

# THE INCORPORATION OF THE IMPLIED WARRANTY OF HABITABILITY IN PUBLIC HOUSING PROGRAMS

## I. INTRODUCTION

Landlords often take advantage of low-income tenants by inducing them, through low rents, to accept substandard housing.<sup>1</sup> The American legal system has recently begun to resolve the inequities involved where public housing tenants pay rent and assume a substantial risk of loss due to the outrageous disrepair of the housing.<sup>2</sup> In support of more stringent maintenance standards in public housing, one court noted:

It seems unconscionable to allow a landlord to extract rent when the shelter paid for is uninhabitable by any decent standards. In that regard, there is simply no difference in principle when the landlord is a public agency. The tenant's plight is the same, and the callous insistence upon continued rent is no less abhorrent.<sup>3</sup>

This Note will analyze judicial incorporation of the implied warranty of habitability under state law in federal public housing legislation. Part I focuses on the history and policy of housing legislation. Part II discusses the implied warranty of habitability under state law, its policy and alternative remedies that courts have applied. Part III

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1. Michelman, *The Advent of a Right to Housing: A Current Appraisal*, 5 HARV. C.R.-C.L. L. REV. 213 (1970).

2. *Id.* at 207-16. Tenants commonly have poorly functioning refrigerators that cause food spoilage. Cockroaches, vermin and mice infest these apartments. There are often structural problems with floors and ceilings. Furthermore, ceilings often are in poor repair and leak, creating both a safety hazard as well as potential personal property damage. *Id.* See *infra* note 95 for a description of the condition of property at issue in *Conille v. Secretary of HUD*, 840 F.2d 105 (1st Cir. 1988).

3. *Techer v. Pierce*, No. N-78-484, slip op. at 4 (D. Conn. Oct 13, 1982).

discusses the early cases that considered the incorporation of the implied warranty into federal housing programs. Part IV analyzes the recent case of *Conille v. U. S. Department of Housing and Urban Development*<sup>4</sup> and the guidelines it created for applying the implied warranty of habitability. Finally, in Part V, this Note will suggest a future approach to protecting low-income tenants.

## II. LEGISLATIVE HISTORY

The two major pieces of legislation providing for the federal housing program are the National Housing Act (NHA) and the United States Housing Act (USHA). Although these Acts provide for different programs, they have the same policy goals. In the National Housing Act of 1934,<sup>5</sup> Congress attempted to increase the accessibility of mortgage credit.<sup>6</sup> NHA programs assist in financing low income housing by guaranteeing mortgages to those who would not ordinarily qualify.<sup>7</sup> In 1937, Congress enacted the United States Housing Act (USHA).<sup>8</sup> Congress developed USHA to correct the "acute shortage of decent, safe and sanitary" housing for lower income families—a problem exacerbated by the Depression.<sup>9</sup> The program continues to be a central feature of the federal public housing program. USHA's main function is to subsidize the operation of local public housing authorities.<sup>10</sup> Under the USHA, HUD and local housing authorities enter into an Annual Contributions Contract under which HUD guarantees the payment of subsidies to house low-income tenants. In return, the agency

4. 840 F.2d 105 (1st Cir. 1988).

5. 12 U.S.C. §§ 1701-1750(W) (1982 & Supp. IV 1986).

6. U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *HOUSING IN THE SEVENTIES: A REPORT OF NATIONAL POLICY REVIEW 1-8* (1974).

7. *Id.*

8. United States Housing Act of 1937, ch. 896, 50 Stat. 889 (1937), *as amended* 42 U.S.C. § 1437 (1982 & Supp. IV 1986); Housing Act of 1949, ch. 338, 63 Stat. 413 (1949), *as amended* 42 U.S.C. § 1441 (1982 & Supp. IV 1986).

9. 42 U.S.C. § 1437 (1982). The broad policy goals of the USHA are set out as follows:

It is the policy of the United States to promote the general welfare of the Nation by employing its funds and credit . . . to assist the several states and their political subdivisions to remedy the unsafe and unsanitary housing conditions and the acute shortage of decent, safe and sanitary dwellings for families of low income and . . . to vest in local public housing agencies the maximum amount of responsibility in the administration of their housing programs.

*Id.*

10. *Id.*

administers the local housing programs.<sup>11</sup>

Congress enacted both of these Acts with the overriding national goal of providing "a decent home and suitable living environment for every American family."<sup>12</sup> However, in 1978 Congress found that this goal was not met,<sup>13</sup> and considered the shortage of low-income housing a "matter of grave national concern."<sup>14</sup> One of the problems was that many housing projects had defaulted on federally insured loans forcing HUD to foreclose on these mortgages. Congress noted that many projects had deteriorated during the period of HUD ownership, yet HUD had not responded to the need for adequate maintenance of their properties.<sup>15</sup> In response to these shortcomings, Congress enacted the Housing and Community Development Act of 1978,<sup>16</sup> which required HUD to take affirmative steps to maintain HUD-owned properties in a

11. 42 U.S.C. § 1437c, 1437d (1982 & Supp. IV 1986).

12. 12 U.S.C. § 1701t provides: "The Congress affirms the national goal, as set forth in section 1441 of Title 42 of 'a decent home and a suitable living environment for every American family.'" 12 U.S.C. § 1701t.

13. S. REP. NO. 871, 95th Cong., 2d Sess. 23, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 4773, 4796.

14. 12 U.S.C. § 1701t provides:

The Congress finds that this goal has not been fully realized for many of the nation's lower income families that this is a matter of grave national concern; and that there exist in the public and private sectors of the economy the resources and capabilities necessary to the full realization of this goal.

12 U.S.C. § 1701t.

15. Section 209(c) [12 U.S.C. § 1701z-11c] would require that the Secretary of [HUD] to maintain all HUD-owned multifamily projects in decent, safe, and sanitary condition. The committee has received testimony that many projects have actually deteriorated during the period of HUD ownership and that HUD has been unresponsive in many cases to the need for adequate maintenance of HUD-owned properties.

S. REP. NO. 871, 95th Cong., 2d Sess. 23, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 4773, 4796.

16. Congress drafted the property disposition program to fit within the structure of the NHA.

(a) The Secretary of [HUD] . . . shall manage or dispose of multifamily housing projects that are owned by the Secretary, in a manner that is consistent with the National Housing Act and this section. . . . The purpose of the property management and disposition program . . . shall be to manage and dispose of projects in a manner which will protect the financial interests of the federal government and be less costly to the federal government than other reasonable alternatives by which the Secretary can further the goals of . . .

(3) maintaining the existing housing stock in a decent, safe and sanitary condition.

12 U.S.C. § 1701z-11(a).

manner consistent with its statutory purpose of providing safe, decent and sanitary housing.

The language in the Housing and Community Development Act<sup>17</sup> provided for agency discretion<sup>18</sup> in determining on a "case by case" basis that maintenance of a particular property is "clearly inappropriate."<sup>19</sup> Nevertheless, HUD's regulations indicate that the Secretary must provide and occupy in a decent, safe, and sanitary fashion as many units as possible in the most cost efficient manner.<sup>20</sup> While the HUD regulations do not define "decent, safe, and sanitary," the Secretary has provided that HUD must assure compliance with local hous-

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17. 12 U.S.C. § 1701z-11(c). These 1978 amendments stated more explicitly the Secretary's duty to maintain his projects in decent, safe and sanitary condition. The Act requires:

the Secretary shall

(A) to the greatest extent possible maintain all occupied multi-family housing projects in a decent, safe and sanitary condition.

(1) In the case of multifamily housing projects . . . that are owned by the Secretary (or for which the Secretary is mortgagee in possession).

*Id.*

18. *Id.* Legislative history draws into question the Congressional intent behind the words "shall seek." The original Senate bill (Senate bill 3084, reported May 15, 1978) for what eventually became section 1701z-11(c) required that the Secretary maintain all occupied multi-family housing projects owned by the Secretary in a decent, safe and sanitary condition. S. Rep. No. 871, 95th Cong. 2d Sess., *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 4773, 4796.

19. 12 U.S.C. § 1701z-11(a). In the legislative history of the Housing and Community Development Act of 1980, Pub. L. No. 96-399, 94 Stat. 1614 (1980), Congress repeated its intent for decent, safe and sanitary housing:

The Committee believes that all projects acquired by the Secretary should be covered by the Section 203 (now 12 U.S.C. § 1701z-11) management and disposition program to assure that the projects are properly cared for during HUD ownership, that they are disposed of in a manner that will promote their use as decent, affordable rental housing for the current and future tenants, and that the needs of the tenants are appropriately considered under any management and disposition decision.

S. REP. NO. 736, 96th Cong., 36, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 3506, 3543. *See* *Frisby v. U.S. Dep't of Hous. and Urban Dev.*, 755 F.2d 1052, 1057 (3d Cir. 1985) (statute identifies factors which the Secretary must take into account in his discretion).

20. The Secretary's own regulations require a minimum standard of maintenance. 24 C.F.R. § 290.10(a) (1989) ("maintain occupied housing in decent, safe and sanitary condition in the most cost efficient manner"). *See also* 24 C.F.R. § 290.20(a)(2) ("maintaining existing housing stock in decent, safe and sanitary condition"); 24 C.F.R. § 290.16(d) (requires immediate repair when the conditions of leased properties present threats to health or safety). *But see* *U.S. v. Cacaes*, 440 U.S. 741, 754 n.18 (1979) ("agencies are not required, at the risk of invalidation of their action, to follow all of their rules, even those properly classified as 'internal'").

ing codes when maintaining HUD-owned and operated multifamily properties.<sup>21</sup>

### III. IMPLIED WARRANTY OF HABITABILITY UNDER STATE LAW

Leases of private property contain an implied warranty of habitability. Because the policy reasons for its implication in private property is consistent with the Congress's goals for public housing, courts are now incorporating the warranty into federal housing statutes.<sup>22</sup>

At common law there was no implied warranty of habitability. The rule of *caveat emptor* did not hinder the typical agrarian tenant because most defects in the property were obvious to the tenant.<sup>23</sup> Moreover, in an agrarian society, the lease applied to the land itself and not the building on the premises.<sup>24</sup> Unlike the agrarian tenants, the contemporary apartment dwellers depend more on their leases to insure habitable living conditions<sup>25</sup> than to protect the land beneath their buildings.<sup>26</sup> Instead, contemporary tenants seek heat, hot water, electricity, plumbing and proper maintenance. In 1970, the District of Columbia Circuit, in the landmark case *Javins v. First National Realty Corp.*,<sup>27</sup> rejected the common law use of *caveat emptor* in context of urban residential leases and provided the tenants with greater protection.<sup>28</sup> To effectuate such a change, the court held that it would interpret leases of urban housing under contract law.<sup>29</sup>

The D.C. Circuit based its conclusion that the common law rule

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21. "HUD has a major responsibility when repairing HUD-owned and operated multi-family properties to assure compliance with local [housing] codes and standards . . . [and the Secretary's] repair program must include those items which will correct or eliminate code deficiencies." HUD Property Disposition Handbook, ch. 2, para 28 (as cited in *Chase v. Theodore Mayer Bros.*, 592 F. Supp 90, 97 (S.D. Ohio 1983)).

22. Comment, *Implied Warranty of Habitability in Federal Housing Projects: Alexander v. Secretary of Housing and Urban Development*, 19 B.C.L. REV. 343, 352 (1978). See also *Techer v. Roberts-Harris* 83 F.R.D. 124, 128 (D. Conn. 1979).

23. *Javins v. First National Realty Corp.*, 428 F.2d 1071, 1074 (D.C. Cir. 1970). See *infra* notes 30-36 and accompanying text for a discussion of *Javins*.

24. 428 F.2d at 1074.

25. *Id.*

26. *Id.*

27. 428 F.2d 1071 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 925 (1970). See generally 3 R. POWELL, THE LAW OF REAL PROPERTY para. 233 (1988 & Supp. 1989) (discussing habitability in private property).

28. 428 F.2d at 1080.

29. *Id.* at 1079.

should be changed on three grounds. First, the court recognized that urban tenants generally have neither the skill nor equipment to make necessary repairs.<sup>30</sup> The average tenant's short stay in a particular apartment does not justify his making extensive repairs.<sup>31</sup> Second, because the contemporary landlord-tenant relationship is similar to that of a buyer and seller of goods, developments in consumer protection law should extend to landlord-tenant law.<sup>32</sup> Third, the housing shortage and the inequality of bargaining power warrant laws favorable to tenants.<sup>33</sup> The court further found that the social impact of substandard housing is not only detrimental to those living in the properties but also to society.<sup>34</sup>

*Javins* has significantly changed landlord-tenant law by introducing the implied warranty of habitability. Under this doctrine the tenant's obligation to pay rent depends on the landlord's maintenance of the premises in habitable condition.<sup>35</sup> Usually the local housing codes establish the maintenance standards.<sup>36</sup> Lessors who violate the implied warranty of habitability are liable for actual and consequential damages.<sup>37</sup>

#### IV. PUBLIC HOUSING AND THE IMPLIED WARRANTY OF HABITABILITY

*Javins*' acknowledgement of the importance of decent housing has prompted courts to consider extending liability for inadequate public housing to the Department of Housing and Urban Development (HUD). Three theories support a tenant's claim against HUD for substandard housing under the NHA and USHA: implied private right of action theory, third party beneficiary theory or the state implied warranty of habitability theory.

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30. *Id.* at 1078.

31. *Id.*

32. *Id.* at 1075.

33. *Id.* at 1079.

34. *Id.*

35. *Id.* at 1082.

36. *Id.*

37. See *Roeder v. Nolan*, 321 N.W.2d 1 (Iowa 1982) (incidental and consequential damages where the implied warranty of habitability was materially breached); *Simon v. Soloman*, 385 Mass. 91, 431 N.E.2d 556 (1982) (landlord liable for difference between rent paid and value of property as well as reckless infliction of emotional distress); *Detling v. Edebrock*, 671 S.W.2d 263 (Mo. 1984) (damages for impaired enjoyment of premises and consequential damages).

The implied right of action theory<sup>38</sup> allows the tenant to attempt to prove an implied right of action exists in the "decent, safe and sanitary" statutory requirement of the USHA.<sup>39</sup> However, courts have repeatedly noted that neither legislative history nor statutory language contain evidence of congressional intent to grant or deny tenants an implied right of action.<sup>40</sup>

Under the third party beneficiary theory, courts may infer third

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38. See generally Note, *Implied Private Rights of Action Under the United States Housing Act of 1937*, 1987 DUKE L.J. 915; Note, *Howard v. Pierce: Implied Cause of Action and the Ongoing Vitality of Cort v. Ash*, 80 NW. U.L. REV. 722 (1985); Comment, *No Implied Cause of Action Under the National Housing Act: A Barrier to a Statutory Right*, 22 URB. L. ANN. 249 (1981) (comment published prior to reevaluation among lower courts concerning existence of an Implied Right of Action under the USHA).

39. 42 U.S.C. § 1437 (1982). The Supreme Court established, in *Cort v. Ash*, 422 U.S. 66 (1975), a four-part test: 1) is the plaintiff one of the class for whose benefit the statute was enacted; 2) is there any indication of legislative intent either to create such a remedy or deny one; 3) is it consistent with the underlying purposes of the legislative theme to imply such a remedy for the plaintiff; 4) is the cause of action one traditionally relegated to state law in an area basically the concern of the states so that it would be inappropriate to infer a cause of action based solely on federal law. 422 U.S. at 80-84.

See generally Note, *Implied Private Rights of Action Under the United States Housing Act of 1937*, 1987 DUKE L.J. 915 (argues that despite the Supreme Court's recent reluctance to imply a private right of action where Congress has not directly provided for one, the federal courts should permit the prosecution of private claims under the USHA's "decent, safe, and sanitary" statutory requirement).

Those courts that have found the private right of action are: *Wright v. City of Roanoke Redev. & Hous. Auth.*, 479 U.S. 418 (1987) (Supreme Court recognized a section 1983 privacy remedy for an alleged violation of the USHA and indicated that plaintiffs may seek redress under private right of action); *Howard v. Pierce*, 738 F.2d 711 (6th Cir. 1984) (legislative silence supports the conclusion that Congress did not intend to deny beneficiaries of Brooke Amendment a private cause of action); *Silva v. East Providence Hous. Auth.*, 423 F. Supp. 453, 464-65 (D.R.I. 1976), *rev'd on other grounds*, 565 F.2d 1217 (1st Cir. 1977) (allowing prospective tenants of lower rent housing to bring action against HUD for terminating a building contract).

40. *Phelps v. Hous. Auth.*, 742 F.2d 816 (4th Cir. 1984) (refused to imply a private right of action); *Perry v. Hous. Auth.*, 664 F.2d 1210 (4th Cir. 1981); *Nelson v. Greater Gadsden Hous. Auth.*, 802 F.2d 405, 407 (11th Cir. 1986) (tenants in public housing have no implied right of action to enforce rent provisions of Brooke Amendment); *Brown v. Hous. Auth.*, 784 F.2d 1533, 1538-39 (11th Cir. 1986) (following 4th Circuit's application of *Cort* factors in *Perry*); *Stone v. District of Columbia*, 572 F. Supp. 976, 978-80 (D.D.C. 1983) (finding no strong evidence of Congressional intent to create a private right of action under 42 U.S.C. § 1437(a)); *McGhee v. Hous. Auth.*, 543 F. Supp. 607, 608-10 (M.D. Ala. 1982). Some courts have held that congressional silence regarding their intent to grant tenants a right of action indicates that there is no implied right. Other courts, however, have held that silence merely requires further analysis under the *Cort* test.

party beneficiary status from contracts with local public housing authorities and private landlords to provide housing for low income families.<sup>41</sup> Tenants use this theory to claim that the legislative mandate "shall" directs the landlord to provide decent, safe and sanitary housing under the USHA.<sup>42</sup> Neither the implied right of action theory nor the third party beneficiary theory has proven as effective as the incorporation of the implied warranty of habitability into the NHA in protecting public housing tenants' interests. Thorough discussion of the

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41. Whereas an implied right of action involves the consideration of Congressional intent, third party beneficiary analysis involves the intent of the parties to the contract. Courts have implied third party beneficiary status in the contracts between HUD and local housing authorities and private landlords providing for subsidized housing through the use of the legislative mandate "shall" in directing the landlord to provide "decent, safe and sanitary" housing. Courts see this as evidence of Congress's intent to give tenants the benefit of the contract. See Note, *Third Party Beneficiary and Implied right of Action Analysis: The Fiction of One Governmental Intent*, 94 YALE L.J. 875 (1985) (argues that some courts incorrectly fail to make the distinction between third party beneficiary and implied cause of action analysis). See generally 2 S. WILLISTON, WILLISTON CONTRACTS § 356 A (1959) ("It is the intent or purpose of the promisee who pays for the promise that has generally been looked upon as governing"); Recent Development, *Third Party Beneficiary Analysis in Federal Housing Law: In Search of Uniformity*, 35 WASH. U. J. URB. & CONTEMP. LAW 203 (1989); Note, *Third Party Beneficiary and Restatement (Second) of Contracts*, 67 CORNELL L. REV. 880 (1982); Note, *Third Party Beneficiary and the Intention Standard: A Search for Rational Contract Decision-making*, 54 VA. L. REV. 1166 (1968).

42. Many courts have not extended third party beneficiary theory for public housing tenants. See *Samuels v. District of Columbia*, 770 F.2d 184, 201 n.14 (D.C. Cir. 1985) (indicated in a footnote that extending third party beneficiary theory for discrete violations of maintaining "decent safe and sanitary" dwellings would be inconsistent with the federal housing law); *Edwards v. District of Columbia*, 628 F. Supp. 329 (D. Kan. 1985) (court rejected the claim that the landlord who allowed the project to fall into a state of disrepair had constructively demolished it without fulfilling statutory prerequisites to demolition); *Perry v. Hous. Auth. of the City of Charleston*, 664 F.2d 1210 (4th Cir. 1981) (plaintiffs were not third party beneficiaries in an Annual Contributions Contract between HUD and the Local Housing Authority).

However, some courts have found third-party beneficiary status for claimants under the Housing Act. See *Holbrook v. Pitt*, 643 F.2d 1261 (7th Cir. 1981) (tenants have third party beneficiary status to bring claim regarding an owner's improper certification of tenants which resulted in delayed payments). These decisions tend to be claims regarding compliance with the Lead Poisoning Prevention Act and other express provisions. See *Ashton v. Pierce*, 716 F.2d 56, 66 (D.C. Cir. 1983), *modified*, 723 F.2d 70 (D.C.Cir. 1983) (tenants as third party beneficiaries of an Annual Contributions Contract between HUD and the local housing authority could enforce Lead-based Paint Poisoning Act, 42 U.S.C. § 4822 (1982), against HUD); *Knox Hill Tenant Council v. Washington*, 448 F.2d 1045, 1046-47 (D.C. Cir. 1971) (tenants could sue as a third party beneficiary).

implied right of action and third party beneficiary theories is beyond the scope of this Note.

When HUD owns low-income housing, plaintiffs may claim that the state implied warranty of habitability is incorporated into the federal housing law.<sup>43</sup> Courts are finding that HUD properties are not like other federal properties, which are "enclaves exempt from local law."<sup>44</sup> Although the federal housing program<sup>45</sup> does not expressly provide for the incorporation of an implied warranty of habitability in public housing, courts have recently extended the state law warranty into the NHA.<sup>46</sup> Most of these decisions, however, have declined to incorporate state law in its entirety.

#### A. *Federal Common Law: Analytical Framework*<sup>47</sup>

Federal courts develop federal common law to fill the gaps<sup>48</sup> that

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43. See *infra* note 82 for a list of courts that have incorporated an implied warranty of habitability in public housing legislation.

44. *Burroughs v. Hills*, 741 F.2d 1525, 1528 (7th Cir. 1984), *cert. denied*, 471 U.S. 1009 (1985). See also *Knox Hill Tenant Council v. Washington*, 448 F.2d 1045, 1055 (D.C. Cir. 1971) (no evidence of Congressional intent to exempt government-owned housing from local codes); *City Wide Coalition v. Philadelphia Hous. Auth.*, 356 F. Supp. 123, 128 (E.D. Pa. 1973) (Congress did not grant HUD right to preempt local health regulations in HUD acquired properties); *City of Philadelphia v. Page*, 363 F. Supp. 148, 153 (E.D. Pa. 1973) (HUD liable to purchasers for property conditions which violate local ordinance).

45. 12 U.S.C. § 1701 (1989). See *infra* note 108 for the statutory language.

46. See *infra* notes 47-58 and accompanying text.

47. Prior to deciding on the merits whether an implied warranty is incorporated into federal law, the court must establish that the Secretary of HUD waived sovereign immunity barring suit. The NHA authorizes the Secretary of HUD to "sue and be sued" in administering the NHA. 12 U.S.C. § 1702. See *Federal Hous. Admin. v. Burr*, 309 U.S. 242, 245 (1940) (Supreme Court held that "sue and be sued" should be construed liberally, but the Court noted that § 1702 did not explicitly waive immunity where waiver would be clearly inconsistent with the goals of the NHA); *Industrial Indemnity, Inc. v. Landrieu*, 615 F.2d 644 (5th Cir. 1980) (payment for construction work insured by the Secretary in an NHA authorized program satisfies the criteria from *Burr* that the Secretary must be carrying out the provisions of the Act and thus the Secretary waives sovereign immunity); *Merrill Tenant Council v. U.S. Dep't of Hous. and Urban Dev.*, 638 F.2d 1086 (7th Cir. 1981) (suit for payment of interest on tenant security deposits, based on the theory that an Illinois statute incorporated as an implied term in the tenants' leases with HUD requiring such interest payments, was within the limiting language of the statute).

48. When Congress does not provide the rule of decision, courts may infer that Congress intended state law to fill in the gaps unless the law conflicts with federal interests at issue. See *Wallis v. Pan Am Petroleum Corp.*, 384 U.S. 63, 68 (1966); *U.S. v.*

Congress<sup>49</sup> has left in the federal statutory scheme.<sup>50</sup> Once the court decide to develop federal common law,<sup>51</sup> it has two options in fashioning its rule: formulate independent federal common law<sup>52</sup> or adopt state law as the federal rule of decision.<sup>53</sup> In analyzing which rule to apply, a court must decide whether adopting state law will conflict

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Standard Oil Co., 332 U.S. 301 (1947); *Georgia Power Co. v. Sanders*, 617 F.2d 1112, 1116 (5th Cir. 1980), *cert. denied*, 450 U.S. 936 (1981).

49. The issue of the landlord's obligation to its tenants does not present a situation where Congress has comprehensively occupied a field and thereby displaced a federal rule. *Cf. Milwaukee v. Illinois*, 451 U.S. 304, 317-32 (1981) (Clean Water Act precludes federal common law public nuisance action for interstate water pollution because it comprehensively addresses federal water pollution and provides remedial scheme for statutory violations). Federal law is essentially incomplete and interstitial and often depends on state law to fill gaps. "Congress acts . . . against the background of state law in much the same way a state legislature acts against the background of common law." Note, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 525 (1954).

50. *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943), is the starting point in recent federal common law analysis. In *Clearfield*, the United States brought an action against the defendant for clearing a check issued by the government which had been fraudulently endorsed. *Id.* at 365. Under state law, the United States would have been barred from recovery. *Id.* at 366. Because there was a gap in federal law the Court was free to fashion a federal common law rule. *Id.* at 367. The Court found that when Congress has not specified a rule, under federal common law federal courts must choose between adopting state law as the federal rule of decision or fashioning an independent federal common law rule. *Id.* The Court held that the interstitial application of state law in this case would subject the federal interests to uncertainty. *Id.*

51. Federal courts have continued to apply federal law in construing leases in which the United States is a party. *See, e.g., Texas Industries Inc. v. Radcliff Materials Inc.*, 451 U.S. 630 (1981); *U.S. v. Little Lake Misere Land Co. Inc.*, 412 U.S. 580 (1973); *Krupp v. Fed. Hous. Admin.*, 285 F.2d 833 (1st Cir. 1961).

52. The Supreme Court has developed federal common law only in a "few and restricted" circumstances. *Wheeldin v. Wheeler*, 373 U.S. 647, 681 (1963). "[W]hen Congress has not spoken to a particular issue . . . and when there exists a 'significant conflict between some federal policy or interest and the use of state law.'" *Milwaukee v. Illinois*, 451 U.S. 304, 313 (1981) (quoting *Wallis v. Pan Am Petroleum Corp.*, 384 U.S. 63, 68 (1966)).

53. The Third Circuit clarified when the court may incorporate state law as a matter of federal common law in *Girard Trust Co. v. United States*, 149 F.2d 872 (3d Cir. 1945). In *Girard Trust*, the court held that leases with the federal government are to be construed like government contracts according to uniform independent federal common law. *Id.* at 874. The court noted the exception that state law applies as a matter of federal common law when the contract defines a relationship to real property since real property is peculiarly the province of state regulation. *Id.* at 874. The implied warranty of habitability does not define a relation to real property within the exception of *Girard Trust*.

with the federal program or federal interest at stake.<sup>54</sup> Courts will not adopt state law if it is inconsistent<sup>55</sup> with the purposes underlying a national problem,<sup>56</sup> if there is a need for uniformity,<sup>57</sup> or if the variation caused by the adoption of state law would subject the government to uncertainty of its rights and duties.<sup>58</sup>

In *United States v. Kimbell Foods, Inc.*,<sup>59</sup> the Supreme Court established guidelines for determining when a court may incorporate state law as the federal rule of decision. In *Kimbell Foods*, a private lienor brought suit to foreclose on personal property in which the United States also claimed an interest.<sup>60</sup> The Court established a three-prong test to determine whether a court may incorporate state law.<sup>61</sup> Under this test, courts may incorporate state law if 1) it does not directly conflict with the federal statute's objectives; 2) there is no federal interest in uniformity; and 3) the state's interest in preventing the displace-

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54. Field, *Sources of Law: Scope of Federal Common Law*, 99 HARV. L. REV. 883, 890 (1986). See, e.g., *U.S. v. Little Lake Misere Land Co. Inc.*, 412 U.S. 580, 594-604 (1973); *Georgia Power v. Sanders*, 617 F.2d 1112, 1118 (5th Cir.1980), cert. denied, 450 U.S. 936 (1981). See generally Comment, *Adopting State Law as the Federal Rule of Decision*, 43 U. CHI. L. REV. 823, 825 (1976).

55. A federal court may incorporate non-conflicting state laws into the federal rule if federal purposes underlying federal legislation will not be compromised. Field, *supra* note 54, at 890-92.

56. In *U.S. v. Standard Oil Co. of California*, 332 U.S. 301 (1947), the Supreme Court held that the federal government has exclusive authority to establish and define its military policies. The Court found, however, in other circumstances when Congress has failed to enact a comprehensive federal program it has implied its consent to the application of consistent state law. *Id.* See also *Powers v. U.S. Postal Service*, 671 F.2d 1041 (7th Cir. 1982) (court applied state landlord tenant law where federal regulatory scheme not affected); *Merrill Tenant Council v. U.S. Dep't of HUD*, 638 F.2d 1086 (7th Cir. 1981) (incorporated state statute requiring the landlord to pay interest on tenants security deposits); cf. *Milwaukee v. Illinois*, 451 U.S. at 317-32 (clean water act precludes federal common law public nuisance action because it comprehensively addresses federal water pollution remedial scheme).

57. C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 4514 at 223-26 (1982). See also Field, *supra* note 54, at 881. A court may construct a federal rule of decision when there is a need for national uniformity that outweighs the need for state uniformity or when national interests are paramount. *Id.* at 962.

58. WRIGHT & MILLER, *supra* note 57. When the court incorporates state law into federal common law the variation of its application among different states may lead to uncertainty. Field, *supra* note 54, at 890.

59. 440 U.S. 715 (1979).

60. *Id.* at 716-17. This was the result of a lien arising under a federal loan guarantee program. *Id.*

61. *Id.* at 728-30.

ment of its laws is substantial.<sup>62</sup> In cases where national interest is paramount, federal courts must formulate an independent federal common law rule. In other cases, courts may adopt applicable state laws as the federal rule of decision as long as the state law does not conflict or frustrate the objectives of federal policy.<sup>63</sup>

### B. *Housing Cases*

In incorporating the implied warranty of habitability, courts must find a gap in the federal statutory scheme and comply with *Kimbell's* test. *Alexander v. Department of Housing and Urban Development*<sup>64</sup> was the first case to confront whether the National Housing Act allows incorporation of a state's implied warranty of habitability. In *Alexander*, HUD terminated a deteriorated housing project rather than restore the property.<sup>65</sup> Tenants brought suit seeking rent abatement on the theory that HUD had breached an implied warranty of habitability in renting substandard housing.<sup>66</sup>

The *Alexander* court declined to consider whether there was an implied warranty of habitability as either an independent federal common law rule or incorporated through state law as a federal rule of decision.<sup>67</sup> Despite the trend in finding an implied warranty of habitability in private residential leases,<sup>68</sup> the court found that an implied warranty of habitability is tantamount to a guarantee that HUD is meeting the

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62. See *Chicago Title Insurance Co. v. Sherred Village Assoc.*, 708 F.2d 804 (1st Cir. 1983) (the *Kimbell* factors applied to HUD mortgage lien results in incorporation of state law).

63. Greig & Althoff, *The Kimbell Decision: Applying State Laws as the Federal Rule of Decision in Priority Disputes Between Federal Agency and State Private and Consensual Liens*, 86 Com. L. J. 447 (1981). In *Kimbell*, the Court affirmed *Clearfield* in part by upholding the application of federal rather than state law when a federal agency is involved. The Court, however, modified *Clearfield* by reasoning that the need for uniformity was not sufficient to justify a uniform federal law as a federal rule of decision in this case. *Id.* at 450.

64. 555 F.2d 166 (7th Cir. 1977).

65. *Id.* at 168. Recognizing that the project had unsafe conditions, non-payment of rents and that it would be costly to bring the project into acceptable condition, HUD had notices to quit served on all tenants. *Id.*

66. *Id.*

67. *Id.* at 171. The court was not persuaded that a warranty of habitability was implied beyond the warranty that stated objectives of national policy have been met. *Id.*

68. See *supra* notes 27-34 and accompanying text for a discussion of *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970).

goal of providing a “decent home and suitable living environment.”<sup>69</sup> The court reasoned that the establishment of such a warranty is Congress’ responsibility.<sup>70</sup> The court refused to interpret the “safe, decent and sanitary” objectives as imposing an absolute fixed obligation on HUD to maintain suitable housing.<sup>71</sup> Instead the court explained that these objectives should be accomplished over many years.<sup>72</sup> By failing to incorporate the implied warranty of habitability, the court tacitly declined to create of federal common law in this area.<sup>73</sup>

After *Alexander*, Congress recognized that the Secretary was not meeting the Act’s requirement to provide a “decent home and suitable living environment.”<sup>74</sup> In response, Congress enacted the Housing and Community Development Act of 1978, which more explicitly states the national housing policy and maintenance standards.<sup>75</sup> Every court

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69. 555 F.2d at 171. The court did not consider whether placing an affirmative contractual obligation upon HUD to repair and maintain low-income dwellings would further the congressional goal of a safe, decent home for every family. The court avoided the issue of how congressional goals could be most effectively implemented by deferring to the possibility of future legislative action. *Id.* See Comment, *Implied Warranty of Habitability in Federal Housing Projects: Alexander v. United States Department of Housing and Urban Development*, 19 B.C.L. REV. 355 (1978).

70. 555 F.2d at 171.

71. *Id.* Other courts have agreed with the *Alexander* court. See *Perez v. U.S.*, 594 F.2d 280 (1st Cir. 1979) (no absolute duty imposed on HUD to make all HUD-financed public housing hazard free); *Daniels v. U.S. Dept. of Hous. and Urban Dev.*, 518 F. Supp. 989 (S.D. Ohio 1981) (Secretary has broad discretion in implementing the National Housing Act).

72. 555 F.2d at 171.

73. Comment, *supra* note 69, at 350. Similar objections to the implication of a warranty of habitability in public housing have been found in *Perry v. Housing Auth.*, 664 F.2d 1210 (4th Cir. 1981), and *Federal Property Management v. Harris*, 603 F.2d 1226 (6th Cir. 1979).

74. Congress noted this in enacting the Housing and Community Development Act of 1978:

Section 209 C [1701z-11c] would require that the Secretary of [HUD] maintain all HUD-owned multifamily projects in a decent, safe, and sanitary condition. This committee has received testimony that many projects have actually deteriorated during period of HUD ownership and that HUD has been unresponsive in many cases to the need for adequate maintenance of HUD owned properties. S. REP NO. 871, 95th Cong., 2d Sess. 23, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 4773, 4796.

75. These 1978 amendments stated more explicitly the Secretary’s duty to maintain his projects in decent safe and sanitary condition. The amendment requires:

(c) maintenance of housing projects

Except where the Secretary has determined on a case by case basis that it would be clearly inappropriate, given the manner by which an individual project is to be

since *Alexander* has found that these amendments impose a duty to lease habitable housing by meeting minimum maintenance standards.<sup>76</sup> However, these courts have yet to incorporate the state law warranty to its full extent.

In *Techer v. Roberts-Harris*<sup>77</sup> tenants of a low-income housing project applied for rent abatement due to the project's unsanitary conditions.<sup>78</sup> HUD denied their application and instituted eviction proceedings.<sup>79</sup> The tenants filed suit seeking injunctive relief.<sup>80</sup> After expressly rejecting the holding in *Alexander*,<sup>81</sup> the district court held that it could incorporate state law in its federal rule of decision to the extent that the implied warranty of habitability was consistent with the National Housing Act.<sup>82</sup>

In its federal common law analysis, the court considered the federal housing policy goal to provide a decent home and suitable living environment for every American family and emphasized congressional concern over the failure to realize that goal.<sup>83</sup> The district court found that public housing policy coincided with the adoption of the implied

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managed or disposed of pursuant to subsection (a) of this section [1701z-11(a)] the Secretary shall seek to—

1. Maintain all occupied multifamily housing projects owned by the Secretary in a decent safe and sanitary condition. . .

12 U.S.C. § 1701z-11e.

76. See *infra* notes 73-121 and accompanying text for cases imposing minimum maintenance standards on public housing.

77. 83 F.R.D. 124 (D. Conn. 1979).

78. *Id.* at 125. During HUD's control, vacant, garbage-filled units were adjacent to occupied units. Plaintiffs claimed they had water leakage, plumbing failure, exposed electrical wires, faulty heating, and rat and roach infestation. *Id.*

79. *Id.*

80. *Id.* at 126. Plaintiff claimed that an implied warranty of habitability is incorporated in HUD leases under the NHA. *Id.*

81. *Id.* at 128. The court explained in a footnote that although *Alexander* had recognized that federal courts are free to shape federal common law rules by looking to state court decisions and legislative history, it had declined to do so. *Id.*

82. Other courts have found an implied warranty. See *Allen v. Housing Auth.*, 683 F.2d 75 (3d Cir. 1982); *Mann v. Pierce*, 803 F.2d 1552 (11th Cir. 1986); *Perez v. Boston Hous. Auth.*, 379 Mass. 703, 400 N.E.2d 1231 (1980); *Chase v. Theodore Mayer Bros.*, 592 F. Supp. 90 (S.D. Ohio 1983) (action filed on a building code issue was not barred by the doctrine of sovereign immunity); *Wilson v. Pierce*, No. 81-264 (W.D. Pa. August 11, 1982) (court found the implied warranty of habitability imposed on NHA projects).

83. 83 F.R.D. at 129.

warranty of habitability in a common law rule.<sup>84</sup> The court recognized an inconsistency with Congressional policy by allowing HUD to “play the role of slum lord by collecting rents without respect for tenants living conditions.”<sup>85</sup> The court recognized that the language of these housing acts and policies was mandatory and not precatory.<sup>86</sup> The court recognized that a tenant’s payment<sup>87</sup> of monthly rent without obtaining decent housing is substantially more harmful than the minimal effect upon HUD of forgoing rental income until it adequately repairs the property.<sup>88</sup> The court awarded restitution of rent payments made while the housing was not habitable as well as equitable relief from payments due until the landlord made necessary repairs.<sup>89</sup>

In *Mann v. Pierce*,<sup>90</sup> a tenant claimed damages for breach of the implied warranty of habitability in a federal housing project.<sup>91</sup> In an appeal based on a sovereign immunity defense to tenant’s claim, the Eleventh Circuit found that there was no bar to the suit.<sup>92</sup> The court also held that the state implied warranty of habitability’s maintenance requirements and consequential damages may be incorporated into the federal law.<sup>93</sup> *Mann* is the only case to find that the award of consequential damages is consistent with the statutory provisions and policy of the federal housing programs.

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84. *Id.* at 130. The court distinguished *Alexander* in that here the plaintiff ought injunctive relief and not a return of monies already paid to HUD. *Id.* at 128.

85. *Techer v. Roberts-Harris (Techer II)*, No. N-78-484, slip op. at 5 (D. Conn. Oct. 13, 1982) (as cited in *Chase v. Theodore Mayer Bros.*, 592 F. Supp. 90, 96 (S.D. Ohio 1983)).

86. 83 F.R.D. at 129. *See also* *U.S. v. Winthrop Towers*, 628 F.2d 1028 (7th Cir. 1980) (language of § 1701t is mandatory, not precatory).

87. 83 F.R.D. at 130. The court found the existence of an implied warranty of habitability in HUD leases was consistent with NHA objectives as well as the reality of the relationship between HUD and tenants. *Id.*

88. 83 F.R.D. at 130.

89. *Techer*, *supra* note 85.

90. 803 F.2d 1552 (11th Cir. 1986).

91. *Id.* at 1554. Tenants claimed that HUD failed to maintain low-income housing while it had been in HUD’s possession and had not taken steps toward the removal of carcinogenic asbestos. *Id.*

92. *Id.* at 1556-57.

93. *Id.* at 1558.

## V. CASE LAW INCORPORATING THE IMPLIED WARRANTY INTO FEDERAL LAW

In the most recent case on the issue, the First Circuit found the implied warranty could be incorporated into federal law, but limited the extent of this incorporation by excluding consequential damages. In *Conille v. Secretary of the Department of Housing and Urban Development*<sup>94</sup> a deteriorated HUD-subsidized apartment forced the tenant to vacate.<sup>95</sup> The plaintiff filed suit alleging that the Secretary had breached an implied warranty of habitability.<sup>96</sup> The plaintiff sought to recover rent and compensatory damages for the period stemming from the beginning of HUD management of the building until the plaintiff vacated.<sup>97</sup>

The district court dismissed the plaintiff's state law claims on the ground that they conflicted with the National Housing Act.<sup>98</sup> The First Circuit reversed.<sup>99</sup> Although the court declined to incorporate state landlord-tenant law in its entirety,<sup>100</sup> it held as a matter of federal common law that the state law warranty of habitability could be enforced insofar as it is consistent with the National Housing Act.<sup>101</sup> The court awarded the plaintiff restitution of rental payments made during the period in which HUD failed to maintain housing.<sup>102</sup>

The First Circuit upheld the principle that courts may incorporate state law as the federal rule of decision in cases involving federal contractual obligations<sup>103</sup> where Congress has not addressed the issue and

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94. 840 F.2d 105 (1st Cir. 1988).

95. *Id.* at 108. The City of Boston Housing Inspection Department had prepared a complaint concerning the poor repair of the plaintiff's ceilings, walls and defective windows. The report found the premises needed a new stove and refrigerator and were infested with mice and cockroaches. *Id.*

96. *Id.* at 108 n.1. HUD asserted that federal law must be applied and that Congress has comprehensively addressed the issues and left no room for federal courts to fashion federal common law in this area. *Id.* at 109.

97. *Id.* at 108.

98. *Conille v. Pierce*, 649 F. Supp. 1133, 1154 (D. Mass. 1986). The district court concluded that even if the Secretary had breached a duty to maintain the premises, the plaintiff would not be entitled to recover either monetary damages or restitution of rent because either remedy would be too extraordinary for this case. *Id.*

99. 840 F.2d at 117.

100. *Id.* at 114.

101. *Id.* at 117.

102. *Id.*

103. The court expressly disagreed with *Alexander's* argument that a warranty in public housing is a guarantee that the national housing goals are being met. 840 F.2d at

state law resolves it without conflicting with federal policy.<sup>104</sup> The court concluded that it must establish a federal common law rule because the case did not present a situation where Congress has comprehensively occupied the field.<sup>105</sup>

In its federal common law analysis, the court considered the degree of conflict in *Conille* and reaffirmed that the statutory maintenance obligation imposed upon HUD was narrower than that imposed upon private landlords.<sup>106</sup> The court found that while there are specific limitations on HUD's maintenance obligations,<sup>107</sup> the NHA does not articulate standards for landlord-tenant relations in HUD properties.<sup>108</sup> The court held<sup>109</sup> that Congress only intended to require the Secretary to take reasonable steps toward maintaining low-income housing projects.<sup>110</sup> The court noted that Massachusetts' requirement that landlords must take affirmative action in building maintenance was more stringent than the federal statute's.<sup>111</sup> The *Conille* court concluded that incorporating the more stringent state law in its entirety would frustrate the NHA's limited maintenance obligation.<sup>112</sup>

The court also found that state law was inconsistent with the NHA

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116 n.15. Instead, the court expanded the federal common law analysis in *Techer* by establishing procedural guidelines for showing a breach and standards for what is "decent, safe and sanitary housing." *Id.* at 117.

104. *Id.* at 110.

105. *Id.* at 111-12.

106. *Id.* at 113.

107. The court disagreed with *Alexander's* finding that the only implied contractual obligation is that federal housing goals are being met. *Id.* at 116 n.15.

108. *Id.* at 111. The relevant statutory language reads:

The NHA provides maintenance obligations . . .

(c) except where the Secretary has determined on a case-by-case basis that it would be clearly inappropriate, the Secretary shall seek to:

(1) maintain all . . . housing projects . . . in a decent, safe and sanitary condition; and

(2) to the greatest extent possible, maintain full occupancy in all multi-family housing projects . . .

12 U.S.C. § 1701.

109. The court considered *Kimbell's* requirements for consistency with federal policy and statutory language. 840 F.2d at 112.

110. *Id.* at 112. The court noted that the choice of the words "shall seek" rather than "shall" indicates more limited liability than under state landlord-tenant law where affirmative steps of private landlords toward meeting their obligations would not prevent liability. *Id.*

111. *Id.* at 113.

112. *Id.*

insofar as it allowed a tenant to recover consequential damages from a landlord who interfered with the tenant's quiet enjoyment of the premises.<sup>113</sup> The court noted that the imposition of consequential damages would potentially interfere with the NHA's goal of upgrading housing by exposing the federal government to unpredictable costs.<sup>114</sup> However, the court recognized that, despite its conflicts, state law must be the starting point in fashioning a federal rule in light of the strong state interest in regulating landlord-tenant relations.<sup>115</sup>

The First Circuit then considered the extent to which the implied warranty coincided with the NHA, and thus could be adopted.<sup>116</sup> The court clearly defined the procedure for establishing a breach by applying the federal common law analytical framework. The court held that if, while on notice of the conditions of the property, the Secretary failed to make the necessary repairs to the premises, the tenant could establish a breach.<sup>117</sup> Once the plaintiff established a breach she would be entitled to the difference between the value of the premises in a decent, safe and sanitary condition and the value of the premises in their deteriorated condition.<sup>118</sup> State and local housing standards provide the criteria for what is a decent, safe and sanitary condition.<sup>119</sup> The court also noted that injunctive relief would be insufficient as it would leave tenants in defective housing with no recourse.<sup>120</sup> Instead the tenant could obtain rent restitution to compensate for inadequate housing and to provide some assurance and incentive that HUD will fulfill its maintenance obligation.<sup>121</sup>

## VI. ANALYSIS

The *Conille* court found only parts of the Massachusetts implied

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113. *Id.* at 113-14.

114. *Id.* at 114. Judge Coffin noted that consequential damages would frustrate Congress's allocation of financial resources that are necessary for the improvement of the nation's housing stock. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 117.

118. *Id.*

119. *Id.*

120. *Id.* The court noted that as soon as a tenant filed for injunctive relief the Secretary could avoid his obligation to respond by making his "clearly appropriate" finding and tenants would remain in defective housing without relief. *Id.*

121. *Id.*

warranty of habitability law consistent with the NHA. Nevertheless, the First Circuit was the first court to go through the federal common law analysis and apply it to specific provisions under state law. The holding in *Conille* clearly defines how far courts may apply the state implied warranty law to public housing tenants.<sup>122</sup> The First Circuit's application of a notice requirement and state and local housing standards filled a wide gap in the federal legislation. The court's rule, however, only incorporated the tenant's remedy of rent restitution.<sup>123</sup> Although the court noted that injunctive relief would not be sufficiently compensatory,<sup>124</sup> it could have followed *Mann v. Pierce*<sup>125</sup> and allowed for incorporation of the full extent of damages that are provided under state law.<sup>126</sup> Without actual and consequential damages there is inadequate incentive for HUD to improve the conditions of public housing when they deteriorate.

Although the *Conille* court mentioned the *Kimbell Foods* test in a footnote,<sup>127</sup> if it had more thoroughly adhered to the three prong test<sup>128</sup> it would have found less of a conflict between state and federal law and incorporated the consequential damages provision. First, adopting state law's affirmative maintenance obligation and consequential damages does not conflict with objectives of providing safe, decent and sanitary housing. Rather, requiring owners of HUD-subsidized properties to meet the local housing codes is inconsistent because when HUD is the landlord the Secretary does not have to comply.<sup>129</sup> The Secretary is one of the largest single landlords in the nation. Such leniency would undermine the policy goals of federal housing.<sup>130</sup>

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122. "[I]f there is no significant conflict between some federal policy or interest and the use of state law, there is no need for a federal court to embark upon the unfamiliar road of common law-making even in situations where the rights or obligations of the United States are at stake." *Id.* at 110 (quoting *Milwaukee v. Illinois*, 451 U.S. 304, 313 (1981)). See also *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979).

123. 890 F.2d at 117.

124. *Id.* The court noted that the Secretary's maintenance requirements under 12 U.S.C. § 1701z-11(c) would be meaningless if the only remedy available to tenants was injunctive relief. *Id.*

125. See *supra* notes 90-93 and accompanying text for a discussion of *Mann v. Pierce*.

126. *Mann v. Pierce*, 803 F.2d 1552, 1556 (11th Cir. 1986).

127. 840 F.2d at 112 n.11.

128. See *supra* notes 60-62 and accompanying text for discussion of the *Kimbell Foods* test.

129. *Chase v. Theodore Mayer Bros.*, 592 F. Supp. 90, 101 (S.D. Ohio 1983).

130. "The establishment of federally immunized slums disrupts tenants rights for

HUD typically argues that the "case by case" exception where maintenance is "clearly inappropriate" suggests a more lenient maintenance requirement and implies that the imposition of consequential damages would be inconsistent.<sup>131</sup> However, Congress' allowance for the Secretary's "case by case" discretion may indicate that where repairing the premises is appropriate, HUD should be liable under state law for its failure to do so. Further, although the *Conille* court held that the "case by case" exception is an irreconcilable conflict with state law,<sup>132</sup> the court did not identify that conflict.

Second, there is no federal interest in uniformity. There is a particularly strong argument for application of state law in its entirety in light of the tradition of state regulation of real property.<sup>133</sup> In considering the need for uniformity, the court must weigh HUD's interest in a uniform statutory scheme against federal policy interests.<sup>134</sup> Courts cannot reject state and local regulations merely because they differ among jurisdictions.<sup>135</sup> The court's fear of "unpredictable costs" that consequential damages may impose on the government can be allayed if the court imposes a limit to the amount the tenant may recover. Even a limited remedy would be better than solely allowing reimbursement of rent.

Finally, under the third prong of *Kimbell*, the court should recognize that property law traditionally has been within the domain of the states. The state has a substantial interest in the application of its implied warranty of habitability.<sup>136</sup> The policy reasons for ensuring decent housing for tenants, expressed in *Javins*, apply equally to private and public landlords.<sup>137</sup> Perhaps there is even more inequality in bar-

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decent and sanitary conditions is in conflict with the guarantee of habitable housing for all its residents regardless of the landlord's identity." Brief for Appellant at 38, *Conille v. U.S. Dep't of Hous. and Urban Dev.* 840 F.2d 105 (1st Cir. 1988).

131. 840 F.2d at 112.

132. *Id.*

133. See *Lindsey v. Normet*, 405 U.S. 56, 68-69 (1972) (no justification to federalize landlord-tenant relations); *Powers v. U. S. Postal Service*, 671 F.2d 1041, 1043 (7th Cir. 1982) (incorporation of state law to govern leases with Post Office).

134. *Chase v. Theodore Mayer Bros.*, 592 F. Supp. 90, 98 (S.D. Ohio 1983).

135. *Id.*

136. In *Powers*, 671 F.2d at 1043, the court concluded that the incorporation of state law as a federal rule of decision "is a frequent choice especially in real property law of which landlord-tenant law is a part." See also *U.S. v. Little Misere Land Co.*, 412 U.S. at 580, 591 (1973) (the great body of law in this country which defines the rights of property owners is found in the statutes and decisions of the states).

137. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1074 (1970).

gaining power among low-income tenants and thus more reason to extend the warranty to public housing.<sup>138</sup> The court incorrectly assumed that the incorporation of rent restitution would assure a minimum housing standard consistent with the state's interest. In some cases the cost of the repairs required to merely bring the housing up to a minimum standard is so great that rent restitution and abatement may be more cost efficient than maintenance. In these cases the threat of liability for consequential damages would be the only adequate protection for tenants and the only way to ensure enforcement of the congressional intent to provide safe housing.

In future cases, courts should first establish that there is a gap in the federal housing legislation and that it is appropriate to incorporate state law as the federal rule of decision. The court then should consider the *Kimbell* factors of conflict, the need for uniformity and the state's interest in preventing the displacement of its law. In considering these factors, the court should balance them with the federal policy of providing a decent, safe and sanitary place to live. The legislative purpose should weigh heavily in the balance.

If courts give this policy its proper weight, it is unlikely they will find that an affirmative maintenance obligation or consequential damages frustrates the provisions of the federal statute. Even if courts find unlimited consequential damages is inappropriate, they should use their discretion and limit the amount the plaintiff can recover. This would avoid subjecting the government to the "unpredictable costs" courts have feared.<sup>139</sup> There are circumstances where a public housing tenant suffers substantial loss other than the rent paid during the period of breach. The tenant should at least be able to recover moving costs, damage to personal property, and medical expenses for treatment of vermin bites.

The optimum solution is for Congress to amend its housing acts and specifically provide its own maintenance requirements and remedies for a breach. In the meantime, tenants must rely on case law to determine their rights. While *Conille* made great advances by articulating low-income housing tenants' interests, without the incorporation of consequential damages into the federal rule of decision, HUD may not be

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138. *Id.* at 1079. Various impediments to competition in the rental market such as racial and class discrimination mean that landlords place tenants in a take it or leave it situation. *Id.*

139. *Conille v. U.S. Dept. of Hous. and Urban Dev.*, 840 F.2d 105, 117 (1st Cir. 1988).

adequately protecting lower-income public housing tenant's interests. The failure to protect these tenants from substandard housing is inconsistent with public housing policy.

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## **COMMENTS**

