

NOTES

Dependent Covenants in Commercial Leases: *Hindquarter Corp. v. Property Development Corp.*

I. INTRODUCTION

One of the most significant trends in modern leasing has been the application of contract law principles to an area of law heretofore governed by the law of property conveyance.¹ Contract principles are now being applied in disputes over residential leases.² Many residential leases today are based on the assumption that the tenant has contracted for a certain quality of housing.³ If that quality is less than the tenant has a right to expect, courts and legislatures have used contract law to award the tenant damages or other relief.⁴ Contract remedies have sim-

1. In common-law countries, such as England and the United States, courts traditionally have held that a lease of land is a conveyance that "vests an estate in the tenant" for a certain period of time. H. TIFFANY, *THE LAW OF REAL PROPERTY* § 87, at 134 (3d ed. 1939). The lease "conveys" a possessory estate to the lessee, hence the term "conveyancing" as applied to property lease law. 1 *AMERICAN LAW OF PROPERTY* § 3.11, at 202 (A.J. Casner ed. 1952).

The rule of *caveat emptor* applies in conveyancing law. "[A] tenant has no implied warranties that the premises are fit for his use . . . [A] party cannot rescind for the other's breach, however material, for the conveyancing rule says that covenants are independent." Stoebuck, *The Law Between Landlord and Tenant in Washington: Part I*, 49 *WASH. L. REV.* 291, 307 (1973) [hereinafter cited as Stoebuck, *Part I*]. See *infra* text accompanying notes 13-17. See also *Green v. Superior Court*, 10 Cal. 3d 616, 622-29, 517 P.2d 1168, 1171-76, 111 Cal. Rptr. 704, 707-12 (1974), for a good discussion of conveyancing laws as they apply to residential leases.

2. *E.g.*, *Sommer v. Kridel*, 74 N.J. 446, 457, 378 A.2d 767, 772 (1977) (landlord must exercise reasonable diligence to minimize damages after tenant abandons apartment).

3. *E.g.*, *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1082 (D.C. Cir.) (Washington, D.C., housing regulations imposed an implied warranty of habitability in housing leases), *cert. denied*, 400 U.S. 925 (1970); *Green v. Superior Court*, 10 Cal. 3d 616, 627, 517 P.2d 1168, 1175, 111 Cal. Rptr. 704, 711 (1974) ("public policy compels landlords to bear the primary responsibility for maintaining safe, clean and habitable housing"); *Marini v. Ireland*, 56 N.J. 130, 144, 265 A.2d 526, 534 (1970) (in residential leases, landlord should "be held to an implied covenant against latent defects, which is another manner of saying, habitability and livability fitness").

4. See *infra* notes 18-30 and accompanying text.

ilarly protected landlords against nonpaying tenants.⁵ In many cases, courts have used the doctrine of dependent covenants to find contractual remedies in residential leases.⁶

Commercial leases, however, have not been affected to the same degree by the growing dependent covenant trend. Most courts apply strict conveyancing rules to commercial leases.⁷ An oft-cited reason for not applying contract rules is that business persons bargain "at arm's length" and therefore have the knowledge and leverage to ensure that each party profits from the lease arrangement.⁸ Thus, bargaining between commercial parties should result in a classic conveyancing situation: the obligations of the landlord and tenant should be mutually exclusive, and breach of one party's covenants should not excuse a breach of the other person's promises.⁹

5. *E.g.*, Residential Landlord-Tenant Act, WASH. REV. CODE ch. 59.18 (1983). For instance, WASH. REV. CODE § 59.18.310 (1983) gives the landlord the right to collect future rents after the tenant abandons the premises (contract remedy) and the right to retake possession (conveyance remedy).

6. *E.g.*, *Foisy v. Wyman*, 83 Wash. 2d 22, 28, 515 P.2d 160, 164 (1973) (tenant's duties are dependent on landlord's performance of implied covenant to keep the premises habitable). "Dependent covenants are those which depend on the prior performance of some act or condition, and until the act or condition is performed, the covenantor is not liable to an action on his covenant." 3 G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 1115, at 377 (J.S. Grimes replacement 1980).

7. *See, e.g.*, *Arnold v. Krigbaum*, 169 Cal. 143, 145, 146 P. 423, 424 (1915) (covenant to repair and covenant to pay rent are independent absent a specific agreement to the contrary), *overruled*, *Green v. Superior Court*, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974); *Rock County Sav. & Trust Co. v. Yost's, Inc.*, 36 Wis. 2d 360, 369, 153 N.W.2d 594, 598 (1967) (court refused to reverse rule that commercial lease covenants are independent).

See also *C & J Delivery, Inc. v. Vinyard & Lee & Partners*, 647 S.W.2d 564, 568 (Mo. App. 1983). In *C & J Delivery*, the Missouri court held that the tenants could not terminate the lease when the landlord breached the covenant of first approval because promises are independent in commercial leases unless expressly made dependent. In dicta, however, the court recognized that the "modern realities of a commercial lease and the true intention of the contracting parties may mitigate in favor of . . . a wholly bilateral agreement." *Id.* at 568 n.2.

8. Arm's length bargaining is one important rationale that courts have used to limit the expansion of the doctrine of mutually dependent covenants into the commercial lease area. *Kruvant v. Sunrise Market, Inc.*, 58 N.J. 452, 456, 279 A.2d 104, 106 (1970) (because a commercial lease is "negotiated at arm's length," the covenants are not dependent), *modified*, 59 N.J. 330, 282 A.2d 746 (1971). *See* 1 AMERICAN LAW OF PROPERTY, *supra* note 1, § 3.11, at 202-03.

9. *E.g.*, *Schulman v. Vera*, 108 Cal. App. 3d 552, 561, 166 Cal. Rptr. 620, 625 (1980) (in a commercial lease, the parties "are more likely to have equal bargaining power, and, more importantly, a commercial tenant will presumably have sufficient interest in the demised premises to make needed repairs and the means to make needed repairs"); *Kruvant v. Sunrise Market, Inc.*, 58 N.J. 452, 456, 279 A.2d 104, 106 (1970) (court refused to allow contract law to govern a commercial lease because it was "negotiated at

A small but growing number of courts and commentators, however, understand that commercial tenants often deserve the protections of a contract theory that stresses dependence of covenants.¹⁰ Some courts have turned to contract law to fashion relief for commercial landlords as well, especially when tenants refuse to pay rent or to perform other agreed-upon services.¹¹ Washington courts have joined the modern trend that finds dependent covenants in commercial leases. Indeed, the Washington Supreme Court applied contract law to a commercial lease dispute in *Hindquarter Corp. v. Property Development Corp.*,¹² thus moving to the forefront of the trend. The decision has seri-

arm's length between parties of equal bargaining power"), *modified*, 59 N.J. 330, 282 A.2d 746 (1971).

10. Courts in the following states have applied dependent covenant rationales used by residential tenants to commercial lease situations: California, Massachusetts, New Jersey, and Texas. The California courts of appeal are divided and that supreme court has not ruled on an appropriate commercial lease dispute. *See Custom Parking, Inc. v. Superior Court*, 138 Cal. App. 3d 90, 187 Cal. Rptr. 674 (1982) (protection against retaliatory eviction extended to commercial tenant); *Four Seas Invest. Corp. v. International Hotel Tenants Ass'n*, 81 Cal. App. 3d 604, 146 Cal. Rptr. 531 (1978) (in dicta the court said that some commercial tenants deserved the same protection against retaliatory eviction as residential tenants); *Groh v. Kover's Bull Pen, Inc.*, 221 Cal. App. 2d 611, 34 Cal. Rptr. 637 (1963) (covenant to repair went to the consideration for the lease and thus the tenant could refuse to pay rent). *But see Schulman v. Vera*, 108 Cal. App. 3d 552, 166 Cal. Rptr. 620 (1980) (covenant to repair, though express, was not dependent on duty to pay rent in a commercial setting); *Charles E. Burt, Inc. v. Seven Grand Corp.*, 340 Mass. 124, 163 N.E.2d 4 (1959) (constructive eviction when the landlord failed to provide electricity and elevator service); *Reste Realty Corp. v. Cooper*, 53 N.J. 444, 251 A.2d 268 (1969) (commercial tenant was constructively evicted by periodic flooding within the control of the landlord); *Demirci v. Burns*, 124 N.J. Super. 274, 306 A.2d 468 (1973) (commercial tenants entitled to same defenses as residential tenants when landlord neglected to maintain premises); *Ingram v. Fred*, 210 S.W. 298 (Tex. Civ. App. 1918) (tenant allowed to break lease when roof leaked severely because building was unlivable). *See also* RESTATEMENT (SECOND) OF PROPERTY § 5.1 reporter's note 2, at 176 (1977) ("The Reporter is of the opinion that the rules of implied warranty of habitability should be extended to nonresidential property. The small commercial tenant particularly needs its protection.").

See infra note 55 and accompanying text for a list of cases in which an option to renew the lease has been made impliedly dependent upon compliance with the tenant's covenants. *See infra* notes 62-63 and accompanying text for a discussion of material inducement as a rationale for using contract rules to determine commercial lease disputes.

11. *E.g.*, *Dave Herstein Co. v. Columbia Pictures Corp.*, 157 N.Y.S.2d 130, 132 (Sup. Ct., Spec. Term 1956) (payment of rent is a condition precedent to enforcement of covenant of quiet enjoyment), *aff'd*, 4 N.Y.2d 117, 149 N.E.2d 328, 172 N.Y.S.2d 808 (1958); *Silken v. Farrell*, 281 A.D. 718, 718, 118 N.Y.S.2d 808, 808 (1952) (breach of quiet enjoyment suit not allowed because tenant was in tax arrears), *aff'd*, 306 N.Y. 585, 115 N.E.2d 686 (1953).

12. 95 Wash. 2d 809, 631 P.2d 923 (1981) (en banc). *See infra* notes 41-52 and accompanying text.

ous implications for those who draft and enforce nonresidential leases in Washington. Following *Hindquarter*, Washington courts will be increasingly receptive to claims that nonresidential lease provisions are mutually dependent, even to the extent that courts will find dependent covenants implied in commercial lease agreements.

This Note demonstrates that the Washington Supreme Court correctly applied contract principles to the *Hindquarter* lease dispute. The Note first reviews the historical development of dependent covenants in both residential and commercial contexts. After setting out this important background information, the Note examines *Hindquarter* and the three factors that influenced the Washington Supreme Court in following the dependent covenants trend: (1) material inducements to execute the lease; (2) the intent of the parties; and (3) equity and policy considerations. The Note concludes that, even though the landlord prevailed in *Hindquarter*, commercial tenants stand to gain most from the supreme court's decision.

II. HISTORICAL APPLICATION OF DEPENDENT COVENANT ARGUMENTS

Under English common law, lease agreements involved an exchange of independent promises.¹³ The breach of one party's promises did not excuse the other party's nonperformance unless the lease contained express conditions allowing nonperformance.¹⁴ Whether express or implied, the two covenants invariably present in any lease were the tenant's duty to pay some kind of rent and the landlord's promise not to interfere with the tenant's quiet enjoyment of the leased property.¹⁵ A feudal tenant could not be ejected for nonpayment of rent unless the lease

13. Stoebuck, *Part I, supra* note 1, at 307 ("Traditionally English and American courts have said conveyancing rules control . . . [and] a tenant has no implied warranties that the premises are fit for his use.").

14. Siegel, *Is the Modern Lease a Contract or a Conveyance? A Historical Inquiry*, 52 J. URB. L. 649, 663 (1975) ("Absent facts or written expressions indicating a contrary intention, lease covenants are generally construed as independent obligations . . ."). See generally *Green v. Superior Court*, 10 Cal. 3d 616, 622-29, 517 P.2d 1168, 1171-76, 111 Cal. Rptr. 704, 707-12 (1974) (extensive discussion of the history of lease law).

15. Love, *Landlord's Liability for Defective Premises: Caveat Lessee, Negligence, or Strict Liability?*, 1975 WIS. L. REV. 19, 32. "There were two implied covenants in any lease: the landlord's covenant to keep the tenant in peaceful possession . . . and the tenant's covenant to pay the rent. In the absence of a provision making them conditional, these covenants were deemed to be independent of each other." *Id.*

specifically so provided.¹⁶ Not until the early 1800s did English statutes permit ejectment for failure to pay rent.¹⁷

American courts followed the English common law until the twentieth century, when they began to find express or implied dependent covenants in residential leases.¹⁸ The impetus stemmed in part from housing codes brought about by changes in public policy.¹⁹ Residential tenants successfully argued that a warranty of habitability could be inferred from the standards set forth in local housing codes.²⁰ In the typical case, the landlord tried to evict the tenant for nonpayment of rent, and the tenant countered that the apartment's condition violated the local housing code.²¹

Even in the absence of an express housing code, many courts have recently held that a residential tenant may be relieved of the promise to pay rent if the landlord has breached an *implied* warranty of habitability.²² The successful tenant

16. McGovern, *Dependent Promises in the History of Leases and Other Contracts*, 52 TUL. L. REV. 659, 665 (1978).

17. *Id.* The remedy is limited to situations in which the tenant abandoned the property. In England today a landlord may not evict a nonpaying tenant who is still in possession unless the lease specifically gives the landlord that remedy. *Id.*

18. *E.g.*, *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1078 (D.C. Cir.) ("today's urban tenants . . . are interested, not in the land, but solely in 'a house suitable for occupation'"), *cert. denied*, 400 U.S. 925 (1970); *Green v. Superior Court*, 10 Cal. 3d 616, 640, 517 P.2d 1168, 1184, 111 Cal. Rptr. 704, 720 (1974) ("outworn" common-law doctrines must give way to new interpretations reflecting modern society's values and ethics); *Foisy v. Wyman*, 83 Wash. 2d 22, 28, 515 P.2d 160, 164 (1973) ("There can be little justification for following a rule that was developed for an agrarian society and has failed to keep pace with modern day realities."); *Pines v. Persson*, 14 Wis. 2d 590, 596, 111 N.W.2d 409, 412-13 (1961) ("To follow the old rule of no implied warranty of habitability in leases would . . . be inconsistent with the current legislative policy . . ."). One commentator has noted that "[c]ourts adopting the implied warranty of habitability have emphasized that the factual assumptions underlying the original common law of landlord-tenant relations have long ceased to exist." Love, *supra* note 15, at 98.

19. Hicks, *The Contractual Nature of Real Property Leases*, 24 BAYLOR L. REV. 443, 465 (1972).

20. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1082 (D.C. Cir.) (D.C. housing code implied that landlord would keep premises fit for occupation), *cert. denied*, 400 U.S. 925 (1970); *Foisy v. Wyman*, 83 Wash. 2d 22, 31, 515 P.2d 160, 166 (1973) (trial court erroneously excluded evidence showing apartment building violated Seattle housing codes; though not conclusive, such evidence would have helped build a case for uninhabitability). Courts in New York and Hawaii have similarly ruled that a housing code may be used to help demonstrate dependent covenants. See *Lund v. MacArthur*, 51 Hawaii 473, 462 P.2d 482 (1969); *Amanuensis, Ltd. v. Brown*, 65 Misc. 2d 15, 318 N.Y.S.2d 11 (N.Y. Civ. Ct. 1971).

21. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1082 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); *Foisy v. Wyman*, 83 Wash. 2d 22, 31, 515 P.2d 160, 166 (1973).

22. *E.g.*, *Marini v. Ireland*, 56 N.J. 130, 144, 265 A.2d 526, 534 (1970) (in which the

must prove that the defects were so substantial that they amounted to a breach of the landlord's duty to provide habitable premises. Some examples of substantial defects include lack of heat, faulty plumbing, vermin infestation, or other major health and safety defects.²³

Until 1973 Washington courts generally held that there was no implied warranty of fitness in either residential or commercial leased property.²⁴ In that year, both the legislature and the supreme court spoke in favor of residential tenants' rights to habitable premises. The Residential Landlord-Tenant Act²⁵ modified traditional conveyancing law to give tenants more protection. Within a few months of the Act, the supreme court held in *Foisy v. Wyman*²⁶ that there was also a state common-law warranty of habitability for residential tenants.²⁷ The tenant in

court held that it is fair to make the landlord responsible for renting and maintaining habitable premises; *Academy Spires, Inc. v. Brown*, 111 N.J. Super. 477, 482, 268 A.2d 556, 559 (1970) ("In a modern society one cannot be expected to live in a multi-storied apartment building without heat, hot water, garbage disposal, or elevator service. Failure to supply such things is a breach of the implied covenant of habitability."); *Foisy v. Wyman*, 83 Wash. 2d 22, 28, 515 P.2d 160, 164 (1973) ("there is an implied warranty of habitability and breach of this warranty constitutes a defense in an unlawful detainer action").

23. *E.g.*, *Green v. Superior Court*, 10 Cal. 3d 616, 621, 517 P.2d 1168, 1170, 111 Cal. Rptr. 704, 706 (1974) (major defects included faulty wiring, defective appliances, insufficient heat, and vermin infestation); *Marini v. Ireland*, 56 N.J. 130, 134, 265 A.2d 526, 534-35 (1970) (apartment had faulty plumbing); *Pines v. Persson*, 14 Wis. 2d 590, 593, 111 N.W.2d 409, 411 (1961) (students rented apartment that had structural and health defects).

24. *Stoebeck, Part I, supra* note 1, at 342. *See, e.g.*, *Penney v. Pederson*, 146 Wash. 31, 33, 261 P. 636, 637 (1927) (no implied warranty of safety or fitness of premises); *McGinnis v. Keylon*, 135 Wash. 588, 591, 238 P. 631, 632 (1925) ("in the absence of an express contract to the contrary, a tenant takes the demised premises in the condition in which he finds them, and . . . there is no implied warranty"). *But cf.* *Washington Chocolate Co. v. Kent*, 28 Wash. 2d 448, 452, 183 P.2d 514, 516 (1947). In *Washington Chocolate Co.*, chocolate stored in a landlord's warehouse that was contaminated by rats was condemned and seized by health officials. The tenant successfully claimed constructive eviction for the seizure and recovered damages. The court held that "[i]n all tenancies there is an implied covenant of quiet enjoyment." *Id.*

25. WASH. REV. CODE ch. 59.18 (1983). Many provisions of the Act gave tenants rights they previously did not have. *See, e.g.*, WASH. REV. CODE § 59.18.060 (1983) (the right to habitable premises); WASH. REV. CODE § 59.18.290 (1983) (the right to claim damages or to terminate if the landlord removes the tenant from possession); WASH. REV. CODE § 59.18.300 (1983) (the right to assert remedies without first vacating if the landlord cuts off utilities).

26. 83 Wash. 2d 22, 28, 515 P.2d 160, 164 (1973).

27. "The value of the lease . . . is that it gives the tenant a place to live, and he expects not just space but a dwelling that protects him from the elements . . . without subjecting him to health hazards." *Id.* at 27, 515 P.2d at 164.

Foisy knowingly rented run-down premises at a greatly reduced monthly rental. When the landlord later brought an unlawful detainer action for nonpayment of rent, the tenant defended by claiming that the landlord violated an implied warranty of habitability by renting dilapidated premises.²⁸ The court first traced the growing implied warranty trend in other jurisdictions²⁹ and then concluded that in Washington, too, every dwelling lease contained such a dependent covenant by implication.³⁰

By comparison, commercial tenants have not been as successful as their residential counterparts in persuading courts to accept dependent covenant theories.³¹ This has been true even when commercial tenants have offered as precedent analogous residential cases decided in the same jurisdiction.³² In several instances, the state courts that generously implied the existence of dependent covenants in residential leases have refused to imply dependent covenants in commercial leases under similar facts.³³

There have been some instances, however, in which the courts have found dependent covenants in commercial leases.³⁴

28. *Id.* at 24, 515 P.2d at 162.

29. *Id.* at 25-28, 515 P.2d at 163-65. "Throughout the United States, the old rule of caveat emptor in the leasing of premises has been undergoing judicial scrutiny." *Id.* at 25, 515 P.2d at 163.

30. *Id.* at 28, 515 P.2d at 164 ("We therefore hold that in all contracts for the renting of premises . . . there is an implied warranty of habitability . . .").

31. *See, e.g.*, *Kruvant v. Sunrise Market, Inc.*, 58 N.J. 452, 456, 279 A.2d 104, 106 (1970) (because equal commercial parties bargained at arm's length, the tenant would not be treated as a residential tenant), *modified*, 59 N.J. 330, 282 A.2d 746 (1971); *Rock County Sav. & Trust Co. v. Yost's, Inc.*, 36 Wis. 2d 360, 369, 153 N.W.2d 594, 598 (1967) (tenant had no right to terminate lease when landlord withheld consent to sublet).

32. *E.g.*, *Schulman v. Vera*, 108 Cal. App. 3d 552, 560, 166 Cal. Rptr. 620, 624 (1980) (court declined to follow ruling on residential warranty of habitability); *Yuan Kane Ing v. Levy*, 26 Ill. App. 3d 889, 891, 326 N.E.2d 51, 54 (1975) (court refused to extend previous case law protecting residential tenants).

33. *E.g.*, *Schulman v. Vera*, 108 Cal. App. 3d 552, 558-60, 166 Cal. Rptr. 620, 624-25 (1980) (previous California cases restricted to residential tenants, so the court declined to extend the doctrine of implied warranty of habitability to a commercial dispute). *See also* *Olson v. Scholes*, 17 Wash. App. 383, 393, 563 P.2d 1275, 1281 (1977) (commercial tenant not allowed to claim warranty of habitability for dog kennel); *Cherberg v. Peoples Nat'l Bank*, 15 Wash. App. 336, 345, 549 P.2d 46, 52 (1976) (commercial landlord's failure to shore up a weak outer wall was held not to breach either express or implied lease covenants; however, an independent duty to repair arose when the city government required the landlord to fix the wall in the interest of public safety and welfare), *rev'd on other grounds*, 88 Wash. 2d 595, 564 P.2d 1137 (1977).

34. *E.g.*, *Medico-Dental Bldg. Co. v. Horton & Converse*, 21 Cal. 2d 411, 422, 132 P.2d 457, 463 (1942) (en banc); *Marini v. Ireland*, 56 N.J. 130, 145, 265 A.2d 526, 534 (1970); *Reste Realty Corp. v. Cooper*, 53 N.J. 444, 455, 251 A.2d 268, 276 (1969); *Demirci*

Some commercial tenants have successfully argued that constructive eviction,³⁵ noncompetition clauses,³⁶ or inequality of bargaining position³⁷ are reasons why their duties to landlords should be dependent on fulfillment of the landlord's responsibilities. In most cases, the success of the commercial tenant has hinged upon the degree to which the commercial tenant resembles a residential tenant: the more similar the circumstances, the more willing courts have been to find dependent covenants in commercial leases.³⁸ Although tenants have usually had the most

v. Burns, 124 N.J. Super. 274, 275, 306 A.2d 468, 469 (1973).

35. Constructive eviction occurs when the tenant cannot remain on the premises because of the property's condition, rather than when the landlord takes back for his own use part or all of the leased property. *E.g.*, *Reste Realty Corp. v. Cooper*, 53 N.J. 444, 449-502, 251 A.2d 268, 270-71 (1969) (periodic flooding of jewelry wholesaler's basement office interfered with training programs and wholesale business). The *Reste* court listed other examples of constructive eviction: lack of heat, backed-up sewer line, or neighbors who used the premises for lewd purposes. *Id.* at 453, 251 A.2d at 275. *See also* *Groh v. Kover's Bull Pen, Inc.*, 221 Cal. App. 2d 611, 614, 34 Cal. Rptr. 637, 639 (1963) (tenant constructively evicted when landlord neglected to repair restaurant roof); *Charles E. Burt, Inc. v. Seven Grand Corp.*, 340 Mass. 124, 127, 163 N.E.2d 4, 6 (1959) (constructive eviction occurred when landlord failed to provide electricity and elevator service as provided in the lease); *Washington Chocolate Co. v. Kent*, 28 Wash. 2d 448, 452, 183 P.2d 514, 516 (1947) (tenant awarded damages for constructive eviction because rented warehouse was rat-infested).

36. *Medico-Dental Bldg. Co. v. Horton & Converse*, 21 Cal. 2d 411, 417-18, 132 P.2d 457, 461 (1942) (*en banc*) (when landlord allowed large medical firm on top floor to sell medicine to its patients, contrary to noncompetition clause in tenant's lease, tenant was allowed to breach the lease because continuance of the lease was dependent on the noncompetition clause); *University Club v. Deakin*, 265 Ill. 257, 260, 106 N.E. 790, 792 (1914) (jewelry store's noncompetition clause dependent on tenant's duty to pay rent); *Teodori v. Werner*, 490 Pa. 58, 60, 415 A.2d 31, 34 (1980) (jewelry store tenant in shopping center had agreement with landlord that the latter would not lease to any other jewelry stores; when another jewelry store moved in, the tenant was allowed to breach the lease because the duty to pay rent was dependent on the noncompetition covenant). *See also infra* notes 65-68 and accompanying text.

37. *E.g.*, *Kruvant v. Sunrise Market, Inc.*, 58 N.J. 452, 456, 279 A.2d 104, 106 (1970) (*in dicta*, the court agreed that some commercial tenants do not bargain at arm's length and thus may be able to use the defenses of residential tenants), *modified*, 59 N.J. 330, 282 A.2d 746 (1971); *Demirci v. Burns*, 124 N.J. Super. 274, 276, 306 A.2d 468, 469 (1973) (commercial tenants were not bargaining as equals). *But see* *Schulman v. Vera*, 108 Cal. App. 3d 552, 561, 166 Cal. Rptr. 620, 625 (1980) (court refused to extend residential tenant defenses to commercial tenant because in a commercial lease "the parties are more likely to have equal bargaining power").

38. *See, e.g.*, *Charles E. Burt, Inc. v. Seven Grand Corp.*, 340 Mass. 124, 127, 163 N.E.2d 4, 6 (1959) (tenant in large commercial office building had no control over electricity or elevator service); *Reste Realty Corp. v. Cooper*, 53 N.J. 444, 452, 251 A.2d 268, 272 (1970) (small business had no control over structural problems that caused periodic flooding of basement office and showroom); *Demirci v. Burns*, 124 N.J. Super. 274, 276, 306 A.2d 468, 469 (1973) (small tenants in commercial office building had as little control over the building's temperature as would an apartment dweller).

to gain from a dependent covenant theory of leasing, landlords, too, have argued that mutually dependent promises should be upheld.³⁹ A landlord usually rents the property with the expectation that the tenant will pay the rent on time. When the tenant fails to pay, the landlord often turns to the theory of dependent covenants and claims that the promise of quiet enjoyment need not be kept. This was the situation that the Washington State Supreme Court confronted in *Hindquarter Corp. v. Property Development Corp.*⁴⁰

III. HINDQUARTER CORP. V. PROPERTY DEVELOPMENT CORP.

Hindquarter is a reversal of the usual pattern in which the tenant seeks relief or raises a defense based on a dependent covenant theory. In *Hindquarter*, it was the landlord who defended its refusal to grant an option to renew by claiming that its promise to renew depended on the tenant's timely payment of rent.⁴¹

Tenant Hindquarter Restaurant (Hindquarter) attempted to exercise a lease renewal option for its premises in a shopping center. The landlord's assignee, Property Development Corporation (Property Development), refused to grant the renewal because the tenant was chronically late with monthly rent checks, many checks were returned for insufficient funds, and the tenant was one month in arrears at the time it tried to exercise the five-year option.⁴² The landlord had filed suit twice to obtain overdue rent. Hindquarter claimed that its obligation to pay rent was independent of the option to renew, especially since the lease did not expressly impose timely rent payment as a condition of renewal.⁴³ Property Development argued that the tenant's right to renew was "implicitly and inherently . . . con-

39. *E.g.*, *Gadsden Bowling Center, Inc. v. Frank*, 249 Ala. 435, 439, 31 So. 2d 648, 651 (1947) (tenant's timely rent payment was a condition of original lease, so tenant could not claim specific performance when landlord refused to renew because rent in arrears); *Brown v. Hoffman*, 628 P.2d 617, 621-22 (Colo. 1981) (habitual failure of tenant to pay rent justified landlord's refusal to renew lease, though he had previously agreed to renew, because renewal was dependent on timely rent payment).

40. 95 Wash. 2d 809, 631 P.2d 923 (1981).

41. *Id.* at 813-14, 631 P.2d at 925-26.

42. Hindquarter had leased the premises for ten years and had already exercised one five-year option to renew when this case arose in 1977. When Property Development refused to grant the renewal, Hindquarter asked the superior court for a declaratory judgment of its right to renew under the terms of the lease. *Id.* at 810, 631 P.2d at 924.

43. *Id.* at 811, 631 P.2d at 924.

ditioned upon its timely performance of its lease obligations.”⁴⁴

The King County Superior Court dismissed Hindquarter’s complaint, holding that the renewal right was implicitly dependent upon timely rent payment.⁴⁵ The court of appeals reversed because there was no express lease language that made renewal dependent on timely payment of rent.⁴⁶ The Washington Supreme Court reversed the intermediate court in a six-to-three decision for the landlord.⁴⁷

The Washington Supreme Court examined the lease language and found sufficient intent to tie renewal to rent.⁴⁸ Moreover, the court held that rent was an implied condition for any lease renewal because rent is the “primary consideration for any lease.”⁴⁹ Finally, the majority agreed that it would be “fundamentally unfair”⁵⁰ to force a landlord to renew its lease with an unreliable tenant. Conveyancing rules would have required the landlord to renew, since its duty to renew and Hindquarter’s duty to pay rent would have been independent.⁵¹ Under contract principles, which the court adopted, the covenants were dependent.⁵² The majority decision focused on three factors that compelled its acceptance of contract principles in a commercial lease.⁵³

44. Brief for Respondent at 12, *Hindquarter Corp. v. Property Development Corp.*, 95 Wash. 2d 809, 631 P.2d 923 (1981) (paraphrasing trial court’s conclusions of law).

45. *Hindquarter*, 95 Wash. 2d at 811, 631 P.2d at 924 (the renewal right “was implicitly and inherently dependent upon the timely payment of its rent”).

46. *Id.* The intermediate court reasoned that without an express condition precedent, the option could not be withheld because of rent arrearages. *Id.*

47. Utter, J., with Brachtenbach, C.J., Stafford, Dolliver, Hicks, and Dimmick, J.J., concurring, and Rosellini, J., dissenting, with Williams and Dore, J.J., concurring in the dissent.

48. *Hindquarter*, 95 Wash. 2d at 813-14, 631 P.2d at 925 (“the lessee’s pattern of conduct indicated, at the time of the attempted renewal, that it was *in effect* not agreeing to the terms of the option”) (emphasis in the original).

49. *Id.* at 815, 631 P.2d at 926. “[P]ayment of rent is an implied condition which must be satisfied.” *Id.* at 814, 631 P.2d at 926 (quoting *Nork v. Pacific Coast Medical Enters., Inc.*, 73 Cal. App. 3d 410, 416, 140 Cal. Rptr. 734, 737 (1977)). See also *Klepper v. Hoover*, 21 Cal. App. 3d 460, 464, 98 Cal. Rptr. 482, 484 (1971) (rent is a condition upon which the option must be exercised).

50. *Hindquarter*, 95 Wash. 2d at 814-15, 631 P.2d at 926 (citing *Gadsden Bowling Center, Inc. v. Frank*, 249 Ala. 435, 31 So. 2d 648 (1947), in which the landlord did not have to renew tenant’s lease when tenant was in serious rent arrears and had violated some express covenants regarding bowling alley fixtures).

51. Stoebuck, *Part I, supra* note 1, at 306-07. See also *supra* notes 1-2.

52. *Hindquarter*, 95 Wash. 2d at 814, 631 P.2d at 926. “The California rule, which we now adopt, is consistent with the evolving trend of applying contract, rather than conveyancing, rules to leases.” *Id.* at 814 n.2, 631 P.2d at 926 n.2.

53. See *infra* text section IV.

IV. FACTORS INFLUENCING DEPENDENT COVENANT REASONING IN *Hindquarter*

Courts have little trouble enforcing commercial lease provisions when the language expressly sets out the parties' responsibilities.⁵⁴ When the lease is silent or ambiguous on certain matters, however, the courts must look elsewhere to determine the parties' intent and the equities of the case.⁵⁵ *Hindquarter* exemplifies the modern movement that looks beyond the lease to resolve rental disputes. The *Hindquarter* court looked beyond the terms of the lease because the controversy focused on an unclear option to renew. Renewal options are often difficult to interpret because parties frequently fail to specify the conditions under which the tenant may renew the lease.⁵⁶ If the option is expressly tied to the tenant's performance of certain covenants, a breach will almost certainly foreclose the option.⁵⁷ If the option or other lease provision is couched in vague terms,⁵⁸ how-

54. See, e.g., *Wilsonian Inv. Co. v. Swope*, 180 Wash. 35, 38 P.2d 399 (1934) (lease specifically provided that refrigeration plant was the responsibility of the landlord).

55. E.g., *Toellner v. McGinnis*, 55 Wash. 430, 104 P. 641 (1909) (court looked to the parties' intent when they agreed on the lease to determine whether the landlord would buy the lessee's building at the close of the lease, and under what conditions). Courts in the following states have implied dependent covenants in options to renew: Alabama, Arkansas, California, Colorado, Louisiana, South Dakota, Texas, and Washington. See *Shell Petroleum Corp. v. Gowan*, 240 Ala. 497, 199 So. 849 (1941); *Jones v. Epstein*, 134 Ark. 505, 204 S.W. 217 (1918); *Felder v. Hall Bros.*, 151 Ark. 182, 235 S.W. 789 (1921); *Lutterloh v. Patterson*, 211 Ark. 814, 202 S.W.2d 767 (1947); *Nork v. Pacific Coast Medical Enters., Inc.*, 73 Cal. App. 3d 410, 140 Cal. Rptr. 734 (1977); *Klepper v. Hoover*, 21 Cal. App. 3d 460, 98 Cal. Rptr. 482 (1971); *Brown v. Hoffman*, 628 P.2d 617 (Colo. 1981); *Piper v. Levy*, 114 La. 544, 38 So. 448 (1905); *Skillman v. Lynch*, 74 S.D. 212, 50 N.W.2d 641 (1951); *Hillhaven, Inc. v. Care One, Inc.*, 620 S.W.2d 788 (Tex. Civ. App. 1981); *Hindquarter Corp. v. Property Dev. Corp.*, 95 Wash. 2d 809, 631 P.2d 923 (1981).

56. See, e.g., *Brown v. Hoffman*, 628 P.2d 617, 622 (Colo. 1981) (no lease language governed conditions under which tenant could renew the lease; court held that rent and renewal were dependent).

57. See, e.g., *Jones v. Epstein*, 134 Ark. 505, 511, 204 S.W. 217, 218 (1918) (court refused tenant's appeal to renew lease because tenant expressly covenanted to build and maintain a hoop milling plant and renewal was based on the original lease terms); *Behrman v. Barto*, 54 Cal. 131, 134 (1880) (tenant paid last rent installment late and thus forfeited right to renew because the renewal was based on timely performance of express covenants); *Henry v. Bruhn & Henry, Inc.*, 114 Wash. 180, 184-85, 195 P. 20, 22 (1921) (tenant violated specific covenants in farm lease, but court allowed tenant to renew lease because landlord knew about and acquiesced in the tenant's course of dealing for the five-year lease period).

58. *Murray v. Odman*, 1 Wash. 2d 481, 488-89, 96 P.2d 489, 492 (1939) (court construed ambiguity in lease language against landlord who drafted lease as to whether the rent was ground rent only or included improvements as well).

ever, or if there is no limiting language at all,⁵⁹ the courts must decide what rules will guide them as they interpret the covenants. Three factors common to contract rather than to conveyancing law have helped courts in general, and the *Hindquarter* court in particular, interpret ambiguity or silence in leases: (1) the parties' material inducements⁶⁰ to execute the lease; (2) the parties' intent, gathered from the lease language and other circumstances; and (3) equitable considerations.⁶¹

A. Material Inducements in Commercial Leases

Tenants and landlords enter into lease agreements because they hope to gain from the lease. One commentator has suggested that because commercial leases involve more bargaining than do residential leases, express covenants in commercial leases are more likely to reflect the parties' purposes in executing the lease and thus should be mutually dependent.⁶² The rationale is that the tenant or landlord would have contracted *only* if the inducement were present.⁶³

59. *E.g.*, *Darling Shop of Birmingham, Inc. v. Nelson Realty Co.*, 255 Ala. 586, 591, 52 So. 2d 211, 215 (1951) (covenant to renew not expressly tied to timely rent payment and other covenants, so court held that the covenants were independent); *Keene v. Zindorf*, 81 Wash. 152, 162-63, 142 P. 484, 488 (1914) (the covenants in the lease all related to the original lease period, but were not directly connected with the option to renew and purchase at the end of the lease; court held that failure to pay the final rent installment when due, but before the original lease ended, was sufficient compliance to preserve the tenant's right to renew); *Draper Machine Works, Inc. v. Hagberg*, 34 Wash. App. 483, 486-87, 663 P.2d 141, 143-44 (1983) (tenant claimed landlord violated implied covenant of quiet enjoyment by failing to turn over leased property at the beginning of the lease period; court held for the landlord because the tenant did not vacate in timely manner).

60. A material, or a significant, inducement is one of such importance that the tenant or landlord would not have entered into the lease without its presence. "[T]hose covenants which run to the entire consideration of a contract are mutual and dependent." *Medico-Dental Bldg. Co. v. Horton & Converse*, 21 Cal. 2d 411, 419, 132 P.2d 457, 462 (1942) (en banc). In *Medico-Dental*, the tenant drug store would not have entered into the lease without the landlords' assurance that no other druggist would be allowed to do business in the building. Thus, noncompetition was a material inducement, breach of which allowed the tenant to rescind under the dependent covenant theory. *Id.* at 419-20, 132 P.2d at 462-63. See *infra* notes 65-68.

61. See *infra* notes 62-137 and accompanying text.

62. Hicks, *supra* note 19, at 464 ("It is in this type of lease [commercial] that the view of holding only those express covenants deemed to be vital enough to go to the 'whole consideration' of the lease to be mutually dependent has worked the most satisfactorily.").

63. *Ringwood Assocs., Ltd. v. Jack's of Route 23, Inc.*, 166 N.J. Super. 36, 45, 398 A.2d 1315, 1320 (1979) (tenant allowed to rescind lease when landlord refused to permit assignment of lease because tenant would not have leased unless landlord had agreed to

1. *Tenant Inducements*

A commercial tenant may receive the benefit of implied dependent covenants when the landlord's promise is a significant inducement to the tenant.⁶⁴ One common type of material inducement for the commercial tenant is the covenant not to compete.⁶⁵ In the typical situation, the landlord promises not to lease nearby property to another business in the same specialization (a noncompetition clause).⁶⁶ When the landlord breaches a noncompetition clause, the tenant usually stops paying rent or vacates.⁶⁷ In court, the tenant must show that the landlord's breach concerned an inducement that was so important to the tenant that the tenant would not have leased the property without the inducement.⁶⁸ In addition to noncompetition clauses, other material inducements for the tenant that have been upheld by courts include: (1) the availability of assignment of the lease;⁶⁹ (2) promised building repairs;⁷⁰ and (3) sufficient resources, such as power or heat, to run the business.⁷¹ In all

permit assignment); *Pawco, Inc. v. Bergman Knitting Mills, Inc.*, 283 Pa. Super. 443, 454, 424 A.2d 891, 896-97 (1980) (court held for tenant when landlord cut energy supply to run tenant's manufacturing business because tenant would not have leased the premises without the energy supply).

64. Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C.L. REV. 503, 558 (1982) ("a commercial tenant should have the benefit of the contract doctrine of mutuality of covenants, at least where the landlord's promise in issue was a 'significant inducement to the making of the lease'").

65. A covenant not to compete is the promise to withhold competition, which is a valuable consideration. 17 C.J.S. *Contracts* § 86 (1963).

66. *See, e.g., University Club v. Deakin*, 265 Ill. 257, 260, 106 N.E. 790, 792 (1914) (tenant allowed to rescind lease when landlord breached a noncompetition clause that was a vital provision in the lease).

67. *See, e.g., Medico-Dental Bldg. Co. v. Horton & Converse*, 21 Cal. 2d 411, 417, 132 P.2d 457, 461-62 (1942) (en banc) (when landlord allowed a medical organization lessee to dispense drugs, the pharmacist tenant was justified in withholding rent and vacating because landlord had assured tenant that no other druggist would be allowed to rent space in the medical center); *Teodori v. Werner*, 490 Pa. 58, 65, 415 A.2d 31, 34 (1980) (when landlord rented shopping center space to another jeweler, tenant was justified in withholding rent because the noncompetition clause was a material inducement).

68. *Teodori v. Werner*, 490 Pa. 58, 65, 415 A.2d 31, 34 (1980).

69. *E.g., Ringwood Assocs., Ltd. v. Jack's of Route 23, Inc.*, 166 N.J. Super. 36, 45, 398 A.2d 1315, 1320 (1979) (tenant could break lease when landlord refused to allow a reasonable assignment; the ability to assign was the tenant's material inducement).

70. *E.g., Groh v. Kover's Bull Pen, Inc.*, 221 Cal. App. 2d 611, 614, 34 Cal. Rptr. 637, 639 (1963) (tenant successfully claimed constructive eviction because landlord's express agreement to maintain the restaurant roof went to the "very root" of tenant's consideration).

71. *E.g., Pawco, Inc. v. Bergman Knitting Mills*, 283 Pa. Super. 443, 447, 424 A.2d 891, 893 (1980) (lessor failed to provide sufficient oil to run steam plant, thus knitting

instances, the tenants proved that they would not have rented the premises without the inducement. The tenant's inducement in *Hindquarter* was not prominently discussed; the landlord's inducement, however, was a major factor.⁷²

2. *Landlord Inducements*

A commercial landlord's purpose for entering into a lease is invariably the rent.⁷³ The *quid pro quo* of early leases was rent in exchange for possession.⁷⁴ The tenant's duty to pay rent stemmed from the idea that rent issued both from the property itself (conveyance) and from the tenant's express covenant to pay rent (contract).⁷⁵ When the tenant does not pay the rent and cannot successfully claim a defense such as waiver or substantial compliance,⁷⁶ the courts generally have held that the nonpayment of rent is a substantial breach that justifies holding for the landlord.⁷⁷

Apart from rent, the most frequently encountered material inducements for the landlord include: (1) part of the profits from the tenant's business;⁷⁸ (2) exclusive covenants by

manufacturer tenant had a defense in an ejectment and back rent action); *Esmieu v. Hsieh*, 20 Wash. App. 455, 460, 580 P.2d 1105, 1108 (1978) (landlord's covenant to help tenant secure irrigation rights for otherwise barren land held to be impliedly dependent on tenant's duty to pay rent), *aff'd*, 92 Wash. 2d 530, 598 P.2d 1369 (1979).

72. *Hindquarter*, 95 Wash. 2d at 815, 631 P.2d at 926 ("The primary consideration for any lease is the rent to be paid and its nonpayment substantially undermines the basis for the agreement.")

73. Humbach, *The Common-Law Conception of Leasing: Mitigation, Habitability, and Dependence of Covenants*, 60 WASH. U.L.Q. 1213, 1273 (1983) ("The landlord's interest in leasing transactions is almost always purely pecuniary. Landlords are in the business of leasing for the rents that leases produce.")

74. See Love, *supra* note 15, at 32 (at least as early as the 16th century, rent was "commonly regarded as the *quid pro quo* for possession"); McGovern, *supra* note 16, at 705 (citing a case decided in 1478 involving the rule that *quid pro quo* is essential for a valid contract).

75. Glendon, *supra* note 64, at 511. *But see* Stoebuck, *The Law Between Landlord and Tenant in Washington: Part II*, 49 WASH. L. REV. 1013, 1016 (1974) [hereinafter cited as Stoebuck, *Part II*].

76. See *infra* notes 86-100 and accompanying text for a discussion of these defenses in a lease context.

77. See, e.g., *Nork v. Pacific Coast Medical Enters., Inc.*, 73 Cal. App. 3d 410, 416, 140 Cal. Rptr. 734, 737 (1977) ("payment of rent is an implied condition which must be satisfied . . . before the option can be exercised"); *Brown v. Hoffman*, 628 P.2d 617, 621-22 (Colo. 1981) (habitual failure to pay rent on time justified landlord's refusal to renew the lease; renewal dependent on timely rent payments).

78. *E.g.*, *Cousins Inv. Co. v. Hastings Clothing Co.*, 45 Cal. App. 2d 141, 153, 113 P.2d 878, 884 (1941) (court held that the lease did not bind the tenant to stay in business when the lease allowed the landlord to collect rent and a percentage of profits from

franchises to purchase only distributor's products;⁷⁹ and (3) royalties, especially in leases of oil, gas, and mineral rights.⁸⁰ The trial court implied in *Hindquarter* that rent was the landlord's inducement to lease space to Hindquarter.⁸¹ Property Development "simply would not have entered into the original lease agreement [if it had been] able to anticipate the indifferent performance by The Hindquarter of its lease obligations."⁸² The Washington Supreme Court agreed that "[t]he primary consideration for any lease is the rent to be paid and its nonpayment substantially undermines the basis for the agreement."⁸³ Because Hindquarter had repeatedly breached the express covenant to pay rent contained in section 7.1(a) of the lease,⁸⁴ the landlord could infer that Hindquarter could not or would not comply with the terms of the option, which were to be the same as those in effect at the time the option was exercised.⁸⁵

3. *Defenses to Breach of a Material Inducement*

Hindquarter had at least one defense to Property Development's charge that frequent breach of the agreement to pay rent defeated the restaurant's right to renew.⁸⁶ Contract law provides the breaching party with several defenses,⁸⁷ some of which have

the tenant's clothier company).

79. *E.g.*, *Bill Wolf Petroleum Corp. v. Chock Full of Power Gasoline Corp.*, 70 Misc. 2d 314, 318, 333 N.Y.S.2d 472, 478-79 (N.Y. Sup. Ct. 1972). In *Bill Wolf*, the oil distributor had an implied, rather than an express, provision in the lease that the service station owner would buy all of his petroleum products from the distributor. The court held that, since the covenant did not run with the land, the subsequent service station owner was not bound by the promise. *Id.* at 319, 333 N.Y.S.2d at 478-79.

80. *E.g.*, *Ashland Oil and Refining Co. v. Cities Serv. Gas Co.*, 462 F.2d 204 (10th Cir. 1972) (natural gas); *Taylor v. Kingman Feldspar Co.*, 41 Ariz. 376, 18 P.2d 649 (1933) (minerals-feldspar); *Darr v. Eldridge*, 66 N.M. 260, 346 P.2d 1041 (1959) (implied covenant to market mineral water). See also Pressler, *Implied Covenants in Oil and Gas Leases*, 18 Miss. L.J. 402, 405 (1947) ("the main consideration to the lessor for his lease is the royalty which he expects to receive from its development").

81. *Hindquarter*, 95 Wash. 2d at 811, 631 P.2d at 924.

82. Brief of Respondent at 37, *Hindquarter Corp. v. Property Dev. Corp.*, 95 Wash. 2d 809, 631 P.2d 923 (1981).

83. *Hindquarter*, 95 Wash. 2d at 815, 631 P.2d at 926.

84. *Id.* at 813, 631 P.2d at 926.

85. *Id.* at 813-14, 631 P.2d at 925-26.

86. *Id.* at 811, 631 P.2d at 924.

87. See, *e.g.*, RESTATEMENT (SECOND) OF CONTRACTS (1979). Several chapters are devoted to breaches and defenses, including the following: Chapter 6—Mistake; Chapter 7—Misrepresentation; Chapter 8—Unenforceability on Grounds of Public Policy; Chapter 10—Performance and Non-Performance; and Chapter 11—Impracticality of Performance and Frustration of Purpose.

followed the contract doctrine of material inducement into the field of leasing. These defenses include substantial compliance,⁸⁸ breach after the other party's first material breach,⁸⁹ and waiver⁹⁰ of certain contract duties.⁹¹

The most obvious defense to a claim of material breach is that the breaching party in fact substantially complied with its promises: that the breach was minor and did not thwart the other's material inducement.⁹² For instance, a tenant who is one or two months behind in rent at the end of a long lease with no other history of breach may have substantially complied with the lease, and should not be prevented from renewing the lease.⁹³

Another defense is that the other party breached the lease first.⁹⁴ Typically, this charge arises in the form of a counterclaim that the plaintiff committed the first serious breach, thus justifying the defendant's subsequent breach. The court must then determine which party committed the first breach that was serious enough to effect a material inducement. Once the court determines who made the first material breach, the other party generally prevails.⁹⁵

A third defense to a charge of breaching a material inducement is waiver of the covenant. Either the landlord or the tenant may waive the right to object to the other's breach. The waiving

88. *E.g.*, *Keene v. Zindorf*, 81 Wash. 152, 162-63, 142 P. 484, 488 (1914) (payment before the end of the lease was sufficient compliance to preserve the option to renew, even though the lease stated that payment was due earlier).

89. *E.g.*, *Esmieu v. Hsieh*, 20 Wash. App. 455, 460, 580 P.2d 1105, 1109 (1978) (breach of landlord's covenant to provide irrigation water to dry land excused the tenant's duty to pay rent), *aff'd*, 92 Wash. 2d 530, 598 P.2d 1369 (1979).

90. A waiver is the "relinquishment, intentionally, of a known right by the possessor of that right." *Lee v. Casualty Co. of Am.*, 90 Conn. 202, 209, 96 A. 952, 955 (1916).

91. *E.g.*, *Henry v. Bruhn & Henry, Inc.*, 114 Wash. 180, 185, 195 P. 20, 22 (1921) (landlord acquiesced for entire five-year lease in tenant's late payments).

92. *See, e.g.*, *Kaliterna v. Wright*, 94 Cal. App. 2d 926, 936, 212 P.2d 32, 37-38 (1949) (landlord waived tenant's minor breaches of the covenants and so could not later refuse to renew on their account), *overruled on other grounds*, *State Farm Mut. Ins. Co. v. Superior Court*, 47 Cal. 2d 428, 304 P.2d 13 (1956). *See also* *Greenfield & Margolies, An Implied Warranty of Fitness in Nonresidential Leases*, 45 ALB. L. REV. 855, 876 (1981) ("dependence of covenants in leases should be tempered by the doctrine of substantial compliance"; thus, a minor breach at the end of a long lease should not work a forfeiture).

93. *E.g.*, *Keene v. Zindorf*, 81 Wash. 152, 161, 142 P. 484, 486 (1914).

94. *E.g.*, *Esmieu v. Hsieh*, 20 Wash. App. 455, 460, 580 P.2d 1105, 1109 (1978) (landlord breached first by not ensuring that the dry farmland had access to irrigation; tenant's subsequent breach was justified), *aff'd*, 92 Wash. 2d 530, 598 P.2d 1369 (1979).

95. *Id.*

party may not object later to the same breach.⁹⁶ A landlord who accepts late payments on a regular basis may not, months later, suddenly object to late rent; the court will often hold that the landlord has waived the right to object.⁹⁷ Some typical instances in which waiver has been found include regular acceptance of late rent,⁹⁸ failure to enforce a forfeiture when it occurred,⁹⁹ and failure to object within a reasonable time to some activity specifically restricted by the lease.¹⁰⁰

The tenant in *Hindquarter* tried unsuccessfully to defend itself against the charge of breaching a material inducement. The restaurant argued that Property Development had waived timely rent payments. The trial court did not find a waiver, and a majority of the supreme court accepted that finding.¹⁰¹ Although *Hindquarter* argued that Property Development had accepted late payments before, therefore consenting to tardy rents, the court found that Property Development had not suffered *Hindquarter's* delays willingly or passively. In fact, twice before the landlord had sent *Hindquarter* ten-day notices to pay rent or to vacate, and had initiated summary judgment suits to collect rent.¹⁰² The supreme court said that these facts set the case apart from other Washington cases, such as *Henry v. Bruhn*

96. *E.g.*, *Draper Machine Works, Inc. v. Hagberg*, 34 Wash. App. 483, 486-87, 663 P.2d 141, 143 (1983) (tenant waived right to declare constructive eviction because he waited three months to claim it).

97. *E.g.*, *Henry v. Bruhn & Henry, Inc.*, 114 Wash. 180, 185, 195 P. 20, 22 (1921) (tenant was allowed to renew lease even though he had violated specific covenants because the landlord acquiesced in the tenant's habitual delay in paying rent).

98. *E.g.*, *Lenci v. Owner*, 30 Wash. App. 800, 803, 638 P.2d 598, 600 (1981) (court said that a landlord's acceptance of late rent did not waive his express right to refuse tenant's subsequent request to renew the lease); *Kaufman Bros. Constr., Inc. v. Estate of Olney*, 29 Wash. App. 296, 300, 628 P.2d 838, 841 (1981) (although failure to pay rent may have given the landlord the opportunity to terminate the lease, he first had to declare his intent to do so; otherwise, the breach may be considered waived).

99. *E.g.*, *Swift v. Occidental Mining & Petroleum Co.*, 141 Cal. 161, 173, 74 P. 700, 704 (1903) (landlord failed to object to tenant's work stoppage in notation of tenant's promise to drill diligently for oil during the entirety of the lease).

100. *E.g.*, *Saxeny v. Panis*, 239 Mass. 207, 210, 131 N.E. 331, 333 (1921) (acceptance of late rent, if accepted with knowledge, waives breach). *But see Skillman v. Lynch*, 74 S.D. 212, 217, 50 N.W.2d 641, 643 (1951) (waiver not declared when landlord overlooked gambling activities for a while, then enforced lease restriction when the neighbors complained following a police raid).

101. *Hindquarter*, 95 Wash. 2d at 812, 631 P.2d at 925. Section 10.3 of the lease stated that no consent or waiver by landlord to any tenant breach waived any other tenant duty.

102. Brief of Respondent at 45, *Hindquarter Corp. v. Property Dev. Corp.*, 95 Wash. 2d 809, 631 P.2d 923 (1981).

& Henry, Inc.,¹⁰³ in which acceptance of late rent effected a waiver. The intent to waive was proved in *Henry* because the landlord never filed suit to collect rent, as did the landlord in *Hindquarter*.¹⁰⁴

The presence of material inducements will influence the court as it decides whether a lease contained dependent covenants. Rent was found to be Property Development's material inducement, and that fact helped lead to the court's finding of dependent covenants. Although defenses such as waiver or immateriality of breach may excuse the breach, such defenses failed in *Hindquarter*, and the dependent covenant theory prevailed. Another factor that courts must consider as they seek to determine whether dependent covenants exist is the parties' intent—what each meant the lease to convey.

B. Determining Parties' Intent in Order to Find Dependent Covenants

In addition to material inducements, the *Hindquarter* court examined the parties' intent to determine whether the lease contained dependent covenants. When the lease language is unclear on a disputed issue, courts must look elsewhere to decide whether the parties intended their covenants to be dependent.¹⁰⁵ The *Hindquarter* court relied on the reasoning of an earlier Washington court in *Toellner v. McGinnis*¹⁰⁶ to find evidence of intent.¹⁰⁷ In *Toellner*, the tenants demanded payment for a building that they erected on the landlord's property, payment that the landlord expressly agreed to make at the end of the lease term. The tenants had agreed to pay certain rents, but because they did not pay any rent for a significant part of the

103. 114 Wash. 180, 195 P. 20 (1921). The tenant's default in *Henry* was cured before the landlord filed suit. *Id.* at 185, 195 P. at 22. *Hindquarter* was still two months in arrears at the time of trial. *Hindquarter*, 95 Wash. 2d at 812, 631 P.2d at 925.

104. 95 Wash. 2d at 815, 631 P.2d at 926.

105. See, e.g., *Murray v. Odman*, 1 Wash. 2d 481, 486, 96 P.2d 489, 492 (1939) (because both parties' interpretations were equally valid, the court adopted the interpretation of the lessee, who did not draft the lease); *Oregon-Wash. R.R. & Navigation Co. v. Eastern Or. Banking Co.*, 81 Wash. 617, 622, 143 P. 154, 156 (1914) (using the *Toellner* rule of considering the whole contract, the court looked at the "four corners" of the lease to determine the parties' intent); *Esmieu v. Hsieh*, 20 Wash. App. 455, 460, 580 P.2d 1105, 1108 (1978) (the tenant had an overall written plan that included the disputed land, all of which was worthless without the promised irrigation), *aff'd*, 92 Wash. 2d 530, 598 P.2d 1369 (1979).

106. 55 Wash. 430, 104 P. 641 (1909).

107. *Hindquarter*, 95 Wash. 2d at 812-13, 631 P.2d at 925.

ten-year lease, the landlord refused to pay for the building as promised.¹⁰⁸ The trial court and the supreme court agreed that each party intended to reap benefits that depended on the other's performance.¹⁰⁹ The court's reasoning was based on the "intention of the parties and the good sense of the case, and technical words must give way to such intention."¹¹⁰

The parties' intent and the "good sense of the case" are determined by examining the existing contract language and the surrounding circumstances.¹¹¹ Often, the party who wants the covenants to be dependent will point to express lease language and argue that the express promises imply other, unstated promises that must also be dependent.¹¹² The difficulty lies in convincing the court that there is a requisite connection between the express and implied covenants that would necessarily lead to a holding that the latter covenants are also dependent. For instance, the common renewal phrase "under the same terms and conditions as those in the original lease" has led some courts to hold that nonpayment of rent will cancel the promise to allow a renewal.¹¹³ This is so because the landlord has proved that the

108. *Toellner*, 55 Wash. at 431, 104 P. at 642.

109. *Id.* at 437-38, 104 P. at 644 ("The one promise would not have been made unless the other had been undertaken. They were mutual and dependent.").

110. *Id.* at 437, 104 P. at 644 (quoting L. JONES, LANDLORD AND TENANT § 324 (1906)).

111. *Esmieu v. Hsieh*, 20 Wash. App. 455, 460, 580 P.2d 1105, 1108 (1978), *aff'd*, 92 Wash. 2d 530, 598 P.2d 1369 (1979). Although the lease did not specifically create dependent covenants, the court held that the covenant to pay rent depended on the landlord's cooperation in securing irrigation. The court applied the *Toellner* rule and looked at the whole agreement. It was evident from the tenant's plans and his actions that he depended on the landlord's promise. *Id.*

112. *E.g.*, *Gadsden Bowling Center, Inc. v. Frank*, 249 Ala. 435, 439, 31 So. 2d 648, 651 (1947) (court implied that renewal was conditioned upon express tenant covenant allowing the landlord to terminate the lease for tenant's nonperformance); *Nork v. Pacific Coast Medical Enters., Inc.*, 73 Cal. App. 3d 410, 416, 140 Cal. Rptr. 734, 737 (1977) ("payment of rent is an implied condition which must be satisfied in addition to other express covenants in the lease before the option can be exercised").

113. *E.g.*, *Brown v. Hoffman*, 628 P.2d 617, 621-22 (Colo. 1981) ("A lease . . . is to be reasonably interpreted according to the apparent intention of the parties."). The *Brown* court looked at all of the parties' writings and concluded that together they were sufficient to show the landlord's intent to renew only if the tenant had faithfully paid his rent. *Id. Contra Darling Shop of Birmingham, Inc. v. Nelson Realty Co.*, 255 Ala. 586, 591, 52 So. 2d 211, 215 (1951). In *Darling Shop*, the landlord could not produce enough evidence to persuade the Alabama high court to tie dependent express covenants to an option to renew that was not made expressly dependent on any tenant promise. The landlord claimed that the tenant was late with rent and did not keep its books in order, but the court was not persuaded to go against the general conveyancing rule that covenants are independent in a commercial lease unless expressly made dependent. *Id.*

parties' intent and the common sense of the case lead to a dependent, if implied, connection between timely rent payment and the option to renew the lease. Obviously, the landlord will have an easier time making such an argument if the tenant's actions are fairly egregious.¹¹⁴ These two pieces of evidence—the express lease language and the parties' actions—worked to the landlord's advantage in *Hindquarter*.

The *Hindquarter* court applied the *Toellner* rule of the parties' intent and the "good sense of the case"¹¹⁵ and found that there was indeed a dependent covenant that tied timely payment of rent to lease renewal.¹¹⁶ The court examined several of the lease provisions to reach this conclusion. The terms of the lease during option periods were to be the same as those in effect during the lease.¹¹⁷ The lease stated that the tenant "upon paying the rent" was to have "quiet enjoyment" throughout the lease term or until the lease was terminated.¹¹⁸ Finally, a third provision stated that rent would be promptly paid.¹¹⁹ The Washington Supreme Court concluded that these lease sections showed the landlord's intent to make renewal conditional upon timely rent payment, even though there was no express language tying rent to the option to renew.¹²⁰

The *Hindquarter* court also examined the tenant's actions to determine intent.¹²¹ Section 7.1(a) of the lease bound Hind-

114. *Gadsden Bowling Center, Inc. v. Frank*, 249 Ala. 435, 438, 31 So. 2d 648, 649-50 (1947) (tenant was so often in arrears "as to indicate a general course of conduct"); *Brown v. Hoffman*, 628 P.2d 617, 622 (Colo. 1981) ("lessee's failure to pay the required rent was intentional and willful, and was a substantial breach of the lease, which precluded the lessee's exercise of the option to renew").

115. *Toellner*, 55 Wash. at 437, 104 P. at 644.

116. *Hindquarter*, 95 Wash. 2d at 813, 631 P.2d at 925 ("Applying those [*Toellner*] principles to this case, we conclude, after reviewing the entire lease and resorting to common sense, that *Hindquarter's* chronic failure to pay rent made its option unenforceable.").

117. *Id.*, Lease § 2.2 ("The terms and conditions of this lease during said option periods shall be the same as those in effect at the time of the exercise of said options.").

118. *Id.* at 814, 631 P.2d at 926, Lease § 9.3 ("Landlord covenants that Tenant, on paying the rent . . . shall peacefully and quietly have, hold, and enjoy the leased premises.").

119. *Id.* at 813 n.1, 631 P.2d at 925-26 n.1, Lease § 7.1(a) (the tenant covenanted to "perform promptly all of the obligations of Tenant set forth in this Lease . . . and to pay when due the Minimum Fixed Rent and the Percentage Rent and all other charges, rates and other sums which by the terms of this Lease are to be paid by Tenant").

120. *Id.* at 814, 631 P.2d at 926 (the court goes on to refer to § 9.3 of the lease as yet more evidence showing the parties intended renewal to be dependent upon timely rent payments). See *supra* note 118.

121. See *supra* notes 101-02 and accompanying text.

quarter to pay rent when due. Yet Hindquarter's pattern of conduct demonstrated that it either could not or would not comply with the rental conditions.¹²² The court concluded that Hindquarter was "*in effect* not agreeing to the terms of the option."¹²³

The express language of the rental contract implied that the parties intended rent payment to be a factor in any option to renew,¹²⁴ and Hindquarter's actions indicated an intent not to abide by the express or implied covenants that tied rent payment to renewal.¹²⁵ The court also held that rent was expressly and impliedly a condition for renewal because rent is the landlord's main inducement to enter into a lease arrangement.¹²⁶ Therefore, the court concluded that there was sufficient justification to deny the tenant's claim of right to renewal. In addition to material inducement and the parties' intent, the court offered one more factor to illustrate why Hindquarter should not prevail: fundamental fairness. The court reasoned that it would have been "fundamentally unfair to require a landlord to renew a lease when rental payments are uncertain."¹²⁷ Fairness encompasses equitable and policy considerations that formed the third factor employed by the *Hindquarter* court to reach its decision.

C. *Equitable and Policy Considerations That Have Led to Dependent Covenant Decisions*

Fundamental fairness is a rationale that judges use to justify holdings that are not decided on strictly legal grounds. Fairness may be tied to a specific remedy in equity, such as rescission for fraud,¹²⁸ or fairness may involve what the *Toellner* court

122. *Hindquarter*, 95 Wash. 2d at 813-14, 631 P.2d at 925-26.

123. *Id.* (emphasis in the original) (citing *Gadsden Bowling Center, Inc. v. Frank*, 249 Ala. 435, 31 So. 2d 648 (1947)).

124. See *supra* notes 117-23 and accompanying text.

125. *Hindquarter*, 95 Wash. 2d at 813-14, 631 P.2d at 926.

126. *Id.* at 815, 631 P.2d at 926 ("The primary consideration for any lease is the rent to be paid and its nonpayment substantially undermines the basis for the agreement."). See *supra* notes 73-85 and accompanying text.

127. *Hindquarter*, 95 Wash. 2d at 814-15, 631 P.2d at 926.

128. *E.g.*, *Shell Petroleum Corp. v. Gowan*, 240 Ala. 497, 499, 199 So. 849, 850 (1941) (gas station tenants asked the court to order the landlord to renew the lease, but the tenant had defrauded the landlord on the gallonage sold per month, which relieved the landlord of his promise to renew the lease). See also RESTATEMENT (SECOND) OF CONTRACTS § 364 comment a, at 185 (1981), which provides that "the discretionary nature of equitable relief permits its denial when a variety of factors combine to make enforcement of a promise unfair." These general equitable doctrines include "unclean hands."

called "the good sense of the case"¹²⁹—the public policies that influence case law just as they influence statutes. The final explanation offered by the *Hindquarter* court for its holding was that it would have been "fundamentally unfair" to force Property Development to renew *Hindquarter's* lease when the tenant had been so desultory about fulfilling its own lease obligations.¹³⁰ The court added that the use of contract rather than conveyancing law produced "fairer" results.¹³¹ Public policy is served by holding parties to their contracts and to their expectations.

The dissent in *Hindquarter* argued that fairness should favor the tenant.¹³² Any doubt about the parties' intent and the lease language should be resolved in favor of the tenant because the landlord drafted the lease and because ambiguities are traditionally resolved in favor of the party who did not draft the contract.¹³³ The argument is solid, for the general rule in Washington has been to favor tenants over landlords in both case law and statute, at least in residential contexts.¹³⁴ The contract principles espoused by the Washington Supreme Court in *Hindquarter* will most certainly benefit more tenants than landlords, for much the same reasons that residential tenants have benefited from dependent covenant theories.¹³⁵ A primary reason why the majority in *Hindquarter* let the equities and policy concerns fall for the landlord—despite decisional precedent and despite implications for the future—was that *Hindquarter's* past acts had been so egregious as to amount to a violation of the equitable "unclean hands"¹³⁶ doctrine.

Id. See *infra* note 136.

129. *Toellner v. McGinnis*, 55 Wash. 430, 437, 104 P. 641, 644 (1909). See also RESTATEMENT (SECOND) OF CONTRACTS § 357 comment c, at 165 (1981) ("In granting relief, as well as in denying it, a court [of equity] may take into consideration the public interest.").

130. *Hindquarter*, 95 Wash. 2d at 814-15, 631 P.2d at 926.

131. *Id.* at 814 n.2, 631 P.2d at 926 n.2.

132. *Id.* at 815, 631 P.2d at 927 (Rosellini, J., dissenting).

133. *Id.* at 816, 631 P.2d at 927.

134. *Stoebuck, Part II, supra* note 75, at 1090. Washington courts have increasingly favored tenants in lease disputes. "The doctrine that leases shall be construed against the drafter, who has been the landlord in the cases, has been applied with vigor." *Id.* See also *Foisy v. Wyman*, 83 Wash. 2d 22, 515 P.2d 160 (1973), and WASH. REV. CODE ch. 59.18 (1984), both of which illustrate Washington's public policy favoring tenants over landlords.

135. See *supra* notes 18-30 and accompanying text.

136. "[W]hen the tenant comes into equity, he must do so with clean hands." *Gadsden Bowling Center, Inc. v. Frank*, 249 Ala. 435, 439, 31 So. 2d 648, 651 (1947) (tenant

The clean hands rule is useful in determining whether covenants should be dependent. In *Hindquarter*, for instance, the legal issue was whether the option to renew could be made dependent upon timely performance of seemingly unrelated express covenants concerning rent.¹³⁷ The equitable issue was whether the landlord should have to renew an unreliable tenant. The inequitable nature of *Hindquarter's* continual failure to pay rent reinforced the two legal bases that the landlord postulated (material inducement and the parties' intent). The tenant's chronic noncompliance decreased its equitable edge while at the same time emphasizing the unjustness of requiring the landlord to renew a tenant with *Hindquarter's* history of late rent and checks drawn on insufficient funds. The landlord's previous legal actions to collect rent also decreased *Hindquarter's* "edge." In the future, tenants whose behavior approaches that of *Hindquarter* will lose the equitable and public policy bias that traditionally favors tenants in this state.

Relative bargaining power is another policy rationale that deserves mention, although it was not a factor in the *Hindquarter* decision. As described earlier,¹³⁸ commercial tenants generally have not persuaded courts to analogize their situations to those of residential tenants claiming warranty of habitability or covenant of quiet enjoyment.¹³⁹ The reason courts often give for dismissing such claims by commercial tenants is that commer-

wanted the court to force the landlord to renew the lease, but the tenant was so often behind in rent that the court denied him an equitable ruling). The "unclean hands" doctrine means that any party who seeks equitable relief must not have behaved inequitably himself. See, e.g., *Häagen Dazs, Inc. v. Frusen Glädjé, Ltd.*, 493 F. Supp. 73 (S.D.N.Y. 1980) (an American ice cream manufacturer who traded on a false Scandinavian affiliation accused another of trading on a spurious connection with a Swedish ice cream enterprise; plaintiff did not enter equity with clean hands, so the court denied equitable relief). Although the *Hindquarter* court did not use the term "unclean hands," it cited a case that did—*Gadsden Bowling Center, Inc. v. Frank*, 249 Ala. 435, 439, 31 So. 2d 648, 651 (1947). The tenant's chronic failure to pay rent on time coupled with express violations of lease covenants precluded him from claiming equitable relief because his own acts were inequitable, i.e., he had unclean hands. *Id.*

137. *Hindquarter*, 95 Wash. 2d at 810, 631 P.2d at 924.

138. See *supra* notes 31-33 and accompanying text.

139. E.g., *Schulman v. Vera*, 108 Cal. App. 3d 552, 560-61, 166 Cal. Rptr. 620, 624-25 (1980). In *Schulman*, the commercial tenant tried to use the reasoning that a residential tenant had used successfully six years before in *Green v. Superior Court*, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974), a case involving implied warranty of habitability. The *Schulman* court refused to accept the analogy because the tenant was a businessman who was expected to bargain at arm's length. *Schulman*, 108 Cal. App. at 560-61, 166 Cal. Rptr. at 624-25.

cial tenants have the business acumen and economic leverage to bargain for leases that protect their interests.¹⁴⁰ In the few commercial lease actions in which courts have allowed the claim of inequality of bargaining position, the tenants have prevailed after proving that their relative power was as insignificant as that of the average residential tenant.¹⁴¹ Thus, some commercial tenants without control over needed repairs to common areas or building climate control have prevailed on the same grounds as their residential counterparts.¹⁴² Relative bargaining power may yet become a serious claim for the commercial tenant, but the burden of proof requires a substantial showing that the tenant and landlord did not bargain as equals.¹⁴³

V. CONCLUSION

Professor Stoebeck noted in his exhaustive 1974 survey that Washington courts have been "increasingly applying contract reasoning to leases, a phenomenon that might allow the dependency-independency issue to be re-examined one of these days."¹⁴⁴ That issue was indeed examined seven years later in *Hindquarter Corp. v. Property Development Corp.*¹⁴⁵ *Hindquarter* clarified the Washington Supreme Court's position regarding the use of the contract theory of mutually dependent covenants in commercial property leases. When the covenants of either party are material inducements to the lease,¹⁴⁶ then absent

140. *E.g.*, *Yuan Kane Ing v. Levy*, 26 Ill. App. 3d 889, 892, 326 N.E.2d 51, 54 (1975) (tenant real estate broker more knowledgeable about leases than his landlady, whose command of the English language was limited).

141. *E.g.*, *Reste Realty Corp. v. Cooper*, 53 N.J. 444, 452, 251 A.2d 268, 273 (1969) (commercial tenant had no way of knowing about a flooding problem before she moved in and could not fix the problem, which originated in a common area of the building); *Demirci v. Burns*, 124 N.J. Super. 274, 276, 306 A.2d 468, 469 (1973) (commercial tenants who rented small office spaces in a large office complex could assert the equitable defense that the landlord failed to provide heat or air conditioning).

142. *Demirci v. Burns*, 124 N.J. Super. 274, 276, 306 A.2d 468, 469 (1973). The plight of the small tenant in a large shopping center or mall furnishes another example of unequal bargaining power. Small tenants in shopping centers are bound by restrictive covenants that overwhelmingly favor the landlord, and the tenants have little room to bargain for individualized considerations or protections. See Pollack, *Shopping Center Leases*, 9 U. KAN. L. REV. 379 (1961); Skolnik, *Shopping Center Lease Negotiations: Some Problems of Representing Small Tenants*, 49 N.Y. St. B.J. 28 (1977).

143. See *supra* note 141.

144. Stoebeck, *Part II*, *supra* note 75, at 1040.

145. 95 Wash. 2d 809, 631 P.2d 923 (1981).

146. See *supra* notes 60-80 and accompanying text.

defenses such as waiver,¹⁴⁷ each party will be held to its promises. When the court can find that one party intended to reap benefits that depended on the performance of the other party, it will hold that the covenants are mutually dependent, even when express contract language is lacking.¹⁴⁸

Equitable as well as legal considerations favor dependent over independent covenants. This is certainly true in residential disputes,¹⁴⁹ and it is becoming more likely in commercial contexts.¹⁵⁰ In Washington, equity and public policy have traditionally favored tenants.¹⁵¹ If the tenant has chronically breached the lease, however, as did *Hindquarter*, then the courts may hold that it would be "fundamentally unfair"¹⁵² to hold even a commercial landlord to the covenants of the lease.

Hindquarter demonstrates that the Washington courts are willing to apply the relatively new doctrine of dependent covenants to a commercial lease dispute, even to the extent that they will imply a covenant from the limited lease language and the intent of the parties. The *Hindquarter* decision does not mean that Washington courts will apply their own individual preferences for contract or conveyancing law to resolve commercial disputes. Rather, Washington has taken a step to the forefront of a new movement in lease law, one that recognizes that contract rules produce "fairer" results more in keeping with modern-day leasing realities.¹⁵³

In the future, commercial tenants will benefit most from the *Hindquarter* decision, even though the landlord prevailed in that instance. *Hindquarter* will give commercial tenants the contract-law basis that they need to assert residential tenant claims, such as implied warranty of fitness and covenant of quiet enjoyment.¹⁵⁴ The Washington Supreme Court already held in *Foisy*

147. See *supra* notes 95-100 and accompanying text.

148. See *supra* notes 105-25 and accompanying text.

149. *E.g.*, *Green v. Superior Court*, 10 Cal. 3d 616, 627, 517 P.2d 1168, 1175, 111 Cal. Rptr. 704, 711 (1974) ("public policy compels landlords to bear the primary responsibility for . . . habitable housing"); *Pines v. Persson*, 14 Wis. 2d 590, 595-96, 111 N.W.2d 409, 412 (1961) ("The legislature has made a policy judgment—that it is socially (and politically) desirable to impose these duties on a property owner.").

150. *E.g.*, *Gadsden Bowling Center, Inc. v. Frank*, 249 Ala. 435, 439, 31 So. 2d 648, 651 (1947) (tenant's violation of lease provision took away his equitable claim for specific performance of a renewal option).

151. See *supra* note 134 and accompanying text.

152. *Hindquarter*, 95 Wash. 2d at 814-15, 631 P.2d at 926.

153. *Id.* at 814-15, 631 P.2d at 926.

154. See *supra* notes 18-38 and accompanying text.

*v. Wyman*¹⁵⁵ that residential tenants deserve the protections offered by contract law. The legislature also acted to protect those who rent their homes by enacting the Residential Landlord-Tenant Act.¹⁵⁶ *Hindquarter* was the next logical step toward acknowledging that a modern commercial lease is far more a contract for space than a conveyance of property.

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155. 83 Wash. 2d 22, 28, 515 P.2d 160, 164 (1973) (conveyancing law was suitable for an agrarian society, but contract law better serves "modern day realities").

156. WASH. REV. CODE ch. 59.18 (1983). The Act spells out significant rights and remedies of landlords and tenants.