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Brown v. Green and Hadian v. Schwartz: Determining Who Is Responsible for Major Structural Repairs in Commercial Leases

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***Brown v. Green* and *Hadian v. Schwartz*: Determining Who Is Responsible for Major Structural Repairs in Commercial Leases**

Todd D. Ruggiero*

TABLE OF CONTENTS

I. INTRODUCTION	418
II. LEGAL BACKGROUND	421
A. <i>Implied Warranty of Fitness and Commercial Leases</i>	423
1. <i>Reste Realty Corp. v. Cooper</i>	424
2. <i>Implied Warranty of Fitness Since Reste Realty</i>	426
B. <i>Implied Warranty of Fitness in California</i>	427
1. <i>Glen R. Sewell Sheet Metal, Inc. v. Loverde</i>	428
2. <i>Green v. Superior Court (Sunski)</i>	429
3. <i>Four Seas Investment Corp. v. International Hotel Tenants' Ass'n</i>	430
4. <i>Schulman v. Vera</i>	430
5. <i>Muro v. Superior Court (Anjac Fashion Building, Inc.)</i>	431
III. THE CALIFORNIA SUPREME COURT CASES	432
A. <i>Brown v. Green</i>	432
1. <i>Factual and Procedural History</i>	433
2. <i>The Unanimous Opinion</i>	434
a. <i>The Relationship of the Cost of the Curative Action to the Rent Reserved</i>	435
b. <i>The Term for Which the Lease Was Made</i>	436
c. <i>The Relationship of the Benefit to the Lessee to that of the Reversioner</i>	436
d. <i>Whether the Curative Action Is Structural or Nonstructural in Nature</i>	436
e. <i>The Degree to Which the Lessee's Enjoyment of the Premises Will Be Interfered with While Curative Action Is Being Undertaken</i>	437
f. <i>The Likelihood That the Parties Contemplated the Application of the Particular Law or Order Involved</i>	437
B. <i>Hadian v. Schwartz</i>	438

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1. <i>Factual and Procedural History</i>	438
2. <i>The Unanimous Opinion</i>	440
a. <i>The Relationship of the Cost of the Curative Action to the Rent Reserved</i>	440
b. <i>The Term for Which the Lease Was Made</i>	441
c. <i>The Relationship of the Benefit to the Lessee to that of the Reversioner</i>	441
d. <i>Whether the Curative Action Is Structural or Nonstructural in Nature</i>	441
e. <i>The Degree to Which the Lessee's Enjoyment of the Premises Will Be Interfered with While the Curative Action Is Being Undertaken</i>	442
f. <i>The Likelihood That the Parties Contemplated the Application of the Particular Law or Order Involved</i>	442
IV. LEGAL RAMIFICATIONS	443
A. <i>Variance in the Glen R. Sewell Sheet Metal Factors Too Great for Lessors and Lessees to Rely Upon</i>	443
B. <i>Factors of Equity—Not Probable Intent</i>	444
C. <i>Implied Warranty of Fitness to Protect Lessees from Property Hazards</i>	448
1. <i>The Implied Warranty of Fitness Applied to Brown</i>	450
2. <i>The Implied Warranty of Fitness Applied to Hadian</i>	451
V. CONCLUSION	451

I. INTRODUCTION

In the past thirty years, landlord-tenant law has undergone dramatic changes from the antiquated common law system.¹ Residential leases, specifically, have undergone the most noticeable changes.² The implied warranty of habitability has

1. See JESSE DUKEMINIER & JAMES E. KRIER, *PROPERTY* 514 (3d ed. 1993) (stating that "with the 1960s there began a period of sweeping reform—most of it at first concerned with residential tenancies"); see also Kenneth J. Sophie, Jr., Comment, *Landlord-Tenant: The Medieval Concepts of Feudal Property Law Are Alive and Well in Leases of Commercial Property in Illinois*, 10 J. MARSHALL J. PRAC. & PROC. 338, 338 (1977) (finding that a number of jurisdictions have attempted to revise substantially the antiquated precepts and doctrines of medieval property law).

2. See Paula C. Murray, *The Evolution of Implied Warranties in Commercial Real Estate Leases*, 28 U. RICH. L. REV. 145, 146 (1994) (observing that landlord-tenant law has undergone dramatic change, particularly in the residential lease context).

been adopted by a majority of jurisdictions.³ No longer is the residential tenant required to take the premises "as is" or subject to the common law doctrine of caveat emptor.⁴ In developing these doctrines, courts have come to recognize a large inequality of bargaining power between the landlord and tenant in a residential lease.⁵

However, courts have refrained from applying a similar warranty of fitness to commercial leases.⁶ In large part, this is due to the belief that a commercial tenant occupies a more favorable bargaining position with the landlord than a residential tenant and can therefore negotiate for more favorable lease terms.⁷ Additionally, some commercial tenants are thought to be more capable of inspecting the premises for defects than residential tenants.⁸ Often though, a small business owner does not have an equal bargaining position with a landlord.⁹ This poses serious problems for the tenant in obtaining favorable lease terms and provides the landlord with an inordinate advantage in negotiating favorable lease terms.

In light of these problems, some state courts, including California's,¹⁰ have demonstrated an inclination toward applying an implied warranty of fitness to commercial tenants.¹¹ They have not, however, expressly granted the same blanket protections, such as the implied warranty of habitability afforded residential tenants, to nonresidential tenants.

3. DUKEMINIER & KRIER, *supra* note 1, at 533; see Fred William Bopp III, Note, *The Unwarranted Implication of a Warranty of Fitness in Commercial Leases—An Alternative Approach*, 41 VAND. L. REV. 1057, 1065 (1988) (explaining that "[t]he vast majority of courts considering this issue have decided to imply a warranty of habitability into residential leases"); Murray, *supra* note 2, at 146 (noting the "widespread adoption of an implied warranty of habitability in short-term residential leases by many American jurisdictions").

4. DUKEMINIER & KRIER, *supra* note 1, at 514; see BLACK'S LAW DICTIONARY 222 (6th ed. 1990) (defining "caveat emptor" as "[l]et the buyer beware").

5. See, e.g., *Schulman v. Vera*, 108 Cal. App. 3d 552, 561, 166 Cal. Rptr. 620, 625 (1980) (stating that the parties in a commercial lease are more likely to have equal bargaining power than parties to a residential lease); see also *E.P. Hinkel & Co. v. Manhattan Co.*, 506 F.2d 201, 206 (D.C. Cir. 1974) (explaining that in a commercial lease negotiated between parties of equal bargaining power there is no reason to imply a duty to repair on the landlord by way of an implied warranty); *Muro v. Superior Court (Anjac Fashion Bldg., Inc.)*, 184 Cal. App. 3d 1089, 1097, 229 Cal. Rptr. 383, 388 (1986) (noting that the lack of knowledge, ability, and bargaining position are not present in the leasing of nonresidential premises when the tenant is more sophisticated); *Service Oil Co. v. White*, 542 P.2d 652, 659 (Kan. 1975) (finding that the commercial lessee generally does not occupy an inferior bargaining position).

6. Murray, *supra* note 2, at 146.

7. *Schulman*, 108 Cal. App. 3d at 561, 166 Cal. Rptr. at 625 (stating that the parties in a commercial lease are more likely to have equal bargaining power).

8. Bopp, *supra* note 3, at 1081.

9. Murray, *supra* note 2, at 146.

10. See, e.g., *Golden v. Conway*, 55 Cal. App. 3d 948, 128 Cal. Rptr. 69 (1976); *Four Seas Inv. Corp. v. International Hotel Tenants' Ass'n*, 81 Cal. App. 3d 604, 146 Cal. Rptr. 531 (1978).

11. See, e.g., *Sun Ins. Servs., Inc. v. 260 Peachtree St., Inc.*, 385 S.E.2d 127 (Ga. Ct. App. 1989); see also *Reste Realty Corp. v. Cooper*, 251 A.2d 268 (N.J. 1969) (imposing an implied warranty against latent defects on the landlord).

The California Supreme Court, in *Brown v. Green*¹² and *Hadian v. Schwartz*,¹³ considered whether the lessor or the lessee should be financially responsible for major structural repairs under a “net” lease.¹⁴ Using six factors set out in *Glen R. Sewell Sheet Metal v. Loverde*,¹⁵ the court held that the lessee in *Brown* was liable for the removal of asbestos.¹⁶ However, the court held the lessor in *Hadian* responsible for seismic reconstruction.¹⁷ The court, through application of the factors, decided to allocate the liability differently, even though both cases involved net leases.

This Casenote argues that the lessor (owner) should be held liable for all major structural repairs. This is based primarily on the fact that the lessor retains possession of the structure upon the termination of the lease. To require the lessee to finance substantial structural repairs not expressly bargained for by the parties provides the landlord with a windfall when the lease term expires. After the tenant vacates the premises, the lessor retains ownership of the improved building which has a higher market value as a result of the tenant-financed repairs.

Furthermore, this Casenote advances the proposition that an implied warranty of fitness¹⁸ should be incorporated within commercial leases, instead of the *Glen R. Sewell Sheet Metal* factors. Although the California Supreme Court did not consider the implied warranty of fitness in *Brown* or *Hadian*, this Casenote addresses its application in these cases. Tenants in both cases were faced with structural conditions that jeopardized the health and safety of the buildings’ occupants.¹⁹ If the cases had involved residential leases, the court may have permitted the tenants to void the leases because of reliance on the implied warranty of habitability.²⁰ An implied warranty of fitness in commercial leases would absolve the tenant from fiscal

12. 8 Cal. 4th 812, 884 P.2d 55, 35 Cal. Rptr. 2d 598 (1994).

13. 8 Cal. 4th 836, 884 P.2d 46, 35 Cal. Rptr. 2d 589 (1994).

14. See 1 MILTON R. FRIEDMAN, *FRIEDMAN ON LEASES* § 10.8, at 672-73 (3d ed. 1990) (defining “net lease” as a lease that holds the lessee responsible for “all repairs, inside and out, structural and otherwise, as well as all necessary replacements of the improvements on the premises”).

15. 70 Cal. 2d 666, 674-75 n.10, 451 P.2d 721, 726 n.10, 75 Cal. Rptr. 889, 894 n.10 (1969).

16. *Brown*, 8 Cal. 4th at 830-34, 884 P.2d at 66-69, 35 Cal. Rptr. 2d at 609-12; see *infra* notes 129-53 and accompanying text (discussing the *Brown* case).

17. *Hadian*, 8 Cal. 4th at 847-50, 884 P.2d at 52-54, 35 Cal. Rptr. 2d at 595-597; see *infra* notes 192-209 and accompanying text (discussing the *Hadian* case).

18. 5 THOMPSON ON REAL PROPERTY § 44.07(c) (David A. Thomas ed., 1994) (defining an “implied warranty of fitness” to mean that “at the inception of the lease there are no latent defects in facilities . . . that are essential to use of the premises for their commercial purpose, and the essential facilities will remain in a suitable condition throughout the term”).

19. See *Hadian*, 8 Cal. 4th at 841, 884 P.2d at 49, 35 Cal. Rptr. 2d at 592 (noting the need for complete reconstruction of the building’s frame to comply with minimum earthquake standards); *Brown*, 8 Cal. 4th at 820, 884 P.2d at 59, 35 Cal. Rptr. 2d at 602 (discussing the presence of airborne asbestos fibers at levels harmful to humans).

20. See *infra* Part II.B. (noting the application of an implied warranty of habitability to residential leases in California).

responsibility for major structural repairs despite the existence of a "net" lease and a "compliance with the laws" provision.²¹

Part II of this Casenote reviews the historical background of landlord-tenant law and outlines the legal foundations for the decisions in *Hadian* and *Brown*.²² Part III discusses the unanimous decisions of both cases and the factors considered by the court in reaching its dichotomous holdings.²³ Part IV examines the possible ramifications of the decisions and considers how the implied warranty of fitness could be applied to commercial leases.²⁴

II. LEGAL BACKGROUND

At common law, a lease was considered a conveyance of property for a specified term.²⁵ There was no legal distinction between residential and commercial leases.²⁶ The landlord was not required to provide the leasehold to the tenant in a condition fit for use regardless of whether the lease was for residential or commercial purposes.²⁷ Furthermore, aside from the implied covenant of quiet enjoyment,²⁸ the lease covenants existed independently of each other, which allowed the landlord to breach the terms of the lease and still hold the tenant responsible for rent.²⁹ Thus, even if the premises were completely destroyed, the tenant would still be held liable for rent.³⁰

21. See *infra* Part II.A.1. (discussing the implied warranty of fitness in a commercial lease and the release of the tenant from liability for major repairs).

22. See *infra* Part II.

23. See *infra* Part III.

24. See *infra* Part IV.

25. See, e.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1074 (D.C. Cir. 1970) (holding that a lease was a conveyance of an interest in land under traditional law); *Green v. Superior Court (Sunki)*, 10 Cal. 3d 616, 622, 517 P.2d 1168, 1171, 111 Cal. Rptr. 704, 707 (1974) (stating that traditional common law considered a lease to be a conveyance of the premises for a term of years); *DUKEMINIER & KRIER*, *supra* note 1, at 438 (finding that, historically, a lease was a conveyance as opposed to a contract).

26. *Murray*, *supra* note 2, at 161; see *Sophie*, *supra* note 1, at 341 (noting that throughout the historical development of landlord-tenant law, "there was no legal distinction between residential and commercial leases").

27. Anthony J. Vlatas, Note, *An Economic Analysis of Implied Warranties of Fitness in Commercial Leases*, 94 COLUM. L. REV. 658, 658 (1994).

28. See 5 THOMPSON ON REAL PROPERTY § 44.07(b)(2) (David A. Thomas ed., 1994 & Supp. 1996) (finding that under the doctrine of constructive eviction, a breach of the implied covenant of enjoyment by the landlord relieves the tenant of any further obligation to pay rent if the tenant abandons the premises within a reasonable period of time after the landlord's act or omission).

29. *Murray*, *supra* note 2, at 147.

30. *Sophie*, *supra* note 1, at 342-43. *But see* *Reste Realty Corp. v. Cooper*, 251 A.2d 268, 275 (N.J. 1969) (holding that a commercial tenant was constructively evicted when the tenant's office space was flooded); *Manhattan Mansions v. Moe's Pizza*, 561 N.Y.S.2d 331, 334 (N.Y. Civ. Ct. 1990) (finding that a commercial tenant, deprived of the beneficial use of leased premises by the landlord's failure to repair a recurrent water leak, suffered a partial constructive eviction).

The tenant, therefore, was saddled with complete responsibility for the condition of the property—*caveat lessee*.³¹

Courts subsequently recognized the unfairness of the doctrine of *caveat lessee*, and developed a number of exceptions to the harsh common law rule.³² The doctrine of constructive eviction was one exception that permitted both residential and commercial tenants to be relieved from paying rent if the landlord failed to perform a material provision of the lease.³³ This doctrine, however, forced the tenant to abandon the premises before the tenant could claim a constructive eviction.³⁴ The burdens placed on many tenants detracted from the practical value of this doctrine because many tenants could not afford the additional financial burden of finding another place to live.³⁵

In the past thirty years, however, residential lease law has discarded the doctrine of *caveat lessee* in favor of an “implied warranty of habitability.”³⁶ The warranty of habitability provides residential tenants with contractual, as opposed to property, remedies at common law.³⁷ This remedy affords tenants more reasonable means of

31. Murray, *supra* note 2, at 145; see Jean C. Love, *Landlord's Liability for Defective Premises: Caveat Lessee, Negligence, or Strict Liability?*, 1975 WIS. L. REV. 19, 27-28 (finding that the relationship between landlord and tenant was controlled by the doctrine of *caveat lessee*, that is, the tenant took possession of the premises irrespective of its state of disrepair); see also Gallagher v. Button, 46 A. 819, 820 (Conn. 1900) (stating that a lessee bears the risk of the condition and quality of the premises); Roth v. Adams, 70 N.E. 445, 446 (Mass. 1904) (ruling that a tenant takes the premises as the tenant finds it).

32. Sophie, *supra* note 1, at 343.

33. See Lemle v. Breeden, 462 P.2d 470, 473 (Haw. 1969) (finding the doctrine of constructive eviction an exception to the rule of *caveat lessee*); Dyett v. Pendleton, 8 Cow. 727 (N.Y. 1826) (holding that the lessee was constructively evicted by the landlord who habitually brought lewd women into the demised premises); Sophie, *supra* note 1, at 343 (noting that the doctrine of constructive eviction is available to both residential and commercial tenants alike).

34. See Legier v. Deveneau, 126 A. 392, 393 (Vt. 1924) (providing that a tenant can abandon the premises if the landlord wrongfully interferes with the tenant's enjoyment of premises); DUKEMINIER & KRIER, *supra* note 1, at 521-22 (declaring that if the tenant abandoned the premises after a substantial disturbance by the landlord, then the eviction was constructive); Sophie, *supra* note 1, at 344 (finding it absolutely necessary for the tenant actually to abandon the premises within a reasonable time after the landlord's breach before the tenant can claim constructive eviction).

35. See Michael P. McCloskey, Comment, *Commercial Leases Behind the Green Door*, 12 PAC. L.J. 1067, 1076 (1981) (stating that the abandonment requirement of constructive eviction is extremely onerous to the tenant).

36. See BLACK'S LAW DICTIONARY, *supra* note 4, at 1589 (defining “implied warranty of habitability” to be an implied warranty by the landlord that the leased premises are properly maintained and are fit for habitation at the time of letting and throughout the lease term); see also CAL. CIV. CODE § 1942(a) (West 1985) (stating that the landlord's failure to make the premises tenantable allows the tenant to repair and deduct the cost of repair from the rent upon giving the landlord proper notice); *Javins*, 428 F.2d at 1082 (finding a warranty of habitability implied by operation of law into leases of dwelling units covered by the District of Columbia's housing regulations); *Hilder v. St. Peter*, 478 A.2d 202, 208 (Vt. 1984) (holding that an implied warranty of habitability exists in a residential lease).

37. See, e.g., Lemle, 462 P.2d at 475 (holding that basic contract remedies are available to a tenant for breach of warranty); Steele v. Latimer, 521 P.2d 304, 310 (Kan. 1974) (finding that traditional contract remedies are available for breach of warranty); Boston Hous. Auth. v. Hemingway, 293 N.E.2d 831, 843-45 (Mass. 1973) (providing that a breach of warranty gives rise to contractual rights and remedies); see also DUKEMINIER & KRIER, *supra* note 1, at 438-39 (stating that modern courts commonly rely on contract principles to reshape the law of

relief from landlords who fail to comply with lease provisions. Unlike constructive eviction, tenants no longer need to leave the premises to seek a remedy.³⁸ Courts adopted the warranty to account for changing social conditions as well as the unequal bargaining power between tenants and landlords.³⁹ However, the implied warranty of habitability has been limited to the residential lease context.⁴⁰

A. Implied Warranty of Fitness and Commercial Leases

Despite the widespread adoption of the implied warranty of habitability in residential leases, courts and legislatures have been more reluctant to apply a similar warranty to commercial leases.⁴¹ Nonresidential lease law is still, in large part, ruled by law created in medieval times.⁴² While some courts continue to provide constructive eviction as a remedy for commercial lessees, the majority of jurisdictions still apply the doctrine of independent covenants⁴³ to commercial leases due to the presumed equality in bargaining power between a landowner and a potential commercial tenant.⁴⁴ This leaves the commercial tenant with virtually no remedy, other

leases).

38. See *supra* note 35 and accompanying text (explaining that a tenant must vacate the premises before bringing an action for constructive eviction).

39. See *Javins*, 428 F.2d at 1077 (noting the changing nature of society from an agrarian to an urban market); see also *Green*, 10 Cal. 3d at 625, 517 P.2d at 1173-74, 111 Cal. Rptr. at 709-10 (outlining the major changes that have accompanied modern urbanization which have led courts to find an implied warranty of habitability in residential leases); *Lemle*, 462 P.2d at 473-74 (explaining that common law conceptions of a lease are no longer viable since, in an urban society, the majority of tenants sign standardized leases); *Jack Spring, Inc. v. Little*, 280 N.E.2d 208, 216 (Ill. 1972) (discussing the need for an implied warranty of habitability in a modern society).

40. See *Vlatas*, *supra* note 27, at 670 (finding that the implied warranty of habitability is restricted to residential leases in about three-fourths of the United States); see also *Murray*, *supra* note 2, at 161 (explaining that the implied warranty protections were created for the residential lease context and have not been adopted for the commercial tenant even though many of the policy considerations are the same or similar for both residential and commercial tenants).

41. Donald R. Pinto, Note, *Modernizing Commercial Lease Law: The Case for an Implied Warranty of Fitness*, 19 SUFFOLK U. L. REV. 929, 945 (1985); see *Murray*, *supra* note 2, at 161 (asserting that courts have been very unwilling to extend the implied covenants to the commercial context). For two jurisdictions whose statutes do not distinguish between residential and nonresidential rental property, see GA. CODE ANN. § 44-7-13 (1982) and LA. CIV. CODE ANN. art. 2695 (West 1996).

42. Gerald R. Greenfield & Michael Z. Margolies, *An Implied Warranty of Fitness in Nonresidential Leases*, 45 ALB. L. REV. 855, 855-56 (1981).

43. See BLACK'S LAW DICTIONARY, *supra* note 4, at 363 (defining an "independent covenant" to exist when the actual performance of one covenant is not dependent on another, and when, consequently, the remedy of both sides is by action).

44. See *In re Axton*, 641 F.2d 1262, 1267 (9th Cir. 1981) (upholding the tenant's obligation to pay for the use of the premises as long as they remained in possession despite a claim that the landlord breached the covenant of quiet enjoyment); *Murphy v. Texaco, Inc.*, 567 F. Supp. 910, 912 (N.D. Ill. 1983) (requiring the tenants to be responsible for rent despite their claim that the landlord breached a covenant of the lease); *Collins v. Shanahan*, 523 P.2d 999, 1003 (Colo. Ct. App. 1974) (finding that a tenant had wrongfully deducted the costs of repainting the premises from the rent because of the doctrine of independent covenants), *aff'd in part and rev'd in part*, 539 P.2d 1261 (Colo. 1975); *Interstate Restaurants, Inc. v. Halsa Corp.*, 309 A.2d 108, 110 (D.C. 1973) (explaining that

than an action in contract for damages, when the lessor breaches a covenant of the lease.⁴⁵

Some courts have begun to recognize the gross inequalities between small business owners and commercial property owners.⁴⁶ The small business owner is less likely to be able to afford legal counsel to review the lease or hire inspectors to ensure the fitness of the property, unlike landlords who are usually better informed about the condition of the premises.⁴⁷ Courts have found that the small business owner's plight is analogous to that of residential tenants who have the protection of the implied warranty of habitability.⁴⁸ This has created a slow trend toward extending to commercial leases the implied warranty which is more dependent on factual analysis than precedent. The first case in this trend was the 1969 New Jersey Supreme Court case of *Reste Realty Corp. v. Cooper*.⁴⁹

I. *Reste Realty Corp. v. Cooper*

In *Reste Realty*, a landlord, seeking past due rent, sued a commercial tenant, who had leased a portion of the basement floor in a commercial building.⁵⁰ Two years before the lease was to end, the tenant had abandoned the premises because of con-

because the commercial lease was negotiated by counsel on behalf of the clients, the covenants in the lease were independent); *McCardle v. Courson*, 402 N.E.2d 292, 295 (Ill. App. Ct. 1980) (noting that the existence of covenants to repair and to pay rent is insufficient to make them mutual); *Yuan Kane Ing v. Levy*, 326 N.E.2d 51, 54 (Ill. App. Ct. 1975) (stating that the usual construction is that covenants of the lessor and the lessee are independent in commercial leases); *Stevan v. Brown*, 458 A.2d 466, 473 (Md. Ct. Spec. App. 1983) (adopting the doctrine of equitable constructive eviction which allowed the tenant to remain on the premises while the court determined if constructive eviction occurred); *C & J Delivery, Inc. v. Vinyard & Lee & Partners, Inc.*, 647 S.W.2d 564, 568 (Mo. Ct. App. 1983) (providing that commercial leases contain mutually independent covenants unless expressly made dependent). *But see* *Reed v. United States Postal Serv.*, 660 F. Supp. 178, 183 (D. Mass. 1987) (holding that the landlord's duty to repair was given in exchange for the tenant's duty to pay rent); *Westrich v. McBride*, 499 A.2d 546, 548 (N.J. Super. Ct. 1984) (holding a landlord's express covenant to heat premises and a tenant's covenant to pay rent were mutually dependent).

45. *See, e.g., Collins*, 523 P.2d at 1003 (finding that covenants are independent unless there is a clear intention to the contrary).

46. *See, e.g., Davidow v. Inwood N. Prof'l Group—Phase I*, 747 S.W.2d 373, 376 (Tex. 1988) (noting that many commercial tenants have short-term leases and limited financial resources). *See generally* RESTATEMENT (SECOND) OF PROPERTY § 5.1, reporter's note at 176 (1977) (urging the adoption of an implied warranty to nonresidential property and noting especially that the small commercial tenant needs its protection). *But see* *Schulman v. Vera*, 108 Cal. App. 3d 552, 561, 166 Cal. Rptr. 620, 625 (1980) (finding that due to their greater bargaining power, commercial lessees are better able to protect their legal rights than residential tenants).

47. *See* Michael J. Glazerman, *Asbestos in Commercial Buildings: Obligations and Responsibilities of Landlords and Tenants*, 22 REAL PROP. PROB. & TR. J. 661, 691 (1987) (suggesting that landlords are in a better position to take appropriate action, in the case of asbestos related problems, because they have or should have greater knowledge of the building).

48. *See, e.g., Golden v. Conway*, 55 Cal. App. 3d 948, 962, 128 Cal. Rptr. 69, 78 (1976) (stating that the reasoning for the implied warranty of habitability in residential leases is persuasive with respect to commercial leases); *Pawco, Inc. v. Bergman Knitting Mills, Inc.*, 424 A.2d 891, 895 (Pa. Super. Ct. 1980) (holding that contract law principles should apply with equal force in residential and commercial contexts).

49. 251 A.2d 268 (N.J. 1969).

50. *Reste Realty*, 251 A.2d at 270.

stant water seepage which rendered conducting business in the building impossible.⁵¹ The landlord contended that the tenant agreed to accept the premises in its present condition which excluded any implied warranty or covenant.⁵² The court disagreed and found that the tenant should not be held liable pursuant to the doctrine of caveat lessee for a latent defect.⁵³ The court reasoned that the lessor was in a better position to know of the defect and should be held responsible for its repair.⁵⁴ Justice Francis wrote:

A prospective lessee, such as a small businessman, cannot be expected to know if plumbing or wiring systems are adequate. Nor should he be expected to hire experts to advise him. Ordinarily all this information should be considered readily available to the lessor who in turn can inform the prospective lessee. These factors have produced persuasive arguments for reevaluation . . . of an implied warranty that the premises are suitable for the leased purposes and conform to local codes and zoning laws.⁵⁵

Due to the significance and latency of the defect, the court held that the tenant was not responsible for past due rent because she had been constructively evicted.⁵⁶

This unique analysis strayed from precedent, which had remained entrenched in the common law doctrine of independent covenants and caveat lessee. The court's approach suggested an extension of the implied warranty of fitness to commercial tenancies. Nevertheless, the *Reste Realty* decision failed to take a permanent hold in New Jersey. In *Berzito v. Gambino*,⁵⁷ the New Jersey Supreme Court found that the language in *Reste Realty* on the implied warranty of suitability was mere dictum, and that the case had been decided on the basis of constructive eviction.⁵⁸ Other courts, however, interpreted *Reste Realty* as adopting an implied warranty of habitability in commercial leases.⁵⁹

51. *Id.* at 270-71.

52. *Id.* at 271.

53. *Id.* at 272; see BLACK'S LAW DICTIONARY, *supra* note 4, at 883 (defining "latent defect" as a hidden or concealed defect that could not be discovered by reasonable and customary observation).

54. *Reste Realty*, 251 A.2d at 272.

55. *Id.*

56. *Id.* at 277.

57. 308 A.2d 17 (N.J. 1973).

58. *Berzito*, 308 A.2d at 19-20; see *Kruvant v. Sunrise Mkt., Inc.*, 279 A.2d 104, 106 (N.J. 1971) (establishing that the implied warranty was not available to the commercial lessee).

59. See, e.g., *Timber Ridge Town House v. Dietz*, 338 A.2d 21, 23 (N.J. Super. Ct. Law Div. 1975) (finding that the *Reste Realty* court had adopted the implied warranty of habitability in commercial leases).

2. *Implied Warranty of Fitness Since Reste Realty*

Since *Reste Realty*, many jurisdictions have evinced a willingness to abandon the common law concept of caveat lessee in favor of an implied warranty of fitness.⁶⁰ In 1988, the Texas Supreme Court found an implied warranty of fitness in a commercial lease when the premises were unsuitable for their intended purpose.⁶¹ This allowed the tenant to assert a breach of this warranty as a defense to an action by the landlord to collect past due rent.⁶² Although the court could have chosen to apply the doctrine of constructive eviction because the lessee had also vacated the premises like the tenant in the *Reste Realty* case, it chose to apply the warranty of fitness that ensured the premises were fit for their particular purpose.⁶³

In *Mayfair Merchandise Co. v. Wayne*,⁶⁴ the New York City Fire Department ordered a sprinkler system to be installed in a building.⁶⁵ The landlord attempted to hold the tenant liable for the costs of installation by enforcing a lease provision that required the tenant to make all necessary repairs at the tenant's own cost.⁶⁶ The court found that this provision did not include "permanent, substantial or unforeseen building additions or alterations."⁶⁷ Focusing on the mutual intent of the parties, the court concluded that the installation of an expensive sprinkler system, necessitated by a change in governmental policy, exceeded the tenant's responsibility under the contractual provision.⁶⁸ Although the court did not discuss the implied warranty of fitness, it did hold the landlord responsible for repairs considered to be beyond the scope of ordinary repairs.⁶⁹

In *Sun Insurance Services, Inc. v. 260 Peachtree Street, Inc.*,⁷⁰ a commercial tenant sought consent from the landlord to make renovations.⁷¹ The landlord consented, but only on the condition that the tenant pay the cost of asbestos removal necessary for the renovation.⁷² The trial court, ruling for the landlord, found that the consent provision in the lease required the tenant to comply with any changes the

60. Bopp, *supra* note 3, at 1069-70.

61. *Davidow v. Inwood N. Prof'l Group—Phase I*, 747 S.W.2d 373, 377 (Tex. 1988).

62. *Davidow*, 747 S.W.2d at 375.

63. *Id.* at 377.

64. 415 F.2d 23 (2d Cir. 1969).

65. *Mayfair Merchandise*, 415 F.2d at 24.

66. *Id.*

67. *Id.* at 25; *see id.* (finding that absent clear evidence that the parties intended the contrary, the courts have limited the scope of such covenants to ordinary repairs).

68. *Id.*; *see id.* (setting forth five factors to determine the intent of the parties, including: (1) The length of the term; (2) the rental reserved for the entire term as compared with the cost of the work to be done; (3) whether the work was caused by the tenant's use of the premises, by a change in governmental policy, or by a defect in the premises; (4) the relative benefits of the work to the respective parties to the lease; and (5) what the parties must have contemplated when they executed the lease).

69. *Id.* at 25.

70. 385 S.E.2d 127 (Ga. Ct. App. 1989).

71. *Sun Ins. Servs.*, 385 S.E.2d at 128.

72. *Id.*

landlord requested before making any additions or improvements.⁷³ A Georgia appellate court disagreed, distinguishing between capital improvements or repairs beneficial to the owner of the underlying property and repairs or modifications beneficial to the lessee.⁷⁴ Quoting from the opinion in *Midtown Chain Hotels Co. v. Bender*,⁷⁵ the court found that:

[w]here improvements of a structural nature outside the contemplation of the parties [become] necessary, in the face of covenants by both parties as to just what repairs they would make . . . it would be more equitable and just to require of the landlord the making of substantial improvements which necessarily [enhance] the value of the property.⁷⁶

Thus, the appellate court relied on principles of equity in holding that the removal of asbestos was the landlord's obligation, rather than strictly interpreting the lease terms as the trial court had done.⁷⁷ This significantly undermined the value of lease provisions assigning liability to the lessee, because the court looked beyond the lease in reaching its conclusion.⁷⁸ Similar to the *Mayfair Merchandise* court, the Georgia appellate court reached a conclusion consistent with the implied warranty of fitness even though it did not expressly use the implied warranty in its rationale.

B. Implied Warranty of Fitness in California

Like many other states, California has adopted the implied warranty of habitability in residential leases.⁷⁹ However, the state's courts have taken conflicting positions over whether, and to what extent, a commercial lease contains an implied warranty of fitness.⁸⁰

73. *Id.*

74. *Id.* at 129; *see also* *Jacobi v. Timmers Chevrolet, Inc.*, 296 S.E.2d 777, 779 (Ga. Ct. App. 1982) (finding that capital improvements or repairs normally work to the advantage of the owner and not the lessee who enjoys only a nonfreehold interest in the property).

75. 49 S.E.2d 779 (Ga. Ct. App. 1948).

76. *Sun Ins. Servs.*, 385 S.E.2d at 129.

77. *Id.*

78. *Id.*

79. *See* *Green v. Superior Court (Sunki)*, 10 Cal. 3d 616, 637, 517 P.2d 1168, 1182, 111 Cal. Rptr. 704, 718 (1974) (adopting the implied warranty of habitability in a residential leasehold).

80. *Compare* *Four Seas Inv. Corp. v. International Hotel Tenants' Ass'n*, 81 Cal. App. 3d 604, 613, 146 Cal. Rptr. 531, 535 (1978) (dictum) (stating that "the warranty of habitability could . . . extend to small commercial operations if the facts warranted") *and* *Golden v. Conway*, 55 Cal. App. 3d 948, 962, 128 Cal. Rptr. 69, 78 (1976) (reasoning that "[t]he philosophy behind [a residential implied warranty of habitability] . . . is . . . persuasive if [the premises] are considered as merely a small commercial outlet") *with* *Muro v. Superior Court (Anjac Fashion Bldg., Inc.)*, 184 Cal. App. 3d 1089, 1098, 229 Cal. Rptr. 383, 389 (1986) (dictum) (stating that a commercial tenant may not assert a landlord's breach of an implied warranty of habitability as a defense in an unlawful detainer proceeding).

I. *Glen R. Sewell Sheet Metal, Inc. v. Loverde*

In *Glen R. Sewell Sheet Metal*, the sublessee, Glenn Sewell, sought to hold the sublessors, the Loverdes, responsible for compliance with a Department of Public Health order governing the use of the premises.⁸¹ The Loverdes had converted the leased premises into a trailer park at which time they made necessary improvements, including the installation of a septic system.⁸² In 1963, Sewell subleased the entire premises from the Loverdes and continued to operate the premises as a trailer park.⁸³ In 1965, the Sacramento Department of Public Health ordered Sewell either to connect the trailer park's septic tank to the public sewer lines or terminate the use of the premises as a trailer park.⁸⁴ Sewell closed the trailer park and abandoned the premises eleven months before the sublease expired.⁸⁵

The Loverdes brought suit to recover past due rents that Sewell did not pay when he abandoned the premises.⁸⁶ The Loverdes contended that Sewell was responsible for complying with the Department of Public Health's order pursuant to a provision in the sublease.⁸⁷ The court, however, did not find this provision to be determinative, and applied a set of six factors, similar to those used in *Mayfair Merchandise*,⁸⁸ to determine the intent of the parties.⁸⁹

The *Glen R. Sewell Sheet Metal* court used six factors to determine whether the parties to the lease had agreed that the lessee assumed responsibility for "substantial" repairs to the leased premises: (1) The relationship of the cost of the curative action to the rent reserved; (2) the term for which the lease was made; (3) the relationship of the benefit to the lessee to that of the reversioner; (4) whether the curative action is structural or nonstructural in nature; (5) the degree to which the lessee's enjoyment of the premises will be interfered with while the curative action is being undertaken; and (6) in cases involving compliance with laws or orders, the likelihood that the parties contemplated the application of the particular law or order involved.⁹⁰ Since Sewell had represented in the lease that he had examined the premises, knew of its condition, and that the Loverdes were relieved of all obligations relating to the repair or maintenance of the improvements, the court determined that Sewell assumed the

81. *Glen R. Sewell Sheet Metal*, 70 Cal. 2d at 670, 451 P.2d at 723, 75 Cal. Rptr. at 891.

82. *Id.* at 670, 451 P.2d at 725, 75 Cal. Rptr. at 893.

83. *Id.* at 670, 451 P.2d at 723, 75 Cal. Rptr. at 891.

84. *Id.*

85. *Id.*; *see id.* (stating that Sewell abandoned the premises after discovering that the required sewer connection would cost approximately \$7500).

86. *Id.*

87. *Id.* at 674, 451 P.2d at 726, 75 Cal. Rptr. at 894.

88. *See supra* notes 64-69 and accompanying text (discussing the *Mayfair Merchandise* case).

89. *Glen R. Sewell Sheet Metal*, 70 Cal. 2d at 674, 451 P.2d at 726, 75 Cal. Rptr. at 894.

90. *Id.* at 674 n.10, 451 P.2d at 726 n.10, 75 Cal. Rptr. at 894 n.10.

risk of conforming the sewer system to the governmental requirements.⁹¹ These factors demonstrated that California courts, like those in Georgia, were willing to look to the circumstances surrounding the lease negotiations, rather than the face of the lease itself, to determine whether the lessor or the lessee was intended to be held responsible for “substantial” repairs required by laws and orders governing the premises and its uses.

2. *Green v. Superior Court (Sunki)*

In *Green v. Superior Court (Sunki)*,⁹² the California Supreme Court held that the implied warranty of habitability could be asserted as a defense in an action brought for summary dispossession in a residential lease.⁹³ A landlord sought possession of the leased premises and past due rent from a residential tenant.⁹⁴ The tenant listed the serious defects in the apartment, which included the presence of rats, the lack of heat, plumbing blockages, and exposed faulty wiring which rendered the premises uninhabitable.⁹⁵ The California Supreme Court formally adopted the implied warranty of habitability, and remanded the case to a lower court to determine whether the landlord had breached this warranty.⁹⁶

The court cited the increasing urbanization of the landlord-tenant relationship from the traditional agrarian lessor-lessee transactions protected by common law precepts as a major impetus for adopting an implied warranty of habitability in residential leases.⁹⁷ The move from a primarily agrarian society to an industrial nation changed the nature of the lease conveyance.⁹⁸ The apartment building constructed on the land became far more important than the land itself.⁹⁹ The court interpreted these developments as necessitating a change in the manner in which modern conveyances were viewed.¹⁰⁰ Residential leases were to be viewed not as a conveyance in land, but as a conveyance in living quarters which brought with it an implied warranty as to the condition of the premises to protect the tenant.¹⁰¹

Furthermore, the court found that the tenant’s rent was dependent on the landlord’s fulfillment of the obligations imposed by the warranty of habitability.¹⁰²

91. *Id.* at 675, 451 P.2d at 726-27, 75 Cal. Rptr. at 894-95; *see id.* at 678, 451 P.2d at 729, 75 Cal. Rptr. at 897 (finding that when a risk has been contemplated and voluntarily assumed and the manner of its occurrence is not unexpected, foreseeability is not an issue and the parties will be held to the bargain they made).

92. 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974).

93. *Green*, 10 Cal. 3d at 631, 517 P.2d at 1178, 111 Cal. Rptr. at 714.

94. *Id.* at 620, 517 P.2d at 1170, 111 Cal. Rptr. at 706.

95. *Id.* at 621, 517 P.2d at 1170, 111 Cal. Rptr. at 706.

96. *Id.* at 639, 517 P.2d at 1184, 111 Cal. Rptr. at 720.

97. *Id.* at 622, 517 P.2d at 1171-72, 111 Cal. Rptr. at 707-08.

98. *Id.* at 623, 517 P.2d at 1172, 111 Cal. Rptr. at 708.

99. *Id.*

100. *Id.* at 624, 517 P.2d at 1173, 111 Cal. Rptr. at 709.

101. *Id.*

102. *Id.* at 635, 517 P.2d at 1181, 111 Cal. Rptr. at 717.

However, *Green* left open the question whether there was an implied warranty in commercial leases in California.

3. *Four Seas Investment Corp. v. International Hotel Tenants' Ass'n*

*Four Seas Investment Corp. v. International Hotel Tenants' Ass'n*¹⁰³ involved an unlawful detainer action instituted by a landlord against what the court characterized as residential tenants in his hotel.¹⁰⁴ The tenants refused to vacate the building and placed the rent in an escrow account when the landlord served them with a notice of termination.¹⁰⁵ They asserted a defense of retaliatory eviction, but the court sided with the landlord for lack of evidence.¹⁰⁶ The court's opinion noted that the lease was primarily residential and applied the implied warranty of habitability, thereby relieving the tenants of any obligation to continue paying rent since the hotel was in poor condition.¹⁰⁷ More importantly, in dictum, the court stated that under the proper circumstances, the implied warranty could apply to small commercial businesses under its earlier decision in *Golden*.¹⁰⁸ In *Four Seas Investment*, the court seemed to intimate that an implied warranty of habitability might be plausible in a commercial lease.¹⁰⁹

4. *Schulman v. Vera*

Two and a half years after *Four Seas Investment*, the Fourth District Court of Appeal refused to find an implied warranty in a commercial setting in *Schulman v. Vera*.¹¹⁰ The tenant in *Schulman* operated a restaurant in a commercial building under a lease providing that the landlord would, after receiving notice, repair the roof, exterior walls, and paved areas.¹¹¹ The landlord instituted an unlawful detainer proceeding¹¹² when the lessee refused to pay property taxes that had accrued under the lease.¹¹³ The lessee raised an affirmative defense that the lessor had failed to repair

103. 81 Cal. App. 3d 604, 146 Cal. Rptr. 531 (1978).

104. *Four Seas Inv.*, 81 Cal. App. 3d at 608-09, 146 Cal. Rptr. at 532-33.

105. *Id.* at 608, 146 Cal. Rptr. at 533.

106. *Id.* at 610, 146 Cal. Rptr. at 533-34.

107. *Id.* at 612-13, 146 Cal. Rptr. at 535; *see id.* (finding that the hotel was maintained in abysmal condition and in violation of health and safety codes).

108. *Id.* at 613, 146 Cal. Rptr. at 535; *see id.* (stating that "the warranty of habitability could . . . extend to small commercial operations if the facts warranted"); *see also* *Golden v. Conway*, 55 Cal. App. 3d 948, 962, 128 Cal. Rptr. 69, 78 (1976) (reasoning that "[t]he philosophy behind [a residential implied warranty of habitability] . . . is . . . persuasive [sic] if [the premises] are considered as merely a small commercial outlet").

109. *See Four Seas Inv.*, 81 Cal. App. 3d at 613, 146 Cal. Rptr. at 535.

110. 108 Cal. App. 3d 552, 166 Cal. Rptr. 620 (1980).

111. *Schulman*, 108 Cal. App. 3d at 555-56, 166 Cal. Rptr. at 621-22.

112. *See* BLACK'S LAW DICTIONARY, *supra* note 4, at 1536 (defining "unlawful detainer proceeding" as a statutory procedure by which a landlord can legally evict a tenant in default on the rent).

113. *Schulman*, 108 Cal. App. 3d at 556-57, 166 Cal. Rptr. at 622.

the roof under the lease, thereby breaching an express covenant.¹¹⁴ The court of appeal, affirming the trial court's ruling, held that the landlord's breach of an express covenant to repair in a commercial lease could not be asserted as a defense in an unlawful detainer action.¹¹⁵

The court examined the rationale behind *Green*, which allowed a residential tenant to raise the breach of implied warranty of habitability in an action for summary dispossession, to determine if similar considerations should apply to commercial tenancies.¹¹⁶ The *Schulman* court concluded that the *Green* rationale was inapplicable because commercial lessees have greater bargaining power and financial means by which to protect their legal rights.¹¹⁷ Based on these distinctions, the court rejected the notion that the California Supreme Court intended to extend the implied warranty of habitability to commercial tenants.¹¹⁸

Several decisions since *Schulman* have relied on this opinion to support the notion that a commercial tenant cannot assert the defense of breach of an implied warranty of habitability in an unlawful detainer action.¹¹⁹ Instead, the tenant must sue the lessor independently for damages arising out of the breach of warranty.¹²⁰

5. Muro v. Superior Court (Anjac Fashion Building, Inc.)

In *Muro v. Superior Court (Anjac Fashion Building, Inc.)*,¹²¹ the court considered whether strict liability in tort for injuries caused by latent defects on the property should be extended to commercial as well as residential landlords.¹²² The court found that the question whether to extend liability was analogous to the question whether a warranty of habitability should be implied in commercial

114. *Id.* at 557, 166 Cal. Rptr. at 622. The lessee introduced evidence that the roof had leaked throughout the lease period, requiring the lessee to place buckets on the restaurant's tables. *Id.*

115. *Id.* at 563, 166 Cal. Rptr. at 626; *see id.* (holding that "[t]he trial court correctly concluded that [the] lessees' claim was not properly litigable in the unlawful detainer proceeding"). The court based its holding on two grounds: (1) The nonapplicability of the *Green* rationale in a commercial setting; and (2) the need to preserve the summary nature of an unlawful detainer proceeding. *Id.* at 560-63, 166 Cal. Rptr. at 624-26.

116. *Id.* at 560-61, 166 Cal. Rptr. at 624-25; *see Green*, 10 Cal. 3d at 637, 517 P.2d at 1182, 111 Cal. Rptr. at 718 (discussing the need for an implied warranty of habitability in modern residential leases).

117. *Schulman*, 108 Cal. App. 3d at 561, 166 Cal. Rptr. at 625; *see id.* (stating that "[t]he parties [in a commercial lease] 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 the needed repairs himself or herself, if necessary, and then sue the lessor for damages").

118. *See id.* at 561, 166 Cal. Rptr. at 624-25 (stating that "[i]t is our conclusion that the *Green* decision is and was intended by the [California Supreme Court] to be restricted to residential leases").

119. *See Muro v. Superior Court (Anjac Fashion Bldg., Inc.)*, 184 Cal. App. 3d 1089, 1098, 229 Cal. Rptr. 383, 389 (1986); *Fish Constr. Co. v. Moselle Coach Works, Inc.*, 148 Cal. App. 3d 654, 658, 196 Cal. Rptr. 174, 176 (1983); *Kemp v. Schultz*, 121 Cal. App. 3d Supp. 13, 16 n.1, 175 Cal. Rptr. 412, 414 n.1 (1981).

120. Bopp, *supra* note 3, at 1067.

121. 184 Cal. App. 3d 1089, 229 Cal. Rptr. 383 (1986).

122. *Muro*, 184 Cal. App. 3d at 1092, 229 Cal. Rptr. at 385.

leases.¹²³ After focusing on five factors—(1) The sophistication of the commercial tenant, (2) the more equal bargaining power of the commercial tenant, (3) the lack of a strong public policy with regard to commercial structures, (4) the availability of commercial properties, and (5) the financial strength of commercial tenants—the court found no support for the extension of an implied warranty of habitability to commercial leases.¹²⁴

Thus, treatment of the implied warranty by California courts is in a state of flux. In the *Golden* and *Four Seas Investment* decisions, appellate courts appeared willing to extend the implied warranty of habitability to some commercial tenants.¹²⁵ However, the *Schulman* and *Muro* decisions reasoned that an implied warranty was not a defense for a commercial tenant.¹²⁶

In 1994, the California Supreme Court reviewed two cases that both involved commercial tenants who were seeking to avoid liability for major structural repairs that were required in the buildings they leased.¹²⁷ The court did not consider the implied warranty of fitness in either case, but instead considered the *Glen R. Sewell Sheet Metal* factors.¹²⁸ The lessee was held liable for major repairs in one case while the lessor was held liable for repairs in the other. This inconsistent outcome resulting from arguably similar factual underpinnings exposes the need for an implied warranty of fitness in commercial leases.

III. THE CALIFORNIA SUPREME COURT CASES

A. *Brown v. Green*

The California Supreme Court granted review in *Brown* to decide whether the lessor or the lessee has the duty to make repairs and alterations to a leasehold necessary to comply with laws affecting the commercial property.¹²⁹ In *Brown*, the court applied the factors set out in *Glen R. Sewell Sheet Metal*,¹³⁰ and held that the parties had agreed the lessee would assume the burden of removing asbestos-laden materials from the building as required by a government abatement order.¹³¹

123. *Id.* at 1097-98, 229 Cal. Rptr. at 388-89.

124. *Id.* at 1098, 229 Cal. Rptr. at 389.

125. *See supra* notes 10-11, 108-09 and accompanying text (discussing the extension of an implied warranty of habitability to commercial tenants).

126. *See supra* notes 110-24 and accompanying text (discussing the absence of an implied warranty of fitness for a commercial tenant).

127. *See supra* notes 12-13 and accompanying text.

128. *See supra* notes 16-17 and accompanying text.

129. *Brown v. Green*, 8 Cal. 4th 812, 816, 884 P.2d 55, 57, 35 Cal. Rptr. 2d 598, 600 (1994).

130. *See supra* note 90 and accompanying text (laying out the factors).

131. *Brown*, 8 Cal. 4th at 816, 884 P.2d at 57, 35 Cal. Rptr. 2d at 600.

1. *Factual and Procedural History*

The defendants, Joseph and Kim Green, Nghia and Chi Dinh, and Steve Chern leased the property at issue from Willet Brown.¹³² The parties did not discuss responsibility for asbestos abatement during the lease negotiations, and before the execution of the lease, none of the parties knew there was asbestos in the building.¹³³ At the time the lease was executed, the tenants had prior leasing experience since they operated ten to twenty retail furniture stores from leased premises.¹³⁴

During the lease negotiations, the defendants were presented with a document entitled "Notice to Owners, Buyers and Tenants Regarding Hazardous Wastes or Substances and Underground Storage Tanks."¹³⁵ The notice included the statement that "owners, buyers, and tenants are urged to consult legal counsel to determine their respective rights and liabilities with respect to the issues described in this notice," including the regulation of asbestos removal.¹³⁶ The defendants signed a document entitled "Proposal to Lease Industrial Space," which included a provision that suggested the signee consult outside legal counsel and other specialists to evaluate the condition of the property, including the possible presence of asbestos.¹³⁷ Joseph Green testified that he read and understood the proposal, and made a deliberate decision not to retain a professional to inspect the property for environmental hazards.¹³⁸

The lease, based on a standard American Industrial Real Estate Association form, was prepared by the landlord's attorney.¹³⁹ The rent was set at \$28,500 per month and the term was fifteen years.¹⁴⁰ The lessees agreed to pay the annual property taxes and to obtain and pay the premiums for liability insurance on the building.¹⁴¹ Furthermore, the lease contained a "compliance with the laws" provision which provided that the lessee would be responsible for any repairs or modifications necessary to comply with local laws.¹⁴² In addition to this provision, the lease also held the lessee responsible for all maintenance and repairs, structural or nonstructural, and relieved

132. *Id.* at 819, 884 P.2d at 58, 35 Cal. Rptr. 2d at 601.

133. *Id.* at 820, 884 P.2d at 59, 35 Cal. Rptr. 2d at 602.

134. *Id.* at 818, 884 P.2d at 58, 35 Cal. Rptr. 2d at 600; *see id.* (demonstrating that the lessees were not unfamiliar with the leasing process).

135. *Id.* at 818 n.1, 884 P.2d at 58 n.1, 35 Cal. Rptr. 2d at 600 n.1.

136. *Id.*

137. *Id.* at 818, 884 P.2d at 58, 35 Cal. Rptr. 2d at 600. *See generally* Glazerman, *supra* note 47, at 674 (explaining that tests for evaluating the condition of asbestos could create more of a hazard than if the material were left alone, and concluding that tenants may not be able to discover the full extent of the risk, even if offered the opportunity to inspect the building). Significant amounts of asbestos are estimated to be present in roughly 20% of all U.S. public and commercial buildings. Joseph Hooper, *The Asbestos Mess*, N.Y. TIMES, Nov. 25, 1990, at 39.

138. *Brown*, 8 Cal. 4th at 818-19, 884 P.2d at 58, 35 Cal. Rptr. 2d at 600.

139. *Id.* at 819, 884 P.2d at 58, 35 Cal. Rptr. 2d at 600.

140. *Id.*

141. *Id.*

142. *Id.*

the lessor of any "obligation in any manner whatsoever to maintain the premises."¹⁴³ Green inspected the property before signing the lease, but did not retain a professional to inspect the property for environmental hazards.¹⁴⁴

Two years into the lease, the Los Angeles County Department of Health Services (Department) inspected the property and found that exposed structural beams were covered with flaking asbestos, and that there was asbestos debris on the carpet below the beams.¹⁴⁵ The Department served the tenants with a notice of asbestos contamination, and ordered them to remove and dispose of the debris.¹⁴⁶ Later, the Department sent an identical notice to the landlord.¹⁴⁷

The landlord and the tenants each demanded that the other remove the asbestos.¹⁴⁸ Brown sued the tenants for back rent, the cost of removing the asbestos-containing material, and the cost of replacing the fireproofing.¹⁴⁹ The trial court, relying principally on the *Glen R. Sewell Sheet Metal* factors,¹⁵⁰ concluded that the language of the relevant lease provision allocated responsibility for asbestos removal and cleanup to the lessees.¹⁵¹ The court of appeal, also relying on *Glen R. Sewell Sheet Metal*, affirmed the judgment of the trial court.¹⁵² The California Supreme Court granted review of the court of appeal judgment.¹⁵³

2. *The Unanimous Opinion*

The California Supreme Court, in an unanimous opinion written by Justice Arabian, addressed whether the lessor or lessee should be held responsible for the removal of asbestos in the absence of a lease provision expressly allocating responsibility for the abatement of environmentally hazardous materials.¹⁵⁴ To determine how the parties intended to allocate responsibility for compliance with the government-ordered alterations unrelated to the lessee's use, the court relied upon the six factors discussed in *Glen R. Sewell Sheet Metal*: First, the relationship of the cost of the curative action to the rent reserved;¹⁵⁵ second, the term for which the lease was

143. *Id.*

144. *Id.* at 818-19, 884 P.2d at 58, 35 Cal. Rptr. 2d at 600.

145. *Id.* at 820, 884 P.2d at 59, 35 Cal. Rptr. 2d at 601.

146. *Id.*

147. *Id.*

148. *Id.* See generally Glazerman, *supra* note 47, at 691 (arguing that it is unreasonable to expect small or average-sized tenants to bear the economic burden of abatement or removal of asbestos).

149. *Brown*, 8 Cal. 4th at 821, 884 P.2d at 60, 35 Cal. Rptr. 2d at 603.

150. See *supra* note 90 and accompanying text.

151. *Brown*, 8 Cal. 4th at 821, 884 P.2d at 60, 35 Cal. Rptr. 2d at 603.

152. *Brown v. Green*, 27 Cal. App. 4th 308, 314, 20 Cal. Rptr. 2d 251, 254 (1993) (unpublished), *aff'd*, 8 Cal. 4th 812, 884 P.2d 55, 35 Cal. Rptr. 2d 598 (1994).

153. *Brown*, 8 Cal. 4th at 821, 884 P.2d at 60, 35 Cal. Rptr. 2d at 603.

154. *Id.* at 816, 884 P.2d at 57, 35 Cal. Rptr. 2d at 600.

155. *Id.* at 830, 884 P.2d at 66-67, 35 Cal. Rptr. 2d at 606-07.

made;¹⁵⁶ third, the relationship of the benefit to the lessee to that of the reversioner;¹⁵⁷ fourth, whether the curative action is structural or nonstructural in nature;¹⁵⁸ fifth, the degree to which the lessee's enjoyment of the premises will be interfered with while the curative action is being undertaken;¹⁵⁹ and sixth, the likelihood that the parties contemplated the application of the particular law or order involved.¹⁶⁰

The court began its opinion by distinguishing the lease in *Glen R. Sewell Sheet Metal*¹⁶¹ from the lease at issue in *Brown*, because it did not contemplate a use of the property by the lessee of the sort likely to trigger a municipal hazardous materials cleanup order.¹⁶² This made the factors detailed in the *Glen R. Sewell Sheet Metal* opinion even more outcome-determinative in *Brown*. Since the lessee's use in *Brown* did not create or cause the abatement order, and the order was beyond the scope of compliance with the laws clause in the lease, the court relied heavily on the *Glen R. Sewell Sheet Metal* factors to determine the parties probable intent when entering into the lease.¹⁶³

a. *The Relationship of the Cost of the Curative Action to the Rent Reserved*

The first factor the court considered was the relationship of the cost of the curative action to the rent reserved.¹⁶⁴ The lease term was for fifteen years at a monthly rent of \$28,500.¹⁶⁵ The total cost of the abatement procedure was \$251,856, less than five percent of the total rent reserved over the lease term.¹⁶⁶ Although the cost of the asbestos disposal operation was considered to be "substantial," the court reasoned that the provisions of the lease agreement, along with the facts that the condition was discovered early in the lease term and the total rent reserved was significantly larger than the cost of removal, suggested that the parties intended that

156. *Id.* at 831, 884 P.2d at 67, 35 Cal. Rptr. 2d at 610.

157. *Id.* at 832, 884 P.2d at 67-68, 35 Cal. Rptr. 2d at 610-11.

158. *Id.* at 832, 884 P.2d at 68, 35 Cal. Rptr. 2d at 611.

159. *Id.* at 833, 884 P.2d at 68, 35 Cal. Rptr. 2d at 611.

160. *Id.* at 833-34, 884 P.2d at 68-69, 35 Cal. Rptr. 2d at 611-12.

161. *See supra* notes 81-91 and accompanying text (presenting a brief synopsis of the *Glen R. Sewell Sheet Metal* case).

162. *See Brown*, 8 Cal. 4th at 824-25, 884 P.2d at 62-63, 35 Cal. Rptr. 2d at 605-06 (finding that because the Green partnership's particular use of the property was not one that triggered the county's abatement order unlike the one at issue in *Glen R. Sewell Sheet Metal*, it lay outside the literal text of the "compliance with laws" clause of the lease).

163. *See supra* note 90 and accompanying text (outlining the *Glen R. Sewell Sheet Metal* factors which offer insight into the probable intent of the parties at the time the lease is created); *infra* Part III.A.2.a.-f.

164. *Brown*, 8 Cal. 4th at 830, 884 P.2d at 66, 35 Cal. Rptr. 2d at 609-10.

165. *Id.* at 830 n.7, 884 P.2d at 67 n.7, 35 Cal. Rptr. 2d at 610 n.7.

166. *Id.*; *see id.* (finding the total rent reserved by multiplying the monthly rent (\$28,500) by the life of the lease (15 x 12 = 180 months) to yield total rent reserved figure of \$5,130,000, and then dividing the cost of abatement (\$251,856) by that figure, yielding 4.9%).

the lessee be held responsible for major structural repairs.¹⁶⁷ Subsequently, the court found that the cost of the curative action was very low compared to the total rent reserved.¹⁶⁸

b. The Term for Which the Lease Was Made

The next factor that the court examined was the length of the lease term.¹⁶⁹ Fifteen years was deemed a “long” lease for the purposes of the court’s analysis.¹⁷⁰ The ability of a lessee to amortize the costs of repair over a long lease term is greater when compared to a short-term lease.¹⁷¹ If the term was three or five years, it would be more difficult to foresee the lessee assuming responsibility for the cost of major repairs.¹⁷² Therefore, the longer the lease, the more likely a lessee is to be held responsible for major repairs if provided for in the lease.

c. The Relationship of the Benefit to the Lessee to that of the Reversioner

The third factor the court examined was the benefit the repair conferred upon the lessor at the expiration of the lease term.¹⁷³ The lessees argued that the benefits would be substantial since the landlord would have an “asbestos free” building at the end of the lease term.¹⁷⁴ The court found that the lessee would also receive a substantial benefit since the condition was discovered early in the lease term so both parties would profit from the asbestos removal.¹⁷⁵

d. Whether the Curative Action Is Structural or Nonstructural in Nature

The fourth factor involves identifying whether the major repair or alteration is structural or nonstructural.¹⁷⁶ The lessees argued that the removal of asbestos was

167. *Id.* at 831, 884 P.2d at 67, 35 Cal. Rptr. 2d at 610; see 1 FRIEDMAN, *supra* note 14, § 10.601, at 656 (finding that when the lease term is relatively long and the tenant has time to amortize the cost, a repair clause is more apt to be strictly construed).

168. *Brown*, 8 Cal. 4th at 830-31, 884 P.2d at 66-67, 35 Cal. Rptr. 2d at 609-10.

169. *Id.* at 831, 884 P.2d at 67, 35 Cal. Rptr. 2d at 610.

170. *Id.*

171. *Id.* at 832, 884 P.2d at 67, 35 Cal. Rptr. 2d at 610.

172. *Id.* at 831-32, 884 P.2d at 67, 35 Cal. Rptr. 2d at 610; see 1 FRIEDMAN, *supra* note 14, § 10.601, at 655-56 (finding that a clause that states the tenant is to make all structural repairs is insufficient to require the tenant to make structural repairs if the lease term is relatively short).

173. *Brown*, 8 Cal. 4th at 832, 884 P.2d at 67, 35 Cal. Rptr. 2d at 610.

174. *Id.*

175. *Id.*

176. *Id.* at 832, 884 P.2d at 68, 35 Cal. Rptr. 2d at 611.

structural in nature because it required stripping the building's structural beams.¹⁷⁷ The court agreed with the lessee's characterization of the abatement procedure as structural, but found that the lease agreement expressly shifted the responsibility for all repairs, including "structural" repairs, to the tenants.¹⁷⁸ Thus, if the express language had not been included in the lease, the court may have been inclined to hold the lessor responsible for the asbestos removal.¹⁷⁹

e. The Degree to Which the Lessee's Enjoyment of the Premises Will Be Interfered with While Curative Action Is Being Undertaken

Next, the court considered whether the abatement order substantially interfered with the lessee's use of the premises.¹⁸⁰ If the court found that the repair operations substantially interfered with the tenant's use of the premises, then it would probably find that the lessor had accepted the burden of compliance.¹⁸¹

In this case, the lessees were able to work around the repair operations by moving the business into the warehouse section of the building.¹⁸² In light of these facts, the court determined that the interference from the asbestos-removal would not weigh heavily in favor of a finding that the lessor accepted responsibility for compliance.¹⁸³

f. The Likelihood that the Parties Contemplated the Application of the Particular Law or Order Involved

The final factor the court examined was whether either party contemplated compliance with a hazardous materials abatement order.¹⁸⁴ Despite the fact that neither party was aware of the presence of asbestos-containing materials, the court found that both parties knew there was a possibility that such a condition might exist.¹⁸⁵ Furthermore, the court looked at the lessees' substantial experience in retail leasing and the fact that they had chosen not to have the premises inspected by a professional.¹⁸⁶ This

177. *Id.*

178. *Id.* at 833, 884 P.2d at 68, 35 Cal. Rptr. 2d at 611; *see id.* (finding the affirmative provisions in the lease that absolved the lessor of any responsibility for repairs, whether or not structural, was evidence of the parties' intent in shifting the burden to the tenants). *But see id.* at 816, 884 P.2d at 57, 35 Cal. Rptr. at 600 (finding that a provision expressly allocating responsibility for the abatement of environmentally hazardous materials was absent).

179. *Id.* at 832-33, 884 P.2d at 68, 35 Cal. Rptr. 2d at 611.

180. *Id.* at 833, 884 P.2d at 68, 35 Cal. Rptr. 2d at 611.

181. *Id.*; *see id.* (finding that "the greater the magnitude . . . of the compliance effort, the more likely it is to qualify as 'substantial' and thus as part of the lessor's duty").

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 833-34, 884 P.2d at 68, 35 Cal. Rptr. 2d at 611.

186. *Id.* at 834, 884 P.2d at 68-69, 35 Cal. Rptr. 2d at 611-12.

led the court to conclude that the parties intended that the lessees would assume the responsibility of complying with the abatement order.¹⁸⁷

In conclusion, the California Supreme Court held that the tenants were responsible for removing asbestos from the leased premises.¹⁸⁸ The court determined that the weight of evidence indicated that the parties intended that the lessee be responsible for all repairs, structural and nonstructural.¹⁸⁹ Furthermore, the court concluded that the lease alone was not dispositive in determining who would be liable for major structural repairs.¹⁹⁰ Finally, the court reaffirmed the rule enunciated in *Glen R. Sewell Sheet Metal* that the entire context of the lease and its terms must be considered in assigning responsibility for major repairs.¹⁹¹

B. *Hadian v. Schwartz*

The California Supreme Court granted review in *Hadian* to decide, as in *Brown*, whether the lessor or the lessee should be held responsible for major structural repairs or alterations of the leasehold necessary to comply with local laws.¹⁹² Like *Brown*, the *Hadian* court applied the factors set out in *Glen R. Sewell Sheet Metal*.¹⁹³ However, unlike *Brown*, the court held that the landlord was responsible for retrofitting the premises for seismic safety in compliance with city laws.¹⁹⁴

1. *Factual and Procedural History*

The defendant (lessee), Edward Schwartz, intending to open a bar and cabaret, signed a three-year commercial property lease with a monthly rent of \$650.¹⁹⁵ The parties amended the preprinted form lease by lining through the “compliance with the law” and “condition of premises” provisions.¹⁹⁶ As signed by the parties, the lease held the lessee responsible for complying with all laws affecting the property.¹⁹⁷

187. *Id.* at 834, 884 P.2d at 69, 35 Cal. Rptr. 2d at 612.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.* at 829, 884 P.2d at 65-66, 35 Cal. Rptr. 2d at 608-09.

192. *Hadian v. Schwartz*, 8 Cal. 4th 836, 839-40, 884 P.2d 46, 47-48, 35 Cal. Rptr. 2d 589, 590-91 (1994).

193. *See supra* notes 81-91 and accompanying text (summarizing the *Glen R. Sewell Sheet Metal* case).

194. *Hadian*, 8 Cal. 4th at 846-47, 884 P.2d at 52, 35 Cal. Rptr. 2d at 595.

195. *Id.* at 840, 884 P.2d at 48, 35 Cal. Rptr. 2d at 591; *see id.* (observing that the lease also contained an option to renew the lease for an additional five years at a monthly rent of \$800).

196. *Id.*; *see id.* (noting that the lease agreement was entitled “Standard Industrial Lease—Net” and was published by the American Industrial Real Estate Association); *id.* (finding that the “compliance with the laws” provision would have held the lessor responsible for the violation of any building codes in existence at the commencement of the lease term). Had the parties not agreed to strike the compliance with the laws provision, the lessor would have been held responsible for seismic alterations. *Id.*

197. *Id.* at 841, 884 P.2d at 48, 35 Cal. Rptr. 2d at 591; *see id.* (explaining that “the lease required the lessee to ‘comply with all applicable statutes, ordinances, rules, regulations, orders, covenants, and restrictions of record, and requirements in effect during the term or any part hereof, regulating the use by the lessee of the premises’”

Additionally, the lessee agreed to accept the building in its current condition and make all repairs, including structural and nonstructural.¹⁹⁸ The lease also relieved the lessor of any obligation to repair or maintain the property.¹⁹⁹

Towards the end of the three-year lease, the lessee exercised the option to renew the lease for five years.²⁰⁰ However, before the new lease term commenced, the City of Los Angeles (City) ordered the lessor, Hadian, to arrange for a structural survey to determine the property's susceptibility to earthquake damage and pay for any costs associated with retrofitting the building in accordance with the code.²⁰¹

Hadian then contacted Schwartz to discuss who was liable under the lease for the seismic alterations.²⁰² Neither party readily accepted liability, and Hadian was forced to pay for the repair operation to respond to the compliance order within the specified time.²⁰³ The building's frame was reconstructed and a new roof was installed.²⁰⁴

Hadian filed a breach of contract action against Schwartz for failing to pay for the seismic alterations.²⁰⁵ Hadian's complaint alleged that the lessee had agreed to comply with any alterations ordered by municipal authorities by virtue of the striking of the "compliance with the laws" provision and that seismic retrofitting was covered by this clause.²⁰⁶ The trial court found for Hadian based on the conclusion that the parties intended to place liability for the cost of the seismic upgrade on the lessee.²⁰⁷ The court of appeal affirmed, relying entirely on the *Glen R. Sewell Sheet Metal*

(quoting the lease)).

198. *Id.*; *see id.* (noting that the lessee accepted the building "in its condition existing as of the lease commencement date or earlier, subject to all applicable zoning, municipal, county and state laws, ordinances, and regulations governing and regulating the use of the Premises" (quoting the lease)) (internal quotation marks omitted); *id.* (observing that the lessee was also required to "keep in good order, condition and repair the Premises and every part thereof, structural and nonstructural . . . , including . . . all . . . walls (interior and exterior), foundation, ceiling, roofs (interior and exterior), [and] floors" (quoting the lease)) (internal quotation marks omitted).

199. *Id.* at 841, 884 P.2d at 48, 35 Cal. Rptr. 2d at 591; *see id.* (stating that the lease provided that "Lessor [shall] have no obligation, in any manner whatsoever, to repair and maintain the Premises nor the building located thereon . . . , whether structural or nonstructural, which obligation is intended to be that of the lessee under the [maintenance and repair provision] hereof" (quoting the lease)) (internal quotation marks omitted); *id.* at 843, 884 P.2d at 50, 35 Cal. Rptr. 2d at 593 (finding that a lessee of a bar/cabaret is not likely to believe the use of the property will result in a reconstruction of the building).

200. *Id.* at 841, 884 P.2d at 48, 35 Cal. Rptr. 2d at 591.

201. *Id.* at 841, 884 P.2d at 49, 35 Cal. Rptr. 2d at 592. Hadian's building was constructed of unreinforced masonry so it was likely that the hazardous condition existed prior to the signing of the lease. *Id.*

202. *Id.*

203. *Id.* at 841-42, 884 P.2d at 49, 35 Cal. Rptr. 2d at 592; *see id.* (noting that the cost of compliance totaled \$34,450.26 after the retrofitting was completed).

204. *Id.* at 842, 884 P.2d at 49, 35 Cal. Rptr. 2d at 592; *see id.* (explaining that the City then issued a certificate of completion).

205. *Id.*

206. *Id.*

207. *Id.*; *see id.* at 842 n.1, 884 P.2d at 49 n.1, 35 Cal. Rptr. 2d at 592 n.1 (noting that the plaintiff argued that the trial court relied on the "observation of the parties" and not the *Glen R. Sewell Sheet Metal* factors).

opinion.²⁰⁸ The California Supreme Court granted review of the court of appeal judgment.²⁰⁹

2. *The Unanimous Opinion*

The California Supreme Court, in a unanimous opinion written by Justice Arabian, addressed whether the lessor or lessee should be held responsible for seismic retrofitting in the absence of a lease provision expressly allocating responsibility for such an operation.²¹⁰ As in *Brown*, the court relied upon the six factors discussed in *Glen R. Sewell Sheet Metal* to determine how the parties intended to allocate responsibility for compliance with the government-ordered alterations unrelated to the lessee's use.²¹¹ The factors were used to shed light on the circumstances surrounding the execution of the lease.

The court noted that the leases were virtually identical in *Brown* and *Hadian*.²¹² However, in *Hadian*, the court concluded that the lessor was responsible for complying with the government-ordered alteration in stark contrast to its decision in *Brown*.²¹³

a. *The Relationship of the Cost of the Curative Action to the Rent Reserved*

As in *Brown*, the first factor the court considered was the relationship of the cost of the curative action to the rent reserved.²¹⁴ The lease term was for three years at a monthly rent of \$650.²¹⁵ The total cost of the retrofitting procedure was \$34,450.26, almost one and one-half times the total rent reserved over the three-year lease term.²¹⁶ Even if the five-year option was included in the equation, the court reasoned that the cost of the seismic upgrade was still significantly larger than the total rent reserved

208. *Id.* at 842, 884 P.2d at 49, 35 Cal. Rptr. 2d at 592; *see id.* (the court of appeal reasoned that, as in *Glen R. Sewell Sheet Metal*, the lease obligated the lessee to comply with all applicable laws and the lessor assumed no obligation for repairs or compliance with the laws).

209. *Id.*

210. *Id.* at 843-44, 884 P.2d at 50, 35 Cal. Rptr. 2d at 593.

211. *Id.* at 846-47, 884 P.2d at 52, 35 Cal. Rptr. 2d at 595; *see id.* at 844, 884 P.2d at 52, 35 Cal. Rptr. 2d at 594 (distinguishing *Hadian* from *Glen R. Sewell Sheet Metal* in that the seismic retrofitting was not related to the lessee's use of the property); *supra* notes 90, 155-60 and accompanying text (setting forth the factors).

212. *Id.* at 845, 884 P.2d at 51, 35 Cal. Rptr. 2d at 594; *see id.* (finding that both the preprinted text and the elimination of provisions by strikeover made the two leases virtually identical).

213. *Id.*

214. *Id.* at 847, 884 P.2d at 52, 35 Cal. Rptr. 2d at 595.

215. *Id.*

216. *Id.* at 847, 884 P.2d at 52-53, 35 Cal. Rptr. 2d at 595-96; *see id.* (finding the total rent reserved, not including the five-year option, by multiplying the monthly rent (\$650) by the life of the lease (3 x 12 = 36 months) to yield a total rent reserved figure of \$23,400 and dividing the cost of upgrading (\$34,000) by that figure, yielding 145%).

over the eight-year life of the lease.²¹⁷ Consequently, the court found that the cost of the curative action was very high compared to the total rent reserved.²¹⁸

b. The Term for Which the Lease Was Made

The next factor that the court examined was the length of the lease term.²¹⁹ The court deemed the three-year lease to be “short.”²²⁰ Therefore, the ability of a lessee to amortize the costs of repair over a short lease term was diminished, as compared to the fifteen year lease in *Brown*.²²¹ Thus, the shorter the lease, the more likely a lessor is to be held responsible for major repairs, such as seismic reconstruction.

c. The Relationship of the Benefit to the Lessee to that of the Reversioner

The third factor the court examined was the benefit the repair conferred upon the lessor at the expiration of the lease term.²²² Unlike *Brown*, the court recognized that the seismic upgrade would primarily benefit the lessor since she would have an earthquake-safe building.²²³ Furthermore, the court noted that the work required was not a result of the lessee’s use of the building, but rather, the City’s classification of the building as one that was susceptible to earthquake damage.²²⁴ Thus, the court refused to hold the lessee responsible for costly structural repairs that would result in a windfall to the lessor.

d. Whether the Curative Action Is Structural or Nonstructural in Nature

The fourth factor involves identifying whether the seismic alteration was structural or nonstructural. The court quickly dispensed with this factor and identified

217. *Id.*; see 1 FRIEDMAN, *supra* note 14, § 10.601, at 655-56 (finding that where the lease term is relatively short and the costs of the repair are nearly as much as the total aggregate rent, courts often refuse to acknowledge lease language assigning liability to the lessee).

218. *Hadian*, 8 Cal. 4th at 847, 884 P.2d at 53, 35 Cal. Rptr. 2d at 596; see *id.* (recognizing that the compliance costs in *Brown* were less than 5% of the aggregate rent while the cost of quake-proofing was 49% of the total rent reserved over the eight-year life of the lease).

219. *Id.* at 847-48, 884 P.2d at 53, 35 Cal. Rptr. 2d at 596.

220. *Id.* at 847, 884 P.2d at 53, 35 Cal. Rptr. 2d at 596; see *id.* (recognizing that “the question of the length of a lease term is . . . relative, [but finding] *most* would agree . . . three years qualifies as *short*” (emphasis added); see *id.* at 848, 884 P.2d at 53, 35 Cal. Rptr. 2d at 596 (including the five-year option when considering the length of the lease and determining the option period would not change the result)).

221. *Id.* at 848, 884 P.2d at 53, 35 Cal. Rptr. 2d at 596.

222. *Id.*

223. *Id.*

224. *Id.*

the retrofitting operation as structural in nature.²²⁵ The retrofitting procedure involved the insertion of a new steel frame into the core of the building, the installation of plywood shear walls and foundation anchors, as well as the construction of a new roof.²²⁶

e. The Degree to Which the Lessee's Enjoyment of the Premises Will Be Interfered with While the Curative Action Is Being Undertaken

The fifth factor considered by the court was whether the abatement order substantially interfered with the lessee's use of the premises.²²⁷ In this case, evidence of interference was absent from the record.²²⁸ However, the court determined that the reconstruction of the building's frame would not be unintrusive.²²⁹ In light of these facts, the court determined that the interference from the reconstruction would not weigh heavily in favor of the lessor.²³⁰

f. The Likelihood that the Parties Contemplated the Application of the Particular Law or Order Involved

On this final factor, the record was not determinative, and the court concluded that it did not favor one party or the other.²³¹ The court recognized the common knowledge that southern California is prone to earthquakes, but was unable to determine if either party knew of the City's program to upgrade unreinforced buildings.²³² The lessor was required to make some earthquake renovations in the late 1960s, which the court used to impute the lessor with a general awareness that the property might need to be retrofitted for earthquake safety in the future.²³³ Still, the court did not find this factor helpful in determining whether the lessor or the lessee anticipated complying with the City's upgrade program.²³⁴

In conclusion, the California Supreme Court found that the lessor was responsible for major structural repairs despite the apparent presence of a net lease.²³⁵ The

225. *Id.* at 848-49, 884 P.2d at 54, 35 Cal. Rptr. 2d at 597.

226. *Id.* at 849, 884 P.2d at 54, 35 Cal. Rptr. 2d at 597.

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.* See generally *California Earthquake Damage at \$7.2 Billion—Insurers*, REUTERS FIN. SERV. (New Jersey), Aug. 4, 1994, at 1 (stating that property damage from the 1994 Northridge earthquake has reached \$7.2 billion); *Los Angeles; 72,000 Buildings Reported Affected by Earthquake*, L.A. TIMES, Mar. 29, 1994, at B2 (reporting that the Northridge earthquake affected 72,000 buildings, 11,000 of which sustained moderate to major damage).

233. *Hadian*, 8 Cal. 4th at 849, 884 P.2d at 54, 35 Cal. Rptr. 2d at 597.

234. *Id.*

235. *Id.* at 850, 884 P.2d at 54, 35 Cal. Rptr. 2d at 597.

court determined that the weight of evidence indicated that the parties intended the lessor to be responsible for all repairs, structural and nonstructural.²³⁶ Furthermore, the court concluded that the lease alone was not dispositive in determining who was to be liable for major structural repairs.²³⁷ Finally, the court reaffirmed the rule enunciated in *Glen R. Sewell Sheet Metal* that the entire context of the lease and its terms must be considered in assigning responsibility.²³⁸

IV. LEGAL RAMIFICATIONS

Despite being decided on the same day, the California Supreme Court handed down decisions regarding similar leases in both *Brown* and *Hadian* that appear to be contradictory. The *Brown* decision held that the lessee was responsible for major structural repairs in a net lease while the *Hadian* decision held that the lessor was responsible for the major structural repairs.²³⁹ *Hadian* involved a short-term lease with a low monthly rent and an expensive retrofitting alteration while *Brown* involved a long-term lease with a high monthly rent and a moderate repair cost.²⁴⁰ Both decisions further expounded upon the six factors set out in *Glen R. Sewell Sheet Metal* that are used to determine the probable intent of the parties in assigning liability for substantial repairs.²⁴¹ The problem with using these factors is that the results vary depending upon the court's interpretation, as evidenced by the dichotomous *Brown* and *Hadian* decisions. Furthermore, the court ignored the possibility of an implied warranty of fitness in its decisions.

A. *Variance in the Glen R. Sewell Sheet Metal Factors Too Great for Lessors and Lessees to Rely Upon*

In delivering inapposite opinions in two cases with similar lease provisions, the California Supreme Court demonstrated the problem with relying solely on the *Glen R. Sewell Sheet Metal* factors. Each of the six factors is fact specific which the court interprets freely, even in the absence of evidence.²⁴² This leaves many questions

236. *Id.*

237. *Id.* at 846-47, 884 P.2d at 52, 35 Cal. Rptr. 2d at 594.

238. *Id.*

239. *Id.* at 850, 884 P.2d at 54, 35 Cal. Rptr. 2d at 597; *Brown v. Green*, 8 Cal. 4th 812, 816, 884 P.2d 55, 57, 35 Cal. Rptr. 2d 598, 602 (1994).

240. Compare *Hadian*, 8 Cal. 4th at 840, 884 P.2d at 48, 35 Cal. Rptr. 2d at 592 (finding the terms of the lease to be three years with a monthly rent of \$650), with *Brown*, 8 Cal. 4th at 819, 884 P.2d at 58, 35 Cal. Rptr. 2d at 600 (recognizing the term of the lease to be 15 years at a monthly rent of \$28,500).

241. *Glen R. Sewell Sheet Metal, Inc. v. Loverde*, 70 Cal. 2d 666, 674 n.10, 451 P.2d 721, 726 n.10, 75 Cal. Rptr. 889, 894 n.10 (1969).

242. In *Hadian*, the court found little evidence on the record for the fifth and sixth factors, but nevertheless weighed the absence of evidence in favor of the lessee, who was successful under the other four factors. *Hadian*, 8 Cal. 4th at 849, 884 P.2d at 54, 35 Cal. Rptr. 2d at 599.

about what constitutes a “net” lease and the consequences which flow from having such a lease.

As lessors and lessees continue to sign what appear to be “net” leases, it is clear from the *Brown* and *Hadian* decisions that the court will look beyond the face of the lease to other extrinsic factors to allocate the risk of compliance with government orders arising from property conditions unrelated to the lessee’s use.²⁴³ This can be interpreted to mean that unless the lessee causes the need for the major repair or alteration, the court will delve into the “probable” intent of the parties at the execution of the lease even if a “compliance with the laws” provision assigns responsibility to the lessee. After *Hadian*, it seems that the net lease is no longer truly “net” in the sense that a lessor can no longer assign liability for all repairs even if the lessee agrees to such a provision and especially when the lease is for a short term.

Similar to *Brown*, the *Hadian* court acknowledged that, construed literally, the “compliance with the laws” provision only applied to governmental orders that regulated the uses made of the property by the lessee.²⁴⁴ Still, the court found for the lessor despite clear evidence that the lessee’s furniture business had not created the asbestos hazard.²⁴⁵ Since the compliance with the laws provisions were similar in both *Brown* and *Hadian*, it becomes clear that the California Supreme Court was not looking into the probable intent of the parties, but rather what the bench contemplated as equitable. Ultimately, the decisions in *Hadian* and *Brown* create a wealth of uncertainty for landlords and lessees alike.

The court was not looking at statements made by the parties at the execution of the lease, nor was it looking to express provisions in the lease. The California Supreme Court imputed intent through the facts of each case. This becomes clear by looking at each factor independently.

B. *Factors of Equity—Not Probable Intent*

First, the court compared the cost of the remedy to the total rent reserved. The court created a balancing test with this factor. If the repair was expensive and the total rent reserved was also high, then it was ascertained that the parties probably intended that the lessee be held responsible for a substantial repair.²⁴⁶ Alternatively,

243. *Brown*, 8 Cal. 4th at 826, 884 P.2d at 63, 35 Cal. Rptr. 2d at 606; see *Hadian*, 8 Cal. 4th at 844-45, 884 P.2d at 51, 35 Cal. Rptr. 2d at 594 (stating that the analysis begins with the language of the lease itself and then the court takes a second step by examining the lease terms in light of the factors surrounding the lease’s execution).

244. See *Brown*, 8 Cal. 4th at 827, 884 P.2d at 64, 35 Cal. Rptr. 2d at 597 (finding that other circumstances surrounding the transaction can be considered in assessing whether the landlord or tenant should be responsible for government-ordered work that is unrelated to the lessee’s use of the building).

245. *Id.*; see *id.* (concluding after looking at the circumstances surrounding the lease transaction that the lessee had accepted responsibility for the government order to remove asbestos from the building).

246. *Id.* at 830-31, 884 P.2d at 66-67, 35 Cal. Rptr. 2d at 609-10 (determining that a commercial lessee in a long term lease containing a “compliance with the laws” provision suggests that the parties intended that the lessee assume the major burdens of ownership).

if the total rent reserved was low and the cost of repair was high, then the court reasoned that the parties intended the lessor be liable.²⁴⁷ In conducting this balancing test, the court was not determining the intent of the parties, but was applying standards of equity to reach a desired result.

In adhering to equitable notions, the court was substituting judicially-created standards instead of strictly interpreting the literal text of the lease. The court applied the *Glen R. Sewell Sheet Metal* factors in both *Brown* and *Hadian*, yet the cases were distinguishable from *Glen R. Sewell Sheet Metal*. In *Glen R. Sewell Sheet Metal*, the Loverdes, the original lessees and subsequent lessors, altered the premises, which necessitated that changes be made to the property to comply with a government order.²⁴⁸ Clearly, the landlord in *Glen R. Sewell Sheet Metal* should not have been held responsible for complying with the government orders when, were it not for the lessee's actions, the government would have mandated no order. However, neither lessee in the cases examined in this Casenote altered the premises in a manner requiring compliance with a government order. The court ignored these facts and engaged in an analysis that combined interpretation of the text of the lease and the *Glen R. Sewell Sheet Metal* factors.

Using this approach, the court failed to accord proper weight to the express terms of the lease. In *Brown*, the court conceded that the "compliance with the laws" provision was applicable to the lessee only if the use of the premises gave rise to a government order.²⁴⁹ Still, the court chose to look at the circumstances surrounding the lease transaction to determine responsibility.²⁵⁰ In *Hadian*, the court refused to acknowledge the lease itself, which dictated that the lessee be responsible for all repairs, "structural or nonstructural."²⁵¹ Instead, the *Hadian* court determined that the lessor should be held responsible.

The court has employed its own sense of fairness and equity using the factors from *Glen R. Sewell Sheet Metal* instead of ascertaining the parties' expressed intent in the lease. As evidenced from the discussion above, the court could have adjudicated both *Brown* and *Hadian* by looking solely to the lease terms. Nevertheless, the court has manufactured standards that allows it to reach what it believes to be an equitable solution. However, this also results in creating confusion among landlords and tenants.

Using formulas that compute the total rent reserved to compare to the cost of the repair does not negate the fact that the parties have already inserted the necessary

247. *Id.* at 831-32, 884 P.2d at 66-67, 35 Cal. Rptr. 2d at 609-10 (finding it unlikely that a lessee would intend or expect to assume the repair/compliance burden if the cost of repair is equal to or a substantial fraction of the total rent over the life of the lease).

248. *See supra* note 82 and accompanying text.

249. *See supra* note 162 and accompanying text.

250. *Brown*, 8 Cal. 4th at 827, 884 P.2d at 64, 35 Cal. Rptr. 2d at 597.

251. *See Hadian*, 8 Cal. 4th at 841, 884 P.2d at 48, 35 Cal. Rptr. 2d at 591 (finding that the lease required the lessee to "keep in good order, condition and repair the Premises and every part thereof, structural and nonstructural").

lease provisions to assign responsibility for structural repairs. The formula goes beyond determining the parties' intent by interjecting judicial values. These values have determined that if a lessee pays a high rent and faces an expensive repair, the lessee should be responsible for the repair, whereas a lessee who pays a low rent should not. The terms "high rent" and "low rent" themselves are subjective in nature. By not strictly construing the terms of the lease, the court ignores the intent of the parties as expressed in the lease, and uses the *Glen R. Sewell Sheet Metal* factors to reach what the court considers to be an equitable solution.

Second, the court considered the length of the lease. The court determined whether the lease was considered to be long or short. There is no bright line "time table" for what the court believes constitutes a long- or a short-term lease. As with the first factor, this second factor was also subjective and equitable in nature. The court reasoned that the longer the lease, the more likely the parties contemplated that the lessee be held responsible for substantial repairs. The court was not examining the parties' actual or probable intent; rather, it merely found it became more equitable to hold the lessee liable if the lease was for a lengthy term. The cost-benefit analysis used by the court found that a long-term tenant has the ability to amortize the costs of repairs over a substantial period of time, making it more affordable for the lessee. Therefore, if two leases are identical in substance, except for the length of the term, the court might find that in one situation the lessee was intended to be liable for repairs, while in the other, the lessee should be held harmless.

This could have serious ramifications as lessees and their legal counsel might negotiate for shorter term leases with options to renew to avoid liability for major repairs.²⁵² Lessors would then have difficulty assigning responsibility through lease provisions because the court would look beyond the lease to circumstances surrounding the lease. By engaging in an equitable balancing test, the court unintentionally places limits on lessor bargaining power. No longer will lessors be able to enter into fair negotiations to assign liability. Instead, lessors will be forced to consider the factors enumerated in *Glen R. Sewell Sheet Metal* when executing a lease to decipher the full extent of their liability.²⁵³

For example, when a lessor enters into a net lease assigning responsibility for all repairs to the lessee, the lessor must look to other extrinsic factors beyond the lease document. The lessor must give consideration to the length of the lease term and the total rent reserved. The lessor must give additional thought to the subjective evaluation of the lessee's leasing experience when entering lease negotiations to ensure that the lessee is fully informed. A court would probably hold the lessor responsible for full disclosure to an inexperienced lessee. Ultimately, the lessors are stripped of their freedom to contract, allowing the terms of the lease alone to assign liability.

252. *Id.* at 848, 884 P.2d at 53, 35 Cal. Rptr. 2d at 596; *see id.* (affording less weight to the five-year option to renew in determining the length of the lease).

253. *See supra* note 90 and accompanying text.

Third, the court examined which party received the most benefits from the repair or alteration. If the lessee had a considerable amount of time remaining in the lease term, the court found that the lessee received a large benefit due to the lessee's extended period of enjoyment of the repair.²⁵⁴ Conversely, if there was little time remaining in the lease term, the lessor was more likely to be found liable because the lessee would not have reaped the benefit of the repair. Ultimately, in any case, the landlord always receives a benefit regardless of the length of the lease term. At the end of the lease, the property is apt to be more marketable with the safety improvements. The lessor can market the building as structurally sound or asbestos-free, which is likely to increase the property's rental value. Future lessees are likely to be attracted to property that meets health and safety standards, resulting in higher rental values for the lessors.

Fourth, the court determined whether the repair was structural or nonstructural.²⁵⁵ If the repair was structural, the court leaned toward holding the lessor liable, but this factor alone was not dispositive. On the other hand, if the repair was nonstructural in nature, the court found the lessee was more likely to have assumed liability. In *Brown*, the court held the lessees liable for structural repairs on the grounds that the lease provisions assigned the liability to the lessees.²⁵⁶ Yet, in *Hadian*, the court refused to hold the lessee liable despite virtually identical lease provisions.²⁵⁷ Once again, while the court appeared to consider the actual intent of the parties, it actually chose the lease terms that would yield results that were consistent with those reached from the extrinsic factors test in *Glen R. Sewell Sheet Metal*.

Fifth, the court took into account the degree to which the repair interfered with the lessee's use of the property. This is another fact-specific factor that the court must analyze on a case-by-case basis. If the lessee was forced to vacate the premises, the court found it more equitable to hold the tenant harmless. In contrast, if the lessee could continue normal use of the premises, the court was likely to find the lessee should be held responsible for the cost of repairs. Under this factor, lessees, claiming that the repair interfered with their use, might be more willing to vacate the premises prematurely to avoid liability when the question of responsibility arises. Obviously, this would create problems for courts in ascertaining whether lessees vacated due to the interference from the repairs or from the desire to escape liability.

Finally, the court considered the likelihood that the parties contemplated the need for compliance with the particular law or ordinance. If the parties expressly assigned responsibility, that designation was controlling. However, if it was not contemplated and neither party should have known of the potential liability, this factor becomes

254. *Brown*, 8 Cal. 4th at 832, 884 P.2d at 67, 35 Cal. Rptr. 2d at 610.

255. Structural elements of a building include the footings, foundation, load-bearing walls, columns, beams, roof, and components of the electrical and mechanical building systems. 5 THOMPSON ON REAL PROPERTY, *supra* note 18, § 44.07 n.86.

256. *Brown*, 8 Cal. 4th at 834, 884 P.2d at 69, 35 Cal. Rptr. 2d at 612.

257. *Hadian*, 8 Cal. 4th at 847, 884 P.2d at 52, 35 Cal. Rptr. 2d at 595.

less important.²⁵⁸ The court will then rely more heavily on the other factors to determine the parties' intent, as occurred in *Hadian*.²⁵⁹

Clearly, only the sixth factor actually probes into the parties' probable intent. Thus, the court was drawing its distinction in assigning liability based upon a standard that is primarily judicially created. Instead of restricting the scope of examination to the strict language of the lease, the court entertained the notion of determining the intent of the parties. Furthermore, the factors treat leases with identical provisions differently, based not upon the intent of the parties, but rather the court's beliefs determined by these judicially created standards. Equitable principles, or results achieved based on equity, do not make good precedent because they are necessarily fact-specific and do not provide much predictability. It is this leap into the arena of probable intent and judicially created standards that leaves lessors and lessees uncertain of who bears the responsibility of major repairs in a net lease.

C. *Implied Warranty of Fitness to Protect Lessees from Property Hazards*

The court did not consider the existence of an implied warranty of fitness in either the *Brown* or the *Hadian* case. Yet both cases involved a lessor delivering the premises with existing hazardous conditions. In *Brown*, the debris inside the building contained asbestos.²⁶⁰ This created serious health hazards for the tenants in the building. With an implied warranty of fitness, like the warranty applied in *Davidow v. Inwood North Professional Group—Phase I*²⁶¹ and *Reste Realty Corp. v. Cooper*,²⁶² the court could have found the lessor responsible for repairs after putting the lessees in a building hazardous to their health. This doctrine provides a more equitable solution in allocating responsibility between the parties because the lessor is likely to be familiar with the building's history and therefore more aware of any latent structural defects therein.

Similarly, the lessees in *Hadian* were put at a high risk of harm when the city inspector found that the building was constructed of unreinforced masonry.²⁶³ In a well known earthquake region, the building's construction posed a serious hazard to the tenants' safety. However, the court did not consider enforcing an implied war-

258. *Id.* at 849, 884 P.2d at 54, 35 Cal. Rptr. 2d at 597.

259. *Id.*

260. *Brown*, 8 Cal. 4th at 820, 884 P.2d at 59, 35 Cal. Rptr. 2d at 602; *see id.* (noting that air samples from the interior of the building proved that airborne asbestos was present at levels harmful to humans); *see* Glazerman, *supra* note 47, at 674 (discussing the difficulty tenants may encounter in trying to detect asbestos, even if offered an opportunity to inspect).

261. 747 S.W.2d 373, 376 (Tex. 1988); *see id.* (recognizing an implied warranty by a commercial landlord to fix the air conditioning system, a leaking roof, and the absence of hot water).

262. 251 A.2d 268 (N.J. 1969); *see supra* Part II.A.1. (discussing the application of an implied warranty of fitness to a commercial tenant whose office space was flooded).

263. *Hadian*, 8 Cal. 4th at 841, 884 P.2d at 49, 35 Cal. Rptr. 2d at 591; *see id.* (finding that the City notified the lessor that in the event of an earthquake, the building was highly susceptible to damage).

ranty of fitness. If the court had considered an implied warranty of fitness, the court would not have needed to engage in a subjective determination of the parties' intent. Instead, the court would have held the lessor responsible for failing to give the lessee the premises in a condition fit for commercial operations.

In 1974, the California Supreme Court formally adopted the implied warranty of habitability in *Green v. Superior Court (Sunski)*.²⁶⁴ However, California courts have not acknowledged the adoption of an implied warranty of fitness for commercial leases.²⁶⁵ Some cases have intimated that such a warranty might be applicable if the commercial business was a small operation because the lessee in these cases would lack equal bargaining power with the lessor.²⁶⁶ After all, the implied warranty of habitability was created to protect the health, safety, and welfare of residential tenants on just this basis.²⁶⁷ Courts should have an interest in protecting a commercial lessee's health and safety as well. Still, California courts have refused to extend an implied warranty to commercial leases.²⁶⁸

While there is no clear test for identifying a small commercial operation, the court would probably label both businesses in *Brown* and *Hadian* as such.²⁶⁹ Both lessees' health and safety were endangered.²⁷⁰ In both cases, the lessors failed to place the lessees in safe buildings, and, through no fault of their own, the lessees were exposed to serious danger. This presents an ideal situation for the application of an implied warranty of fitness. A state should have a strong interest in protecting the health and safety of commercial, as well as residential, tenants.²⁷¹

There is no justification for drawing an arbitrary line at residential versus commercial safety. In fact, the rationale of protecting health and safety may even be more forceful with commercial tenants. Commercial enterprises have employees who work on the premises and the premises are usually open to the public. Therefore, the scope of individuals affected is potentially larger than in the residential context. Additionally, as with residential landlords, commercial lessors are in a better position

264. 10 Cal. 3d 616, 637, 517 P.2d 1168, 1182, 111 Cal. Rptr. 704, 718 (1974); see *supra* Part II.B.2.

265. Bopp, *supra* note 3, at 1077; see *id.* (finding that California courts have been inconsistent in deciding whether to adopt an implied warranty of fitness for commercial leases).

266. See *supra* notes 108-09 and accompanying text (discussing the possible application of an implied warranty of fitness for small businesses).

267. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1075-76 (D.C. Cir. 1970) (finding that the consumer's health and safety should be protected in the context of sale or lease transactions).

268. See *supra* notes 110-18 and accompanying text.

269. See *Brown*, 8 Cal. 4th at 818, 884 P.2d at 58, 35 Cal. Rptr. 2d at 601 (detailing the lessee's furniture store operation); see also *Hadian*, 8 Cal. 4th at 840, 884 P.2d at 48, 35 Cal. Rptr. 2d at 591 (finding that the lessee intended to use the property for a bar and cabaret). One could argue that the furniture store in *Brown* was a medium sized commercial operation with 10 to 20 outlets, but this should not affect the application of an implied warranty of fitness.

270. See *Brown*, 8 Cal. 4th at 820, 884 P.2d at 59, 35 Cal. Rptr. 2d at 602 (finding that airborne asbestos was present in quantities harmful to humans); see also *Hadian*, 8 Cal. 4th at 841, 884 P.2d at 49, 35 Cal. Rptr. 2d at 592 (stating that the premises were structurally unsound for earthquake safety).

271. See Glazerman, *supra* note 47, at 678 (stating that the strong health and safety concerns generated by the asbestos issue might provide for an extension of the implied warranty in a commercial setting).

to know the history of the building and its defects. By adopting the implied warranty of fitness, courts could protect the health and safety of unsuspecting commercial tenants as well as their customers.

An implied warranty of fitness would require that the lessor place the commercial tenant in possession of premises that meet all of the state health and safety codes. Lessors should not be able to escape liability for health and safety violations through lease provisions in light of the increasing inequality of bargaining power between lessors and lessees. However, if the lessee's use of the premises necessitates additional measures to meet code standards, the lessee should be held liable. The warranty would provide commercial lessors and lessees with a uniform industry standard by which all parties could determine responsibility.

Furthermore, it is important that courts provide lessors and lessees with predictability. Lack of predictability in a situation in which such a great expense is involved could have a severe and detrimental impact on small business owners. Small entrepreneurs might be discouraged from starting a small operation due to the high costs and liability associated with leasing commercial space.

Assigning liability to the lessor will afford a more equitable solution than the application of the *Glen R. Sewell Sheet Metal* factors, provided that the tenant's use of the property did not create the need for repair. In such a case, the court should not apply the implied warranty of fitness. The lessor has little, if any, control over the lessee's actions once the tenant is in possession. Therefore, after taking possession of a building that complies with state health and safety codes, tenants should be held responsible for all code violations caused thereafter by their use of the property. This will protect lessors from reckless tenants who create the need for major structural repairs.

By refusing to adopt such a warranty, courts are clinging to an old common law tradition, and forcing tenants to pay for costly repairs that result in a windfall to the landlord. Until courts adopt an implied warranty in the commercial setting, landlords will continue to be able to pass on the costs of major structural repairs to faultless lessees who fail to notice a latent defect.

1. *The Implied Warranty of Fitness Applied to Brown*

Had the California Supreme Court considered an implied warranty of fitness in *Brown*, the court might have handed down a decision in favor of the lessee. Setting aside the factors from *Glen R. Sewell Sheet Metal*, the court would have focused instead on the presence of dangerously high levels of asbestos present before the lessee took possession.

Under the doctrine of implied warranty of fitness, a court would consider this danger to public health as the most determinative factor of liability. To further the state's interest in protecting the health and safety of tenants and their customers, a

court would be required to hold the lessor liable for the presence of asbestos.²⁷² A lessor would be unable to escape liability by eliminating lease terms warranting the condition of the property and compliance with applicable laws.²⁷³ This would provide a just result, holding the party who markets the property for rent responsible for compliance with health and safety codes.

2. *The Implied Warranty of Fitness Applied to Hadian*

The decision in *Hadian* would remain unchanged if the court had applied the warranty of fitness. The lessor was found responsible for seismic retrofitting. It was a condition that existed prior to the lessee taking possession. Furthermore, the condition of the building was dangerous to tenant and public safety. Under an implied warranty of fitness analysis, the lessor would be held liable for failing to put the lessee in possession of premises compliant with state safety codes.

V. CONCLUSION

In *Brown v. Green* and *Hadian v. Schwartz*, the California Supreme Court increased confusion in the area of commercial lease law. No longer can a lessor or lessee accurately predict who will be responsible for major structural repairs despite the existence of a "compliance with the laws" provision in the lease. If the repair was not necessitated by the lessee's use, courts will apply the factors from *Glen R. Sewell Sheet Metal* to determine the probable intent of the parties. However, courts are actually engaging in a balancing test, weighing judicially created standards to reach an equitable solution.

Additionally, California courts have not adopted the implied warranty of fitness for commercial leases. Until California courts extend the warranty to commercial tenants, lessees will have no protection against latent defects difficult to discover through visual inspection. Small businesses will be especially affected because the costs of leasing will increase as expert inspections become necessary. Courts should adopt the implied warranty of fitness because, in the long term, the landlord will reap the benefits of ownership from the building while a tenant will occupy the premises for a short period of time.

272. See *id.* at 662 (detailing the health hazards of asbestos).

273. See *Brown*, 8 Cal. 4th at 819, 884 P.2d at 59, 35 Cal. Rptr. 2d at 602 (noting that the lessor crossed out lease provisions that warranted the condition of the property and compliance with applicable laws).

