Non-Waiver of the Implied Warranty of Habitability in Residential Leases

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Non-Waiver of the Implied Warranty of Habitability in Residential Leases

KATHERYN M. DUTENHAVER*

INTRODUCTION

"TENANT AGREES THAT NO REPRESENTATIONS, WARRANTIES (EXPRESSED OR IMPLIED) OR COVENANTS WITH RESPECT TO THE CONDITION, MAINTENANCE OR IMPROVEMENTS OF THE APARTMENT, BUILDING, OR OTHER AREAS HAVE BEEN MADE TO TENANT EXCEPT THOSE CONTAINED IN THIS LEASE, THE APPLICATION, OR OTHERWISE IN WRITING SIGNED BY THE LESSOR.""

Under common law principles, a landlord had no duty to place or maintain premises in a habitable condition. As transferee of a less-than-freehold estate, a tenant was treated as an owner and was given the rights and duties of ownership for the agreed upon term: the right of exclusive possession and the concomitant duties to pay rent and not to commit waste.² The transfer was considered a conveyance of land and the property principle of caveat emptor was applicable. A tenant had to rely on his own inspection and his own judgement. There were no implied warranties relating to the condition of the premises. The only covenant implied by operation of law to the landlord was that of quiet enjoyment. Once the right to possession was delivered, a landlord had fully performed all legal obligations, and the only continuing duty was to refrain from interfering with the tenants peaceable enjoyment of the premises.³

Thirty-seven jurisdictions have now departed from the common law interpretation of the landlord-tenant relationship and have discarded to a considerable extent the application of the doctrine caveat emptor.⁴ This departure has taken various forms. Twenty-

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4. These jurisdictions are: Alaska, Arizona, California, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska,
two states have enacted legislation which places some duty on a landlord for the condition of the premises rented for residential purposes.\textsuperscript{5} Of these states, half have adopted the applicable provi-

\begin{footnotesize}

New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Virginia, Washington, Wisconsin. See notes 5—8 infra and accompanying text.

The common law doctrine of \textit{caveat emptor} is still adhered to in Alabama, Arkansas, Colorado, Idaho, Mississippi, Nevada, North Carolina, Pennsylvania, South Carolina, Texas, Utah, Vermont, West Virginia and Wyoming. Application of this doctrine permits the tenant to inspect the premises and determine for himself their suitability with the option of securing an express warranty from the landlord. \textit{1 American Law of Property} § 3.45 (A.J. Casner ed. 1952).


In ten of the states which still adhere to the doctrine of \textit{caveat emptor}—Alabama, Arkansas, Idaho, Mississippi, Nevada, South Carolina, Utah, Vermont, West Virginia, and Wyoming—the issue of whether to discard the doctrine has not been before the courts. Nonetheless, Nevada, without any judicial decisions on the issue, may have indicated its rejection of the doctrine by enacting legislation in January of 1976 which requires any written rental contract or lease to contain a provision relating to the respective responsibilities of the landlord and the tenant as to any damage or repair to the apartment or any of its furnishings.


Some states require the landlord to initially turn over and thereafter keep the premises in repair. \textit{See} N.D. CENT. CODE §§ 47-16-13.1—2 (1977). A similar provision appears in OKLA. STAT. ANN. tit. 41, § 31 (West 1954). \textit{See also} GA. CODE ANN. § 61-111 (1966): "The landlord must keep the premises in repair, and shall be liable for all substantial improvements placed upon them by his consent." In Louisiana, "The lessor is bound from the very nature of the contract . . . to maintain the thing [leased] in a condition such as to serve for the use for which it is hired." LA. CIV. CODE ANN. art. 2692 (West 1952). \textit{Compare} MD. CODE ANN. R.P. § 8-211(a) (Supp. 1978):

The purpose of the section is to provide tenants with a mechanism for encouraging the repair of serious and dangerous defects which exist within or as part of any residential dwelling unit, or upon the property used in common of which the dwelling unit forms a part. The defects sought to be reached by this section are those which present a substantial and serious threat of danger to the life, health and
sions of the Uniform Residential Landlord and Tenant Act ("ULRTA"). Other jurisdictions have judicially implied warranties

safety of the occupants of the dwelling unit, and not those which merely impair the aesthetic value of the premises, or which are, in those locations governed by such codes, housing code violations of a nondangerous nature.


Unless the repair was made necessary by the negligence or improper use of the premises by the tenant, the landlord is under duty to:
1. Keep in reasonable state of repair portions of the premises over which he maintains control;
2. Keep in a reasonable state of repair all equipment under his control necessary to supply services which he has expressly or impliedly agreed to furnish to the tenant, such as heat, water, elevator or air conditioning;
3. Make all necessary structural repairs;
4. Repair or replace any plumbing, electrical wiring, machinery or equipment furnished with the premises and no longer in reasonable working condition.


Still others require the landlord to meet a more general standard such as complying with a warranty that a dwelling is fit for human habitation. See, e.g., Me. Rev. Stat. tit. 14, § 6021 (Cum. Supp. 1978-79).


relating to the condition of the property. In certain jurisdictions, judicially implied warranties co-exist with [non-uniform] statutes.

To counteract this recent development in the law, many landlords are currently presenting tenants with leases, usually standardized forms, by which a tenant purports to waive rights and remedies or hold the landlord harmless for the condition of the premises. This article will explore the impact of leases containing such waiver provisions and will set forth the rationale for declaring such provisions unenforceable.

**Evolution of Warranties**

To support the proposition that a waiver of the implied warranty of habitability should not be permitted and that the inclusion of waiver provisions in standardized form leases should be penalized, it is necessary to examine the traditional common law from which the warranty evolved and the rationales of the courts which have implied the warranty.

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7. See notes 23-38 infra and accompanying text.


9. The implied warranty of habitability has been the subject of numerous publications in law journals. Most have primarily focused on a recitation of the rationales articulated by the courts in creating the warranty. See, e.g., Abbott, Housing Policy, Housing Codes and Tenant Remedies: an Integration, 56 B.U.L. Rev. 1 (1976); Meyers, Covenant of Habitability and the American Law Institute, 27 Stan. L. Rev. 879 (1975); Line, Implied Warranties of Habitability and Fitness for Intended Use in Urban Residential Leases, 26 Baylor L. Rev. 161 (1974); Moskovitz, Implied Warranty of Habitability: A New Doctrine Raising New Issues, 62 Calif. L. Rev. 1444 (1974); Special Project: Developments in Contemporary Landlord-Tenant Law: An Annotated Bibliography, 26 Vand. L. Rev. 689 (1973); Modern Status of Rules as to Existence of Implied Warranty of Habitability or Fitness for Use of Leased Premises, 40 A.L.R. 3d 646 (1971).

By comparison, little has been written within these articles on the issue of a waiver of landlord's duty. See generally Note, The Great Green Hope: The Implied Warranty of Habitability in Practice, 28 Stan. L. Rev. 729, 768-9 (1976); Love, Landlord's Liability for Defective Premises: Caevat Lessee, Negligence, or Strict Liability?, 75 Wis. L. Rev. 19, 106-7 (1975); Meyers, The Covenant of Habitability and the American Law Institute, 27 Stan. L. Rev. 879, 881 (1975); Moskovitz, The Implied Warranty of Habitability: A New Doctrine Raising New Issues, 62 Calif. L. Rev. 1444, 1445 (1974); Comment, Tenant Protection in Iowa, 58 Iowa L. Rev. 656, 673-83 (1973). The only publication which dealt specifically with the issue of waiver was an analysis of the one case in which waiver was litigated. Note, Waiving the Implied Warranty of Habitability in Residential Leases, 53 Neb. L. Rev. 610 (1974).
The Common Law

Due to the independent covenants rule, applied to the landlord-tenant relationship along with caveat emptor, the tenant's rent became due once the landlord delivered possession. The obligation to pay rent was excused only if the landlord interfered with possession causing an eviction of the tenant. The tenant was not relieved of his rental obligation even if the landlord breached an express promise to repair the premises. Improvements on the premises were considered incidental to the land, which was the subject matter of the lease. Carried to its logical extreme, the tenant's obligation for rent continued even if the improvements were totally destroyed.

The practical effect of applying caveat emptor and the independent covenants rule was that the tenant could choose to rent less than desirable dwellings, setting personal standards of acceptability. The law provided for the exceptional situations so that if there were latent defects undiscoverable by the tenant upon an inspection or if the tenant were renting a furnished dwelling for a short term without the time or opportunity for an adequate inspection, a limited duty was placed on the landlord to disclose the existence of known defects. The remedy offered to the tenant was to terminate the lease.

In an agricultural environment where land and not housing was the primary bargain of the parties, where housing was of very simple construction so that the tenant was generally capable of repair if choosing to do so, and where there was no shortage of housing, these rules seldom injured the tenant. The common law doctrine of caveat emptor, however, has an adverse effect upon today's tenant. The tenant is now primarily interested in renting a dwelling rather

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10. Under the rule that covenants were independent, the duty of immediate performance was not dependent on performance by the other party to the lease. Therefore, failure of one to perform did not excuse performance by the other. All promises by landlord and tenant were secondary to the landlord-tenant relationship. Breach of a secondary undertaking did not terminate the estate but gave rise to a cause of action for damages only. 1 American Law of Property § 3.11 (A.J. Casner ed. 1952). See Barry v. Frankini, 287 Mass. 196, 191 N.E. 651, 93 A.L.R. 1240 (1934).


15. Sunasack v. Morey, 196 Ill. 569, 63 N.E. 1039 (1902); Restatement (Second) of Torts § 358 (1965).


than land. Generally, the tenant does not possess the skills necessary to assume repairs nor does he have the capability of repairing or the long term interest in the property necessary for financing. Moreover, many defects require repair work that extends beyond his right of possession in the demised premises.\(^\text{18}\)

**Judicially Implied Warranties: The Courts Answer To Unenforced Housing Codes**

The first attempt to remedy this situation was the enactment of statutes which enabled local units of government to establish housing codes regulating the condition of dwellings.\(^\text{19}\) The enforcement of these elaborately detailed provisions was delegated to public authorities.\(^\text{20}\) However, official enforcement proved inadequate. Illustrative of the problem are the facts of a New York case in which the bulk of the code violations which had been in existence for more than four years were still not repaired by the landlord despite repeated court proceedings initiated by the enforcement agency.\(^\text{21}\) If

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18. Id. at 1078; Green v. Superior Court, 10 Cal. 3d 616, 624-25, 517 P.2d 1168, 1173, 111 Cal. Rptr. 704, 709 (1974).


20. The duties imposed by the Housing Regulations . . . [were] established by the Commissioners because, in their judgment, the grave conditions in the housing market required serious action. Yet official enforcement of the housing code has been far from uniformly effective. Innumerable studies have documented the disparate condition of rental housing in the District of Columbia and in the Nation.


public enforcement had been effective there would have been no need for the implied warranty of habitability.

The warranty is another attempt to establish minimum housing conditions. It is a judicial means of providing a tenant with private enforcement of the provisions of housing codes which have already shifted the primary duty for habitable dwelling units to the landlord. An implied warranty of habitability has been recognized by a growing number of courts in the last few years. Under this warranty, the duty has been imposed upon the landlord to deliver premises in a habitable condition, or to maintain the premises in a condition fit for habitation. In some jurisdictions, the duty has been implied as to both delivery and maintenance.


The Javins case, in recognizing the lack of suitable housing for low income tenants, discussed the inability of modern tenants to assume the ownership responsibilities of their agrarian predecessors, the lack of power they possess as against the landlords at the time of signing the lease agreement and the inability of today's tenants to use the historical doctrine of constructive eviction as a remedy to living in uninhabitable conditions. See text accompanying footnotes 41-50, infra. In response to this dilemma, the court held that a warranty of habitability is implied into all leases by operation of law and that the warranty is measured by the standards set out in the Housing Regulations. 428 F.2d at 1071-72. By basing the breach of this warranty on existing housing codes, the court provided a minimum standard for the condition of the premises of residential tenants. It further provided the same tenants the remedy of privately enforcing the provisions of the code.

24. Although the habitable condition of premises has not been clearly defined, the court in Steele v. Latimer, 214 Kan. 329, 338, 521 P.2d 304, 311 (1974) has stated: "Not every defect or inconvenience should be deemed to constitute a breach of covenant of habitability; the condition complained of should be such as truly renders the premises uninhabitable in the eyes of a reasonable person."

Courts have developed two identifiable classes of implied warranties. The first is based upon the provisions of applicable housing codes ("code-based warranty"). Other courts have implied a more general warranty. A general warranty is usually stated as a warranty by the landlord that at the inception of the rental there are no latent or patent defects in facilities vital to the use of the premises for residential purposes and that these essential facilities will remain during the entire term in a condition which makes property livable. This general warranty has been devised for the stated pur-
pose that the protection afforded by the code-based warranty does not necessarily coincide with housing code requirements and that there may be instances where conditions not covered by code regulations render the apartment uninhabitable. 30

Where breach is determined on the basis of violations of a housing code, minor violations have been held not to constitute breach. 31 In either case, the landlord has not breached the general or code-based warranties where defects are caused by any act of the tenant. 32 Once breach has been determined, the tenant has been allowed to terminate the lease 33 and sue for damages. 34 Because the traditional remedy of termination does not necessarily result in putting the premises in a habitable condition, 35 courts have also devised various rem-

30. Two courts have implied both the general warranty and the code based warranty.
Under these circumstances we hold the landlord impliedly warrants at the outset of the lease that there are not latent defects in facilities and utilities vital to the use of the premises for residential purposes and that these essential features shall remain during the entire term in such condition to maintain the habitability of the dwelling. Further, the implied warranty we perceive in the lease situation is a representation there neither is nor shall be during the term a violation of applicable housing law, ordinance or regulation which shall render the premises unsafe, or unsanitary and unfit for living therein.
Tenant asserts that [the warranty of habitability] was broken because landlord failed to supply heat and water service to a ninth-story apartment; the incinerator did not function, impairing garbage disposal; the hot water supply failed; water leaked into the bathroom, there were defects in venetian blinds; the plaster in the walls was cracked, and the apartment was unpainted. Some of these clearly go to bare living requirements. In a modern society one cannot be expected to live in a multi-storied apartment building without heat, hot water, garbage disposal or elevator service. Failure to supply such things is a breach of the implied covenant of habitability. Malfunction of venetian blinds, water leaks, wall cracks, lack of painting, at least of the magnitude presented here, go to what may be called ‘amenities.’ Living with lack of painting, water leaks and defective venetian blinds may be unpleasant, aesthetically unsatisfying, but does not come within the category of uninhabitability.
Id. at 482-83, 268 A.2d at 559.
35. The implied warranty of habitability remedy developed, in measure, as response to a chronic and prolonged housing shortage, particularly for those of low income . . . . Common law constructive eviction, (based upon a fiction which the implied warranty remedy discards) could be claimed only by a tenant who abandoned the premises within a reasonable time. Abandonment was required to main-
edies which permit raising the conditions of the premises and at the same time not forcing the tenant to vacate. Tenants have been permitted to repair the defect and deduct the cost from future rental payments\textsuperscript{3}\textsuperscript{6} and to withhold rental payments alleging the breach as a defense to a suit by the landlord for possession or past rent. The courts, however, have not accepted the concept that breach of the warranty causes rent to abate totally and thus a measurable value has been attached to the use of the premises in the defective condition\textsuperscript{37} and has been assessed against the tenant.

\textit{The Courts' Rationale}

In addition to the changes in the factual setting of the landlord-tenant relationship, courts have cited a series of rationales for implying the warranty.\textsuperscript{38} Underlying all of these rationales is the objective of providing minimum housing standards and the fact that

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\item tain the fiction of an eviction and thus the breach of the dependent covenant of quiet enjoyment. The effect of the abandonment requirement was to prevent a tenant from remaining in possession without paying rent . . . . Constructive eviction has proved an insufficient remedy for those most likely to have resorted to it, low income tenants. The dilemma it raises for them is that they must continue to pay rent and endure the conditions of untenantability or abandon the premises and hope to find another dwelling which in these times of severe housing shortage, is likely to be as uninhabitable as the last.\textsuperscript{39}
\item\textsuperscript{36} King v. Moorehead, 495 S.W.2d 65, 76-77 (Mo. App. 1973). Recognition of an implied warranty of habitability makes available to the tenant the basic contract remedies of damages, reformation and recision. Mease v. Fox, 200 N.W.2d 791, 796 (Iowa 1972).
\item\textsuperscript{37} Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970).
\end{itemize}

These enormous factual changes in the landlord-tenant field have been paralleled by equally dramatic changes in the prevailing legal doctrines governing commercial transactions. Whereas the traditional common law 'no duty to maintain or repair' rule was steeped in the caveat emptor ethic of an earlier commercial era . . . . modern legal decisions have recognized that the consumer in an industrial society should be entitled to rely on the skill of the supplier to assure that goods and services are of adequate quality. In seeking to protect the reasonable expectation of consumers, judicial decisions, discarding the caveat emptor approach, have for some time implied a warranty of fitness and merchantability in the case of the sale of goods . . . . In recent years, moreover, California courts have increasingly recognized the applicability of this implied warranty theory to real estate transactions; prior cases have found a warranty of fitness implied by law with respect to the construction of new housing units . . . .

\begin{itemize}
\item Green v. Superior Court, 10 Cal. 3d 616, 626-27, 517 P.2d 1168, 1174, 111 Cal. Rptr. 704, 710 (1974).
\end{itemize}
the tenant, left on his own, is unable within the framework of common law principles to bargain for habitable housing.\textsuperscript{40}

In contrast to the situation at common law where the parties to a lease were in an equal bargaining position,\textsuperscript{41} today's tenants have little bargaining power.\textsuperscript{42} This lack of bargaining power affects the tenant both prior to the signing of the lease and after the lease term has begun. An inspection today may prove to be a useless task for the tenant who is often not capable of discovering defects in complex wiring, plumbing, heating and electrical systems.\textsuperscript{43} If uninhabitable conditions are discovered and the tenant is not capable of performing repairs, he cannot bargain for a lower rental in exchange for making the repairs himself.\textsuperscript{44} In this respect, today's tenant stands in sharp contrast to his agrarian predecessor. The logical choice then is to bargain for the landlord to expressly covenant to repair or to look elsewhere. Given today's housing shortage,\textsuperscript{45} the tenant generally has no leverage to extract a covenant to repair from the landlord. There are alternate premises, but all are likely to be in a similar state of dilapidation.\textsuperscript{46}


Although tenants as a class are not able to secure habitable housing conditions without the implication of a warranty of habitability, it is within the realm of possibility that an individual tenant may have the bargaining power to place himself beyond the need of this protection. It is possible that the burden of proof may establish that a particular tenant has in fact the capacity to bargain equally with his landlord. Also, there might be circumstances where there is clear and convincing evidence that the tenant does have the financial capability to assume repairs and/or the physical capability to cure defects especially when the repair needed can be accomplished entirely within the demised premises. When the financial and physical capabilities are joined with the requisite meeting of minds to ensure that the tenant knowingly waives landlord's duty, then through the application of standard contract principles the tenant could waive an otherwise legally enforceable right without destroying the objective of the warranty.

However, this is not the thrust of landlord-tenant law. Nor is this the tenant that the implied warranty was created to protect. Although within the framework of legal analysis, the principle of freedom of contract remains inviolate, courts must infringe upon it where it does not operate effectively. It does not operate effectively in the majority of landlord-tenant cases.


\textsuperscript{42} See Mease v. Fox, 200 N.W.2d 791, 794-95 (Iowa 1972).


\textsuperscript{44} Green v. Superior Court, 10 Cal. 3d 616, 630, 517 P.2d 1168, 1176-77, 111 Cal. Rptr. 704, 713 (1974).


\textsuperscript{46} See Green v. Superior Court, 10 Cal. 3d 616, 517 P.2d 1168, 1173-74, 111 Cal. Rptr. 704, 709-10 (1974).
The tenant also lacks the bargaining power necessary to force the landlord to maintain habitable premises once possession has been taken. Under common law principles, the doctrine of constructive eviction was the sole remedy in the absence of an express covenant to repair.\(^{47}\) This remedy permitted the tenant to terminate the lease in very limited circumstances. Conduct by the landlord which had the effect of depriving the tenant of the beneficial use of the demised premises permitted the tenant, after notice, to abandon if he did so within a reasonable length of time thereby ending his obligation to pay the remaining rental. By recognizing that the landlord could make the tenant’s position so untenable that he would be forced to abandon the premises, the common law provided the tenant with the same remedy as for actual eviction.\(^{48}\) Because the doctrine was based on a breach of landlord’s limited duties, and because of the difficulty in proving that the tenant was justified in abandoning and had done so within a reasonable time, the doctrine has been applicable in limited circumstances.\(^{49}\) Even if the limited doctrine of constructive eviction were expanded to impose greater duties on today’s landlord, more often than not there are no alternative places to rent to fulfill the doctrine’s requirement of abandonment.\(^{50}\)

The comprehensive housing codes which have been enacted in the

\(^{47}\) 1 AMERICAN LAW OF PROPERTY § 3.47 (A.J. Casner ed. 1952).

\(^{48}\) Id. at § 3.51.

\(^{49}\) The original application of the doctrine of constructive eviction was in the famous case of Dyett v. Pendleton, 8 Cow. 727 (N.Y. 1826). In that case, parts of a building were rented to tenants who used their holding for immoral purposes and created disturbances which prevented defendant from sleeping. Accordingly, the defendant was permitted to introduce evidence that he abandoned. The doctrine has been expanded but has been most significantly applied in those cases involving breach of an express covenant or a statutory duty to repair or to furnish heat or services. 1 AMERICAN LAW OF PROPERTY § 3.51 (A.J. Casner ed. 1952).

\(^{50}\) Green v. Superior Court, 10 Cal. 3d 616, 625, 517 P.2d 1168, 1174, 111 Cal. Rptr. 704, 709-10 (1974); President’s Committee on Urban Housing, A Decent Home (1968).

When various impediments to competition in the rental housing market, such as racial discrimination, class discrimination, and standardized form leases are added to these difficulties, it is obvious that landlords frequently place tenants in a take-it-or-leave-it situation. Javins v. First Nat’l Realty Corp., 428 F.2d 1071, 1079 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970). The effect of this change, from an agrarian to an urban setting and the lack of tenants’ bargaining power, is that many tenants are forced to live in far less than satisfactory conditions. This is an undesirable situation for the individual tenants and also the general public. See Pines v. Perssion, 14 Wis. 2d 590, 596, 111 N.W.2d 408, 412 (1961). Substandard housing is detrimental to the whole of society, not merely the unlucky ones who must suffer the daily indignity of living in a slum. Various studies establish the social impact of bad housing. A. Schoor, Slums and Insecurity (1963). Compare Hillspaugh and G. Breckenfield, The Human Side of Urban Renewal (1960). Slum housing has been considered at least a contributing cause of such problems as urban blight, juvenile delinquency, and high property taxes for conscientious landlords. See Pines v. Perssion, 14 Wis. 2d 590, 596, 111 N.W.2d 408, 412, 413 (1961).
past half century have expressly authorized local entities to impose more stringent regulations on landlords. "The [y] . . . affirm that, under contemporary conditions, public policy compels landlords to bear the primary responsibility for maintaining safe, clean and habitable housing . . . ." In addition to housing codes, legislative rules, administrative rules, and health regulations all impose certain duties on a property owner with respect to condition of the premises. Thus, the legislature has made a policy judgement that it is socially (and politically) desirable to impose these duties on a property owner.

This duty is imposed on the landlord because he is in the best position to know the condition of the premises. Housing code requirements and violations are usually made known to the landlord. The tenant should not be expected to know if the plumbing and wiring systems conform to local codes nor should the tenant be expected to hire experts to advise him. The landlord has access to equipment and areas totally within his control which in multi-unit buildings are often crucial to adequate repair. It is the owner who has become a party in the transaction for business purposes, and the business risk falls to him. The landlord will retain ownership and should bear the costs of repair.

The process through which the implied warranty of habitability accomplishes this purpose is twofold. First, by incorporating all existing law relevant to leases (e.g., housing codes) into the contract between landlord and tenant, the duty imposed on the landlord by such codes becomes the duty imposed by the implied warranty.

56. Id. at 1078.
58. Cf. Schiro v. Gould & Co., 18 Ill. 2d 538, 165 N.E.2d 286 (1960). In Schiro, plaintiff had agreed to purchase certain real property on which defendants were to erect a house. Plaintiffs tendered the amount due on the purchase price and requested that the court order defendants to install a water and sewerage system in conformance with the Chicago Building Code. Defendants moved to strike the complaint, as amended, arguing that it failed to state a cause of action in that the contract contained no provision requiring that such a water and sewer system be installed. The trial court allowed the motion and dismissed the suit. In reversing the judgment the appellate court said:

It is settled law that all contracts for the purchase and sale of realty are presumed
Second, through the doctrine of dependent covenants, the tenant has the power to enforce the implied duty.\(^9\)

Simply, however, to imply compliance with those code provisions into the landlord's obligations to the lease without changing the tenant's remedies under the lease is to deny the tenant any realistic private enforcement. The tenant must have a different remedy than what was offered under common law. Only if contractual principles

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... Thus, the law existing at the time and place of the making of the contract is deemed a part of the contract, as though expressly referred to or incorporated in it.

The rationale for this rule is that the parties to the contract would have expressed that which the law implies 'had they not supposed that it was unnecessary to speak of it because the law provided for it'. Consequently, the courts in construing the existing law as part of the expressed contract, are not reading into the contract provisions different from those expressed and intended by the parties, as defendants contend, but are merely construing the contract in accordance with the intent of the parties.

... Applying this established law to the instant case, it is evident that the contract to purchase the land and building to be constructed by defendants included, as an integral part, the relevant provisions of the city code in existence at the time the contract was executed. The requirements of that code were, therefore, as much a part of the contract as if they had been enumerated by the parties.

\(\text{Id. at 544-45, 165 N.E.2d at 290-91. See also Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 361, 280 N.E.2d 208, 214, 215 (1972).}\)

59. At common law, the tenant could never justifiably withhold rent until the landlord made repairs because his rental obligation was not dependant on any services performed by the landlord besides delivery of the property to the tenant. \(\text{[T]he Legislature in enacting the rent withholding provisions, have retreated from the fundamental common law assumption on which the independent covenants rule is based, namely, that a lease is primarily a conveyance of an interest in real estate. By fixing a clear duty of repair on the landlord before the landlord can recover withheld rent in those cases where the demised premises are in violation of the standards of fitness for human habitation established under the State Sanitary Code, the Massachusetts Legislature has further weakened the old common law rule that the tenant's obligation to pay rent is totally independent of any obligation the landlord may bear.}\)


This legislative alteration of the most important incident of the common law status of a lease as a property conveyance requires a judicial reappraisal of the common law status itself because the Legislature's actions reflect a characterization of the landlord-tenant relationship that radically differs from the status accorded to it by the common law.

Our reexamination leads us to conclude that the exception to the independent covenants rule carved out by the Ingalls case . . . in response to what was then an unusual situation, must now become the rule in an urban industrial society where the essential objective of the leasing transaction is to provide a dwelling suitable for habitation. The old common law treatment of the lease as a property conveyance and the independent covenants rule which stems from this treatment have outlived their usefulness.

\(\text{Id. at 196-97, 293 N.E.2d at 841.}\)
Warranty of Habitability

are applied to the landlord-tenant relationship will this be accomplished. The tenant's obligation to pay rent must be held to be mutually dependent upon the landlord's duty to provide habitable premises.60

THE ISSUE OF WAIVER

The courts which have implied the warranty of habitability are divided on the issue of whether or not to permit waiver. The issue has actually been litigated in only one case, *Foisy v. Wyman.*61 In that case, the landlord and tenant had agreed to a reduced rental in exchange for premises which had a substantial number of defects. The court stressed the fact that this type of bargaining by a landlord with a tenant was contrary to public policy and to the purpose of the implied warranty of habitability.62 It pointed out that a "disadvantaged tenant should not be placed in a position of agreeing to live in uninhabitable premises."63 Moreover, it stated that uninhabitable housing conditions were "a health hazard, not only to the individual tenant but to the community which is exposed to the individual."64 Accordingly, the court held that in all contracts for the renting of premises, oral or written, there is an implied warranty of habitability and breach of this warranty constitutes a defense in an unlawful detainer action.65

Eight jurisdictions have never mentioned waiver.66 Those remaining have commented on the issue in dicta, offering conflicting guidelines.67 The first case to discuss waiver was the now famous case of *Javins v. First National Realty Corporation.*68 In *Javins,* the court

60. Id. at 198, 293 N.E.2d at 842.
62. Id. at 28, 515 P.2d at 164.
63. Id.
64. Id.
65. Id.
voiced the opinion that duties specifically placed upon the lessor by the Housing Regulations could not be waived or shifted by agreement. Accordingly, the court stated that any private agreement to shift duties imposed by the regulations would be illegal and unenforceable because such an agreement would nullify the object of the statute.

In apparent contrast to the approach of the Javins court is that of the New Hampshire Supreme Court in Kline v. Burns, a case decided just one year later. The Kline court commented that in determining whether there has been a breach of the implied warranty, one factor to be considered is whether the tenant waived the defect.

These cases are distinguishable, however, in that Kline implies a general warranty not based on a Housing Code. The reference in the decision to existing housing codes was only an acknowledgement that the legislature recognized the need and desirability of insuring adequate housing. Apparently the court was attempting to provide a minimum standard in circumstances where the housing code was not available or was not well drawn. But the court neither defined the general warranty nor provided guidelines for permissible waiver.

Javins and Kline seemed to indicate that waiver would not be permitted where a court implied a code-based warranty but would be permitted for a general warranty. Nevertheless, following these decisions, waiver was permitted in the Iowa case of Mease v. Fox where the court implied both code-based and general warranties without stating if waiver attached to only one. Standing alone, Mease v. Fox would seem to confuse what would otherwise be two distinct trends. Fortunately, it was followed by the case of Boston Housing Authority v. Hemingway decided by the Supreme Judicial Court of Massachusetts. Boston Housing Authority was the first case to imply both the code-based warranty and the general warranty while clearly distinguishing the waiver issue as applicable to the general warranty but not to the code-based warranty.

69. Id. at 1082 n.58.
71. Id. at 93, 276 A.2d at 252.
72. Id. Although the court cited Javins it was only for the principle that courts have a duty to reappraise old doctrines in the light of the facts and values of contemporary life. Id. at 91, 276 A.2d at 251.
73. Id.
74. 200 N.W.2d 791 (1972). "A factor in determining breach is whether or not tenant voluntarily, knowingly and intelligently waived the defects." Id. at 797.
75. Id.
76. 363 Mass. 184, 293 N.E.2d 831 (1972).
77. "This warranty (in so far as it is based on the State Sanitary Code and local health
The Statutes: A State of Similar Confusion

There is a similar lack of consistency in the statutory material. Although the jurisdictions adopting the URLTA provisions follow a general pattern of permitting waiver of the general warranty and denying waiver of the code-based warranty, there are exceptions to both. Tennessee and Virginia permit waiver of the landlord's duty to comply with housing codes. Arizona, Connecticut and New Mexico specifically prohibit waiver of the landlord's duty to put and maintain premises in a habitable condition. Florida, Nebraska, Ohio and Washington's versions of ULRTA do not specifically prohibit waiver of the general warranty but contain the general provision that no rental provision can specify that the tenant agrees to waive or forego rights or remedies contained in the act. Of the remaining statutes implying a duty to the landlord, it is generally permissible to waive but this is not absolute.

The Non-Waiver of the Implied Warranty of Habitability

The dissenting opinion in Boston Housing Authority pointed out that despite use of words of a warranty that went beyond compliance with codes, it was clear that relief in implied warranty cases was based entirely on the existence of conditions which constitute violations of codes. A careful reading of each of the implied war-

regulations) cannot be waived by any provision in the lease or rental agreement." Id. at 199, 293 N.E.2d at 843.
81. ARIZ. REV. STAT. § 33-1324 (1974); CONN. GEN. STAT. ANN. § 47a-7 (West 1978); N.M. STAT. ANN. § 70-7-20 (Supp. 1975).
83. OKLA. STAT. tit. 41, § 31 (West 1954); R.I. GEN. LAWS § 34-18-16b (2) (1970) (if the term of the lease is nine months or more); MICH. COMP. LAWS ANN. § 554.139 (2) (Supp. 1978-79) (if the term is at least one year).
ranty cases substantiates this assertion. Like *Boston Housing Authority*, those which speak in terms of a general warranty have actually been factual situations in which the uninhabitable conditions constituted violations of existing codes.\(^8\) In the cases decided prior to *Javins*, the language is that of a general warranty but the uninhabitable conditions were defects in plumbing, heating, electrical systems and rat infestation.\(^7\) Although these courts did not specifically find these conditions to violate provisions of housing codes, these are the very conditions which codes guard against. Thus, although none of these cases were decided on the basis of violations of certain housing code provisions, each of them could have been.

When viewed in the light of later cases which do not mention a general warranty but specifically base their holdings on existing codes,\(^8\) a distinct trend towards recognition of only a code based warranty is signified.

Because these codes are implied by law into all existing landlord-tenant relationships the landlord’s duty to meet the minimum standards set by codes cannot be waived. Where the implied warranty of habitability is in fact based on housing codes, waiver clauses in leases should be void and unenforceable.\(^9\) To permit such private

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\(^8\) See Green v. Superior Court, 10 Cal. 3d 616, 637-38, 517 P.2d 1168, 1182-83, 111 Cal. Rptr. 704, 718-19 (1974) where the court stated:

This implied warranty of habitability does not require that a landlord ensure that leased premises are in perfect, aesthetically pleasing condition, but it does mean that bare living requirements must be maintained. In most cases substantial compliance with those applicable building and housing code standards which materially affect health and safety will suffice to meet the landlord’s obligations under the common law implied warranty of habitability we now recognize.

Although the opinion may be interpreted as providing a general and a code-based warranty, the concern that minor code violations would not be sufficient to constitute breach seems to be the object of the language of the opinion. See also King v. Moorehead, 495 S.W.2d 65, 79 (Mo. App. 1973); Glyco v. Schultz, 62 Ohio Op. 2d 459, 464, 289 N.E.2d 919, 926 (1972); Foisy v. Wyman, 83 Wash. 2d 22, 32, 515 P.2d 160, 166 (1973). Compare South Austin Realty Ass’n v. Sombright, 47 Ill. App. 3d 29, 361 N.E.2d 795 (1977) (code based warranty may not be waived by clause in lease).

\(^9\) Mandatory minimum standards for housing units as prescribed by statutes, ordinances, rules, regulations or codes, having the force and effect of law, cannot be waived or otherwise undercut by agreement of the parties. See *Javins v. First Nat’l Realty Corp.*, 428 F.2d 1071, 1082 n.58 (D.C. Cir. 1970).
agreements would frustrate public policy and nullify the object of the statute.  

It is not enough, however, to declare waiver clauses unenforceable. As long as the issue is unlitigated landlords will attempt to negate the impact of the implied warranty of habitability by including waiver clauses in form leases. Even where waiver clauses may be prohibited, if the landlord inserts an invalid clause into the lease the unknowing tenant may not enforce his rights and will remain in potentially dilapidated housing. In a recent survey, one landlord's attorney admitted writing legally unenforceable provisions into rental agreements in an attempt to deceive the tenants. When a waiver of the implied warranty with respect to the condition of the premises is coupled with a waiver of dependent covenants the tenant has effectively agreed to eliminate all the judicial protection which has been given.

Definite preventive steps are necessary to preclude landlords from presenting standardized form leases containing waiver provisions. One means of accomplishing that is found in the Uniform Residential Landlord Tenant Act. The Act provides that if a landlord deliberately uses a rental agreement containing provisions known by him to be prohibited (e.g., confession of judgment clause, agreement to pay landlord's attorneys fees or agreement to exulpate or limit liability of landlord arising under law, etc.), the tenant may recover in addition to his actual damages an amount up to three months periodic rent and reasonable attorney fees. Otherwise, with a few lines of black print the author of a standardized lease form washes away the innovation of judicial decisions and/or the work and desires of legislatures.

90. "This warranty (in so far as it is based on the State Sanitary Code and local health regulations) cannot be waived by any provision in the lease or rental agreement." Boston Hous. Auth. v. Hemingway, 363 Mass. 184, 199, 293 N.E.2d 831, 843 (1973).

91. "Unless the courts insist that private agreements to shift the duties are illegal and unenforceable, much of the impact of Javins and its progeny will go down the drain since waiver of the implied covenant will rapidly become a stock clause in every landlord's lease." J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 209 (2d ed. 1975). See text accompanying note 9, supra.


93. Any waiver of the dependency of covenants waives tenants' remedies.

  Tenant's waiver: Tenant's covenant to pay rent is and shall be independent of each and every other covenant of this Lease.

  Tenant agrees that Tenant's damages for Lessor's breach shall in no case be deducted from rent nor set off for purposes of determining whether any rent is due in a forcible detainer action brought on the basis of unpaid rent.

Chicago Real Estate Board, Apartment Lease No. 15 § 24 (1974).

94. URLTA, 7 UNIFORM LAW ANNOTATED, Business and Financial Laws § 1.403(b), (Supp. 1976).
CONCLUSION

The implied warranty of habitability may only turn out to be a remedy for an interim period of time. We may discover that it, too, will not fully achieve habitable housing. However, since the courts and legislatures have established that the implication of a warranty of habitability is the best available method of providing tenants with habitable housing conditions and waiver is likely to destroy that desired result, it must not be permitted.

The present lack of guidelines regarding waiver affects both landlords and tenants. In all jurisdictions but those few where the issue has been litigated or dicta clearly indicates the outcome, the parties do not know whether their own agreement on the issue would be upheld and if so under what circumstances.

The value of standardized acceptable housing is so great that the law should place upon the landlord the duty to provide habitable housing regardless of the circumstances. By adopting that standard, all that is forfeited by forbidding waiver is the freedom of contract on the part of a particular class of tenants which is very small in number. The benefit of a nonwaivable implied warranty of habitability to the large class of tenants in need of protection far outweighs the interest of law in contractual freedom.

95. As Charles J. Meyers so descriptively points out:

[T]he Property Restatement proposes landlord and tenant rules that are likely to involve the courts in costly and time consuming litigation . . . likely to injure the interests of tenants by pricing them out of some housing and causing the abandonment of other housing; and likely to transfer wealth from some landlords to their tenants although the landlords themselves may be as victimized by present housing policies as the tenants.

Meyers, The Covenant of Habitability and the American Law Institute, 27 STAN. L. REV. 879, 903 (1975). Writers have also expressed the concern that an evaluation of the present landlord-tenant relationship shows the need for a complete transformation from private and public landlords to mutual ownership. See Cribbet, supra note 91 at 238. Rather than making the assumption that private ownership of housing is doomed to total collapse or that the implied warranty is the certain remedy to the plight of the low income tenant, it is necessary to view the warranty as an important step in the process of providing minimally safe housing. Therefore, if the implied warranty, in fact, does not provide a sufficient framework within which to provide habitable housing conditions, a more adequate remedy will have to be fashioned. However, if implied warranty doctrine is effective, it will still be necessary to prune it for its most effective application.

96. See note 40, supra.