EXPANDING THE IMPLIED WARRANTY OF HABITABILITY: *KNIGHT v. HALLSTHAMMER*

State housing laws have recently imposed an increasing number of responsibilities upon landlords.[1] Many state legislatures now specify minimum standards of habitability by requiring landlords to maintain both new and existing housing units at an acceptable level.[2] These statutory requirements are often supplemented by judicially imposed habitability standards.[3] The California Supreme Court, in an early attempt to improve the living conditions of tenants, imposed

1. *See, e.g.*, MASS. ANN. LAWS ch. 186, § 14 (Law Co-op. 1981) (penalty on lessor for failure to furnish water, heat, etc.; waivers by tenant prohibited; any lessor or landlord who indirectly or directly interferes with one's quiet enjoyment of any residential premises by the occupant or who attempts to regain possession without benefit of judicial process shall be punished by a fine of not less than $25 nor more than $300, or by imprisonment for not more than six months); MICH. STAT. ANN. §§ 26.1109a, .1109b (Callaghan 1970) (in every lease or license of residential premises, the lessor or licensor convenants: (a) that the premises and all common areas are fit for the use intended by the parties; (b) to keep the premises in reasonable repair during the term of the lease or license, and to comply with the applicable health and safety laws of the state and of the local unit of government where the premises are located).

The California housing law and local housing codes require that the landlord maintain the premises in a "sound structural condition." M. MOSKOVITZ, CALIFORNIA TENANTS' HANDBOOK 79 (1972). Accordingly, the landlord must maintain the roof, plumbing, and heating facilities. Additionally, he must maintain the common areas of the premises under his control and subject to use by all tenants (i.e. stairways and halls) in a clean, sanitary and safe condition, which includes insect and rodent control and eradication. *Id.*

2. *See supra* note 1. The California legislature has specified the minimum standard to which landlords must adhere. For the applicable California housing code, see CAL. CIV. CODE § 1941 (Deering 1981), which states that to make a dwelling-house fit for its purpose: "The lessor . . . must in the absence of an agreement to the contrary, put it into a condition fit for occupation, and repair all subsequent dilapidations thereof, which render it untenantable . . ."; *id.* § 1941.1 (listing of specified housing requirements for determining whether dwelling tenantable); *id.* § 1941.2 (tenant's violations as excusing landlord's duties under § 1941 or § 1942); *id.* § 1942 (lessee's right to make repairs when dwelling uninhabitable); *id.* § 1942.1 (agreement to waive tenants' rights under § 1941 or § 1942 prohibited).

3. *See* Abbott, *Housing Policy, Housing Codes and Tenant Remedies: An Integration*, 56 B.U.L. REV. 1, 2, 17 (1976); Note, *The Great* Green *Hope: The Implied Warranty of Habitability in Practice*, 28 STAN. L. REV. 729, 732 (1976).

upon landlords an implied warranty of habitability.[4] This implied warranty forces landlords to maintain leased premises in habitable condition, but does not guarantee new tenants habitable apartments.[5] Further, the warranty typically ensures that landlords must repair defects that develop during the tenancy, but does not hold landlords responsible for defects that exist at the inception of the tenancy.[6] In *Knight v. Hallsthammer*,[7] however, the California Supreme Court expanded the prevailing implied warranty doctrine by holding that a landlord must make leased premises habitable at the inception of the tenancy, regardless of whether the tenant knew of defects existing before obtaining possession.[8]

In *Knight v. Hallsthammer*, the plaintiff-landlord increased the rent[9] in his newly acquired apartment building.[10] In protest over the

4. *See* Green v. Superior Court, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 104 (1974).

The inclusion of an implied warranty of habitability in leases accomplishes three things. First, it does away with *caveat emptor* (*see supra* notes 17-19 and accompanying text) by holding the landlord responsible to the tenant for even patent defects that existed at the inception of tenancy. Second, it abolishes the no-repair rule by imposing upon the landlord an obligation to repair. Third, it changes formally independent covenants (e.g., maintenance and rent payment) to interdependent covenants. Moskovitz, *Rent Withholding and the Implied Warranty of Habitability—Some New Breakthroughs*, 4 CLEARINGHOUSE REV. 49, 67 (1970). Comment, *Landlord and Tenant: Repairing the Duty to Repair*, 11 SANTA CLARA LAW. 298, 315 (1971); *See generally*, Myers, *The Covenant of Habitability and the American Law Institute*, 27 STAN. L. REV. 879 (1975).

5. Historically, a tenant who moved into an "uninhabitable apartment" had no recourse against the landlord. A tenant could bring an affirmative cause of action for the breach of an implied warranty of habitability only if the defective condition was unknown to the tenant at the beginning of the occupancy. *See* Myers, *supra* note 4, at 767.

Prior to *Knight*, many courts had declined to find a breach of the implied warranty of habitability when the tenant knew of the conditions at the inception of the lease. In Quevedo v. Braga, 72 Cal. App. 3d Supp. 1, 140 Cal. Rptr. 143 (1977), the court refused to recognize an implied warranty of habitability for any tenant knowingly moving into substandard housing. The court also denied the tenant the right to use nonpayment of rent as a means to obtain a habitable apartment. *Id.* at 2, 140 Cal. Rptr. at 144. In Knight v. Hallsthammer, 29 Cal. 3d 46, 623 P.2d 268, 171 Cal. Rptr. 707 (1981), the court rejected the *Quevedo* requirements and overruled the decision.

6. *See* Myers, *supra* note 4, at 776.

7. 29 Cal. 3d 46, 623 P.2d 268, 171 Cal. Rptr. 707 (1981).

8. *Id.* at 54, 623 P.2d at 269, 171 Cal. Rptr. at 708.

9. Knight served the tenants with rental increase notices effective July 1, 1977. Knight then raised Hallsthammer's rent from $125 per month to $255 per month, a $130 per month increase. Brief for Appellee at 5. *See* Knight v. Hallsthammer, 29 Cal. 3d 46, 50, 623 P.2d 268, 270, 171 Cal. Rptr. 707, 709 (1981).

building's state of disrepair and the rent increase, the defendant-tenant withheld his rental payments. The landlord subsequently instituted an unlawful detainer action[11] against the tenant in arrears. In defense of the suit, the tenant invoked the implied warranty of habitability theory.[12] Unpersuaded by the tenant's argument, the trial court rendered judgment in favor of the landlord.[13] The tenant argued on appeal that a lessee has no obligation to pay rent when the landlord fails to provide a habitable apartment, even if the lessee had knowledge of the defects at the inception of the lease.[14] The Califor-

10. 29 Cal. 3d at 55, 623 P.2d at 270, 171 Cal. Rptr. at 709. In applying contract principles to this case, the court allowed tenants to assert against a successor landlord any defense they had against the previous landlords. *Id.* at 57, 623 P.2d at 273, 171 Cal. Rptr. at 714. Such a policy is consistent with the holding in Doll v. Maravillas, 82 Cal. App. 2d 943, 949, 187 P.2d 885, 888 (1947). In *Doll*, the court answered a similar question and held the successor landlord to the prior owner's interpretation of the lease. Thus, the new landlord could gain no better position than the previous landlord. *See also* Scholey v. Stelle, 59 Cal. App. 2d 402, 405, 138 P.2d 733, 734 (1943).

11. 29 Cal. 3d at 55, 623 P.2d at 270, 171 Cal. Rptr. at 709. The unlawful detainer statutes make summary procedure available for terminating a lease and evicting a tenant who has refused to vacate. A court will find a tenant guilty of unlawful detainer when he continues in possession after the end of the rental term or when he defaults on rental payments after having received notice. *See* Harney, *Unlawful Detainer: Synopsis of California Law and Constitutional Considerations*, 44 S. CAL. L. REV. 768, 769 (1971).

The California Code of Civil Procedure outlines five circumstances in which a court will find a tenant guilty of unlawful detainer: first, when a tenant remains in possession beyond the specified rental term, CAL. CIV. PROC. CODE § 1161(1) (West 1972); second, if the tenant defaults in the payment of rent, and landlord serves tenant with the proper notice, *id.* § 1161(2); third, if the tenant fails to perform a covenant or agreement in the lease and after notice still refuses to both perform or leave, *id.* § 1161(3); fourth, if the tenant commits waste or uses the premises for an illegal purpose and the tenant remains in possession after having been served with the proper notice, *id.* § 1161(4); fifth, if the tenant gives the landlord a "30-days' notice" of termination (of a month-to-month tenancy or tenancy of unspecified duration), CAL. CIV. CODE § 1946 (Deering 1981) or if the tenant informs the landlord (in writing) of his intention to surrender the apartment and the landlord accepts (also in writing), but the tenant stays beyond the specified date, CAL. CIV. PROC. CODE § 1161(5) (Deering 1981). If the court finds the tenant guilty of having unlawfully detained, the court will reinstate the landlord's right to possession and hold the tenant liable for rent owed, as well as for any damages incurred by the tenant's actions. The court in *Knight v. Hallsthammer* held that the tenants may defend an unlawful detainer action against a current owner of the basis of the former landlord's breach of his implied warranty of habitability. 29 Cal. 3d at 52, 623 P.2d at 271, 171 Cal. Rptr. at 710.

12. 29 Cal. 3d at 50, 623 P.2d at 270, 171 Cal. Rptr. at 709.

13. *Id.* at 51, 623 P.2d at 271, 171 Cal. Rptr. at 710.

14. *Id.* at 55, 623 P.2d at 273, 171 Cal. Rptr. at 712.

nia Supreme Court accepted the tenant's argument and reversed the trial court's decision.[15]

Until recently, courts viewed a lease as a conveyance of property[16] subject to the principle of *caveat emptor*.[17] The landlord had no duty to make the leased premises habitable at the inception of the tenancy, nor any duty to correct the premises if it subsequently fell into disrepair.[18] The doctrine of *caveat emptor* assumes that the tenant has made a careful inspection of the premises, has discovered all of its defects and has assumed full responsibility for their repair.[19] In return, the landlord warrants the tenant's legal right to possession and quiet enjoyment.

After centuries of uncritical acceptance, courts have slowly aban-

15. *Id.* at 59, 623 P.2d at 276, 171 Cal. Rptr. at 715. The court stated:
> The same reasons which imply the existence of the warranty of habitability—the inequality of bargaining power, the shortage of housing, and the impracticability of imposing upon tenants a duty of inspection—also compel the conclusion that a tenant's lack of knowledge of defects is not a prerequisite to the landlord's breach of the warrant.

29 Cal. 3d at 55, 623 P.2d at 273, 171 Cal. Rptr. at 712.

16. Courts usually acknowledge that a lease of real property is a combination of property and contract doctrines. D. HILL, LANDLORD AND TENANT LAW 8 (1940).

17. *Caveat emptor* translates as "let the buyer beware." This maxim summarizes the rule that a purchaser must examine, judge and test for himself. BLACK'S LAW DICTIONARY 202 (5th ed. 1965). *See also* D. HILL, *supra* note 16, at 110-117; R. POWELL, *The Law of Real Property* 300 (P. Rohan ed. 1974); Bearman, *Caveat Emptor in Sales of Realty—Recent Assaults Upon the Rule*, 14 VAND. L. REV. 541 (1961); Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133 (1931) (an in-depth discussion of the origin of the doctrine). For a further definition and discussion of the evolution and development of the doctrine, see generally Loeb, Hinson v. Delis: *California Adopts the Implied Warranty of Habitability*, 24 HASTINGS L.J. 374 (1973); Moskovitz, *The Implied Warranty of Habitability: A New Doctrine Raising New Issues*, 62 CALIF. L. REV. 1445 (1974); Myers, *supra*, note 4, at 34; Quinn, *The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future*, 38 FORDHAM L. REV. 225 (1969) Comment, *supra* note 4, at 298-306.

18. D. HILL, *supra* note 16, at 111. *See also* Comment, *supra* note 4, at 299.

19. *See* Abbott, *supra* note 3, at 19; Quinn, *supra* note 17. The common law rule of *caveat emptor* functions most efficiently in an agrarian society, where the responsibility of maintenance and repair is most sensibly allocated to the occupant-farmer rather than the owner-*bourgeoise*. *See* D. HILL, *supra* note 16, at 111; Comment, *supra* note 4, at 302. People in agrarian societies viewed structures on the land as incidental to the lease. *See* Moskovitz, *supra* note 17 at 1445. Because courts viewed the lease as a conveyance, the covenants of the landlord and tenant were mutually independent of each other. Regardless of the condition of the premises, the tenant paid his rent. If the landlord breached an express covenant, the independent covenant rule forced the tenant to pay rent. *See* Moskovitz, *supra* note 17, at 1445; Myers, *supra* note 4, at 34.

doned *caveat emptor* in landlord-tenant relations in favor of an implied warranty of habitability.[20] The new doctrine better reflects the requirements of an increasingly urban population.[21] The implied

20. Many decisions have recognized the implied warranty of habitability. *See, e.g.*, Brown v. Southall Realty Co., 237 A.2d 834 (D.C. Mun. App. 1968) (if the landlord is aware of housing regulation violations at the time the lease is signed, yet fails to correct them, the lease becomes illegal and void); Lemle v. Breeden, 51 Hawaii 426, 462 P.2d 470 (1969) (due to landlord's constructive eviction and breach of his implied warranty of fitness, tenant could recover both his deposit and rent payments from the landlord); Steele v. Latimer, 214 Kan. 329, 521 P.2d 304 (1974) (rejected the common law doctrine of *caveat emptor* and impliedly incorporated the provisions of the municipal housing code into a lease agreement); Kline v. Burns, 111 N.H. 87, 276 A.2d 248 (1971) (specifically rejected *caveat emptor* and, in holding for the tenant, reiterated the legislatures' public policy commitment of insuring adequate housing for all tenants); Amanuennsis Ltd. v. Brown, 65 Misc. 2d 15, 318 N.Y.S.2d 11 (1971) (held that landlord cannot recover rent if there are "rent-impairing violations placed against the apartment); Pugh v. Holms, 486 Pa 272, 405 A.2d 897 (1979) (a tenant may assert an implied warranty of habitability at both the inception of the tenancy and throughout its duration); Pines v. Perssion, 14 Wis. 2d 590 (1961) (landlord in breach of warranty ordered to supply tenants with a habitable furnished house and adjudged to be liable for rent paid).

Public policy considerations are often the basis for a court's decision to equip tenants with the implied warranty of habitability and compel landlords to be primarily responsible for maintaining habitable dwellings. In Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961), the court stated:

> To follow the old rules of no implied warranty of habitability in leases would, in our opinion, be inconsistent with the current legislative policy concerning housing standards. The need and social desirability of adequate housing for people in this era of rapid population increases is too important to be rebuffed by that obnoxious legal cliché, *caveat emptor*.

Id. at 596, 111 N.W.2d at 412-13. *See also* Henrioulle v. Marin Ventures, Inc., 20 Cal. 3d 512, 573 P.2d 4651, 143 Cal. Rptr. 247 (1978); Green v. Superior Court, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974).

21. Most contemporary leases are for urban apartments. Tenants, therefore, are more interested in the condition of the apartment than of the surrounding land. This is contrary to the circumstances influencing the common law doctrine. *See supra* note 19. *See also* D. HILL, *supra* note 16, at 114. The court in Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970), recognized the expectations of modern residential lessees:

> When American city dwellers, both rich and poor, seek "shelter" today, they seek a well-known package of goods and services—a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation and proper maintenance.

Id. at 1074. Proper repair of these apartments requires skills that the average tenant lacks. Moskovitz, *supra* note 17, at 1445. The court in Green v. Superior Court, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974), took judicial notice of these changing societal needs and developments. The court discussed: 1) the scarcity of adequate low-cost housing, leaving tenants little bargaining power to negotiate for

warranty of habitability requires the landlord to maintain leased property in a habitable condition.[22] Most courts, in accepting the implied warranty theory, adopt the standards of the state housing code and impliedly incorporate the housing code requirements into the lease agreement,[23] thus creating private enforceable contract rights for the tenant.[24]

Two decades ago, the Supreme Court of Wisconsin was the first court to adopt the implied warranty of habitability. In *Pines v. Perssion*,[25] the court held that the landlord's breach of the implied warranty of habitability relieved the lessees of any obligation to pay rent.[26] In *Pines*, the leased premises were filthy and without the promised furnishings. Additionally, a city building department in-

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proper maintenance and repair; 2) the widespread enactment of comprehensive housing codes in the past 50 years, demonstrating legislative recognition of the problem and the landlord's duty; 3) the developmental surge in consumer rights (including the application of implied warranty theories to real estate transactions); and 4) the recent adoption of the implied warranty doctrine by the highest courts of seven states and the District of Columbia. Moskovitz, *supra* note 17, at 1445.

22. *See* Abbott, *supra* note 3, at 12-13.

23. Some cases base the implied warranty standard only on public policy considerations. Other cases imply the warranty on the sole basis of existing housing codes. *See* Myers, *supra* note 4, at 901. Each theory has its advantages and disadvantages. In jurisdictions that rely heavily on the housing code provisions, there is more certainty in deciding if a breach has occurred. These jurisdictions, however, recognize only substantial violations of the housing code as a breach.

Tenants must also be aware that the stringency of housing codes vary in different locales. Courts have much greater latitude in jurisdictions that incorporate their public policy goals into their implied warranty of habitability. In these jurisdictions, courts have more freedom to decide the standard of habitability and what defects constitute a breach of the warranty. *See* D. HILL, *supra* note 16, at 121, 122.

24. Courts often rely on the applicable housing code in determining the habitability of a dwelling. *See, e.g.*, Javins v. First Nat'l Realty Corp., 428 F. 2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970). In *Javins*, the court stated that they would measure the warranty of habitability by the standards set out in the Housing Regulation for the District of Columbia. *Id.* at 1080. *See also* Jack Spring Inc. v. Little, 50 Ill. 2d 351, 280 N.E. 2d 208 (1972); Mease v. Fox, 200 N.W. 2d 791 (Iowa 1972); Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970); Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

When courts substitute their own standards of habitability in place of legislatively defined standards, however, critics charge that they overstep their role of "triers of fact." *E.g.*, Boston Hous. Auth. v. Hemingway, 363 Mass. 184, 293 N.E. 2d 831 (1973) (Quirico, J., concurring and dissenting in part) (objects to the majority's implication of a "new and otherwise undefined warranty of fitness" for rented premises). *See also* Abbott, *supra* note 4, at 17.

25. 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

26. *Id.* at 591, 111 N.W.2d at 410.

spection disclosed several building code violations.[27] In reaching its decision, the court relied upon existing statutes, codes, and health regulations that, in the court's opinion, imposed implied duties upon property owners to provide tenants with habitable dwellings.[28]

Although previously adopted by other states,[29] the California Court of Appeals first recognized the implied warranty of habitability in *Hinson v. Delis*.[30] The court held that a tenant may withhold rental payments when his landlord fails to meet his statutory duty to maintain the premises in accordance with either state or local housing regulations.[31] In *Hinson*, the tenant informed the landlord of the apartment's deteriorating condition, but the landlord took no action to correct them. Months later, the building's structural defects[32] caused the tenant and her son serious injury. Basing its decision upon the implied warranty of habitability, the court held that the tenant was obligated to pay the rent only after the landlord had repaired the apartment and made it safe and habitable.[33] Although *Hinson* was not an unlawful detainer suit, it impliedly holds that the warranty of habitability can be used as a defense to an unlawful detainer action.[34]

The California Supreme Court settled the issue of the propriety of asserting the implied warranty of habitability as a defense to an unlawful detainer action in *Green v. Superior Court*.[35] In *Green*, the

27. *Id.* at 595, 111 N.W.2d at 413.

28. *Id.*

29. *See, e.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); Lemle v. Breeden, 51 Hawaii 426, 462 P.2d 470 (1969); Gillette v. Anderson, 4 Ill. App. 3d 838, 282 N.E.2d 149 (1972); Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970).

30. 26 Cal. App. 3d 62, 102 Cal. Rptr. 661 (1972). *See also* Myers, *supra* note 5; Henderson, *California Adopts the Implied Warranty of Habitability*, 24 HASTINGS L.J. 369, 392 (1972).

31. 26 Cal. App. 3d at 68-69, 102 Cal. Rptr. at 665.

32. Approximately a year after tenant took possession of the apartment, the bathroom floor developed a hole. *Id.* at 64, 102 Cal. Rptr. at 662.

33. *Id.*

34. *See* Henderson, *supra* note 30, at 369. *Hinson* holds that a tenant has no duty to make rental payments until after a landlord complies with the housing code. It follows, therefore, that a tenant cannot be guilty of unlawful detainer until landlord complies, because no rent would be due. *Id.* at 369, 392.

35. 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974). In *Green*, the tenant withheld his rental payment but initiated an affirmative defense to the unlawful detainer by claiming that the landlord had failed to maintain the premises in habitable condition. *Id.* at 620, 517 P.2d at 1170, 111 Cal. Rptr. at 706.

court held that the tenant's obligation to make rental payments and the landlord's warranty of habitability are mutually dependent covenants of the lease.[36] This ruling enabled tenants to defend successfully an unlawful detainer action brought for nonpayment of rent following the landlord's breach of the implied warranty of habitability.[37] In addition, the *Green* court refused landlords' use of their superior bargaining power to negate the warranty of habitability.[38] Public policy, the court stated, would not permit any other result.[39]

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36. *Id.* at 623, 517 P.2d at 1172, 111 Cal. Rptr. at 706. *See also* Myers, *supra* note 4, at 34. Formerly, courts held that the landlord's failure to maintain the premises was independent of the tenant's duty to pay rent. Under this rule, an alleged breach of the landlord's duty was not important in an eviction action for nonpayment of rent, since this breach did not relieve the tenant of his independent duty to pay. In *Green*, the court rejected this independent covenant rule. The court stated that the independent covenant rule originated at a time when the habitability of a dwelling (usually a farm) was an incidental item in the lease. 10 Cal. 3d at 622-23, 517 P.2d at 1172-73, 111 Cal. Rptr. at 707-08. *See also* Moskovitz, *supra* note 17, at 1446.

37. 10 Cal. 3d at 620, 517 P.2d at 1171, 111 Cal. Rptr. at 706.

38. *Id.* at 625, 639, 517 P.2d at 1173, 1184, 111 Cal. Rptr. at 709, 720. The court indicated that the severe scarcity of low-cost housing had given tenants little bargaining power through which they could exact express warranties of habitability from landlords. *Id.* at 625, 517 P.2d at 1174, 111 Cal. Rptr. at 710.

Courts also invalidate leases when a particular housing code specifically prohibits the rental of an apartment with code violations. *See, e.g.*, Brown v. Southall Realty Co., 237 A.2d 834 (D.C. 1968). *See also* Moskovitz, *supra* note 4, at 62.

39. 10 Cal. 3d at 639, 517 P.2d at 1184, 111 Cal. Rptr. at 720. The court looked to existing housing codes to support its decision to impose the implied warranty of habitability. *Id.* at 639, 517 P.2d at 1183, 111 Cal. Rptr. at 719. The court explained that it is in the interest of public good to place the burden of providing safe and habitable housing upon the landlord. *Id.* at 637, 517 P.2d at 1182, 111 Cal. Rptr. at 718. *See also* Amicus Curiae Brief of the Nat'l Hous. Law Project in Support of Defendants-Appellants at 14; Moskovitz, *supra* note 17, at 1447-54.

Other cases expressly hold that waiver provisions are invalid as contrary to public policy. *See, e.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.) (court indicated in dicta that the current shortage in housing may force a tenant to accept a unit notwithstanding observable defects; leases entered into under such circumstances are contrary to public policy), *cert. denied*, 400 U.S. 925 (1970); Buckner v. Azulai, 251 Cal. App. 2d Supp. 1013, 59 Cal. Rptr. 806 (1967); Berzito v. Gambino, 114 N.J. Super. 124, 129, 274 A.2d 865, 868 (1971), *aff'd*, 63 N.J. 460, 308 A.2d 17 (1973). *Cf.* Boston Hous. Auth. v. Hemingway, 363 Mass. 184, 293 N.E.2d 831 (1973) (held that as a matter of public policy the warranty of habitability could not be waived); Steinberg v. Carreras, 74 Misc. 2d 32, 38, 344 N.Y.S.2d 136, 141-42 (N.Y. City Civ. Ct. 1973) (invalidated rental agreement forms that favored landlords). In Foisy v. Wyman, 83 Wash. 2d 22, 515 P.2d 160 (1973), the tenant knew of the defects before he moved in and negotiated a reduction in rent. Nevertheless, the court ruled against the landlord, and allowed the use of the implied warranty of habitability. In the court's view: "This type of bargaining by the landlord with the tenant is contrary to public

Apparently rejecting any compelled waiver of the warranty, the *Green* court did not decide whether a court should presume that a tenant accepted the risk of premises obviously uninhabitable at the inception of the tenancy.[40] Several other jurisdictions have considered this issue with varying results.[41]

In *Knight v. Hallsthammer*, the California Supreme Court expanded the scope of the implied warranty of habitability by barring waiver of patent defects known at the inception of the tenancy.[42] The *Knight* court stated that continued possession of uninhabitable premises does not necessarily indicate that the tenant has released the landlord from his implied warranty of habitability.[43] Breach of the warranty is not signaled by abandonment of the premises and is not dependent upon the tenant's unawareness of the defects that make the premises uninhabitable.[44] The court based its decision upon several theories. First, the greater bargaining power of the landlord necessitates court protection of the tenant's basic housing needs.[45] Second, the general shortage of housing further exaggerates the inequality of the parties' bargaining positions.[46] Third, it is unrealistic

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policy and the purpose of the doctrine of the implied warranty of habitability. . . ." *Id.* at 28, 515 P.2d at 164. *But see* Mease v. Fox, 200 N.W.2d 791 (Iowa 1972) (the court suggested that the breach might not be material if the tenant "voluntarily, knowingly and intelligently waived the defects.")

40. The *Green* court did not rule directly on this issue, but expressed a preference to limit the doctrine's application. 10 Cal. 3d at 640, 517 P.2d at 1184, 111 Cal. Rptr. at 720. If, at the inception of the tenancy, the tenant knew of defects existing in the apartment, the *Green* court would probably not allow the tenant to assert the implied warranty of habitability. The court's reluctance to allow the doctrine in that situation seems based upon the fear that a dishonest tenant would move into an uninhabitable apartment in order to escape payment of rent. *See* Moskovitz, *supra* note 17, at 1450.

41. Some courts have decided the issue, holding, either expressly or impliedly, that the warranty does apply when the premises are defective at outset. *See, e.g.*, Mease v. Fox, 200 N.W.2d 791 (Iowa 1972) (warranty covers only latent defects at outset); Boston Hous. Auth. v. Hemingway, 363 Mass. 184, 293 N.E.2d 831 (1973) (implied warranty of habitability held to cover patent and latent defects); Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970). In other cases, the defects existed at the inception of the tenancy and the court adopted the implied warranty of habitability without discussing its rationale for doing so. *See, e.g.*, Lemle v. Breeden, 51 Hawaii 426, 62 P.2d 470 (1969), Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

42. 29 Cal. 3d at 54, 623 P.2d at 272, 171 Cal. Rptr. at 711. *See also* Myers, *supra* note 4, at 881.

43. 29 Cal. 3d at 51-52, 59, 623 P.2d at 271, 276, 171 Cal. Rptr. at 710, 715.

44. *Id.* at 59, 623 P.2d at 276, 171 Cal. Rptr. at 715.

45. *Id.* at 59, 625 P.2d at 276, 171 Cal. Rptr. at 715.

46. *Id.* The current shortage of adequate low-income housing further limits a

to expect the tenant to make an expert inspection of structurally complex premises.[47] Accordingly, the court reasoned that it could not enforce the doctrine of *caveat emptor*,[48] even for patent defects existing before the tenancy began.[49]

The *Knight* decision may serve to eliminate existing substandard housing.[50] If courts follow the *Knight* decision, any landlord who rents an uninhabitable apartment will automatically breach the implied warranty of habitability.[51] When the landlord has actual or constructive knowledge of existing defects, he can no longer defer his obligation to repair until the tenant notifies him of the defects.[52] The landlord must now provide his tenant with a habitable dwelling from the inception of the tenancy.

While facially appealing, the court's decision fails to consider the landlord's response to this situation.[53] The landlord will either repair

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tenant's ability to inspect adequately a prospective dwelling. Because the demand for low-income urban apartments so far exceeds the supply, tenants accept obviously defective units. *See supra* note 39. Tenants often have no further option than to accept the housing with the hope that the landlord will make the necessary repairs. *Id.* at 54, 625 P.2d at 273, 171 Cal. Rptr. at 712.

47. *Id.* The court believed that it was unrealistic to hold a naive, inexperienced and ill-equipped tenant responsible for making an inspection of a prospective apartment. In many cases, the average tenant does not have to requisite knowledge (about utilities, etc.) to make a thorough inspection. *Id.*

The court in *Green v. Superior Court* believed that the landlord was better equipped for such an inspection. The court indicated that given complex heating, electrical and plumbing systems, a meaningful inspection by a tenant is practically impossible. The court felt that the landlord was in a much better position to discover and cure dilapidations and defects in the premises. 10 Cal. 3d at 636, 517 P.2d at 1173, 111 Cal. Rptr. at 709.

48. *See supra* notes 17-19 and accompanying text.

49. 29 Cal. 3d at 54, 623 P.2d at 273, 171 Cal. Rptr. at 712. Real property law historically established the basis for the rights, obligations and duties created under a lease. Recently, courts have looked to contract law principles to interpret and enforce lease provisions, whether express of implied. *See* Abbott, *supra* note 3, at 25-34 (provides a full discussion of the utility of contract law to determine the rights and obligations of the parties to a lease agreement). *See also supra* note 16 and accompanying text.

50. *See* Myers, *supra* note 4, at 885, 888.

51. *Id.*

52. In his dissent, Justice Clark emphasized and described the effort taken by the landlords to repair the building. 29 Cal. 3d at 60-63, 623 P.2d at 277-278, 171 Cal. Rptr. at 716-717. Notwithstanding the landlord's good faith efforts, the majority held that he breached the implied warranty. *Id.* at 47, 59, 623 P.2d at 269, 276, 171 Cal. Rptr. at 708, 715.

53. The court's decision will not benefit low-income persons for very long. The

the building to meet the state's habitability standard, necessitating a rental increase to cover the cost of repairs, or he will abandon the building as too expensive to repair.[54] If he chooses to repair, tenants currently occupying the premises will either leave, unable to pay the rent increase, or they will pay a higher portion of their income for rent,[55] with fewer dollars left for food, heating, clothing and other essentials.

As in *Green*, the *Knight* court's acceptance of the implied warranty of habitability as a defense to an unlawful detainer action gives tenants the legal right to demand a habitable dwelling.[56] The decision evinces the court's commitment to public policy that guarantees all California residents a habitable dwelling. It is unfortunate that the court cannot so easily achieve this public policy goal.[57] Despite the court's attempt to better the living conditions of the urban poor, economic realities ensure that they will continue to suffer.[58] Many families will be unable to afford rent substantial enough to cover the expenses incurred by the conscientious landlord who complies with the expanded implied warranty of habitability.[59] Although the burden of complying appears to fall initially on the landlord,[60] unless federal, state and local governments directly or indirectly subsidize the expense of urban renewal,[61] the burden of compliance will ulti-

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landlord will be able to afford a reduced return on capital for only a short period of time. *See* Myers, *supra* note 4, at 891.

54. *Id.* at 890.

55. *Id.*

56. Courts disagree, however, on what constitutes a "habitable dwelling." *See* Moskovitz, *supra* note 4, at 62. *See also supra* note 24.

57. With the application of the implied warranty, high rents will price tenants out of some housing and cause other housing to be abandoned. The quality of housing that poor can afford to rent or to buy will depend on the political decisions affecting income distribution on the buyer's side and the operation of the market on the seller's side. J. FRANKLIN, THE REVITALIZATION OF OLDER URBAN NEIGHBORHOODS: TRENDS, FORCES AND THE FUTURE OF CITIES 52, 53, 55 (1978).

58. The elimination of substandard housing will only initially benefit low-income tenants. As long as the rent the landlord receives pays for the maintenance of his building (at applicable housing standards), he will repair in order to protect his interest in the property. It is more likely that the landlord will not be able to recover by higher rents the additional investment made to bring the apartment up to code. Myers, *supra* note 4, at 890.

59. *Id.*

60. *Id.*

61. The federal government must decide either to subsidize new housing construction or subsidize rehabilitation federally. DEPARTMENT OF HOUSING AND URBAN

mately fall upon low-income tenants.[62]

Knight v. Hallsthammer guarantees to all California tenants the right to habitable dwelling from the inception of tenancy, by recognizing an implied warranty of habitability in every residential lease. Under the expanded scope of the implied warranty doctrine, a tenant may now withhold rent owed to the landlord and successfully defend an unlawful detainer action even when the tenant knew or should have known of patent defects before entering possession of the premises.[63] A landlord breaches the implied warranty of habitability when he leases any premises with material defects. A landlord's good

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DEVELOPMENT, FINANCING MULTIFAMILY REHABILITATION 3 [hereinafter cited as FINANCING MULTIFAMILY REHABILITATION]. See also A. SCHAAF, ECONOMIC ASPECTS OF URBAN RENEWAL: THEORY, POLICY AND AREA ANALYSIS (1960).

62. The *Knight* decision, unless modified, could increase displacement and neighborhood deterioration. Neighborhood deterioration and housing abandonment are significant sources of population displacement. The initiation of housing revitalization will force low-income neighborhood tenants, through eviction or inflation, to move out of their homes. *See* J. FRANKLIN, *supra* note 60. The very existence of slums in American cities is proof that voluntary, privately conducted renovation and maintenance of housing units has not eliminated, and will not eliminate, the number of uninhabitable dwellings. A. SCHAAF, *supra* note 60, at 3.

The expanded implied warranty of habitability, guaranteed as an enforceable lease term by *Knight*, will further reduce private sector incentives to repair and renovate. The sole motivation for private market renewal will always be anticipated profits, and the very existence of substandard housing and slums demonstrates the lack of profitability. A. SCHAAF, *supra* note 60, at 1.

The increased expense of complying with the implied warranty will discourage many owners from reinvesting in and renovating their apartment buildings. *See, e.g.*, FINANCING MULTIFAMILY REHABILITATION, *supra* note 60, at 11. *See also id.* at 3 (for a discussion of the types of private rehabilitators, *i.e.*, investor-owner, Non-Profit Developer and Profit-Motivated Developer).

Courts generally set the repair schedule for the landlord rather than permit the landlord to set his own repair schedule according to his sound business judgment and his financial capabilities. *See* Myers, *supra* note 4 at 757-66. Renewal and rehabilitation will become less desirable as the implied term of each lease forces the landlord to absorb more repair costs or pass the costs to the tenants with the associated risk of increased incidences of abandonment. In either case, higher costs or higher vacancies will lower the profit of the landlord and will decrease his ability to make capital expenditures for the premises. In the absence of private rehabilitation and maintenance of habitable dwellings, the federal government will bear a greater responsibility for providing the very poor with habitable housing. Ultimately, economic realities cast this burden upon the taxpayers.

Rehabilitation is the best way of increasing the supply of decent housing for low-income families. *See* FINANCING MULTIFAMILY REHABILITATION, *supra* note 60, at 2. For a discussion of other advantages of rehabilitation, particularly environmental conservation, see J. FRANKLIN, supra note 57, at 1.

63. 29 Cal. 3d 46, 54, 623 P.2d 268, 269, 171 Cal. Rptr. 707, 708 (1981).

faith intent to repair existing defects, even in a newly purchased dwelling, will not excuse performance of the implied warranty of habitability.[64] The court's holding succeeds in advancing the public policy goal of ensuring decent housing for urban poor. Full achievement of these goals will require, however, a fundamental reallocation of the costs of repair and maintenance of deteriorating dwellings.[65]

Joan I. Glaser

64. To excuse performance of the warranty would mean that the breach of warranty of habitability is terminated by a change in ownership rather than by the correction of the defects. Brief for Appellee at 31.

65. *See generally* FINANCING MULTIFAMILY REHABILITATION, *supra* note 64.