is one of the few cases to expand the holding of *Javins.*

In conformity with the history of the New York warranty of habitability, Civil Courts in New York City allowed actions for damages by tenants years before any appellate court permitted such actions.[67] Although the warranty statute was enacted in 1975, it was not until 1980 that an appellate decision stated, "[t]his court holds that this warranty may be used affirmatively in a cause of action for property damage."[68]

Similarly, the New Jersey case which created the warranty of habitability, *Marini v. Ireland,* did not provide for an affirmative action

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62. Javins v. First Nat'l Realty Corp. 428 F.2d 1071, 1083 n.64 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970).

63. Bell v. Tsintolas Realty Co., 430 F.2d 474 (D.C. Cir. 1970).

64. McNeal v. Habib, 346 A.2d 508 (D.C. 1975); Brown v. Young, 364 A.2d 1171 (D.C. 1976). An exception is Knox Hill Tenant Council v. Washington, 448 F.2d 1045 (D.C. Cir. 1971).

65. 458 A.2d 43 (D.C. 1983).

66. Id., at 46. See also, Towers Tenant Association, Inc. v. Towers Ltd. Partnership, 563 F. Supp. 566 (D.C. Cir. 1983); District of Columbia Survey: George Washington University v. Weintraub: Implied Warranty of Habitability as a (ceremonial?) Sword, 33 Cath. U.L. Rev. 1137 (1984).

67. Groner v. Lakeview Management Corp., 83 Misc.2d 932, 373 N.Y.S.2d 807 (N.Y. Civ. Ct. 1975); Roberts, 1976 Survey of New York Law - Property, 28 Syracuse L. Rev. 353, 356 (1977).

68. McGuiness v. Jakubiak, 106 Misc. 2d 317, 321, 431 N.Y.S.2d 755, 757 (N.Y. Sup. Ct. 1980).

by a tenant.[69] Three years after *Marini,* the New Jersey Supreme Court in *Berzito v. Gambino*[70] stated that since the covenant of habitability and the covenant to pay rent were mutually dependent, a tenant could bring an action for damages for breach of the warranty.[71]

Allowing a tenant to bring an action for breach of the warranty is a significant and necessary expansion of the warranty of habitability. Louisiana law has long permitted the lessee to seek damages under the code articles relative to the condition of leased premises. The lessee may set up breach of the Louisiana warranty as a defense to a suit for rent. He may also collect damages for injury to person and property and for the cost of self-help repair of the premises.

B. *Standard of Breach*

The effectiveness of a warranty of habitability depends in large measure upon what type of defects are warranted against. The New York legislature intentionally created an implied warranty without explicit standards of habitability so that courts might fashion appropriate remedies on a case-by-case basis.[72] The result, however, has been an inconsistent body of caselaw which makes litigation of the tenant's rights or the landlord's duties unpredictable.[73]

The leading case is *Park West Management Corp. v. Mitchell,*[74] in which the court attempted to provide standards for future use of the warranty, but unfortunately created some confusion as to the nature of a defect which the tenant would be required to prove. The case involved a seventeen day interruption of services in a high rise dwelling due to a maintenance and janitorial strike. The trash on the sidewalks and rats which accompanied it caused a New York Sanitation Department "health emergency." Holding that the implied warranty of habitability had been breached, the court stated that the warranty is applicable to defects existing at the inception of the lease and arising during the term of the lease.

The court's opinion focused upon the threat which the interruption of services posed to the health and safety of the tenants. This focus caused confusion as to whether the only defects which breach the warranty

69. Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970); Survey of the 1973 New Jersey Supreme Court Term, Landlord and Tenant—Affirmative Action for Rent Abatement is Appropriate Remedy for Breach of Landlord's Covenant of Habitability, 27 Rutgers L. Rev. 597 (1974).

70. 63 N.J. 460, 308 A.2d 17 (1973).

71. Survey of the 1973 New Jersey Supreme Court Term, supra note 69.

72. Note, supra note 59.

73. Id. at 666; Note, Recovery under the Implied Warranty of Habitability, 10 Fordham Urban L.J. 285, 300-301 (1982).

74. 47 N.Y.2d 316, 418 N.Y.S.2d 310, 391 N.E.2d 1288, cert. denied, 444 U.S. 992 (1979).

of habitability were those detrimental to health and safety. Most subsequent cases involved defects which were a threat to tenant health or safety, but the courts rarely stated whether such a threat was required. For example, in *111 East 88th Partners v. Simon,*[75] a lack of heat, hot water, elevator service, inadequate cleaning and maintenance, removal of lobby furniture, broken front door lock, and irregular garbage collection were held to comprise a breach of the warranty. However, the court did not discuss which factors would have individually caused a breach and did not state whether the breach was based upon a threat to tenant health or safety.

Other cases have found a breach of the implied warranty of habitability for lesser defects. In *Whitehall Motel v. Gaynor,*[76] mere inconvenience to the tenant caused by protracted renovation by the landlord was held to have breached the warranty. In addition to this uncertainty over whether a threat to health or safety is required, other cases have held that housing code violations which pose a *de minimus* threat to health or safety will not violate the warranty.[77]

The approach of New York courts to this problem has been, on the whole, unsatisfactory. Rather than define standards of habitability or follow the statutory guidelines which mandate consideration of life, health, safety, usefulness of the premises, and expectations of the parties, the courts have decided cases on an *ad hoc* basis.

The New Jersey courts have more successfully defined a standard for breach of the implied warranty of habitability. The case which created the warranty, *Marini v. Ireland,*[78] defined a breach as a defective "vital facility." *Marini* was criticized for this vague standard,[79] and the New Jersey Supreme Court responded with its decision in *Berzito v. Gambino.*[80] *Berzito* adopted a list of factors previously set forth in an Iowa case[81] as considerations "in determining whether in fact there has been a breach of the covenant of habitability."[82] The factors are:

1. Has there been a violation of any applicable housing code or building or sanitary regulations?
2. Is the nature of the deficiency or defect such as to affect a vital facility?
3. What is its potential or actual effect upon safety and sanitation?

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75. 106 Misc.2d 693, 434 N.Y.S.2d 886 (N.Y. Civ. Ct. 1980).
76. 121 Misc.2d 736, 470 N.Y.S.2d 286 (N.Y. Civ. Ct. 1983).
77. Suarez v. Rivercross Tenants' Corp., 107 Misc.2d 135, 438 N.Y.S.2d 164 (N.Y. Civ. Ct. 1981).
78. 56 N.J. 130, 265 A.2d 526 (1970).
79. Dembling, supra note 18.
80. 63 N.J. 460, 308 A.2d 17 (1973).
81. Mease v. Fox, 200 N.W.2d 791 (Iowa 1973).
82. Berzito v. Gambino, 63 N.J. 460, 470, 308 A.2d 17, 22 (1973).

4. For what length of time has it persisted?
5. What is the age of the structure?
6. What is the amount of the rent?
7. Can the tenant be said to have waived the defect or be estopped to complain?
8. Was the tenant in any way responsible for the defective condition?[83]

The court also stated that the listing was "suggestive rather than exhaustive."[84]

New Jersey courts have also considered cases in which the alleged defect was not encompassed by this list of factors. In *Millbridge Apartments v. Linden,*[85] the tenants asserted that noisy neighbors constituted a breach of the landlord's warranty of habitability. The court realized that a disturbance by neighbors would not amount to a breach under the *Berzito* test and suggested the addition of another factor: "[I]s the condition one to which the tenant should reasonably be expected to accommodate as part of everyday living in an area populated as the premises in question?"[86] The court held that noise could constitute a breach of the warranty, but in this case the noise did not reach the necessary level.

De minimus inconveniences do not constitute a breach. The warranty is not against all inconveniences or discomfort, and cases distinguish between material and non-material defects.[87] For example, *Academy Spires, Inc. v. Brown*[88] considered the following defects to be individually material: heat, hot water, garbage disposal, and elevator service. The following defects were considered non-material: malfunction of venetian blinds, water leaks, wall cracks, and lack of painting.

The caselaw interprets materiality under an objective standard,[89] which tends to produce predictable results. Thus, in *Housing Authority of Newark v. Scott,*[90] a lack of heat, dirty hallways, incinerator smoke in hallways and the apartment, falling plaster, lack of paint in the apartment, water leaks in the bathroom and kitchen, flooding from a standby pipe in the hallway, broken windows, and disrepair of the

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83. Id.; The court ignored standards set forth in existing legislation, N.J. Stat. Ann. § 2A:42-96 (West 1952 & Supp. 1985), but the *Berzito* listing basically encompasses the statutory standard.

84. Id. at 470, 308 A.2d at 22.

85. 151 N.J. Super. 168, 376 A.2d 611 (Camden County Ct. 1977).

86. Id. at 172, 376 A.2d at 614.

87. See, for example, Academy Spires, Inc. v. Jones, 108 N.J. Super. 395, 261 A.2d 413 (N.J. Super. Ct. Law Div. 1970).

88. 111 N.J. Super. 477, 482-83, 268 A.2d 556, 559 (Essex County Ct. 1970).

89. Berzito v. Gambino, 63 N.J. 460, 308 A.2d 17 (1973).

90. 137 N.J. Super. 110, 348 A.2d 195 (N.J. Super. Ct. App. Div. 1975).

kitchen stove were predictably held sufficient to have breached the warranty. But even use of an objective standard can occassionally create an unpredictable result. For example, in *Timber Ridge Town House v. Dietz*[91] the court held that a mud flow across a townhouse patio and parking area, totally exterior to the townhouse, affected a "vital facility" and constituted breach of the warranty. The court did, however, refuse additional rent abatement for the defective swimming pool. In spite of cases like *Dietz,* the New Jersey courts have defined the parameters of their warranty in a much clearer manner than the New York courts.

The experience in the District of Columbia reflects the pattern in that jurisdiction in which a broad pro-tenant case is narrowed by subsequent jurisprudence. In this instance, *Javins v. First National Realty Corp.*[92] created the District's warranty of habitability based upon housing regulation violations. Although the *Javins* court did not expressly limit the warranty to merely encompass housing regulation violations, a subsequent case declined to find a breach where the tenant had been deprived of air conditioning and hot water, holding that the landlord's duties are "discharged when he has complied with the applicable standards set forth in the Housing Regulations."[93] Although the housing regulations are a "bright line" standard, the D.C. warranty has been unnecessarily limited by cases which refuse to find a breach under any other standard.[94]

The Louisiana Civil Code articles which are analogous to the common law warranty of habitability have essentially divided the standard of breach into two levels. First, if the uninhabitability is caused by a repairable defect, the Civil Code apportions repair responsibility between landlord and tenant. This codal division of repair duties makes the landlord primarily responsible for the repair of defects affecting the premises. Article 2693 provides that the landlord "ought to make, during the continuance of the lease, all the repairs which may accidentally become necessary; except those which the tenant is bound to make, as hereafter directed."[95] The specific repairs for which the landlord is responsible are defined by negative implication from the codal listing of those repairs for which the tenant is responsible.

Article 2721 provides that the tenant is responsible for repairs that are required due to his own fault.[96] This general article is more clearly defined by article 2716 which provides an illustrative listing of those

91. 133 N.J. Super. 577, 338 A.2d 21 (N.J. Super. Ct. Law Div. 1975).

92. 428 F.2d 1071 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970).

93. Winchester Management Corp. v. Staten, 361 A.2d 187 (D.C. 1976).

94. Gerwin, supra note 28, at 494; Note, Javins v. First National Realty Corp. (428 F.2d 1071)—The Implied Warranty of Habitability and Rent Withholding in Urban Leases, 66 N.W.U.L. Rev. 227 (1971).

95. La. Civ. Code art. 2693.

96. La. Civ. Code art. 2721.

items for which it is presumed that repairs have become necessitated by the tenant's fault. This article provides that the tenant is responsible for repairs to the hearth, the back of chimneys, chimney casing, the plastering in the lower part of interior walls, the pavement of rooms, window glass, shutters, partitions, locks, and hinges.[97]

The obligations of repair are further defined in that the landlord is responsible even for those repairs that are normally the responsibility of the tenant in the event that the need for repairs occurred before the inception of the lease.[98] Thus, the tenant can rely upon receiving delivery of the premises in proper repair and fitness. Additionally, the landlord is responsible for those items that are normally the responsibility of the tenant when the need for repair is caused by natural decay or a fortuitious event.[99] When the landlord fails to make the necessary repairs after notification by the tenant, the tenant is entitled to repair the defect and deduct the cost from his rent.[100]

Although these articles are fairly antiquated, as is especially evidenced by the somewhat quaint listing of tenant's obligations under article 2716, the overall implication of the articles is clear. The landlord is generally responsible for repair of the leased premises, and thus is primarily accountable for ensuring their continuing habitability. This obligation is only relieved under the code articles when repairs are necessitated through fault of the tenant. Unfortunately, the clarity of this repair system is vastly diminished in regards to practical application because the parties are free to stipulate in the lease that repairs which would normally be the responsibility of the landlord shall be performed by the tenant, as has become common practice.

The second level of the Louisiana warranty involves disrepair that is sufficient to render the premises unfit for their intended use. The Louisiana Civil Code provides that if the premises become unfit for any reason other than the fault of the lessee, he may annul the lease.[101] Unfitness may be the result of defects arising prior to the inception of the lease or during the lease term.[102] The Code and jurisprudence have divided this aspect of the warranty into four general categories: full destruction, partial destruction, unfitness for intended use, and housing code violations. Destruction of the premises as a basis for cancellation is beyond the scope of this article.

The tenant may seek to annul the lease under article 2699 when the

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97. La. Civ. Code art. 2716.

98. La. Civ. Code art. 2693; Wolfe v. Walker, 342 So.2d 1122 (La. App. 4th Cir. 1976).

99. La. Civ. Code arts. 2716 and 2717.

100. La. Civ. Code art. 2694.

101. La. Civ. Code art. 2699.

102. La. Civ. Code art. 2695.

dwelling ceases to be fit for the purpose for which it was leased. The courts have developed a standard of unfitness which varies according to the reasonable expectations of the parties. Under this standard, a determination of whether a specific defect renders the leased premises unfit necessarily depends upon the age of the structure, the accessories which accompany the premises, and claims which the landlord makes during negotiations regarding the quality of the premises.[103]

This standard was applied in *Purnell v. Dugue,*[104] in which the lessee complained that the heating system could not maintain an adequate temperature in the apartment. The court held that where the lessor had rented an apartment which included a modern heating system he had implicitly warranted to his lessee that the system was of sufficient size and efficiency to maintain a reasonable temperature in the apartment.

An objective test of reasonable expectations was also applied in *Smith v. Castro Brothers Corp.*[105] In this case the Louisiana Fourth Circuit held that a lessee's low expectations regarding the condition of a dwelling did not totally excuse the lessor of his obligation to provide habitable premises. Thus, "large rats freely roaming the premises" and the plumbing's unusability were held to have made the premises unfit for use as a dwelling.[106]

The Louisiana law regarding unfitness of the premises would benefit from a clearer standard, such as a listing of factors to be used in ascertaining degrees of unfitness. Factors such as those used in *Berzito v. Gambino*[107] could be adapted to fit the sliding scale of the reasonable expectations standard, and housing codes could be imposed as a minimal standard in order to cover situations similar to the *Smith* case.

A lessee in Louisiana may also cancel his lease if the building fails to meet local minimal housing code standards. However, this remedy is limited to those situations in which the housing code violation threatens the health or safety of the tenant. The use of this standard is illustrated by *Chagnard v. Schiro,*[108] where the lessee quit his apartment and stopped paying rent, alleging that the premises were in violation of the New Orleans Building Code. The apartment's single entryway violated the provision requiring at least two exits as a fire safety precaution. The court held that this defect was indeed a threat to the lessee's safety and allowed him to annul the lease.

Due to the small number of cases which consider the issue of habitable

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103. Purnell v. Dugue, 14 La. App. 137, 129 So. 178 (Orl. 1930).

104. Id.

105. 443 So.2d 660 (La. App. 4th Cir.), cert. denied, 446 So.2d 1229 (1984).

106. Id. at 661.

107. 63 N.J. 460, 308 A.2d 17 (1973); See text accompanying supra note 82.

108. 166 So. 496 (La. App. Orl. 1936); see also Zibilich v. Rouseau, 166 La. 547, 117 So. 586 (1928).

premises in Louisiana, standards are not thoroughly defined. The current habitability equation which considers the lessor's representations, the lessee's expectations, housing standards, and threats to health and safety should be refined in order to provide more guidance to Louisiana landlords and tenants.

C. *Notice to the Landlord as a Condition of Liability*

New Jersey, New York, and the District of Columbia require notice to the landlord and an opportunity to repair before the tenant can recover under the implied warranty of habitability.[109]

New Jersey adopted a requirement of notice and an opportunity to repair in *Chess v. Muhammad,*[110] where the tenants claimed an abatement of rent for the one week during which the building had neither heat nor hot water because the landlord was repairing the boiler. The court held that the tenants were not entitled to an abatement because the landlord had repaired the boiler within a reasonable time after learning of the defect. The court cited three justifications for this rule:

> [M]aking the landlord strictly liable for any breakdown of vital facilities would impose obligations that realistically cannot be met. Even the most diligent landlord cannot prevent occasional interruptions in the livability of rented premises, whether due to the breakdown in mechanical facilities or sudden acts of nature. Furthermore, it can reasonably be maintained that neither party to a lease expects perfect maintenance; both realize that mechanical systems will occasionally break down, and it would be inconsistent to imply a term into the contract which was really not intended by the parties. Finally, making a landlord strictly liable might well discourage landlords from repairing vital facilities. Landlords may prefer to take the chance that the unrepaired system will continue to function, or that even if it does not and tenants withhold rent, the landlord's net loss would be less than if he made substantial expenditures in repairing the facility and at the same time lost rental income. A landlord may have no incentive to repair vital facilities if the tenants' rent will be abated in any event.[111]

The District of Columbia adopted a similar approach in *George Washington University v. Weintraub.*[112] In this case the tenant attempted to hold the landlord for damages caused by the flooding of the tenant's

109. Chess v. Muhammad, 179 N.J. Super. 75, 430 A.2d 928 (N.J. Super. Ct. App. Div. 1981); George Washington University v. Weintraub, 458 A.2d 43 (D.C. 1983).

110. 179 N.J. Super. 75, 430 A.2d 928 (N.J. Super. Ct. App. Div. 1981).

111. Id. at 79, 430 A.2d at 930.

112. 458 A.2d 43 (D.C. 1983).

apartment. The tenant argued that a notice requirement would be inconsistent with the contractual nature of the warranty of habitability, but the court declined to adopt this strict liability theory.

Although the leading New York case, *Park West Management Corp. v. Mitchell,*[113] can be viewed as an adoption of a strict liability application of the warranty of habitability, subsequent cases have required notice to the landlord and an opportunity to repair.[114]

Louisiana permits a lessee to recover for injury to persons or property caused by a defect in the premises without proof of the lessor's knowledge of the vice,[115] but the lessee may not repair defects and deduct his expenses from the rent without first notifying the lessor. Louisiana has no reported decision considering whether notification is a prerequisite for cancellation of the lease when the premises become unfit; however, the relevant Civil Code article does not require notice.[116] Inasmuch as the lessee may cancel the lease where the cause of unfitness is beyond the lessor's control, an opportunity to correct the impediment is probably not required.

D. *Waiver of the Implied Warranty of Habitability*

New York law prohibits waiver of the warranty of habitability. Section 235-b states in part that "[a]ny agreement by a lessee or tenant of a dwelling waiving or modifying his rights as set forth in this section shall be void as contrary to public policy."[117] The courts have strictly enforced this provision.[118] In one case, the court invalidated a covenant obligating the tenant to furnish the landlord with written notice of any dangerous or defective condition because the covenant in effect waived the tenant's right to bring suit for breach of the warranty of habitability.[119]

Javins v. First National Realty Corp.[120] indicated in dictum that the District of Columbia warranty of habitability would not be waivable.[121] Commentators encouraged development of this facet of the case as a necessary element of an effective warranty of habitability.[122] *Javins* had

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113. 47 N.Y.2d 316, 418 N.Y.S.2d 310, 391 N.E.2d 1288 (N.Y.), cert. denied, 444 U.S. 992 (1979).

114. Mahlmann v. Yelverton, 109 Misc. 2d 127, 439 N.Y.S.2d 568 (N.Y. Civ. Ct. 1981); see also, Segal v. Justice Court Mut. Housing Co-op., Inc., 105 Misc. 2d 453, 432 N.Y.S.2d 463 (N.Y. Civ. Ct. 1980), aff'd., 108 Misc.2d 1074, 442 N.Y.S.2d 686 (N.Y. Civ. Ct. 1981).

115. La. Civ. Code arts. 2317 and 2322.

116. La. Civ. Code art. 2699.

117. N.Y. Real Prop. Law § 235-b(2) (Consol. 1984).

118. Vanderhoff v. Casler, 91 A.D.2d 49, 458 N.Y.S.2d 289 (N.Y. App. Div. 1983).

119. Id.

120. 428 F.2d 1071 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970).

121. Id. at 1082.

122. Note, Implied Warranty of Habitability in Housing Leases, 21 Drake L. Rev. 300, 311 (1972); District of Columbia Survey, supra note 66, at 1154.

integrated the housing regulations into every lease, and these regulations expressly prohibited waiver of their requirements. The commentators argued that public policy should also prohibit private parties from shifting the burden of compliance with housing regulations from landlord to tenant. Allowing such a shift of the maintenance burden would defeat the policies underlying the housing regulations and *Javins.*[123] However, it was not until 1983, in *George Washington University v. Weintraub,*[124] that the court invalidated a lessor's exculpatory clause because D.C.'s critical housing shortage had resulted in unequal bargaining power between landlord and tenant.

Weintraub left open the issue of permitting punitive damages in instances where landlords continue to use judicially unenforceable exculpatory clauses.[125] Landlords continue to use these clauses because most tenants believe that they are effective.[126] Thus, the continued, unpunished use of exculpatory clauses has a chilling effect upon the enforcement of tenants' rights under the warranty of habitability, and the use of punitive damages may be a necessary development in the arsenal of remedies.[127]

New Jersey also prohibits exculpatory clauses. The State Supreme Court recognized in *Berzito v. Gambino*[128] that the legislature had codified the ban on exculpatory clauses,[129] and all such clauses are now void as violative of public policy.

Louisiana cases have held that a lessee may waive the lessor's warranty that the premises are free of defects. Such waivers are not contrary to public policy.[130] However, courts limit this principle of freedom of contract and are very reluctant to find that a tenant has waived his legal rights. This reluctance is often in recognition of the inequality of bargaining power between landlords and tenants.[131]

A recent case, *Moity v. Guillory,*[132] illustrates this reluctance. The tenant signed a lease which the trial judge described as "one of the most favorable to the landlord that the Court has ever seen."[133] It recited

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123. Note, supra note 122; District of Columbia Survey, supra note 66, at 1154.

124. 458 A.2d 43 (D.C. 1983).

125. District of Columbia Survey, supra note 66, at 1162.

126. Id.

127. Id.

128. 63 N.J. 460, 308 A.2d 17 (1973).

129. N.J. Stat. Ann. § 2A:42-96 (West 1952 & Supp. 1984).

130. Cordona v. Glenny, Orl. App. 22 (La. App. 1903); Pecararo v. Grover, 5 La. App. 676 (Orl. 1927); Tassin v. Slidell Mini-Storage, Inc., 396 So.2d 1261 (La. 1981); See also La. Civ. Code art. 11.

131. Moity v. Guillory, 430 So.2d 1243 (La. App. 1st Cir.), cert. denied, 437 So.2d 1148 (1983).

132. Id.

133. Id. at 1245.

that the premises were in "first class condition" and that the tenant agreed to return the premises in the same condition. Additionally, the lease provided that the tenant would be responsible for all repairs, both major and minor. The court found that the premises were in fact in "horrible condition" at the inception of the lease. In addition to the effects of vandalism, the court listed the following defects: "[w]indows were broken, screens were out, the toilet was broken, the plumbing was not even connected, the heating system in the house did not work, the roof leaked, the hot water heater was located in an outhouse behind the main dwelling and never worked properly."[134] The court noted that the tenant had been "desperately in need for a place for himself and his children," showing an inequality of bargaining power,[135] and held that the recitations of the lease were ineffective to waive the warranty of fitness.

The aversion of Louisiana courts to waiver of this warranty is expressed in several ways. Courts have stated that any waiver must be in clear, unequivocal language,[136] and this standard is applied quite strictly. For example, a lease provision providing that the premises are accepted "as is" has been held not to have waived the warranty against defects.[137] Similarly, a provision requiring the lessee to make all necessary repairs is not a waiver of the warranty of habitability.[138] Moreover, acceptance of the premises in "first class condition" with an obligation to return them in the same condition will not waive the warranty.[139]

Louisiana jurisprudence also prohibits waiver of the landlord's warranty against defects existing at the inception of a lease.[140] Additionally, if the lessor knows or should have known of a defect, a lessee with no knowledge of the defect cannot waive that defect.[141]

While Louisiana's law may be subject to criticism for allowing waiver of the warranty of habitability, two factors would mitigate this criticism. First, social and housing conditions in Louisiana are generally not comparable to those in New York, New Jersey, and the District of Columbia. Louisiana is not generally suffering from a critical housing shortage

134. Id. at 1245.

135. Id. at 1245.

136. Tassin v. Slidell Mini-Storage, Inc., 396 So.2d 1261, 1264 (La. 1981); Pylate v. Inabnet, 458 So.2d 1378, 1385 (La. App. 2d Cir. 1984).

137. Reed v. Classified Parking System, 232 So.2d 103 (La. App. 2d Cir. 1970); Moity v. Guillory, 430 So.2d 1243, 1247 (La. App. 1st Cir. 1983).

138. Houma Oil Co., Inc. v. McKey, 395 So.2d 828 (La. App. 1st Cir. 1981); Pylate v. Inabnet, 458 So.2d 1378 (La. App. 2d Cir. 1984).

139. Moity v. Guillory, 430 So.2d 1243 (La. App. 1st Cir. 1983).

140. Bennett v. Southern Scrap Material Co., 121 La. 204, 46 So. 211 (1908).

141. Tassin v. Slidell Mini-Storage, Inc., 396 So.2d 1261 (La. 1981); Pylate v. Inabnet, 458 So.2d 1378 (La. App. 2d Cir. 1984).

requiring drastic remedial efforts by the legislature and judiciary. Second, the courts have consistently applied equitable principles to cases involving waivers, and the result has been a very restrictive view of these lease provisions. While these two arguments seem persuasive, two equally cogent arguments favor a prohibition of waiver of the warranty of habitability. First, a prohibition of exculpatory clauses and waivers would limit the court to an application of code articles in lease disputes rather than requiring a strained interpretation of the parties' "intent." This approach would simplify and standardize adjudication of disputes over the condition of the premises. Second, although Louisiana does not yet suffer from a critical housing shortage, a prohibition of waiver provisions would help prevent the development of slum housing in this state. Therefore the rule of the common law jurisdictions under examination here, prohibiting waiver of the warranty of habitability, is preferable to the current Louisiana position.

E. *Deposits Into Court Pending Trial*

A deposit into court is the payment of rent by a tenant to an officer of the court for safekeeping pending resolution of the dispute between the landlord and tenant.[142] Upon resolution of the dispute the deposited funds are disbursed in accordance with the judicial ruling. All three of the common law jurisdictions discussed in this article utilize deposits in court, but only the District of Columbia has a significant body of jurisprudence on the subject. The experience in D.C. with this procedural device demonstrates that Louisiana may benefit from adoption of a similar procedure.

The use of the deposit into court benefits both the landlord and the tenant. The landlord is protected against the loss of income which may occur if he wins the lawsuit and the tenants abandon the premises without paying the back rent.[143] Additionally, disbursements from the deposited funds are available in certain circumstances so that the landlord will not suffer undue hardship.[144]

The tenant benefits by being protected from eviction for nonpayment of rent at the conclusion of the suit[145] and also from forfeiture of the lease in the event he prevails after lengthy litigation but is unable to pay the rent in arrears.[146] Additionally, the deposit of rent into the court

142. 26A C.J.S. Deposits in Court § 1 (1956).

143. Note, Dameron v. Capitol House Associates Limited Partnership: Protective Orders to Provide Rent Collection, Loophole for Landlord?, 31 Catholic Univ. L. Rev. 615 (1982).

144. Dameron v. Capitol House Assocs. Ltd. Partnership, 431 A.2d 580 (D.C. 1981).

145. Note, supra note 143, at 615.

146. Dameron v. Capitol House Assocs. Ltd. Partnership, 431 A.2d 580, 584 (D.C. 1981).

registry makes the remedy of rent abatement more readily available. For example, the court may order that the tenant pay only a reduced rent into the registry due to the unfitness of the premises.[147] The deposited rent also provides a fund from which an abatement can be paid at the end of the litigation.[148] The tenant is not unduly harmed by a requirement that he continue paying rent because he is only fulfilling his voluntarily assumed contractual obligation to pay rent.[149] The payment of rent into the court registry also protects other tenants from a potential decline in services resulting from a drop in income to the landlord.[150] Deposits into court are for these reasons the "norm rather than the exception" in D.C. landlord-tenant disputes.[151]

Although the procedure is obviously attractive, its effectiveness as a rent withholding device may be undermined if the courts too readily allow disbursements to the landlord during the litigation.[152] Such a disbursement was permitted in *Dameron v. Capitol House Associates Limited Partnership,*[153] which has been criticized as perhaps signalling a trend towards more sympathetic treatment of the District's landlords.[154] As disbursement of registry funds is at the discretion of the court, it is imperative that this discretion be restrictively applied in order to preserve the benefits of deposits in court.

Deposits in court are not unheard of in Louisiana, as is evidenced by the use of such devices in expropriation cases[155] and in instances of abandoned or unclaimed property.[156] However, there are no statutory provisions for this desirable procedural device in lessor-lessee disputes.

IV. Remedies for Breach of the Implied Warranty of Habitability

The effectiveness of a warranty of habitability depends upon the remedies available to the tenant when the warranty is breached. In the District of Columbia, the early cases in the development of the warranty promised a wide range of remedies. However, subsequent cases have significantly limited this promise.

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147. Cooks v. Fowler, 459 F.2d 1269 (D.C. Cir. 1971).

148. Adams v. Jonathan Woodner Co., 475 A.2d 393, 398 (D.C. 1984); Armwood v. Rental Assocs., Inc., 429 A.2d 190 (D.C. 1981).

149. Bell v. Tsintolas Realty Co., 430 F.2d 474, 482 (D.C. Cir. 1970); Dameron v. Capitol House Assocs. Ltd. Partnership, 431 A.2d 580, 583 (D.C. 1981).

150. Dameron v. Capitol House Assocs. Ltd. Partnership, 431 A.2d 580, 583 (D.C. 1981).

151. Note, supra note 143, at 621 n.45.

152. Id.

153. 431 A.2d 580 (D.C. 1981).

154. Note, supra note 143.

155. La. R.S. 19:8 and 19:11 (1979).

156. La. R.S. 9:159 (Supp. 1985).

In *Brown v. Southall Realty Company,*[157] the court stated that a lease was void when housing regulation violations existed at the beginning of the term. Where the lease is void, the tenant may cancel it. However, the remedy of cancellation is of little value in an area suffering from a shortage of decent housing.[158] While the *Brown* remedy was somewhat impractical, it still offered relief to tenants in certain circumstances. However, these circumstances were drastically limited by *Saunders v. First National Realty Corp.,*[159] which held that a lease would be voided only when the landlord knew of the housing regulation violations at the beginning of the lease. Besides placing this difficult burden of proof on the tenant,[160] the court also held that the *Brown* remedy was inapplicable to any regulation violations arising during the tenancy.[161] Thus, the remedy of recission in D.C. is only available in very limited circumstances.

In *Javins,*[162] the case which developed the District's warranty of habitability, the court adopted the doctrine of dependent covenants, stating that "breach of this warranty gives rise to the usual remedies for breach of contract."[163] This broad statement indicated that tenants would have a wide variety of remedies to choose from when the landlord violated any of his obligations. However, the dependent covenant doctrine was confined in *Winchester Management Corp. v. Staten,*[164] which held that the tenant's obligation to pay rent was only dependent upon the landlord's adherence to the housing regulations. Thus, Staten could not obtain a rent abatement for the defective air conditioning, even though the court noted that air conditioning represented a large portion of the rent paid in consideration for the lease.[165]

Apparently leases in the District have only one dependent covenant.[166] Such a restriction severely limits the tenant's available remedies, as is vividly illustrated by *Staten.* The major remaining remedy is for the tenant to seek a rent abatement, which represents a reduction in rent down to fair market value for premises containing similar defects.[167] However, the problem with the remedy of rent abatement is that the

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157. 237 A.2d 834 (D.C. 1968), cert. denied, 393 U.S. 1018 (1969).

158. 2 R. Powell, supra note 1, at § 225[2][a].

159. 245 A.2d 836 (D.C. 1968).

160. Gerwin, supra note 28, at 478 n.89.

161. Comment, Arbitration of Landlord-Tenant Disputes, 27 Am. U.L. Rev. 407, 413 (1978).

162. 428 F.2d 1071 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970).

163. Id. at 1073.

164. 361 A.2d 187 (D.C. 1976).

165. Gerwin, supra note 28, at 464 n.24.

166. Id. at 491-492; Comment, supra note 161, at 412 n.24.

167. See Adams v. Jonathan Woodner Co., 475 A.2d 392 (D.C. App. 1984); Armwood v. Rental Assocs., Inc., 429 A.2d 190 (D.C. 1981); Cooks v. Fowler, 459 F.2d 1269 (D.C. Cir. 1971).

landlord may find it less costly to accept the reduced rent than to make the necessary repairs.[168] Thus, the rent abatement may not improve the quality of the premises, and in effect amounts to little more than "damages for living in squalor."[169]

New Jersey also has fairly limited remedies. The state's leading case only permitted the tenant to repair and deduct, or to abandon the premises.[170] To repair and deduct, the tenant must give both timely notice of a defective condition and a reasonable opportunity for the landlord to repair. If the landlord fails to repair the defect, the tenant may undertake the repairs and deduct the cost from his rent.[171]

The repair and deduct remedy is the most precise means of calculating the value of the defect and the extent to which it impairs the lease.[172] Additionally, this remedy provides for quick repairs without recourse to the courts.[173] However, the remedy has several drawbacks. Many repairs require access to areas which may be in the control of the landlord.[174] Also, the cost of the repairs may exceed one month's rent, or be completely beyond the means of the tenant, as in the case of a defective stairway or elevator.[175]

In recognition of the inadequacy of cancellation of the lease and repair and deduct remedies, the New Jersey Supreme Court has approved the use of rent abatement.[176] The amount of the abatement is measured by the difference between the rent paid and the reasonable value of the premises with the defects. Such a remedy is appropriate because, as a trial judge aptly stated, "if we are going to have property that belongs in the slums we are going to have slum rates."[177] In recognition of criticism that precise valuation of a rent abatement is impossible,[178] one court has adopted a "percentage diminution" approach which gives the tenant an abatement based upon the percentage reduction in use of the premises.[179]

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168. Comment, supra note 20, at 129.

169. Id. at 129.

170. Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970).

171. Id.

172. Note, Trentacost v. Brussel: An Extension of the Landlord's Implied Warranty of Habitability, 33 Rutgers L. Rev. 1157, 1166 (1981).

173. Id.

174. Dembling, supra note 18, at 810.

175. Id.; 1973 New Jersey Supreme Court Term, Landlord and Tenant—Affirmative Action for Rent Abatement is Appropriate Remedy for Breach of Landlord's Covenant of Habitability, 27 Rutgers L. Rev. 597 (1974).

176. Berzito v. Gambino, 63 N.J. 460, 308 A.2d 17 (1973); 1973 New Jersey Supreme Court Term, supra note 175.

177. C.F. Seabrook Co. v. Beck, 174 N.J. Super 577, 595, 417 A.2d 89, 92 (N.J. Super. Ct. App. Div. 1980).

178. Note, supra note 172, at 1166.

179. Academy Spires, Inc. v. Brown, 111 N.J. Super. 477, 268 A.2d 556 (Essex County Ct. 1970).

The New York legislature drafted § 235-b without a detailed remedy provision in order that the courts could fashion appropriate remedies on a case-by-case basis.[180] The result has been the development of a wide variety of remedies, the most common being a rent abatement.[181] The leading New York case established the parameters of this remedy:

> Inasmuch as the duty of the tenant to pay rent is coextensive with the landlord's duty to maintain the premises in habitable condition, the proper measure of damages for breach of the warranty is the difference between the fair market value of the premises if they had been as warranted, as measured by the rent reserved under the lease, and the value of the premises during the period of the breach.[182]

These damages are available even though they are "not susceptible to precise determination" in all instances.[183] In applying this formulation of rent abatement, subsequent cases have granted a wide range of damages. In *Mantica R Corp. NV v. Malone,*[184] the tenant complained about demolition conducted by the landlord next to the tenant's apartment. The court found that the tenant knew of the future demolition when he moved in, that he voluntarily changed apartments to facilitate it, and that he had received a "good bargain" on his lease as a result. The court granted nominal damages of .06¢ per month. On the other end of the spectrum, in *Goodman v. Ramirez,*[185] the tenant suffered for two months from chipped and cracked walls, an improperly functioning toilet, and a lack of gas and water which caused a substantial disruption of his daily living. The court affirmed an award of $400.00, an amount in excess of the rent due for the two month period involved.

The *Goodman* case represents an award of consequential damages in addition to a diminution in rent, but other New York courts have denied consequential damages for breach of the implied warranty of habitability. For example, in *Bay Park One Co. v. Crosby,*[186] the tenant

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180. Note, New York's Search for an Effective Implied Warranty of Habitability in Residential Leases, 43 Alb. L. Rev. 661, 666 n.32 (1979).

181. See, e.g., Whitehall Hotel v. Gaynor, 121 Misc. 2d 736, 470 N.Y.S.2d 286 (N.Y. City Civ. Ct. 1983); Parker 72nd Assocs. v. Isaacs, 109 Misc.2d 57, 436 N.Y.S.2d 542 (N.Y. City Civ. Ct. 1980); H&R Bernstein v. Barrett, 101 Misc.2d 611, 421 N.Y.S.2d 511 (N.Y. City Civ. Ct. 1979); New York tenants also benefit from rent abatement under N.Y. Mult. Dwell. Law § 302-a (Consol. 1974), but this remedy cannot be brought as a private action.

182. Park West Management Corp. v. Mitchell, 47 N.Y.2d 316, 329, 428 N.Y.S.2d 310, 317, 391 N.E.2d 1288, 1295 (N.Y.), cert. denied, 444 U.S. 992 (1979).

183. Id.

184. 106 Misc.2d 953, 436 N.Y.S.2d 797 (N.Y. City Civ. Ct. 1981).

185. 100 Misc.2d 881, 420 N.Y.S.2d 185 (N.Y. City Civ. Ct. 1979).

186. 109 Misc.2d 47, 442 N.Y.S.2d 837 (N.Y. App. Div. 1981), reversing 101 Misc.2d 586, 421 N.Y.S.2d 529 (N.Y. City Civ. Ct. 1979).

of a 21st floor apartment was unable to go to work for seven days because the elevator was inoperative. The civil court's award of lost wages was reversed by the appellate court.

New York tenants may also utilize a repair and deduct remedy.[187] A tenant must first give notice and a reasonable opportunity to repair.[188] The courts consistently require that the tenant's expenditures not be excessive,[189] although no standard is given to define excess.

New York also has a statutory provision for an organized rent strike by multiple dwelling tenants.[190] When a landlord's failure to maintain leased premises in habitable condition goes beyond a single apartment, the most effective way for the tenants to obtain relief is to act in concert, jointly exercising their right to withhold rent.[191]

Punitive damages are available when the court ascertains that the landlord's intentional conduct has caused the uninhabitable conditions. For example, in *111 East 88th Street Partners v. Fine,*[192] the landlord's intentional building-wide reduction in services, including cessation of elevator service, heat, and hot water, was held to entitle the tenant to punitive damages. Such damages are imposed to vindicate the public interest in habitable dwellings and to encourage landlord maintenance of their premises.[193] Attorney's fees are also granted at the discretion of the court.[194]

Although Louisiana has the codal foundations for a broad range of remedies, the effective options of the lessee are few and represent the weakest part of Louisiana's warranty of habitability. Article 2695 provides that the lessor is responsible for repair of all defects except those caused by the fault of the lessee. However, the benefits of this article are effectively destroyed by the fact that the parties may contractually waive its provisions,[195] as has become the accepted practice.

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187. Katurah Corp. v. Wells, 115 Misc.2d 16, 454 N.Y.S.2d 770 (N.Y. App. Div. 1982); Jangla Realty Co. v. Gravagna, 112 Misc.2d 642, 447 N.Y.S.2d 338 (N.Y. City Civ. Ct. 1981); New York tenants also benefit from repair remedies under N.Y. Mult. Dwell. Law § 309 (Consol. 1974), but this remedy cannot be pursued as a private action.

188. Katurah Corp. v. Wells, 115 Misc.2d 16, 454 N.Y.S.2d 770 (N.Y. App. Div. 1982).

189. Id., and, for example, Jangla Realty Co. v. Gravagna, 112 Misc.2d 642, 447 N.Y.S.2d 338 (N.Y. City Civ. Ct. 1981).

190. N.Y. Real Prop. Acts. § 769-782 (Consol. 1974).

191. Whitby Operating Corp. v. Schleissner, 117 Misc.2d 794, 459 N.Y.S.2d 203 (N.Y. Sup. Ct. 1982); see also, Park West Management Corp. v. Mantica, 47 N.Y.2d 316, 418 N.Y.S.2d 310, 391 N.E.2d 1288 (N.Y.), cert. denied, 444 U.S. 992 (1979).

192. 110 Misc.2d 960, 443 N.Y.S.2d 195 (N.Y. City Civ. Ct. 1981).

193. Kipsborough Realty Corp. v. Goldbetter, 81 Misc.2d 1054, 367 N.Y.S.2d 916 (N.Y. City Civ. Ct. 1975).

194. Century Apartments, Inc. v. Yalkowsky, 106 Misc.2d 762, 435 N.Y.S.2d 627 (N.Y. City Civ. Ct. 1980).

195. La. Civ. Code art. 11 (1952); see text accompanying supra notes 168-187; Pecararo v. Grover, 5 La. App. 676 (Orl. 1927); Comment, supra note 20.

Additionally, if the lessor fails to repair a defect for which he is responsible, the lessee is not entitled to withhold rent to coerce the repairs.[196] The lessee in one case withheld rent for seven months in an effort to prod the lessor into making promised repairs. The court relied upon the contractual nature of a Louisiana lease and article 2712 which states that "the lessee may be expelled from the property if he fails to pay the rent when it becomes due."[197] Thus, the lessee's rent withholding constituted a breach of his contractual obligations, and the lessor was entitled to evict him.

Louisiana tenants are entitled to cancel the lease if the premises become unfit for their intended use.[198] Courts have also allowed lessees to annul their leases when local minimum housing codes were substantially violated by defects threatening health or safety.[199] The remedy of cancellation obviously requires the lessee to quit the premise when the lease is dissolved.

Louisiana does not permit rent abatement as a remedy for premises which have become uninhabitable. In one case involving a commercial lease the lessee sought recovery of damages in an amount representing the difference between the rent paid and the fair market value of the premises. Noting that a lessee of defective property is entitled to damages in an amount measured by the provable loss which he has sustained, the court rejected the lessee's approach to the calculation of these damages as the diminished value of the premises. The Louisiana judge distinguished cases from other states which were "applying innovative reasoning under common law lease principles to meet modern-day urban sociological problems relative to residential housing," and held that there was no authority for rent abatement in Louisiana.[200]

Louisiana lessees are the beneficiaries of a full range of consequential damages resulting from the lessor's failure to repair. These damages include loss sustained and profit unearned as a consequence of the lessor's breach of warranty.[201] A lessee may even recover damages for mental anguish,[202] and emotional discomfort and humiliation.[203]

Repair and deduct is also available to a lessee in this state on much the same terms followed elsewhere. The repair must be indispensable

196. Bruno v. Louisiana School Supply Co., 274 So.2d 710 (La. App. 4th Cir. 1973).

197. La. Civ. Code art. 2712 (1952).

198. La. Civ. Code art. 2699 (1952).

199. Zibilich v. Rouseau, 166 La. 547, 117 So. 586 (1928); Chagnard v. Schiro, 166 So. 496 (La. App. Orl. 1936); Mecca Realty, Inc. v. New Orleans Health Corp., 389 So.2d 403 (La. App. 4th Cir. 1980).

200. Reed v. Classified Parking System, 324 So.2d 484 (La. App. 2d Cir. 1975), cert. denied, 325 So.2d 791 (La. 1976).

201. Id.; Florsheim v. Penn, 18 La. App. 375, 137 So. 749 (La. App. 2d Cir. 1931).

202. Smith v. Castro Bros. Corp., 443 So. 2d 660 (La. App. 4th Cir. 1983).

203. Evans v. Does, 283 So. 2d 804 (La. App. 2d Cir. 1973).

and the price reasonable. The lessee must also give prior notice and opportunity to repair to the lessor. The efficacy of this remedy is limited by the amount which can be applied to repair, which may not exceed the sum due or to become due under the lease. If the lease is month-to-month, only one installment may be applied to repairs.

V. CONCLUSION

The legislatures and the judiciaries of the common law states under examination in this article have modified the nature of residential leases. In certain respects they are now interpreted as contracts rather than conveyances of real estate for a term of years. Statutes and jurisprudence have inserted implied warranties of fitness and habitability into leases. The landlord must disclose or repair defects existing at the beginning of the term and correct those which develop later. Some obligations in a lease, express or implicit, are mutually dependent, permitting the tenant to cancel the agreement if the landlord breaches a fundamental provision. Breach of the implied warranty of habitability ordinarily entitles the tenant to rescission or damages in the amount of the diminished value of the property, but not contract damages such as lost profit and other consequential loss.

Although the landlord and tenant relationship in common law jurisdictions is no longer purely a type of real estate conveyance, it is also not a pure consumer contract. Aspects of administrative law, such as the housing codes, have also played a role in the transformation of the common law lease.

Inasmuch as Louisiana has traditionally considered leases to be contracts, lessees in this state have long enjoyed the type of protection which advanced, urban common law jurisdictions have only recently provided their tenants. However, the scope of remedies available to the Louisiana lessee might be expanded, as by permitting an abatement of rent where the lessee wishes to retain possession, or by allowing payment of rent into court during the pendency of litigation. In addition, courts should be permitted to award both attorney's fees to correct the unbalanced distribution of power between residential lessor and lessee, and exemplary damages in cases of egregious misconduct by the lessor.

The experience of the common law jurisdictions indicates that treating leases as contracts is not a cure for all ailments afflicting residential leases. Traditional notions of freedom of contract permit tenants to waive the protection of implied warranties, and lease stipulations often shift the burden of repairs during the term to the tenant. Additionally, to achieve *in terrorem* effect, landlords insert provisions which courts will not enforce. Where the tenant is ignorant of the impact of the lease terms, as is the normal state of affairs, the lease can be an oppressive document. Louisiana might profitably incorporate the experience of other

jurisdictions with administrative approaches to residential lease problems by prohibiting lessor's exculpatory clauses and retaliatory eviction.

On the eve of commencement of studies by the Louisiana State Law Institute directed toward revision of the Civil Code articles on leases, this article's review of recent experiences in three advanced common law jurisdictions has provided several suggestions for improvements to Louisiana law. Although Louisiana's warranty of habitability had been in many respects sufficient since 1870, the warranty may need to undergo extensive revisions to be effective in the future.