TENANTS IN SEARCH OF PARITY WITH CONSUMERS: CREATING A REASONABLE EXPECTATIONS WARRANTY

I. INTRODUCTION

Article 2 of the Uniform Commercial Code (U.C.C.) provides consumers with a set of warranties applying to transactions in goods.[1] Subsequent to the U.C.C.'s adoption,[2] federal and state legislatures enacted legislation to further protect consumers.[3] However, these laws excluded consumers of housing—residential tenants.[4] To lessen this disparity, courts and legislatures created an implied warranty of habitability to govern housing conditions.[5] Yet, this warranty generally covers only those conditions endangering the life, health, or safety of the tenant.[6] Moreover, the scope, coverage, and effect of the warranty varies widely among the states,[7] and it does not even exist in some jurisdictions.[8] Thus, current landlord-tenant

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1. *See* JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 1, at 4-5 (3d ed. 1988).

2. The District of Columbia, the Virgin Islands, and all states except Louisiana have adopted the U.C.C. Louisiana has adopted several Articles, but not Article 2 or 2A. UNIF. COMMERCIAL CODE, 1B U.L.A. 1 (Supp. 1991).

3. *See, e.g.*, Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301-2312 (1975); Federal Truth in Lending Act, 15 U.S.C. §§ 1601-1666 (1988); Federal Truth in Leasing Act, 15 U.S.C. §§ 1667-1693 (1984); Unif. Consumer Sales Practices Act, 7A U.L.A. §§ 231-64 (1985).

4. James H. Backman, *The Tenant as a Consumer? A Comparison of Developments in Consumer Law and in Landlord/Tenant Law*, 33 OKLA. L. REV. 1, 7-8 (1980). This Note addresses residential tenants. However, some of the proposals in this Note may be applied to commercial leases as well. *See generally* Donald R. Pinto, Note, *Modernizing Commercial Lease Law: The Case for an Implied Warranty of Fitness*, 19 SUFFOLK U. L. REV. 929 (1985).

5. *See infra* part II.C. This warranty was based on the theories that old English real property law was no longer an effective tool for governing the residential lease and that the lease more closely resembled a contract than a conveyance. *Id.*

6. The early cases centered on unsafe and unsanitary conditions. *See id.*

7. *See infra* part III.

8. Alabama, Arkansas, Colorado, and Wyoming have not recognized any implied warranty of habitability. *See* Deborah H. Bell, *The Mississippi Landlord Tenant Act of 1991*, 61 MISS. L.J. 527, 528 n.2 (1991).

The situation in Connecticut is less certain. In a claim arising after the state legislature passed a statutory implied warranty of habitability, the Connecticut Supreme Court ignored the statute and used prior caselaw to require the tenant to pay withheld rent even though the East Shore District Health Department had determined that the premises were not habitable. Johnson v. Fuller, 461 A.2d 988, 990 (Conn. 1983). *But see* Techer v. Roberts-Harris, 83 F.R.D. 124, 128 n.7 (D. Conn. 1979) (recognizing

law leaves tenants without the protections afforded other consumers—a situation that courts and legislators are best positioned to address.[9]

Legislatures may provide the best avenue for more protections for the tenant because they can quickly create a uniform body of law. However, because legislatures are slow to create traditional implied warranties[10] and resist adopting the Uniform Residential Landlord and Tenant Act,[11] the judiciary may have to take this important step in equalizing the tenant's position with the consumer's position. Courts may follow *Solow v. Wellner*,[12] an exemplary decision in which a New York court held that the state's statutory implied warranty of habitability[13] covers the tenant's reasonable expectations whether or not the conditions threaten life, health, or safety.[14]

This Note focuses on how the foundations of the implied warranty of habitability support an extension of the warranty to include the reasonable expectations of the tenant and how states might effect this greater warranty.[15] Part II traces the foundations of the warranty as they emerged in the early exceptions to caveat lessee and finally solidified in the adoption of the implied warranty of habitability. Part III analyzes the states' variations in the current implied warranty and the possible justifications for these differences. Part IV examines how the New York courts have provided a warranty that a leased premises will meet the reasonable expectations of the tenant by analogizing the language of New York's

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that new Connecticut statute creates an implied warranty of habitability). *See generally* Marc W. Vallen, Comment, *The Uncertainty of the Implied Warranty of Habitability in Connecticut*, 10 U. BRIDGEPORT L. REV. 465 (1990) (highlighting the Connecticut court's decision in *Johnson*).

9. *See* Backman, *supra* note 4, at 28 (stating that landlord-tenant laws are "appalling" compared with consumer protection laws).

10. *See infra* part III.

11. UNIF. RESIDENTIAL LANDLORD AND TENANT ACT, 7B U.L.A. 430 (1985 & Supp. 1993) [hereinafter URLTA]. URLTA was promulgated by the National Conference of Commissioners on Uniform State Laws and approved by the American Bar Association in 1974 after some modification. *See* Steven G. Davison, *The Uniform Residential Landlord and Tenant Act and its Potential Effects Upon Maryland Landlord-Tenant Law*, 5 U. BALT. L. REV. 247 (1976). See *infra* note 95 and accompanying text for adopting jurisdictions and variations.

12. Solow v. Wellner, 569 N.Y.S.2d 882 (N.Y. Civ. Ct. 1991).

13. N.Y. REAL PROP. LAW § 235-b (McKinney 1989 & Supp. 1994).

14. *Solow*, 569 N.Y.S.2d at 888.

15. This Note does not attempt to trace the foundation for the warranty in every jurisdiction. Most courts and legislatures do not clearly indicate a particular foundation. *See* JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 302 (1981) ("In most jurisdictions the source of the warranty is obscure or polyglot."). Instead, this Note argues that tenants should have a "reasonable expectations" warranty based on the traditional reasons for needing a warranty of habitability and the interests of consumer protection.

implied warranty of habitability statute to the U.C.C. Part V argues that an analogy between different states' implied warranties of habitability and the U.C.C. supports a more comprehensive warranty for the residential tenant, but cautions that a landlord should be able to waive warranties relating to conditions beyond life, health, or safety.

II. DEVELOPMENT OF THE IMPLIED WARRANTY OF HABITABILITY

Obtaining even the minimum protections of the implied warranty of habitability was a long and arduous journey.[16] Tenants living with rats, roaches, and raw sewage often stopped paying rent only to have a court hold that they owed the withheld rent and future rental payments[17] and that the landlord was under no obligation to make the dwelling more habitable.[18] This unusual result occurred because courts applied real property law to the lease, as they had done since the sixteenth century.[19] Small exceptions did emerge to alleviate some of the law's harsh results.[20] Significant progress, however, did not begin until 1970. After much concern about the urban slums and recognition that a lease was more like a contract, a court finally refused to apply real property law and instead implied a warranty of habitability.[21]

A. Real Property Law and the Lease: The Principle of Caveat Lessee

Beginning in the sixteenth century,[22] real property law recognized that the lease gave the tenant property "as is" and the landlord had no duty to keep the property in a habitable condition or fit for a particular purpose.[23]

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16. For a more complete history of this development, see 1 AMERICAN LAW OF PROPERTY §§ 3.1-3.103. (A. James Casner ed., 1952 & Supp. 1962); Jean C. Love, *Landlord's Liability for Defective Premises: Caveat Lessee, Negligence, or Strict Liability*, 1975 WIS. L. REV. 19.

17. ROBERT S. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT § 3:10 (1980).

18. *See, e.g.*, Pomeroy v. Tyler, 9 N.Y. St. Rep. 514, 515 (1887) ("The landlord, in the absence of fraud or express condition, is not responsible for the presence of rats, mice, bugs or roaches about his premises."); Burns v. Fuchs, 28 Mo. App. 279, 281 (1887) ("[T]he lessee is bound to pay rent according to the terms of the lease notwithstanding the premises may become, during the term, entirely uninhabitable and useless to him.").

19. *See infra* part II.A.

20. *See infra* part II.B.

21. Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

22. *See* 1 AMERICAN LAW OF PROPERTY, *supra* note 16, § 3.1, at 176; SCHOSHINSKI, *supra* note 17, § 3:10, at 109. However, Louisiana, has not adopted the common law from England; it has always viewed the lease as a contract with dependent covenants. *See* Love, *supra* note 16, at 93.

23. *See* Love, *supra* note 16, at 27-28; 1 AMERICAN LAW OF PROPERTY, *supra* note 16, § 3.45, at 267. Keeping the premises habitable was one purpose of the implied warranty of habitability.

Principles of caveat lessee make the tenant responsible for examining property before bargaining with the landlord for express warranties.[24] In the absence of express warranties, the landlord was not responsible for repairing the premises during the tenancy.[25] In fact, under traditional property theory, the tenant was responsible for making such repairs so as not to commit waste.[26]

Treating a lease as a conveyance of property meant that covenants in the lease were independent.[27] If the landlord breached an express duty within the lease, the tenant, who covenanted to pay rent, could not withhold rent or terminate the lease.[28] The tenant had to continue paying full rent and either repair and sue for damages[29] or sue for breach of covenant.[30] Meanwhile, the landlord did not have to make any repairs and had no incentive to do so because the tenant was still liable for the rent.[31]

Generally, the landlord is not responsible for delivering the property and warranting quiet enjoyment. *See* 1 AMERICAN LAW OF PROPERTY, *supra* note 16, § 2.47, at 271-72. The warranty of quiet enjoyment guarantees that the landlord will not interfere with the tenant's enjoyment of the property, including interfering with possession or harassing the tenant while the tenant is in possession. *See* 1 *id.* § 2.47, at 272.

24. *See* Lemle v. Breeden, 462 P.2d 470, 472 (Haw. 1969) (citing 6 SAMUEL WILLISTON, THE LAW OF CONTRACTS § 890 (3d ed. 1962)); Pugh v. Holmes, 405 A.2d 897, 900-01 (Pa. 1979) (quoting Moore v. Weber, 71 Pa. 429, 432 (1872)); 1 AMERICAN LAW OF PROPERTY, *supra* note 16, § 3.45, at 267-69; HERBERT T. TIFFANY, LANDLORD AND TENANT § 86, at 556 (1912).

25. *See* TIFFANY, *supra* note 24, § 86, at 560-61; 1 AMERICAN LAW OF PROPERTY, *supra* note 16, § 2.78, at 246-49.

26. 2 RICHARD R. POWELL, POWELL ON REAL PROPERTY ¶ 233 (1993 & Supp.). Waste occurs when a tenant permissively allows a property to deteriorate or actively destroys part of the premises. *See* 1 AMERICAN LAW OF PROPERTY, *supra* note 16, § 3.7, at 192-94.

27. 1 AMERICAN LAW OF PROPERTY, *supra* note 16, § 3.11, at 202.

28. SCHOSHINSKI, *supra* note 17, §§ 2:13-14, at 112-17.

29. *Id.* Most tenants will not have the resources to make the repairs and pay rent while waiting to be reimbursed. A repair and deduct remedy is therefore more beneficial because the tenant can withhold the reasonable cost of repairs from the rent. Also, the prospect that a tenant may withhold rent is often enough to motivate landlords to repair defects on tenants' terms. However, a tenant who is not knowledgeable in the law and who does not seek legal assistance may eventually have to pay for the repair and pay full rent because the tenant must fulfill many specific requirements to legally exact performance from the landlord. If the tenant does not follow all the requirements, the landlord has a valid claim for the full rent. One common limitation affecting tenants is the maximum amount they may deduct for repairs. URLTA allows tenants to deduct the greater of $100 or "an amount equal to one-half the periodic rent." URLTA § 4.103 (1992). However, other jurisdictions allow a tenant to accumulate rent in an escrow account to cover major repairs costing more than one month's rent. *See* Vallen, *supra* note 8, at 475.

30. *See* Vallen, *supra* note 8, at 475.

31. *Id.*; SCHOSHINSKI, *supra* note 17, §§ 3:13-14, at 112-17.

B. Exceptions to Caveat Lessee for Residential Leases

When tenants typically rented property for agrarian reasons, the caveat lessee rule worked because the tenant could readily inspect the land.[32] The potential tenant wanted the lease for the land, not the buildings,[33] and such buildings were usually simple enough for the tenant to repair.[34] Further, the tenant and landlord had equal bargaining power when deciding on the terms of the lease, and the tenant could get a landlord to agree to an express warranty if desired.[35] However, as property was sometimes leased for nonagrarian reasons, courts tried to mitigate the effects of caveat lessee. Courts carved out exceptions for short-term leases of furnished dwellings.[36]

The Massachusetts Supreme Court was one of the first courts in the United States to imply some type of warranty in a lease. In *Ingalls v. Hobbs*,[37] the court reasoned that an important element in a lease for a furnished dwelling is the tenant's expectation of immediate use of the property and structure as a dwelling.[38] Because the lease was for a furnished place to live for a short term, the landlord could reasonably expect the tenant to want to live there immediately.[39] The court distinguished the furnished, short-term lease exception from other leases by saying that a long-term tenant might want to change the premises to suit his needs.[40]

In *Delamater v. Foreman*,[41] another state court followed the *Ingalls* trend. The court noted that a tenant in an apartment is not allowed to

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32. *See* SCHOSHINSKI, *supra* note 17, § 3:10.

33. *See* 2 POWELL, *supra* note 26, ¶ 233.

34. *See* Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1077 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

35. *See* SCHOSHINSKI, *supra* note 17, § 3:10, at 109-10; 1 AMERICAN LAW OF PROPERTY, *supra* note 16, § 2.45, at 267.

36. *See, e.g.*, Smith v. Marrable, 152 Eng. Rep. 693 (1843). *See also* 1 AMERICAN LAW OF PROPERTY, *supra* note 16, § 3.45, at 267; 2 POWELL, *supra* note 26, ¶ 233[1][a].

37. 31 N.E. 286 (Mass. 1892).

38. *Id.* at 286. *See also* Young v. Povich, 116 A. 26 (Me. 1922) (holding that a short-term lease of furnished apartment infested with bedbugs at the beginning of the lease violated warranty by landlord); Morgenthau v. Ehrich, 136 N.Y.S. 140 (N.Y. Sup. Ct. 1912) (stating that warranty of availability of furniture in short-term lease for furnished house was breached when bedbugs made furniture unavailable from the beginning).

39. *Ingalls*, 31 N.E. at 286.

40. *Id.* at 287.

41. 239 N.W. 148 (Minn. 1931).

interfere with the walls, floors, and ceilings where vermin propagate,[42] and therefore, the landlord is responsible for bedbugs within the tenant's apartment only if they come from common areas.[43] The tenant's expectations and the reality of the tenant's position as to the leased premises moved the *Ingalls* and *Delamater* courts to create these small exceptions to the caveat lessee principles.[44]

Courts developed another exception to caveat lessee for situations in which a tenant could not inspect the premises because construction or alteration of a building was in progress during the negotiation process and the lease specified that the building would be used for a particular purpose.[45] Because the tenant could not inspect at the beginning of the lease, caveat lessee was inappropriate.[46] Courts held that the specification of the building's future use created a warranty of fitness similar to a contractual warranty.[47] Courts would not abandon the notion of a lease as a conveyance of property, but applied the exception when equity so demanded.[48] However, the arguments for these exceptions undermine the use of caveat lessee for unfurnished dwellings as well.[49]

To alleviate further the hardships of caveat lessee, courts began to extend

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42. *Id.* at 149.

43. *Id.* The tenant's efforts to exterminate the bedbugs did not work, and bedbugs kept entering the apartment through cracks in the floor. *Id.*

44. Courts varied on the application of the "furnished-dwelling" exception, but the majority would only apply it to conditions present at the inception of the lease. *See generally* 2 POWELL, *supra* note 26, ¶ 233[1][a]. Courts were split on whether the exception applied to the whole dwelling or only to the furniture. *Id.*

45. *See generally* 1 AMERICAN LAW OF PROPERTY, *supra* note 16, § 3.45.

46. *See* 2 POWELL, *supra* note 26, ¶ 233[1][b].

47. *See id.*

48. *Id.* Also, a landlord who knew of a latent defect that a prospective tenant might find by inspecting the property at the beginning of the lease but failed to inform the tenant of the defect was responsible for any injury to the tenant. The landlord was also responsible for any fraudulent misrepresentations. *See* 1 AMERICAN LAW OF PROPERTY, *supra* note 16, § 3.45, at 269; TIFFANY, *supra* note 24, § 86, at 562.

49. If the tenant is renting an unfurnished apartment, the landlord should reasonably expect that the tenant would like to occupy the dwelling immediately. The tenant should be able to expect a dwelling free from vermin and suitable for living. The mere absence of furniture should not decrease the tenant's rights, as long as the premises is rented as a place to live. *See* Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1074 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970) ("[Tenants] seek a well known package of goods and services—a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance."). Even when the tenant is afforded the opportunity to inspect a finished dwelling, the caveat lessee rule is inappropriate because the tenant is not able to properly inspect today's complex structures. *See infra* notes 78-79 and accompanying text.

the scope of the warranty of quiet enjoyment.[50] The warranty of quiet enjoyment holds that when a tenant vacates a premises because the landlord has substantially interfered with the tenant's possession or enjoyment, the tenant has been constructively evicted and may terminate the lease.[51] However, the tenant must vacate the residence first and then gamble that a court will find that the premises were uninhabitable.[52] Often, however, the tenant is not able to vacate the premises as no other housing is available.[53] In response to the limited protection the warranty of quiet enjoyment provided, isolated courts expanded a tenant's rights by creating the doctrine of partial constructive eviction whereby the tenant must only refrain from using the uninhabitable portion of the premises and pay only part of the rent.[54] Even more helpful for the tenant was constructive eviction without the vacating requirement. The tenant could stay and withhold rent until the landlord remedied the problem.[55] However, few courts adopted these partial "constructive eviction" theories, leaving most tenants without recourse if a dwelling became uninhabitable.[56]

C. Rejection of Real Property Law's Caveat Lessee for Residential Leases

Recognizing the helpless condition of the modern tenant, several scholarly articles in the 1960s advocated changes from the traditional application of real property law to the lease.[57] From these articles

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50. The warranty of quiet enjoyment is not breached by the landlord's interference with a tenant's economic, as opposed to possessory, interests. *See* SCHOSHINSKI, *supra* note 17, § 3:5. Before it viewed the lease as a contract, a court would find a covenant not to disturb a tenant's economic interest independent of the tenant's duty to pay rent. *See* 1 AMERICAN LAW OF PROPERTY, *supra* note 16, § 2.11, at 203-04. *But see* University Club of Chicago v. Deakin, 106 N.E. 790 (Ill. 1914) (holding that in commercial lease, landlord's violation of noncompete clause is ground for termination of lease by tenant). *See also* 2 POWELL, *supra* note 26, ¶ 232[1].

51. *See* 1 AMERICAN LAW OF PROPERTY, *supra* note 16, § 3.51, at 282.

52. *See* 2 POWELL, *supra* note 26, ¶ 232[4]. *See, e.g.*, Portal Enter., Inc. v. Cahoon, 715 P.2d 1324 (Nev. 1986); Union Dime Sav. Bank v. Frohlich, 394 N.Y.S.2d 255 (N.Y. App. Div. 1977). *But see* Charles E. Burt, Inc. v. Seven Grand Corp., 163 N.E.2d 4 (Mass. 1959) (declaring that a tenant may litigate the issue of constructive eviction before vacating the premises).

53. *See* Love, *supra* note 16, at 36-37.

54. *See, e.g.*, East Haven Assoc. v. Gurian, 313 N.Y.S.2d 927, 928 (N.Y. Civ. Ct. 1970) (holding that tenant was constructively evicted from terrace of apartment when ash from incinerator and green fluid from air conditioner rendered terrace useless).

55. 2 POWELL, *supra* note 26, ¶ 232[3].

56. Love, *supra* note 16, at 37.

57. *See infra* note 59.

emerged two foundations for creating an implied warranty of habitability.[58] The first was the need to cure the problem of slums in which low income and indigent tenants live.[59] The second was that because the lease closely resembles a contract, the parties to it should have the same contractual rights and remedies as parties in other contexts.[60]

Courts also joined the movement for change by recognizing the need to take greater steps to increase the tenant's bargaining position in relation to the landlord. Some relied on housing codes designed to eliminate slums while others based their decisions on the lease as a contract. In *Pines v. Perssion*,[61] the Wisconsin Supreme Court relied solely on the advent of building codes and health regulations to find public policy in favor of the implied warranty.[62] In *Brown v. Southall Realty Co.*,[63] the court held the lease to be an illegal contract because it violated applicable housing regulations and was thus void.[64]

A year later, in *Lemle v. Breeden*,[65] a court declared for the first time

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58. These articles also focused on other changes, such as rent control and better means of housing code enforcement. *See infra* note 59.

59. *See, e.g.*, Paul G. Garrity, *Redesigning Landlord-Tenant Concepts for an Urban Society*, 46 J. URB. L. 695 (1969) (positing possible solutions to the problem of substandard housing); Joel R. Levine, *The Warranty of Habitability*, 2 CONN. L. REV. 61 (1969) (highlighting the ineffectiveness of housing code enforcement); Daniel N. Loeb, *The Low Income Tenant in California: A Study in Frustration*, 21 HASTINGS L.J. 287 (1970); Carl Schier, *Protecting the Interests of the Indigent Tenant: Two Approaches*, 54 CALIF. L. REV. 670 (1966); Robert S. Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO. L.J. 519 (1966).

60. *See, e.g.*, John Forrester Hicks, *The Contractual Nature of Real Property Leases*, 24 BAYLOR L. REV. 443 (1972); Thomas M. Quinn & Earl Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future*, 38 FORDHAM L. REV. 225 (1969) (demonstrating that current application of real property law to lease is inadequate for multifamily dwellings); Frank F. Skillern, *Implied Warranty in Leases: The Need for Change*, 44 DENV. L.J. 387 (1967) (stating that commercial and residential leases should be considered contracts complete with all general contract warranties).

61. 111 N.W. 409 (Wis. 1961). In *Pines*, college students rented a house that the landlord promised to fix and clean, but the landlord left the premises filthy and with defective plumbing, heating, and electrical wiring. *Id.* at 413.

62. *Id.* at 412. In Posnanski v. Hood, 174 N.W.2d 528 (Wis. 1970), the court ignored *Pines* and held that "the housing code was not a mutually dependent covenant with a tenant's covenant to pay rent." *Id.* at 532. *See also* Love, *supra* note 16, at 95 nn.400-01.

63. 237 A.2d 834 (D.C. 1968) (listing defects including broken toilet, railing, and low ceiling height in basement).

64. *Id.* at 836. This approach seems to mix the housing code concerns with the contract theory. Yet, regardless of whether the court wanted the lease to be a contract, the lease was only invalid because of the code violations, indicating that the court was concerned with maintaining a minimum housing standard. *Id.*

65. 462 P.2d 470 (Haw. 1969).

that a lease was a contract with an implied warranty of habitability[66] without referring to any housing codes.[67] The court also stressed the greater remedies available under contract law.[68] The court's definition of breach of the warranty included two general factors: (1) the seriousness of the defect; and (2) its duration.[69]

Javins v. First National Realty Corp.[70] is the case hailed as the beginning of the implied warranty of habitability.[71] The United States Court of Appeals for the District of Columbia Circuit held that violations of the District's housing regulations were a valid defense to an action brought by a landlord for eviction of tenants who had withheld rent.[72] Although the court articulated several familiar reasons for not following the common law of caveat lessee,[73] two key arguments for implying the warranty emerged: (1) changes in society compel a shift from the view of a lease as a conveyance of property to the lease as a contract;[74] and (2) the District of Columbia's housing code mandates the warranty.[75]

First, the court reasoned that because the caveat lessee theory was based on assumptions that no longer hold true, the rule had no rational basis in today's society.[76] To support its assertion, the court found that the typical

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66. *Id.* at 474. Hawaii subsequently passed legislation tying the implied warranty to the housing codes. HAW. REV. STAT. § 521-42(a)(1) (1985 & Supp. 1991).

67. Although the court never referred to either housing codes or the public policy behind correcting substandard housing, the tenants had complained of rats, *id.* at 474, which are specifically deemed health hazards in most housing codes. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 17920.3(a)(12) (West 1984).

68. 462 P.2d at 475.

69. *Id.* at 476.

70. 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

71. *See* 2 POWELL, *supra* note 26, ¶ 233[2][a]; Vallen, *supra* note 8, at 466. Although *Lemle* is arguably the first case to imply a warranty of habitability, it is not highlighted as the watershed of tenants' rights. Perhaps this is because *Lemle* is only a state court decision, and all eyes were focused on the District of Columbia Circuit Court, which had a reputation for activism.

72. 428 F.2d at 1072-73.

73. First, the factual assumptions on which the old rule was based have changed. Second, consumer protection cases require protection for the tenant as well. Third, the nature of urban housing mandates changing the old rule. *Id.* at 1077.

74. *Id.* at 1075. The court stated, "[O]ur holding in this case reflects a belief that leases of urban dwelling units should be interpreted and construed like any other contract." *Id.* The court also mentioned that when a tenant continues to pay the same rent, the tenant should have a right to expect the same conditions that existed at the beginning of the lease. *Id.* at 1079.

75. *Id.* at 1077. "In the District of Columbia, the standards of this warranty are set out in the Housing Regulations." *Id.* The court also believed that the housing code itself required the implied warranty. *Id.* at 1080. "The duties imposed by the Housing Regulations may not be waived or shifted by agreement if the Regulations specifically place the duty upon the lessor." *Id.* at 1081-82.

76. *Id.* at 1077.

tenant no longer leases land containing simple structures for agrarian purposes.[77] Rather, today's tenant faces complex structures which the tenant may not be able to fix.[78] Additionally, the tenant often may not have access to the areas where he must make such repairs.[79] Importantly, the tenant also does not have a sufficient interest in the property to obtain financing for major repairs.[80]

The court further argued that the movement toward greater consumer protection should extend to the landlord-tenant relationship.[81] The court asserted that tenants, like other consumers, do not have equal bargaining power with landlords. Landlords usually provide preprinted forms that favor the landlord, and tenants have little opportunity to change them.[82] During housing shortages, tenants have even less bargaining power because few other options exist.[83] Thus, the court concluded that today's urban society mandates a change from caveat lessee as well as caveat emptor.[84]

Second, the court noted that although the District of Columbia's housing code was silent with respect to private remedies, the language supported an implied warranty.[85] The court also relied on *Brown v. Southall Realty Co.*,[86] in which the court gave tenants a cause of action under the housing code after concluding that the code was designed to protect the poor.[87] The court prevented landlords from simply including a waiver of the warranty in each preprinted lease form by holding that the landlord's responsibilities under the housing code could not be shifted by contract.[88]

Citing *Javins* with approval, courts and legislatures began to change the law and craft an implied warranty of habitability for residential lessees. Mirroring *Javins*, these reforms were supported either by a belief that the modern landlord-tenant relationship was inconsistent with the foundation

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77. 428 F.2d at 1077.

78. *Id.* at 1078 ("[T]oday's city dweller usually has a single specialized skill unrelated to maintenance work; he is unable to make repairs like the 'jack-of-all-trades' farmer who was the common law's model of the lessee.").

79. *Id.*

80. *Id.* at 1078-79.

81. *Id.* at 1079.

82. 428 F.2d at 1079. *See also* URLTA § 1.403 cmt. (1972).

83. 428 F.2d at 1079.

84. *Id.* at 1080.

85. *Id.*

86. 237 A.2d 834 (D.C. 1968).

87. *Javins*, 428 F.2d at 1080-81. See *supra* notes 63-64 and accompanying text for a discussion of *Brown*.

88. 428 F.2d at 1081-82.

of the principle of caveat lessee or by a desire to eliminate substandard housing.[89]

III. THE IMPLIED WARRANTY OF HABITABILITY TODAY

States' warranties, whether judicially or legislatively created, vary widely.[90] Significantly, states differ over whether landlords may waive the warranty and in defining the situations in which the warranty may be applied. These variations often arise from the two foundations of the warranty highlighted in *Javins*.[91]

A. Survey of the Jurisdictions

As in *Javins* and *Lemle,* many courts have created an implied warranty of habitability,[92] which some legislatures later codified.[93] In other states,

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89. *See infra* part III.

90. States also differ with respect to the types of damages they will allow if a tenant proves a breach of the implied warranty of habitability as an affirmative action or as a counterclaim to a rent or eviction suit. *See* Debra T. Landis, Annotation, *Measure of Damages for Landlord's Breach of the Implied Warranty of Habitability*, 1 A.L.R.4th 1182 (1980); Francis S. L'Abbate, Note, *Recovery Under Implied Warranty of Habitability*, 10 FORDHAM URB. L.J. 285, 315 (1982). Rent abatement is the most common remedy allowed. In one method, the tenant only has to pay the fair rental value of the property as it existed in its uninhabitable condition. *See, e.g.,* Mease v. Fox, 200 N.W.2d 791, 797 (Iowa 1972); Boston Hous. Auth. v. Hemingway, 293 N.E.2d 831, 844 (Mass. 1973); Kline v. Burnes, 276 A.2d 248, 252 (N.H. 1971). In Pennsylvania, courts decrease the rent by the percentage of diminished use. *See, e.g.,* Pugh v. Holmes, 405 A.2d 897, 909 (Pa. 1979) (rejecting use of the difference in contract rent and fair market value as a measurement because it is impossible to determine the fair market value of an uninhabitable dwelling).

Courts may also award consequential damages. *See, e.g.,* McGuinness v. Jakubiak, 431 N.Y.S.2d 755 (N.Y. Sup. Ct. 1980). Some jurisdictions have recognized that it is not only a monetary loss that the tenant has suffered. Often, tenants have had to change their lifestyles and suffer inconveniences. *See, e.g.,* Goodman v. Ramirez, 420 N.Y.S.2d 185, 188 (N.Y. Civ. Ct. 1979) (awarding damages for disruption of daily living); Gokey v. Bessette, 580 A.2d 488, 492 (Vt. 1990) (compensating for discomfort of living in an unsanitary dwelling); Hilder v. St. Peter, 478 A.2d 202, 209 (Vt. 1984) (awarding damages for discomfort and annoyance suffered); Teller v. McCoy, 253 S.E.2d 114 (W. Va. 1978) (awarding damages for the absence of hot water which prevented tenant from taking a bath).

Some courts even allow damages for emotional and mental suffering. Simon v. Solomon, 431 N.E.2d 556, 562-63 (Mass. 1982); Fair v. Negley, 390 A.2d 240, 246 (Pa. Super. Ct. 1978). Although not explicitly allowed under URLTA, courts have implied emotional damages. *See* Wanda Ellen Wakefield, Annotation, *Tenant's Recovery of Damages for Emotional Distress Under Uniform Residential Landlord and Tenant Act*, 6 A.L.R.4th 529 (1981).

91. *See supra* text accompanying note 89.

92. Green v. Superior Court, 517 P.2d 1168 (Cal. 1974); Masur v. Eubanks, 401 So. 2d 1328 (Fla. 1981); Lemle v. Breeden, 462 P.2d 470 (Haw. 1969); Jack Spring, Inc. v. Little, 280 N.E.2d 208 (Ill. 1972); Breezewood Management Co. v. Maltbie, 411 N.E.2d 670 (Ind. Ct. App. 1980); Mease v. Fox, 200 N.W.2d 791 (Iowa 1972); Steele v. Latimer, 521 P.2d 304 (Kan. 1974); Boston Hous. Auth. v. Hemingway, 293 N.E.2d 831 (Mass. 1973); Detling v. Edelbrock, 671 S.W.2d 265 (Mo. 1984)(en banc);

legislatures have directly codified an implied warranty of habitability,[94] many of them adopting the implied warranty contained in the Uniform Residential Landlord and Tenant Act (URLTA).[95] Alabama, Arkansas,

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Kline v. Burns, 276 A.2d 248 (N.H. 1971); Marini v. Ireland, 265 A.2d 526 (N.J. 1970); Glyco v. Schultz, 289 N.E.2d 919 (Ohio Munic. Ct. 1972); Pugh v. Holmes, 405 A.2d 897 (Pa. 1979); Kamarath v. Bennett, 568 S.W.2d 658 (Tex. 1978); Wade v. Jobe, 818 P.2d 1006 (Utah 1991) (applying general warranty of habitability to case although state legislature had enacted warranty statute because case originated before statute became effective); Birkenhead v. Coombs, 465 A.2d 244 (Vt. 1983); Foisy v. Wyman, 515 P.2d 160 (Wash. 1973); Teller v. McCoy, 253 S.E.2d 114 (W. Va. 1978).

93. *See* CAL. CIV. CODE § 1941 (West 1985) (enacted 1970); FLA. STAT. ANN. § 83.51 (West 1987 & Supp. 1993) (enacted 1987); HAW. REV. STAT. § 521-42 (1985 & Supp. 1992) (enacted 1972); IOWA CODE ANN. § 562A.15 (West 1992) (enacted 1978); KAN. STAT. ANN. § 58-2553 (1983) (enacted 1975); MASS. ANN. LAWS ch. 111, §§ 127A-L (Law. Co-op. 1985 & Supp. 1993) (enacted 1965); MO. ANN. STAT. § 441.510 (Vernon 1986) (enacted 1969); N.H. REV. STAT. ANN. §48-A:14 (1991) (enacted 1979); N.J. STAT. ANN. § 2A:42-88 (West 1987) (enacted 1971); OHIO REV. CODE ANN. § 5321.04 (Anderson 1989 & Supp. 1992) (enacted 1974); PA. STAT. ANN. tit. 35, § 1700-1 (1977) (enacted 1966); TEX. PROP. CODE ANN. § 92.052 (West 1984 & Supp. 1993) (enacted 1983); VT. STAT. ANN. tit. 9, §§ 4457, 58 (Supp. 1993) (enacted 1985); WASH. REV. CODE ANN. § 59.18.060 (West 1990 & Supp. 1992) (enacted 1973); W. VA. CODE § 37-6-30 (1985) (enacted 1978).

94. ALASKA STAT. § 34.03.100 (1990) (enacted 1974); ARIZ. REV. STAT. ANN. § 33-1324 (West 1990) (enacted 1973); CONN. GEN. STAT. ANN. § 47a-7 (West 1978 & Supp. 1993) (enacted 1979); DEL. CODE ANN. tit. 25, § 5303 (1989) (enacted 1953); GA. CODE ANN. § 44-7-13 (1991) (enacted 1863); IDAHO CODE § 6-320 (1990) (enacted 1977); KY. REV. STAT. ANN. § 383.595 (Michie/Bobbs-Merrill Supp. 1992) (enacted 1984); LA. CIV. CODE ANN. arts. 2692, 2693, 2695, 2717 (West 1952) (enacted 1924); ME. REV. STAT. ANN. tit. 14, § 6021 (West 1980 & Supp. 1992) (enacted 1971); MD. CODE ANN., REAL PROP. § 8-211 (1988 & Supp. 1992) (enacted 1975); MICH. COMP. LAWS ANN. § 554.139 (West 1988 & Supp. 1992) (enacted 1968); MINN. STAT. ANN. § 504.18 (West 1990 & Supp. 1993) (enacted 1971); MISS. CODE ANN. § 89-8-23(1)(a) (1992) (enacted 1991); MONT. CODE ANN. § 70-24-303 (1993) (enacted 1977); NEB. REV. STAT. § 76-1419 (1990) (enacted 1975); NEV. REV. STAT. ANN. § 118A.290 (Michie 1991) (enacted 1977); N.M. STAT. ANN. § 47-8-20 (Michie Supp. 1993) (enacted 1975); N.Y. REAL PROP. LAW § 235-b (McKinney Supp. 1989) (enacted 1975); N.C. GEN STAT. § 42-42 (1992) (enacted 1977); N.D. CENT. CODE § 47-16-13.1 (1978) (enacted 1977); OKLA. STAT. ANN. tit. 41, § 118 (West 1986) (enacted 1978); OR. REV. STAT. § 90.320 (1990) (enacted 1973); R.I. GEN. LAWS § 34-18-22 (Supp. 1992) (enacted 1986); S.C. CODE ANN. § 27-40-440 (Law. Co-op. 1991) (enacted 1986); S.D. CODIFIED LAWS ANN. §§ 43-32-8 to -9 (1983) (enacted 1976); TENN. CODE ANN. § 66-28-304 (1993) (enacted 1975); UTAH CODE ANN. §§ 57-22-1 to -6 (Supp. 1993) (enacted 1990); VA. CODE ANN. § 55-248.13 (Michie 1986 & Supp. 1993) (enacted 1974); WIS. STAT. ANN. § 704.07 (West 1981 & Supp. 1992) (enacted 1971).

95. URLTA § 2.104 (Supp. 1993). Alaska, Arizona, Kentucky, Montana, Nebraska, New Mexico, Oregon, Rhode Island, South Carolina, Tennessee, and Virginia codified the implied warranty by adopting URLTA.

However, some of these jurisdictions have amended the uniform act. For example, the first provision in the URLTA implied warranty is landlord compliance with "building and housing codes materially affecting health and safety." URLTA § 2.104(a)(1) (1972). Alaska and Oregon have not adopted this subsection. Alaska's statute begins with URLTA's second provision—that the landlord must keep the premises in a "fit and habitable condition." *Compare* URLTA § 2.104(a)(2) (1972) *with* ALASKA STAT. § 34.03.100(a)(1) (1990). The New Mexico legislature changed "fit and habitable" to read "safe." N.M. STAT. ANN. § 47-8-20(A)(2) (Michie Supp. 1993). Oregon's statute does not follow

Colorado, and Wyoming still have the traditional property law of caveat lessee.[96]

A few states provide unique restrictions upon the warranty. Tennessee limits the warranty to counties with a population greater than 200,000,[97] effectively excluding much of the state.[98] Similarly, although Kentucky adopted URLTA,[99] the statute is not effective unless adopted by the local governments, and only Lexington, Louisville, and Covington have taken this step.[100] Utah's statute effectively limits the cases in which the tenant can prevail[101] by requiring the tenant to notify the landlord of defects twice before filing a suit.[102] Tenants must also comply with numerous provisions of which they may not be aware.[103] Even if the tenant brings an otherwise successful action, the landlord has the option of evicting the tenant rather than fixing the defects.[104]

Louisiana is also a unique jurisdiction because its housing code has always held that a lease is a contract.[105] The Louisiana housing code details specific duties the landlord must perform, including keeping the premises fit for its intended use.[106] The strict contract theory allows the

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URLTA's warranty and instead provides that a dwelling must be habitable, listing conditions that make a dwelling uninhabitable. OR. REV. STAT. § 90.320(1) (1990). *Accord* NEV. REV. STAT. ANN. § 118A.290 (Michie 1991).

Connecticut, North Dakota, Mississippi, Ohio, and West Virginia all have implied warranty statutes similar to section 2.104 of URLTA although these legislatures have not formally adopted the uniform act.

96. *See* Bell, *supra* note 8, at 528 n.2.

97. TENN. CODE ANN. § 66-28-102 (1993).

98. *See* Bell, *supra* note 8, at 528.

99. KY. REV. STAT. ANN. § 383.595 (Michie/Bobbs-Merrill Supp. 1992).

100. *See id.*

101. *See* David C. Richards, Comment, *The Utah Fit Premises Act and the Implied Warranty of Habitability: A Study in Contrast*, 1991 UTAH L. REV. 55, 68. Richards' Comment was written before the Utah Supreme Court acknowledged the implied warranty of habitability in Wade v. Jobe, 818 P.2d 1006 (Utah 1991), a case arising before the effective date of the Utah Fit Premises Act. Utah courts have not yet considered whether the implied warranty from *Wade* will exist along with the statutory provision. If it does, the courts can grant an implied warranty even when the tenant does not comply with the complicated and extensive requirements of the statute.

102. UTAH CODE ANN. § 57-22-6 (Supp. 1993). *See also* Richards, *supra* note 101, at 68.

103. *See* Richards, *supra* note 101, at 67-68. For example, section 57-22-6(1) requires the tenant to comply with section 57-22-5. Compliance includes notifying the landlord in writing of any increase in the number of occupants residing in a dwelling, even a new baby, and securing written permission for the extra tenants to live there. *See* Richards, *supra* note 101, at 67 (discussing requirements Utah tenants must obey).

104. UTAH CODE ANN. § 57-22-4(4) (Supp. 1993).

105. *See* Love, *supra* note 16, at 93.

106. LA. CIV. CODE ANN. art. 2692(2) (West 1952).

landlord and tenant to contract out of any of their statutory duties. Yet, the courts have often refused to enforce waivers on grounds that the bargaining power was unequal and the resulting waiver was unconscionable.[107]

B. Implied Warranty of Habitability—Waivers and Coverage

The differing foundations of the warranty have created a split among the states as to whether a landlord may waive the warranty. Preventing a landlord from waiving the implied warranty is justified by the need to eliminate substandard housing.[108] Allowing waiver, however, is consistent with contract theory, which states that parties should be free to reach any agreement, even if one party waives his or her rights.[109] In fact, the U.C.C. allows waivers of consumer warranties.[110] However, courts will void contractual provisions if they are unconscionable or against public policy.[111] Thus, even under contract theory, courts have found waivers of the warranty void for unconscionability.[112]

Even if the landlord cannot generally waive the warranty under the state's law, there are some exceptions. Some jurisdictions specifically exclude farm tenancies because the foundations for the implied warranty do not apply.[113] Often, the warranty does not apply to or may be waived for

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107. *See* George M. Armstrong & John C. LaMaster, *The Implied Warranty of Habitability: Louisiana Institution, Common Law Innovation*, 46 LA. L. REV. 195, 213-16 (1985).

108. *See, e.g.*, Boston Hous. Auth. v. Hemingway, 293 N.E.2d 831, 843 (Mass. 1973) (finding no waiver to the extent of State Sanitary Code and local health regulations); Fair v. Negley, 390 A.2d 240, 243-45 (Pa. Super. Ct. 1978) (stating that "as is" provision in lease and actual knowledge of defect does not constitute waiver); Foisy v. Wyman, 515 P.2d 160, 164-65 (Wash. 1973) (holding that due to public policy concerns no waiver of the warranty is allowed even if at time lease was signed tenant knew of defects and agreed to reduced rent); Teller v. McCoy, 253 S.E.2d 114, 130-31 (W. Va. 1978) (finding any waiver of warranty against public policy because no reasonable person would voluntarily live in unsafe housing).

109. *See, e.g.*, Mease v. Fox, 200 N.W.2d 791, 797 (Iowa 1970) (stating that waiver is a factor used to determine if a landlord breached the warranty); Kline v. Burns, 276 A.2d 248, 252 (N.H. 1971) (following *Mease* factors); Berzito v. Gambino, 308 A.2d 17, 22 (N.J. 1973) (same); Kamarath v. Bennett, 568 S.W.2d 658, 662 (Tex. 1978) (holding that waiver is allowed if it is made by express agreement). *See also* RESTATEMENT (SECOND) OF PROPERTY, LANDLORD AND TENANT § 5.6 (1977).

110. *See* U.C.C. § 2-316 (1977).

111. *See* Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965) (declaring cross-collateralization clause in installment contract void because it was unconscionable); 1 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 128 (1963).

112. Louisiana allows waivers of the warranty unless the provision is unconscionable. *See supra* note 107 and accompanying text.

113. *See, e.g.*, URLTA § 1.202(7) (1972) (stating that URLTA does note apply to "premises used by the occupant for primarily agricultural purposes"); IDAHO CODE § 6-320(e) (1990) ("The provisions of [this section] shall not apply to tracts of land of five (5) acres or more used for agricultural

single family dwellings. Additionally, some jurisdictions either exempt landlords of two-, three-, and four-unit buildings or allow these landlords to waive the warranty.[114] Still other states exclude employer-provided housing.[115]

The differences among jurisdictions in the scope of the warranty's coverage reflects the varying rationales underlying the warranty.[116] Some jurisdictions adhere to the theory that the implied warranty of habitability arises from building or housing codes.[117] Most jurisdictions rely on housing codes to limit the warranty to those code provisions that substantially affect life, health, or safety,[118] but some construe literal violations of the code as breaches of the warranty.[119] Even without explicitly tying

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purposes."); MD. CODE ANN., REAL PROP. § 8-211(c) (1992 & Supp. 1993).

114. URLTA allows a landlord and tenant of a single family dwelling to agree that the tenant must provide garbage removal, heat, and hot water. URLTA § 2.104(c) (1972). A single family unit's tenant may also agree to make minor repairs if the agreement is in good faith. *Id. Compare* ALASKA STAT. § 34.03.100(c) (1992) (allowing the above URLTA agreements for both one- and two-family residences) *with* MONT. CODE ANN. § 70-24-303(3) (1993) (setting the limit at three-family unit buildings) *and* KAN. STAT. ANN. § 58-2553(b) (1983) (setting the limit at four-family unit buildings).

URLTA allows all tenants, other than those occupying single-family units, to agree to perform specific repairs, maintenance, alterations, or remodeling subject to certain conditions, one being that the landlord must always be responsible for housing code violations. URLTA § 2.104(d)(2) (1972). Montana allows a shift in responsibilities from landlord to tenant for up to three-family dwellings, MONT. CODE ANN. § 70-24-303(4) (1993), while Oregon, Rhode Island, Tennessee, and Virginia allow any tenants to agree to make such repairs, OR. REV. STAT. § 90.320(2) (1990); R.I. GEN. LAWS § 34-18-22(c) (Supp. 1992); TENN. CODE ANN. § 66-28-304(c) (1982); VA. CODE ANN. § 55-248.13(c) (Michie 1986).

115. *See* URLTA § 1.202(5) (1972); KY. REV. STAT. ANN. § 383.535(5) (Supp. 1992); VA. CODE ANN. § 55-248-5 (Michie Supp. 1993).

116. *See* 2 POWELL, *supra* note 26, ¶ 233[2][c].

117. *See, e.g.*, Winchester Management Corp. v. Staten, 361 A.2d 187 (D.C. 1976) (holding that implied warranty of habitability includes only those conditions contained in the housing regulations); Green v. Superior Court, 517 P.2d 1168, 1182 (Cal. 1974) (stating that the implied warranty is designed to cover bare living requirements and does not include perfection or aesthetically pleasing conditions); Steele v. Latimer, 521 P.2d 304, 309-10 (Kan. 1974) (declaring that the housing code becomes part of a lease as a matter of law); Detling v. Edelbrock, 671 S.W.2d 265, 270 (Mo. 1984) (en banc) (limiting warranty to bare living requirements and specifically excluding aesthetically pleasing items) (citing *Green*, 517 P.2d at 1182); Glyco v. Schultz, 289 N.E.2d 919, 923-24 (Ohio Munic. Ct. 1972) (holding that a lease entered into in violation of a housing code is void).

Massachusetts' statute provides for the state and local governments to set up specific codes to prohibit conditions that "materially impair the health or well-being" of the tenant. MASS. ANN. LAWS ch. 111, §§ 127A, 127C (Law. Co-op. 1985 & Supp. 1993).

118. *See, e.g.*, Mease v. Fox, 200 N.W.2d 791, 796 (Iowa 1972) (limiting the warranty to material violations of the housing code that "render the premises unsafe or unsanitary"); *Detling*, 671 S.W.2d at 270 ("[M]inor housing code violations which do not affect habitability will be considered de minimis.") (quoting King v. Moorehead, 495 S.W.2d 65 (Mo. Ct. App. 1973)).

119. *See* 2 POWELL, *supra* note 26, ¶ 233[2][c][ii].

the implied warranty of habitability to a housing code, some states hold that the warranty's coverage is limited to provisions generally found in housing codes.[120]

The jurisdictions adhering to the theory that the lease is a contract[121] do not explicitly limit the standard to conditions endangering the tenant's life, health, or safety.[122] Yet, most of the cases in these jurisdictions involve conditions that do violate housing codes or are clearly threatening to life, health, or safety.[123] In isolated cases, courts have required landlords to do more than simply assure that their premises do not threaten life, health, or safety.[124] The lease-as-contract foundation does not mandate a limit on the landlord's duty based upon housing codes.[125]

C. Inadequacies in the Present State of the Implied Warranty of Habitability Mandating a More Expansive Warranty

There are two major reasons why courts and legislatures should extend a greater warranty to residential tenants. First, many of the current implied warranties of habitability do not provide the intended relief to residential tenants. Second, residential tenants, as consumers of living space, need protection for the same reasons consumers of personal goods need it. Thus, consumers of residential dwellings should receive warranties that further protect them.

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120. *See, e.g.*, MD. CODE ANN., REAL PROP. § 8-211(a) (1992 & Supp. 1993) ("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 safety of the occupants of the dwelling unit, and not those which merely impair the aesthetic value of the premises, or . . . housing code violations of a nondangerous nature."); N.J. STAT. ANN. 2A:42-88(a) (West 1987) (setting the threshold of a breach at a violation of a housing code or "any other condition dangerous to life, health or safety"); PA. STAT. ANN. tit. 35, § 1700-1 (1993) (requiring a state official to certify the dwelling as unfit for human habitation in order to declare a breach of the warranty); TEX. PROP. CODE ANN. § 92.052(a)(3) (West 1984 & Supp. 1993) (explicitly stating that any breach must involve conditions that threaten the physical health and safety of an ordinary tenant); UTAH CODE ANN. § 57-22-4(1) (Supp. 1993) (same).

121. *See, e.g.*, Breezewood Management Co. v. Maltbie, 411 N.E.2d 670, 673 (Ind. Ct. App. 1980). *Breezewood Management Co.* relied upon Weaver v. American Oil Co., 276 N.E.2d 144 (Ind. 1972), which invalidated exculpatory and indemnification clauses by applying U.C.C. § 2-302, which prohibits unconscionable contracts. 411 N.E.2d at 673.

122. *See, e.g.*, Timber Ridge v. Dietz, 338 A.2d 21, 23 (N.J. Super. Ct. 1975) (holding that tenant was entitled to rent abatement when mudslide covered patio, sidewalks, and parking area).

123. *See, e.g.*, Housing Auth. v. Scott, 348 A.2d 195 (N.J. Super. Ct. App. Div. 1973).

124. *See, e.g.*, *Timber Ridge*, 338 A.2d at 23.

125. *See, e.g.*, Park West Management Corp. v. Mitchell, 391 N.E.2d 1288, 1294 (housing codes are one factor in determining breach, but are not the conclusive factor), *cert. denied*, 444 U.S. 992 (1979); Hilder v. St. Peter, 478 A.2d 202, 209 (Vt. 1984) (same).

The implied warranty of habitability is supposed to safeguard the tenant's life, health, and safety.[126] However, as noted, the warranty in each state varies widely in terms of the true protection afforded the tenant in these areas.[127] Procedural impediments[128] and outright exceptions[129] create classes of tenants that have no protection at all. Also, states differ over what conditions threaten life, health, and safety.[130] Often the violations of which a tenant complains must be egregious before relief is granted.[131] Thus, for many tenants, the current warranties do not even afford a minimum level of protection against the conditions that they were designed to protect.

The rationale behind legislation protecting consumers of personal goods also applies to consumers of living space.[132] Many of the characteristics of the modern tenant highlighted in *Javins*[133] are similar to those of other consumers meriting legal protection.[134] Both tenants and consumers in today's society cannot meaningfully inspect products and services because today's goods are too complex.[135] Moreover, the landlord-tenant relationship, like the consumer-merchant relationship, is not one of equal bargaining power.[136] In fact, even wealthy tenants may not have enough bargaining power when there is a housing shortage.

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126. *See supra* notes 118-25 and accompanying text.

127. *See supra* part III.A.

128. *See supra* notes 101-04 and accompanying text.

129. *See supra* notes 98-99 and accompanying text.

130. *See, e.g.*, Allaire v. United States Trust Co., 478 F. Supp. 826 (D.V.I. 1979) (holding that a hole in a porch was not covered by the implied warranty of habitability because a porch is not a vital facility).

131. *See supra* note 120.

132. *See* Backman, *supra* note 4, at 4.

133. *See supra* notes 70-89 and accompanying text.

134. *See* Backman, *supra* note 4, at 3-11.

135. *See* ROSS CRANSTON, CONSUMERS AND THE LAW 1-2 (2d ed. 1984); Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1075 (D.C. Cir.) ("[T]he tenant must rely upon the skill and *bona fides* of his landlord at least as much as a car buyer must rely upon the car manufacturer."), *cert. denied*, 400 U.S. 925 (1970). *See also id.* at 1074 (stating that the "city dwellers, both rich and poor, seek . . . a well known package of goods and services.").

136. *See* CRANSTON, *supra* note 135, at 3 ("Consumers are typically in a weak bargaining position because of the disparity in knowledge and resources between the parties."); Tower West Assoc. v. Derevnuk, 450 N.Y.S.2d 947, 952 (N.Y. Civ. Ct. 1982) (recognizing the middle-class tenant as "the tenant who is not poor enough to elicit the customary sympathies . . . nor wealthy enough to move the powers that be").

IV. NEW YORK'S EXTENSION OF THE IMPLIED WARRANTY OF HABITABILITY

When New York codified the implied warranty of habitability in 1975,[137] the legislature gave no indication that the warranty was anything more than a means to alleviate the abhorrent conditions in urban slums.[138] However, courts have interpreted the statute's language to extend the warranty beyond conditions affecting life, health, or safety.[139] For example, in *Solow v. Wellner*,[140] the court held that the presence of mice and roaches violated the implied warranty of habitability because this condition affects the tenants' health and safety.[141] However, the court continued to analyze other alleged violations in terms of the statutory language guarantying that "the premises . . . are fit for . . . the uses reasonably intended by the parties."[142] The court reasoned that because this language is similar to U.C.C. section 2-315,[143] the legislature intended the implied warranty to extend as far as the U.C.C.[144]

The court then determined whether the landlord in *Solow* had breached the warranty with respect to these other conditions by using the test New York traditionally employs under U.C.C. section 2-315—the reasonable

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137. N.Y. REAL PROP. LAW § 235-b (McKinney 1989 & Supp. 1994). For a discussion of the development of the implied warranty of habitability in New York before Solow v. Wellner, 569 N.Y.S.2d 882 (N.Y. Civ. Ct. 1991), see L'Abbate, *supra* note 90, at 297-301. *See also* Armstrong & LaMaster, *supra* note 107, at 204.

138. *See* Governor's Memorandum of Approval, 1975 N.Y. LAWS 1760.

139. *See, e.g.*, Walling v. Holman, 858 F.2d 79, 83 (2d Cir. 1988) (holding that under New York law, warranty is not limited to conditions that endanger life, health, and safety), *cert. denied*, 489 U.S. 1082 (1989); Tower West Assoc. v. Derevnuk, 450 N.Y.S.2d 947, 951 (N.Y. Civ. Ct. 1982) (holding that a tenant has the right to expect to receive reliable services, such as an intercom system, elevator service, heat, and hot water), *cert. denied*, 444 U.S. 992 (1979); Mantica R. Corp. v. Malone, 436 N.Y.S.2d 797, 799 (N.Y. Civ. Ct. 1981) (interpreting the warranty to guaranty a dwelling that is (1) not dangerous to life, health, or safety, (2) habitable and usable, and (3) in accord with reasonable expectations).

140. 569 N.Y.S.2d 882 (N.Y. Civ. Ct. 1991).

141. *Solow*, 569 N.Y.S.2d at 887. Other conditions affecting the tenant's health and safety in *Solow* were exposed wires in the lobby, the absence of elevators for those living above the tenth floor, accumulating garbage, unlocked doors, malfunctioning smoke alarms, collapsing ceilings, and overflowing sinks. *Id.*

142. *Id.* at 887-88. "By adopting the phraseology 'the uses reasonably intended by the parties,' the legislators manifested their desire that the warranty of habitability in residential tenancies paralleled the warranty of fitness in commercial transactions under U.C.C. section 2-315." *Id.*

143. U.C.C. § 2-315 reads, "there is . . . an implied warranty that the goods shall be fit for such [ordinary] purposes." U.C.C. § 2-315 (1977).

144. *Solow*, 569 N.Y.S.2d at 888.

expectations of the consumer.[145] In this case, the tenants' expectations were based on the location of the building, the architectural design, and the amount of the rent.[146] The apartment building was on Manhattan's Upper East Side and had won architectural design awards.[147] The rents ranged from approximately $1000 to $5400 per month.[148] From these facts and from descriptions in a brochure[149] that the landlord used in leasing the apartments, the court concluded that the tenants had a reasonable expectation of having a clean, well-run apartment building.[150] Because breach of the implied warranty of habitability is a defense to a suit for rent,[151] the court held that a breach of a tenant's reasonable expectations is also a defense if the landlord institutes against the tenant a summary proceeding for nonpayment of rent.[152]

V. EXTENDING THE U.C.C. ARTICLE TWO WARRANTIES TO RESIDENTIAL LEASES

The same bases from which the traditional implied warranty of habitability[153] originated support judicial extension of the warranty. Because some legislatures have never attempted to codify warranties,[154] courts' interpretations of statutes and caselaw will be the only means by which to extend the warranty in many jurisdictions. For example, in *Solow*, a New York court took the language of a state statute and

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145. *Id.* at 887.

146. *Id.* at 888.

147. *Id.* at 884.

148. *Id.*

149. The brochure contained a floor plan and a listing of features including the following descriptions: "Panoramic views of New York City, its rivers and bridges; . . . Private membership . . . [to] Pool Club. 24 hour attended lobby. . . . Four pipe central air conditioning system providing a choice of cooling and/or heating during transitional seasons. Air conditioned lobby and corridors. . . . 46th floor laundry room with spectacular city views. . . . 4 high speed Otis elevators equipped with intercom phone. . . ." The lease specifically included the brochure as part of the lease while excluding any oral statements made by the leasing agent. *Solow*, 569 N.Y.S.2d at 884-85.

150. *Id.* at 888. Because the lease specifically included the brochure as part of the agreement, the court could have decided this case in the tenant's favor based on breach of an express covenant. *See* SCHOSHINSKI, *supra* note 17, § 3:13.

151. *See, e.g.*, Park West Management Corp. v. Mitchell, 391 N.E.2d 1288, 1293 (N.Y. 1979) (allowing the tenant to use the implied warranty of habitability as a defense to landlord's summary nonpayment proceeding).

152. *Solow*, 569 N.Y.S.2d at 888.

153. The "traditional warranty" refers to the warranty of conditions threatening to life, health, and safety. *See supra* notes 118-20 and accompanying text.

154. Illinois and Indiana have developed an implied warranty through caselaw. *See supra* note 92 and accompanying text. See *supra* note 8 for jurisdictions with no implied warranty of habitability.

analogized it to a U.C.C. warranty in order to create a "reasonable expectations" warranty.[155] Some state statutes lend themselves to this analogy, or at least do not preclude an extension,[156] while statutory language in other jurisdictions makes a successful analogy impossible[157] unless the statutes are bypassed altogether.[158] Yet, both the traditional reasons for the warranty and an analogy to consumer law support extending the warranty or creating a new warranty encompassing the reasonable expectations of the tenant.[159]

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155. *See supra* part IV.

156. See *infra* note 177 for analogies between state implied warranty of habitability statutes and U.C.C § 2-314.

157. Maryland, Massachusetts, New Jersey, New Mexico, Pennsylvania, Texas, and Utah have warranty statutes focusing on threats to life, health, and safety. *See supra* notes 93-94. Statutes in Oregon, Nevada, and New Hampshire specifically list the conditions that make a dwelling uninhabitable, leaving no general standard by which to analogize the U.C.C. warranties. *See supra* notes 93-94. The Florida statute, mandating compliance with housing and building codes, additionally lists conditions of habitability if there is no code. *See supra* note 93.

158. See *infra* note 177 for an argument that the existence of a statute granting an implied warranty of habitability does not preclude a tenant from obtaining a remedy by using a consumer law analogy. *Cf.* Citaramanis v. Hallowell, 613 A.2d 964, 975 (Md. 1992) (allowing tenants to bring action under Consumer Protection Act for landlord's failure to license property as required by law); Love v. Amsler, 441 N.W.2d 555, 560 (Minn. Ct. App. 1989) (applying Prevention of Consumer Fraud Act to landlord-tenant relationship). *See also* David L. Johnson, Note, *Necessity or Overkill? Regulating Residential Landlord-Tenant Relations Through the Utah Consumer Sales Practices Act*, 1990 B.Y.U. L. REV. 1063 (arguing that in light of the perceived uselessness of the Utah Fit Premises Act, the Utah Consumer Sales Practices Act may provide tenants with a cause of action against a landlord for unfair or unconscionable acts). However, most of these consumer protection statutes require proof of fraud or deception and will not cover many situations that an implied warranty of reasonable expectations would cover. *See infra* part V.B.

159. However, the economic arguments against implying the warranty of habitability do not support an argument against implying a reasonable expectations warranty.

One argument against the traditional implied warranty of habitability is that it will not provide better housing for the poor because it will increase the cost of low-income housing and decrease the supply. Complying with the warranty would require a landlord to raise rents in order to cover the cost of repairs. Therefore, if the landlord could not raise rents high enough to make a profit, the landlord would abandon the rental business thus removing his or her buildings from the housing market. *See* Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 558-63 (1984). *See also* Levine, *supra* note 59, at 89-93; Love, *supra* note 16, at 111.

Joel Levine is skeptical of such arguments: drug, appliance, utility, and insurance companies made similar arguments when legislatures considered greater regulations affecting them, yet after the legislation went into effect, the ill consequences predicted did not occur. *See* Levine, *supra* note 59, at 80-91. Additionally, Duncan Kennedy specifically rejects the economic arguments based on his own economic analysis of the housing situation. Duncan Kennedy, *The Effect of the Warranty of Habitability on Low Income Housing: "Milking" and Class Violence*, 15 FLA. ST. U. L. REV. 485 (1987).

These arguments do not apply to the proposed reasonable expectations warranty because the landlord

A. Traditional Reasons for the Implied Warranty Support an Expansion of the Warranty by the Judiciary

The traditional reasons for the implied warranty of habitability support extending the warranty to cover the consumer's reasonable expectations. Changes in today's society from the time of the agrarian tenant apply not only to the low-income tenant, but to any residential renter.[160] The middle- to high-income tenant is similarly incapable of inspecting today's complex buildings.[161] These tenants, whether low or high-income, generally do not have the skills, access, or sometimes, the financial resources to fix defects.[162] This inability applies equally to defects that threaten life, health, and safety and to those that do not.[163]

The consumer protection movement also supports the extension of the implied warranty of habitability.[164] Tenants whether low-, middle-, or high-income still do not have equal bargaining power with landlords.[165] Landlords proffer preprinted form leases to tenants that favor the landlord's position.[166] In some situations, the leasing agent of the building may not even be authorized to make changes on these forms at the tenant's request. A greater income does not assure that a tenant has more knowledge and expertise with respect to a residential lease. Most tenants will always have less knowledge and experience than the landlord.

A possible counterargument is that more affluent tenants do have the means to both inspect the premises and equalize the bargaining power by

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is free to contract out of this warranty. *See infra* part V.D. The author recognizes that landlords will incur the transaction costs associated with modifying existing lease forms to include such waivers. However, these costs will not be great. Moreover, revised form leases, would emerge soon after the creation of a new law, further decreasing the cost to each individual landlord.

160. *See* SCHOSHINSKI, *supra* note 17, § 3:14. Some of the reasoning in this section may support extending warranties to commercial leases as well. *See generally* Pinto, *supra* note 4.

161. *See* CRANSTON, *supra* note 135, at 1-2 (arguing that consumer protection is necessary because the consumer, even if sophisticated, is unable to inspect meaningfully products and services because modern goods are complex).

162. *See* Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1078-79 (D.C. Cir.) (recognizing that tenants will not have the necessary resources), *cert denied*, 400 U.S. 425 (1970).

163. *See id.*

164. For similarities between tenants and consumers of goods, see Backman, *supra* note 4, at 3-11.

165. *See* CRANSTON, *supra* note 135, at 3 ("Consumers are typically in a weak bargaining position because of the disparity in knowledge and resources between the parties."); Backman, *supra* note 4, at 3. *See also supra* note 136.

166. *See* Backman, *supra* note 4, at 3.

hiring a building inspector[167] and an attorney. Then, a tenant could supposedly bargain for express warranties to cover current and potential future defects highlighted by the inspector with the attorney providing the bargaining power to insure the items appear correctly in the lease. This argument first assumes the tenant is aware that it is worthwhile to spend financial resources in order to equalize his or her bargaining power with the landlord.[168] Second, it assumes a free market in which the tenant is able to rent elsewhere if the landlord does not agree to the express warranties. In many areas, housing shortages exist for all income levels, so the tenant will not have equal bargaining power regardless of how many experts are hired.[169]

Additionally, although the housing codes used to imply warranties of liability only affect conditions threatening life, health, and safety, public policy concerns in general favor the protection of all consumers.[170] Thus, the traditional reasons for implying a warranty of habitability also lend support to an extension of the warranty to include situations not threatening to life, health, and safety.

B. U.C.C. Warranties as a Basis for Judicial Expansion of the Implied Warranty of Habitability

An analogy between the warranty of habitability and U.C.C. Article 2 warranties can be employed to imply a warranty that a leased premises will be suitable for the type of living the tenant reasonably expects.[171] Although the U.C.C. warranties do not expressly apply to leases of real

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167. *See* Daniel P. Schwallie, Note, *The Implied Warranty of Habitability as a Mechanism for Redistributing Income: Good Goal, Bad Policy*, 40 CASE W. RES. L. REV. 525, 528 n.15 (1989-90).

168. *See* Alex Y. Seita, *Uncertainty and Contract Law*, 46 U. PITT. L. REV. 75, 134-36 (1984) (asserting that consumers only read contracts and consult an attorney for interpretation if the expected loss is high, as with the purchase of a home). Renting a home or apartment may not seem important to many prospective tenants, especially those who have a short-term lease of one or two years or who asses their investment in terms of monthly rent rather than the total rent due under the lease.

169. *See* Vallen, *supra* note 8, at 474.

170. See *supra* note 3 for statutes and regulations protecting consumers. *See also* CRANSTON, *supra* note 135, at 1-8.

171. *See* Daniel E. Murray, *Under the Spreading Analogy of Article 2 of the Uniform Commercial Code*, 39 FORDHAM L. REV. 447 (1971). Three factors support the spread of Article 2 concepts into other areas of the law: (1) the need for a quick, available source by which to settle disputes in cases involving small amounts that do not justify extensive research; (2) the drafters of the U.C.C. are also drafting other documents in the law of contracts; and (3) "[t]he Code lends an aura of authority and may justify a judge in . . . doing something that he has been afraid to do in the past because of a lack of enough clear authority to support his position[.]" Murray, *supra*, at 459.

property,[172] courts have applied them to cases involving leases of personal property by analogy.[173] Article 2A was drafted to cover chattel leases,[174] but it provides the same warranties as Article 2[175] and is not as widely accepted as Article 2.[176] Thus, an analogy from caselaw and current implied warranty statutes for consumer goods can create an expanded implied warranty of habitability, covering the tenants "reasonable expectations."[177]

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172. *See* 3 RONALD A. ANDERSON, ANDERSON ON THE UNIFORM COMMERCIAL CODE, § 2-315:13 (1983). *But see* Breezeport Management Co. v. Maltbie, 411 N.E.2d 670, 673 (Ind. Ct. App. 1980) (analogizing a commercial lease to the U.C.C. to determine that an exculpatory and indemnification clause written in fine print was invalid as unconscionable under U.C.C. § 2-302 and that it violated an implied warranty of fitness for ordinary purposes) (quoting Weaver v. American Oil Co., 276 N.E.2d 144, 148 (Ind. 1972)).

173. *See* Andrew M. Boka, et al., Special Project, *Article Two Warranties in Commercial Transactions*, 64 CORNELL L. REV. 30 (1978). *See also* KPLR TV, Inc. v. Visual Elecs. Corp. 327 F. Supp. 315, 324-25 (W.D. Ark. 1971) (declaring that the lessor should bear the loss because it had greater knowledge), *modified on other grounds*, 465 F.2d 1382 (8th Cir. 1972); Cintron v. Hertz Truck Leasing & Rental Serv., 212 A.2d 769, 776 (N.J. 1965); Hertz Commercial Leasing Corp. v. Transportation Credit Clearing House, Inc., 298 N.Y.S.2d 392, 395 (N.Y. Civ. Ct. 1969), *rev'd on other grounds*, 316 N.Y.S.2d 585 (N.Y. Sup. Ct. 1970).

Maryland has included personal property leases within Article 2. MD. CODE ANN., COM. LAW § 2-314(4) (1992).

174. Article 2A was not completed until 1987. 18 U.L.A. 647-649 (1989).

175. U.C.C. §§ 2A-212, 2A-213 (1987).

176. *See* IB U.L.A. 1-2 (Supp. 1991).

177. The discussion below analyzes specific phrases that occur in warranty of habitability statutes.

1. "Fit for the uses intended by the parties"

Michigan's and Minnesota's statutes contain the language "fit for the use intended by the parties." MICH. COMP. LAWS ANN. § 554.139(1)(a) (West 1988 & Supp. 1992); MINN. STAT. ANN. § 504.18(1)(a) (West 1990). New York's statute refers to "reasonably intended" uses. N.Y. REAL PROP. LAW § 235-b (McKinney 1989 & Supp. 1994). The court in *Solow* specifically analogized this language to U.C.C. § 2-315. *See supra* note 142 and accompanying text. An analogy between these statutes' language and the U.C.C. language should support an extension to broaden the scope of these warranties in line with the U.C.C. warranties.

2. "Fit and habitable"

Alaska, Delaware, North Carolina, Oklahoma, West Virginia, and Vermont maintain the standard of the warranty as "fit and habitable" without mentioning any life, health, or safety requirements. *See supra* note 94. Additionally, although these statutes may require common areas to be "clean and safe," the statutes do not necessarily focus on the welfare of the tenant throughout the premises. To create an analogy with U.C.C. § 2-314, the requirement that the dwelling is "fit" must be found as an affirmative requirement and not mere surplusage to the habitability requirement. *See* Karl Llewellyn, *Remarks on the Theory of Appellate Decision & the Rules or Canons About How Statutes Are to Be Construed,* 3 VAND. L. REV. 395, 401-06 (1950). Alone, the word "fit" may be analogous to U.C.C. § 2-314's warranty that goods "are fit for the ordinary purposes for which such goods are used." U.C.C. § 2-314(2)(c) (1987).

Other state statutes actually mention health and safety. Arizona, Connecticut, Hawaii, Iowa, Kansas, Kentucky, Mississippi, Montana, Nebraska, North Dakota, Ohio, Rhode Island, South Carolina,

The same theory that forms the basis of the U.C.C. warranties applies in the lessor/lessee relationship.[178] The seller (lessor) is in a better position to know the product and repair it than the buyer (lessee).[179] The seller

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Tennessee, and Virginia adopt URLTA's implied warranty, yet have a life, health, and safety requirement in their statutes. *See supra* notes 93-94. However, this requirement is added to limit the building and housing code violations that create a breach of the warranty and does not directly attach to the "fit and habitable" requirement. Therefore, because URLTA states that "[a] landlord shall comply with the requirements of applicable building and housing codes materially affecting health and safety," URLTA § 2.104(a)(1), this wording may weaken the argument that "fit" means a different, more demanding standard than endangering life, health, or safety.

3. "Fit for human habitation"

Statutes setting the warranty standard at "fit for human habitation" also create an analogy with U.C.C. § 2-314. The analogy between the statutes is based on their common use of the word "fit" and the assertion that the "for human habitation" language is simply stating the "ordinary purpose for which such goods are used." Yet, one must further argue that "human habitation" should be construed liberally to include factors such as similar dwellings or the tenant's reasonable expectations. However, courts generally construe "habitable" as a minimum standard providing only the barest necessities. Therefore, the language of these statutes must be analogized to U.C.C. § 2-314 which is broader.

4. "Repair"

Georgia, South Dakota, and Wisconsin have warranty statutes based on keeping the premises "in repair" or "in reasonable repair." GA. CODE ANN. § 44-7-13 (1991); S.D. CODIFIED LAWS ANN. §§ 43-32-8 to -9 (1983); WIS. STAT. ANN. § 704.07 (West 1981 & Supp. 1992). No direct analogy to Article 2 warranties exists because these warranties are drafted to cover the sale of goods in which the seller has no ongoing obligations. Article 2A only repeats the Article 2 warranties and is therefore not helpful. However, one may argue that "in repair" includes the reasonable expectations of the tenant because the landlord-tenant relationship is similar to the relationship between a seller and a consumer. *See* Backman, *supra* note 4, at 3.

5. Analogizing from Prior Caselaw

In the absence of a statutory warranty, one must use caselaw to analogize tenants to consumers. Illinois and Indiana, for example, do not have statutory warranties. Because some Indiana courts explicitly recognize the historical foundation of the warranty of habitability as a change in contract theory, one may directly apply contract principles of warranty. *See* Kahf v. Charleston South Apartments, 461 N.E.2d 723, 732 (Ind. Ct. App. 1984) ("The historical development of the implied warranty of habitability in landlord-tenant law demonstrates that the warranty is grounded in concepts of contract."). Because a tenant is in the same position as the consumer of goods with respect to a landlord or merchant, a lease of residential real property should contain the same warranties available for the purchase or lease of consumer goods.

On the other hand, Illinois caselaw follows the D.C. Circuit Court's ruling in *Javins*. Within a single sentence, the court both recognized the lease as a contract and limited the implied warranty to housing code violations. Jack Spring v. Little, 280 N.E.2d 208, 217 (Ill. 1972) ("We find the reasoning in *Javins* persuasive and we hold that included in the contracts, both oral and written, governing the tenancies of the defendants . . . is an implied warranty of habitability which is fulfilled by substantial compliance with the pertinent provisions of the Chicago building code."). Thus, the stage is set for competing arguments based upon the contractual and building code foundations for the warranty of habitability in caselaw.

178. *See, e.g.*, W.E. Johnson Equip. Co. v. United Airlines, Inc., 238 So. 2d 98, 100 (Fla. 1970) (implying U.C.C. § 2-315 warranty into a lease in which lessee relied on lessor's skill and judgment).

179. *See* Backman, *supra* note 4, at 3; CRANSTON, *supra* note 135, at 2-3.

is also better able to bear the risk.[180] Just as the consumer can no longer inspect the complex goods available on today's market, the tenant cannot effectively inspect the premises. Therefore, the duty in both cases should be shifted to the seller.[181]

1. Warranty of Merchantability (U.C.C. § 2-314)

The U.C.C.'s warranty of merchantability warrants that goods are fit for their ordinary purpose.[182] For this warranty to apply, the seller must be a merchant.[183] Under the U.C.C., a merchant is one who regularly sells the kind of goods in question or one who holds himself out as having knowledge of such goods.[184] The opposite of such a merchant is the casual seller who does not ordinarily sell a particular kind of item.[185] Courts vary as to how to determine merchant status. One test bases merchant status on both the seller's knowledge of the product and the frequency of sales.[186] The buyer will presume the seller is knowledgeable with respect to the product if sales occur often or on a regular basis.[187]

As some sellers fit easily within the merchant definition, some landlords who rent a large number of dwellings on a regular basis will also fit easily

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180. *See* CRANSTON, *supra* note 135, at 157. The landlord may not be in the same position as the seller because the seller can transfer and spread the cost among its consumers whereas the landlord has a fixed number of tenants to whom he or she may pass the cost. *See* Backman, *supra* note 4, at 10. However, the landlord is properly situated to tell the tenant exactly what is and is not warranted, limiting the potential cost. Having had prior experience with the building, the landlord is also in a better position than the tenant to anticipate the costs of upkeep and repair.

181. *See* CRANSTON, *supra* note 135, at 1; Backman, *supra* note 4, at 3.

182. U.C.C. § 2-314(1), (2)(c) (1977). Section 2-314 states:

> Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. . . . Goods to be merchantable must be at least such as are fit for the ordinary purposes for which such goods are used.

Id.

183. U.C.C. § 2-314 (1977).

184. U.C.C. § 2-104(1) (1977). Section 2-104(1) defines "merchant" as:

> a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

Id.

185. *See id.*

186. *See* Special Project, *Article Two Warranties in Commercial Transactions: An Update*, 72 CORNELL L. REV. 1159, 1197 (1987) [hereinafter Special Project Update].

187. *Id.*

within the merchant definition.[188] The more difficult situation occurs when the landlord rents a small number of units. However, if the landlord has even rented the dwelling once a year for the past several years,[189] this should be frequent enough to give the landlord greater knowledge as to the particular premises and the leasing process itself such that a court should deem the landlord a merchant.[190]

Next, under U.C.C. section 2-314, the goods sold must meet certain standards, one of which is "fit[ness] for ordinary purposes."[191] This provision warrants that the product is reasonably safe and able to serve its ordinary purpose.[192]

The traditional implied warranty of habitability already covers the reasonable safety of the tenant. However, the "ordinary purpose" warranty is broader. For example, a high-rise that does not have working elevators may be safe, but it may not be able to perform its ordinary purpose—to act as a dwelling from which the tenant can get to work and come home to eat dinner.[193] The tenant may also want to use promised areas like the patio, but if it is covered with mud, the tenant will not be able to have an outdoor barbecue.[194] Although courts found these situations were covered by a warranty, such treatment is not assumed under current laws.

2. *Warranty of Fitness for a Particular Purpose (U.C.C. § 2-315)*

The warranty of fitness for a particular purpose is narrower than the warranty of merchantability. The drafters' interpretation of section 2-315

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188. *See* Jane P. Mallor, *The Implied Warranty of Habitability and the "Non-Merchant" Landlord*, 22 DUQUESNE L. REV. 637 (1984) (discussing the scope of the traditional implied warranty of habitability as applied to different classes of landlords).

189. Even if the landlord is a first-time lessor, he or she may be considered a merchant, similar to the seller who sells a first product. *See, e.g.*, Alpert v. Thomas, 643 F. Supp. 1406, 1416 (D. Vt. 1986) (holding that a seller making a first sale was a merchant because he held himself out as having knowledge).

190. *But see* Zimmerman v. Moore, 441 N.E.2d 690, 695-96 (Ind. Ct. App. 1982) (holding that a lessor who rented her former home for the first time was a "non-merchant lessor" because she had no greater knowledge than the tenant and was in no better position to absorb losses).

191. U.C.C. § 2-314(2)(c) (1977). Other standards, such as those in § 2-314(2)(a),(b),(d)-(f), would not apply to leases.

192. Special Project Update, *supra* note 186, at 1208-09.

193. *See* Tower West Assoc. v. Derevnuk, 450 N.Y.S.2d 947, 951 (N.Y. Civ. Ct. 1982) (holding working elevators to be part of implied warranty of habitability).

194. Timber Ridge v. Dietz, 338 A.2d 21, 23 (N.J. Super. Ct. Law Div. 1975) ("[T]enants had a reasonable expectancy of a decent exterior environment from the sales promotion, the initial condition of the premises, and the higher price of the apartment compared to others in the community, whether the expectancy be characterized as one of amenity or necessity.").

limits its use to situations in which the consumer is using the good for a purpose other than the ordinary purpose.[195] This interpretation indicates that section 2-315 will not apply to the residential renter because all tenants will be using the premises for its ordinary purpose—a dwelling. However, many states apply the section 2-315 warranty to uses for ordinary purposes, as long as the other requirements are satisfied.[196] The transaction must satisfy three requirements: (1) the buyer must actually rely on the seller's knowledge and skill; (2) the seller has to have reason to know of the buyer's purpose; and (3) the seller must believe or should reasonably believe that the buyer is relying on the seller's skill.[197] Notably, this warranty does not require that the seller be a merchant.[198]

As to the first requirement, most tenants will be forced to rely on the landlord's knowledge of the premises. One or a few inspections will not give the tenant enough knowledge about items such as ordinary noise levels, quality of heating and cooling, and cleanliness of the building to make an informed independent decision. The landlord, who has either been inside the building numerous times or who is in communication with someone who has, is in a much better position to know about the building than the tenant.[199]

The second requirement is also easily met. The landlord should know that the buyer intends to use the premises as a dwelling because the landlord is holding the place out as such.[200] More specifically, if a landlord advertises that an apartment is suited to a particular group, such as students, the elderly, or families, the landlord should realize that tenants may want to use the premises with these factors in mind. Accordingly, these tenants will have special expectations. For example, students might expect the area to be quiet throughout the day to allow for studying.

Finally, with respect to the third requirement, the landlord should know that the buyer is relying on the landlord's statements because this is the only way the tenant will learn about the building. Accordingly, the U.C.C. warranty of fitness for a particular purpose is applicable to residential leases, and should therefore be included in residential leases in order to

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195. U.C.C. § 2-315 cmt. 2 (1977).

196. *See* 3 ANDERSON, *supra* note 172, § 2-315:20.

197. 3 *id.* § 2-315:29.

198. U.C.C. § 2-315 (1977).

199. Backman, *supra* note 4, at 3.

200. *Cf.* Ingalls v. Hobbs, 31 N.E. 286 (Mass. 1892) (finding that because the landlord should have expected the tenant of a furnished dwelling to inhabit it immediately, there was a warranty of habitability).

provide tenants with needed protection.

C. Standards Governing Breach of a Reasonable Expectations Warranty

In determining whether or not a party has breached sections 2-314 or 2-315, courts consider the actual good in question. The sale of a mobile home provides a close analogy to a residential lease. However, cases applying the warranty of merchantability to mobile homes are sparse. The Supreme Court of Mississippi has held that merchantability must mean habitability, but this may only be a minimum standard.[201] Conversely, the Supreme Court of Virginia has stated that merchantability is a higher standard than simple habitability.[202]

Generally, under the U.C.C., courts applying the warranty of merchantability first determine the ordinary purpose of the good in question.[203] Courts do so by deciding what use the merchant could reasonably foresee.[204] Next, courts decide whether the good complies with a basic standard of fitness.[205] Some courts use general standards such as whether the good is "reasonably fit"[206] or "reasonably suited"[207] for its ordinary purpose or for the purpose intended. Some courts look to the performance of other products in the trade to establish a standard of performance.[208]

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201. Guerdon Indus., Inc. v. Gentry, 531 So. 2d 1202, 1206 (Miss. 1988) (stating that the "fit for ordinary purpose" standard of the U.C.C. "surely means that a mobile home must be 'habitable'"). The court held that the trial court had properly submitted the case to the jury even though evidence suggested the mobile home was habitable. *Id.* at 1208. The seller had already made at least thirty repairs, including replacing several appliances and fixing leaky plumbing. *Id.*

202. Twin Lakes Mfg. Co. v. Coffey, 281 S.E.2d 864, 867 (Va. 1981) ("[T]he fact that people may be able to live safely in a mobile home does not mean that it satisfied the warranty of merchantability.").

203. *See* 3 ANDERSON, *supra* note 172, § 2-314.

204. *See, e.g.*, Global Truck & Equip. Co. v. Palmer Mach. Works, Inc., 628 F. Supp. 641, 649 (N.D. Miss. 1986) (declaring that a manufacturer could not foresee that a dump truck would be used to haul something other than washed rock); Allan v. Chance Mfg., 494 N.E.2d 1324, 1326 (Mass. 1986) (stating that a product's ordinary purpose is a purpose reasonably foreseeable by the merchant).

205. *See* 3 ANDERSON, *supra* note 172, § 2-314.

206. *See, e.g.*, Salt River Project Agric. Improvement and Power Dist. v. Westinghouse Elec. Corp., 694 P.2d 198 (Ariz. 1984).

207. *See, e.g.*, Bell Fuels, Inc. v. Lockheed Elecs. Co., 474 N.E.2d 1312 (Ill. App. Ct. 1985).

208. *See, e.g.*, Pisano v. American Leasing, 194 Cal. Rptr. 77 (Cal. Ct. App. 1983). This comparative standard may apply to leases if one compares the leased premises with other properties charging a similar rent in the same or a similar area, and advertising a similar type of dwelling.

D. Waiving the Reasonable Expectations Warranty

The reasonable expectations test used in *Solow* would provide lessees with the most protection,[209] but not without some difficulty. Under the test, the landlord is at the mercy of the tenant's "reasonable expectations" because the tenant can withhold rent from the landlord until the dispute is resolved.[210] Determining a tenant's reasonable expectations may be difficult, and factors such as price and geographic area may not clearly indicate the types of amenities a court might find that a tenant reasonably expected.[211]

Therefore, a landlord should be able to waive the warranty by informing the tenant of what *not* to expect. The landlord is in a position to discover the tenant's reasonable expectations and either comply with or change these expectations.[212] To ensure that a tenant is properly informed about what not to expect, the landlord should be required to explicitly list such items in the lease.[213] Such an exclusion should be clear and unambiguous so that tenants will understand the meaning of such disclaimers.[214] If the landlord is forced to specify exactly what is not warranted, the tenant will be on more equal footing, and it will be less likely that a tenant will

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209. The words "reasonably fit" and "reasonably suited" are too vague. Being "fit" is a standard found in many of the current statutory implied warranties and thus may not convey any greater warranty than that already available.

210. In most jurisdictions, a tenant may withhold rent if a landlord has breached the implied warranty of habitability. *See* SCHOSHINSKI, *supra* note 17, § 3:19. The tenant may then use the breach as a defense to the landlord's action for rent or eviction. The tenant may also bring an action for breach of the warranty. If the issue is resolved in favor of the landlord, the tenant must pay the back rent. In some jurisdictions, the tenant is required to pay the rent to the court. This requirement ensures that the tenant is not simply trying to live rent-free.

211. Michael I. Meyerson, *The Efficient Consumer Form Contract: Law and Economics Meets the Real World*, 24 GA. L. REV. 583, 612 (1990).

212. *Cf. id.* at 611. Enforcing form contracts with the reasonable expectations of the buyer in mind will force sellers to include the expectations in their warranties or educate the consumer so that the consumer can assent or bargain further. *Id.*

213. *Cf.* Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1179 (1983). The party adhering to a contract of adhesion is not likely to have read or understood it. In an informal survey, many lawyers and law professors admitted that they did not regularly read form contracts. *Id.* In contrast, the contract envisioned here would be the result of true bargaining as the reasonable expectations warranty will give the lessee the leverage to demand explicit disclaimers.

214. As in the U.C.C. provisions on waiver, *see, e.g.*, U.C.C. § 2-316 (1977), a reasonable expectations warranty should require that the language be conspicuous.

assume that certain services will be provided.[215] Protection for the tenant may be meaningless, however, if the tenant does not take the time to read the lease.[216]

Extending the U.C.C. Article 2 warranties to residential leases would give tenants the same protections afforded consumers of other goods. Changes from an agrarian to an urban society with complex structures and specialization of skills supports this extension of consumer law.

Legislatures should also adopt the reasonable expectations warranty, covering conditions over and above life, health, and safety, as a separate warranty, allowing the landlord to contract out of expectations and avoid the problems of determining the tenant's reasonable expectations.[217] Such a statute would keep the traditional implied warranty of habitability as a minimum unwaivable standard to effectuate the public policy concerns regarding substandard housing. Legislative action is the best method by which to create a reasonable expectations warranty because it would create a law more comprehensive than caselaw. In some states, legislative action is the last resort for tenants as courts have expressly refused to create the traditional warranty, holding the legislature responsible for such changes in the law.[218]

Nevertheless, as URLTA demonstrates, state legislatures are unlikely to adopt such a statute. Accordingly, the task of creating a reasonable expectations warranty, if it is to occur, will likely fall upon the courts.

VI. CONCLUSION

The tenant does not yet have the same protections afforded to the consumer of goods or personal property leases even though the same considerations apply.[219] The implied warranty of habitability has not been sufficient to rectify this disparity.[220] Thus, a "reasonable expecta-

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215. For example, a tenant may not inquire about snow removal when signing the lease in the balmy days of summer.

216. To increase the likelihood that a tenant will read the disclaimers, the tenant should be required to initial each provision. Spaces for the tenant's initials could easily be incorporated in the new form leases that would emerge. *See supra* note 159.

217. See *supra* part V.D. for reasons why the waiver is necessary.

218. *See, e.g.*, Bedell v. Zapatistas, Inc., 805 P.2d 1198, 1200 (Colo. Ct. App. 1991) ("[I]mplied warranty of habitability . . . does not exist in this state. . . ."); Miles v. Shauntee, 664 S.W.2d 512, 518 (Ky. 1983) ("[I]t is for the legislature to create rights and duties nonexistent under the common law. . . ."); Young v. Morrisey, 329 S.E.2d 426, 429 (S.C. 1985) (declaring that the implied warranty of habitability does not exist for leases even though it exists for new home purchasers).

219. *See* Backman, *supra* note 4, at 3.

220. *See supra* notes 6-7 and accompanying text. *See also supra* part III.

tions" warranty is necessary.[221]

The implied warranty of habitability may be extended to include the tenant's reasonable expectations through an analogy to the U.C.C.[222] In most states, the judiciary is more likely to respond to the disparity in consumer and landlord-tenant law than is the legislature.[223]

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221. *See supra* note 9 and accompanying text. *See also supra* part V.
222. *See supra* part V.
223. *See supra* note 154 and accompanying text.