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### Forty (Plus) Years After the Revolution: Observations on the Implied Warranty of Habitability

Donald E. Campbell

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FORTY (PLUS) YEARS AFTER THE REVOLUTION: OBSERVATIONS  
ON THE IMPLIED WARRANTY OF HABITABILITY

*Donald E. Campbell\**

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## I. INTRODUCTION

The implied warranty of habitability has been called the “most prominent result” of the revolution in tenant rights that arose in the 1960s and 1970s.<sup>1</sup> A leading treatise on property law calls the adoption of the implied warranty “the most dramatic and sudden change in [landlord-tenant] law in modern times . . . .”<sup>2</sup> How has the revolution fared after forty-plus years? How have courts responded to the shift from examining the landlord-tenant relationship under the doctrines of contract in the place of property law? This article examines some of the issues that courts are addressing today with regard to the implied warranty of habitability. The article will begin with a historical discussion of the warranty’s rise to provide context for how truly revolutionary its adoption was. Then, jumping forward, cases addressing the implied warranty over the last twelve years will be examined to provide context to discuss unresolved questions that remain. The purpose of this article is to provide a snapshot of the state of the implied warranty today, so that when soldiers fighting in the landlord-tenant revolution forty years from now look back, they have some understanding of how the battle lines of this generation were drawn.

The article begins in Part I with a discussion of the historical roots of landlord-tenant relationship—from the doctrine of *caveat emptor* to the adoption of the implied warranty of habitability. Part II, analyzing reported cases between 2000 and 2012, looks at whether the definition of “habitability” in the implied warranty of habitability has evolved or shifted since the warranty was first adopted. Part III shifts to how statutory implied warranties of habitability (as expressed for example in the Uniform Residential Landlord Tenant Act) interact—or perhaps counteract—the common law implied warranty of habitability. Part IV questions whether the implied warranty of habitability is a legal doctrine at all, or whether it is an equitable doctrine dressed in legal (contractual) garb.

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1. David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CAL. L. REV. 389, 392 (2011) (“The late 1960s and early 1970s saw wide-ranging changes in tenants’ rights. The civil rights movement led to prohibitions on racial discrimination. Federal housing programs began subsidizing rents in privately owned buildings; landlords accepting those subsidies were required to afford tenants a host of new rights. Some jurisdictions imposed rent control, prohibited eviction without just cause, limited condominium conversions, or authorized receiverships for ill-maintained rental housing. The most prominent result of the revolution, however, was reading an implied warranty of habitability into residential leases . . . . These measures, eventually adopted in almost every state, seemed to reverse the landlord’s historical dominance in the landlord-tenant relationship.”).

2. William B. Stoebuck & Dale A. Whitman, *THE LAW OF PROPERTY* 299 (3d ed. 2000).

## II. THE ADOPTION OF THE IMPLIED WARRANTY OF HABITABILITY

Viewed through the lens of property law—with its unwavering focus on certainty and consistency—recognition of the implied warranty of habitability in the late 1960s and early 1970s seems too radical to believe. After all, the doctrine it replaced—*caveat emptor*—had stood the test of time since the 1500's.<sup>3</sup> To understand how this revolutionary shift occurred requires looking at historical, political, cultural, and legal circumstances facing landlords and tenants over time.

Developed during feudal times, the idea that a landowner would put someone else in possession of the land for a period of time—transferring less than absolute ownership—was something of an anomaly. Was the agreement to transfer land a contract-based relationship or a property-based one? Blackstone describes leases as “estates less than freehold” and defines a lease for a term as “a contract for the possession of land or tenements, for a determinate period.”<sup>4</sup> In that definition is both the estate language of property and the covenant language of contract. Early on the issue was further complicated by the fact that while the conveyance was for land (and in those days land was of primary importance), the transaction itself was based on a loan agreement between a landowner and a creditor.<sup>5</sup> In the transaction, the creditor would receive an estate for years in return for loaning a sum of money to the landowner. The creditor was repaid through the fruits of the land—the rent.<sup>6</sup> In this transaction the relationship between the landlord and tenant could be viewed as either one of contract or one of property (or both).

English courts (and American courts following the English lead) chose to label the leasehold relationship as one based in property law.<sup>7</sup> It was thought the transfer could not be contractual because the law of contracts did not recognize the inherent rights held in a leasehold estate—namely the transfer of title during the term with the landowner retaining the right of

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3. See *Gardiner v. William S. Butler & Co.*, 245 U.S. 603, 604 (1918) (Holmes, J.) (“But the law as to leases is not a matter of logic in vacuo; it is a matter of history that has not forgotten Lord Coke.”).

4. William Blackstone, 2 COMMENTARIES ON THE LAWS OF ENGLAND \*141.

5. Thomas F. Bergin & Paul G. Haskell, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 40 (2d ed. 1984).

6. *Id.*

7. This property-based approach was adopted in the 1200's as the rights associated with a tenancy shifted from one based on the relationship between the landlord and the tenant to one based on the relationship between the tenant and the land. As Tiffany puts it, “It was thus that the interest of a grantee for years came gradually to be regarded, not as a mere right of action resting on a covenant by the lessor, but as a right of property enforceable against any wrongdoer by a remedy analogous to that to which the owner of a freehold is entitled.” Herbert T. Tiffany, 1 THE LAW OF REAL PROPERTY AND OTHER INTERESTS IN LAND § 38 (1920).

reversion<sup>8</sup> In addition, while a contract could be invalid for lack of consideration, a leasehold estate could be conveyed with no consideration at all.<sup>9</sup>

The problems and complications of categorizing the landlord-tenant relationship as based in property remained hidden for generations because viewing the transfer of a leasehold interest as a “sale” of an interest in the land for a time benefited both parties. The landlord wanted rent and the agrarian tenant wanted to ensure undisturbed possession of the property for the length of the term.<sup>10</sup> A transaction based in property did just that—the landlord relinquished right to possession and use of the land. The tenant, however, gained the land and the right to be free from landlord interference.<sup>11</sup> There was no expectation that the landlord warranted that any structures on the property were in any particular condition. Tenants were expected to examine the property before renting it and thereafter took the property as they found it.<sup>12</sup> Thus, the doctrine of *caveat emptor* was born.

In addition to *caveat emptor*, the categorization of leases as based in property had another significant and related consequence. Because the transfer of the land itself was the most valuable part of the transfer, other covenants included in the lease were considered incidental to and independent of the interest in land.<sup>13</sup> While the principle of *dependent* obligations developed in contract law, the concept was foreign to the law of property.<sup>14</sup> Therefore,

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8. Herbert T. Tiffany, 1 *THE LAW OF LANDLORD AND TENANT* § 16 (1910) (“The fundamental objection to [a contract theory] of a lease is that it entirely ignores the common-law theory of a particular and a reversionary estate in the lessee and lessor respectively, and substitutes therefor the civil concept of a contract of hiring . . . which passes no title or property in the thing hired, but merely binds the owner . . . to secure the enjoyment of the thing to the hirer.”).

9. *Id.*

10. Blackstone, *supra* note 4, at \*141 (“These estates were originally granted to mere farmers or husbandmen, who every year rendered some equivalent in money, provisions, or other rent, to the lessors or landlords; but, in order to encourage them to manure and cultivate the ground, they had a permanent interest granted them, not determinable at the will of the lord.”).

11. John L. Zenor, *Judicial Expansion of the Tenants’ Private Law Rights: Implied Warranties of Habitability and Safety in Residential Urban Leases*, 56 *CORNELL L. REV.* 489, 490 (1970) (“The common law focused on possession rather than service. The ideal landlord delivered possession, then did nothing more; the ideal tenant paid his rent and demanded nothing more than possession.”).

12. *Bowe v. Hunking*, 135 *Mass.* 380, 383–84 (1883) (“A tenant is a purchaser of an estate in the land or building hired; and . . . no action lies by a tenant against a landlord on account of the condition of the premises hired, in the absence of an express warranty or of active deceit . . . . This is the general rule of *caveat emptor*.”).

13. Bettina B. Plevan, *Contract Principles and Leases of Realty*, 50 *B.U. L. REV.* 24, 26 (1970).

14. *Stoebuck & Whitman*, *supra* note 2, at § 6.10; (“A lease was usually spoken of as a conveyance and not a contract. An important consequence was that, when the law of contract

because any claim for breach of a contractual provision was deemed independent, the parties were not allowed to refrain from satisfying their obligations under the lease merely because the other party failed to perform.<sup>15</sup> As a result, the tenant's obligation to pay rent was for the right of continuing possession of the estate/land—it was not contingent or dependent upon the landlord doing anything.<sup>16</sup> This meant that even if the landlord *expressly* agreed in the lease to keep the premises in a habitable condition, a breach of that agreement would not relieve the tenant from having to pay rent.

The historical foundations on which the *caveat emptor* and dependent covenants doctrines were based came under attack in the mid-1800s.<sup>17</sup> The presumptions no longer held. The emphasis on land and the independence of covenants began to appear one-sided and subject to abuse. Because these doctrines fulfilled the expectations of the parties when they were adopted, early courts cannot be blamed for looking to property principles to govern the landlord-tenant relationships. However, the consequences of this categorization, and the “formalistic, box-like structure” of property law—in which rights are automatically determined by rules whose justifications may be long past their relevance—began to come under increased criticism.<sup>18</sup>

#### A. Caveat Emptor Comes Under Attack: Constructive Eviction

The first judicially-created crack in the *caveat emptor* doctrine was based on the warranty implied in every lease—the tenant's right to quiet enjoyment. This move had the advantage of being consistent with the property-based view of the leasehold arrangement. The common law implied an

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developed the concept of dependency of covenants . . . , that remedy was not a traditional part of landlord-tenant law . . .”).

15. Tiffany, *supra* note 8, at § 51 (“The modern tendency . . . , in reference to contracts generally is to construe promises as dependent on each other when they form the whole consideration for each other, but this criterion would seem to be inapplicable to covenants in leases, since the making of the demise itself, that is, the grant of an estate in the land, ordinarily enters into the consideration.”).

16. Thomas M. Quinn & Earl Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past With Guidelines for the Future*, 38 *FORDHAM L. REV.* 225, 228 (1969) (“Significantly, the landlord was not being paid to do anything. He was turning over the land to the tenant with the rent serving as continuous compensation for the transfer. The landlord was *not* expected to assist in the operation of the land. Quite the reverse, he was expected to stay as far away as possible.”).

17. John S. Grimes, *Caveat Lessee*, 2 *VAL. U. L. REV.* 189, 190 (Spring 1968) (“The sloth of our new law has permitted rules formulated too often by dynastic struggles in English history to filter our social growth. Typical of this legal inadequacy is the long lot of human misery created by the application of the concept of caveat emptor to the relationship of landlord and tenant.”).

18. Curtis J. Berger & Joan C. Williams, *PROPERTY: LAND OWNERSHIP AND USE* 211 (4th ed. 1997).

obligation on the part of the landlord to not disturb the quiet enjoyment of the tenant—just as it did in the transfer of a fee simple estate.<sup>19</sup> This traditionally meant that the landlord could not improperly physically evict the tenant.

Courts had little trouble extending the violation of the right to quiet enjoyment to partial eviction—when, as a result of the landlord's actions, the tenant was unable to occupy a portion of the leased premises. In the case of a partial eviction, courts held that the landlord had breached the covenant of quiet enjoyment and the tenant was excused from paying rent on the entire premises because the landlord should not be permitted to apportion his wrong.<sup>20</sup> For example, where the landlord sold part of the leased premises to a railroad company and the company put down tracks making it impossible for the tenant to utilize all of the leased property, the tenant was excused from paying any rent.<sup>21</sup>

While actual, physical ouster was the clearest example of this type of eviction, some courts were willing to go further by expanding the meaning of "eviction." What if the landlord did not physically remove the tenant from all or part of the premises, but made conditions on the premises too difficult so as to constructively evict the tenant? The foundational case in this regard is *Dyett v. Pendleton* from New York.<sup>22</sup> In that case, the tenant complained that the landlord allowed prostitutes to utilize portions of a house where the tenant rented a room. The tenant argued that the visitors disturbed his possession by making a "great deal of indecent noise and disturbance . . . often screaming extravagantly . . . frequently using obscene and vulgar language so loud as to be understood at a considerable distance."<sup>23</sup> The court held that while there was no actual eviction of the tenant from even a portion of the leased premises, the landlord's actions (allowing the noisy visitors to utilize portions of the house) made continued occupation by the tenant so untenable that it was as if the landlord had physically evicted the tenant. In such a situation the tenant, after vacating the premises, could defend a suit by the landlord for rent by arguing he was constructively evicted.

Courts were hesitant to expand the concept of constructive eviction too far, and adopted a number of elements to ensure it was only applied in extreme situations. Thus, courts required the tenant to demonstrate the condition was attributable to the landlord or her agent (and not a third party),<sup>24</sup> creating an intentional and substantial interference with the tenant's enjoy-

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19. Tiffany, *supra* note 8, at § 16.

20. See *Giraud v. Milovich*, 85 P.2d 182 (Cal. Dist. Ct. App. 1938).

21. *Halligan v. Wade*, 21 Ill. 470 (Ill. 1859).

22. *Dyett v. Pendleton*, 8 Cow. 727 (N.Y. 1826).

23. *Id.* at 735–36.

24. *Sanders v. Allen*, 188 P.2d 760, 763 (1948).

ment of the premises,<sup>25</sup> and that, as a result of the unbearable condition, the tenant vacated the premises within a reasonable time after the condition arose.<sup>26</sup>

This last element—abandonment—was logical when considering that the defense arose as a limited expansion under the property-based landlord-tenant regime and the right of the tenant to be free from eviction by her landlord.<sup>27</sup> The evolution of the concept of eviction to recognize constructive eviction provided tenants an additional remedy, but it was soon discovered that the doctrine was insufficient to address growing concerns over substandard condition of rental property.<sup>28</sup>

### B. The Revolution Succeeds: Recognition of the Common Law Implied Warranty of Habitability

The rise of the industrial revolution and the movement of individuals to cities and factories from the farm meant that tenants were entering into the lease agreement with a new set of expectations. Tenants no longer wanted the land and to be left alone, but instead sought safe and secure housing. The combination of the landlord-friendly *caveat emptor* doctrine combined with housing shortages in cities meant that the right to claim constructive eviction, which had been premised on the “extreme verge” of rights when adopted, became an inadequate if not useless remedy.<sup>29</sup> After all, to take advantage of a constructive eviction defense, the tenant had to leave the premises. In a housing shortage, such an option was unlikely.<sup>30</sup> In addition, con-

25. *Lindenberg v. MacDonald*, 214 P.2d 5, 9 (Cal. 1950); see *Tregoning v. Reynolds*, 28 P.2d 79, 80 (Cal. Dist. Ct. App. 1934); see also *Kelley v. Long*, 122 P. 832, 834 (Cal. Dist. Ct. App. 1912).

26. *Lori, Ltd., v. Wolfe*, 192 P.2d 112, 119 (Cal. Dist. Ct. App. 1948) (stating that tenants must be forced to vacate a property for constructive eviction to occur); see also *Coen v. City of Los Angeles*, 234 P. 426, 431 (Cal. Dist. Ct. App. 1925) (stating that no matter how much a tenant’s enjoyment is disturbed, constructive eviction only takes place when a tenant is forced to leave a property).

27. *Quinn & Phillips*, *supra* note 16, at 236 (“[Constructive eviction] appeared very traditional. The law was not talking about the landlord’s failure to supply services, but rather of his obligation to assure quiet possession. That was the old idea, and that was what triggered the old remedy, *i.e.*, the tenant’s power to abate the rent by leaving the premises.”).

28. Peter Simmons, *Passion and Prudence: Rent Withholding Under New York’s Spiegel Law*, 15 BUFF. L. REV. 572, 577 (1965) (“Slum tenants, though, are unlikely to find meaningful protection in [the constructive eviction] doctrine; long term residential leases are uncommon, and the requirement that the tenant must vacate the premises offers little more than the alternative of quitting one substandard unit for another.”).

29. *Notes of Recent Decisions*, 38 CENT. L.J. 403, 403 (1894).

30. *Buonocristiani, Notes: Partial Constructive Eviction: The Common Law Answer in the Tenant’s Struggle for Habitability*, 21 HASTINGS L.J. 417, 417-18 (1969) (“The pressures of the 20<sup>th</sup> century have substantially negated the effectiveness of constructive eviction as a tenant remedy. The expanding population, the migration to urban areas and the ensuing hous-



structive eviction operated as a defense in a claim for unpaid rent by their landlord. Tenants ran the risk that a court would determine that the landlord's actions were not sufficient to satisfy the elements of constructive eviction—putting the tenant on the hook for the cost of the new residence as well as the abandoned lease.<sup>31</sup>

While courts were struggling with expanding and reevaluating tenant rights in respect to traditional common law concepts, other branches of government were acting to alleviate what was viewed as public health and safety concerns of substandard and unhealthy living conditions. To address these concerns, local governments (beginning with New York City in 1901) enacted housing and building codes. These codes set out minimum health and safety standards for construction and occupancy. The presence of the codes moved from sporadic enactments in large cities to almost universal adoption across the United States between 1956 and 1968—as adoption of codes became a prerequisite for obtaining federal funds.<sup>32</sup> There were high hopes that these codes would alleviate substandard housing.<sup>33</sup> If landlords faced criminal sanctions for failing to maintain their property in a habitable condition, the reasoning went, they (and their landlord colleagues) would have an incentive to ensure that their properties were maintained.<sup>34</sup> However, in practice, building codes did not live up to these theoretical assumptions.<sup>35</sup>

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ing shortage have made the tenant's procurement of adequate housing difficult, if not impossible. Consequently, the tenant is likely to accept certain inadequacies rather than expend more for proper accommodations, or struggle to find better housing in the same price range. Thus, many tenants are currently enduring conditions that might well constitute a basis for constructive eviction.”).

31. See, e.g., *Charles E. Burt, Inc. v. Seven Grand Corp.*, 163 N.E.2d 4, 8 (Mass. 1959). See also *Buoncristiani*, *supra* note 30, at 427 (“Even if the tenant does elect to avail himself of constructive eviction, the same factors that force other tenants to endure also operate to make the recourse somewhat of a gamble. If the tenant removes and it is later judicially determined that he did so without cause, he remains liable on the lease in addition to incurring the expense of finding new habitation.”).

32. Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 551-52 (1983) (discussing the evolution of the adoption of local housing codes).

33. Daniel N. Loeb, *The Low-Income Tenant in California: A Study in Frustration*, 21 HASTINGS L.J. 287, 293-97 (1969) (discussing the limitations of housing code enforcement from the perspective of the low-income tenant).

34. For example, in St. Louis, Missouri, an uncorrected building code violation could result in a fine of up to \$500 and imprisonment of up to 90 days. St. Louis Ordinance # 51637, Section 4 (1963). Revised Code of St. Louis, Section 1.100.

35. Brian J. Strum, *Proposed Uniform Landlord and Tenant Act: A Departure from Traditional Concepts*, 8 REAL PROP. PROB. & TR. J. 495, 498 (Fall 1973) (collecting articles); see also *id.* at 498 (“The search for an acceptable and workable method of requiring landlords to maintain habitable dwellings has continued for many years. At first, a building and housing code which imposed penalties on landlords where buildings failed to meet the prescribed standards were thought to be the answer, but the desired result has not been achieved.”).

There were a number of reasons for the failure. Some statutes provided that landlords had an obligation to maintain premises unless the parties contracted around it. Such provisions, while putting laws on the books, became ineffectual in practice for all but the most unsophisticated landlord.<sup>36</sup> In addition, building code procedures presumed that there were other options available to tenants. For example, under the New York City Tenement Housing Act of 1901, the remedy was for the agency in charge of administering the statute to issue a “vacate” order on those premises that were found to violate the building code requirements.<sup>37</sup> The building was to remain vacant until sufficient repairs were made.<sup>38</sup> As housing became more and more scarce, the vacate remedy became less effective because tenants—vacated from their home and unable to find other accommodations—faced a catch-22.<sup>39</sup> In addition, government officials were hesitant to enforce building code violations that had the effect of putting all tenants out onto the street.<sup>40</sup> Finally, by placing the obligation of enforcement solely in the hands of government officials (as opposed to a tenant), a “lack of manpower, inefficiency, corruption, or mere indifference”<sup>41</sup> created obstacles to the overall goal of improving leased premises.<sup>42</sup> Enforcement was described as “too slow, too weak, or non-existent.”<sup>43</sup> The fact that violations of building codes carried criminal penalties resulted in a double disadvantage. First, courts were hesitant to impose stiff criminal penalties (crime or jail time) for housing code violations. Second, when fines were imposed, landlords had an incentive to pay the fine instead of remedying the condition on the premises and merely considering the fine a cost of doing business. Rather than rendering the premises habitable, landlords instead considered paying the fine as merely a cost of doing business.<sup>44</sup> In short, the criminal-ordinance based approach to addressing premises conditions did not work.<sup>45</sup>

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36. Buoncristiani, *supra* note 30, at 417-18.

37. William E. Marshall, *Remedies of the Indigent Tenant in Substandard Housing—Past, Present, Future*, 6 WAKE FOREST INTRAMURAL L. REV. 119, 120 (1970).

38. *Id.*

39. *Id.* at 120-21.

40. Charles Donahue, Jr., *Change in the American Law of Landlord and Tenant*, 37 MOD. L. REV. 242, 251 (May 1974).

41. Zenor, *supra* note 11, at 492.

42. Zenor, *supra* note 11, at 492.

43. Marshall, *supra* note 37, at 120; *see also* Kenneth A. Neal, *The New Michigan Landlord-Tenant Law: Partial Answer to a Perplexing Problem*, 15 WAYNE L. REV. 836, 850 (1968) (noting that putting the decision of what conditions are sufficiently poor to justify pursuing under a building code enforcement regime is an unnecessarily paternalistic approach).

44. Zenor, *supra* note 11, at 492; Neal, *supra* note 43, at 837.

45. Judah Gribetz & Frank P. Grad, *Housing Code Enforcement: Sanctions and Remedies*, 66 COLUM. L. REV. 1254, 1256 (1966) (“The trouble with criminal prosecution for housing violations . . . is that in hard-core cases it does not work. The remedy is inadequate as a

Housing codes did not eliminate substandard housing as their early proponents predicted. They did, however, provide evidence that state and local governments recognized that rental units were being maintained in substandard conditions and that, as a matter of public policy, the responsibility for maintaining properties in a structurally sound condition should be placed on the landlord. The question then became, how did these codified obligations impact the legal relationship between the landlord and tenant? Do they indicate an obligation on behalf of the landlord beyond merely avoiding actions that constitute an actual or constructive eviction? There were three approaches to these questions. The first was that the presence of the codes created no private right of action and that violations were to be handled through the enforcement mechanism, with the relationship of the landlord and tenant remaining static.<sup>46</sup>

The second approach relied on the *laissez faire* economic doctrine and viewed the codes as irrelevant to risk allocation in a lease agreement. For these courts, even though the relationship between landlord and tenant may have no longer resembled the agriculturally-centered relationship that it had in the past, the primacy of the right to contract trumped the need to impose additional obligations on the landlord. According to this philosophy, tenants and landlords entered into a contract at arm's length and if the tenant wanted greater protection, such as being ensured a habitable premises, they should negotiate for it:

According to this fiction, courts are not called upon to perform any necessary social function in reforming landlord and tenant law because the parties to a lease are fully able to protect their own interests and to secure the terms and conditions which they wish. If a tenant lives in an unsafe or unhealthy dwelling it must be because he wishes to do so; if the tenant did not approve the condition of the premises he would have bargained with the landlord for desirable repairs and improvements before he agreed to the tenancy. Both landlord and tenant are free men and both

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cure or deterrent . . . ."); see Joseph L. Sax & Fred J. Hiestand, *Slumlordism as a Tort*, 65 MICH. L. REV. 869, 873 (1965) ("[T]raditional code enforcement provisions tend to be self-defeating because they are largely built upon an erroneous economic premises."); see also Salsich, *supra* note 34, at 44 ("Has housing code enforcement in the St. Louis area been successful? The answer would appear to be a resounding, No.").

46. *Kline v. Burns*, 276 A.2d 248, 249-50 (N.H. 1971) ("The proper action for enforcing the ordinance rests with the City officials and once their attention was directed to the violations, it was their duty to act . . . . It has long been the general rule of law that, absent an agreement to repair, the tenant may not refuse to pay rent because the landlord's failure to repair.")

‘stand upon equal terms [and] either may equally well accept or refuse to enter into the relationship.’<sup>47</sup>

The third approach—the one that provided justification for the implied warranty of habitability—viewed the codes as an obligation placed upon the landlord as a matter of public policy. This provided an opening for a radical (from a property perspective) new obligation upon landlords and a remedy for tenants. Some argued that the new obligation should be enforceable as a tort and courts should recognize a new tort of “slumlordism.”<sup>48</sup> Others argued that courts should instead nest the tenant’s rights in the law of contracts.<sup>49</sup> If the legislative branch adopted statutes requiring structures to meet minimum building standards, then it should follow that the tenants living in those buildings should have the benefit of those regulations. As *Pines v. Perssion*—an early case adopting the implied warranty of habitability—put it:

Legislation and administrative rules, such as the safe place statute, building codes, and health regulations, all impose certain duties on a property owner with respect to the condition of his premises . . . . To follow the old rule of no implied warranty of habitability in leases, would in our opinion, be inconsistent with the current legislative policy concerning housing standards. The need and social desirability of adequate housing for people in this era of rapid population increases is too important to be rebuffed by that obnoxious legal cliché, *caveat emptor*.<sup>50</sup>

The legal debate was not the only factor playing into a reexamination of the landlord-tenant relationship. The “on the ground” reality of the disparity between the landlord and tenant was becoming increasingly apparent. Landlords had a great deal of leverage in the rental process. Tenants were replaceable and landlords could present a property on a take it or leave it basis. There was no incentive to improve or maintain property because there was always a tenant desperate enough to take the property in a substandard condition, or “slum condition.”<sup>51</sup> The inequities of humans living in slums

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47. Simmons, *supra* note 28, at 576 (quoting *Kirshenbaum v. Gen. Outdoor Adver. Co.*, 180 N.E. 245, 247 (N.Y. 1932)). See also William Schwartz, *Property and Conveyancing*, 16 ANN. SURV. MASS. L. 78, 79 (1968-69) (courts operated “under the flourishing myth that overborne tenants were omniscient people, dealing at arm’s length on a plane of legal parity, who might be expected to give the premises an intensive examination before renting them.”).

48. Sax & Hiestand, *supra* note 45, at 873.

49. Comment, *The California Lease—Contract or Conveyance?*, 4 STAN. L. REV. 244, 244 (1952).

50. *Pines v. Perssion*, 111 N.W.2d 409, 412-13 (Wis. 1961).

51. Joel R. Levine, *The Warranty of Habitability*, 2 CONN. L. REV. 61, 77-79 (1969) (arguing that in these conditions the lease agreement is a contract of adhesion).

triggered a social revolution of sorts to develop a policy to address the problem. By 1960, it was estimated that 10.6 million out of a total of 58.3 million units of housing were substandard.<sup>52</sup> The living conditions of the nation's poor were becoming too pronounced to be ignored.<sup>53</sup> In 1966, President Johnson decried the fact that "some four million urban families [are] living in homes of such disrepair as to violate decent housing standards."<sup>54</sup> The problem was exacerbated as middle and upper classes moved to the suburbs, draining local governments' resources as the tax base moved out, putting the plight of the inner city poor in stark relief.<sup>55</sup>

Something had to give. As late as 1968, one scholar, while noting that courts had been willing to create a number of exceptions to the *caveat emptor* rule, could find no jurisdiction that had imposed an implied obligation of habitability on landlords.<sup>56</sup> In fact, he was willing to go so far as to say: "we must accept as gospel in the United States the basic principle of caveat lessee . . ."<sup>57</sup> If this author had written his article a couple of years later, the "gospel" of landlord-tenant relationships he found would be much different.

Courts, conscious of the social and political movements afoot, were receptive to a reevaluation of the landlord-tenant relationship. They needed a "ready word or phrase" to encapsulate the new relationship.<sup>58</sup> The phrase needed to be both manageable (so that other courts could quickly pick it up) and flow logically from prior legal concepts. The phrase "implied warranty of habitability" fit the bill; it was both easy to articulate and flowed logically

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52. Tom L. Davis, *Cooperative Self-Help Housing*, 32 L. & CONTEMP. PROBS. 409, 409 (1967).

53. *Id.* at 410 ("Enlightened leaders are aware that riots and violence against property are the harvest of generations of neglect and that the resources of a nation are dependent upon the productivity and cultural times of its people.").

54. 112 CONG. REC. H1126 (daily ed. Jan. 26, 1966) (message from Pres. Johnson).

55. Roberto G. Quercia & George C. Galster, *Threshold Effects and the Expected Benefits of Attracting Middle-Income Households to the Central City*, 8 HOUSING POL'Y DEBATE 409, 409-10 (1997); Super, *supra* note 1, at 402.

56. John S. Grimes, *Caveat Lessee*, 2 VAL. U. L. REV. 189, 199 (Spring 1968) (exceptions to the rule recognized in the case of "nuisance, furnished habitations, short term seasonal leases, constructive eviction, commercial frustration, lessors' covenants, lettings for public use, knowledge of lessor of improper conditions or concealment amounting to fraud, areas in common use, lease of part of a building, multiple dwelling, fiduciary relationships, houses built by the lessor for rent, or special statutes").

57. *Id.* at 206. See also Quinn & Phillips, *supra* note 16, at 225 (calling the continuing recognition of the property-based landlord-tenant relationship "just bad law" and stating that "it is incomprehensible that responsible men and women who are normally alert to intolerable social conditions in other societies can be so blind and complacent with respect to their own shameful system").

58. Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. REV. 503, 546 (1982) (quoting E. Levi, AN INTRODUCTION TO LEGAL REASONING 8 (1949)).

from principles of contract law.<sup>59</sup> As one of the leading cases in the area recognized, urban tenants in a high-rise apartment were not concerned about the land itself—as agrarian tenants were—but were instead seeking/expecting/contracting for a “package of goods and services” including “not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance.”<sup>60</sup> Courts were persuaded that creating a warranty or promise that the residential leasehold would be in a habitable condition was consistent with the obligation of warranty in other areas of the law such as products liability. As the District of Columbia court held in a leading case adopting the implied warranty of habitability:

Modern contract law has recognized that the buyer of goods and services in an industrialized society must rely upon the skill and honesty of the supplier to assure that goods and services purchased are of adequate quality. In interpreting most contracts, courts have sought to protect the legitimate expectations of the buyer and have steadily widened the seller’s responsibility for the quality of goods and services through implied warranties of fitness and merchantability. Thus without any special agreement a merchant will be held to warrant that his goods are fit for the ordinary purposes for which such goods are used and that they are at least of reasonably average quality. Moreover, if the supplier has been notified that goods are required for a specific purpose, he will be held to warrant that any goods sold are fit for that purpose. These implied warranties have become widely accepted and well established features of the common law, supported by the overwhelming body of case law. Today most states as well as the District of Columbia have codified and enacted these warranties into statute, as to the sale of goods, in the Uniform Commercial Code.<sup>61</sup>

Courts found it a short step from the obligations imposed in the contract for goods to contracts for housing. In addition, there was a general belief in the United States, underscored by President Johnson’s Great Society and war against poverty, that the time had come to take action against inadequate living conditions for the poor—bolstered by the belief that landlords

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59. *Id.* at 521 (quoting E. Levi, AN INTRODUCTION TO LEGAL REASONING 8 (1949)). Professor Glendon notes that the Minnesota Supreme Court had, as early as 1931, recognized an “implied covenant that the premises [in an apartment building] will be habitable,” but that concept did not gain traction until the introduction of the “implied warranty of habitability” and its asserted analogy to warranties implied in the sale of goods. *Id.* at 546–47 (quoting *Delameter v. Foreman*, 239 N.W. 148, 149 (Minn. 1931)).

60. *Javins v. First Nat’l Realty Corp.*, 428 F.2d 1071, 1074 (D.C. Cir. 1970).

61. *Id.* at 1075.

took in enough profits to justify shifting the cost of maintenance to them.<sup>62</sup> In the midst of this shift in public opinion, courts often acted first in this area because state legislative branches were typically unwilling to pass explicit legislation on the issue—either because of the conservative nature of the legislature and/or the strong influence of the landlord lobby (and the commensurate lack of influence by tenants).<sup>63</sup>

Things began to change at the legislative level as reapportionment brought in more urban members, and tenants began to organize (using techniques developed during the civil rights movement and aided by the increase of legal aid societies).<sup>64</sup> In addition, middle and upper income renters started to experience the inequity of the traditional rules. As one commentator put it: “[t]he resident of a Park Avenue flat who could not get his landlord to fix the garbage disposal . . . began to perceive himself as having a problem different in quality but not in kind from that of a black resident in Harlem whose flat was infested with rats.”<sup>65</sup> In 1974, the American Law Institute proposed a draft Restatement of the Law, Second, Property, which proposed a non-waivable implied warranty of habitability.<sup>66</sup> In an area of law where certainty and tradition tend to reign, this quick and sharp break from the past marked a new era in landlord-tenant law.

With all of the attacks to common law doctrines, two realities persisted. First was the lingering concern expressed by some courts that the adoption of an implied warranty of habitability was a matter of policy best left to the legislature.<sup>67</sup> Second was the need for a comprehensive and consistent approach to answer questions left open by adoption of the warranty when it was adopted by courts. For example, what were a tenant’s remedies upon

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62. Rabin, *supra* note 32, at 551–52 (“The general prosperity made it seem feasible to launch and win a ‘war against poverty’ that would have been unthinkable in a period of economic stringency. Judges and legislators believed that landlords could afford to give up some of their profits for the benefit of slum dwellers because the landlord’s economic position, like that of everyone else, was improving.”).

63. Donahue, *supra* note 40, at 245–46.

64. *Id.* at 246; Glendon, *supra* note 58, at 521 (In the late 1960s, “expanding legal services bureaus began to attract lawyers who were interested not only in aiding individual poor clients, but in bringing about change in the legal and social systems. Thus, ‘ordinary’ residential landlord-tenant cases often became test cases which could be financed, staffed and appealed [sic], even though the amounts actually in controversy might be quite small.”).

65. Donahue, *supra* note 40, at 246.

66. RESTATEMENT (SECOND) OF PROPERTY, LANDLORD AND TENANT (Tent. Draft No. 2, 1974).

67. *Blackwell v. Del Bosco*, 558 P.2d 563, 565 (Colo. 1976) (stating “[w]e have concluded that, however desirable the adoption of the rule of implied warranty of habitability might be, the resolution of this issue is more properly the function of the General Assembly . . . [T]he implied warranty of habitability theory involves many economic and social complexities, and we believe its adoption should be preceded by the research and study of which the legislature is more capable.”).

discovering a condition that breached the warranty of habitability? What type of conduct would violate the warranty?

### C. Defining the Terms of Engagement: Introduction of the Uniform Residential Landlord Tenant Act and the Statutory Implied Warranty of Habitability

In 1972, the National Conference of Commissioners on Uniform State Laws produced the Uniform Residential Landlord and Tenant Act (“URLTA”), which provided state legislatures a model approach to recognizing the warranty of habitability in residential leases. The stated purpose of the act was three-fold: (a) to “simplify, clarify, [and] modernize” the legal relationship between landlord and tenant;<sup>68</sup> (b) to prompt landlords to “maintain and improve the quality of housing”<sup>69</sup>; and (c) to provide a uniform method of accomplishing these goals.<sup>70</sup> Following early court decisions, the URLTA made provisions in the lease dependent and explicitly excused a tenant’s obligation to pay rent when the landlord materially breached the lease agreement.<sup>71</sup> The act also provided some guidance for landlords as to exactly what their habitability obligations entailed.<sup>72</sup>

The central duty of the landlord—which could lead to tenant remedies (for example rent withholding or the right to bring a claim for breach of the warranty)—was the obligation of the landlord to “maintain” the premises up to certain standards.<sup>73</sup> The landlord has an obligation—explicitly imposed by the act—to comply with building and housing codes that “materially” affect health and safety.<sup>74</sup> The landlord is also required to do “whatever is necessary to put and keep the premises in a fit and habitable condition.”<sup>75</sup> In addition, the landlord must maintain “all electrical, plumbing, sanitary, heating, ventilating, air-conditioning, and other facilities and appliances, including elevators, supplied or required to be supplied.”<sup>76</sup> The landlord must also provide and maintain “receptacles and conveniences for the removal of ash-

68. UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 1.102(b)(1), 7B U.L.A. 292 (2006).

69. *Id.* at § 1.102(b)(2).

70. *Id.* at § 1.102(b)(3).

71. *Id.*

72. R. Ladd Lonquist & R. Michael Healey, *A Prospectus on the Uniform Residential Landlord and Tenant Act in Nebraska*, 8 CREIGHTON L. REV. 336, 346 (1974-75) (“Under URLTA, the constricted common law review of a landlord’s obligations is rejected. Instead, the doctrine express in the recent warranty of habitability cases is adopted and codified. In addition, certain common concepts are revised and codified to clarify existing landlord obligations.”).

73. UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 2.104, 7B U.L.A. 326 (2006).

74. *Id.* at § 2.104(a)(1).

75. *Id.* at § 2.104(a)(2).

76. *Id.* at § 2.104(a)(4).



es, garbage, rubbish, and other waste incidental to the occupancy of the dwelling . . .”<sup>77</sup> Finally, the act requires that the landlord “supply running water and reasonable amounts of hot water at all times and reasonable heat . . .”<sup>78</sup>

If the landlord fails in her obligation to adequately maintain the premises, the tenant may cease paying rent and may assert a breach of the obligation to maintain in a subsequent action by the landlord to recover rent.<sup>79</sup> The tenant also has the right to bring an affirmative claim against the landlord for failure of the duty to maintain the premises.<sup>80</sup>

The concern that the URLTA went too far and swung the pendulum too much in the tenant’s favor was a common theme of skeptics of the act. First, some questioned whether there was really an abundance of uninhabitable rental units that required the act or whether the movement itself was based more on perception of housing conditions than reality.<sup>81</sup> Others argued that making the URLTA apply to all residential leases as opposed to those that are most likely to suffer inhabitable conditions and against those landlords most likely to be able to afford the improvements would result in an unintended burden falling on small or individual landowners while corporate landlords would avoid liability.<sup>82</sup>

Substantively, the URLTA, while purporting to emphasize the contractual nature of the landlord-tenant relationship, seemed to go further. For example, a tenant faced with an uninhabitable leasehold could choose to repair and then deduct the cost of repair from the rent. This could expose the landlord to “uncurbed exposure” not as a matter of contractual agreement but as a matter of legislative decree.<sup>83</sup> The result of the act, opponents claimed, would be fewer landlords entering into the rental market resulting in even fewer rentals being available.<sup>84</sup> In addition, it was argued that the

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77. *Id.* at § 2.104(a)(5).

78. *Id.* at § 2.104(a)(6).

79. UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 4.105, 7B U.L.A. 387 (2006). See also Samuel Jan Brakel, *URLTA in Operation: The Oregon Experience*, 1980 AM. B. FOUND. RES. J. 565, 568 (1980).

80. UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 4.104, 7B U.L.A. 383 (2006).

81. Rabin, *supra* note 32, at 542–43. *But see* Gerald R. Gibbons, *Residential Landlord-Tenant Law: A Survey of Modern Problems with Reference to the Proposed Model Code*, 21 HASTINGS L.J. 369, 385 (1970) (arguing that even though more rental units might theoretically be available, racial segregation makes the market for low income rentals tight and does not provide an incentive for landlords to improve or maintain the stock).

82. Donahue, *supra* note 40, at 260.

83. Strum, *supra* note 35, at 501.

84. Gibbons, *supra* note 81, at 385–86 (“The great need is to increase the supply and quality of low-cost rentals, and this requires investment in the construction of new units . . . . Increasing the rights of tenants tends to discourage private investment in new rental housing.”); Strum, *supra* note 35, at 501 (“This uncurbed exposure to liability may discourage the

landlord would shift the cost of the improvements to the tenants by increasing rent, making housing unaffordable to those who need it most.<sup>85</sup> Similarly, there was a concern that improvements would give the landlord the incentive to take the units off the market rather than improve them.<sup>86</sup> There was also concern that improving the units might make the units attractive to those who would not otherwise rent them, reducing the stock of rentals to low income.<sup>87</sup>

So the revolution appears to be complete. The common law implied warranty and the statutory warranty have been around for forty years, with almost all states adopting the URLTA in some form. This leads to questions about how successful the implied warranty has been in balancing the landlord-tenant relationship, encouraging landlords to maintain and improve their rental properties, and (with regard to the URLTA) creating a uniform method of enforcement. This is a difficult (if not impossible) quest. It is impossible to know how many residential premises are being maintained in a habitable condition because of the implied warranty of habitability. These premises never make it into reported cases, but are an important category of houses that the adoption of the implied warranty affects. Conversely, it is impossible to measure through case law the number of tenants who are living in inhabitable conditions with a valid claim for breach of the implied warranty of habitability but for one reason or another (lack of knowledge about the right, lack of alternative housing) fail to bring a claim at all. Therefore, this article's examination of the implied warranty is necessarily limited to and skewed toward those cases resulting in a written opinion.<sup>88</sup>

These limitations, while worth noting, are not fatal to an examination of the current status of the implied warranty of habitability. The cases examined here provide an insight into some of the issues that courts continue to face when dealing with the critical and unique landlord-tenant relationship. The first question is relatively straightforward: has the concept of "habitability" changed since the implied warranty was first adopted more than forty years ago?

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building of rental units and spur the conversion of existing rental units to condominium or cooperative projects.").

85. Rabin, *supra* note 32, at 558–59.

86. Donahue, *supra* note 40, at 261.

87. Rabin, *supra* note 32, at 560 (discussing Professor Bruce Ackerman's arguments from Bruce Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 Yale L.J. 1093 (1971) and Bruce Ackerman, *More on Slum Housing and Redistribution Policy: A Reply to Professor Komesar*, 82 Yale L.J. 1194 (1973)).

88. The article is also limited to purely contractual claims and does not include any substantive discussion of the rights of a tenant to bring a tort claim against a landlord based on the condition of the premises.

### III. CONSIDERING “HABITABILITY” AS AN EVOLUTIONARY CONCEPT

With the shift from the traditional property-based landlord-tenant relationship to the interpretation of the common law and statutory obligation (e.g. the URLTA) what has happened to the implied warranty of habitability? When courts first began enacting the implied warranty, they did so based on certain cultural understandings of what was meant by “habitable” and what constituted a habitable premises. The judges’ frame of reference shaped how they interpreted the obligations of the landlord. These frames inevitably shift over time as new judges are faced with similar questions (is the premises habitable?) view the question of “habitability” through their own cultural lens. In short, the concept of habitability is largely socially constructed, and perhaps should evolve as judges with different social backgrounds face these issues.<sup>89</sup>

For purposes of this article, the fact that judges may view the concept of “habitability” differently based on the historical moment in which they live presents an empirical question. It has been more than forty years since the D.C. Circuit decided *Javins v. First National Realty Corporation* and the introduction of the URLTA. How has the concept of habitability fared? To provide a partial answer to the question, this article examines 117 cases dealing with the implied warranty of habitability in the residential lease context between 2005 and 2012.<sup>90</sup>

#### A. In the Beginning: Defining “Habitability” Under the New Implied Warranty

The early courts had the unenviable task of drawing the line between a condition that made a residence uninhabitable and a condition which could be described as inconvenient, but not impacting habitability. This is a con-

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89. PAMELA BRANDWEIN, RECONSTRUCTING RECONSTRUCTION: THE SUPREME COURT AND THE PRODUCTION OF HISTORICAL TRUTH 18–19 (1999) (“Institutional resources do not exist objectively in the world. They come into existence through social processes. Shifts in institutional and historical contexts also work to enable and constrain access to particular resources.”). See also Simon Swaffield, *Contextual Meanings in Policy Discourse: A Case Study of Language Use Concerning Resource Policy in the New Zealand High Country*, 31 POL’Y SCI. 199, 205 (1998) (situational policy analysis “suggests that people from similar institutional backgrounds . . . will tend to conceptualise resource policy issues in similar ways, and that meaning of specific terms may derive, in part, from the shared values of a wider group of people, for example a professional institution.”) (citing MARY DOUGLAS, HOW INSTITUTIONS THINK (1986))).

90. To obtain the universe of cases, I used the Westlaw database “all cases” and did a search for “implied warranty of habitability” and “landlord” with a date restriction of January 1, 2000 through December 31, 2012. As noted above, the limitation of this examination is significant. It does not include any cases where the results were not included in a reported case.

tinuum. On one extreme, the Georgia Court of Appeals held that a residence that did not include a bathroom, was not equipped with hot water and which violated local building codes, did not excuse the tenant from paying rent because she continued to live on the premises and—because the premises could physically be lived in—it was habitable.<sup>91</sup> On the other extreme are conditions that do not trigger habitability concerns—often called amenities or conditions that may be inconvenient but not impacting habitability. In all jurisdictions where there is common law or statutory implied warranty, courts must make decisions about where along this continuum to place a particular complaint.<sup>92</sup>

How strictly the definition of habitability will be defined remains an open question. In fact, in Washington state there is a split among intermediate appellate courts over the habitability standard, with one division requiring a showing that the alleged breach of the warranty “render[ed] a dwelling actually unfit to be lived in”<sup>93</sup> and another holding that a breach has been established when the defect “pose[s] an actual or potential safety hazard to its occupants.”<sup>94</sup> Engaging in an “*Erie*-guess” a federal district court held that the Washington Supreme Court would likely adopt the more lenient standard of actual or potential hazard.<sup>95</sup>

To put the question in contract terms: what conditions do the landlord and tenant contract for that would be considered a part of the “package of goods and services” that is implied into the lease?<sup>96</sup> By comparing the answer to this question when the implied warranty was first adopted and today, it can provide some evidence of whether the concept of “habitability” has changed over time. It seems reasonable to hypothesize that technological advances and societal expectations may have rendered certain items that were considered amenities when the implied warranty was first adopted necessities now.

In 1974, Professor Moskowitz completed a study in which he undertook the task of evaluating the “new” doctrine of the implied warranty of habita-

91. *Morris v. Jones*, 198 S.E.2d 354 (Ga. Ct. App. 1973). Certainly this case would come out differently today. To define the warranty of habitability so strictly defeats the purpose of the warranty and forces tenants to vacate the premises, essentially returning the law to the days of constructive eviction.

92. See UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 2.104(a)(1) (landlord shall comply with building and housing codes that “materially affect[] health and safety”); *id.* at § 2.104(a)(2) (landlord shall make repairs and do what is necessary to keep premises in “fit and habitable condition”); *id.* at § 2.104(a)(3) (landlord shall keep common areas in “clean and safe condition”).

93. *Wright v. Miller*, 963 P.2d 934, 940 (Wash. Ct. App. 1998) (“The alleged defects here do not impact the livability of the house so as to render it unfit for habitation.”).

94. *Lian v. Stalick*, 25 P.3d 467, 472 (Wash. Ct. App. 2001).

95. *Pinckney v. Smith*, 484 F.Supp.2d 1177, 1182–84 (W.D. Wash. 2007).

96. *Javins*, *supra* note 60, at 1074.

bility and examining the issues it raised, providing a glimpse into some early cases applying the warranty.<sup>97</sup> As part of his study, Professor Moskowitz sought to identify and categorize what conditions breached the implied warranty in cases decided from the initial adoption of the warranty through the publication of his article in 1974. His analysis provides a perspective of how the implied warranty was viewed by courts in the early years of its adoption.

Moskovitz found that early courts were focused on facilities. This included facilities on the rental premises as well as common areas that impact the leased premises, but are in the control of the landlord (*e.g.* central heat and water pipes).<sup>98</sup> There was a line below which the condition would not be considered a breach.<sup>99</sup> Thus, the seriousness of the defect was important; mere *de minimus* violations of the building code were not considered a breach. The test was whether the tenant was “deprived of essential functions which a residence is expected to provide.”<sup>100</sup> Moskowitz discovered that courts had found that defects in eating, sleeping, or restroom facilities were most likely to violate the warranty. In addition, the fear that the tenant would suffer injury or health problems as a result of the condition constituted a breach.<sup>101</sup>

In essence, early courts limited the meaning of “habitability” to conditions that directly related to whether the residence could be lived in and emphasized certain facilities necessary to satisfy the livability standard. This limited approach is unsurprising considering that courts were deciding these cases from the prior position that there was no responsibility to provide a habitable residence. Would judges today—removed from shock of the outbreak of the revolutionary—hold to the same categories of these older courts or would they work to expand the definition to fit new cultural expectations?

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97. Myron Moskowitz, *The Implied Warranty of Habitability: A New Doctrine Raising New Issues*, 62 CALIF. L. REV. 1444 (1974).

98. *Id.* at 1455.

99. The idea that any violation of housing code ordinances could render a lease invalid had credence in early cases as courts sought to establish what should be considered a breach of the implied warranty. For example, in *Brown v. Southall Realty Co.*, 237 A.2d 834 (D.C. Cir. 1968), the court found that the underlying lease was void because it contained violations of the D.C. housing codes, including “obstructed commode, a broken railing and insufficient ceiling height in the basement . . . .” The court reasoned that to uphold the lease would “flout” the purposes of the housing codes. *Id.* at 837.

100. Moskowitz, *supra* note 97, at 1459.

101. *Id.* at 1461.

## B. Defining Habitability Today: An Examination of Cases from 2005–2012

The simple conclusion after reviewing reported cases between 2005 and 2012 is that there are very few conditions that courts have found to constitute an uninhabitable condition that would not also breach the obligation of habitability under earlier cases. The recent cases can be placed into four overarching categories: (1) “slum” conditions;<sup>102</sup> (2) substandard structural conditions;<sup>103</sup> (3) substandard physical conditions on the premises;<sup>104</sup> and (4) no breach of the implied warranty.<sup>105</sup>

### 1. “Slumlord” Conditions

The cases that are perhaps most similar to those that led to the adoption of the implied warranty of habitability, are those that allege slumlord conditions. These properties have numerous substandard conditions. The conditions include both structural and physical conditions of the property.<sup>106</sup> Typically the facts of these cases are also particularly egregious. For example, in the seminal case of *Pines v. Persson*, the premises were in such disrepair that the landlord did not tell prospective tenants that he had previously resided on premises because he was embarrassed to admit that he had lived in such conditions.<sup>107</sup> In *Hilder v. St. Peter*, another often-cited case, the tenant faced among other things broken windows, inoperable toilets, inadequate electrical wiring, and an overwhelming odor of raw sewage.<sup>108</sup>

More recently, slumlord condition cases continue to be surprisingly common. Since 2005, there were fourteen cases dealing with properties with slum conditions, 29% of the total cases where a breach of the implied warranty was found. Furthermore, the facts are no less egregious than some of the early cases. In a 2008 case from the District of Columbia, a housing inspection report found: “electrical deficiencies, ineffective heating, rotting structures, basement flooding, and rodent infestation.”<sup>109</sup> In a California case the court found a gas leak (resulting in period without heat and hot water), no stove, the floor in bathroom was caving in, the toilet leaked a foul-

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102. See *infra* Part III.B.1.

103. See *infra* Part III.B.2.

104. See *infra* Part III.B.3.

105. See *infra* Part III.B.4.

106. See *In re Stancil*, 2005 WL 3036647 (Bankr. D.C. 2005) (numerous tenants with numerous complaints).

107. *Pines*, 111 N.W.2d at 410.

108. *Hilder v. St. Peter*, 478 A.2d 202, 206 (Vt. 1984).

109. *Chibs v. Fisher*, 960 A.2d 588, 589 (D.C. Cir. 2008).

smelling liquid, there were problems with electricity, and gaps between the floor and wall that allowed rats and spiders into the apartment.<sup>110</sup>

### 2. *Structural Conditions of the Premises*

The second category is defective or non-conforming structural conditions. This category includes cases where the only claim of breach is a defect in the physical structure of the leasehold itself. These types of conditions are the most likely to compromise the value of the landlord's investment if not remedied. Therefore, it is not surprising that during the time frame studied, there were only ten cases (approximately 20%) where a structural defect alone was cited as a breach of the implied warranty. For example, a court held that inadequate wiring and failure to have adequate fire blocking (in violation of fire code) was a violation.<sup>111</sup> Structural conditions on the premises that are faulty often lead to additional harm to the tenant. For example, where the landlord neglected a building's roof and brick façade—a breach of the implied warranty of habitability—it allowed rainwater into the premises and damaged the tenant's personal property.<sup>112</sup> In another case the tenant noticed "bubbles" on the ceiling in her bedroom (presumably from a water leak) and the ceiling subsequently collapsed causing injury.<sup>113</sup>

### 3. *Physical Condition on the Premises*

The third category of cases involves a breach of the implied warranty of habitability based on the physical condition of the property. This includes both the lack of essential services as well as unbearable condition—most commonly odors. In these cases there are no allegations that the premises are structurally unsound, but that a condition on the premises breaches the warranty. Recent cases that have found a breach based on the physical condition of the premises have involved bedbugs<sup>114</sup> roach or rodent infesta-

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110. *Pama Management Co. v. Brooks*, No. ACIAS 1100051, 2012 WL 6213789 (Cal. App. Dep't Super. Ct. 2012).

111. *Chiodini v. Fox*, 207 S.W.3d 174, 175–78 (Mo. Ct. App. 2006).

112. *Spanish Court Two Condo. Ass'n v. Carlson*, 979 N.E.2d 891, 894 (Ill. App. Ct. 2012).

113. *Dumbadze v. Saxon Hall Owner, LLC*, 940 N.Y.S.2d 315, 316 (N.Y. App. Div. 2d Dept. 2012).

114. *Lee v. Fairfield Prop., LP*, No. 2:12-cv-06202-ODW(SHx), 2012 WL 5411818 (C.D. Cal. 2012); *see JWD & Sons, Ltd. v. Alexander*, 941 N.Y.S.2d 538 (N.Y. Just. Ct. 2011); *see also Kolb v. DeVille I Prop., LLC*, 326 S.W.3d 896 (Mo. Ct. App. 2010); *see also Valoma v. G-Way Mgmt., LLC*, 918 N.Y.S.2d 401 (N.Y. Civ. Ct. 2010).

tion,<sup>115</sup> and mold.<sup>116</sup> However, even in these cases, the condition must be more than a typical or reasonable tenant could be expected to bear. For example, a tenant's claim was dismissed where her evidence did not establish the presence of mold beyond what typically exists in residential units.<sup>117</sup>

Inadequate provision of essential services is also a breach of the warranty. A breach will most likely be found where the landlord completely fails to provide an essential service such as water,<sup>118</sup> heat,<sup>119</sup> or electricity.<sup>120</sup> In one extreme example, the landlord breached her duty when she had the water turned off to the premises and then called child services and reported that the tenant's child was living in home without running water.<sup>121</sup>

A breach can also occur when the service, while provided, is essentially unusable by the tenant.<sup>122</sup> For example, a breach was found at a property where tap water had a noxious odor that was "so extreme that it made [the tenant and her children] nauseous, ruined clothes washed in it, and forced them not only to launder clothes, but to bathe and eat, elsewhere."<sup>123</sup> A landlord also breaches the warranty when she provides a service but it is not up

115. *Landis & Landis Constr., LLC v. Nation*, 286 P.3d 979 (Wash. Ct. App. 2012); *Hammie v. Reddick*, 2012 WL 5200910, \*1, \*8 (Conn. Super. Ct. 2012) ("Rodent infestation is certainly a grounds to conclude a premises was uninhabitable.").

116. *McCall v. Norman*, No. COA12-244, 2012 WL 3573897, at \*1, \*3 (N.C. Ct. App. Aug. 21, 2012); *Poland v. Sandville*, No. DC-26028-09, 2012 WL 3030236 at \*1, \*2 (N.J. Super. Ct. App. Div. July 26, 2012) (apartment flood resulting in mold); *N. Vill. at Webster v. Braman*, No. 11-P-391, 2012 WL 761966, at \*1, \*1-2 (Mass. App. Ct. March 12, 2012); *Sanders ex rel Sanders v. Rosenberg*, No. 06-1406(NLH), 2008 WL 2945983 \*1, \*1 (D.N.J. July 30, 2008). *But see* *Allen v. Cypress Vill., Ltd.*, No. 3:10-CV-994-WKW, 2011 WL 2559614 \*1, \*2-4 (M.D. Ala. June 27, 2011) (recognizing that Alabama does not recognize claim for breach of implied warranty of habitability and dismissing claim based on presence of mold); *Huber Rental Prop., LLC v. Allen*, 2012 Ark. App. 642 at 1, No. CA 12-255, 2012 WL 5423919, at \*7 (Ark. Ct. App. Nov. 7, 2012) (while Arkansas does not recognize an implied warranty of habitability, tenant had a valid claim for breach of express provisions of lease agreement).

117. *Avalon Oaks v. King*, No. 07-ADMS-10042, 2007 WL 4100265 at \*1 (Mass. Dist. App. Div. Aug. 23, 2007).

118. *Belanger v. Mulholland*, 30 A.23d 836, 837 (Me. 2011) (water pipe broke and landlord told tenant that the tenant "was on his own with that" and that he would only allow an abatement of rent for repairs).

119. *Amerifirst Mortg. Corp. v. Green*, No. SP 821/05, 2005 WL 1306065 at \*2, 801 N.Y.S.2d 229 (N.Y. Dist. Ct. May 31, 2005).

120. *Holsman v. Carrick*, 2010 WL 1189596 at \*9 (Cal. Ct. App. 2010) ("There was substantial evidence from which the court could have concluded that the premises were uninhabitable for an appreciable period of time, due to water intrusion, electrical power, and heating concerns . . .").

121. *Crenshaw v. Roland*, 965 N.E.2d 341 (Ohio Ct. App. 2011).

122. *Durkee v. McMahan*, No. 2006-465, 2007 WL 5313341, at \*1 (Vt. Apr. 1, 2007) (failure to provide potable water).

123. *Newkirk v. Scala*, 90 A.D.3d 1257, 1258 (N.Y. App. Div. 2011).



to code. For example, where heat was furnished, but not within the temperature required by the state's health code.<sup>124</sup>

Property that is made unbearable as a result of odor can also breach the implied warranty.<sup>125</sup> Often these cases are accompanied by other structural problems (such as faulty plumbing), but this is not always the case. For example, the warranty was breached where a septic system malfunctioned and overflowed in a common area creating a "horrible septic smell" in the house.<sup>126</sup> A New Jersey court found a breach of the implied warranty where a tenant's upstairs neighbor created strong fumes "like plastic burning or smoking crack cocaine."<sup>127</sup>

As noted above, there are few areas where there is clear evolution of the implied warranty of habitability. There are few conditions where it can be said with a fair amount of certainty that the condition would not have been considered a breach when the implied warranty of habitability was first adopted. However, there does seem to be some movement with regard to conditions outside the tenant's unit that impact the tenant's use and enjoyment of the home.<sup>128</sup> Some courts have been willing to recognize a breach in conditions that historically would have likely been considered merely an inconvenience or not to be included in the definition of "habitable." A prime example of this is second-hand smoke. A couple of recent New York cases hold that infiltration of an apartment by second-hand smoke breaches the implied warranty of habitability.<sup>129</sup> A Massachusetts case also found a possible breach of the implied warranty (the case was remanded) where the tenant fell on an icy sidewalk in front of her apartment. The court held that the sidewalk directly outside the apartment is a "physical facility vital to the use of" the tenant's apartment.<sup>130</sup>

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124. *Claessens v. Aiello*, 935 N.E.2d 391, at \*1 (Mass. App. Ct. 2010); *Sherr v. Ndir*, 873 N.Y.S.2d 515, at \*1 (N.Y. Just. Ct. 2008) (lack of proper heat during the night "on more than several occasions").

125. See *Newkirk*, 90 A.D.3d at 1258.

126. *Pocasset Mobile Home Park, LLC v. Carvalho*, 2011 Mass. App. Div. 77, at \*2 (Mass. App. Div. 2011).

127. *Penny Point Park Apartments v. Barnes*, No. LT-5234-06, 2007 WL 3289133, at \*1 (N.J. Super. Ct. App. Div. Nov. 8, 2007).

128. *Armstrong v. Archives, L.L.C.*, 46 A.D.3d 465, 465 (N.Y. App. Div. 2007) (remanding for a determination of whether the noise coming from outside tenant's apartment was "so excessive that [the tenant was] deprived of the essential functions that a residence is supposed to provide:") (citation omitted).

129. *Upper East Lease Assocs., LLC v. Cannon*, 924 N.Y.S.2d 312 (N.Y. Dist. Ct. 2011); *Poyck v. Bryant*, 820 N.Y.S.2d 774 (N.Y. Civ. Ct. 2006).

130. *Cortes v. Clinton Hous. Auth.*, 27 Mass.L.Rptr. 465, at \*1 (Mass. Super. Ct. 2010) (emphasis omitted) (quoting *Doe v. New Bedford Hous. Auth.*, 630 N.E.2d 248, 253-54 (Mass. 1994)).

#### 4. *Conditions that Do Not Breach the Warranty of Habitability*

Certainly, not every less-than-perfect condition on leased premises gives rise to a valid claim for breach of the implied warranty of habitability. Conditions that are considered amenities or merely impact the aesthetics of the premises will not constitute a breach.<sup>131</sup> Attempting to reconcile these cases is problematic because, just as every leasehold is unique, every claim for breach of the implied warranty is distinct. Generalities in this regard can be difficult at best and deceptive at worst. It is not just the nature of the condition itself that determines whether there is a breach; it is also its severity. In other words, while a recurring or constant problem with mold will likely trigger a breach of the warranty, a singular occurrence that is quickly remedied by the landlord may not.<sup>132</sup> However, there are cases that demonstrate the types of claims that are considered to be beyond the outer perimeter of the warranty. For example, Professor Moskowitz found that early courts were unwilling to find a breach of the implied warranty as a result of leaky water faucets, cracks in walls, unpainted walls, and defective venetian blinds.<sup>133</sup>

More recent cases have a similar theme when finding a tenant's claim did not rise to the level of a breach of the implied warranty.<sup>134</sup> As noted previously, the majority of the time tenants are not successful arguing for breach when the condition complained of occurs outside the leased premises or is a defect not associated with the leased premises.<sup>135</sup> The Vermont Supreme Court, a leading court in adopting the implied warranty of habitability, was recently faced with the question of whether a landlord breached the warranty when a tenant's car was damaged after snow and ice fell from the

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131. *Hammie v. Reddick*, No. NNHCV116022445S, 2012 WL 5200910, at \*9 (Conn. Super. Ct. Oct. 1, 2012) (stating that the "passage to the backdoor, although rendered somewhat inconvenient and not presenting an aesthetically pleasing sight" did not breach code obligation to provide safe means of ingress and egress).

132. *AvalonBay Cmty., Inc. v. Hamilton*, 26 Mass.L.Rptr. 436, at \*5 (Mass. Super. Ct. 2010).

133. Moskowitz, *supra* note 97, at 1455–63.

134. The tenant has the burden to bring forth evidence sufficient to demonstrate a breach of the implied warranty. Mere allegations—even if sufficient if proven—are not enough. *Adams v. Apeland*, No. 382230-0-II, 2009 WL 4047868, at \*6 (Wash. Ct. App. 2009) (“[T]he [tenants] did not provide any evidence sufficient to support their claim that the lake water was contaminated. There is no evidence supporting the allegation that the water system at the property”) *inter alia* impaired the tenants’ “health or safety”) (quoting WASH. REV. CODE ANN. § 59.18.060 (West 2013); *Baldwin Merrick Assocs. v. Relles*, 867 N.Y.S.2d 372 (N.Y. Dist. Ct. 2008) (tenant testimony alone was not sufficient to establish breach for roach infestation)).

135. See *Pocasset Mobile Home Park, LLC v. Carvalho*, 2011 Mass. App. Div. 77, at \*2 (Mass. App. Div. 2011); *Penny Point Park Apartments v. Barnes*, No. LT-5234-06, 2007 WL 3289133, at \*1 (N.J. Super. Ct. App. Div. Nov. 8, 2007).

residence onto her parked car.<sup>136</sup> Stating that the warranty of habitability has “been limited to circumstances of . . . failures to meet personal safety and health standards for tenant occupation of the premises,” the court held that the tenant’s claim did not involve a “compromise to tenant’s personal health and safety . . . unrelated to the landlord’s implied or statutory guarantee of premises ‘safe, clean and fit for human habitation.’”<sup>137</sup> The Michigan Supreme Court ruled in a similar fashion with regard to a tenant who fractured her ankle walking on 1-2 inches of accumulated snow in the parking lot of her apartment complex.<sup>138</sup> The court held that the parking lot was not part of the “premises” for purposes of the warranty of habitability.<sup>139</sup> Similarly, courts have been hesitant to find a breach when the claimed violation is the result of actions by third-parties. For example, where the tenant alleged that harassment by other tenants was a breach of the implied warranty, the court held that the allegations did not rise to the level of the type of mandated obligations under the warranty—such as “hot or cold water, heat, light . . . .”<sup>140</sup> Similarly, the New Hampshire Supreme Court denied a tenant’s claim for breach of warranty based on criminal assault by the tenant’s neighbor: “the warranty of habitability implied in residential lease agreements protects tenants against structural defect, but does not require landlord so take affirmative measures to provide security against criminal attack.”<sup>141</sup>

At times a finding that the tenant has not established a breach can seem arbitrary and based on how the court frames the alleged defect. For example, in a New Jersey case tenants faced water infiltration into the basement of their premises requiring them to move their personal property out of the way.<sup>142</sup> The landlord repaired the problem in a timely manner, but the tenants sought breach of the implied warranty based on the “massive amounts of inconvenience” they suffered in having to move their property and in having to wear galoshes to go into the basement to do their laundry.<sup>143</sup> The court found that such “inconvenience . . . does not equate to the loss of a

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136. *Weiler v. Hooshiari*, 19 A.3d 124 (Vt. 2011).

137. *Weiler*, 19 A.3d at 127. (quoting VT. STAT. ANN. tit. 9 § 4457(a) (2013)). The cases which the court cites to give examples of the type of condition that breaches the warranty includes unsafe drinking water, broken toilet, broken septic and heat systems and leaky roof, and deteriorating walls, soiled carpet, disconnected heat and electricity, and inadequate plumbing. *Id.*

138. *Allison v. AEW Capital Mgmt. LLC*, 751 N.W. 2d 8 (Mich. 2008).

139. *Id.* at 14–15.

140. *Freda v. Phillips*, No. C–63–12 SC, 2012 WL 3569954, at \*1 (N.Y. Just. Ct. 2012). The court also noted that the tenant seemed to be the instigator of much of the conflict with the other tenants. *Id.*

141. *Ward v. Inishmaan Assocs. Ltd. P’ship*, 931 A.2d 1235,1238 (N.H. 2007) (quoting *Walls v. Oxford Mgmt. Co., Inc.*, 633 A.2d 103 (N.H. 1993) (internal quotes omitted)).

142. *Cohn v. Hinger*, 2011 WL 6820293 (N.J. Super. Ct. 2011).

143. *Id.* at \*2.

‘vital facility’ of the rental property, nor did it render the apartment unlivable during the limited period the seepage was occurring.”<sup>144</sup> This was true even though the tenants were unable to utilize the basement space while the water was present.<sup>145</sup>

It is difficult to explain why the concept of “habitability” has changed significantly within the past 40 years. Perhaps the simplest answer is that what is considered as essential facilities for a habitable residence has not evolved, even as technology has advanced. Courts may view statutes such as the URLTA—which focus on basic housing and building codes—as setting the outer limits of habitability, creating a hesitation to expand the concept beyond these statutory minimums. There are also some external social reasons why there has not been movement. First, societal priorities have changed. While at the time of the Great Society there was a belief that legislation and government intervention could eliminate substandard housing, this idea of societal responsibility has been replaced by skepticism for the effectiveness of government involvement. Secondly, the recent economic downturn has hit low-income individuals particularly hard. Not only have the types of problems normally associated with economic hard times increased—such as unemployment, foreclosures, and domestic issues<sup>146</sup>—but the downturn also pushed a number of new individuals into poverty.

While the number and needs of the poor have increased, funding for traditional methods of access to lawyers for the poor has been slashed.<sup>147</sup> This has resulted in record numbers of self-represented litigants who cannot hire a lawyer.<sup>148</sup> In fact, for the cases examined for this article, there were twice as many litigants proceeding *pro se* as were represented by legal aid

144. *Cohn*, 2011 WL 6820293 at \*7 (quoting *Chess v. Muhammad*, 430 A.2d 928, 929 (N.J. Super. Ct. 1981)).

145. *Id.*

146. LEGAL SERVICES CORPORATION, DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 5 (Sept. 2009), available at [http://www.lsc.gov/pdfs/documenting\\_the\\_justice\\_gap\\_in\\_america\\_2009.pdf](http://www.lsc.gov/pdfs/documenting_the_justice_gap_in_america_2009.pdf). (“The current economic crisis, with its attendant problems of high unemployment, home foreclosures and family stress, has resulted in legal problems relating to consumer credit, housing, employment, bankruptcies, domestic violence and child support, and has pushed many families into poverty for the first time.”).

147. *Funding Cuts Expected to Result in Nearly 750 Fewer Staff Positions at LSC-Funded Programs* (Aug 15, 2012), <http://www.lsc.gov/media/press-releases/funding-cuts-expected-result-nearly-750-fewer-staff-positions-lsc-funded>.

148. Karen McGlone, *Framing the Fight for Justice*, 72 OR. STATE BAR BULL. 25, 30 (2012) (“Funding for legal aid has been slashed which, when combined with issues that mushroom in a poor economy—debt collection, foreclosures and marriage dissolution—drives more and more people to represent themselves. The responsibility for educating them about court proceedings, legal issues, and how to represent themselves increasingly falls to the underfunded courts.”).

lawyers.<sup>149</sup> Rare is the *pro se* litigant who is familiar enough with landlord-tenant law to be able to push for an expansion of the implied warranty. Furthermore, the dramatic reduction in funding to legal aid offices also decreases the likelihood of an expansion. This is a particularly unfortunate situation because legal aid lawyers were at the forefront of pressing for initial recognition of the implied warranty of habitability.<sup>150</sup> Now these lawyers, faced with more clients and decreased funding, do not have the time, resources, or institutional support to press cases for larger policy goals, such as pressing for the expansion of tenants' rights. In sum, there is very little evidence that what constitutes "habitability" has shifted over the last forty years. It has remained limited to structural and physical conditions of the premises. The fact that there has been very little variability in the *conditions* that establish a breach of the warranty of habitability leaves open the question of whether there has been any shift in the nature or understanding of the *claims* asserted that claim a breach of the duty to maintain a habitable premises.

#### IV. THE IMPACT OF THE UNIFORM RESIDENTIAL LANDLORD TENANT ACT ON THE IMPLIED WARRANTY OF HABITABILITY

Current issues surrounding the implied warranty of habitability extend beyond the scope of a landlord's habitability obligation. There is also an overarching question about how the common law implied warranty and the statutory-created implied warranty (*e.g.* the URLTA) interact. In jurisdictions where the implied warranty was adopted as a matter of common law prior to legislative action, does a common law claim continue to be viable, or has it been superseded by the legislative enactment? In jurisdictions where the legislature acted first, does a common law claim of breach exist at all?

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149. Fourteen litigants acted *pro se* and seven litigants were represented by a legal aid office. A note of caution: these numbers only represent those individuals that I could conclusively determine were represented by a legal aid lawyer or were proceeding *pro se*. Therefore, these numbers could underestimate the problem. For example, it is possible that someone acted *pro se* at the trial court level and obtained a lawyer for appeal. Those litigants would not be counted as acting *pro se*.

150. Helaine M. Barnett, *Justice for All: Are We Fulfilling the Pledge?*, 41 IDAHO L. REV. 403, 416 (2005) ("Litigation brought by legal aid lawyers during the OEO and early LSC periods created important new legal rights . . . The work of legal services lawyers also led to the prohibition of retaliatory evictions and the recognition of an implied warranty of habitability in many states."); Alan W. Houseman, *Civil Legal Assistance for Low-Income Persons: Looking Back and Looking Forward*, 29 FORDHAM URB. L.J. 1213, 1223 (2002).

### A. Arguments for Maintaining a Separate and Unique Common Law Implied Warranty of Habitability

Landlords typically take the position that a statutory implied warranty supersedes any common law rights. Consider the Washington case of *Landis & Landis Construction v. Nation*.<sup>151</sup> In that case, Landis & Landis Construction (Landis) leased a house from Nation for its crew. The day that the crew arrived, they discovered a rat infestation (an express violation of the Washington landlord-tenant act) in the house. The crew immediately moved out, refusing to risk exposure.<sup>152</sup> Landis sued Nation for the return of prepaid rent.<sup>153</sup> Nation argued that Landis should lose because she had not been given a sufficient opportunity to cure the infestation as required by the state's landlord-tenant act.<sup>154</sup> Specifically, the statute required that the landlord be given notice of the condition and at least ten days to cure the defect—and even more time than ten days if the condition is “so substantial that it is unfeasible for the landlord to remedy the defect within the time allotted.”<sup>155</sup>

The question for the court was whether the statute superseded the common law implied warranty of habitability. If it did, then Landis was not entitled to a return of the prepaid rent because it had not satisfied the notice requirements under the statute. However, if the common law implied warranty of habitability remained a valid claim, Landis's claim could stand because the common law had no requirement that the landlord be given a set amount of time to remedy the condition.

The Washington appellate court held that the landlord-tenant act did not supersede the common law remedy.<sup>156</sup> It relied on language from the Washington statute which provided tenants an option to pursue statutory rights “in addition to [the] pursuit of remedies otherwise provided him or her by law.”<sup>157</sup> The court read this language to mean that the tenant had a choice of three remedies when the landlord failed to maintain the premises: they could proceed under the lease, under the landlord-tenant act, or under the common law.<sup>158</sup> It should be noted that the court's interpretation was made somewhat easier because the Washington Supreme Court adopted the common law implied warranty *after* the legislature adopted the landlord-

151. *Landis & Landis Constr., LLC v. Nation*, 286 P.3d 979 (Wash. Ct. App. 2012).

152. *Id.* at 980–81.

153. *Id.* at 981.

154. *Id.* at 982.

155. *Id.* at 981.

156. *Id.*

157. *Landis*, 286 P.3d at 981.

158. *Id.*

tenant act.<sup>159</sup> This fact reinforced the position that the landlord-tenant act could not have superseded a common law implied warranty that did not come into existence until after the statute went into effect.<sup>160</sup>

The same issue arose under very similar facts in the Kansas case *Claus v. Deware Enterprises, LLC*.<sup>161</sup> In *Claus*, the tenant, moving to Kansas from out of state, provided a security deposit to the landlord (\$475).<sup>162</sup> Upon arriving at the rental, the tenant discovered the premises uninhabitable—inoperable door locks, defective electrical fixtures, and a cockroach infestation.<sup>163</sup> The tenant sued for return of his security deposit.<sup>164</sup> The landlord argued that the tenant forfeited the deposit by failing to give the landlord an opportunity to remedy the conditions as required by Kansas' landlord-tenant act.<sup>165</sup> The landlord argued that the act superseded any common law right that the tenant had and failure to follow the notice requirements was fatal to the tenant's claim. The Kansas court took an interesting position in resolving how the common law and statute interact.<sup>166</sup> Unlike Washington, the Kansas Supreme Court adopted a common law implied warranty prior to adoption of the statute. The court held that the landlord-tenant act "did not abrogate the holding in *Steele v. Latimer* [recognizing the implied warranty of habitability], but rather the [act] included or is augmented by the landlord's common law duty to provide a habitable premises."<sup>167</sup> This, according to the court, meant that the tenant's claim could not be separated into "breach of implied warranty of habitability" and "breach of residential landlord tenant act"—instead, the claim was simply for breach of contract.<sup>168</sup>

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159. The Residential Landlord Tenant Act went into effect in July 1973 and the Washington Supreme Court adopted the implied warranty of habitability in *Foisy v. Wyman*, 515 P.2d 160 (Wash. 1973) in October, 1973. *Landis*, 286 P.3d at 981.

160. *Id.* at 982 ("Because the act and the *Foisy* decision developed independently, 'we cannot presume that the Legislature intended the act to restrict application of the implied warranty of habitability.'") (quoting *Aspon v. Loomis*, 816 P.2d 751, 815 (Wash. Ct. App. 1991)). The court notes that there was some confusing language from cases indicating that the legislature followed the "lead" of the Washington Supreme Court in adopting the Residential Landlord Tenant Act, but points out that the statement was incorrect from a chronological standpoint. *Id.* ("The legislature may have been following a general trend in the law, but obviously the legislature was not following the lead of *Foisy*, which had not yet been decided.")

161. *Claus v. Deware Enters., L.L.C.*, 136 P.3d 964 (Kan. Ct. App. 2006).

162. *Id.* at \*1.

163. *Id.*

164. *Id.* at \*2.

165. *Id.*

166. *Id.* at \*3.

167. *Claus*, 136 P.3d 964.

168. *Id.* ("The district court was not required to separately analyze the implied warranty of habitability and the provisions of the RLTA. Rather, both were germane to the minimum housing standards which are necessarily read into the lease agreement as a contractual obligation of [the landlord].").

Therefore when evaluating a claim, the landlord-tenant act “augmented by” the common law determines the obligations of the landlord and whether a breach has occurred. Thus, it was no defense to a breach of contract claim based upon the implied warranty of habitability that the tenant failed to give the notice and time to cure required by the statute—because the common law aspect of the warranty did not require any particular notice.<sup>169</sup>

As these cases indicate, a holding that the implied warranty and the residential landlord-tenant law provide separate claims (*Landis*)<sup>170</sup> or that common law rights supplement the statutory remedy (*Claus*)<sup>171</sup> typically works to the tenant’s benefit – allowing her to bring a claim based on the common law implied warranty of habitability even when her statutory claim fails.

Another recent case finding a common law claim independent of the statutory scheme, but providing a note of caution, is *Myrah v. Campbell* from Utah.<sup>172</sup> In *Campbell* the court dismissed the tenant’s statutory claim because, although she sent emails and telephoned the landlord about the problems with her rental, she did not provide formal written notice of a defect and an opportunity to cure as required by the statute.<sup>173</sup> The court, however, recognizing a separate claim for breach of the common law warranty, allowed her common law claim to stand.<sup>174</sup> Note that the consequence of recognizing a distinct common law and statutory claim means that that failure to satisfy the statutory requirements may result in denial of damages that might be available as a matter of statute but not as a matter of common law. Therefore, in *Campbell*, the tenant was not entitled to statutory penalties for failure to return her security deposit because she failed to satisfy the statutory prerequisites. Thus, even in those jurisdictions where a common law implied warranty of habitability exists, the tenant may find herself forfeiting certain rights by relying solely on the common law implied warranty.

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169. *Id.* (“We do not read the RLTA as granting every landlord 30 days accrued rent upon entering a lease agreement.”). *See also* Pocasset Mobile Home Park, LLC v. Carvalho, No. 10-ADMS-40024, 2011 WL 1744114, \*1 (Mass. App. Ct. 2011) (requiring that tenant personally give notice to landlord in order to trigger landlord’s obligation to remedy defective sewer system “interprets the notice requirement too strictly, particularly for a large multi-unit facility.”).

170. *Landis*, 286 P.3d 979.

171. *Claus*, 136 P.3d 964.

172. *Myrah v. Campbell*, 163 P.3d 679, 683 (Utah Ct. App. 2007).

173. *Id.* The court noted that the tenant failed to properly appeal the issue of whether substantial compliance under the statute would be sufficient notice and that the argument was therefore waived.

174. *Id.* at 684 (“Because all Tenants’ counterclaims concerning habitability under the Act were dismissed by partial summary judgment, we assume that the trial court analyzed the habitability issue under the common law implied warranty of habitability.”).



## B. Arguments for Preemption of the Common Law Implied Warranty and for Rejecting Adoption of the Implied Warranty

While recognition of a separate common law cause of action may work to the benefit of the tenant, the opposite is also true—a finding that the statutory warranty preempts or supersedes the common law claim will work to the advantage of the landlord. The Vermont case of *Willard v. Parsons Hill Partnership* provides a stark example.<sup>175</sup> Although the *Willard* court ultimately held that the common law warranty continues to exist independent of the statutory claim, a vigorous dissent argued for preemption.

In *Willard*, the landlord was aware that the tenants' drinking water had been deemed unsafe and undrinkable by the state department of health for fourteen years.<sup>176</sup> Despite this knowledge, the landlord failed to take any action and did not inform the tenants. Subsequently, while doing Internet research, a tenant serendipitously discovered the unsafe nature of the water.<sup>177</sup> One group of tenants retained a lawyer who provided notice to the landlord of the unsafe drinking water. A second group of tenants did not give notice. Both groups of tenants brought suit against the landlord *inter alia* for breach of the implied warranty of habitability.<sup>178</sup>

The landlord sought to have the warranty claim dismissed, arguing that the tenants' only remedy was under Vermont's landlord-tenant act.<sup>179</sup> The trial court agreed, holding that the act codified and superseded the common law implied warranty of habitability and the tenants were required to follow the procedures set out in the act to recover.<sup>180</sup> Furthermore, because the act required notice to the landlord and an opportunity to cure, all of the tenants' claims were dismissed.<sup>181</sup> The claims of the tenants who gave notice were dismissed because they did not give the landlord a sufficient opportunity to cure the defect—the trial court strictly construing the statutory language measured the time for cure from the time that the tenants gave actual notice—and the claims of the tenants who did not give notice were dismissed because of the failure to give any notice.<sup>182</sup> The court refused to recognize

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175. *Willard v. Parsons Hill P'ship*, 882 A.2d 1213 (Vt. 2005).

176. *Id.* at 1215.

177. *Id.* at 1214.

178. *Id.* at 1215–16. The tenants sued a number of parties and settled all claims but their claim for breach of the implied warranty of habitability.

179. *Id.* at 1216.

180. *Id.* at 1216–17.

181. *Willard*, 882 A.2d at 1216–17. (“Notwithstanding the fact that defendants had received several written notices of the water problem from the state over a fourteen-year period, the trial court ruled that the [tenants] failure to give the [landlord] written notice of the alleged habitability defect pursuant to [the landlord tenant act] barred their claim.”).

182. *Id.* at 1216.

the notice provided by the state government as sufficient, holding that the express language of the statute required notice from the tenant.<sup>183</sup>

The tenants appealed. The Vermont Supreme Court recognized that the state's landlord-tenant law was enacted "partly in response" to the court's adoption of the common law implied warranty of habitability standard in *Hilder v. St. Peter*.<sup>184</sup> Therefore, the court was faced with the question: was the statute intended to supersede the common law implied warranty?<sup>185</sup>

The court approaches the question as one of statutory interpretation. What defects did the legislature intend to cover? The plain language of the statute did not distinguish between patent and latent defects. Therefore, if the court adopted a plain language approach, the statute could be read as supplanting the common law implied warranty and requiring written notice as a prerequisite to seeking remedies for breach of the implied warranty. The dissent argued for this approach.<sup>186</sup>

The landlord-tenant act was a response to and codification of the *Hilder* decision, the dissent reasoned, and should be read to abrogate the common law and set out the tenant's sole remedy for breach of the implied warranty.<sup>187</sup> Because the statute requires notice and an opportunity to cure prior to recovery, the failure to strictly satisfy these requirements is fatal to the claim.

The dissent recognized that the outcome may seem harsh to tenants (particularly in this case),<sup>188</sup> but their remedy is with the legislature and not the courts.<sup>189</sup> The job of the courts is to apply the plain language of the statute as written. After all, the landlord-tenant act was an attempt to balance the rights and interests of landlords and tenants. The fact that, "[i]n responding to concerns of landlords, the drafting committee may well have gone further than necessary to protect their legitimate interest . . . are not grounds for refusing to apply a clear legislative requirement . . . ."<sup>190</sup> In essence, this

183. *Id.* at 1217.

184. *Id.* at 1218 (citing *Hilder v. St. Peter*, 478 A.2d 202 (Vt. 1984)).

185. *Id.* at 1217 ("The principle issue is whether plaintiffs may rely on the common-law implied warranty of habitability we recognized in *Hilder v. St. Peter* . . . , or whether the common law as stated therein was preempted by the Legislature's enactment" of the state's landlord tenant act).

186. *Id.* at 1226 (Dooley, J., dissenting).

187. *Id.* at 1227 (Dooley, J., dissenting) ("By its plain meaning, the statute covers both [patent and latent conditions]. Just as explicitly, it requires the tenant to give 'actual notice of the noncompliance.'").

188. In fact, the dissent indicates that the majority's decision may have been based on "sympathetic to plaintiffs' situation" rather than legal principles. *Willard*, 882 A.2d at 1226 (Dooley, J., dissenting).

189. The dissent also notes that the tenants would have a claim under the traditional common law exception to the doctrine of caveat emptor—where the landlord fails to disclose a dangerous defect known to the landlord). *Id.* at 1228 (Dooley, J., dissenting).

190. *Id.* at 1227.

interpretation sees the procedural notice requirements of the act equally as important and substantive as the tenant remedies provision.

An alternate approach to strict construction—and the approach adopted by a majority of the Vermont court—was to interpret the statute in such a way that some claims that fall outside the statute continue to exist at common law. While acknowledging that the express language of the statute did not make any distinction between patent and latent defects, the court held that the law could be “logically understood to apply only to patent defects.”<sup>191</sup> Relying on legislative history, the court held that the legislators’ express concern was with regard to conditions unknown to the landlord, but known to the tenant.<sup>192</sup> Because the legislators did not contemplate latent defects unknown to the tenant but known to the landlord, the court held that the notice provision did not apply.<sup>193</sup> Therefore, the court held, the statutory notice and opportunity to cure requirements addressed only *patent* defects of the leasehold premises and not latent defects known to the landlord, and to hold otherwise would lead to a “patently absurd result.”<sup>194</sup>

The Vermont opinion, recognizing claims independent of the landlord-tenant act, leaves open additional, harder questions. First, and foremost, the court seems to be recognizing that, with regard to patent defects, the statutory scheme is the tenant’s sole remedy. If that is true, a tenant who reports a defect to the landlord but fails to do so in the manner required by statute (*e.g.* in writing or personally delivered), may find their claim dismissed. In addition, questions are certain to arise about the *sufficiency* of the notice—even if it is given in the form required. For example, what if the tenant provides notice to the landlord about a water leak and inadequate ventilation in the bathroom and the tenant subsequently asserts a claim for breach of the implied warranty based on mold. The tenant never gave actual notice of mold. Should the landlord be considered to have *constructive* notice of mold when the notice was provided with regard to conditions that can lead to the development of mold? To put it another way, would the tenant’s claim fail for failure to give actual notice of what he ultimately claims to be the defect (mold), or would the landlord have sufficient notice because of the conditions the tenant reported? A strict interpretation of the statute may require such claims to be rejected. A California court, applying the common law standard of breach, held that constructive notice was sufficient under these

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191. *Id.* at 1218.

192. *Id.* at 1219.

193. *Id.* at 1218 (“The statute’s notice provision is designed to ensure that a landlord is not penalized for failing to fix a problem of which the landlord had no knowledge.”).

194. *Willard*, 882 A.2d at 1219.

facts.<sup>195</sup> It is unclear how Vermont and other jurisdictions following the Vermont approach would decide the case.

Not only can the adoption of the landlord-tenant act work to the disadvantage of tenants if a court rules that the common-law right has been superseded but, unsurprisingly, the statutes also tend to negatively impact tenant rights in those jurisdictions that have not adopted a common-law warranty. Courts in these states may be hesitant to create an independent cause of action in the face of the statutory scheme. In those states, the tenant may be left to rely solely on the statutory claim and risk losing that claim by failing to strictly follow the statutory prerequisites. For example, in *Roche v. Lincoln Property Company*, the Fourth Circuit addressed a tenant claim for breach of the implied warranty of habitability applying Virginia law.<sup>196</sup> The court dismissed the tenant's claim, noting that Virginia does not recognize the implied warranty of habitability<sup>197</sup> and that the tenant failed to adequately plead a cause of action under Virginia's landlord-tenant act.<sup>198</sup>

Another example of a court refusing to enact a common law remedy after legislative action is from Idaho—*Jesse v. Lindsley*.<sup>199</sup> In *Jesse*, the tenant was injured when she fell into a sinkhole.<sup>200</sup> She asserted a claim against her landlord for both violation of the landlord-tenant act and negligence.<sup>201</sup> In Idaho, the legislature enacted a landlord-tenant law prior to the adoption of a common law warranty by the Idaho courts.<sup>202</sup> The court held that because the legislature had acted, the legislative branch had preempted the field with regard to the rights and obligations of landlords and tenants, and the court refused to adopt an implied warranty of habitability as a matter of common law and would not change or expand traditional common law rules in the area of landlord liability.<sup>203</sup> Because the tenant did not strictly comply with the notice provision of the landlord-tenant act—requiring written notice of the defect and three days to correct—she could not recover on her claim of

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195. *White v. Indian Oaks, LP*, No. B208727, 2009 WL 692739, at \*6 (Cal. Ct. App. 2009) (“[W]e conclude that the evidence creates a triable issue of material fact whether defendants’ actual notice of certain conditions in the apartment (conditions that defendants’ lease associated with mold growth) gave defendants constructive notice of the reasonable potential for mold growth in White’s apartment).

196. *Roche v. Lincoln Prop. Co.*, 175 Fed. App’x 597, 603 (4<sup>th</sup> Cir. 2006)

197. *Id.* (citing *Hutton v. Burke & Herbert Bank & Trust Co.*, 46 Va. Cir. 146, 147 (Va. Cir. Ct. 1998)).

198. *Id.* at 604 (“[B]ecause the implied warranty of habitability is not cognizable under Virginia law, and because the plaintiffs failed to assert a separate claim under the VRLTA . . . we conclude that the district court correctly granted the defendants’ motion for summary judgment.”).

199. *Jesse v. Lindsley*, 233 P.3d 1 (Idaho 2008).

200. *Id.* at 3.

201. *Id.* at 4.

202. *Id.*

203. *Id.* at 5 (citing *Worden v. Ordway*, 672 P.2d 1049, 1053 (Idaho 1983)).

breach. The court strictly construed what notice was required, finding that “[a]lthough Jesse did inform Lindsley of the defective condition a number of times, there is no allegation of her having given written notice. Thus, Jesse lacks standing to bring a claim under the statute.”<sup>204</sup>

The question of to what extent statutory implied warranties will preempt or limit the common law implied warranty will continue to be an open question that each state will have to address. The landlord lobby will see an opportunity to turn back or limit the extent of liability not by contracting what is considered “habitable”, but instead by seeking to increase the procedural hurdles a tenant must satisfy to have a valid statutory claim. This very well could be the next front in the landlord-tenant revolution (or perhaps better described as a counter-revolution).

In those jurisdictions where the court determines that the statutory implied warranty preempts the common law warranty, tenants will face additional hurdles and may find that they have a claim based on inhabitable living conditions for which there is no remedy because they failed to satisfy the conditions set out in the statute. Such a holding certainly seems consistent with the reason the implied warranty was initially adopted—to put the burden on the landlord to remedy substandard housing without being able to stand behind legal barriers. Rejection of the common law implied warranty essentially replaces the doctrine of caveat emptor with the doctrine of procedural avoidance.

In those jurisdictions where courts determine that the common law implied warranty exists as an independent claim, tenants may succeed without following the statutory procedures, which raises different concerns. Such a holding fails to recognize that landlord-tenant acts are often a compromise between various factions and contain set procedures and methods for a tenant to assert a claim. For example, the legislative warranty may require a finding by a public body of a defect before a claim for breach of the statutory warranty can be asserted.<sup>205</sup> Recognizing a separate common-law claim upsets this balance. In addition, such a holding also contradicts a primary purpose of the Uniform Residential Landlord Tenant Act, which is to provide uniformity among the states. The recognition of common law claims, which will inevitably have different standards across the country, defeats that goal.

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204. *Id.* at 5.

205. *Holsman v. Carrick*, No. HO33054, 2010 WL 1189596 (Cal Ct. App. 2010) (tenant unable to recover on statutory claim but stated a valid claim for breach of the implied warranty of habitability).

V. THE IMPLIED WARRANTY OF HABITABILITY AS A MATTER OF EQUITY  
AND NOT CONTRACT

An underlying logic in the adoption of the implied warranty of habitability was that a residential leasehold was more akin to a contractual relationship than one based in property. Early courts were able to latch onto the property doctrine by calling the essence of a lease agreement the transfer of a bundle of goods and services and not the transfer of an interest in land.<sup>206</sup> This provided two critical conceptual hooks that gave the rationale for the warranty's legitimacy. First, the ability to turn to the law of contracts and the already established doctrines that accompanied it made the transition an immediate legal foundation. As Professor Super explains, this provided a convenient, effective, and logical shortcut for courts:

The lease, as amended by the implied warranty, became a contract between landlord and tenant. As with parties to other contracts, their relationship was to be symmetrical before the law. The courts had long provided landlords with a service essential to their businesses: [such as summary eviction proceedings]. The courts would now demand that, in exchange for this extraordinary help in requiring tenants to perform their legal obligations, landlords comply with the laws on health and safety. Contract law already had a host of principles for assessing performance, handling mutual breaches, measuring damages, and so forth. This allowed the new legal regime to burst onto the scene fully formed, without the need for time-consuming articulation over series of cases that had been required to transform civil rights law and criminal procedure.<sup>207</sup>

The second hook was comparing the grant of a leasehold interest to the sale of goods. If the transfer is more like goods and services, courts reasoned, then rules that apply to goods and services should similarly be applied to leaseholds.

While using the contractual sale of goods analogy allowed courts to make the landlord-tenant relationship consistent with growing societal ex-

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206. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1074 (D.C. Cir. 1970) ("The city dweller who seeks to lease an apartment on the third floor of a tenement has little interest in the land 30 to 40 feet below, or even in the bare right to possession within the four walls of his apartment. When American city dwellers, both rich and poor, seek 'shelter' today, they seek a well-known package of goods and services – [sic] a package which includes [sic] not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance."); *see also* *Steele v. Latimer*, 521 P.2d 304, 308 (Kan. 1974); *Foisy v. Wyman*, 515 P.2d 160, 164 (Wash. 1973).

207. Super, *supra* note 1, at 401.

pectations, the actual analogy was a strained one.<sup>208</sup> Consider these differences between the sale of goods under the Uniform Commercial Code (UCC) and the landlord-tenant relationship. The common law implied warranty of habitability covered both patent and latent defects throughout the term of the lease, while under the UCC the buyer has an obligation to inspect for patent defects and the seller does not have an on-going obligation to keep the goods sold in repair.<sup>209</sup> The UCC allows for “as is” transactions while courts often hold that the implied warranty of habitability cannot be waived by contract.<sup>210</sup> With regard to remedy, the UCC requires the purchaser of defective goods to make a choice—either reject the goods or keep them and sue for damages.<sup>211</sup> The implied warranty of habitability on the other hand, allows the tenant to remain in possession of the “goods”—the leased premises—and stop paying rent.<sup>212</sup>

The point is that the relationship between the seller and purchasers of goods is fundamentally different from that of a landlord and tenant. There is an on-going relationship between the landlord and tenant that does not exist in the sale of goods.<sup>213</sup> Professor Glendon concludes that the inherent differences between the sale of goods and the lease of property means that the “implied-in-law” lease terms such as the warranty of habitability are more akin to creating a regulatory scheme under the guise of contract doctrines.<sup>214</sup> Under this regulatory scheme, the question becomes, not what did the parties agree (as it would be in a traditional contract dispute), but instead what reflects “ever-changing compromises among, and fluctuating perceptions of, the interests involved, as well as diverse views about the relationship of law to economic and social reality.”<sup>215</sup>

While courts justified the implied warranty on private-contract grounds, the underlying goal was to do more than merely allocate the rights between two private parties to a contract, but to extend the warranty for broader social objectives.<sup>216</sup> Some courts made the connection between

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208. Glendon, *supra* note 58, at 547 (“It is clear even from *Javins* that the implied warranty of habitability in residential leases has small resemblance to implied warranties in the sale of goods.”).

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.* at 548 (“A sale . . . is meant eventually to sever the seller’s connection with the goods and to make the buyer the owner. A lease establishes an ongoing relationship between lessor and lessee, which, whether characterized as a property or contractual relation, is meant to be temporary, with all rights to be reunited with the lessor at some future time.”).

214. Glendon, *supra* note 58, at 549.

215. *Id.* at 550.

216. *See* Super, *supra* note 1, at 401 (adopting the implied warranty as a matter of contract law “depend[ed] on the courts to hew fairly closely to established principles of contract

regulating landlord-tenant relationships in an effort to combat underlying societal ills explicit: “Permitting landlords to rent ‘tumbledown’ houses is at least a contributing cause of such problems as urban blight, juvenile delinquency and high property taxes for conscientious owners.”<sup>217</sup>

Adopting the warranty of habitability as a creature of contract created problems for future courts because the lease-as-goods analogy is difficult to apply in individual cases. Furthermore, if the underlying goal of the warranty is less contractual and more policy based, then courts will seek to find ways to loosen the burdens of proof required in traditional breach of contract claims because the true purpose of the warranty is to create more equity between the landlord and tenant.

So how do courts enforce equity while still maintaining a contract-based analysis? They tend to do this in two primary ways. First by engaging in a very deferential standard of review on appeal, and second by imposing a lessened burden of proof regarding damages.<sup>218</sup> The underlying presumption here is that courts utilize these methods to aid the tenant. While this is true, courts can always fall back to the contract principles—and require a higher amount of proof—when the court feels that equity is not on the tenant’s side.

#### A. Enforcing Equity Through Law: The Deferential Standard of Review

The standard of review in landlord-tenant disputes is extremely deferential. Appellate courts say that the findings of the trial court, “[will] not be disturbed unless they are so wholly insupportable as to result in a denial of justice,”<sup>219</sup> or that the trial court has “‘broad discretion’ to determine whether a particular condition is a material breach of the warranty of habitability.”<sup>220</sup> By recognizing an extremely deferential standard of review, appellate courts can find that a particular holding was within the discretion of the judge, even if there are valid arguments to challenge the court’s holding on the basis of inadequate proof—either of the breach of the implied warranty or of damages.

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law in deciding landlord-tenant disputes. Their failure to do so in practice meant that one idiosyncratic legal regime, based on notions of estates in land, would give way to another, based on current public policy preference.”)

217. *Pines*, 111 N.W.2d at 413.

218. This article is of course limited to review of appellate decisions. There are likely other methods available at the trial court level as well.

219. *Cohn v. Hinger*, No. SC-2950-10, 2011 WL 6820293, at \*4 (N.J. Super. Ct. 2011) (internal quotes omitted) (quoting *Rova Farms Resort v. Investors Ins. Co.*, 65 N.J. 474, 483–84 (1974)).

220. *Pocasset Mobile Home Park*, 2011 WL 1744114 at \*2.



If courts are focused as much on ensuring equity and balance in the landlord-tenant relationship as they are in enforcing contract rights, such deference makes sense. After all, often these claims occur in small claims courts where the tenant is more likely to appear pro se than the landlord. These judges who hear the evidence and observe the landlord and tenant have the best chance to observe their credibility and reliability.

Consider a recent New Jersey case *Cohn v. Hinger*.<sup>221</sup> The tenant lived in the premises for the entire rental period and paid rent in a timely manner. During the tenancy the landlord decided to sell the property and had an inspection performed. The inspection (“serendipitously” the court says) discovered the premises lacked proper electrical outlets, carbon monoxide detectors, and that the basement had asbestos.<sup>222</sup> During the tenancy there was also a water leak that made it difficult for the tenants to use the basement for approximately four months.<sup>223</sup> The tenant brought an action against the landlord seeking rent abatement for these conditions. The trial court seemed very skeptical of the tenant’s motives in bringing the suit, inquiring why the tenant did not put the rent into escrow and come to court sooner and commenting, “And an argument could be made, I’m not making that argument, but an argument could be made by the landlord that if the tenant was so inconvenienced, why did he pay the rent every month? He could have put it in escrow with the Court.”<sup>224</sup> Going on, the trial court says that the tenant presented “no evidence of specific damage.”<sup>225</sup> These comments indicate skepticism on the part of the trial court toward the tenant—likely based on a belief the tenant raised the “inhabitable” conditions simply to recover rent already paid on a premises that the tenants had few complaints about during the tenancy (they did complain about water intrusion into the basement).

On appeal, the New Jersey Superior Court upheld the trial court’s findings—emphasizing the great deference given to the trial judge. The court then goes on to approach the concept of “habitability”—stressing that the concept means “suitability for living purposes; the house must be occupiable. As such, not every defect or inconvenience will be deemed to constitute a breach of the covenant of habitability. The defect or problem must be such as to truly render the premises uninhabitable in the eyes of a reasonable person.”<sup>226</sup> Starting from this more stringent definition of habitability, the court had no problem holding that the tenants failed to show that any of the defects “had a significant impact on their occupancy or safety.”<sup>227</sup> This is so,

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221. 2011 WL 6820293 (N.J. Super. Ct. 2011)(internal quotes omitted).

222. *Id.* at \*1.

223. *Id.*

224. *Id.* at \*3.

225. *Id.*

226. *Id.* at \*5 (quoting *Berzito v. Gambino*, 63 N.J. 460, 469 (1973)).

227. *Cohn*, 2011 WL 6820293 at \*6.

even though it is certainly arguable that proper electrical outlets and carbon monoxide detectors are a part of the “goods and services” the tenant contracts for—particularly when the lack of those items violates housing or building codes. The court dismissed the allegation that the trial court’s comments indicated a bias against the tenant for failing to pursue remedies sooner and the requirement that the tenants show actual damages.<sup>228</sup>

Similarly in *Elder Broach Properties, Inc. v. McNeel*, the tenant rented a house from a church.<sup>229</sup> The tenant complained of mold and mildew in the home. The church had an inspector examine the problem who confirmed the presence of “severe mold” (there was also a city inspection that also found the presence of mold).<sup>230</sup> The church provided a humidifier but the tenant claimed it did not solve the problem. The tenants brought a claim for breach of the implied warranty of habitability—after they found a new home they wished to purchase. The trial court (with the appellate court affirming) found that the tenant, who they described as lacking credibility, did not establish his claim for breach of warranty.<sup>231</sup>

The *Cohn* and *McNeel* cases demonstrate a situation where the tenant arguably demonstrated sufficient conditions to establish a breach of the implied warranty, but the claims were rejected, relying on the deferential standard of review. However, this same deferential standard can work to the tenant’s advantage as well. Consider the Utah case *Myrah v. Campbell*.<sup>232</sup> The tenant brought a claim for breach of the implied warranty of habitability as a counterclaim to a suit for rent. After hearing the evidence of the property’s condition, the trial court found that the home was “uncomfortable” and “inconvenient” but that it was “certainly habitable.”<sup>233</sup> However, in the final judgment the court granted “equitable relief” and offset what the plaintiff owed to the defendant based on the uncomfortable condition of the premises. The Utah court of appeal, after citing to numerous cases discussing the “broad authority” of courts to grant equitable relief that are reviewed under an abuse of discretion standard, held that the equitable offset would not be disturbed.<sup>234</sup>

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228. *Id.* (After noting that the trial court commented on the tenant’s failure to act earlier and the failure to bring forth proof of harm caused by the conditions, the court concludes that the “decision focused almost exclusively on the fact that plaintiffs failed to demonstrate that the alleged defects had a significant effect on their occupancy or safety.”).

229. *Elder Broach Props., Inc. v. McNeel*, No. COA08-202 2008 WL 5221597 (N.C. Ct. App. Dec. 16, 2008).

230. *Id.* at \*2.

231. *Id.* at \*4.

232. 163 P.3d 679, 683 (Utah Ct. App. 2007).

233. *Id.* at 684.

234. *Id.* at 685 (“At the end of the trial, the trial court concluded that the conditions in the house were unbearable, inconvenient, and uncomfortable, but nonetheless habitable. Because the reasons for equitably offsetting payment of the last month’s rent are supported by the

The point is not that these courts reached wrong outcomes, but that these decisions are being made largely on the credibility of the parties, and are being upheld by appellate courts through reliance on a very deferential standard of review. In other words, when the equities are in favor of the tenant, the alleged defect is likely to be found to make the premises inhabitable. On the other hand, when the court is skeptical of the tenant's credibility, they have no problem adhering to a more stringent definition of "habitability" and holding in favor of the landlord. Perhaps in this area, where so many of the parties—particularly tenants—proceed *pro se*, an equity based ad hoc analysis of these claims is the best way to achieve the larger policy objective of eliminating substandard rentals and protecting the investment of legitimate landlords from tenants who are merely seeking to avoid paying rent. However, it should be acknowledged that these decisions are being made with reference to equity and not through application of contract principles.

#### B. Enforcing Equity Through Law: Proving Damages

Perhaps the area where the break from contract doctrines is most pronounced is with regard to damages. A breach of the implied warranty is a contract claim, with the underlying premise that the landlord has materially breached an implied term of the lease agreement and therefore the tenant should be excused from performing (paying rent) or should be entitled to damages.<sup>235</sup> Two basic principles of contract seem to lose their meaning when they arise in landlord-tenant disputes. First, is the rule that a party seeking to prove damages must do so with "reasonable certainty."<sup>236</sup> The second is the rule that with regard to breach of contract actions, equitable remedies are inappropriate unless legal remedies would be inadequate.<sup>237</sup>

Damages can be measured in one of two ways. The first is the diminution-of-value measure, in which the tenant can recover the difference between the property as warranted and the property in the condition that the tenant received it.<sup>238</sup> A second measure is the cost of repair or to restore the

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evidence, we conclude the trial court did not exceed its broad authority in granting equitable relief.").

235. *Cohn v. Hinger*, No. SC-2950-10, 2011 WL 6820293, at \*8 (N.J. Super. Ct. App. Div. Dec. 7, 2011) ("Generally speaking, because a breach of the implied warranty of habitability involves an injury to the tenancy—a species of real property—we look to the law of realty for guidance as to damages.").

236. RESTATEMENT (SECOND) OF CONTRACTS § 352.

237. Jeff Ferriell, UNDERSTANDING CONTRACTS § 17.03 (and accompanying notes) (2d ed. 2009).

238. *Cohn*, 2011 WL at \*8.

property to a habitable condition.<sup>239</sup> Both of these standards require the tenant to put on proof.

When considering this burden through a purely contractual lens, we would expect that the tenant would put on proof of the amount and value of damages.<sup>240</sup> However, in the landlord-tenant area there is no uniformity regarding the amount of proof of damages required from the tenant. Some courts merely require the tenant to put on evidence of the breach itself, and the court determines the amount of deduction that the tenant is entitled to. For example, in *Pocosset Mobile Home Park, LLC v. Carvalho*, a Massachusetts appellate court upheld a 25% reduction in rent for the tenant where the landlord failed to properly maintain a septic system and the plaintiff was required to endure a “horrible septic smell.”<sup>241</sup> Based solely on the tenant’s testimony related to the nature of the smell, the court determined that the tenant’s damages justified a 25% reduction in rent due.<sup>242</sup> The court held that the trial court’s holding would not be disturbed “particularly in an area such as breach of habitability where quantification is merely impossible.”<sup>243</sup>

It is surely not impossible to put on expert testimony (perhaps from a realtor or another familiar with the rental market in the area) of the value of a residence in a habitable condition, and the value of that same residence with the defect. Perhaps acquiring such evidence would be expensive or inconvenient, but it would not be impossible. In fact, *some* evidence would be expected in a traditional contract dispute. The standards applied in landlord-tenant actions make sense only when it is acknowledged that courts are not applying these standards as a matter of contract but as a matter of equity.<sup>244</sup>

An example of this is a recent case out of California *Holsman v. Carrick*.<sup>245</sup> The trial court found that the landlord breached the implied warranty of habitability and awarded the tenant \$18,600. The appellate court agreed that the implied warranty was breached, but found that there was no evidence in the record on how the damages were calculated. The court remanded the case to the trial court for a determination of damages “in an amount the court deems appropriate and supported by the evidence previously presented.”<sup>246</sup> The only evidence put forward by the tenant related to the condi-

239. *Id.*

240. 22 AM. JUR. 2d *Damages* § 703 (2012)(“Generally, the burden is upon the plaintiff, or on the party making a claim of damages, to show the fact and extent of an injury and to show the amount and value of his or her damages.”).

241. *Carvalho*, 2011 WL at \*3.

242. *Id.*

243. *Id.* at \*3.

244. *Cohn*, 2011 WL at \*6.

245. *Holsman v. Carrick*, 2010 WL 1189596 (Cal. Ct. App. 2010).

246. *Id.* at \*10.

tion of the property; there was no evidence of the value of the premises “as warranted” and the appellate court makes it clear that additional evidence would not be allowed.<sup>247</sup> Without additional evidence, the court is left to determine, based on its own conception of the value of the property what damages the tenant is entitled to. Such equitable discretion tends to make the implied warranty a legal concept in name only and not in practice.

It should not be surprising that, if equity is the guiding factor in the decision of how much proof is necessary, courts will sometimes impose the traditional contractual burden on the tenant. As one court noted: “While it may prove to be too much to ask a plaintiff in the Small Claims Section to present expert appraisal evidence to compare the rental value of the premises on the date of the inception of the lease with the rental value during the period of supposed breach of the implied warranty of habitability, we nevertheless view the present record as utterly barren of *any* evidence of valuation of damages whatsoever.”<sup>248</sup> The bottom line is that these decisions are based upon the court’s view of equity and not any consistent application of legal principles.

In sum, the adoption of the implied warranty of habitability as a creature of contract was never an easy fit. Courts have been left to determine how to deal with a doctrine where the legal rules that it implicated often worked counter to the underlying policy purpose of the rule. Courts have dealt with the issue by adopting an extremely deferential standard of review of landlord-tenant disputes. Trial courts are given a great deal of discretion to determine what breaches the obligation to provide a “habitable” premises and how much proof must be brought forward to establish damages.

## VI. CONCLUSION

It is impossible to know what the next forty years holds for the implied warranty of habitability. Over the last forty years the implied warranty has been adopted in almost all jurisdictions as a matter of common law and/or as a matter of statute. The definition of what constitutes a “habitable” residence has remained remarkably consistent over the years – with very little evolution even though society itself has changed dramatically. Courts have begun to with how to legally reconcile the common law implied warranty and the statutory warranty. As these issues are reconciled, the symmetry between the rights and obligations of landlords and tenants produced by the implied warranty very well may be challenged or even skewed toward the landlord or the tenant. If that is the case, there may be a counterrevolution to bring the relationship back into balance. Finally, courts have had to deal with the

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247. *Id.* at \*10 n.24.

248. *Cohn*, 2011 WL at \*6.

consequence of adopting the implied warranty as a matter of contract. The established contract doctrines—particularly relating to proving breach of the warranty and damages—are difficult to enforce both because they are so fact dependent and because the proof may be beyond the capacity of a tenant faced with inadequate housing to produce. This results in courts looking to principles of equity to decide landlord-tenant disputes while continuing to give lip-service to contractual doctrines.