Buffalo Law Review

Volume 24 | Number 1 Article 10

10-1-1974

The Constitutionality of Employment Restrictions on Resident Aliens in the United States

Susan Bass Levin

AN ASSESSMENT OF THE IMPACT OF AN IMPLIED WARRANTY OF HABITABILITY IN NEW YORK STATE

INTRODUCTION

The warranty of habitability in residential landlord-tenant leases can no longer be considered a legal oddity. The doctrine has not only received extensive treatment in professional journals, but, as of this writing, at least fifteen jurisdictions have adopted it.[1] However, the status of the warranty in New York State is still unclear, for, while the Civil Court of the City of New York has been utilizing the doctrine since 1971,[2] the appellate courts of the state have not definatively ruled on the issue. In light of the unresolved nature of the present situation, this Comment will investigate and assess five aspects of the warranty's impact on the laws and housing stock of the State of New York. First, those lower court warranty cases which already exist in the state will be examined in order to assess the nature of the doctrine's development to the present. Second, an analysis of the warranty doctrine as it affects existing New York landlord-tenant statutes will be undertaken. Third, the economic impact of the warranty doctrine upon rental housing markets will be assessed in order to determine if the doctrine will yield adverse or favorable results in terms of the quality and quantity of present housing stocks. Fourth, the effectiveness of a change within the law, such as the adoption of the warranty, will be compared to other possible approaches for reforming the landlord-tenant law. Finally, an assessment of the impact of the doctrine and an analysis of the possible position New York courts may adopt if and when they are called upon to rule on the scope of the warranty's effect, will be made.

---

1. *Special Project, Developments in Contemporary Landlord-Tenant Law,* 26 VAND. L. REV. 689, 729-39 (1973). It should be noted that the courts of five jurisdictions have recently rejected the warranty of habitability. *Id.* at 730-31.

2. *E.g.,* Morbeth Realty Corp. v. Velez, 73 Misc. 2d 996, 343 N.Y.S.2d 406 (N.Y.C. Civ. Ct. 1973); Morbeth Realty Corp. v. Rosenshine, 67 Misc. 2d 325, 323 N.Y.S.2d 363 (N.Y.C. Civ. Ct. 1971); Amanuensis, Ltd. v. Brown, 65 Misc. 2d 15, 318 N.Y.S.2d 11 (N.Y.C. Civ. Ct. 1971).

WARRANTY BACKGROUND

The ancient property concepts which generally govern the landlord-tenant relationship even today originated in medieval England. Over the centuries a number of legal tenets developed which, when assessed in light of modern realities, have proven to be inappropriate for the contemporary urban dweller.[3] For example, under the caveat emptor rule, the tenant accepted the premises "as is," having no redress against the landlord for defects of quality unless he was legally defrauded.[4] However, this rule has left the modern tenant unprotected for, prior to renting a unit, he cannot reasonably be expected to perform an intelligent investigation of an architecturally and technically sophisticated contemporary apartment building.[5] Another legal tenet which developed from ancient estate principles was the "no-repair" rule. This rule developed due to the passive role that a landlord assumed once his interest was conveyed. It provided that a landlord could not lawfully enter the premises without the tenant's consent. Thus, tenants undertook the responsibilities of repairing and maintaining the premises. Again, these responsibilities present an impossible task for the contemporary urban tenant who is faced with the complexities of a modern unit.[6]

In response to the needs of urban tenants, it became customary, probably as a result of market pressures, to include basic repair and service obligations (for example, the supplying of heat and water) in the lease as duties of the landlord.[7] However, the tenant's remedies for a breach of such covenants proved to be inadequate because the courts continued to view the lease as a conveyance. This interpretation demanded that the tenant continue to pay rent in order to enforce the promises made by the landlord with regard to services and repairs or be faced with eviction.[8] The only remedy available was a suit for

3. Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1074-75 (D.C. Cir.), *cert. denied,* 400 U.S. 925 (1970); Quinn & Phillips, *The Law of Landlord-Tenant,* 38 FORDHAM L. REV. 225, 227-31 (1970).

4. MODEL RESIDENTIAL LANDLORD-TENANT CODE General Introduction, at 5 (Tent. Draft 1969).

5. Comment, *Tenant Protection in Iowa,* 58 IOWA L. REV. 656, 659-61 (1973).

6. Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1077-79 (D.C. Cir. 1970); MODEL RESIDENTIAL LANDLORD-TENANT CODE General Introduction, at 6 (Tent. Draft 1969); Comment, *The Landlord's Common-Law Duty to Repair,* 22 SYRACUSE L. REV. 997, 998-99 (1971).

7. Quinn & Phillips, *supra* note 3, at 232.

8. Comment, *supra* note 6, at 999-1000.

damages on the ground of breach of the lease. Besides being costly and time consuming, this remedy put little pressure on the landlord to fulfill his duties since the rent was still being paid. As a result, the tenant had to suffer the uncomfortable consequences of living in premises which were without essential services.[9]

Recognizing the impracticalities of this remedy, various jurisdictions developed other legal devices, including the doctrine of constructive eviction,[10] housing codes,[11] and remedial statutes.[12] However, all these attempts have been unavailing.[13] It is readily conceded by commentators[14] and judges[15] alike that contemporary landlord-tenant law is generally ineffective in providing tenants with adequate legal devices to enforce their rights. In response to the plight of the urban tenant in particular and to the inadequacies of the landlord-tenant law in general, many commentators have advocated the implementation of an implied warranty of habitability;[16] and the courts of ap-

9. Quinn & Phillips, *supra* note 3, at 234.

10. *Id.* at 235-37. In recent years, constructive eviction *without* abandonment has been suggested, but this modification has met with little success. *See* Barash v. Pennsylvania Terminal Real Estate Corp., 26 N.Y.2d 77, 256 N.E.2d 707, 308 N.Y.S.2d 649 (1970), *rev'g* 31 App. Div. 2d 342, 298 N.Y.S.2d 153 (1969); McCarthy & Wolf, *Real Property,* 1970-71 ANNUAL SURVEY OF AM. L. 365, 374-75.

11. As of 1968, over 4,900 municipalities had housing codes and many states had set minimum standards. Comment, *Judicial Expansion of Tenant's Private Law Rights,* 56 CORNELL L. REV. 489, 491 (1971); *see, e.g.,* N.Y. MULT. DWELL. LAW §§ 1-365 (McKinney Supp. 1973); D.C. CODE ENCYCL. ANN. §§ 5-501 to 634 (West 1966), *as amended,* (West Supp. 1970); WASHINGTON, D.C., HOUSING REGULATIONS §§ 2304, 2501 (1956).

12. *E.g.,* N.Y. REAL PROP. ACTIONS LAW §§ 769-82 (McKinney Supp. 1973); *id.* § 755. *See also Special Project, supra* note 1, at 740-41.

13. For material on the failure of the doctrine of constructive eviction to provide an adequate remedy for tenants, see note 10 *supra.* For a discussion of the inadequacies of housing codes, see Quinn & Phillips, *supra* note 3, at 239-41; Comment, *supra* note 6, at 1002-03. Material on the ineffectiveness of New York's remedial statutes is found in Quinn & Phillips, *supra* note 3, at 242-49.

14. Quinn & Phillips, *supra* note 3, at 225.

15. Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1074-75 (D.C. Cir. 1970).

16. *E.g.,* Quinn & Phillips, *supra* note 3, at 254; Schoshinski, *Remedies of the Indigent Tenant,* 54 GEO. L.J. 519, 523-28 (1966); Skillern, *Implied Warranty in Leases,* 44 DEN. L.J. 387 (1967). Warranties have been employed in many areas of the law, notably in the sales field. *See* Jaeger, *The Warranty of Habitability* (pt. 1), 46 CHI-KENT L. REV. 123 (1969); Jaeger, *The Warranty of Habitability* (pt. 2), 47 CHI-KENT L. REV. 1, 1-27 (1970). However, in real property, warranties have been utilized in very few instances and only under limited circumstances. Skillern, *supra,* at 391-93. Judicial recognition of an implied warranty of habitability first occurred in short term furnished rentals. *E.g.,* Young v. Povich, 121 Me. 141, 116 A. 26 (1922); Ingalls v. Hobbs, 156 Mass. 348, 31 N.E. 286 (1892). In recent years, there has also been some movement toward implying a warranty of habitability into the sale of new

proximately fifteen jurisdictions have reacted by adopting the warranty doctrine.[17]

While the court decisions adopting a warranty vary with respect to detail, there are a number of concepts which are common to all and are essential to an understanding of the doctrine. The warranty of habitability is often expressed in terms of warranting the fitness of the housing unit for a particular purpose.[18] The modern tenant expects not only a shelter, but also a "package of goods and services" which includes "adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation and proper maintenance."[19] To secure these goods and services, the tenant agrees to pay rent.[20] Thus, according to this view, the transaction is essentially a contractual one wherein a promise to pay rent is exchanged for a promise to provide a habitable dwelling.[21] The legal ramifications of such an analysis are rather astounding. By characterizing the landlord-tenant relationship as contractual,[22] the courts take the view that a tenant, as a buyer, relies on the expertise of the landlord, as a supplier, to meet the tenant's legitimate expectations in light of the rental unit's intended use.[23] Once an implied warranty of habitability is judicially read into the lease, the obligation on the part of the tenant to pay rent is dependent upon the landlord's performance of his obligation to provide a habitable dwelling.[24] Of course, this result contradicts the property law concept that a tenant, who has failed to pay his rent, can be evicted for nonpayment even though the landlord has breached a provision in the lease by failing to provide services.[25] Under the contract theory, even if the court determines that a landlord's breach of the warranty was such that the tenant is only entitled

homes. Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965); Jaeger, *The Warranty of Habitability*, 47 CHI-KENT L. REV. 1, 30-52 (1970); Skillern, *supra*, at 393; Note, 23 U. FLA. L. REV. 626 (1971).

17. *Special Project*, *supra* note 1, at 729-30. There are also at least twenty jurisdictions with remedial statutes which alter the tenant's obligation to pay rent when a landlord fails to maintain his premises in a habitable condition. *Id.* at 740-41. One new addition to this type of statute is MINN. STAT. § 504.18 (Supp. 1973).

18. Skillern, *supra* note 16, at 394. *Cf.* UNIFORM COMMERCIAL CODE § 2-315.

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

20. Morbeth Realty Corp. v. Velez, 73 Misc. 2d 996, 999, 343 N.Y.S.2d 406, 410 (N.Y.C. Civ. Ct. 1973).

21. Lemle v. Breeden, 51 Haw. 426, 436, 462 P.2d 470, 474 (1969).

22. *See* notes 7-9 *supra* & accompanying text.

23. Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1075-76 (D.C. Cir. 1970).

24. *Id.* at 1082.

25. *See* note 8 *supra* & accompanying text.

to a partial setoff from his rent, the tenant can pay the landlord that portion which is due and defeat an action by the landlord for possession on the ground of nonpayment.[26] The warranty also allows the tenant access to all the traditional contract remedies, including damages, reformation, rescission,[27] and specific performance.[28] Furthermore, the tenant may be allowed the right to repair the premises and deduct the cost from his rent.[29]

The Warranty in New York State

Prior to 1971, New York rejected the implied warranty of habitability doctrine.[30] That year, in *Amanuensis, Ltd. v. Brown*,[31] three tenants were permitted to defend against the landlord's nonpayment summary proceeding on the warranty ground. Relying on contract principles, the court emphasized the tenants' lack of bargaining power as a basis for rejecting the caveat emptor rule, and read the housing code requirements into residential leases as the minimum standards of habitability.[32] Thus, the court laid the foundation for acceptance of the warranty doctrine in New York. While *Amanuensis* has resulted in a line of cases ruling in favor of the adoption of the doctrine,[33] it must be stressed that all of these subsequent cases, and *Amanuensis* itself, were decisions of the Civil Court of the City of New York and do not possess any force of precedent outside the Civil Court.[34] Therefore, it

26. Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1083 (D.C. Cir. 1970).

27. Lemle v. Breeden, 51 Haw. 426, 436, 462 P.2d 470, 475 (1969).

28. Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1082 n.61 (D.C. Cir. 1970). *But cf.* Samson Management Corp. v. Reichman, 63 Misc. 2d 238, 309 N.Y.S. 2d 838, 842 (Sup. Ct. 1970); Abrams v. S.A. Schwartz Co., 7 Misc. 2d 635, 161 N.Y.S.2d 1008, 1016 (Sup. Ct. 1957) (in which it was held that in New York, a tenant cannot obtain an order to force a landlord to make capital improvements).

29. *See* Jackson v. Rivera, 65 Misc. 2d 468, 318 N.Y.S.2d 7 (N.Y.C. Civ. Ct. 1971).

30. Potter v. New York, O. & W. Ry., 233 App. Div. 578, 253 N.Y.S. 394 (4th Dep't. 1931), *aff'd*, 261 N.Y. 489, 185 N.E. 708, 264 N.Y.S. 489 (1933); Looney v. Smith, 198 Misc. 99, 96 N.Y.S.2d 607 (Sup. Ct. 1950); Byrnheim-Linden Realty Corp. v. Great E. Contracting Co., 41 Misc. 2d 361, 245 N.Y.S.2d 490 (Nassau County Ct. 1963).

31. 65 Misc. 2d 15, 318 N.Y.S.2d 11 (N.Y.C. Civ. Ct. 1971).

32. *Id.* at 19-21, 318 N.Y.S.2d at 17-19.

33. *E.g.*, Morbeth Realty Corp. v. Velez, 73 Misc. 2d 996, 343 N.Y.S.2d 406 (N.Y.C. Civ. Ct. 1973); Morbeth Realty Corp. v. Rosenshine, 67 Misc. 2d 325, 323 N.Y.S.2d 363 (N.Y.C. Civ. Ct. 1971).

34. *See* Morbeth Realty Corp. v. Velez, 73 Misc. 2d 996, 1000, 343 N.Y.S.2d 406, 411 (N.Y.C. Civ. Ct. 1973). *See also Special Project, supra* note 1, at 729-31,

cannot be said that the warranty has definitely become part of the common law of New York. However, by virtue of these decisions, and the general trend which is in evidence throughout the country, the state of legal limbo in which the warranty exists cannot continue indefinitely.

Despite the lack of appellate authority for the warranty doctrine in New York, the lower court cases present an interesting, even peculiar, example of the development of a common law doctrine. Because *Amanuensis* was the first case to sustain the warranty in New York, the court found it necessary to restrict that case to its facts in order to circumvent precedents which had excluded the warranty.[35] As a result of this distinguishing process,[36] three preconditions to the assertion of a defense based on the warranty were established.[37] Although subsequent case law did not adhere to the last two of the *Amanuensis* prerequisites,[38] the first criterion, which required the tenant to show that the landlord made "no good faith effort to comply with the [housing codes]," remained a major obstacle to the full employment

---

which lists most of the warranty of habitability cases along with those jurisdictions which have adopted the doctrine. Note that as of 1973 every jurisdiction except Colorado, Ohio and New York has developed appellate authority for the doctrine.

An indication that the warranty cases are not as yet being followed throughout the state is found in the ruling of one appellate court outside the City of New York which expressly ruled against the acceptance of the warranty. The court reversed a lower court which had issued a preliminary injunction ordering a landlord to repair a number of housing code violations, Graham v. Wisenburn, 39 App. Div. 2d 334, 334 N.Y.S.2d 81 (3d Dep't. 1972), *rev'g* 70 Misc. 2d 492, 334 N.Y.S.2d 79 (Sup. Ct.). Interestingly, neither the lower court's decision in *Graham* nor the subsequent appellate court reversal mentioned any of the New York City warranty of habitability cases, indicating either a "hands-off" attitude, or an unawareness of their existence.

35. *See* 65 Misc. 2d at 18-21, 318 N.Y.S.2d at 15-18.

36. For an interesting jurisprudential discussion on the use of the distinguishing process for the purpose of circumventing stare decisis, see J. FRANK, COURTS ON TRIAL 275-77 (1970).

37. The three preconditions which must be established by the evidence before the warranty doctrine can be employed were set forth in *Amanuensis*:

> First, where the landlord has not made a good faith effort to comply with the law, and there have been substantial [housing code] violations seriously affecting the habitability of the premises.
>
> Second, where there are substantial violations and codes enforcement remedies have been pursued and have been ineffective.
>
> Third, where substantial violations exist and their continuance is part of a purposeful and illegal effort to force tenants to abandon their apartments.

64 Misc. 2d at 21, 318 N.Y.S.2d at 19.

38. *See* Mannie Joseph, Inc. v. Stewart, 71 Misc. 2d 160, 335 N.Y.S.2d 709 (N.Y.C. Civ. Ct. 1972); Morbeth Realty Corp. v. Rosenshine, 67 Misc. 2d 325, 323 N.Y.S.2d 363 (N.Y.C. Civ. Ct. 1971); Jackson v. Rivera, 65 Misc. 2d 468, 318 N.Y.S. 2d 7 (N.Y.C. Civ. Ct. 1971).

of the warranty doctrine in New York State. Clearly, the evidentiary burden imposed on the tenant in proving that his landlord did not make a good faith effort to repair is a higher standard of proof than that employed in other jurisdictions utilizing the warranty doctrine.[39] Indeed, for the tenant to prove that the landlord's efforts were not in good faith, there must be evidence of fraud or a violation of the law which could overcome the evidentiary presumption that the landlord's motives were proper.[40] A lack of good faith is not necessarily shown if there has been an honest miscalculation as to one's rights or duties, but rather some interested or sinister motive must be demonstrated.[41] Thus, in those cases where the landlord has made some attempt to repair the defect, the tenant is obligated to present substantial evidence tending to show a lack of good faith. Due to this added evidentiary burden on the tenant, landlords may easily avoid the impact of the warranty by making token repairs in a feigned display of "good faith."

The entrenchment of the "no-good-faith-effort-to-repair" criterion began in *Jackson v. Rivera*[42] which was decided the same day as *Amanuensis.* The court in *Jackson* allowed a tenant to defend against the landlord's nonpayment action on the grounds that the landlord had breached the implied warranty of habitability, thus entitling the tenant to a rent setoff for funds spent on repairing a defective toilet.[43] However, the court found that this landlord had not made a good faith effort to comply with the housing codes because he had refused to repair the toilet.[44] In the next New York case that ruled on the warranty, *Morbeth Realty Corp. v. Rosenshine,*[45] the court ruled that the tenant was required to pay only 80 percent of his rent, the other 20 percent constituting damages for the landlord's breach of the warranty.[46] Again, in *Rosenshine* the court allowed the setoff on the

39. *See, e.g.,* Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970); Boston Housing Authority v. Hemingway, 293 N.E.2d 831 (Mass. 1973); Kline v. Burns, 111 N.H. 87, 276 A.2d 248 (1971). An examination of these cases will not reveal a criteria similar to the "no-good-faith-effect-effort" prerequisite found in *Amanuensis.*

40. 21 N.Y. JUR. *Evidence* § 116 (1961).

41. Edwards-Warren Tire Co. v. Coble, 102 Ga. App. 106, 115 S.E.2d 852, 858 (1960); *see* 21 N.Y. JUR. *Evidence* § 201 (1961).

42. 65 Misc. 2d 468, 318 N.Y.S.2d 7 (N.Y.C. Civ. Ct. 1971).

43. *Id.* at 470-71, 318 N.Y.S.2d at 10-11.

44. *Id.* at 471, 318 N.Y.S.2d at 10.

45. 67 Misc. 2d 325, 323 N.Y.S.2d 363 (N.Y.C. Civ. Ct. 1971).

46. *Id.* at 327-28, 323 N.Y.S.2d at 366-67.

ground of the warranty, with the finding that the landlord had not made a bona fide effort to repair.[47]

Despite the apparent trend toward the inclusion of this burdensome prerequisite into the law, more recent warranty cases in New York City's civil court indicate that tenants will no longer have to present evidence tending to show a lack of good faith on the part of the landlord. In *Morbeth Realty Corp. v. Velez*,[48] the court awarded one half of approximately three-years' rent to the tenants as damages for the landlord's breach of the warranty of habitability, even though the court found that there "was an effort by the landlord to respond constructively that was grossly inadequate but by no means trivial."[49] Clearly, this landlord at least made an effort to repair. However, whether this was sufficient to be considered a "good faith effort" is a question which the court did not discuss except as a mitigating factor in determining the damages.[50] Since the court's opinion did not mention the repair prerequisite and since no evidence was presented to indicate a lack of good faith, it seems as though the *Velez* court abandoned the "no-good-faith-effort-to-repair" criterion. This conclusion is further supported by *Steinberg v. Carreras*,[51] where the landlord's breach consisted of a failure to provide heat for 28 days and hot water for 12 days[52] due to a number of boiler breakdowns which occurred over the course of a winter. The landlord in *Steinberg* did make good faith efforts to repair since the breakdowns were attended

47. *Id.* at 326, 323 N.Y.S.2d at 365. *Rosenshine's* employment of the first *Amanuensis* criterion was reflected in Mannie Joseph, Inc. v. Stewart, 71 Misc. 2d 160, 335 N.Y.S.2d 709 (N.Y.C. Civ. Ct. 1972), in which the court totally abated the tenant's rent in sustaining a warranty of habitability defense to the landlord's nonpayment action. The judge personally viewed the unit and dubbed it "a chamber of horrors," *id.* at 161, 335 N.Y.S.2d at 710, indicating that the landlord also had not made a good faith effort to repair.

48. 73 Misc. 2d 996, 343 N.Y.S.2d 406 (N.Y.C. Civ. Ct. 1973).

49. *Id.* at 1001, 343 N.Y.S.2d at 412.

50. *Id.*

51. 74 Misc. 2d 32, 344 N.Y.S.2d 136 (N.Y.C. Civ. Ct. 1973), *rev'd per curiam*, 77 Misc. 2d 774, 357 N.Y.S.2d 369 (App. T. 1974). This case was reversed on the ground that "there was a lack of adequate proof of the reduced value of the apartments as a result of the landlord's failure to supply heat. . . ." *Id.* at 775, 357 N.Y.S.2d at 370. Since the case was reversed on the above stated narrow grounds, it is upheld as a matter of law on the issues which affect the warranty of habitability.

52. 74 Misc. 2d at 34, 344 N.Y.S.2d at 141. *Steinberg* did not apply the warranty of habitability directly, but it did utilize a basic warranty principle. *See* notes 55-61 *infra* & accompanying text. However, the court indicated its willingness to apply the doctrine under the facts of the case, 74 Misc. 2d at 38, 344 N.Y.S.2d at 145.

to within five or six days,[53] yet the court awarded the tenants a rent setoff for the landlord's failure to provide those services.[54] Thus, *Velez* and *Steinberg* indicate that New York City's tenants will no longer have to assume the extra evidentiary burden involved in proving that the landlord did not make a bona fide effort to repair.

IMPACT OF THE WARRANTY ON NEW YORK LAW

When New York's appellate courts are called upon to rule on the warranty, they will be confronted with a number of legal issues which have already arisen in the previously discussed lower court cases. *Steinberg* illustrates the possible import of the warranty doctrine on New York State's landlord-tenant law. Unlike other cases which were explicitly grounded on the warranty,[55] the court in *Steinberg* applied the doctrine indirectly. *Steinberg* held that the landlord's failure to provide heat for 28 days and hot water for 12 days contravened an express provision of the lease with the tenants, thereby entitling them to a setoff equal to one week's rent.[56] The court then noted that "[t]he result reached . . . on the basis of the lease provisions would be *independently required* under the developing doctrine of implied warranty of habitability, at least with regard to the period not connected with the repair of the boiler."[57] While this discussion

53. 74 Misc. 2d at 33-34, 344 N.Y.S.2d at 140.

54. *Id.* at 38, 344 N.Y.S.2d at 144.

55. *E.g.*, Morbeth Realty Corp. v. Velez, 73 Misc. 2d 996, 343 N.Y.S.2d 406 (N.Y.C. Civ. Ct. 1973); Morbeth Realty Corp. v. Rosenshine, 67 Misc. 2d 325, 323 N.Y.S.2d 363 (N.Y.C. Civ. Ct. 1971); Amanuensis, Ltd. v. Brown, 65 Misc. 2d 15, 318 N.Y.S.2d 11 (N.Y.C. Civ. Ct. 1971).

56. 74 Misc. 2d at 38, 344 N.Y.S.2d at 144.

57. *Id.* at 38, 344 N.Y.S.2d at 145 (emphasis added). In mentioning the lack of service during repairs of the boiler, the court raised, but never squarely confronted, the issue of whether the warranty of habitability would make actionable interruptions of service which are temporary and beyond the control of the landlord. The landlord claimed that for two days the boiler was being repaired due to a sidewalk cave-in. *Id.* at 33, 344 N.Y.S.2d at 140.

In an article written before the warranty doctrine was adopted by many jurisdictions, one author advocated limiting the warranty in those cases where the landlord's failure to provide services was due to circumstances beyond his control, Skillern, *supra* note 16, at 395. This would be analogous to defending against a claim of a breach of contract on the grounds of impossibility of performance. *See generally* Canadian Indus. Alcohol Co. v. Dunbar Molasses Co., 258 N.Y. 194, 179 N.E. 383 (1932); Angus v. Scully, 176 Mass. 357, 57 N.E. 674 (1900).

of the warranty was merely dicta, it is important to note that the decision could not have been reached without the incorporation of some of the warranty principles. The landlord initiated this case by asking for a summary nonpayment eviction against 36 tenants.[58] Clearly, these tenants would have been dispossessed under the traditional property concepts even if they had won their breach of lease counterclaim.[59] However, in deciding against the landlord's action for possession and upholding the tenants' partial defense by awarding the setoff, the court adopted the principle that the obligation on the part of the tenant to pay rent and the landlord's performance of his obligations to maintain the premises were mutually dependent upon one another.[60] The effect of the *Steinberg* decision was to interject the "dependency of promises" doctrine, which was implicit in the warranty by virtue of its contractual nature, into the landlord-tenant law generally. This interjection radically alters existing law. At least one jurisdiction which has adopted the warranty doctrine limits the use of the mutuality of promises doctrine to those cases in which a tenant alleges and proves a breach of the warranty.[61] Thus, the broad impact attributed to the warranty in *Steinberg* will undoubtedly be an issue which the appellate courts must eventually resolve.

The impact of the "dependency of promises" doctrine does not stop with the issues raised by the *Steinberg* case. Even if New York's appellate courts were to limit the effect of the mutuality doctrine only to warranty cases, the warranty doctrine still would be in conflict with the state's special or summary nonpayment proceeding statutes.[62] The summary proceeding is a device which enables a land-

58. 74 Misc. 2d at 32, 344 N.Y.S.2d at 139 (N.Y.C. Civ. Ct. 1973).

59. *See* notes 6-8 *supra* & accompanying text.

60. *See* notes 19-23 *supra* & accompanying text. This conclusion is supported by a direct statement of the court. In its discussion of a lease provision which limited the tenant's possible defenses in a summary proceeding only to the issue of payment, the court stated that "the principle sustaining such lease provisions was adopted at a time when the intimate inter-relationship between the landlord's right to receive rent and his duty to provide services had not received judicial recognition. . . ." 74 Misc. 2d at 37, 344 N.Y.S.2d at 144.

61. *See* Berzito v. Gambino, 63 N.J. 460, 308 A.2d 17 (1973); Moskovitz, *Rent Withholding and the Implied Warranty of Habitability*, 4 CLEARINGHOUSE REV. 49, 66 (1970).

62. *See generally* N.Y. REAL PROP. ACTIONS LAW §§ 713, 721, 735, 747 (McKinney 1963), *as amended*, (McKinney Supp. 1973). While it is possible for the warranty and the summary proceeding to coexist within the law (*see* note 61 *supra* & accompanying text), it is contended that these two rules of law are inimical in spirit and principle. New York's courts have been willing to circumvent the summary pro-

lord to collect his rents without the expense of protracted litigation by limiting the tenant's defenses to the issue of payment.[63] This procedure was a sensible one when, regardless of the landlord's alleged breaches, the tenant could only maintain possession if he continued to pay his rent.[64] However, since the warranty provides that the tenant's obligation to pay rent is dependent upon the landlord's promise to maintain the premises in habitable condition, the summary proceeding becomes an obsolete and logically inconsistent provision within the law. In addition, the summary proceeding has been severely criticized. While it was ostensibly created to protect the landlord from the expense of protracted lawsuits, the economic hardship sustained by a tenant, who is forced to bring a separate action in order to collect damages for the landlord's breaches, is often greater than that which would be suffered by the landlord were the summary procedure not available.[65] Furthermore, some courts have noted that the landlord's interests are adequately protected if the tenant is required to deposit his rents with the court before the commencement of the trial. In the event the landlord is successful in his nonpayment action, the money will be available to satisfy his judgment.[66] In light of these arguments and other attacks against the summary proceeding,[67] it is contended that the propriety of the nonpayment procedure is very much in doubt.

The warranty has also had an impact upon one of New York's various remedial statutes.[68] Specifically, section 755 of New York's

---

ceeding when confronted by authority which is in conflict with it. In reviewing the history of the summary eviction or nonpayment proceeding, the court in Markese v. Cooper, 70 Misc. 2d 478, 333 N.Y.S.2d 63, (Monroe County Ct. 1972), concluded that because the procedure is "in derogation" of the common law, it must be strictly construed against the landlord when it conflicts with a statute which enables the tenant to bring "any legal or equitable defense." *Id.* at 480, 486, 333 N.Y.S.2d at 66, 72. The statute referred to in *Markese* is N. Y. REAL PROP. ACTIONS LAW § 743 (McKinney Supp. 1973), *amending* (McKinney 1963).

63. *See* Lindsey v. Normet, 405 U.S. 56, 72-73 (1972).

64. *See* note 7-9 *supra* & accompanying text.

65. *See* Lindsey v. Normet, 405 U.S. 56, 84-85 (1972) (Douglas, J., dissenting in part); 58 VA. L. REV. 930, 943 (1972).

66. Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1083 n.67 (D.C. Cir. 1970).

67. *See* Lindsey v. Normet, 405 U.S. 56, 73-79 (1972) (in which a summary proceeding provision was unsuccessfully challenged on Constitutional grounds); 25 VAND. L. REV. 654, 658 (1972). *See generally* Clough, *The Case Against the Doctrine of Independent Covenants,* 52 OREGON L. REV. 39 (1972); Note, *The Constitutionality of Texas' Landlord Laws and Other Summary Proceeding,* 25 BAYLOR L. REV. 215 (1973); Comment, *Landlord Tenant Law,* 25 U. FLA. L. REV. 220 (1972).

68. *See* note 12 *supra* & accompanying text.

Real Property Actions and Proceedings Law[69] is intended to force landlords to repair properties which are not in substantial compliance with the housing codes. This is supposed to be accomplished by allowing the tenant, upon an order of the court, to deposit his rent with the court clerk until the landlord makes the repairs. Although this statute and other remedial statutes have been criticized for their ineffectiveness,[70] landlords will nevertheless argue that the withholding provisions of section 755 are designed to provide an exclusive remedy for tenants and that the enactment of section 755 is an implicit rejection of the warranty doctrine.

In spite of an earlier decision which held that this statute, as a merely remedial device, does not provide the tenant with "any new substantive rights,"[71] an examination of the thrust of the warranty cases in New York tends to cast doubt on section 755's preemptive force. The court in *Morbeth Realty Corp. v. Rosenshine,*[72] in addition to issuing a withholding order, awarded the tenants a 20 percent setoff as damages for the landlord's breach of the warranty, thus requiring the tenant to deposit only 80 percent of his rent into the court. Section 755 permits rent withholding, but does not provide any mechanism for reducing the rent to be deposited.[73] One commentator thus remarked that *Rosenshine* "probably goes further than most courts in New York would be willing to go absent legislation."[74] Nonetheless, the judicial extension of the provisions in section 755 continued in *Ellabee Realty Corp. v. Beach,*[75] in which a landlord initiated an action to obtain all the funds which his tenants had deposited with the court pursuant to an earlier withholding order. The

69. N.Y. REAL PROP. ACTIONS LAW § 755 (McKinney Supp. 1973). [hereinafter referred to as section 755]. The requirement for the issuance of a section 755 order is a showing by the tenant that the condition of the premises is "likely to become dangerous to life, health and safety." *Id.* Subdivision three of section 755 was a recent amendment that allowed the funds which are deposited in court to be released to the landlord only for the purpose of repair, thus not entirely encumbering the landlord's capital and resulting in counterproduce effect. Chapter 820 of the 1969 Laws extended the statute's force throughout the State of New York. As originally adopted the statute was only applicable inside New York City.

70. Quinn & Phillips, *supra* note 3, at 242-49.

71. 176 East 123rd St. Corp. v. Flores, 65 Misc. 2d 130, 317 N.Y.S.2d 150 (N.Y.C. Civ. Ct. 1970).

72. 67 Misc. 2d 325, 327-28, 323 N.Y.S.2d 363, 367 (N.Y.C. Civ. Ct. 1971).

73. *See* REAL PROP. ACTIONS LAW § 755 (McKinney Supp. 1973).

74. Diamond, *1971 Survey of New York Law: Property Law,* 23 SYRACUSE L. REV. 569, 603 (1972).

75. 72 Misc. 2d 658, 340 N.Y.S.2d 8 (N.Y.C. Civ. Ct. 1972).

court noted that the landlord had not repaired any of the defects that led to the issuance of the section 755 order during the two years that the order had been in effect. Under these circumstances, the court awarded all the deposited rents to the tenant in order to avoid frustrating the purpose of the statute.[76] The same reasoning was employed in *Velez,* where the court stated that:

> The purpose of a 755 order, to motivate the Landlord to discharge his responsibilities, would be brutally undercut, if he could calmly await the removal of the tenant because of intolerable conditions and then pick up the money.[77]

The above discussion demonstrates that when the statute is employed in conjunction with the warranty doctrine, the tenant is provided with a comprehensive remedy. However, in the absence of warranty principles, section 755 neither compels the landlord to repair nor provides compensation to the tenant since he is forced to continue to live in deplorable surroundings and still surrender his rent.[78] This author would argue that the courts have refused to rule that section 755 preempts the warranty doctrine because, without the presence of the warranty, the statute fails to fulfill its designated purpose.

Economic Impact

While the warranty doctrine may be a desirable remedy for some of the inequities of the present landlord-tenant law, there are substantial economic difficulties that this new doctrine may present for the residential-rental market.[79] Economic ramifications may result because the warranty doctrine strikes at the heart of the landlord's financial base—his rents. In addition, since New York and most jurisdictions which have adopted the warranty doctrine utilize the housing codes as guidelines for minimum standards of habitability,[80] extensive use

76. *Id.* at 659-60, 340 N.Y.S.2d at 9-10.

77. 73 Misc. 2d at 1001, 343 N.Y.S.2d at 412.

78. Ellabee Realty Corp. v. Beach, 72 Misc. 2d 658, 660, 340 N.Y.S.2d at 10; Quinn & Phillips, *supra* note 3, at 246.

79. Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor,* 80 YALE L.J. 1093, 1095 (1971).

80. Morbeth Realty Corp. v. Velez, 73 Misc. 2d 996, 999-1000, 343 N.Y.S.2d 406, 410 (N.Y.C. Civ. Ct. 1973). Most jurisdictions that have adopted the warranty doctrine utilize the codes as the standards. *E.g.,* Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972); Hinson v. Delis, 26 Cal. App. 3d 62, 102 Cal. Rptr.

of the doctrine would be equivalent to private enforcement of the codes, converting each violation into its money value.[81] The consequences of comprehensive code enforcement through the warranty are particularly acute in the lower-income rental market,[82] as illustrated by the following statement from a recent New Jersey case:

> We take judicial notice of the fact that there is an acute shortage of low-income housing in the City of Newark, and that such housing which exists is frequently not in full compliance with the city's housing ordinances and building codes. We must also recognize the hard practical facts of life that if landlords under existing conditions, were to be deprived of all rents because of noncompliance with such ordinances and building codes there would be far fewer available low income housing units because landlords would either abandon their properties, or if they spent the money needed to comply with the ordinances and codes the amount of rent they would have to charge would price low income tenants out of the market. The problems seem to be almost insolvable.[83]

The court's statement is supported by statistics showing that a significant number of units are being abandoned by landlords in the slum areas of New York and other cities.[84]

---

661 (Ct. App. 1972); Samuelson v. Quinones, 119 N.J. Super. 338, 291 A.2d 580 (App. Div. 1972). As of 1968, over 4,900 municipalities had housing codes and many states had set minimum standards. Comment, *supra* note 11. *Contra,* Mease v. Fox, 200 N.W.2d 791 (Iowa 1972); Lemle v. Breeden, 51 Haw. 426, 462 P.2d 470 (1969). *Lemle* and others do not rely on the codes but purport to judge each case "on its facts" taking into account such factors as the "seriousness of the claimed defect and the length of time for which it persists." For a more complete list of the relevant factors to be considered in those cases that do not rely on the codes for standards, see Comment, *supra* note 5, at 659.

81. Bross, *Law Reform Man Meets the Slumlord,* 3 URBAN LAWYER 609, 617 (1971).

82. A low-income family of four is defined as one whose income is below $4,500 per year. Clough, *supra* note 67, at 40 n.5. Because this author feels that this figure vastly understates what an adequate living income is, the term "lower-income" is used in this Comment as including tenants whose income for a family of four is somewhat higher than $4,500 per year.

83. Samuelson v. Quinones, 119 N.J. Super. 338, 343, 291 A.2d 580, 583 (App. Div. 1972). For a definition of "code compliance," see Comment, *Philadelphia's Urban Homesteading Ordinance,* 23 BUFFALO L. REV. 735, 738 n.12 (1974). For a definition and extensive discussion of the phenomenon of abandonment, see *id.* at 744-52.

84. As of 1970, New York City had 18,000 abandoned multiple dwellings and the pace of this phenomenon has been accelerating over the past fourteen years, Comment, *supra* note 83, at 745-46. Other cities have also experienced a proportional abandonment crisis. For the statistics on this trend in Washington, D.C., Boston, Philadelphia, Baltimore, Detroit, Houston, Cleveland, and Buffalo, see *id.* at 746 n.62.

While it is clear that the abandonment problem is due at least in part to comprehensive code enforcement, very little research has been done to determine the extent of code enforcement's effect upon lower-income rental markets. Thus, the economic impact of the warranty doctrine cannot be ascertained with any great degree of accuracy. However, Professor James Bross conducted a study in a number of low-income areas in Philadelphia[85] which does provide some clues. This survey attempted to determine the effect upon slum markets of a private code enforcement program which included: provisions prohibiting any extra or nonjudicial eviction; rent withholding by depositing funds into an escrow account and allowance of a full refund to the tenant if the landlord did not repair within six months; and prohibitions against rent increases and retaliatory evictions during the pendency of any withholding order.[86] With the exception of the provisions concerning retaliatory evictions,[87] this program yields legal consequences which are almost identical to the warranty's results. Thus, the findings of this study should be roughly similar to those which the warranty would produce. The study concluded that in those areas where one-third of the housing was already abandoned and another one-third was unfit (in that it was below code compliance) the program forced many landlords to repair, but, an equal number abandoned their properties. However, where 20-25 percent of the housing in an area was unfit and only 10 percent or less was abandoned, a significant minority of buildings (20 out of 119) were repaired while the remainder continued to be maintained at their previous level.[88] Thus, the overall pattern was one of significant improvement of approximately 17 percent of the structures involved in the program, while the remaining 83 percent at least did not worsen.[89] However, abandonment was exacerbated by comprehensive

85. *See* Bross, *supra* note 81. (Professor Bross is an assistant professor of law at the Northwestern School of Law.)

86. *Id.* at 619-20.

87. Despite the warranty's ability to compensate the tenant while allowing him to remain in possession during the lease, the power of the landlord to refuse to renew the lease or to cancel a periodic tenancy without having to account for his motives continues to be troublesome for the more foresighted tenant. *See* Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968), *rev'g* 277 A.2d 388 (Ct. App. D.C. 1967). *See generally* Comment, *Landlord-Tenant Law,* 23 U. FLA. L. REV. 785, 789 (1971).

88. Bross, *supra* note 81, at 625, 627.

89. *Id.* at 625.

code enforcement in the most depressed areas—a result predicted by a number of municipal license and inspection officials.[90]

In light of his findings, Professor Bross concluded that the reform program would undoubtedly remove many unfit structures from the market.[91] However, this would occur in only the most dilapidated areas where abandonment and its attendant consequences,[92] had already taken their toll. In most areas, the majority of structures would remain unrepaired, but those tenants still in possession would be paying little or no rent.[93] Analogizing the results of this study to the warranty situation and assuming that the doctrine would be extensively utilized, it seems the warranty would reduce the housing stock in lower-income markets by triggering some abandonment. Nonetheless, the extent of this phenomenon would not be as drastic as some have feared. In addition, it should be noted that a lower-income tenant, by definition, cannot afford to pay as much rent as other tenants; thus there is an absolute ceiling on the maximum quality of housing for the poor. Ultimately, improvements beyond this ceiling are dependent upon the infusion of governmental aid into this market.[94] While some efforts have been made in this direction,[95] one commentator has noted that the courts cannot and do not control "the other tools of social policy which are needed for a coordinated attack on the housing problem."[96] However, the courts should not hesitate to take reasonably effective and responsible initiatives, such as the adoption of the warranty doctrine, even in the face of possible, but not drastic, economic ramifications.

While most of the economic questions have centered on the possible counterproductive effects of the warranty on the financially marginal slum markets, the economic impact on middle- and upper-income residential markets must also be considered. Because these units are not in as bad repair as the lower-income units,[97] the effect

90. Nachbaur, *Empty Houses,* 17 How. L.J. 3, 40 (1971).
91. Bross, *supra* note 81, at 627.
92. Comment, *supra* note 83, at 751-52.
93. Bross, *supra* note 81, at 627.
94. *Id.* at 627-28.
95. Edson, *Housing Abandonment,* 7 Real Prop. Prob. & Trade J. 382, 382-86 (1972).
96. 84 Harv. L. Rev. 729, 735 (1971).
97. *Compare* Steinberg v. Carreras, 74 Misc. 2d 32, 32-35, 344 N.Y.S.2d 136, 139-41 (N.Y.C. Civ. Ct. 1973) *with* Morbeth Realty Corp. v. Velez, 73 Misc. 2d 996, 998, 344 N.Y.S.2d 406, 409 (N.Y.C. Civ. Ct. 1973).

of the warranty of habitability will undoubtedly be less economically threatening to the owners of upper- and middle-income housing stock. In addition, the nature of these markets is very different from that of the lower-income market. Because the vacancy rate is significantly higher in upper- and middle-income markets,[98] the competition among landlords is greater. Landlords are more sensitive to their tenants' maintenance demands; thus, they may be expected to avoid the force of the warranty by making repairs and preventing a loss of rental income. Because upper- and middle-income tenants have the advantage of a lessee's market, the warranty doctrine will have a much greater deterrent effect on the landlord in these areas than in the lower-income areas.

RULE CHANGE VERSUS COLLECTIVISM

Having investigated the legal and economic ramifications of the warranty doctrine, there remains another critical question: Will the warranty be utilized by tenants to the degree necessary to produce the results for which it is designed? Until recently, most legal scholars and lawyers assumed that merely because a law had been decreed a significant number of people would utilize it. However, legal sociologist Marc Galanter[99] and others who have studied the legal process have contended that changes in the law which favor a specific group will have little impact in accomplishing reform in favor of that group unless its members organize to pursue their cause in a coherent and coordinated fashion.[100] Litigants such as tenants, who are interested in a "one-shot" lawsuit, cannot afford the best legal services and do not use overall strategies designed to effect true reforms. In addition, victory in one lawsuit is often symbolic for, as Professor Galanter

98. *See* UNITED STATES BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1973, at 685, table 1159 (94th ed.), which shows statistics on the number of units completed and rented in the calendar quarter of 1970 to 1972. The lower-income units showed a significantly lower vacancy rate in all quarters with the exception of one. The figures also show the vacancy rates for rental units from 1969 to 1972 broken down according to the rent per month. The units renting for $60 to $99 per month had a vacancy rate of approximately 4.75 percent, while those renting for $100 or more showed a 6.2 percent vacancy rate. *Id.* at 686, table 1162.

99. M. Galanter, Why the "Haves" Come Out Ahead 30-32, 45-49, August, 1973 (unpublished article by Professor Marc Galanter, Faculty of Law and Jurisprudence, State University of New York at Buffalo, on file at *Buffalo Law Review*).

100. For a discussion of the difficulties involved in rule change, see *id.* at 30-32, 45-49.

states: "Rule-changes secured from courts or other peak agencies do not penetrate automatically and costlessly to other levels of the system, as attested by the growing literature on impact."[101]

Myron Moskovitz, Chief Attorney of the National Housing and Economic Development Law Project in Berkeley, California, has taken a position on the proposed Model Residential Landlord-Tenant Code[102] which is similar to the approach of Professor Galanter. Mr. Moskovitz states that the basic problem for low-income tenants is their lack of bargaining power due to the housing shortage.[103] He concludes that "[i]n the face of these stark economic realities, the nature of the landlord-tenant laws on the books in [the tenant's] state is largely irrelevant."[104] In order to make significant reforms in the landlord-tenant law, we must increase the supply of decent housing and "organize tenants to use collective action, so tenants will have more bargaining power."[105] Thus, Mr. Moskovitz's solution is essentially identical to the one put forth by Mr. Galanter: reorganization and collectivization of the parties into one coherent contingent.[106] Assuming that the warranty, in theory, is capable of producing favorable legal consequences for tenants, and assuming that its economic impact would not significantly disrupt the already tenuous slum markets, the issues raised by Mr. Galanter and Mr. Moskovitz are essentially strategic ones. First, is it worth pressing for the adoption of the warranty or would such action merely drain resources that could be used to implement more effective remedies? Second, would the warranty have any effect in the battle to provide decent housing and adequate remedies for tenants?

In order to investigate these questions, it is necessary to divide rental markets into the two categories utilized previously in the section on economic impact. As has already been noted,[107] the nature of the lower-income market is vastly different from that of the upper- and middle-income markets. Similarly, in terms of the "rule change versus collectivism" issue, there will be a difference in the impact of the warranty depending upon which market is being considered.

101. *Id.* at 47. *See* Bross, *supra* note 81, at 609 (statement by a legal service attorney on the minimal results of court rulings).

102. MODEL RESIDENTIAL LANDLORD-TENANT CODE (Tent. Draft 1969).

103. Moskovitz, *The Model Landlord-Tenant Code,* 3 URBAN LAWYER 597 (1971).

104. *Id.* at 597-98.

105. *Id.* at 598.

106. M. Galanter, *supra* note 99, at 51.

107. *See* notes 97-98 *supra* & accompanying text.

An examination of the upper- to middle-income markets reveals two circumstances which will help insure the effectiveness of a rule change such as the utilization of the warranty doctrine. First is the obvious fact that these tenants can afford to obtain the services of experienced and effective lawyers. Thus, upper- to middle-income tenants can be expected to resort to the remedies provided by the warranty doctrine more frequently than lower-income tenants.[108] Second, the warranty will have a greater deterrent effect in upper- to middle-income markets due to their more competitive nature.[109] In essence, upper- to middle-income tenants will not have to resort to the legal rule as frequently as lower-income tenants because its mere presence will tend to produce the desired reforms. Therefore, it is contended that, despite the caveats against rule changes forwarded by legal sociologists, the warranty will be an effective device in upper- to middle-income rental markets.

In contrast to the upper- and middle-income markets, the lower-income market displays those characteristics which would tend to decrease the effectiveness of a judicially imposed rule change. Not only do slum landlords have the advantage of a tremendous disparity in bargaining power over their tenants,[110] but also researchers have found that lower-income tenants are less likely to challenge or complain to their landlords.[111] In addition, since the housing shortage in lower-income markets is severe[112] and the level of maintenance is often low,[113] the magnitude of these problems would seem to indicate that a legal rule change alone would not correct the inadequacies and deficiencies under which lower-income tenants suffer.[114] However, the warranty doctrine can play a significant role in the strategies of collective action. In his article criticizing the rule change approach taken by the Model Landlord-Tenant Code, Mr. Moskovitz specifically criticized the lack of warranty-like provisions in the proposed Code.[115]

108. It is not only the fiscal advantage that enables upper- to middle-income tenants to litigate more frequently than lower-income tenants, but also, upper- to middle-income tenants are not subjected to the inhibiting and frustrating circumstance of living in a state of poverty. Hill, *Housing the Poor,* 41 U. COLO. L. REV. 541, 544 (1969); Vaughan, *The Landlord-Tenant Relation in a Low-Income Area,* 16 SOCIAL PROBLEMS 208, 216 (1968).

109. *See* note 98 *supra* & accompanying text.

110. Moskovitz, *supra* note 103, at 597.

111. Hill, *supra* note 108; Vaughan, *supra* note 108.

112. Moskovitz, *supra* note 103, at 597.

113. *See* notes 82-84 *supra* & accompanying text.

114. *See* notes 95-96 *supra* & accompanying text.

115. Moskovitz, *supra* note 103, at 598-99.

He recognized that while collective action holds greater promise in terms of overall effectiveness, it too will fail unless there are legal principles upon which organized tenants can rely to enforce their demands.[116] Because the warranty allows rent withholding where landlords have failed to repair, because it prevents a landlord from dispossessing a tenant when he does withhold, and because it directly compensates tenants by awarding damages or rent abatements, the doctrine can serve as a very valuable tool in the legal arsenal of collectivized tenants. Thus, although the ultimate impact of the warranty doctrine will depend upon the collective action of lower-income tenants, its adoption by New York courts is justified as a step by which the effectiveness of such collective actions can be increased.

CONCLUSION

In light of the foregoing analyses of the legal, economic, and utilitarian effects of the warranty of habitability in New York State, an assessment of the warranty's overall impact can be suggested. One concern has been the potential economic damage that would be caused by the widespread usage of the warranty. However, the economic analysis undertaken in this Comment indicates that the warranty's impact will not be as drastic as has been feared. In addition, due to the aforementioned inherent limitations on the effectiveness of a rule change, it cannot automatically be assumed that the warranty would enjoy the kind of universal application which would test its maximum economic impact. Thus, it is not anticipated that the doctrine will precipitate major economic difficulties.

However, there remain a number of unanswered questions concerning the warranty's economic impact. For example, the tenant's ability to recover consequential or incidental damages is a subject that has been raised in the literature.[117] In addition, the question arises as to whether the warranty will support an action for strict tort liability. Some indication of the future judicial disposition of this issue is evident in a recent New Jersey case in which the court ruled that the warranty does not give rise to strict tort liability for a tenant's per-

116. In 1970, Mr. Moskovitz labeled then recent warranty of habitability decisions as "some of the most important landlord-tenant cases ever to be decided by American courts," Moskovitz, *supra* note 61, at 49.

117. Quinn & Phillips, *supra* note 3, at 256; Skillern, *supra* note 16, at 396; Comment, *supra* note 5, at 671 n.124.

sonal injuries.[118] While it is difficult to predict the eventual disposition of such an issue in New York's courts, it is clear from the New Jersey decision that economic factors alone may result in limitations on the various ancillary causes of action that could theoretically arise under the warranty doctrine.[119]

Another approach which the courts may adopt in order to tailor the warranty doctrine to the economic realities of the residential rental market is to provide some flexibility with regard to the operation of a waiver. Although the warranty generally cannot be waived by the tenant or contractually disclaimed by the landlord,[120] it has been suggested that the "occasional" landlord (usually the lessor of an apartment in his own home) be given the opportunity to avoid the obligations imposed on his commercial counterpart.[121] This policy would be appropriate since the adoption of the warranty doctrine has been justified in part on the assumption that the landlord is engaged in the business of renting residential units and, therefore, has expertise upon which the tenant relies.[122] As a model for such a waiver, one might use those statutes which imply a covenant of "fitness for intended purpose" into residential leases while providing that a tenant may agree to undertake specific repairs, but only if the waiver is "supported by adequate consideration and set forth in a conspicuous writing."[123]

Due to the complexity of the housing situation and the economic concerns surrounding the warranty, the courts may conceivably view the implied warranty of habitability as a sui generis legal device. As such, the warranty may be regarded as so unique that attempts to predict even the general course that will be taken by the courts, for example, by comparing it with other warranties in our law,[124] would be a fruitless exercise.[125] Clearly, the legitimate public concern for the landlord's financial well-being might call for decisions that would seem

118. Dwyer v. Skyline Apartments, Inc., 63 N.J. 577, 311 A.2d 1 (1973); 5 SETON HALL L. REV. 409 (1974).

119. 5 SETON HALL L. REV. 409, 427-28 (1974).

120. Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1080 n.49 (D.C. Cir. 1970); MINN STAT. § 504.18 (1) (Supp. 1973).

121. *Cf.* 2 RUT.-CAM. L.J. 120, 126 (1970).

122. *See* Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1075-77 (D.C. Cir. 1970).

123. MINN. STAT. § 504.18 (2) (Supp. 1974).

124. *See* UNIFORM COMMERCIAL CODE §§ 2-312, -318.

125. Comment, *Tenant Remedies,* 16 VILL. L. REV. 710, 724-25, 726-27 (1971); *see* 84 HARV. L. REV. 729, 732-34 (1971).

anomalous in the context of the law surrounding warranties in general. However, the essentially contractual nature of the warranty of habitability is designed to meet this concern, since it furnishes equitable treatment for both the landlord and the tenant by awarding a rent setoff until the landlord repairs and restoring the full rent to him once he does repair.[126] The use of contract and sales principles in the employment of the warranty provides reasonably fair judicial standards[127] and enables the courts to apply "equitable principles" in making their decisions.[128] Thus, because of the inherent flexibility of the contract principles embodied in the doctrine, the courts are free to tailor the warranty to the various exigencies of the contemporary housing situation.

While this Comment has been largely concerned with the legal and economic impact of the warranty, there is another aspect of the doctrine's impact which deserves mention. The importance of this aspect has been emphasized by many authors who have taken notice of the profound human costs of being subjected to the brutalizing condition of our cities' slums.[129] In this context, the value of a compensatory device such as the warranty of habitability was forcefully noted by Thomas M. Quinn and Earl Phillips. In describing this area of the law before the widespread adoption of the warranty doctrine these authors observed: "The law of landlord-tenant is *the law* to most low income dwellers and it instructs them everyday on the value society places on basic fairness and the social classes it prefers."[130] Clearly the adoption of the warranty of habitability can alleviate some of the hardships of slum victims by compensating them for the environmental miseries to which they are subjected,[131] while providing a greater measure of protection for all consumers in the residential rental market.

MATTHEW GREENBLATT

126. Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1083 n.64 (D.C. Cir. 1970).

127. Quinn & Phillips, *supra* note 3, at 225.

128. Samuelson v. Quinones, 119 N.J. Super. 338, 343, 291 A.2d 580, 583 (App. Div. 1972).

129. *See* Wilner & Walkley, *Effects of Housing on Health and Performance,* in THE URBAN CONDITION 215 (L. Duhl ed. 1963); Ackerman, *supra* note 79, at 1096; Quinn & Phillips, *supra* note 3, at 258.

130. Quinn & Phillips, *supra* note 3, at 258.

131. Morbeth Realty Corp. v. Velez, 73 Misc. 2d 996, 999-1000, 343 N.Y.S.2d 406, 410-11 (N.Y.C. Civ. Ct. 1973).