Tenant Remedies - The Implied Warranty of Fitness and Habitability

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Recommended Citation
Stanley A. Lockitski, Tenant Remedies - The Implied Warranty of Fitness and Habitability, 16 Vill. L. Rev. 710 (1971).
Available at: http://digitalcommons.law.villanova.edu/vlr/vol16/iss4/2

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COMMENTS

TENANT REMEDIES — THE IMPLIED WARRANTY OF
FITNESS AND HABITABILITY

I. INTRODUCTION

The major concern of one seeking reasonably permanent accommodations is the condition of the dwelling and surrounding premises. A critical inquiry is whether they are such that he could reside there in safety and relative comfort. In short, the tenant's goal is to secure a dwelling place that is in an habitable condition. Unfortunately, the realities of the present urban housing malaise render these expectations unattainable for many tenants. Indeed, the United States Congress has recognized the existence of the problem and the necessity for workable solutions to ameliorate the harshness of its impact:

It is hereby declared to be a matter of legislative determination that . . . , conditions existing in the District of Columbia with respect to substandard housing . . . , are injurious to the public health, safety, morals, and welfare, and it is hereby declared to be the policy of the United States to protect and promote the welfare of the inhabitants of the seat of the Government by eliminating all such injurious conditions by employing all means necessary and appropriate for the purpose. . . .

The threshold inquiry of this comment is to review the application of contract law to leases, set forth the basic purpose and scheme of housing codes, and show the inadequacies of existing remedies available to the tenant. The focus will then be directed toward the growth of the doctrine of the implied warranty of fitness and habitability. Finally, the basis for this doctrine will be examined in an attempt to demonstrate the comparative strengths and weaknesses of each.

II. HISTORY

A. Contract Law

At common law a lease was considered a purchase of an interest in land and the lease agreement was deemed an instrument of the con-

veyance of realty for a term, during which time the tenant assumed all the benefits, obligations, and liabilities of ownership. The rent paid was the purchase price. Moreover, all leases were subject to the doctrine of *caveat emptor*. Thus, the only means for a lessee to alter this allocation of obligations was to secure express contractual modifications. Absent such terms, landowners were neither compelled to deliver the premises in a safe and sanitary condition nor had any duty to maintain the premises in an habitable condition. Since express warranties could be incorporated into the agreement, it was felt that an agreement without any warranty reflected the intentions of the parties. In addition, covenants placed in the lease were considered independent obligations, hence, the breach by one party did not relieve the other party from his obligations under the agreement.

These doctrines became solidified in a society that was basically agrarian, in which leases were negotiated primarily for the use of the land, rather than the buildings erected thereon. Thus, the legal form of the lease followed its function. The tenant's real desire was the land itself and the economic sustenance which could be derived therefrom. Consequently, the form of the legal relation between the owner and the tenant was logically and properly rooted in property concepts. With the proliferation of large urban masses caused by industrialization, the function of the lease was radically altered. The landlord's duties no longer terminated when he delivered the leasehold. He became obligated through municipal codes or contractual arrangements to maintain the premises and provide various services for the individual tenant.

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5. 1 American Law of Property § 3.38 (A. Casner ed. 1952).
6. For the origin and development of the doctrine of *caveat emptor*, see Hamilton, *The Ancient Maxim Caveat Emptor*, 40 Yale L.J. 1133 (1931).
7. See, e.g., Fowler v. Bott, 6 Mass. 63, 67 (1809), where the court stated: [A] lease for years is a sale of the demised premises for the term; and unless in the case of an express stipulation for the purpose, the lessor does not insure the premises against inevitable accidents, or any other deterioration. At common law, the application of *caveat emptor* to a lease was practical since the tenant was concerned primarily with the condition of the land, which was invariably subjected to visual inspection. In most bargaining situations, therefore, the parties were familiar with both the land and customary bargaining techniques. Dunham, *Vendor's Obligation as to Fitness of Land for a Particular Purpose*, 37 Minn. L. Rev. 108, 110 (1953).
12. For examples of such clauses in Federal Housing Authority and Veterans Administration contracts, see Bearman, *Caveat Emptor in Sales of Realty — Recent Assaults upon the Rule*, 14 Vand. L. Rev. 541, 550 (1961).
such as gas, water and electricity. Since these services were of the type usually obtained through a contractual agreement, many jurisdictions, recognizing this functional change in the landlord-tenant relationship, no longer construed the lease as a purchase of an interest in land, but rather as a contract for the purchase of space and services. In short, the lease came to be viewed as an agreement whereby the tenant received a package of services from the landlord in consideration for the price paid.

It is important to understand that although the relationship between the parties began to be governed by different legal principles, the basic methodology of prior law was affirmed because the application of law was made to conform to the function of the lease and the expectations of the parties.

Despite socio-economic conditions which caused a transformation in the basic function of the lease, many courts continued to apply the doctrine of *caveat emptor* in resolving landlord-tenant disputes. This was due in large part to the reluctance of courts to abandon a doctrine which had become deeply embedded in the law.

An example of the inconsistency resulting from the residual effects of the *caveat emptor* doctrine upon modern lease contract interpretation is found in *Reste Realty Corp. v. Cooper*, where the lessee of commercial office space, after having complained about continual flooding from rainwater, and having received no relief from the landlord, vacated the premises. The court, tracing the demise of *caveat emptor*, concluded that an implied warranty against latent defects in the premises was necessary to protect the rights of tenants. In spite of this the court...


[T]he complexities of city life, and the proliferated problems of modern society in general, have created new problems for lessors and lessees and these have been commonly handled by specific clauses inserted in leases. This growth in the number and detail of specific lease covenants has reintroduced into the law of estates for years a predominantly contractual ingredient. In practice, the law today concerning estates for years consists chiefly of rules determining the construction and effect of lease covenants.


The norms applied today... bear marked resemblance to those in force two and three centuries ago and must be taken as an indication that these rules are deemed satisfactory, or that the necessary pressure in the direction of improvement has been lacking, or perhaps that the judiciary has felt itself bound by these principles solely because of their longevity and the assumption that change must await legislative action.

apparently could not advance a suitable remedy under the implied warranty approach, and in order to give the tenant relief, retreated to the doctrine of constructive eviction, which was *caveat emptor's* only remedy. Consequently, from the standpoint of remedial assistance, the *Reste* result does little to aid the majority of tenants who desire to remain on the premises and obtain repairs.

**B. Housing Codes**

Ideally, statutory housing codes, which can be seen as legislative reallocations of benefits and burdens between landlord and tenant, should establish equitable criteria\(^\text{17}\) for determining the parameters of a warranty of habitability. Many codes require the landlords to put the dwelling in an habitable condition prior to rental.\(^\text{18}\) Others impose a duty to repair,\(^\text{19}\) and a few states allow tenants to make necessary repairs and deduct their reasonable cost from the rent payment.\(^\text{20}\)

In addition to a desire for uniformity, these codes are a recognition that a clear inequity between landlord and tenant bargaining power exists and results in injustices to tenants of sufficient seriousness to warrant the intervention of the state in an attempt to remedy the problem.

**III. INADEQUACY OF EXISTING REMEDIES**

Although legislatures and courts have made some advances toward remedying the hardships and injustices suffered by tenants, these remedies are insufficient to satisfactorily offset the manifold evils which confront many tenants. It is self-evident that an insufficiency in the law will create pressure for change.

**A. Constructive Eviction**

Traditionally, in order to perfect the defense of constructive eviction, it was necessary for the tenant to abandon the premises within a reasonable time after an intentional act or omission by the landlord which permanently deprived the tenant of the beneficial enjoyment of the demised premises or of a substantial or vital part thereof.\(^\text{21}\) In con-

\(^{17}\) *But see* note 82 *infra.*


temporary times this remedy has proved inadequate since many tenants, because of the housing shortage or the expense and time involved in finding suitable substitute housing, are forced to remain in the uninhabitable dwelling. Thus, the doctrine's impracticality has effectively negated it as a meaningful tenant safeguard. Despite its impotency, however, in many jurisdictions it was the only available remedy. As a result, great pressure was exerted by tenants to relax its primary weakness — the abandonment requirement.

For a short time, courts in New York City modified constructive eviction requirements by taking judicial notice of the housing shortage and sustaining the defense of constructive eviction without abandonment against an action for rent.²² However, this view was not accepted with favor in the appellate courts of New York,²³ mainly because it was felt that the traditional rules should be followed.

The inertia which courts have demonstrated in aligning landlord-tenant law with the needs and expectations of tenants is demonstrated in Reste which, in effect, posits that the modern idea of constructive eviction is based upon implied warranty. But even though the Reste court grounded its decision in contract law and implied warranty, the remedy granted by the court was no greater than that available by application of the constructive eviction doctrine. Thus, although Reste advanced the theoretical predicate for the tenant's action, the most important aspect of the law from the tenant's viewpoint was left unaltered.

Another shortcoming of the constructive eviction doctrine arises when the act or omission of the landlord does not prevent use of the whole premises, but merely a part thereof, e.g., a room or a vital facility. The courts have not, in general, been receptive to the theory of partial constructive eviction because of its pronounced exclusion from traditional legal theory.


While it is true that in order to sustain the defense of constructive eviction, there must be an abandonment of the premises, that rule rests upon the reasoning that if the premises in fact were not fit for occupancy, the tenant would not have retained possession but would have moved elsewhere, and his remaining in the premises belies any claim that they were not fit and habitable. Such a rule should prevail where a market of available apartments or dwelling accommodations exists. However, where there are no living accommodations available elsewhere or there is such a scarcity of them that impels the legislature to declare a public emergency to exist because of such a condition, the reason upon which the rule is based disappears, and the rule should therefore be relaxed.

B. Housing Codes

Despite the complete regulatory scheme embodied in most housing codes, their impact has been minimized due to inadequate enforcement and administrative processes.24

The main problem facing housing authorities is the lack of manpower to make the numerous inspections necessary to enforce adherence to the code.25 Another unfortunate difficulty is the general lack of concern by inspectors over minor infractions.26

Stricter fines for violations and provisions allowing the tenant to withhold the entire rental payment until repairs are made are two suggestions often advanced to augment the legislative purpose behind housing codes. It is submitted that these alternatives may have unintended deleterious effects upon the tenant. Stricter fines and rent withholding are basically punitive measures intended to force the landlord to act. The evil lies in depriving the landlord of funds which could be used to make the repairs. Moreover, both of these remedies can cause delay in repair, which is contrary to their intended goal. A specific defect in rent withholding is that if the landlord prevails and the tenant has not escrowed his rental payments, an action of eviction for non-payment of rent may lie. Conversely, if the tenant is vindicated, the escrowed funds can be seen as a poor allocation of his resources, since they are frozen while his rights are being determined, rather than being used for other necessary expenditures. This can be an onerous hardship for an impoverished tenant.

A final objection to these suggestions is the landlord's propensity to retaliate, which usually takes the form of rent increases or eviction.27 If the tenant is not afforded legal protection from the landlord's intimidation, the rationale behind housing codes is defeated. Many jurisdictions, however, have shown sensitivity to this problem, which is basically a product of the landlord's superior bargaining position. Retaliatory eviction has been held to give a separate cause of action in some jurisdictions,28 while others have held that it constitutes the common law tort of abuse of process, or is a *prima facie* tort.29

24. See generally [NATIONAL COMMISSION ON URBAN PROBLEMS, NEW APPROACHES TO HOUSING CODE ADMINISTRATION (1969); NATIONAL COMMISSION ON URBAN PROBLEMS, HOUSING CODE STANDARDS (1969); Gribetz & Grad, Housing Code Enforcement: Sanctions and Remedies, 66 COLUM. L. REV. 1254 (1966); Note, Enforcement of Municipal Housing Codes, 78 HARV. L. REV. 801 (1965).]


26. Id. at 277-79.

27. See [Annot., 6 A.L.R.3d 177 (1966).]


29. For an extensive discussion of these two doctrines, see Schoshinski, *supra* note 11, at 545-51.
C. Dependent Obligations

An important corollary to the application of contract law to lease agreements is the recognition of the mutual dependency of lease covenants. Under the mutual dependency principle, any substantial failure by the landlord to meet his obligations under the lease relieves the tenant of his corresponding obligations, including the payment of rent.\(^{30}\) Relying upon this doctrine, the tenant could rescind the lease and vacate the premises.\(^{31}\) However, should the tenant wish to remain in possession, he could affirm the contract and pay rent equivalent to what the value of the dwelling would be in its present condition.\(^{32}\) An essential weakness in this remedy is that some courts do not consider every lease covenant to have a corresponding obligation, i.e., to be mutually dependent,\(^{33}\) and therefore, under certain circumstances, notwithstanding a major defect in the premises, the tenant may not be relieved of his obligations. An example of this infirmity in the rule is when there is no express covenant to repair and an essential repair is needed. In this situation the principle of mutually dependent obligations is of no assistance. Moreover, since most landlords do not expressly agree to repair or perform other analogous services, in large part the doctrine of mutually dependent covenants lacks vitality.

D. Other Remedies

A few jurisdictions have employed the concept of an illegal contract to aid the tenant. Basically, an illegal contract is one concluded to be in violation of existing law. Generally, the violation consists of a failure to comply with an applicable housing code provision.\(^{34}\) Courts that have held such a contract illegal, and therefore unenforceable, not only deny the landlord relief under the contract, but also refuse to grant him any recovery of the value of the benefit conferred.\(^{35}\) Moreover, it has been held that knowledge by the second contracting party that the contract violates the law does not estop him from using the remedy.\(^{36}\)

30. See University Club v. Deakin, 265 Ill. 257, 106 N.E. 790 (1914).
31. 6 S. Williston, Contracts § 822, at 45 (3d ed. 1962); 1 American Law of Property § 3.79 n.22 (A. Casner ed. 1952).
33. Courts taking this position hold that only the material covenants of a lease are mutually dependent. See, e.g., Medico Dental Bldg. Co. v. Horton & Converse, 21 Cal. 2d 411, 132 P.2d 457 (1942) (covariant to pay rent held contingent upon performance of a restrictive covenant); University Club v. Deakin, 265 Ill. 257, 106 N.E. 790 (1914) (same covenants); Stifter v. Hartman, 225 Mich. 101, 195 N.W. 673 (1923) (payment of rent conditioned upon landlord's covenant to share office expenses); Higgins v. Whiting, 102 N.J.L. 279, 131 A. 879 (1926) (rental payment held dependent on covenant to supply heat).
35. See Restatement of Contracts § 598 (1932).
Another doctrine of tangential importance is the rule, which has emerged under a constructive eviction theory in some jurisdictions, that abandonment is not required if the landlord’s interference with the tenant’s possession is sufficient to justify abandonment, and if equitable relief is sought. Application of this doctrine imposes liability for rent on the tenant, but only for the reasonable value of the premises in their present condition. If for some reason, constructive eviction, legal or equitable, cannot be attained, the tenant may, in some jurisdictions, be able to recover damages for the landlord’s interference. The impact of the above remedies has not, however, been widespread enough to ameliorate the countless problems tenants face.

IV. GENESIS AND DEVELOPMENT OF THE IMPLIED WARRANTY OF FITNESS AND HABITABILITY

A. Origins in Sales Law

The imposition of an implied warranty of fitness and habitability necessitates complete denunciation of the caveat emptor doctrine because this warranty holds the landlord liable for damages from dangerous conditions or an uninhabitable leasehold despite the non-existence of expressed warranties. In the context of dwelling places, the application of the implied warranty had its origin in the sale of residential dwellings. Initially, a warranty was implied in the sale of a new building which was still under construction at the time of purchase, and later was extended to the sale of a home through the showing of a sample. Ultimately, a warranty was implied where a new home was sold. Unfortunately, the development of protection for the tenant did not follow parallel lines. Until recently, the only application of protection given to the tenant analogous to the home buyer’s has been in the short term lease of a furnished dwelling. The rationale behind this rule is that since these purchasers and tenants do not have sufficient

42. See, e.g., Stevens v. Milestone, 190 Md. 61, 57 A.2d 292 (1948).
opportunity to inspect the premises, they should be protected from any existing defect.\(^{45}\)

Clearly this rule is unavailable to the tenant who leases a dwelling in apparently good condition and later is beset by problems arising either due to latent defects or to the breakdown or end of the useful life of some fixture, which the landlord refuses to repair because the lease contained no express covenant requiring him to do so.

Recognizing the dual limitations of inapplicable legal principles and inadequate remedies, progressive jurisdictions began to imply warranties of fitness and habitability in leases. It is submitted that, like the change from property law to contract law, this development can be seen as a realignment of legal principles in accord with contemporary needs and expectations.

1. *Lemle v. Breeden*

The question which arose in *Lemle v. Breeden*\(^{46}\) was whether the lessee of a furnished dwelling who had an opportunity to inspect the home prior to occupancy and who signed a lease devoid of express warranties could rescind the lease because the premises were uninhabitable. Although the facts might have established a constructive eviction,\(^{47}\) the court chose to predicate its decision upon a breach of an implied warranty. It stated:

> Legal fictions and artificial exceptions to wooden rules of property law aside, we hold that in the lease of a dwelling house . . . there is an implied warranty of habitability and fitness for the use intended.\(^{48}\)

Shortly thereafter, finding no reasonable distinction between furnished and unfurnished dwellings, the same court, affirming the *Lemle* rationale, extended the implied warranty of habitability to unfurnished dwellings.\(^{49}\)

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\(^{46}\) 51 Hawaii 426, 462 P.2d 470 (1969). Plaintiff, the lessee of a furnished home, brought suit to rescind the lease and to recover his advance rental payment. Prior to signing the lease, the plaintiff was shown the house and was told that it was available for immediate occupancy. Since the plaintiff did not discover any significant defects in the premises during a one-half hour daylight inspection, he subsequently signed an eight month lease. The night after the plaintiff and his family took possession, it became evident that there were rats within the main dwelling and on the roof, a condition which caused the plaintiff considerable apprehension. The next day the defendant's agent was notified of the infestation and he procured extermination services which were only partially successful. After three days of occupying the dwelling, upon notifying the defendant's agent of his intention, the plaintiff vacated the premises. After an unsuccessful demand for return of the advance rent and rescission of the lease, the plaintiff brought the instant suit. The trial court ruled that there had been a breach of an implied warranty of habitability and fitness of a dwelling house and that the plaintiff was constructively evicted and thus could recover the rental advance. The Supreme Court of Hawaii affirmed, holding that there was a material breach of the implied warranty of habitability and fitness for the use intended which justified the plaintiff's rescinding the rental agreement and vacating the premises.


\(^{48}\) 51 Hawaii at 470, 462 P.2d at 474.

Thus, Hawaii became the first jurisdiction to make a complete break with the vestiges of the *caveat emptor* doctrine and apply the sales law concept of implied warranty in a lease situation.

Arguably, the *Lemle* court could have based its decision on the traditional furnished dwelling exception to *caveat emptor*, but, perhaps recognizing that the facts before it were inconsistent with the reason behind the accepted rule, it chose to posit its holding upon the rationale that since the tenant is "implicitly or expressly bargaining for immediate possession of the premises in a suitable condition," his expectations should be realized. The validity of this reasoning is inescapable in cases involving rental of furnished dwellings and short term leases because of the tenant's obvious desire for immediate habitability. Moreover, in such a situation, the tenant's lack of opportunity and interest in making repairs can be readily inferred. Finally, since a fundamental basis for the existence of any warranty is the buyer's desire for goods or services that conform to his needs, the significance of the court's "bargained-for" rationale cannot be underestimated. This position constitutes a recognition by the court that, as a tenant, an individual is in the market for a product or service to the same extent as when he procures other consumer goods. Seen in this light, the court's position endeavors to make an individual's expectations as a lessee conform to his expectations as a consumer.

The *Lemle* court further reasoned that since a lease can be considered a sale, and since sales law protects the purchaser through implied warranties, an implied warranty should also apply to leases. The predicate of this syllogism, that leases can be considered sales, appears sound since the modern lease is essentially a contract for the purchase of space and services.

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50. See p. 717 supra.
51. The rationale behind the traditional exception is the insufficient opportunity for inspection. In this case there was an actual inspection which did not disclose any defects and therefore the tenant would be within the *caveat emptor* rules. See *Miller v. Cannon Hill Estates, Ltd.*, [1931] 2 K.B. 113.
52. 51 Hawaii at ___, 462 P.2d at 473. See also Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. Rev. 117, 149 (1943), which states: [The warranty of merchantable quality] ... has not required reliance upon any skill or judgment or information of the seller. It has not rested upon misrepresentation, with its tort theories, but upon contract. The question is one of what the buyer has ordered and the seller has undertaken to deliver.
53. See *Lesar, supra* note 11, at 1281.
54. See, e.g., *Uniform Commercial Code* §§ 2-314, 315.
55. 51 Hawaii at ___, 462 P.2d at 474. For examples of the nature, limitations, and remedies of implied warranties in the lease of business premises, see *Skillern, supra* note 40, at 394-97.
56. *Schoshinski, supra* note 11, at 535. In interpreting most contracts, courts have sought to protect the logical and legitimate expectations of the buyer and have
2. Related Cases

Although the Supreme Court of New Jersey in Reste based its decision on constructive eviction, it considered the doctrine of implied warranty of habitability, taking the position that such a warranty existed with respect to latent defects remediable by the lessor and a breach of this warranty allowed the tenant to vacate.

Subsequently, in Marini v. Ireland, the New Jersey Supreme Court expanded the tenant’s remedies by allowing him to repair defects in vital facilities and deduct the cost of the repairs from the rental. Significantly, the Marini court established a continuing promissory warranty, thus extending the landlord’s duty to repair throughout the entire lease term.

In reaching this conclusion, the court disregarded traditional doctrines, ruling that leases were to be interpreted by contract law. To determine whether an implied covenant to repair existed, the court looked to the intent of the parties and decided that the purpose for entering into the agreement was to rent a “dwelling” fit for habitation. Therefore, the court, making reality conform to expectation, held that the lessor, by marketing the premises, warranted that they were in habitable condition.

In Javins v. First National Realty Corp., the Court of Appeals for the District of Columbia held that a continuing warranty of habitability, measured by housing code standards, is implied by operation of law in leases of urban dwellings and that contract remedies are available for any breach of the warranty. In extensive dicta, however, the Javins court argued that a lease contract could be analogized to a sale of goods, and that a tenant, much like the purchaser of a product, should be assured that the goods and services which the landlord provides are of adequate quality. The court did not embellish upon the concept that principles of consumer protection should be adopted within a landlord-tenant framework, but it is submitted that because of the similarity of factors which justify imposition of warranties in sales cases, the analogy is sound. Among these common factors are: (1) considerations of public policy, which indicate that responsibility for defects should be placed on those parties who offer their product in the market place, thus representing their suitability and fitness; (2) one party has induced another’s reliance on his superior skill and knowledge; (3) the party inducing reliance is

[Further citations and notes follow, discussing the implications of these cases in the context of landlord-tenant law and consumer protection.]

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58. 56 N.J. at 145, 265 A.2d at 534.
in a better position to know and control the quality of the product; and
(4) that party is in a better position to absorb the loss flowing from the
defect.  

The final argument in favor of applying the sales law concept of im-
plied warranty to the landlord-tenant relationship is based simply on
fundamental fairness and basic equity. By reason of the demand for
adequate housing, a seller's market has been created which places the
tenant in a "take it or leave it" situation. Consequently, the tenant is
in the unfavorable position of requiring housing but being unable to bar-
gain with the landlord to assure that the housing will be habitable. The
adoption of an implied warranty will remedy this situation by assuring
rentals that the premises leased will be fit to live in.

B. Origin in Housing Codes

In many jurisdictions where housing codes have been enacted, courts
have placed great emphasis upon them in an attempt to improve living
conditions. In Pines v. Perssion, the lessee inspected the apartment and
found it to be in a state of disrepair. Upon an oral agreement by the
lessor to have the repairs completed prior to the time the lessee wished
to occupy, the lessee signed the lease, which did not incorporate this oral
agreement. Finding numerous housing code violations, the court stated:

Legislation and administrative rules, such as the safeplace statute,
building codes, and health regulations, all impose certain duties on
a property owner with respect to the condition of his premises. Thus,
the legislature has made a policy judgment — that it is socially (and
politically) desirable to impose these duties on a property owner —
which has rendered the old common law rule obsolete. To follow
the old rule of no implied warranty of habitability of leases would,
in our opinion, be inconsistent with the current legislative policy
concerning housing standards. The need and social desirability of
adequate housing for people in this era of rapid population increases
is too important to be rebuffed by that obnoxious legal cliché, caveat
emphor.  

61. See generally Jaeger, Product Liability: The Constructive Warranty, 39
Notre Dame Law. 501 (1964); Prosser, The Assault Upon the Citadel (Strict
Liability to the Consumer), 69 Yale L.J. 1099 (1960).
62. See Edwards v. Habib, 397 F.2d 687, 701 (D.C. Cir. 1968), cert. denied,
393 U.S. 1016 (1969); President's Committee on Urban Housing, A Decent
Home (1968).
63. See Schoshinski, supra note 11, at 554. In Reitmeyer v. Sprecher, 431 Pa. 284,
289-90, 243 A.2d 395, 398 (1968), the court stated:
We must recognize the fact that... critical changes have taken place economically
and socially. Aware of such changes, we must realize further that most fre-
quently today the average prospective tenant vis-à-vis the prospective landlord
occupies a disadvantageous position. Stark necessity very often forces a tenant
into occupancy of premises far from desirable and in a defective state of repair.
The acute housing shortage mandates that the average prospective tenant accede
to the demands of the prospective landlord as to conditions of rental, which, under
ordinary conditions with housing available, the average tenant would not and
should not accept.
64. 14 Wis. 2d 590, 111 N.W.2d 409 (1961).
65. 14 Wis. 2d at 596, 111 N.W.2d at 412-13.
Despite this encouraging language, the court held that the presence of violations breached the implied warranty of habitability found in a short term lease of a furnished dwelling. Thus, although voicing a significant new doctrine, the court's holding merely applied a long-standing exception to the *caveat emptor* doctrine.

Perhaps the best example of the judiciary's attempt to synthesize the requirements of housing codes with tenants' needs can be found in cases arising in Washington, D.C. In *Whetzel v. Jess Fisher Management Co.*, the court held that the housing regulations altered the common law and created a duty on the part of the landlord to maintain the premises in a safe condition. Thus, if such regulations were violated, the landlord would be liable for any injury sustained by the tenant as a result of such violation.

Subsequently, in *Brown v. Southall Realty Co.*, the lessor, knowing that the apartment's commode was obstructed and that housing code violations in the basement prohibited its use as a dwelling place, leased the premises to a tenant, thereby violating a housing regulation that forbade rental of any dwelling unless it is clean, safe, and in sanitary condition. The court, reasoning that the basic validity of every housing contract depends upon substantial compliance with the housing code at the beginning of the lease term, held that the lease was void as an illegal contract and denied the lessor his claim for unpaid rent.

*Javins* is the most recent addition to these cases. There the court held that an implied warranty of fitness and habitability applied to the lease through the housing code. The rationale for this position was that parties contract in accordance with applicable law. Thus, in this case, the housing codes were incorporated into the agreement. The court further ruled that the tenant's obligation for rent was dependent upon the landlord's performance of his duties, including his warranty to maintain the premises in an habitable condition. Consequently, a breach of the housing code regulations would lead to a breach of the landlord's warranty of habitability, justifying the tenant's use of his choice of contract remedies.

### C. Model Code

The Model Residential Landlord-Tenant Code is an attempt to codify, reform, and bring uniformity to landlord-tenant law.

The major duty imposed on the landlord by the Model Code is to supply and maintain a fit dwelling in compliance with all applicable hous-
This fundamental obligation provides the tenant with an habitable dwelling at the inception of the lease and assures him that it will remain so throughout the lease term. The tenant's primary obligations, in addition to payment of rent, are not to commit waste and to inform the landlord of any defective condition in the leasehold. To protect the landlord, liability is imposed upon the tenant for failure to supply such information.

Since the Model Code requires the tenant to obey all of the "rules" designated by the landlord, the landlord is still free to dictate the lease. However, the Model Code places a limitation on the application of such "rules" by requiring the landlord to take the tenant's safety and welfare into consideration. Moreover, the terms of such "rules" must be just and reasonable.

Although the Model Code presents important developments in landlord-tenant law, it is clear that its protection is predicated upon housing codes and in this respect, bears close resemblance to the position adopted by courts which have found private remedies in these regulatory schemes. Consequently, much of what is said in relation to implied warranties which are grounded upon housing codes would seem to apply to the Model Code.

V. COMPARATIVE ANALYSIS OF THE PROTECTIONS AFFORDED THROUGH SALES LAW AND HOUSING CODE WARRANTIES

It has been demonstrated that courts have arrived at the conclusion that implied warranties should exist in lease contracts through two different logical processes. This difference further manifests itself with respect to the remedies that may be obtained under each method. Since the tenant's major concern in a suit against his landlord is the scope of his available remedies, the difference in decisional predicates is crucial. The focus of this section is to evaluate which basis affords the most protection to the tenant.

A. Sales Law

The initial question which arises when a court imposes an implied warranty of fitness and habitability is, what are the parameters of such a warranty. This difficulty arises because courts are thrust into a situation in which there are no established guidelines. Thus, standards must be determined by analogy to similar protections afforded in other consumer transactions and from an examination of the function of the warranty protection.

71. Id. at § 2-203(1).
72. Id. at § 2-304.
73. Id. at § 2-305.
74. Id. at § 2-306.
75. Id. at § 2-311(1).
76. Id. at § 2-311(2).
In consumer transactions involving the sale of goods, and in other transactions which are sufficiently analogous to such a sale, Article 2 of the Uniform Commercial Code supplies the standards which govern the quality of the purchase. Although no court has specifically relied upon the Code, it is submitted that, by analogy, certain subsections could ostensibly apply to leases of residential dwellings. Applying the Code standards for implied warranties enumerated in Section 2–314(2) to a typical lease, a court might announce the following requirements: (1) such residences would have to pass without objection in the housing trade as described within the lease contract; (2) the dwellings would have to be fit for the ordinary purposes for which they are used, viz., as human habitations; and (3) they would have to conform to any promises or affirmations of fact made by the lessor.

Apart from the Code, the judiciary has attempted to describe the sales-type warranty in a lease situation. The scope of the warranty announced in Reste was that the premises would be suitable for the leased purposes and conform to local codes and zoning laws. However, the warranty coverage was limited to latent defects. The Marini court, although not specifically requiring conformity to municipal codes, also limited the warranty to latent defects. The court said that the imposition of a warranty would ensure that:

[T]here are no latent defects in facilities vital to the use of the premises for residential purposes because of faulty original construction or deterioration from age or normal usage. And further . . . that these facilities will remain in usable condition during the entire term of the lease. . . . [T]he landlord is required to maintain those facilities in a condition which renders the property livable.

Based upon this standard, it is arguable that the tenant's position is compromised since any defect which could be discovered would not fall within the warranty protection. However, such an interpretation fails to consider the severe housing shortage and the resulting disparity in bargaining positions between landlord and tenant. Therefore, it is submitted, that the term latent should not be given literal interpretation, but

77. The Uniform Commercial Code § 2–314, states in pertinent part:
(2) Goods to be merchantable must be at least such as:
(a) pass without objection in the trade under the contract description; and
(b) in the case of fungible goods, are of fair average quality within the description; and
(c) are fit for the ordinary purposes for which such goods are used; and
(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
(e) are adequately contained, packaged, and labeled as the agreement may require; and
(f) conform to the promises or affirmations of fact made on the container or label, if any.

78. 53 N.J. at 452, 251 A.2d at 272.
79. 53 N.J. at 454, 251 A.2d at 273.
80. 56 N.J. at 144, 265 A.2d at 534.
rather should be construed in light of the function of the warranty, which is to provide the tenant with continuous habitability.

The Marini court also attempted to define the outer limits of the landlord's obligation by stating that "[t]he nature of the vital facilities and type of maintenance and repair required is limited and governed by the type of property rented and the amount of rent reserved." This language raises the question whether the parameters of the warranty should bear a relation to the amount of rent paid. It is submitted that in order for the warranty protections to have an impact upon those who most require its assistance, courts should establish a stratum or minimal standard which could not be diminished. Such a standard would, in effect, be a guarantee to the lessee that the lessor will supply necessities, such as plumbing, electricity, heating, and any other vital facilities. To assist in determining this sine qua non protection, a court could use housing codes as evidence of a reasonable standard of protection. Such codes should not, however, become the court's sole inquiry because they often lack specificity and adaptability, both of which are essential in framing relief. While the suggestion of a "ground floor" minimum of protection would have its greatest impact upon low-rent dwellings, clearly such a standard does little to safeguard the interests of those living in more expensive units, for in these dwellings, vital facilities are generally in good condition. It is submitted that the suggestion of the Marini court can best be applied to protect this latter group. For such tenants a standard of "reasonableness" or "liveableness," to be determined on a case by case method, could well be the judicial test. On behalf of these better situated tenants, it could be argued that if they are paying a higher rent due to the existence of luxury appointments and facilities, such factors should be taken into account in determining the unit's "liveableness" and some reduction should be made in the rent until the malfunction is remedied. Thus, the standard would vary once the foundation standard has been surpassed, and could fluctuate in relation to the price paid and the kind of dwelling place.

By adopting the view that a lease is a contractual relationship, the basic contract remedies of damages, reformation, and rescission are available to the tenant. Thus, for a breach of an implied warranty the tenant could rescind the lease contract and abandon the premises without liability for rent payment or demand compensation for any harm to his person or property which has resulted from the breach.

81. 56 N.J. at 144-45, 265 A.2d at 534.
83. However, rescission of the lease or abandonment of the premises is not always desirable. See generally Millsbaugh, Problems and Opportunities of Relocation, 26 LAW & CONTEMP. PROB. 6 (1961).
Although case law yields no direct application of Uniform Commercial Code remedies to leases, because of the demonstrated conceptual similarity of sales to leases, it is submitted that Code remedies could be applied to a lease agreement. Initially, it should be observed that under the Code there is no obligation upon the buyer to return the goods before the court determines whether there has been a breach of contract. If this rule were applied to the lease situation, the tenant could bring suit for his chosen remedy and still remain in possession. The significance of this is that it would remove the choice tenants now face due to the unavailability of replacement housing.

Another Code feature is that, in lieu of taking judicial notice of the housing shortage, courts could admit evidence showing that any effort to find substitute housing or "cover" would be unavailing. The Code also provides for specific performance where the goods are unique or "in other proper circumstances." The official comment to this section clarifies the latter phrase by stating that "inability to cover is strong evidence of 'other proper circumstances'." Either upon the rationale that each dwelling could be considered unique, or that the severe housing shortage is sufficient evidence of inability to cover, a court could compel repair to alleviate breach of the implied warranty of habitability. Indeed, the Uniform Commercial Code urges more liberal application of this remedy.

The most difficult problem that confronts warranties arising out of sales law is the use of the disclaimer clause incorporated into the lease. There is little doubt that attempts will be made to limit or exclude the landlord's liability by including disclaimer clauses in the lease because the present seller's market favors the landlord who may dictate the terms of the lease. By ruling that a lease is like a sale, a court could readily employ the Uniform Commercial Code treatment of disclaimer clauses. Under this analogy, in order for the lessor to exclude implied warranties of fitness, language is necessary which in effect states that no warranty of fitness is applicable. Moreover, the requirement of conspicuousness

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86. See note 22 supra.
87. Uniform Commercial Code § 2-716(3).
88. Uniform Commercial Code § 2-716(1).
89. Uniform Commercial Code § 2-716, Comment 2.
90. Uniform Commercial Code § 2-716, Comment 1, states: The present section continues in general prior policy as to specific performance and injunction against breach. However, without intending to impair in any way the exercise of the court's sound discretion in the matter, this Article seeks to further a more liberal attitude than some courts have shown in connection with the specific performance of contracts of sale.
91. See p. 721 supra.
93. Uniform Commercial Code § 2-316(2). Under these provisions, a written disclaimer would have to state the word "habitability" or be ineffective. Whether or not the disclaimer is conspicuous is a question for determination by the court. Id. at § 1-201(10).
which has a specific meaning under the code,\textsuperscript{94} could be imposed in order to insure that the tenant is well aware of the disclaimer. Should the disclaimer clause meet these requirements, the tenant might nevertheless avoid its effect by claiming that the lease contract is adhesive in nature due to his inability to bargain.\textsuperscript{95} In addition, dictates of public policy might negate disclaimers which attempted to derogate from the minimum standard suggested above.

It seems clear that by the use of a sales-like implied warranty, the court can obtain valuable flexibility. After a basic standard is evolved in a particular jurisdiction it will be left to the courts of that jurisdiction, weighing facts such as the amount of rent paid, severity of loss, and tenant protection, to proceed by a case by case method to decide whether there is a breach of warranty and what would be a sufficient measure of damages. Consequently, a warranty grounded in sales law theory, because of its ability to fluctuate above a certain minimum standard, may beneficially serve the broad spectrum of tenants as opposed to only those who are afflicted with the special problems of low-income private housing.

\textbf{B. Housing Codes}

In sharp contrast to a sales-like implied warranty, when an implied warranty springs from a housing code, there is no problem finding the extent of protection; the code itself measures the scope of the warranty. The advantages of such a situation are: (1) uniformity of application; (2) certainty of expectation; and (3) predictability of outcome. Unfortunately, these strengths can also be weaknesses. Often, the standards set down by housing codes are inflexible and unable to keep up with changing needs.\textsuperscript{96} Vitality of the warranty depends on the code itself, which in many circumstances is inadequate because of lack of coverage of a specific situation, thus forcing the court to act interstitially without familiar guidelines.

The issue of the source of remedies for breach of the warranty is a more complex question than the scope of the warranty. The obvious solution is to restrict the remedies to those enumerated in the housing code, but most codes are not comprehensive enough or far-sighted enough to

\textsuperscript{94} The Uniform Commercial Code § 1-201(10), states in pertinent part: "Conspicuous": A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals . . . is conspicuous. Language in the body of a form is "conspicuous" if it is in larger or other contrasting type or color . . . . Whether a term or clause is "conspicuous" or not is for decision by the court.

\textsuperscript{95} An adhesion contract has been defined as a standardized or form agreement that is drafted unilaterally by a dominant party and then presented to a weaker party as the only acceptable instrument. Schuchman, Consumer Credit by Adhesion Contract, 35 Temp. L.Q. 125, 128 (1962). Recognizing that a tenant in a "take it or leave it" situation does not intentionally waive his rights, the court in Santiago v. McElroy, 319 F. Supp. 284, 294 (E.D. Pa. 1970), took judicial notice of the fact that a form lease was an adhesion contract.

\textsuperscript{96} See note 82 supra.
provide adequate remedies. This is because the codes were not drafted in contemplation of judicially created "private housing inspectors" which is what, in effect, the tenant becomes. Moreover, codes do not provide retribution payments to tenants for the loss of services. Faced with these weaknesses, the court in Javins arrived at a far more efficacious solution. Incorporating the housing code into the contract, the court took the position that a breach of the code was also a breach of the contract, thus triggering the broad remedial protections of contract law, in particular, specific performance and set off. Under this approach, the remedies applicable through housing codes are basically the same as those of the sales approach.

A significant advantage of housing code warranties is that the obligations of the housing code are imposed upon the landlord by legislative enactment. Thus it would violate the ordinance to allow him to disclaim his duties. Moreover, many codes explicitly forbid the landlord to shift his duties. This factor effectively negates any attempt by landlords to circumscribe their obligations through disclaimer clauses. The major drawbacks of this method are that the effectiveness of the warranty is dependent upon the comprehensiveness of the relevant code, and that since codes generally endeavor to provide only basic protection, the impact of a warranty predicated upon them will be felt in the main only by those in lower income dwellings.

VI. CONCLUSION

Although an implied warranty of fitness and habitability can be obtained either through sales law reasoning or housing codes, using a sales-like approach seems to be more beneficial because of the flexibility inherent therein. In addition, as has been demonstrated, the Uniform Commercial Code could be used as a basic guide for the formulation of the scope and remedies obtainable under the warranty. The principal weakness in this approach is the limitation on landlords' duties which could be wrought by disclaimers.

Housing code warranties, on the other hand, could allow for the same remedies as a sales-like warranty if incorporated into the lease. But their weakness is that while they are certain and predictable in their application, their import depends on the codes themselves and many times a code will not cover a certain fact situation or will be too inflexible to adapt to it. The major advantage of the code warranty — that provision could be made to disallow any type of disclaimer — should not, however, be underestimated.

Under either methodology, however, it is submitted that a long overdue grant of protection for tenants can be realized.

Stanley A. Lockitski

97. Id.
98. The Javins court stated that if the housing regulations explicitly placed certain duties with the landlord, any private agreement to shift these duties would be illegal and unenforceable. 428 F.2d at 1081-82.