

RETROACTIVE RENT ABATEMENT

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Until 1961, the doctrine of *caveat emptor* was nearly universal in landlord-tenant relations.¹ In that year, the Wisconsin Supreme Court rejected *caveat emptor* and adopted the implied warranty of habitability doctrine.² It was another twelve years before a state court recognized an action by which a tenant could affirmatively sue a landlord for breach of this warranty.³ This cause of action is retroactive rent abatement. Since then, courts in at least ten other states

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1. *Caveat emptor* means "let the buyer beware." In residential leases it provides that the tenant assumes possession of the leasehold "as is." The burden is on the tenant to inspect the premises before agreeing to the lease to ensure that the dwelling is satisfactory. The tenant then takes possession from the landlord subject to any later discovered defects. Moreno, *The Warranty of Uninhabitability*, 7 SAN FERN. V. L. REV. 67, 68 (1978). A lessee can alter a landlord's obligation in a jurisdiction that follows the *caveat emptor* doctrine and require that the premises be turned over in a particular condition only by express contractual modification. Note, *Tenant Remedies—The Implied Warranty of Fitness and Habitability*, 16 VILL. L. REV. 710, 711 (1971) [hereafter cited as *Tenant Remedies*]. The first United States decision to officially recognize the *caveat emptor* doctrine in a residential landlord-tenant setting was *Moore v. Weber*, 71 Pa. 429 (1872). In that case, the Pennsylvania Supreme Court held that "[i]n the absence of an express agreement there is no implied obligation on the landlord to repair demised premises, nor does he impliedly undertake that they are fit for the purposes for which they are rented—that they are tenantable or shall continue so." *Id.* at 432.

2. *Pines v. Persson*, 14 Wis. 2d 590, 111 N.W.2d 409 (1961). Although this case is symbolic of a doctrinal change, it is not the first decision to acknowledge the implied warranty of habitability. Thirty years earlier, the Minnesota Supreme Court held that a landlord's failure to rid a rented, unfurnished apartment of vermin infestation constituted a breach of an implied promise that the premises were habitable. *Delamater v. Foreman*, 184 Minn. 428, 239 N.W. 148 (1931). Other courts virtually ignored this holding until *Pines*.

3. *Berzito v. Gambino*, 63 N.J. 460, 308 A.2d 17 (1973).

have accepted or seriously considered this action.⁴

Retroactive rent abatement is a tenant-initiated remedy in which the tenant seeks monetary damages from the landlord for breach of the implied warranty of habitability.⁵ The court calculates the damages retroactively to the time the landlord knew or should have known of the unacceptable living conditions.⁶ The tenant is thus able

4. Before recognition of retroactive rent abatement, few courts allowed tenants to affirmatively sue their landlords for breach of the implied warranty of habitability. The theories underlying these affirmative suits were inconsistent and often unclear. *See* notes 48-62 *infra*. The cause of action discussed in this Note represents a change in this pattern. With increasing frequency, courts have turned to a new theory of tenant recovery. In California, at least two superior courts have allowed tenants to sue their landlords for retroactive rent abatement. *Quevedo v. Braga*, 72 Cal. App. 3d 1, 140 Cal. Rptr. 143 (App. Dep't Super. Ct. 1977); *Kruse v. Hill*, No. 62936 (Butte County Cal. Super. Ct. March 1, 1978). In Massachusetts, an appellate court recognized such an action. *McKenna v. Begin*, 5 Mass. App. Ct. 304, 362 N.E.2d 548 (1977). Similarly, the Pennsylvania superior courts in *Fair v. Negley*, 257 Pa. Super. Ct. 50, 390 A.2d 240 (1978) and *Beasley v. Freedman*, 256 Pa. Super. Ct. 208, 389 A.2d 1087 (1978) allowed the lessee such recovery. *See also* *Brown v. Robyn Realty Co.*, 367 A.2d 183 (Del. Super. Ct. 1976) (tenants successfully sued landlord for breach of implied warranty of habitability); *Hsu v. Thomas*, 387 A.2d 588 (D.C. 1978) (tenant permitted to sue landlord for amount in excess of reasonable rental value of leased premises); *Jarrell v. Hartman*, 48 Ill. App. 3d 985, 363 N.E.2d 626 (1977) (since breach of implied warranty is allowed as defense to rent suits, it would be inconsistent to deny tenant a remedy for same breach when rent has been paid). In *Covington v. McKeiver*, 88 Misc. 2d 1000, 390 N.Y.S.2d 502 (Sup. Ct. 1976), the court rejected retroactive rent abatement as a recoupment type of relief, arguing that courts permit abatement only as a defense or setoff. The case of *Reilly v. Lasso*, 166 N.J. Super. 404, 399 A.2d 1057 (Essex County Ct. 1979), also involved retroactive rent abatement. The court, however, avoided discussing it by dismissing the action on unrelated procedural grounds.

No statute enacted to date specifically provides for a tenant remedy labeled retroactive rent abatement. The Uniform Residential Landlord and Tenant Act (URLTA), adopted in varying forms by 13 states, however, includes provisions for tenant recovery of damages when the landlord fails to fulfill specified obligations regarding maintenance of the leased premises. The Act does not limit theories of recovery to defenses, setoffs or counterclaims. Arguably, therefore, a tenant can initiate a suit for damages based on a theory of breach of the implied warranty of habitability and recover amounts equal to retroactively abated rent. UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT §§ 2.104, 4.101, 4.104 (1972).

5. *See generally* Blumberg & Quinn, *Beyond URLTA: A Program for Achieving Real Tenant Goals*, 11 HARV. C.R.-C.L. L. REV. 1 (1976) [hereinafter cited as *Beyond URLTA*]; Plaintiff's Answering Brief at 6, *Brown v. Robyn Realty Co.*, 367 A.2d 183 (Del. Super. Ct. 1976); Plaintiff's Memoranda of Points and Authorities at 10, *Kruse v. Hill*, No. 62936 (Butte County Cal. Super. Ct. March 1, 1978).

A concise definition of retroactive rent abatement is difficult, if not impossible, largely because it is a new remedy and the elements vary among jurisdictions.

6. *Beyond URLTA*, *supra* note 5, at 25.

to recover unnecessarily paid rents.

Because of its recent origin, the effectiveness of this remedy is untested and uncertain. By examining the development and rationale behind retroactive rent abatement, this Note evaluates the potential usefulness of this new judicially defined affirmative remedy to residential tenants.

I. THE IMPLIED WARRANTY OF HABITABILITY

A. *Development of the Doctrine*

The doctrine of *caveat emptor* in residential leases developed in a rural context in which the landlord's sole obligation was to give the tenant possession.⁷ The tenant, in return, paid the landlord rent.⁸ Since tenants sought the lease primarily for the land, they had little concern for the residential facility or structural defects.⁹ Thus, the landlord was not responsible for dwelling defects which the tenant failed to discover before entering into the lease agreement or which arose during the tenancy.¹⁰

This arrangement was acceptable so long as the setting remained rural. Urban tenants, however, require more of the landlord than mere property conveyance. Unlike their agrarian counterparts, they seek housing maintenance and a combination of services.¹¹ Initially

7. In contrast to the modern tendency to treat the lease as a set of mutually dependent covenants, courts first interpreted the lease as transferring an estate in land. See *Lemle v. Breedan*, 51 Hawaii 426, 430, 462 P.2d 470, 472 (1969); *Mease v. Fox*, 200 N.W.2d 791, 793 (Iowa 1972).

8. When the economy was primarily agrarian, *caveat emptor* was understandable. The tenant had an opportunity to inspect the property and to discover major defects. Defects discovered later were usually reparable by the tenant. RESTATEMENT (SECOND) OF PROPERTY LAW OF LANDLORD AND TENANT § 5.1, Comment b (1977).

The leases were elaborate and included fully the expectations of the parties. Thus, any unusual conditions of the land or any modification desired by the parties could be incorporated into the lease agreement. *Lemle v. Breedan*, 51 Hawaii 426, 430, 462 P.2d 470, 472-73 (1969); *Mease v. Fox*, 200 N.W.2d 791, 793 (Iowa 1972).

9. See *Mease v. Fox*, 200 N.W.2d 791, 793 (Iowa 1972).

10. The landlord was not expected to do anything to the land. Only if the landlord interfered with the tenant's quiet enjoyment to the extent of physical eviction could the tenant sue the landlord. Under no other circumstances could tenants unilaterally alter their rent obligations. Quinn & Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past With Guidelines for the Future*, 38 FORDHAM L. REV. 225, 229-30 (1969) [hereinafter cited as *A Critical Evaluation*].

11. For example, the tenant expects the landlord to maintain the common areas of a multi-dwelling unit and furnish services such as gas, water, electricity and plumbing. *Tenant Remedies*, *supra* note 1, at 711-12.

courts viewed these new tenant interests and concerns as separate from the possession-rent relationship.¹² This gradually changed as courts deemed tenants to have paid rent in exchange for services as well as possession.¹³

From a practical perspective, rejection of the *caveat emptor* doctrine makes sense for urban apartment buildings. A tenant is seldom able to sufficiently inspect a unit in a multi-unit dwelling to discover defects prior to assuming possession.¹⁴ Moreover, the tenant is often unable to repair defects found after he or she assumes possession.¹⁵ These problems, housing shortages,¹⁶ and public policies favoring adequate housing¹⁷ combined to cause a gradual erosion of the doctrine.¹⁸ Courts began reading an implied warranty of habitability into residential leases to deal with the shortcomings of *caveat emptor*. Finally, courts began to totally discard the doctrine.¹⁹

12. What the law did was to preserve the old landlord-tenant law with its fixation on possession as the crux of the lease, and with rent as the quid pro quo for possession. Onto this was engrafted a new set of rights and duties (concerning heat, hot water and repairs) which were independent of the possession-rent relationship and considered incidental and unimportant relative to possession. *A Critical Evaluation, supra* note 10, at 233 (footnote omitted).

13. *Tenant Remedies, supra* note 1, at 712.

14. Modern dwellings include far more complicated structures and facilities than did earlier dwellings. Often the tenant knows little about these technical constructions. RESTATEMENT (SECOND) OF PROPERTY LAW OF LANDLORD AND TENANT § 5.1, Comment b (1977).

15. The urban tenant is not like a jack-of-all-trades agrarian tenant. Moreno, *The Warranty of Uninhabitability*, 7 SAN FERN. V. L. REV. 67, 70 (1978). In addition, few landlords would allow a single tenant to attempt to repair facilities or services shared by other tenants in the same building.

16. *See Academy Spires, Inc. v. Brown*, 111 N.J. Super. 477, 480, 268 A.2d 556, 558 (Essex County Ct. 1970).

17. "Across the nation, there is a substantial body of statutory and common law reflecting a trend that no one should be allowed or forced to live in unsafe and unhealthy housing." *Houston Realty Corp. v. Castro*, 94 Misc. 2d 115, 117, 404 N.Y.S.2d 796, 798 (Civ. Ct. 1978).

18. *See, e.g., Pines v. Persson*, 14 Wis. 2d 590, 596, 111 N.W.2d 409, 413 (1961) (*caveat emptor* considered an obnoxious legal cliché).

19. *E.g., Reste Realty Corp. v. Cooper*, 53 N.J. 444, 251 A.2d 268 (1969); *Lemle v. Breedon*, 51 Hawaii 426, 462 P.2d 470 (1969). Pennsylvania is the most recent state to reject *caveat emptor* in residential landlord-tenant agreements. *Pugh v. Holmes*, — Pa. —, 405 A.2d 897 (1979).

Other reasons sometimes cited as partly responsible for this increasing awareness of tenant rights include "Great Society" legislation passed during the Johnson administration, urban riots and the civil rights movement. *See Cunningham, The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to*

B. *What is Habitable?*

The implied warranty of habitability is a set of promises the law imputes to a landlord leasing residential property.²⁰ The premises must be fit for occupation at the start of the tenancy. The landlord implicitly assures that the premises will remain habitable throughout the tenancy and that the landlord will repair damages caused by ordinary wear.²¹ Although courts initially created the implied warranty,²² several states have now adopted it by statute.²³

Specific standards of habitability vary among jurisdictions. Often local housing codes determine the standard;²⁴ nevertheless, a court may take other factors into consideration,²⁵ distinguishing between general necessities such as adequate plumbing, heat and water and

Status, 16 URBAN L. ANN. 3, 9 (1979); Donahue, Jr., *Change in the American Law of Landlord and Tenant*, 37 MOD. L. REV. 242, 246 (1974).

For further discussion of the history of the landlord-tenant relationship, see Abbott, *Housing Policy, Housing Codes and Tenant Remedies: An Integration*, 56 B.U. L. REV. 1 (1976) [hereinafter cited as *Housing Policy*]; Gerwin, *A Study of the Evolution and Potential of Landlord Tenant Law and Judicial Dispute Settlement Mechanism in the District of Columbia—Part I: The Substantive Law and the Nature of the Private Relationship*, 26 CATH. U. L. REV. 457 (1977).

20. Although courts often read into lease agreements warranties similar to the warranty of habitability, most jurisdictions limit them to residential leases. *Housing Policy*, *supra* note 19, at 14. Agreements other than leases may also contain implied warranties. Section 2-314 of the Uniform Commercial Code, for example, contains an implied warranty of merchantability.

21. *Housing Policy*, *supra* note 19, at 12-13. As of July 1979, 40 states (legislatures or appellate courts) as well as the District of Columbia had adopted the implied warranty of habitability. *Pugh v. Holmes*, — Pa. —, —, 405 A.2d 897, 901 (1979).

22. For a list of states that have judicially adopted the warranty, see *Pugh v. Holmes*, — Pa. —, — n. —, 405 A.2d 897, 901 n.2 (1979).

23. For a list of the statutory enactments of the implied warranty, see *Pugh v. Holmes*, — Pa. — n.—, 405 A.2d at 901 n.2. For a detailed discussion of the forms these statutes have taken, see Cunningham, *supra* note 19, at 6-7.

24. *Beyond URLTA*, *supra* note 5, at 7-8.

25. The Uniform Residential Landlord Tenant Act adopts the doctrine recognized in various jurisdictions. It requires not only that the landlord comply with housing codes, but also that the landlord make repairs necessary to maintain habitable conditions, keep common areas clean and safe, maintain electrical, plumbing, sanitary, heating and other facilities and appliances, provide and maintain receptacles for garbage, and provide running water and reasonable amounts of hot water. UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 2-104 (1972).

The Restatement (Second) of Property states that, although significant code violations conclusively prove a leased dwelling is unsuitable for residential purposes, other modes of proof may be acceptable. RESTATEMENT (SECOND) OF PROPERTY § 5.1, Comment e (1977).

amenities such as peeling paint and water leaks.²⁶ The former significantly affect the tenant's health and safety and are therefore elements of habitability. The amenities, however, are seldom requisites of habitability.²⁷

Determination of breach under the warranty of habitability follows no mechanical formula.²⁸ Most courts require that the breach be material.²⁹ Among the factors often considered to determine materiality are the seriousness of the defect, the age of the structure, the length of time the defective condition has existed and the amount of rent the tenants paid.³⁰ The tenant, in order to assert a breach, cannot be responsible for the defect.³¹ Since the factors considered are many

26. *Academy Spires, Inc. v. Brown*, 111 N.J. Super. 477, 268 A.2d 556 (Essex County Ct. 1970) (malfunction of venetian blinds, lack of painting and water leaks not covered by implied warranty of habitability).

27. Neither courts nor statutes require that leased premises be in perfect condition. *See Green v. Superior Ct.*, 10 Cal. 3d 616, 627, 517 P.2d 1168, 1182, 111 Cal. Rptr. 704, 718 (1974).

28. *See Plaintiff's Answering Brief at 22, Brown v. Robyn Realty Co.*, 367 A.2d 183 (Del. Super. Ct. 1976).

29. In *Pugh v. Holmes*, the Pennsylvania Supreme Court held that to constitute a breach of the warranty "the defect must be of a nature and kind which will prevent the use of the dwelling for its intended purpose to provide premises fit for habitation by its dwellers." — Pa. at —, 405 A.2d at 905. *Accord, Mease v. Fox*, 200 N.W.2d 791, 796 (Iowa 1972) (breach must be of such substantial nature as to render premises unsafe or unsanitary). *Cf. McKenna v. Begin*, 5 Mass. App. Ct. 304, 309, 362 N.E.2d 548, 551 (1977) (multitude of minor violations with cumulative effect on habitability may equal breach).

30. The court in *Mease* outlined the following seven factors, in addition to housing code violations, to consider when determining the materiality of a breach of the warranty of habitability:

1. the nature of the deficiency or defect;
2. its effect on safety and sanitation;
3. the length of time for which it persisted;
4. the age of the structure;
5. the amount of the rent;
6. whether tenant voluntarily, knowingly and intelligently waived the defects, or is estopped to raise the question of breach; and
7. whether the defects or deficiencies resulted from unusual, abnormal or malicious use by the tenant.

200 N.W.2d 791, 797 (1972). *See also Cochran, Landlord-Tenant Law Reform—Implied Warranty of Habitability: Effects and Effectiveness of Remedies for its Breach*, 5 TEX. TECH. L. REV. 749, 760 (1974).

31. All courts agree with this proposition. *See, e.g., Hinson v. Delis*, 26 Cal. App. 3d 62, 70, 102 Cal. Rptr. 661, 666 (1972) (contract principle that no one may benefit from his or her own wrong prevents tenant from recovering damages caused by tenant's own wrongful action). *Cf. Marini v. Ireland*, 56 N.J. 130, 144, 265 A.2d 526, 534

and specific guidelines do not exist, courts must decide questions of habitability on a case-by-case basis. Unfortunately, neither the tenant nor the landlord can be certain on what basis a court will find a breach of the warranty. Thus, neither party knows, with any assurance, the responsibilities of the landlord.³²

Since the recognition of the implied warranty doctrine, courts have read lease agreements as contracts.³³ This allows the tenant, in the event of a warranty breach, access to contractual remedies.³⁴ This development greatly expands the number of nonstatutory remedies available to the tenant seeking compensation for injuries inflicted upon him by the landlord.³⁵

In spite of the landlord's breach, however, most jurisdictions deny the tenant a cause of action. These courts allow the injured tenant to

(1970) (tenant may be liable for repair damages caused maliciously or by abnormal or unusual use).

32. Critics fault the implied warranty of habitability on other grounds as well. Some express concern that owners of marginal housing units will consider the cost of repair too substantial and the return of investment too questionable. They therefore close or abandon the building, thereby increasing housing shortages. *Fair v. Negley*, 257 Pa. Super. Ct., 50, —, 390 A.2d 240, 247 (1978) (Price, J., dissenting). Some commentators also believe that tenants will use warranty remedies to harrass landlords. Hesker, *The Warranty of Habitability Debate: A California Case Study*, 66 CAL. L. REV. 37, 38 (1978).

Alternatively, landlords may simply pass on the repair cost to tenants by raising rents. Hirsch, Hirsch & Margolis, *Regression Analysis of the Effects of Habitability Laws Upon Rent: An Empirical Observation on the Ackerman-Komesar Debate*, 63 CAL. L. REV. 1098, 1099-100 (1975). This will particularly affect the quantity of housing available to low-income tenants. Meyers, *The Convenant of Habitability and the American Law Institute*, 27 STAN. L. REV. 879, 893-94 (1974-75).

33. This is perhaps the most significant effect of the doctrine's adoption. *But see* Donahue, Jr., *Change in the American Law of Landlord and Tenant*, 37 MOD. L. REV. 242, 257-58 (1974) (contract analogy deemed inappropriate in landlord-tenant setting). Other heralded results include the preservation of low-cost housing, the improvement of tenants' legal status, the broadening of housing code enforcement and the inducement of landlords to make repairs. Further, proponents of the implied warranty predict housing improvements without rent increases as well as an increase in the tenants' leverage in out-of-court settlements. Hesker, *supra* note 32, at 38.

34. *Teller v. McCoy*, — W. Va. —, —, 253 S.E.2d 114, 125 (1979) (upon recognizing a lease as a contract, courts make available common contract remedies).

35. 43 U. CIN. L. REV. 197, 198-99 (1974). The basic contract remedies generally available include damages, reformation, and rescission. *Lemle v. Breeden*, 51 Hawaii 426, 436, 462 P.2d 470, 475 (1969); *Mease v. Fox*, 200 N.W.2d 791, 796 (1972). In contrast, the legal effect of *caveat emptor* was to allow the injured lessee a remedy only if there was fraud or mistake in the initial transaction. 51 Hawaii at 429, 462 P.2d at 472.

challenge the landlord's breach of warranty only as a defense, counterclaim or setoff.³⁶ If the tenant establishes a breach, several remedies other than retroactive rent abatement then may become available.

Some courts recognize a repair and deduct remedy.³⁷ This allows the tenant to repair the defective conditions and deduct the cost from rent.³⁸ If, however, the court later holds there was no breach by the landlord or that the breach was not material, the tenant must reimburse the landlord for the rent withheld.³⁹ Furthermore, if the tenant is unable to afford the initial repair costs, the remedy is useless.⁴⁰

Another judicially and legislatively recognized remedy is rent withholding. When the tenant believes the premises are uninhabitable, he or she may cease to pay rent.⁴¹ Some statutes provide for the establishment of an escrow account into which the withheld money is

36. *See Fair v. Negley*, 257 Pa. Super. Ct. 50, —, 390 A.2d 240, 240-41 (1978), in which the court summarized the tenant's options as follows:

The tenant may assert a breach of the implied warranty of habitability as a defense against a landlord's action for possession or for unpaid rent The tenant also may assert a breach of the warranty as a counterclaim and seek reimbursement or a rent reduction for sums expended by the tenant for repairs made to make the dwelling habitable.

See also *Houston Realty Corp. v. Castro*, 94 Misc. 2d 115, 118, 404 N.Y.S.2d 796, 798 (N.Y. City Civ. Ct. 1978) (breach of warranty of habitability is traditionally raised as an affirmative defense to a nonpayment eviction proceeding).

37. *See, e.g., Marini v. Ireland*, 56 N.J. 130, 265 A.2d 526 (1970) (tenant may make repairs upon landlord's failure to do so and offset the cost against the rent).

38. The tenant usually is required to give the landlord notice of the defect and to allow the landlord a reasonable time in which to have the repairs made before making the repairs himself. The advantage of the repair and deduct remedy is that after notice and a reasonable time, the tenant may take immediate action. Bentley, *An Alternative Residential Lease*, 74 COLUM. L. REV. 836, 873 (1974).

39. Courts limit the remedy of repair and deduct to defects in vital facilities. The tenant is "in the highly untenable position of having to make a decision he [or she] is highly unqualified to make and then running the risk that his [or her] predetermination was erroneous." Amicus Curiae Brief of the New Jersey Tenants Organization at 8-9, *Berzito v. Gambino*, 63 N.J. 460, 308 A.2d 17 (1973).

A further problem may be the impossibility of finding a contractor or repairperson willing to repair a landlord's property on a tenant's request. Blumberg & Robbins, *Retroactive Abatement: A Landmark Tenant Remedy*, 7 CLEARINGHOUSE REV. 323, 323 (1973).

40. Blumberg & Robbins, *supra* note 39, at 323-24.

41. Unlike the repair and deduct remedy, rent withholding requires the landlord to perform the repairs. Comment, *Implied Warranty of Habitability in Pennsylvania*, 15 DUQUESNE L. REV. 459, 488 (1977).

deposited.⁴² Once repairs are made, the amount withheld is paid to the landlord. Before repairs are made, the tenant continues to live in the uninhabitable dwelling and pay full rent into escrow.⁴³

A third generally accepted remedy is rent abatement.⁴⁴ This remedy decreases the rent owed by the tenant to the diminished value of the premises caused by breach of the implied warranty of habitability.⁴⁵ The relief granted is generally limited, however, to the time the tenant withheld rent rather than the time the landlord failed to maintain habitable quarters.⁴⁶

The tenant's financial risk under these remedies is severe, while the landlord, in the long run, is burdened no more than if he or she had continuously observed the warranty.⁴⁷ Without the tenant assuming

42. This remedy has been enacted by legislatures and by courts. Maryland's statute, for example, provides: "If the landlord refuses to make repairs or correct the conditions, or if after a reasonable time he has failed to do so, the tenant may bring an action of rent escrow to pay rent into court because of the asserted defects or conditions." MD. REAL PROP. CODE ANN. § 8-211(i) (Cum. Supp. 1979).

For a list of additional statutes providing rent withholding as a remedy, see RESTATEMENT (SECOND) OF PROPERTY LAW OF LANDLORD AND TENANT, Statutory Note to Ch. 5, item 3g (1977).

43. A related problem is the potential delay between the time the tenant notifies the landlord of the defect and the time the landlord makes the repairs. Comment, *Implied Warranty of Habitability in Pennsylvania*, *supra* note 41, at 489.

44. This remedy is judicially or statutorily based. For a list of statutes enacting rent abatement as a remedy for breach of the warranty of habitability, see RESTATEMENT (SECOND) OF PROPERTY LAW OF LANDLORD AND TENANT, Statutory Note to Ch. 5, item 3c (1977). The Restatement provides:

If the tenant is entitled to an abatement of the rent, the rent is abated to the amount of that proportion of the rent which the fair rental value after the event giving the right to abate bears to the fair rental value before the event. Abatement is allowed until the default is eliminated or the lease terminates, whichever first occurs.

Id. at § 11.1.

45. Bentley, *supra* note 38, at 873. Proponents of the remedy claim it motivates the landlord to make repairs promptly and to engage in preventative maintenance to avoid the rent abatement remedy. *Id.*

46. See, e.g., *Academy Spires, Inc. v. Brown*, 111 N.J. Super. 477, 268 A.2d 556 (Essex County Ct. 1970). "This narrow application of the rent abatement remedy was based upon the illogical conclusion that the basis of abatement was not the period of time over which a landlord failed to repair but over which the tenant refused to pay rent." Blumberg & Robbins, *supra* note 39, at 324. See generally Bruno, *Rent Abatement: A Reasonable Remedy for Aggrieved Tenants*, 2 SETON HALL L. REV. 357 (1971).

47. Under the repair and deduct remedy, for example, the tenant uses the money not tendered as rent to secure improvements to the landlord's property. Similarly, under the rent withholding remedy, the landlord recovers money initially withheld as

the risks, there is little incentive for the landlord to maintain the property.

II. AFFIRMATIVE TENANT ACTIONS PRIOR TO RETROACTIVE RENT ABATEMENT

Prior to the development of retroactive rent abatement, the few cases in which courts allowed tenants to initiate affirmative actions against landlords for breach of the implied warranty of habitability rested on theories other than breach of contract.⁴⁸ In *William J. Davis v. Slade*,⁴⁹ for example, the court upheld a lower court decision declaring the lease an illegal contract.⁵⁰ The contract was void because the landlord rented the dwelling knowing there were substantial housing code violations.⁵¹ Thus, the tenant successfully brought an action against the landlord to recover rent paid under the void lease.⁵² The District of Columbia Court of Appeals held that, although the landlord was not entitled to a recovery under the lease, he was entitled to the reasonable value of the premises when occupied.⁵³

The lessee sued the landlord for breach of the implied warranty of

soon as the necessary repairs are made. Under the rent abatement remedy the landlord never recovers the rent specified in the lease, nor accrues physical improvements to the property. Rather, the tenant pays for the actual value of the dwelling only; no penalty exists for renting a substandard unit.

48. See 43 U. CIN. L. REV. 197, 198 n.17 (1974).

49. 271 A.2d 412 (D.C. App. Ct. 1970).

50. *Id.* at 413. The issue on appeal was what compensation the tenants owed the landlord under the void lease for use and occupancy of the premises. *Id.*

51. *Id.* at 414, 415. The court relied upon its decision in *Brown v. Southall Realty Co.*, 237 A.2d 834 (D.C. App. Ct. 1968), in determining the contract unenforceable. 271 A.2d at 415.

52. 271 A.2d at 416.

53. *Id.* Because the lease was illegal, the court held that the tenant was one at sufferance. In other words, the tenant maintained possession without the right of title. C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 83-84 (1963). Since this tenancy was legal in the jurisdiction, the tenant owed the landlord the reasonable value of the premises. The court explicitly rejected a quasi-contractual analysis as unavailable in the jurisdiction. 271 A.2d at 416.

In *Glyco v. Schultz*, 62 Ohio Op. 2d 463, 289 N.E.2d 919 (Mun. Ct. 1972) the landlord initiated the action for nonpayment of rent. The court granted the tenant damages for breach of the implied warranty, also based on an illegal contract theory. *Id.* at 924. The landlord violated the county housing code because he failed to maintain a substantially habitable dwelling. The tenant recovered amounts paid in excess of the reasonable value of the rented, defective property. *Id.*

habitability in *Lemle v. Breeden*.⁵⁴ In that case, the tenant abandoned the premises shortly after she had assumed possession and immediately gave notice of her intention to rescind and vacate due to the uninhabitable living conditions.⁵⁵ The court upheld the abandonment because there was no indication the premises would be habitable within a reasonable time.⁵⁶ The court therefore granted the tenant relief based largely on a contract rescission theory. It refused to decide whether the tenant also could recover for constructive eviction under an implied warranty breach.⁵⁷

Although the New Hampshire Supreme Court did not actually acknowledge retroactive rent abatement as a remedy for breach of the warranty, it clearly foreshadowed this development in *Kline v. Burns*.⁵⁸ The tenant sued the landlord for rent paid during occupancy because defects in the apartment violated the local housing code.⁵⁹ After considering several factors,⁶⁰ the court read into the lease an implied warranty of habitability.⁶¹ With virtually no discussion supporting its remedial determination for breach of warranty, the court awarded the tenant damages equal to the difference between the agreed rent and the fair rental value of the occupied premises.⁶²

54. 51 Hawaii 426, 462 P.2d 470 (1969).

55. *Id.* at 428, 462 P.2d at 472.

56. *Id.* at 436, 462 P.2d at 476.

57. The court held for the tenant on the ground that the landlord breached the implied warranty of habitability which justified the tenant's "rescinding the rental agreement and vacating the premises." *Id.* The tenant recovered the money previously paid. *Id.* at 428, 434, 462 P.2d at 472, 475.

58. 111 N.H. 87, 276 A.2d 248 (1971).

59. *Id.* at 89, 276 A.2d at 249. Although the tenant brought the initial action, the landlords subsequently instituted an independent suit to recover rent withheld by the tenant and gain possession. The court consolidated the actions. *Id.* at 88, 276 A.2d at 249.

60. These factors included: legislative recognition that public welfare requires rented dwellings to be maintained in safe and habitable condition; acknowledgement that the landlord is in a better position than the tenant to know the conditions of the premises, realization that because the landlord retains ownership of the premises, he or she should bear the cost of repairs; and belief that the landlord is in a better bargaining position than the tenant. *Id.* at 92, 276 A.2d at 251.

61. The court defined this doctrine to mean "that at the inception of the rental there are no latent defects in facilities vital to the use of the premises for residential purposes and that these essential facilities will remain during the entire term in a condition which makes the property liveable." *Id.* at 92, 276 A.2d at 252.

62. *Id.* at 93-94, 276 A.2d at 252.

III. RETROACTIVE RENT ABATEMENT

In several jurisdictions retroactive rent abatement followed in a logical sequence the recognition of the implied warranty of habitability and the acceptance of tenant defensive remedies. The New Jersey Supreme Court, for example, recognized in 1970 that a residential lease is subject to an implied warranty of habitability and that landlord-tenant relationships are subject to contract principles.⁶³ In that same year another New Jersey court awarded a tenant rent abatement for breach of the warranty.⁶⁴ The tenant was responsible for only the reasonable rental value of the defective premises.⁶⁵

Berzito v. Gambino,⁶⁶ decided by the New Jersey Supreme Court in 1973, was the first decision to apply retroactive rent abatement.⁶⁷ In *Berzito*, the tenant leased an apartment from the defendant in 1968. Two years later, the landlord sued for non-payment of rent.⁶⁸ Finding the landlord had breached his warranty of habitability, the court abated the rent retroactively to the date the tenant began to withhold.⁶⁹ After the tenant vacated the apartment, she initiated a new action to recover rent paid between 1968 and 1970.⁷⁰ The court granted the requested relief.⁷¹

63. *Marini v. Ireland*, 56 N.J. 130, 140-41, 265 A.2d 526, 532-33 (1970). Before this decision, the court in *Reste Realty Corp. v. Cooper*, 53 N.J. 444, 251 A.2d 268 (1969) suggested but did not adopt this doctrine. See Bruno, *supra* note 46, at 357.

64. *Academy Spires, Inc. v. Brown*, 111 N.J. Super. 477, 488, 268 A.2d 556, 562 (Essex County Ct. 1970). Although the *Marini* court held that the tenant could repair and deduct or move, the *Academy Spires* court said the tenant's remedies were not so limited. *Id.* at 484, 268 A.2d at 560.

65. *Id.* at 488, 268 A.2d at 562.

66. 63 N.J. 460, 308 A.2d 17 (1973).

67. *Id.* at 469, 308 A.2d at 22.

68. In defense, the tenant alleged that at the time the terms of the unwritten lease were arranged, the landlord promised to make the premises habitable and make certain repairs. *Id.* at 463-64, 308 A.2d at 19.

69. *Id.* at 463, 308 A.2d at 19.

70. *Id.* at 464, 308 A.2d at 19.

71. [A] tenant may initiate an action against his landlord to recover either part or all of a deposit paid upon the execution and delivery of the lease or part or all of the rent thereafter paid during the term, where he alleges that the lessor has broken his covenant to maintain the premises in habitable condition. In such an action, if the alleged breach on the part of the landlord is proven, the tenant will be charged only with the reasonable rental value of the property in its imperfect condition during his period of occupancy.

Id. at 469, 308 A.2d at 22. For further discussion of *Berzito*, see Blumberg & Robins, *supra* note 39, at 323. See also Case Development, 18 How. L.J. 468 (1974).

In Pennsylvania, recognition of both the implied warranty and retroactive rent abatement occurred in the lower courts in the course of a single year. In 1978, a Pennsylvania superior court rejected *caveat emptor* and adopted the implied warranty of habitability in *Pugh v. Holmes*.⁷² The court also held that contract principles applied to leases.⁷³ Shortly thereafter, another superior court held that an aggrieved tenant could use breach of the warranty as an affirmative complaint.⁷⁴ The court upheld the tenant's right to recover any amount paid in excess of the reasonable rental value.⁷⁵

A. Rationales

Retroactive rent abatement can be viewed on two levels. First, one can consider the doctrine as an application of traditional contract principles to leases.⁷⁶ Section 2-714 of the Uniform Commercial Code provides that a buyer who accepts defective goods and gives the seller notice of the defects may sue for damages.⁷⁷ The buyer recovers based upon the defective goods' value at the time and place of acceptance.⁷⁸ Measurement of the buyer's damages is retroactive; the Code does not limit a buyer's cause of action to defenses and counterclaims. By analogy, therefore, once a court implies the warranty of habitability and allows remedies for its breach, the court also should measure the damages retroactively.⁷⁹

72. 253 Pa. Super. Ct. 76, 384 A.2d 1234 (1978), *aff'd*, — Pa. —, 405 A.2d 897 (1979).

73. *Id.* at —, 384 A.2d at 1240. The court approved the remedies of rent abatement and repair and deduct for warranty breaches. *Id.* at —, 384 A.2d at 1241.

74. *Fair v. Negley*, 257 Pa. Super. Ct. 50, —, 390 A.2d 240, 242 (1978).

75. *Id.* at —, 390 A.2d at 242.

76. In contract law an injured party may bring an action for damages caused by another party's breach retroactive to the time the breach occurred. Blumberg & Robbins, *supra* note 39, at 324, 326.

77. U.C.C. § 2-714(1) (1977).

78. "The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods as accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount." U.C.C. § 2-714(2) (1977).

79. Amicus Curiae Brief of the New Jersey Tenants Organization at 12, *Berzito v. Gambino*, 63 N.J. 460, 308 A.2d 17 (1973).

If one agrees to apply the U.C.C. by analogy to the landlord tenant habitability doctrine, one must also decide which sections to use. If all sections dealing with the quality of goods are relevant, then the waiver provision of § 2-316 is also applicable. This section permits the seller to exclude implied warranties of fitness by a statement in writing. If courts allow similar exclusions in lease agreements, the landlord, argua-

The second level of analyzing retroactive rent abatement extends the already well-accepted remedy of rent abatement. The major distinction between the two theories is that the tenant raises the former as an independent cause of action whereas the latter is a defense to a lawsuit brought by the landlord.⁸⁰ In some instances, there is also a difference in the damage computation.⁸¹ Retroactive rent abatement damages seek to compensate the tenant for rent already paid. In contrast, rent abatement looks to the sum the tenant is withholding.⁸²

Support for retroactive rent abatement is contained in part within the rationales of other breach of warranty of habitability remedies. Like repair and deduct,⁸³ rent withholding,⁸⁴ and rent abatement,⁸⁵ retroactive rent abatement seeks to balance the landlord's and tenant's bargaining powers. Retroactive rent abatement, however, provides the tenant with strategic advantages lacking in the other remedies. Because it is a tenant-initiated action, the tenant can select the litigating forum.⁸⁶ The tenant also can bring suit after the lease has expired when he or she is no longer in possession. Landlord retaliation is thereby restricted.⁸⁷

bly, can escape the habitability requirement. This raises particular problems for statutorily based implied warranties of habitability. For example, simply by adding a sentence saying there are no warranties not explicitly stated in the written lease allows the landlord to circumvent the purpose of the statute. *See also* notes 95-109 and accompanying text *infra*.

80. Plaintiff's Memorandum of Points and Authorities at 10, *Kruse v. Hill*, No. 62936 (Butte County Cal. Super. Ct. March 1, 1978).

81. *See* notes 110-18 *infra*. *Contra*, Plaintiff's Answering Brief at 30, *Brown v. Robyn Realty Co.*, 367 A.2d 183 (Del. Super. Ct. 1976) (jurisdiction's measure of rent abatement is applicable to retroactive rent abatement).

82. Plaintiff's Memorandum of Points and Authorities at 10, *Kruse v. Hill*, No. 62936 (Butte County Cal. Super. Ct. March 1, 1978).

83. *See* notes 37-40 and accompanying text *supra*.

84. *See* notes 41-43 and accompanying text *supra*.

85. *See* notes 44-46 and accompanying text *supra*.

86. This allows the tenant to avoid summary dispossession actions or other negative consequences of the landlord's forum choice. *Beyond URLTA*, *supra* note 5, at 26.

87. *Id.* If the tenant brings suit before expiration of the lease, he or she may stay in possession at least until complete adjudication of the matter. By taking advantage of procedural stall tactics, this may be a considerable time. In a community faced with severe housing shortages this provides an advantage over rent withholding. In the latter case, the landlord can usually initiate immediate action to remove the tenant from the premises. The disadvantage with the former approach, however, is that the tenant must pay the landlord the total originally agreed upon rent.

B. *Jurisdictional Similarities*

Jurisdictions that recognize retroactive rent abatement often require similar prerequisites to stating a cause of action. Most courts require that the tenant notify the landlord of the defect and request its correction. Generally, the tenant must also give reasonable notice.⁸⁸ Although courts give little explanation for this requirement, it clearly derives from contract law. Section 2-607(a) of the Uniform Commercial Code,⁸⁹ for example, provides that a buyer, after acceptance of tender, must notify the seller within a reasonable time following discovery of any breach. Failure to do so precludes any remedial relief.⁹⁰

Courts do not distinguish between defects that exist prior to and those that arise during tenancy. Failure to make this distinction is a mistake. If the tenant fails to apprise the landlord of the defective condition when he or she takes possession or within a reasonable time thereafter, the landlord is not liable for its repair. Thus, failure to give notice effectively waives the landlord's responsibility. It is the landlord's burden, however, to warrant habitability. There are several reasons why this burden should not be shifted to the tenant for failure to give notice. First, the tenant may be unable to discover material defects prior to or immediately after taking possession. Second, requiring the tenant to notify the landlord of such defects prior to occupancy may cause the landlord to refuse to let the premises to that tenant, fearing a future troublemaker. Finally, allowing the landlord to escape his or her responsibility provides little incentive to repair before the tenant takes possession.⁹¹

The notice requirement is sensible, however, when the defect arises after the tenant has occupied the dwelling. As the landlord will not know of the condition without prior notice, requiring the landlord to

88. See, e.g., *Quevedo v. Brago*, 72 Cal. App. 3d 1, 8, 140 Cal. Rptr. 143, 147 (App. Dep't Super. Ct. 1977) (tenant must allege notice was given to landlord); *Berzito v. Gambino*, 63 N.J. 460, 469, 308 A.2d 17, 22 (1973) (tenant must give landlord positive and reasonable notice of defect).

89. U.C.C. § 2-607(3)(a) (1978).

90. *Id.* This requirement also may be a carryover from other tenant remedies for warranty breaches. The court in *Pugh* held that in order to assert a defense or counterclaim of breach of the implied warranty of habitability, the tenant must prove he or she notified the landlord of the defect. 253 Pa. Super. Ct. 76, —, 384 A.2d 1234, 1241 (1978), *aff'd*, — Pa. —, 405 A.2d 897 (1979).

91. Given the possibility that the tenant will not notify at all or within a reasonable time, the landlord may wait and take the chance that he or she does not have to repair. This clearly defeats the purpose of the warranty.

uncover defects in occupied premises would impose an unnecessarily harsh burden.

Additionally, to state a cause of action, a tenant must provide the landlord reasonable opportunity to make repairs.⁹² The tenant must also observe the state statute of limitations applicable to contract law.⁹³ Lastly, the tenant must not have caused the defect in order to bring a suit for retroactive rent abatement.⁹⁴

C. *Waiver of Warranty*

In addition to the waiver of relief for failure to notify the landlord, two other waiver questions exist in retroactive rent abatement cases. The first is whether a tenant waives patent defects present at the tenancy's inception because he or she accepted the premises in that condition. The second is whether a tenant waives relief rights because he or she remained in possession and paid full rent after the breach occurred.⁹⁵

Under the Uniform Commercial Code, a buyer waives the right to an implied warranty of merchantability if he or she knowingly accepts defective goods.⁹⁶ By analogy, the tenant arguably waives the right to the habitability warranty if he or she knows of the dwelling's

92. *See, e.g.*, *Quevedo v. Brago*, 72 Cal. App. 3d 1, 8, 140 Cal. Rptr. 143, 147 (App. Dep't Super. Ct. 1977) (landlord must have reasonable time to correct condition while tenant remains in possession); *Berzito v. Gambino*, 63 N.J. 460, 469, 308 A.2d 17, 22 (1973) (reasonable time to correct defect is a prerequisite to maintaining the action); *Fair v. Negley*, 257 Pa. Super. Ct. 50, 390 A.2d 240 (1978) (landlord must have reasonable opportunity to correct defects).

93. *Blumberg & Robbins*, *supra* note 39, at 324. Additionally, the tenant may begin the suit during or after occupancy or lease expiration. *Beyond URLTA*, *supra* note 5, at 26.

94. *See, e.g.*, *Berzito v. Gambino*, 63 N.J. 460, 472, 308 A.2d 17, 23 (1973) (proof that tenant was at fault is cause to dismiss action).

95. 43 U. CIN. L. REV. 197, 200 (1973). Whether the landlord and tenant can agree in the written lease that the tenant rents the dwelling in an "as is" condition presents a third possible waiver issue. By drawing an analogy to the Uniform Commercial Code § 2-316, the parties to a written contract can expressly exclude implied covenants. Unlike the U.C.C., however, courts and legislatures have mandated and defined the implied warranty of habitability. Allowing private parties to agree to waive this warranty permits avoidance of legal obligations such as housing codes, enacted for the public good. *See also* note 79 *supra*. *See generally Housing Policy*, *supra* note 19, at 32.

96. U.C.C. § 2-316(3)(b) (1977). The U.C.C., however, recognizes an exception to this rule; the waiver cannot be unconscionable. U.C.C. § 2-302 (1977). *See also* 43 U. CIN. L. REV. 197, 201 (1973).

defects upon occupancy.⁹⁷ In *Quevedo v. Brago*,⁹⁸ a California appellate court held that if the tenant knew of a defective condition at the start of tenancy, he or she waived any right to relief.⁹⁹ The *Quevedo* court neglected to explain why a lack of knowledge was a requirement for relief.¹⁰⁰

Recognizing the tenant's unfair burden under the *Quevedo* decision, a California superior court in *Kruse v. Hill*¹⁰¹ refused to adopt this requirement.¹⁰² The burden, like those imposed upon the tenant under the *caveat emptor* doctrine, allows the landlord to avoid liability by disclosing the dwelling's faults prior to rental. This places the tenant, facing a short supply of housing, in a "take it as is or leave it" position,¹⁰³ a position which undercuts public policies favoring safe and sanitary housing. It allows rentals of uninhabitable dwellings in violation of case precedents and statutes.¹⁰⁴

Denying a tenant a cause of action because he or she paid full rent also contravenes public policy. Such an estoppel ignores housing shortage problems. Because suitable alternative housing does not exist, the tenant must pay full rent. Otherwise, he or she may face landlord retaliation for self-initiated rent alterations.¹⁰⁵ Even if retaliation is not a threat, the tenant may be unaware of the availabil-

97. The trial court in *Fair v. Negley* found such a waiver based on U.C.C. § 2-316. Noting that the landlord-tenant relationship differs from sale of good contracts, the appellate court reversed. 257 Pa. Super. Ct. 50, —, 390 A.2d 240, 243 (1978). See also [August/September 1978] 8 LAW PROJECT BULL. (Nat'l Housing L. Project). See also note 79 *supra*.

98. 72 Cal. App. 3d 1, 140 Cal. Rptr. 143 (App. Dep't Super. Ct. 1977).

99. *Id.* at 7, 140 Cal. Rptr. at 147.

100. The court's discussion of this requirement was dictum. At issue was whether "a breach of implied warranty of habitability gives rise to an affirmative cause of action for damages." *Id.* at 5, 140 Cal. Rptr. at 145.

101. No. 62936 (Butte County Cal. Super. Ct. Mar. 1, 1978).

102. *Id.*

103. Plaintiff's Memorandum of Points and Authorities at 19, *Kruse v. Hill*, No. 62936 (Butte County Cal. Super. Ct. Mar. 1, 1978).

104. Adoption of this waiver "would amount not only to a waiver of the implied warranty of habitability, but of the state and local housing code standards as well." *Id.*

Cf. *Teller v. McCoy*, — W. Va. —, —, 253 S.E.2d 114, 131 (1979) (when tenant raises breach of implied warranty of habitability as a defense, allegations that tenant waived the warranty are against public policy). *Contra*, *Kline v. Burns*, 111 N.H. 87, 93, 276 A.2d 248, 252 (1971) (court may consider whether tenant waived defects in determining whether landlord breached warranty of habitability).

105. In retaliation for the tenant's failure to pay all or part of the rent, the land-

ity of other remedies. When this occurs, the tenant's waiver of the right to retroactive rent abatement is hardly knowingly and voluntarily made.¹⁰⁶ Fortunately, only the *Quevedo*¹⁰⁷ court acknowledged this waiver. In contrast, the *Berzito*¹⁰⁸ court clearly rejected the possible waiver as a landlord defense to a tenant's affirmative action.¹⁰⁹

D. *Measure of Damages*

A warranty has no value unless there exist means to compensate those injured by its breach. Thus, a court must consider the measure of damages for retroactive rent abatement. Case law indicates two such measures based upon traditional measures for breach of the implied warranty of habitability. The *Berzito*¹¹⁰ court measured the difference in value between the contract rent and the fair rental value in the deteriorated condition.¹¹¹ Under a second approach, the *Kruse*¹¹² court applied a percentage-loss-of-use theory¹¹³ by awarding the tenant an amount equal to the "difference between the value of what the tenant should have received (in consideration for paying

lord may sue for rent owed under the lease or begin proceedings to evict the tenant. *Beyond URLTA*, *supra* note 5, at 25-26.

106. "[C]ontinued payments due to ignorance of the availability of the remedies cannot be deemed a knowing and voluntary waiver of the right to retroactive rent abatement." *Id.*

107. 72 Cal. App. 3d 1, 140 Cal. Rptr. 143 (App. Dep't Super. Ct. 1977).

108. 63 N.J. 460, 308 A.2d 17 (1973).

109. *Id.* at 473, 308 A.2d at 24. For additional discussion of waivers of implied warranty of habitability, not limited to the retroactive rent abatement context, see Cunningham, *supra* note 19, at 95-97.

110. 63 N.J. 460, 308 A.2d 17 (1973).

111. *Id.* at 469, 308 A.2d at 22. *See also* *Quevedo v. Brago*, 72 Cal. App. 3d 1, 8, 140 Cal. Rptr. 143, 147 (App. Dep't Super. Ct. 1977) (damages should reflect the difference between the rent paid during existence of the unfit condition and the reasonable rent). *See also* *Housing Policy*, *supra* note 19, at 20-21.

For other cases in which courts have applied similar damage measures for breach of the warranty, though not under a retroactive rent abatement theory, see *Kline v. Burns*, 111 N.H. 87, 93-94, 276 A.2d 248, 252 (1971) (rent liability equals difference between agreed rent and premises' value while occupied); *Glyco v. Schultz*, 62 Ohio Op. 2d 459, 463, 289 N.E.2d 919, 925 (Mun. Ct. 1972) (landlord is entitled only to reasonable rental value of premises).

112. *Kruse v. Hill*, No. 62936 (Butte County Cal. Super. Ct. Mar. 1, 1978).

113. This theory seeks establishment of damages "based on the tenant's loss of use of the premises and facilities. The loss, once proven, is reduced to a percentage figure which is multiplied by the contract or lease rent and subtracted therefrom." Plaintiff's Answering Brief at 27, *Brown v. Robyn Realty Co.*, 367 A.2d 183 (Del. Super. Ct. 1976).

the agreed upon rent) and the fair value of what the tenant in fact received (for which the tenant is obliged to pay 'reasonable rent')."¹¹⁴

Both approaches involve uncertainties. The first measure is probably more difficult and expensive to ascertain because it may require expert testimony to determine market values.¹¹⁵ The percentage reduction valuation looks to the individual tenant's loss of use and enjoyment, thereby limiting the need for expert testimony. More importantly, this measure more accurately reflects the injured tenant's losses.¹¹⁶ If the aim of damage awards is to return the injured party to the position he or she would have held had there been no injury,¹¹⁷ then the percentage-loss-of-use theory is preferable.¹¹⁸

E. *Effects of Adopting Retroactive Rent Abatement*

At least two purposes are inherent in a judicial or legislative adoption of remedies for breach of the implied warranty of habitability. First, the remedies seek to compensate injured tenants on an individual basis. On a broader scale, underlying the recognition of the implied warranty and application of its accompanying remedies is a public policy of maintaining decent housing stock. It is unfortunate,

114. Brief in Support of Defendant's Motion on Remand for an Order Granting a Money Judgment on Defendant's Counterclaim at 7-8, *Panos v. Cruz*, No. 938-022 (Milwaukee, Wisc. County Ct. March 3, 1978). Although the tenant in *Panos* did not initiate the lawsuit, she did seek retroactive rent abatement.

115. [April/May 1978] 8 LAW PROJECT BULL. (Nat'l Housing L. Project) 7, 9; Plaintiff's Answering Brief at 28, *Brown v. Robyn Realty Co.*, 367 A.2d 183 (Del. Super. Ct. 1976).

Arguably this measure is inconsistent with the purposes behind the implied warranty of habitability. The fair rental value theory "is premised upon the fiction of a willing lessor and lessee bargaining in a voluntary transaction, and its operation virtually immunizes a landlord from damages necessary to enforce the implied warranty and compensate the tenant." Based on surveys of the locale's rental rates, the measure is likely to reflect rents received for other deteriorated housing in the area. Because housing shortages inflate the rents of these uninhabitable dwellings, the difference between the amount used as fair rental and the contract price may be slight. 55 CHI.-KENT L. REV. 337, 347-48 (1979). See note 118 *supra*.

116. This measure attempts to put the tenant back to the financial position he or she would have been in had the rent agreed upon actually reflected the value of the leasehold. *Pugh v. Holmes*. — Pa. —, —, 405 A.2d 897, 909 (1979).

117. *McKenna v. Begin*, 5 Mass. App. Ct. 304, 362 N.E.2d 548 (1977).

118. The percentage-loss-of-use measure, however, is far from ideal. The court must still decide some means to arrive at the percentages. Perhaps the testimony of the tenants as to the effect on their use and enjoyment the conditions had on the dwelling would be sufficient. See 55 CHI.-KENT L. REV. 337 (1979). Unfortunately, this valuation makes objective and verifiable criteria impossible.

though probable, that these goals conflict, thereby limiting the effectiveness of the tenant remedies.¹¹⁹ Examination of retroactive rent abatement illustrates this point.

Retroactive rent abatement speaks directly to the first goal by providing monetary compensation to injured tenants who have lived in an uninhabitable dwelling. Inevitably it will affect the balance of power between the landlord and the tenant. For example, the threat of a tenant-initiated suit will improve the tenant's clout when negotiating for repairs.¹²⁰ Hopefully, this will provide landlords with an incentive to maintain their property rather than face possible court action.¹²¹

The incentive, though, will likely be on a relatively small scale. Generally, landlords receive little incentive to improve existing housing or to prevent further deterioration from retroactive rent abatement. The remedy may impose economic sanctions so severe the landlord will be forced out of business.¹²² The landlord may not have sufficient resources to pay the injured tenant and to repair the defects causing the uninhabitable conditions. This must ultimately have a detrimental effect on the general housing stock.¹²³ Even when sufficient funds are available, retroactive rent abatement provides no

119. In addition, there exists a basic conflict of interest. The tenant wants a habitable dwelling and one that meets his or her financial restrictions. The landlord, on the other hand, wants to make a profit from the property owned. Note, *Landlord-Tenant Reform—Implied Warranty of Habitability: Effects and Effectiveness of Remedies for Its Breach*, 5 TEX. TECH. L. REV. 749, 750-51 (1974).

120. See Blumberg & Robbins, *supra* note 39, at 326.

121. "The possibility of resort to these remedies by tenants may prevent landlords from allowing their premises to deteriorate and may provide additional incentives for the maintenance of an acceptable level of decent housing." *Beyond URLTA*, *supra* note 5, at 26.

122. Critics of retroactive rent abatement argue that the remedy may cause foreclosures, bankruptcy or abandonment by landlords. Amicus Curiae Brief of the New Jersey Tenants Organization at 36-37, *Berzito v. Gambino*, 63 N.J. 460, 308 A.2d 17 (1973).

123. Although no one has yet empirically studied evaluating the economic impact of retroactive rent abatement, there are several studies concerning the overall impact of the implied warranty of habitability. Observers assert that the implied warranty of habitability increases the landlord's financial burden. To compensate for increased costs, the landlord must either increase the rent charged, recover smaller profits or abandon the building. Hirsch, Hirsch & Margolis, *Regression Analysis of the Effects of Habitability Laws Upon Rent: An Empirical Observation on the Ackerman-Komesar Debate*, 63 CAL. L. REV. 1098, 1099 (1975). After conducting an empirical study on the effect of habitability requirements on rent, the authors concluded there was no significant relationship between repair and deduct and rent withholding, and the rent

guarantee that the landlord will expend the funds in this area.¹²⁴ In addition, there is the threat of landlord abandonment.¹²⁵ Thus, it is impossible to expect this new remedy to promote the second goal.

Examined as a remedy solely aimed at assisting individual tenants, problems still remain with retroactive rent abatement. Like other remedies for warranty breaches, it may be ineffective because of the possible infrequency of its use. Because it is an affirmative action, if the aggrieved tenant is unaware of the action, it cannot be used.¹²⁶ One solution is to increase tenants' awareness of their rights to decent housing. This may encourage tenants who lease substandard dwellings to seek legal assistance. At this point, the lawyer must assume the responsibility to aggressively pursue relief on behalf of the injured tenant. Without each of these steps, retroactive rent abatement will remain an empty source of relief.¹²⁷

The importance of retroactive rent abatement, however, cannot be dismissed because of its several flaws. It represents the first affirmative cause of action recognized by a significant number of courts which allows tenant recovery for landlords' breach of the implied

charged the tenant. The authors cautioned, however, that this result might differ with increased use of these tenant remedies. *Id.* at 1139.

For additional discussion of the economic effects of the implied warranty of habitability, see Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Code Enforcement and the Poor*, 80 YALE L.J. 1093 (1971); Komesar, *Return to Slumville—A Critique of the Ackerman Analysis of Housing Code Enforcement and the Poor*, 82 YALE L.J. 1175 (1973).

124. Retroactive rent abatement does not force the landlord to maintain his property in habitable condition. As one critic of rent abatement stated, the remedy "does not provide heat." Ventantonio, "Equal Justice Under the Law": *The Evolution of a National Commitment to Legal Services for the Poor and a Study of Its Impact on New Jersey Landlord-Tenant Law*, 7 SETON HALL L. REV. 233, 272 (1976).

125. See generally G. STERNLIEB & R. BURCHELL, *RESIDENTIAL ABANDONMENT: THE TENEMENT LANDLORD REVISITED* (1973); Meyers, *The Covenant of Habitability and the American Law Institute*, 27 STAN. L. REV. 879, 894 (1974-75). See also note 32 *supra*.

126. The tenant seeks the other remedies as part of a defense, counterclaim or setoff. In such cases the tenant, once served, will probably consult an attorney. The lawyer, thus, will apprise the tenant of the available remedies. Because retroactive rent abatement is sought in an affirmative action, the tenant may not know enough to consult an attorney.

127. The limited number of courts that have recognized a tenant's right to an affirmative action for breach of the implied warranty of habitability indicates another possible solution: Legislative enactment of retroactive rent abatement. As a remedy it may increase public awareness of this cause of action and may clarify uncertainties surrounding its application.

warranty of habitability. Its recognition may foreshadow judicial willingness to grant other relief, such as injunctions, to tenants who initiate actions against landlords for warranty breaches.

IV. CONCLUSION

The ultimate effect of retroactive rent abatement is uncertain. Its effect largely depends on the resolution of issues such as notice, waivers and damage measures. Resolution of such issues, however, will not solve the long range problems of housing shortages and housing stock deterioration. Thus, like the previously well-accepted remedies of repair and deduct, rent withholding, and rent abatement, the utility of retroactive rent abatement as a remedy for breach of the implied warranty of habitability will remain limited.