

Indiana Law Review

Volume 10

1977

Number 3

Landlord-Tenant Law: Indiana at the Crossroads

WALTER W. KRIEGER, JR.*

MICHAEL A. SHURN**

I. INTRODUCTION

The law of landlord-tenant changed very little from the sixteenth century to the late 1960's. In the sixteenth century the lease was viewed as a conveyance of an estate in land and a part of the law of real property.¹ As a result, the subsequent developments in the law of contracts, such as the doctrine of dependent conditions and the implied warranties of fitness of use and merchantability in consumer transactions, were not incorporated into the law of landlord-tenant.²

Although it took the courts five centuries to recognize that a lease is a contract as well as a conveyance of an estate in land, once this occurred it is remarkable how quickly the courts infused contract principles into the law of landlord-tenant. A similar rejection of the common law of landlord-tenant has occurred in an ever-increasing number of states through the enactment of modern landlord-tenant codes. At the end of the 1960's there were only a handful of decisions recognizing an implied warranty of habitability in residential leases,³ and only a few jurisdictions had modern landlord-tenant

*Associate Professor, Indiana University School of Law—Indianapolis. B.A., Bellarmine College, 1959; J.D., University of Louisville, 1962; LL.M., George Washington University, 1969.

**Member of Indiana Bar. B.A., Indiana Central College, 1971; J.D., Indiana University School of Law—Indianapolis, 1975.

¹Hicks, *The Contractual Nature of Real Property Leases*, 24 BAYLOR L. REV. 443, 449-51 (1972). For a discussion of the historical development of landlord-tenant law, see Lesar, *The Landlord-Tenant Relation in Perspective: From Status to Contract and Back in 900 Years?*, 9 U. KAN. L. REV. 369 (1961).

²1 AMERICAN LAW OF PROPERTY § 3.11 (A.J. Casner ed. 1952) [hereinafter cited as A.L.P.]; 6 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 890 (3d ed. W. Jaeger 1962).

³Buckner v. Azulai, 251 Cal. App. 2d 1013, 59 Cal. Rptr. 806 (1967); Lund v. MacArthur, 51 Haw. 473, 462 P.2d 482 (1969); Lemle v. Breeden, 51 Haw. 426, 462 P.2d 470 (1969); Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969); Pines v. Persson, 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

codes.⁴ Today, just seven years later, more than half the jurisdictions, by case law, legislation, or a combination thereof, have completely rewritten the law of landlord-tenant.⁵

There appear to be a number of reasons for this phenomenon. The sixties were a time of change when traditional values and institutions were being questioned. While much of the law suffers from senility, few areas were as antiquated and out of touch with the needs of society as was the law of landlord-tenant.⁶ Numerous scholarly articles, highly critical of the law of landlord-tenant, appeared in the sixties.⁷ Many of the courts to first recognize the contractual nature of the lease cited these articles, suggesting the courts were moved by the logic and eloquence of the authors.⁸ But perhaps the courts simply realized that it was time to discard judge-made rules of law, developed in an agrarian society, which no longer served the needs of an urban society.⁹

⁴Legislative reform began in the late 1960's. Gibbons, *Residential Landlord-Tenant Law: A Survey of Modern Problems with Reference to the Proposed Model Code*, 21 HASTINGS L.J. 369 (1970). A Model Residential Landlord-Tenant Code was drafted in 1968 as a research project of the American Bar Foundation with financial support from the Legal Services Program of the Office of Economic Opportunity. J. LEVI, P. HABLUTZEL, L. ROSENBERG & J. WHITE, MODEL RESIDENTIAL LANDLORD-TENANT CODE 3 (Tent. Draft 1969) [hereinafter cited as MODEL CODE]. The Model Code was used as a starting point when, in 1969, the National Conference of Commissioners on Uniform State Laws established a subcommittee to study landlord-tenant relations. *Report of Committee on Leases, Trends in Landlord-Tenant Law Including Model Code*, 6 REAL PROP., PROB. & TR. J. 550, 557 (1971) [hereinafter cited as *Report of Committee on Leases*]. After nearly three years' work by the subcommittee, the Commissioners approved the Uniform Residential Landlord and Tenant Act [hereinafter cited as URLTA] for enactment in August 1972. Blumberg & Robbins, *Beyond URLTA: A Program for Achieving Real Tenant Goals*, 11 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 1, 3-4 (1976) [hereinafter cited as *Beyond URLTA*]. For a brief discussion of the URLTA provisions, see Note, *The Uniform Residential Landlord and Tenant Act: Reconciling Landlord-Tenant Law with Modern Realities*, 6 IND. L. REV. 741 (1973).

⁵For citations to the statutes and decisions from 29 jurisdictions recognizing an implied warranty of habitability in residential leases, see *Beyond URLTA*, *supra* note 4, at 7-8 n.28.

⁶J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 190 (2d ed. 1975).

⁷Grimes, *Caveat Lessee*, 2 VAL. L. REV. 189 (1968); Lesar, *Landlord and Tenant Reform*, 35 N.Y.U.L. REV. 1279 (1960); Quinn & Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future*, 38 FORDHAM L. REV. 225 (1969); Schoshinski, *Remedies of the Indigent Tenant: Proposals for Change*, 54 GEO. L.J. 519 (1966); Skillern, *Implied Warranties in Leases: The Need for Change*, 44 DEN. L.J. 387 (1967).

⁸*E.g.*, Lemle v. Breeden, 51 Haw. 426, 433, 462 P.2d 470, 474 (1969); King v. Moorehead, 495 S.W.2d 65, 69 nn.4 & 5, 73 n. 12 (Mo. Ct. App. 1973); Morbeth Realty Corp. v. Velez, 73 Misc. 2d 996, 1000, 343 N.Y.S.2d 406, 410-11 (1973).

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A rule which in its origin was the creation of the courts themselves, and was supposed in the making to express the *mores* of the day, may be

Another reason for the movement may have been the sudden availability of free legal services for the poor.¹⁰ It was the poor tenant, who was least able to do anything about it, who was affected most by the common law of landlord-tenant.¹¹ The law was weighted heavily in favor of the landlord, and the tenant maintained scant hope that a justice of the peace or magistrate court would deviate from the existing law. Thus, it required an expensive appeal to obtain any relief from the oppressive common law rules governing the landlord-tenant relationship. Usually the amount in controversy was so small that it was economically unfeasible for even the average middle class tenant to fight an apparent injustice.¹² As a result, there are few landlord-tenant cases to be found among the reported decisions prior to the 1960's. In many of the early decisions of the sixties challenging the outmoded common law of landlord-tenant, the tenant was represented by an attorney from the local legal services office.¹³ In fact, at the present time the poor tenant is in a better position than the middle class tenant, or for that matter, the middle class landlord, who must still bear the cost of his own litigation.¹⁴

Finally, there appears to be a simple explanation for the recent legislative response to the needs of the urban tenant. The total population has been increasing while the number of farm families has diminished.¹⁵ The greater demand resulting from the flight to the cities has created a shortage of decent housing. The sheer number of tenants, combined with their organization of tenant unions, has given

abrogated by courts when the *mores* have so changed that perpetuation of the rule would do violence to the social conscience. . . . This is not usurpation. It is not even innovation. It is the reservation for ourselves of the same power of creation that built up the common law through its exercise by the judges of the past.

Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 367, 280 N.E.2d 208, 217 (1972), quoting from B. CARDOZO, THE GROWTH OF THE LAW 136-37 (1924).

¹⁰Gibbons, *supra* note 4, at 370, 376-78; Love, *Landlord's Liability for Defective Premises: Caveat Lessee, Negligence, or Strict Liability?*, 1975 WIS. L. REV. 19, 92.

¹¹Report of the Committee on Leases, *supra* note 4, at 554-57.

¹²2 R. POWELL, THE LAW OF REAL PROPERTY ¶ 250[3] (P. Rohan ed. 1967).

¹³E. RABIN, FUNDAMENTALS OF MODERN REAL PROPERTY LAW 33 (1974).

¹⁴For example, in *Marini v. Ireland*, 56 N.J. 130, 265 A.2d 526 (1970), the tenant was able to deploy the full resources and staff of the local Legal Services Office, while the landlord would have incurred legal expenses of several thousand dollars in an effort to recover \$95.00 withheld rent had his private attorneys not agreed to continue as counsel, without compensation, following an appeal from a judgment in favor of the landlord. Letter from William R. Hyland, quoted in RABIN, *supra* note 13, at 56-58.

¹⁵According to the 1920 census, 30.1 percent of the nation's population lived on farms. By 1960 the farm population had fallen to 8.7 percent, and to 4.8 percent in 1970. U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS: FARM POPULATION, Ser.-ERS, P-27, No. 47, at 1 (Sept. 1976).

them considerable political power.¹⁶ In industrial states such as New York and New Jersey, where most of the population lives in large metropolitan areas and there is a shortage of decent housing, the state legislatures have enacted modern landlord-tenant codes.¹⁷ In midwestern states, such as Indiana, however, where a large percentage of the population still resides in rural areas or small towns, the problem may not appear as critical to state legislators.¹⁸ This may help explain why the Indiana legislature has failed to enact a modern landlord-tenant code and why a judicial response to the needs of the urban tenant was finally compelled.

Whatever the reason, the law of landlord-tenant is being rewritten. In some states the changes have already taken place, but in others, such as Indiana, the changes are just beginning. The purpose of this Article is therefore twofold: First, to point out new developments in Indiana's landlord-tenant law, specifically *Old Town Development Co. v. Langford*,¹⁹ and second, to suggest further changes which are likely to occur based upon trends in other jurisdictions.

The focus of this Article is limited to an analysis of landlord-tenant law as it relates to *residential* leases, partly for the sake of manageability, but primarily because *Old Town*, the decisions of other jurisdictions, and the statutes revolutionizing the law of landlord-tenant have focused on the plight of the urban residential tenant. This is not to say that much of the same rationale dictating a warranty of habitability in a residential lease would not apply equally in a commercial setting;²⁰ however, there are important differences which cannot be fully developed within the confines of

¹⁶Blumberg & Robbins, *The Landlord Security Deposit Act*, 7 CLEARINGHOUSE REV. 411 (1973); *Beyond URLTA*, *supra* note 4, at 45-46. For a comprehensive study of how the sheer number of tenants, plus their rising middle class standards, has had a localized impact, see Baar, *Rent Control in the 1970's: The Case of the New Jersey Tenants' Movement*, 28 HASTINGS L.J. 631 (1977).

¹⁷For discussion of the New Jersey and New York statutes going beyond even the URLTA reforms, see generally *Beyond URLTA*, *supra* note 4.

¹⁸In 1970, 85.6 percent of the population of New York State lived in urban areas and in New Jersey the figure was even higher—88.9 percent. U.S. BUREAU OF THE CENSUS, CENSUS OF POPULATION: 1970, Vol. 1, *Characteristics of the Population*, Part 1, United States Summary § 1, Table 18. In contrast, in 1970, only 64.9 percent of the population of Indiana lived in urban areas. *Id.* And these statistics do not tell the whole story because the urban areas in New York and New Jersey are far more densely populated than those of Indiana.

¹⁹349 N.E.2d 744 (Ind. Ct. App. 1976).

²⁰It appears that the analogy to the warranties under the UCC, for example, should apply equally to commercial leases. Love, *supra* note 10, at 103-04.

this Article.²¹ Also, the possibility should be noted that the warranty of habitability may be applied differently in the residential setting depending on whether multi-unit or single family dwellings are involved.²² However, since only one jurisdiction has limited the warranty of habitability to multi-unit residential dwellings,²³ and since the rationale for the warranty appears to apply equally to both types of dwellings,²⁴ we shall ignore such distinctions.

II. TRADITIONAL LANDLORD-TENANT LAW

A. *The Lease As a Conveyance*

Until a few years ago the law viewed the lease as a conveyance of an estate in land.²⁵ The landlord gave the tenant possession of the land for a term and in return the tenant gave the landlord a sum of money as rent for the use and enjoyment of the land. There were no implied promises in a lease, other than the landlord's covenant of quiet enjoyment, *i.e.*, that the landlord would do nothing to interfere with the tenant's use and enjoyment of the land during the term of the lease.²⁶ Neither party was under a duty to make repairs or maintain

²¹There does not appear to be a shortage of suitable commercial property; the commercial tenant may therefore be in a better position to negotiate a lease rather than being forced to accept a form lease on a take it or leave it basis. RESTATEMENT (SECOND) OF PROPERTY, LANDLORD AND TENANT § 5.1, Comment *b*, at 175 (Tent. Draft No. 1, 1973) [hereinafter cited as RESTATEMENT DRAFT 1]. *But see* Weaver v. American Oil Co., 257 Ind. 458, 276 N.E.2d 144 (1971). Several jurisdictions have refused to imply a warranty of habitability in commercial leases. *See, e.g.*, Interstate Restaurants, Inc. v. Halsa Corp., 309 A.2d 108 (D.C. Ct. App. 1973); Yuan Kane Ing v. Levy, 26 Ill. App. 3d 889, 326 N.E.2d 51 (1975); Van Ness Indus., Inc. v. Claremont Painting & Decorating Co., 129 N.J. Super. 507, 324 A.2d 102 (1974). Similarly, URLTA, as its name suggests, does not apply to commercial or agricultural leases. URLTA, *supra* note 4, § 1.101, Comment.

²²When a single family residence is involved, the URLTA would permit the landlord to shift his duty to the tenant with regard to certain minor repairs and maintenance, if accomplished by a "good faith" written agreement supported by adequate consideration. URLTA, *supra* note 4, § 2.104(c).

²³Although several courts have used the term "apartment" when discussing the implied warranty of habitability in residential leases, *see, e.g.*, Old Town Dev. Co. v. Langford, 349 N.E.2d at 764, only Illinois has actually limited the warranty to multi-unit dwellings. *See* Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972); Yuan Kane Ing v. Levy, 26 Ill. App. 3d 889, 326 N.E.2d 51 (1975).

²⁴Jack Spring, Inc. v. Little, 50 Ill. 2d at 363, 280 N.E.2d at 221-22 (dissenting opinion); Moskovitz, *The Implied Warranty of Habitability: A New Doctrine Raising New Issues*, 62 CAL. L. REV. 1444, 1447 (1974).

²⁵Hicks, *supra* note 1; Lesar, *supra* note 1.

²⁶*E.g.*, Hoagland v. New York, C. & St. L. Ry., 111 Ind. 443, 12 N.E. 83 (1887); Avery v. Dougherty, 102 Ind. 443, 2 N.E. 123 (1885). *See generally* 2 POWELL, *supra* note 12, ¶ 225[3].

the premises,²⁷ although the tenant was under a duty not to commit waste.²⁸ Under the doctrine of caveat emptor the tenant was presumed to have inspected the land and to have accepted it "as is."²⁹

B. *The Doctrines of Independent Covenants and Constructive Eviction*

At common law all covenants in leases were held to be independent. In the agrarian society in which the law of landlord-tenant developed the right to possession of the land was the most important aspect of the lease, and all other covenants in the lease were of secondary importance.³⁰ As long as the tenant's peaceful use and enjoyment of the land were not disturbed by the landlord, there could be no failure of consideration. Thus, if the landlord breached an obligation under the lease the tenant could sue for damages,³¹ but the tenant's duty to pay the full amount of the reserved rent continued as long as he remained in possession of the land, *i.e.*, as long as he was not evicted by the landlord.³²

At early common law, the doctrine of independent covenants could be equally harsh on the landlord. If the tenant failed to pay the rent, the landlord could not evict him since the breach of an independent covenant did not work a forfeiture of the estate.³³ The landlord was quick to remedy this situation, however, by making the tenant's covenants "conditions subsequent" and by including a power of termination clause in the lease, thereby reserving the right to reenter and terminate the estate for the tenant's breach of any condition in the lease.³⁴ Thus the standard lease, drafted by the landlord's attorney, made the tenant's right to continued possession of

²⁷3A G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 1230 (J. Grimes, 1959 Repl.). Indiana followed this general rule, *see* *Hanson v. Cruse*, 155 Ind. 176, 57 N.E. 904 (1900), but not without criticism. *See* Grimes, *supra* note 7, at 202.

²⁸3A THOMPSON, *supra* note 27, §§ 1230, 1270-80.

²⁹1 A.L.P., *supra* note 2, § 3.45. There were several exceptions to this general rule, however. *Id.*; Grimes, *supra* note 7, at 193; Comment, *Implied Warranty of Habitability in Lease of Furnished Premises for Short Term: Erosion of Caveat Emptor*, 3 RICH. L. REV. 322 (1969). Indiana followed the general rule, but did recognize exceptions. *See, e.g.*, *Anderson Drive-In Theatre, Inc. v. Kirkpatrick*, 123 Ind. App. 388, 110 N.E.2d 506 (1953).

³⁰*King v. Moorehead*, 495 S.W.2d 65, 69 (Mo. Ct. App. 1973); Quinn & Phillips, *supra* note 7, at 227-28.

³¹*Bryan v. Fisher*, 3 Blackf. 316 (1883).

³²*Id.*

³³*Brown v. Bragg*, 22 Ind. 122 (1864).

³⁴2 POWELL, *supra* note 12, ¶ 231; 3A THOMPSON, *supra* note 27, §§ 1324-26.

the premises dependent upon his compliance with the conditions in the lease.

In addition, in the nineteenth century most states, including Indiana, enacted forcible entry and unlawful detainer statutes (hereinafter referred to as FED statutes) which provided the landlord with a quick and summary procedure for evicting the tenant for nonpayment of rent.³⁵ The majority of these statutes permitted the landlord to evict the tenant for nonpayment of rent despite the absence of a forfeiture provision in the lease.³⁶ Since the other covenants in the lease were viewed as independent, the courts would not allow the tenant to raise the landlord's breach of an obligation in the lease as a defense to the action for possession.³⁷

Finally, at early common law even conditions in a contract were considered to be independent;³⁸ the contract doctrine of dependent conditions did not develop until the eighteenth century. By this time, the rental agreement was clearly governed by the law of real property and not contract law, so the doctrine never became part of the law of landlord-tenant.³⁹ It was only recently, when the courts recognized that a lease is a contract as well as a conveyance of land, that contract principles became applicable to the rental agreement.⁴⁰

To meliorate the harshness of the doctrine of independent covenants the courts gradually developed the doctrine of constructive eviction.⁴¹ Rather than requiring an actual physical eviction of the tenant to terminate the estate, and with it the rental obligation, the courts began to hold that the tenant could treat the landlord's breach of a covenant in the lease materially affecting the tenant's use and enjoyment of the land as a "constructive" eviction.⁴² However, since the constructive eviction terminated the tenant's obligation to pay

³⁵*E.g.*, IND. CODE § 32-7-1-5 (Burns 1973). For a list of the statutes from other states providing for summary eviction upon nonpayment of rent, see RESTATEMENT (SECOND) OF PROPERTY, LANDLORD AND TENANT, Statutory Note to § 11.1, at 24-30 (Tent. Draft No. 3, 1975) [hereinafter cited as RESTATEMENT DRAFT 3].

³⁶RESTATEMENT DRAFT 3, *supra* note 35, Statutory Note to § 11.1, at 25-29. Indiana is among this majority. See *Templer v. Muncie Lodge, I.O.O.F.*, 50 Ind. App. 324, 328, 97 N.E. 546, 547-48 (1912).

³⁷*See, e.g.*, *Lindsey v. Normet*, 405 U.S. 56 (1972). *But cf., e.g.*, *Rene's Restaurant Corp. v. Fro-Du-Co Corp.*, 137 Ind. App. 559, 210 N.E.2d 385 (1965). *See generally* Clough, *The Case Against the Doctrine of Independent Covenants: Reform of Oregon's FED Procedure*, 52 ORE. L. REV. 39 (1972).

³⁸6 WILLISTON, *supra* note 2, § 890.

³⁹*Id.*; 1 A.L.P., *supra* note 2, § 3.11.

⁴⁰Lesar, *supra* note 1, at 375.

⁴¹For a brief history of the development of the doctrine of constructive eviction, see Rapacz, *Origin and Evolution of Constructive Eviction in the United States*, 1 DEPAUL L. REV. 69 (1951).

⁴²1 A.L.P., *supra* note 2, § 3.51.

rent only because the tenant was no longer considered to be in possession of the land, the law required the tenant to actually vacate the premises.⁴³ If the tenant failed to vacate the premises within a reasonable time after the landlord's breach of the covenant, the tenant was deemed to have waived his right to terminate the rental agreement.⁴⁴

One of the major problems with this remedy at common law was the law's failure to impose any affirmative duties on the landlord, along with the landlord's practice of rarely agreeing to assume any obligations which might give rise to a constructive eviction. Thus, if the premises were uninhabitable at the beginning of the term, or if they became uninhabitable during the term from lack of repairs, the tenant could not claim a constructive eviction. The recognition of an implied warranty of habitability solves this problem by creating a duty on the part of the landlord to turn over the premises in a habitable condition at the beginning of the term and to maintain it in a habitable condition during the term. If the landlord breaches this duty the tenant can treat the breach as a constructive eviction and terminate the lease.⁴⁵

Even with the recognition of an implied warranty of habitability, however, two major problems with the remedy of constructive eviction remain. First, the act or omission of the landlord must be material; not every interference by the landlord will give rise to a breach of the covenant of quiet enjoyment.⁴⁶ If the court later determines that the tenant was not justified in treating the default of the landlord as a constructive eviction, the tenant's vacation of the premises will be considered an abandonment rendering him liable for the remaining rent even though he has lost all use and enjoyment of the land.⁴⁷

Second, in order to treat the breach of the covenant of quiet enjoyment as a constructive eviction, the tenant is required to vacate the premises within a reasonable time.⁴⁸ If he remains in possession he must seek his remedy through an action for damages.⁴⁹ In areas where there is a shortage of adequate housing, this may prove to be a very unsatisfactory remedy since the tenant will be unable to obtain

⁴³See, e.g., *Talbott v. English*, 156 Ind. 299, 307, 59 N.E. 857, 860 (1901).

⁴⁴*Id.*; see generally 2 POWELL, *supra* note 12, ¶ 225[3], at 278-79; Rapacz, *supra* note 41, at 86-87.

⁴⁵See, e.g., *Marini v. Ireland*, 56 N.J. 130, 265 A.2d 526 (1970).

⁴⁶E.g., *Talbot v. Citizens Nat'l Bank*, 389 F.2d 207 (7th Cir. 1968).

⁴⁷E.g., *Aberdeen Coal & Mining Co. v. City of Evansville*, 14 Ind. App. 621, 43 N.E. 316 (1896).

⁴⁸See authorities cited note 44 *supra*.

⁴⁹See *Bryan v. Fisher*, 3 Blackf. 316 (1833).

substitute housing⁵⁰ (not to mention the time and expense of relocating). Instead, the tenant would prefer to remain in possession and either correct the default himself and deduct the cost from his rent, or bring pressure on the landlord to remedy the default by withholding all or part of the rent. Unfortunately, these remedies are not available to the tenant under traditional landlord-tenant law because of the doctrine of independent covenants. If the tenant corrects the condition and deducts the cost from the rent, the landlord will immediately file suit for possession under the local FED statute. Under this summary procedure the only issue is whether there is any rent due and owing, and since the landlord's breach of an independent covenant does not relieve the tenant from his obligation to pay rent, the court will grant a judgment for possession.

III. TRENDS IN LANDLORD-TENANT LAW

A. *The Implied Warranty of Habitability*

1. Historical Development and Rationale

(a) *Contract Principles*

The real property concepts which governed the law of landlord-tenant led to the doctrine of caveat lessee. Perhaps the doctrine was not unsuited to the agrarian society in which it developed:

The parties were substantially on an equal bargaining level and the average tenant was capable of inspecting the land for possible defects prior to entering the lease. Often the land contained no physical structures, and if present, they were normally simple in design and of secondary importance to the purpose of the lease. If defects arose during the term of the lease, the tenant was usually possessed of both the skill and the resources to make the necessary repairs.⁵¹

The doctrine is not well suited, however, to the needs of an urban society. Today's tenant is not interested in the land, but instead in a shelter, a shelter far different from the simple abode of the medieval peasant. The complexity of our modern urban dwellings with their sophisticated heating, electrical, and plumbing systems, often hidden from view and located in areas under the control of the landlord, makes inspection difficult if not impossible.⁵² More importantly, the

⁵⁰Loeb, *The Low-Income Tenant in California: A Study in Frustration*, 21 HASTINGS L.J. 287, 304-05 (1970); Schoshinski, *supra* note 7, at 530-31.

⁵¹Old Town Dev. Co. v. Langford, 349 N.E.2d at 754.

⁵²Green v. Superior Court, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974).

tenant is no longer simply purchasing land, but is purchasing a "package of goods and services," and is relying upon the landlord's ability to provide them.⁵³

Having recognized that the tenant is a consumer of goods, the courts logically turned to the law of contracts governing consumer transactions:

Modern contract law has recognized that the buyer of goods and services in an industrialized society must rely upon the skill and honesty of the supplier to assure that goods and services purchased are of adequate quality. In interpreting most contracts, courts have sought to protect the legitimate expectations of the buyer and have steadily widened the seller's responsibility for the quality of goods and services through implied warranties of fitness and merchantability.⁵⁴

While the warranties of fitness of use and merchantability implied in the sale of goods and codified in the Uniform Commercial Code (UCC) did not originally extend to the sale or lease of real property, within the last few years the courts have begun to apply the UCC provisions by analogy to non-sale of goods situations.⁵⁵

Many jurisdictions now recognize an implied warranty of fitness in the sale of a new house by a builder-vendor, thereby extending the UCC warranties to the sale of real property.⁵⁶ Almost paralleling this development has been the recognition of an implied warranty of habitability in residential leases. In *Theis v. Heuer*,⁵⁷ when the Indiana Supreme Court discarded the doctrine of caveat emptor in the sale of a new house by a builder-vendor and replaced it with an

⁵³In *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970), the most quoted case in this area, Judge Skelly Wright observed: 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 (footnote omitted).

⁵⁴*Id.* at 1075 (footnotes omitted). "[A] lease is, in essence, a sale as well as a transfer of an estate in land and is, more importantly, a contractual relationship." *Lemle v. Breeden*, 51 Haw. 426, 433, 462 P.2d 470, 474 (1969).

⁵⁵Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 653 (1957); Murray, *Under the Spreading Analogy of Article 2 of the Uniform Commercial Code*, 39 FORDHAM L. REV. 447 (1971). See, e.g., *Gilbert v. Stone City Constr. Co.*, 357 N.E.2d 738 (Ind. Ct. App. 1976) (bystander construction inspector had sufficient 402A strict liability claim against lessor of construction equipment to get to the jury).

⁵⁶Note, *Implied Warranty of Fitness of Habitation in Sale of Residential Dwellings*, 43 DEN. L.J. 379 (1966).

⁵⁷280 N.E.2d 300 (Ind. 1972).

implied warranty of fitness, it noted in dictum: "There is a parallel development in the law which is relevant but not necessary for our decision here. It is in the area of landlord-tenant. Modern case law is now finding an implied warranty of habitability by a landlord to his tenant."⁵⁸ That the court went out of its way to comment on the similar development in the area of landlord-tenant law suggests that it will not be unmindful of this trend when the question of an implied warranty of habitability in residential leases is presented to it.

(b) *Public Policy*

While there can be little doubt that the implied warranty of habitability is a logical and necessary implication resulting from the recognition that a lease creates a contractual relationship, there appears to be a second and entirely separate rationale for the imposition of an implied warranty of habitability in the residential lease. This rationale is based on the same public policy consideration which led to the enactment of housing codes—that there should be "a decent home and a suitable living environment for every American family."⁵⁹

Housing codes have existed since the turn of the century, but the history of housing code enforcement is a study in frustration: understaffed and underfunded enforcement agencies, soft prosecution, sympathetic courts, and fines so small in relation to the cost of compliance that landlords have simply accepted the fines as a part of the cost of doing business.⁶⁰ While housing and health codes place a duty on the owner of a structure to maintain it in a safe and sanitary condition, the courts have generally held that these statutes are criminal in nature and create no civil rights for the tenant or in any way affect the landlord-tenant relationship.⁶¹

In many of the decisions recognizing an implied warranty of habitability in residential leases there is language suggesting a public policy rationale. A number of courts have taken judicial notice of the shortage of decent housing and the resultant unequal bargaining position of the parties, concluding that the recognition of

⁵⁸*Id.* at 305 n.1.

⁵⁹Housing Act of 1949, ch. 338, § 2, 63 Stat. 413.

⁶⁰Grad, *Legal Remedies for Housing Code Violations* (Research Report No. 14 of the Nat'l Comm. on Urban Problems 1968) [hereinafter cited as Grad]; Gribetz & Grad, *Housing Code Enforcement: Sanctions and Remedies*, 66 COLUM. L. REV. 1254 (1966) [hereinafter cited as Gribetz & Grad]. As late as 1969 fines for code violations in New York City averaged only \$12.62. Rutzick & Huffman, *The New York City Housing Court: Trial and Error in Housing Code Enforcement*, 50 N.Y.U.L. REV. 738 (1975).

⁶¹See, e.g., *Fechtman v. Stover*, 139 Ind. App. 166, 199 N.E.2d 354 (1964).

an implied warranty of habitability in residential leases is the only way to insure adequate housing.⁶² The courts have further noted that the average tenant does not possess the skills to maintain complex electrical and heating systems, nor does he have the funds or sufficient economic interest in the leasehold to justify the expenditure of vast sums of money for repairs which will primarily benefit the landlord.⁶³ Consequently, unless the landlord makes these repairs no one will make them, and in time the property will become a part of our shameful substandard housing statistics. Thus, the doctrine of caveat emptor is inconsistent with the public policy regarding housing standards, the same policy which led to the enactment of housing and sanitation codes.⁶⁴

In *Pines v. Persson*,⁶⁵ the first case to break completely with the common law by recognizing a warranty of habitability in a residential lease, the Supreme Court of Wisconsin remarked:

Legislation and administrative rules, such as the safeplace statute, building codes, and health regulations, all impose certain duties on a property owner with respect to the condition of his premises. . . . To follow the old rule of no implied warranty of habitability in leases would, in our opinion, be inconsistent with the current legislative policy concerning housing standards. . . . Permitting landlords to rent "tumble-down" houses is at least a contributing cause of such problems as urban blight, juvenile delinquency, and high property taxes for conscientious landowners.⁶⁶

While the courts can base the warranty of habitability on either a contract or public policy rationale there is one situation in which the particular rationale used could be important. Undoubtedly landlords will attempt to obtain the tenant's "waiver" of the warranty in the

⁶²Schoshinski, *supra* note 7, at 552-57. See, e.g., *Berzito v. Gambino*, 63 N.J. 460, 308 A.2d 17 (1973).

⁶³See, e.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d at 1078-79.

⁶⁴See *Marini v. Ireland*, 56 N.J. 130, 265 A.2d 526 (1970) (analyzing landmark decisions on this point).

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

⁶⁶*Id.* at 595-96, 111 N.W.2d at 412-13.

Likewise, in the *Javins* case, the court, after discussing the contractual nature of the lease, concluded:

In our judgment, the old no-repair rule cannot coexist with the obligations imposed on the landlord by a typical modern housing code, and must be abandoned in favor of an implied warranty of habitability. In the District of Columbia, the standards of this warranty are set out in the Housing Regulations.

428 F.2d at 1076-77 (footnotes omitted).

standard form lease, or will claim that the tenant, by his knowledge of the existence of patent defects materially affecting health or safety at the time of the lease, waived his right to complain about them. If the implied warranty is based on a contract theory a court should have no difficulty with an intelligent waiver of the warranty, but under a public policy rationale a court might hold that there can be no waiver of housing or health code standards.⁶⁷

(c) *Old Town*

In view of this trend towards the recognition of an implied warranty of habitability in residential leases, it should not have come as a complete shock that in July 1976, the Indiana Court of Appeals in *Old Town* rejected the "hoary precepts of primordial common law" in favor of an implied warranty of habitability. In a lengthy opinion, and after a careful and detailed analysis of the common law rules governing landlord-tenant relations, Judge Paul Buchanan, Jr. concluded:

[W]e must decide if this Court will chant again the centuries old litany of *caveat lessee*. Or, do we look to the contemporary social and economic scene and adopt an implied warranty of habitability and nonimmunity in tort as the most accurate expression of the ultimate reality between today's residential landlord and tenant? Judge-made law created *caveat lessee* and judge-made law can discard it. The common law is a malleable tool. Five centuries of *caveat lessee* is enough.⁶⁸

In rejecting the doctrine of *caveat emptor*, the Indiana Court of Appeals noted that "the single most important reason was recognition that the lease had been gradually transformed from essentially a conveyance to a contract . . ."⁶⁹ The court went on to draw the analogy between the sale of goods, carrying with it an implied warranty of fitness and merchantability, and the leasing of real property,⁷⁰ concluding: "In summary then we have rejected *caveat lessee* and have found that an apartment (residential) lease is essentially contractual in nature carrying with it mutually dependent covenants including an implied warranty of habitability and the full range of remedies for breach of contract . . ."⁷¹

⁶⁷See pp. 607-09 *infra* for a discussion of these waiver concepts.

⁶⁸*Old Town Dev. Co. v. Langford*, 349 N.E.2d at 764.

⁶⁹*Id.* at 755.

⁷⁰*Id.* at 756-59.

⁷¹*Id.* at 764. The court earlier listed these remedies as "*damages*, rescission, specific performance, reformation, and rent abatement." *Id.* at 761 (emphasis in original).

While the court emphasized the contractual nature of the lease and the growing similarity between merchant-consumer and landlord-tenant transactions, there is language in the case suggesting a broader base for the warranty. The court noted that additional factors prompting the reevaluation of landlord-tenant law are the "widespread enactment of housing codes" and the "shortage of low-cost housing (creating a disparity in bargaining power between landlords and residential tenants)."⁷² Similarly, the court quoted, with apparent approval, language from other decisions which relied on a public policy rationale.⁷³

While review of *Old Town* is currently pending in the Indiana Supreme Court,⁷⁴ the creation of an implied warranty of habitability is presumably of sufficient public importance to compel the court to comment in some manner, especially in light of its own recent decisions in the area of implied warranty of habitability⁷⁵ and other activities throughout the state.⁷⁶

(d) Resulting Standards

The separate bases for the implied warranty of habitability in residential leases lead to a problem in determining when the warranty has been complied with or breached. A number of jurisdictions, particularly those using the public policy rationale for the warranty, have looked to the local housing and health codes for the standard.⁷⁷ While some of these decisions suggest that the codes establish only a "minimum" standard,⁷⁸ others can be read as holding

⁷²*Id.* at 756.

⁷³*Id.*, quoting from *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970); also citing *Pines v. Persson*, 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

⁷⁴Petition to transfer was filed with the Indiana Supreme Court by appellant-landlord *Old Town* on September 23, 1976.

⁷⁵*E.g.*, *Barnes v. Mac Brown & Co.*, 342 N.E.2d 619 (Ind. 1976) (implied warranty of fitness for habitation from builder to second owner); *Theis v. Heuer*, 280 N.E.2d 300 (Ind. 1972) (same warranty to first owner).

⁷⁶The subject has been before the Indiana General Assembly. See pp. 641-42 *infra*. Additionally, litigation is currently being pursued at the trial court level. See *The Advocate*, January 1977, at 15 (newspaper published by LSC of Indianapolis, listing *Welborn v. Society for the Propagation of the Faith* on remand to be considered in light of *Old Town*) [hereinafter cited as *The Advocate*].

⁷⁷"In the District of Columbia, the standards of this warranty are set out in the Housing Regulations." *Javins v. First Nat'l Realty Corp.*, 428 F.2d at 1077. "It is an obligation which the landlord fulfills by substantial compliance with the relevant provisions of an applicable housing code." *King v. Moorehead*, 495 S.W.2d at 75.

⁷⁸"[W]e point out that several courts have equated adherence to applicable building and housing code standards with the *bare requirements* for compliance with this warranty." *Old Town Dev. Co. v. Langford*, 349 N.E.2d at 780 n.44 (citations omitted) (emphasis in original). "[R]elevant local health regulations provide . . . the

that the codes establish the "maximum" standard.⁷⁹ This latter position has been criticized by legal scholars because it creates a standard too low to be of any value to tenants who are above the poverty level.⁸⁰

Other courts appear to have created a "judicial" standard separate and distinct from the housing code standards.⁸¹ The judicial standard has several advantages over the code standard. First, it would create a statewide standard. Secondly, it would apply in those areas without local housing and health codes.⁸² Finally, it would not be subject to the rule of *inclusio unis est exclusio alterius* and might offer relief to middle class tenants by considering such factors as the amount of rent, the age of the structure, and its location in determining the scope of the warranty of habitability based upon the expectations of the parties.⁸³ The major difficulty with the judicial standard is that it is not as precise as the code standard and could take years to establish on a case-by-case basis, thereby leading to uncertainty and litigation.⁸⁴

threshold requirements that all housing must meet." *Boston Housing Auth. v. Hemingway*, 363 Mass. 184, 200-01, 293 N.E.2d 831, 844 n.16 (1973) (emphasis in original).

⁷⁹*E.g.*, *Jack Spring, Inc. v. Little*, 50 Ill. 2d 351, 280 N.E.2d 208 (1972); *King v. Moorehead*, 495 S.W.2d 65 (Mo. Ct. App. 1973).

⁸⁰The tenant in a luxury apartment, for example, may legitimately expect the landlord to supply janitorial service, elevator service, and air conditioning in the summer; however, it is very unlikely that such requirements will be found in a typical housing code. *See generally* Moskowitz, *supra* note 24, at 1457-58; Comment, *Landlord-Tenant Law Reform—Implied Warranty of Habitability: Effects and Effectiveness of Remedies for Its Breach*, 5 TEX. TECH. L. REV. 749, 760 (1974).

⁸¹Love, *supra* note 10, at 101-03.

⁸²*Id.* at 102-03.

⁸³

The nature of the deficiency, its effect on habitability, the length of time for which it persisted, the age of the structure, the amount of the rent, the area in which the premises are located, whether the tenant waived the defects, whether the defects resulted from malicious, abnormal, or unusual use by the tenant, are among the factors to be considered in deciding if there has been a breach of the warranty of habitability.

Kline v. Burns, 111 N.H. 87, 93, 276 A.2d 248, 252 (1971) (citations omitted).

⁸⁴*Boston Housing Auth. v. Hemingway*, 363 Mass. at 215, 293 N.E.2d at 852 (dissenting opinion). It should be noted, however, that the same vagueness exists in some housing codes compelling several courts to reject them as standards for the implied warranty of habitability, *e.g.*, *Posnanski v. Hood*, 46 Wis. 2d 172, 174 N.W.2d 528 (1970) ("reasonably good state of repairs"; "clean and sanitary condition"; "adequately"; "reasonably good working conditions"), *citing* *Saunders v. First Nat'l Realty Corp.*, 245 A.2d 836 (D.C. Ct. App. 1968), but this has been no impediment to other courts using the same housing code standards. *See, e.g.*, *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970) (*Saunders* on appeal).

Whether a court adopts the code standard or the judicial standard, it is clear from a reading of the cases that minor defects will not be treated as a breach of the warranty of habitability. Courts utilizing the code standard will treat minor code violations not affecting health or safety as "de minimis."⁸⁵ Similarly, courts using the judicial standard have held that the lack of certain amenities, while unpleasant, does not render the premises uninhabitable.⁸⁶

Although the court in *Old Town* noted the two distinct standards for the warranty, it determined that "the permissible scope of the implied warranty of habitability is not at issue here . . ." ⁸⁷ The court's conclusion was correct since the case involved a latent defect, known to the landlord but unknown to the tenant, which was a violation of the local housing code materially affecting health and safety.

2. Nature of the Implied Warranty

There are two distinct branches or aspects of the implied warranty of habitability:

[T]he implied warranty of habitability burdens the landlord with two obligations . . . a warranty of fitness and a duty to repair. By renting an apartment for residential use the landlord impliedly (1) *warrants* that the leasehold is then free from any latent defects or conditions rendering the premises uninhabitable for residential purposes; and (2) *promises* that the premises will remain reasonably fit for residential purposes during the entire term, a promise which necessarily carries with it an implied duty to repair.⁸⁸

The first branch of the warranty is much like the warranty of fitness for use found in the UCC. The second branch is similar to the duty to repair imposed upon the owner of a structure by housing and

⁸⁵*E.g.*, *Diamond Housing Corp. v. Robinson*, 257 A.2d 492, 494 (D.C. Ct. App. 1969).

⁸⁶

In a modern society one cannot be expected to live in a multi-storied apartment building without heat, hot water, garbage disposal or elevator service. Failure to supply such things is a breach of the implied covenant of habitability. Malfunction of venetian blinds, water leaks, wall cracks, lack of painting, at least of the magnitude presented here, go to what may be called "amenities." Living with lack of painting, water leaks and defective venetian blinds may be unpleasant, aesthetically unsatisfying, but does not come within the category of uninhabitability.

Academy Spires, Inc. v. Brown, 111 N.J. Super. 477, 482-83, 268 A.2d 556, 559 (1970).

⁸⁷349 N.E.2d at 780 n.44.

⁸⁸*Id.* at 774 (emphasis in original).

health codes.⁸⁹ For purposes of discussion it is easier to treat each branch of the warranty separately.

(a) *Warranty of Fitness at the Lease's Inception*

One of the major problems with regard to the first branch of the implied warranty is whether it applies to "patent" defects observable by the tenant at the time of the lease. The language of some cases suggests that it applies only to "latent" defects, *i.e.*, defects which are hidden and not discoverable by a reasonable inspection of the premises and which later surface to render the dwelling unfit for habitation.⁹⁰ There have actually been very few cases dealing with this question; most of the cases have involved latent defects or defects arising under the second aspect of the warranty.

Several courts in dicta have suggested that the warranty does not apply to patent defects which the tenant voluntarily, knowingly, and intelligently waives.⁹¹ A number of cases, however, have indicated that it would be against public policy to allow a landlord to lease an uninhabitable dwelling.⁹² If the court is basing the implied warranty of habitability on an analogy to a consumer sales contract then a waiver seems well founded, since such patent defects are not within the warranty under the UCC.⁹³

If, on the other hand, the court is basing the warranty on public policy—the duties imposed upon the landlord by housing and health codes—it would seem inconsistent to relieve the landlord of his duty to maintain a safe and sanitary structure simply because the tenant is aware of the conditions. In *Foisy v. Wyman*,⁹⁴ one of the few cases directly on point, the Washington Supreme Court refused to allow the tenant to waive patent defects even though there was consideration for the waiver. "A disadvantaged tenant should not be placed in a position of agreeing to live in an uninhabitable premises. Housing

⁸⁹"[T]he old no-repair rule cannot coexist with the obligations imposed on the landlord by a typical modern housing code . . ." *Javins v. First Nat'l Realty Corp.*, 428 F.2d at 1076-77.

⁹⁰*Old Town Dev. Co. v. Langford*, 349 N.E.2d at 775.

⁹¹*See, e.g.*, *Green v. Superior Court*, 10 Cal. 3d 616, 621, 517 P.2d 1168, 1170-71, 111 Cal. Rptr. 704, 706-07 n.3 (1974); *Mease v. Fox*, 200 N.W.2d 791, 797 (Iowa 1972).

⁹²*See, e.g.*, *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970); *Foisy v. Wyman*, 83 Wash. 2d 22, 515 P.2d 160 (1973); *Pines v. Perssion*, 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

⁹³

[W]hen the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him . . .

IND. CODE § 26-1-2-316(3)(b) (Burns 1974).

⁹⁴83 Wash. 2d 22, 515 P.2d 160 (1973).

conditions, such as the record indicates exist in the instant case, are a health hazard, not only to the individual tenant, but to the community which is exposed to said individual."⁹⁵

The Uniform Residential Landlord and Tenant Act does not appear to distinguish between latent and patent defects or defects existing at the inception of the lease and those occurring thereafter. Instead, it imposes a duty on the landlord to comply with provisions of local housing codes materially affecting health and safety and to maintain the premises in a habitable condition during the term of the lease.⁹⁶ Since the tenant cannot waive his rights in the rental agreement,⁹⁷ it seems his knowledge of the defective condition would be immaterial. The *Restatement (Second) of Property* has taken the position that the tenant may freely and intelligently waive defective conditions existing at the time of the lease which do not materially affect the tenant's health or safety,⁹⁸ but that the knowledge of the defective conditions is not itself a waiver, since in most situations the tenant may assume that the landlord will correct the conditions.⁹⁹ Likewise, a court should not permit an unconscionable waiver of the warranty which is forced upon the tenant because of an unequal bargaining position.¹⁰⁰

In *Old Town*, since the defect involved was latent, it was not necessary for the court to decide whether patent defects existing at the outset of the lease fall within the first branch of the warranty.¹⁰¹ Nevertheless, the court used language which suggests that the first branch of the warranty is limited to latent defects,¹⁰² and that the

⁹⁵*Id.* at 28, 515 P.2d at 164.

⁹⁶URLTA, *supra* note 4, § 2.104. "Vital interests of the parties and public under modern urban conditions require the proper maintenance and operation of housing. It is thus necessary that minimum duties of landlords and tenants be set forth." *Id.*, Comment.

⁹⁷*Id.* § 1.403(a)(1).

⁹⁸RESTATEMENT DRAFT 1, *supra* note 21, § 5.3 & Comment c. It would be against public policy to allow the tenant to accept unsafe or unhealthy premises. *Id.*, Comment c.

⁹⁹*Id.* § 5.1, Comment d.

¹⁰⁰The *Restatement* draws an analogy to U.C.C. § 2-302, the unconscionability provision. *Id.* § 5.6, Reporter's Note 2.

¹⁰¹"Regardless of which the jury chose, they all were concededly *latent* defects, i.e., *hidden conditions in the premises at the inception of the lease . . .*" 349 N.E.2d at 775 (emphasis in original).

¹⁰²In discussing the first branch of the warranty, the court twice used the phrase "*warrants that the leasehold is then free from any latent defects or conditions rendering the premises uninhabitable for residential purposes . . .*" *Id.* at 764, 774 (emphasis in original). And again, in discussing the duty of the landlord to transfer the premises in a reasonably habitable condition and to maintain the premises in a reasonable state of repair for the duration of the term, the court noted that the landlord does not warrant against all minor defects "whether latent or developing after the lease's inception." *Id.* at 780.

second branch of the warranty covers only patent defects arising after the inception of the lease.¹⁰³ Of course one could argue that an additional reason the court labelled the defects latent was to avoid problems such as waiver or assumption of the risk which would be raised if the court were to discuss patent defects existing at the inception of the lease.¹⁰⁴

Another issue arising with regard to the first aspect of the implied warranty is whether the landlord must possess actual or constructive knowledge of the defective condition and be allowed a reasonable time to remedy that condition before a breach of the warranty of habitability occurs. Since the first aspect is analogous to the implied warranties of fitness of use and merchantability found in the law of sales of goods, the landlord's inability to discover the defect should be irrelevant.¹⁰⁵ The *Restatement*, however, has taken the position that when the landlord can show that he could not have discovered a latent defect by a reasonable inspection of the premises, the tenant must give him notice of the defect and a reasonable opportunity to correct the condition before it can be treated as a breach of the warranty.¹⁰⁶ This position seems to suggest that the landlord must be at "fault" before there can be any breach of the warranty. In most contractual contexts the distinction should prove to be of little importance since the economic loss between the time of discovery and the opportunity to repair should be relatively small. In a tort context, however, the issue may be critical because a latent defect may cause serious personal injury or property damage before the tenant has had an opportunity to notify the landlord of the defective condition.¹⁰⁷

Finally, even if a court required the tenant to show that the landlord had notice of the defective condition at the inception of the lease or allowed the landlord to raise his inability to discover the defect as a

¹⁰³"Defects which are not latent, i.e., those arising or developing after the tenant has assumed possession and not present at the lease's inception, are within the second branch of liability under the implied warranty of habitability . . ." *Id.* at 775 n.36.

¹⁰⁴This argument is strengthened by the court's use of a passage from *Kline v. Burns*, 111 N.H. 87, 276 A.2d 248 (1971), in defining the nature of the warranty: "[A]t the inception of the rental [the landlord warrants] there are no latent [or patent] defects in facilities vital to the use of the premises for residential purposes . . ." 349 N.E.2d at 767 (emphasis by the *Old Town* court).

¹⁰⁵See *Old Town Dev. Co. v. Langford*, 349 N.E.2d at 766; J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 9-6, at 286-88 (1972).

¹⁰⁶RESTATEMENT DRAFT 1, *supra* note 21, § 5.1, Comment *e*, at 178.

¹⁰⁷By economic loss in the contractual setting, we mean loss of bargain or like damages and not any personal injury or property damages, which are arguably consequential damages for breach of contract. These latter losses are included under tort recoveries discussed *infra* at 625-32.

defense, in most cases the court would find that the landlord had constructive notice of the condition from his implied affirmation and prior possession of the premises. As noted in *Old Town*, such a holding contains strong overtones of strict liability: "A blurry line separates constructive notice and the imputed notice characteristic of the UCC warranties of merchantability and fitness for a particular purpose . . . and strict products liability in terms of Restatement (Second) of Torts § 402(A)."¹⁰⁸

(b) *Promise of Continued
Fitness*

With regard to the second branch of the warranty, the duty to repair aspect, the courts recognize that notice to the landlord is an "indispensible [*sic*] prerequisite to liability."¹⁰⁹ This requirement is reasonable since the tenant, not the landlord, is in possession of the premises.¹¹⁰ The URLTA recognizes the right of the landlord, upon the tenant's consent, to enter the premises for purposes of inspection and repairs, and declares that such consent shall not be withheld unreasonably.¹¹¹ Furthermore, in an emergency, or when the tenant is absent for more than seven days or has abandoned the premises, the landlord can enter the premises without the tenant's consent.¹¹²

Unlike the first branch of the warranty, it is not clear that under the second branch the landlord will be liable for all conditions arising after the making of the lease regardless of the cause. Thus the "fault" concept becomes much more relevant. The cases discussing the issue clearly indicate that the landlord is not liable for conditions caused by the negligent acts or omissions of the tenant.¹¹³ This rule is derived from the contract principle that a person may not benefit from his own wrong.¹¹⁴

At common law the risk of loss from casualty or the acts of third persons fell upon the tenant.¹¹⁵ As long as the tenant still had

¹⁰⁸349 N.E.2d at 775 (citations omitted).

¹⁰⁹*Id.* at 775 n.36.

¹¹⁰At common law it was doubtful whether the landlord had a right to enter the premises to inspect or make repairs without an express provision to that effect in the lease. 3A THOMPSON, *supra* note 27, § 1230, at 140. *But see, e.g.,* Talbott v. English, 159 Ind. 299, 59 N.E. 857 (1901). However, such a right would seem necessarily implied from a landlord's duty to maintain the premises in a state of repair. Love, *supra* note 10, at 105.

¹¹¹URLTA, *supra* note 4, § 3.103(a).

¹¹²*Id.* §§ 3.103(b), 4.203(b) and (c). Special remedies available to both landlord and tenant for abuse of the right of access are provided in § 4.302.

¹¹³*See, e.g.,* Hinson v. Delis, 26 Cal. App. 3d 62, 102 Cal. Rptr. 661 (1972); King v. Moorehead, 495 S.W.2d 65 (Mo. Ct. App. 1973).

¹¹⁴*See* cases cited in note 113 *supra*.

¹¹⁵*See* Talbott v. English, 156 Ind. 299, 59 N.E. 857 (1901).

possession of the land the duty to pay rent continued. Destruction of any structures on the land was not considered to be a failure of consideration.¹¹⁶ Thus, if the tenant leased a house and lot and the house burned to the ground, the tenant's obligation to pay rent continued for the remainder of the term because he still maintained the use and enjoyment of the "land." The sole exception to the rule occurred when the tenant had leased an apartment without any land conveyed with it.¹¹⁷ Thus, if the apartment was destroyed by casualty there was a destruction of the subject matter of the lease and the estate terminated.

Presently, approximately half the states have enacted legislation relieving the tenant from the obligation to pay rent when the premises are materially damaged or destroyed by casualty.¹¹⁸ Several of these statutes also allow the tenant to remain in possession with an abatement in rent if the tenant can still lawfully occupy a portion of the premises.¹¹⁹ These statutes, however, do not require the landlord to restore or rebuild the premises. There still exists some question whether under the implied warranty of habitability the landlord might be required to restore to a habitable condition premises damaged or destroyed by casualty or the acts of third persons. The language in several cases suggests that the landlord's duty to maintain the premises in a habitable condition is limited to the performance of routine maintenance, *i.e.*, a duty to prevent the premises from becoming uninhabitable through normal wear and tear.¹²⁰ However, in at least one case, *Key 48th Street Realty Co. v. Munez*,¹²¹ the landlord was required to restore an apartment which was totally destroyed by fire. It should be noted, however, that in *Munez* the building itself was less than twenty-five percent destroyed, there was no major structural damage, and there was at least partial fire insurance coverage. It can be argued that such damage is foreseeable and that the landlord should be required to carry casualty insurance.¹²²

The URLTA does not specifically address the risk of loss issue, although it does contain a provision allowing the tenant to terminate the estate in the event the dwelling unit is damaged or destroyed by fire or other casualty or, if continued occupancy is lawful, to continue

¹¹⁶*See, e.g.,* *Womack v. McQuarry*, 28 Ind. 103 (1867).

¹¹⁷*Moran v. Miller*, 198 Ind. 429, 153 N.E. 890 (1926); *Womack v. McQuarry*, 28 Ind. 103 (1867).

¹¹⁸RESTATEMENT DRAFT 1, *supra* note 21, Statutory Note para. 2a to ch. 5, at 168-69.

¹¹⁹*Id.* para. 3c.

¹²⁰*E.g.,* *Marini v. Ireland*, 56 N.J. 130, 265 A.2d 526 (1970).

¹²¹174 N.Y.L.J. 17 (Civ. Ct. Sept. 22, 1975).

¹²²*Id.*

in possession of the habitable portion of the premises with the rent reduced in proportion to the diminution of the fair rental value of the dwelling unit.¹²³ Because a specific clause on casualty was included, it can be assumed that the other provisions of the Act were not intended to apply to conditions resulting from casualty.

The *Restatement* is more specific and clearly relieves the landlord of liability for conditions arising from the fault of the tenant, the consequences of a sudden non-manmade force, or the conduct of third persons.¹²⁴ In other words, the landlord's liability is limited to "fault." If a condition occurs which renders the premises uninhabitable after the lease is made but before the tenant takes possession, the tenant had no remedy other than to terminate the lease, unless the condition was the fault of the landlord.¹²⁵ If the condition occurs after the tenant is in possession, the tenant may still terminate if the condition is the result of a sudden non-manmade cause,¹²⁶ but has no remedy against the landlord if the condition is caused by the act of a third person.¹²⁷

Placing the risk of loss from casualty or the acts of third persons on the landlord would be a heavy burden. Often the landlord might lack the funds to restore the structure, or it might be economically impractical to rebuild. To permit an action for specific performance or damages seems unduly harsh since the landlord was in no way responsible for the loss. On the other hand, the tenant is as free from fault as the landlord and it would be equally unfair to require the tenant to continue paying rent after the premises have been destroyed. As suggested by the URLTA and the *Restatement*, the tenant should be allowed to terminate the estate even though the landlord has not breached the warranty of habitability. The landlord could protect his reversionary interest and any loss of rent by insurance, and could bring suit against any third person responsible for the loss.

3. Contractual Remedies

The recognition of an implied warranty of habitability in residential leases would be of little value to the tenant had the courts

¹²³URLTA, *supra* note 4, § 4.106.

¹²⁴RESTATEMENT DRAFT 1, *supra* note 21, § 5.4, Comment *f* at 205, Comment *h* at 206-07, Comment *i* at 207.

¹²⁵*Id.* § 5.2.

¹²⁶*Id.* § 5.4. The *Restatement* limits the tenant's remedy to termination of the lease because it would be unfair to burden the landlord with other remedies when he is not formally at fault. *Id.*, Comment *f* at 205 and Reporter's Note 11a at 213. Sudden non-manmade forces would include the collapse of a floor caused from termite infestation which did not exist at the date of the lease. *Id.*, Comment *e*, Illustration 7 and Comment *f* at 205.

¹²⁷RESTATEMENT DRAFT 1, *supra* note 21, § 5.4, Comment *i* at 207.

not at the same time also recognized the contractual nature of the lease, thereby opening up an entirely new range of remedies to the tenant. Of course, the warranty of habitability is based on the similarity between consumer and landlord-tenant transactions, so to recognize a contractual right without providing contractual remedies would be totally inconsistent.¹²⁸

Since *Old Town* involved an action for personal injuries and property damage resulting from the breach of the implied warranty, the court was not particularly concerned with contractual remedies. Nevertheless, in rejecting the doctrine of caveat lessee, the court concluded: "In summary then we have rejected *caveat* lessee and have found that an apartment (residential) lease is essentially contractual in nature carrying with it *mutually dependent covenants* including an implied warranty of habitability and the *full range of remedies* for breach of contract . . ." ¹²⁹ At another point the court elaborated on this full range of remedies: "The warranty of habitability as developed to date is a covenant implied in residential leases, the breach of which invokes the full range of contract remedies . . . *damages*, rescission, specific performance, reformation, and rent abatement."¹³⁰

(a) Termination

At common law there was no implied warranty of habitability or duty on the part of the landlord to maintain the premises in a habitable condition, and so the tenant could not terminate the lease because the premises were uninhabitable. The recognition of the warranty of habitability now creates such a duty on the landlord and gives the tenant the right to terminate the lease if the duty is breached.¹³¹

However, at common law the tenant did possess the right to terminate the lease if the landlord breached an express covenant to repair and the lack of repair materially affected the tenant's use and enjoyment of the land.¹³² So in reality the implied warranty operates like an express covenant to repair at common law, permitting the tenant to treat the breach of warranty as a constructive eviction. In fact, in several of the earlier cases recognizing the implied warranty of habitability in residential leases the tenants had vacated the

¹²⁸Love, *supra* note 10, at 108.

¹²⁹349 N.E.2d at 764 (emphasis added).

¹³⁰*Id.* at 761 (emphasis in original).

¹³¹See, e.g., *Marini v. Ireland*, 56 N.J. 130, 265 A.2d 526 (1970), and text accompanying note 45 *supra*.

¹³²See discussion *supra* at 597-98.

premises on the theory of constructive eviction.¹³³ Thus, the contractual remedy of termination (rescission) adds little to the real property remedy of constructive eviction¹³⁴ and also suffers from the same inadequacies.¹³⁵

(b) *Damages*

Damages have always been available to the tenant when the landlord has breached a covenant in the lease.¹³⁶ Unfortunately, until recently there were no implied warranties, and the landlord seldom made an express covenant to maintain the premises in a habitable condition. This problem has now been remedied by the implied warranty of habitability in residential leases.

When the tenant terminates the lease by vacating the premises and sues the landlord for breach of his implied warranty of habitability, the courts are agreed that the measure of damages is the difference between the fair rental value of the premises for the unexpired term of the lease and the rent owed by the tenant for the unexpired term, *i.e.*, the tenant's loss of bargain.¹³⁷ If the tenant remains in possession, however, the courts are not in agreement as to the proper measure of damages.¹³⁸ The standard contract measure of damages for breach of warranty when the party accepts a non-conforming performance is the difference between the value of the performance as warranted and the value of the performance as received¹³⁹—the difference between the value of the premises as warranted and the value of the premises in their present uninhabitable condition. While some courts have applied the standard contract measure of damages,¹⁴⁰ other courts have applied a different measure of damages—the difference between the agreed rent under the lease and the fair rental value of the premises in their present condition.¹⁴¹

¹³³*E.g.*, *Pines v. Persson*, 14 Wis. 2d 590, 111 N.W.2d 409 (1961) (college students vacated premises because of housing code violation; court held there was a failure of consideration, absolving students from rent liability under the lease and imposing rent liability only for reasonable rental value of premises during actual occupancy).

¹³⁴See the discussion of the remedy of constructive eviction in *Lemle v. Breeden*, 51 Haw. 426, 462 P.2d 470 (1969).

¹³⁵*Id.*

¹³⁶See note 31 *supra* and accompanying text.

¹³⁷See, *e.g.*, *Boston Housing Auth. v. Hemingway*, 363 Mass. at 203 & n.21, 293 N.E.2d at 845 & n.21 (1972); *King v. Moorehead*, 495 S.W.2d at 76 (Mo. Ct. App. 1973).

¹³⁸See Note, *The Great Green Hope: The Implied Warranty of Habitability in Practice*, 28 STAN. L. REV. 729, 759-61 (1976) [hereinafter cited as *The Great Green Hope*].

¹³⁹*E.g.*, U.C.C. § 2-714(2).

¹⁴⁰*E.g.*, *Green v. Superior Court*, 10 Cal. 3d 616, 638, 517 P.2d 1168, 1183, 111 Cal. Rptr. 704, 719 (1974); *Mease v. Fox*, 200 N.W.2d 791, 797 (Iowa 1972).

¹⁴¹*E.g.*, *King v. Moorehead*, 495 S.W.2d 65, 76 (Mo. Ct. App. 1973).

This conflict appears to be due, in part, to the language in several of the decisions first recognizing the warranty of habitability. In these cases the tenants had vacated the premises without paying rent for the time in possession. In actions by the landlords for unpaid rent, the courts held the landlords were entitled to the reasonable rental value of the premises for the time the tenants were in actual possession. Obviously the tenants had chosen to rescind the lease and in returning the parties to their status quo the courts awarded the landlords the reasonable value of their performance.¹⁴²

In later years, when the tenant remained in possession of the premises rather than rescinding and the landlord sued for rent, the courts continued to talk in terms of quantum meruit recovery. The tenant was no longer liable for the reserved rent but was still obligated to pay the reasonable rental value of the premises in their present condition. It was only a small misstep to thus conclude that "the tenant's damages are reasonably measured by the difference between the agreed rent and the fair rental value of the premises as they were during occupancy by the tenant in the unhealthy or unsafe condition."¹⁴³ Thus, these courts have applied a rent abatement measure of damages determined by the difference between the agreed rent and the fair rental value of the premises in their present condition.¹⁴⁴ Under this rule the tenant would not recover his loss of bargain.

The *Restatement* has created a compromise position: "[T]he amount of the abatement is to that portion of the rent which the fair rental value after the event giving the right to abate bears to the fair rental value before such event."¹⁴⁵ By way of example, suppose a tenant leases a dwelling, with a rental value as warranted of \$250 a month, for \$200 a month, but in its present uninhabitable condition the dwelling has a fair rental value of only \$150 a month. If the tenant remains in possession he receives a part performance worth \$150, but if the premises had been as warranted he would have received a performance worth \$250. Under the standard measure of damages the tenant's loss of bargain would be \$100—the difference between

¹⁴²*E.g.*, Lemle v. Breeden, 51 Haw. 426, 462 P.2d 470 (1969); Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969); Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

¹⁴³King v. Moorehead, 495 S.W.2d at 76, *citing* Kline v. Burns, 111 N.H. 87, 276 A.2d 248 (1971) and Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961). It should be noted, however, that in the cited portions of *Kline* and *Pines* only the landlord's loss was considered; thus, the cases were improper authority for calculating the loss a tenant encounters by substandard housing.

¹⁴⁴See *The Great Green Hope*, *supra* note 138, at 760.

¹⁴⁵RESTATEMENT (SECOND) OF PROPERTY, LANDLORD AND TENANT § 10.1 (Tent. Draft No. 2, 1974) [hereinafter cited as RESTATEMENT DRAFT 2].

what he should have received (\$250) and what he actually received (\$150). Under the rent abatement theory he would be required to pay only \$150 as rent. However, since the rent was \$200 he has only recovered \$50 as damages—the difference between the agreed rent (\$200) and the fair rental value (\$150). Under the *Restatement* rule the amount the tenant must pay as the abated rent is to the rent (\$200) what the present rental value (\$150) is to the fair rental value as warranted (\$250). Thus the formula for calculating the abated rent would be: $x/200 = 150/250$, thus $x = \$120$. Under this rule the tenant would receive \$80 as damages, thereby granting him a percentage of his loss of bargain.

There has been some concern expressed that the cost of establishing, by expert testimony, the fair rental values of premises as warranted and in their present condition is too expensive and, at best, highly speculative.¹⁴⁶ One solution suggested in several cases is a “percentage reduction of use” measure of damages.¹⁴⁷ Under this theory one would reduce or abate the rent in proportion to the diminution of the use and enjoyment of the premises. While perhaps less expensive it is no more precise than the difference in value measure of damages and is in reality based on a “gut reaction” as to the extent of damages.¹⁴⁸

Perhaps the courts have been reluctant to apply the traditional contract measure of damages for breach of warranty in landlord-tenant cases because in the lease of substandard housing an “implied warranty of habitability” was never contemplated or intended by the parties.¹⁴⁹ The defects are patent, so the tenant accepts the premises “as is” with full knowledge of their defective condition and with no expectation that the landlord will correct them. Likewise, the rent agreed upon in the lease is based upon the fair rental value of the premises in their defective condition, which is far below the rental value of the premises had they met the standard of habitability and fitness of use suggested by a warranty of habitability.¹⁵⁰ Thus, if a court refused to find that the tenant had “waived” patent defects because it is against public policy to allow a tenant to live in unsafe or unhealthy housing, and then applied the standard measure of

¹⁴⁶See Moskowitz, *supra* note 24, at 1468-70; *The Great Green Hope*, *supra* note 138, at 762 & n.156.

¹⁴⁷*Green v. Superior Court*, 10 Cal. 3d 616, 639 n.24, 517 P.2d 1168, 1183 n.24, 111 Cal. Rptr. 704, 719 n.24 (1974); *Academy Spires, Inc. v. Brown*, 111 N.J. Super. 477, 486, 268 A.2d 556, 562 (1970).

¹⁴⁸*Moskovitz*, *supra* note 24, at 1468-70; *The Great Green Hope*, *supra* note 138, at 762, 764-66.

¹⁴⁹See *Samuelson v. Quinones*, 119 N.J. Super. 338, 291 A.2d 580 (1972).

¹⁵⁰*The Great Green Hope*, *supra* note 138, at 763-64.

damages for breach of warranty, it is conceivable that the landlord might have to pay the tenant to live in the substandard dwelling.¹⁵¹

If the above rule were strictly applied it would certainly discourage the leasing of substandard dwellings, but the ultimate result might be that the poor would be forced to sleep under bridges instead of in unsafe and unhealthy houses.¹⁵² One solution is to return to the illegal contract theory suggested in *Brown v. Southhall Realty Co.*¹⁵³ *Brown* and several other cases¹⁵⁴ have held that when the landlord leases a dwelling knowing that it is not in compliance with local housing code regulations the lease is null and void. This theory has now fallen into disuse because of the recognition of the implied warranty of habitability.¹⁵⁵ Its revival should be considered with caution and applied only when both parties are *in pari delicto*—where both the landlord and tenant have contracted with full knowledge of housing code defects and have negotiated the lease, including the rent, on the basis of the uninhabitable conditions.¹⁵⁶ To do

¹⁵¹

[I]f the value as warranted is \$150, the contract rent is \$60, and the fair rental value of the premises in its actual condition is \$50, damages under the difference in value rule would be . . . \$100. Therefore, the reasonable rental value would be equal to the contract rent (\$60) less damages (\$100), or -\$40 . . . forcing the landlord to pay a tenant \$40 per month to live in the premises worth \$50 a month.

The Great Green Hope, *supra* note 138, at 764 n.162.

¹⁵²Meyers, *The Covenant of Habitability and the American Law Institute*, 27 STAN. L. REV. 879, 889-97 (1975); *King v. Moorehead*, 495 S.W.2d 65, 79 (Mo. Ct. App. 1973). At the present time there is considerable disagreement concerning the effect of habitability laws on the housing market. For an excellent discussion of the problem see 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 (1975). For this reason we suggest that the courts proceed with caution in applying the warranty of habitability to patent defects existing in substandard housing when both the landlord and the tenant are *in pari delicto*.

¹⁵³237 A.2d 834 (D.C. Ct. App. 1968).

¹⁵⁴*E.g.*, *Shephard v. Lerner*, 182 Cal. App. 2d 746, 6 Cal. Rptr. 433 (1960); *King v. Moorehead*, 495 S.W.2d 65 (Mo. Ct. App. 1973).

¹⁵⁵See Moskowitz, *supra* note 24, at 1454.

¹⁵⁶As noted by Professor Moskowitz, if it is illegal to lease premises with existing housing code violations, then the tenant's knowledge of the violations is immaterial. *Id.* at 1452-53. Thus, to require the tenant be *in pari delicto* may appear illogical. However, we are not suggesting that the tenant could not raise this defense when he is not *in pari delicto*, although it is most unlikely that he would choose to do so since the defense affords the tenant less protection than the implied warranty of habitability defense. *King v. Moorehead*, 495 S.W.2d 65, 79 (Mo. Ct. App. 1973). *But see* Moskowitz, *supra* note 24, at 1454. Rather we are suggesting that the illegal contract theory would be the tenant's sole defense when he is *in pari delicto*. We do so with full knowledge that this will deny the poor tenant a habitable dwelling, but to force the landlord either to comply with the housing codes or to take the premises off the housing market could be even more detrimental to the tenant. See note 152 *supra*. By applying the illegal

otherwise would deprive the tenant of his contractual remedies, including loss of bargain, where he actually has relied upon an implied warranty of habitability. Under the illegal contract theory, the lease is void and the tenant becomes a tenant at will. Later decisions point out that the tenant is not permitted to live rent free and that the landlord may recover the reasonable rental value of the premises in quantum meruit.¹⁵⁷ Holding such contracts illegal avoids rent gouging of the poor because the landlord's recovery is limited to the reasonable rental value of the premises, while at the same time the tenant is prevented from taking undue advantage of the situation by attempting to recover damages for breach of a warranty of habitability. Of course, nothing should prevent the tenant from filing a complaint with the proper code enforcement agency; if the landlord then evicts the tenant for reporting the housing code violations the tenant can claim retaliatory eviction.¹⁵⁸

Finally, with regard to the recovery of consequential damages one should keep in mind that recognition of the remedy of rent application, the right of the tenant to repair minor defects and deduct the cost of the repair from the rent due and owing, might bar recovery of damages which could have been avoided by the tenant. The Indiana decisions recognizing the right to repair and deduct have specifically held that when the cost of repairs is small and the potential damage from nonrepair great, the tenant has a duty to mitigate his damages by making the repairs, and cannot recover consequential damages which he could have avoided.¹⁵⁹ Failure to

contract theory we afford the tenant limited protection while at the same time giving the landlord an incentive to remain in business. Likewise, a court will be far less likely to hold the tenant has "waived" patent defects under the implied warranty of habitability theory. See notes 92-100 *supra* and accompanying text. Finally, by applying the warranty of habitability to all other dwellings we prevent them from becoming slums, and, in time, the habitable dwellings will "filter down," middle class tenants will "move up" as new housing is built, and the poor tenants will obtain habitable dwellings without the short range problem. Of course, we realize that slums are a blight on the community, contribute to crime and juvenile delinquency, and increase the taxes of conscientious landowners. *Foisy v. Wyman*, 83 Wash. 2d 22, 28, 515 P.2d 160, 164 (1973); *Pines v. Perssion*, 14 Wis. 2d 590, 596, 111 N.W.2d 409, 412 (1961). But there simply are no easy solutions.

¹⁵⁷*William J. Davis, Inc. v. Slade*, 271 A.2d 412 (D.C. Ct. App. 1970); *King v. Moorehead*, 495 S.W.2d 65 (Mo. Ct. App. 1973).

¹⁵⁸See *Robinson v. Diamond Housing Corp.*, 463 F.2d 853 (D.C. Cir. 1972), *rev'g* 267 A.2d 833 (D.C. Ct. App. 1970). After Mrs. Robinson had successfully raised the illegal contract theory as a defense to an action for possession for nonpayment of rent, the landlord sought to take the property off the housing market. The District of Columbia Court of Appeals held the landlord had a right to do so and evict Mrs. Robinson; however, the United States Court of Appeals reversed, holding the landlord could not take the premises off the market if the purpose were to punish Mrs. Robinson.

¹⁵⁹See notes 166-68 *infra* and accompanying text.

repair minor defects may also raise the issue of assumption of risk in an action for personal injuries or property damage against the landlord.

(c) *Repair and Deduct (Rent Application)*

Since the covenant of repair and the covenant to pay rent were considered to be independent covenants at common law, courts did not recognize the right of the tenant to make repairs and deduct the cost from the rent even though the landlord had breached his covenant to repair. The tenant was forced to continue to pay the full amount of the reserved rent and to sue the landlord in a separate action for damages. Actually, if the landlord brought an action for the rent, most courts would allow the tenant to set off the cost of the repairs from the rent. However, the landlord usually chose to treat the failure to pay rent as a forfeiture and brought an action for possession under the local FED statute for nonpayment of the rent. Under the summary procedure of the FED statutes the tenant was not permitted to raise a counterclaim or setoff as a defense because the only issue to be resolved was whether rent was, in fact, due and owing. That issue would be decided against the tenant because the breach of the covenant by the landlord did not relieve the tenant of the duty to pay the rent. Thus, the problem was procedural as well as substantive; the tenant might have a right to set off the cost of repairs from the rent but if he attempted to do so he could be evicted.

To remedy this situation a number of states enacted legislation authorizing the tenant to make repairs and deduct the cost from the rent if the landlord was in breach of his covenant to repair.¹⁶⁰ Unfortunately, however, most of these statutes were of little value to the tenant because they placed severe limitations on the type and extent of the repairs which could be made, often limiting the cost of repairs to \$100 or one month's rent.¹⁶¹ In addition, most of the early statutes, as construed, permitted waiver of the right by the tenant,¹⁶² and in the standard lease the landlord made sure that it was waived.

Because of the dissatisfaction with the remedy of constructive eviction and the recognition of the doctrine of mutual dependency of covenants, several courts have recently reached the remedy of rent application without the aid of a statute. In *Marini v. Ireland*,¹⁶³ the New Jersey Supreme Court recognized the right of a tenant to repair

¹⁶⁰For a list and brief discussion of rent application statutes see RESTATEMENT DRAFT 2, *supra* note 145, Statutory Note to § 10.2, at 268-70.

¹⁶¹*Id.*

¹⁶²*Id.* Reporter's Note to § 10.2 at 272-73.

¹⁶³56 N.J. 130, 265 A.2d 526 (1970).

a broken toilet and offset the cost of the repairs against the rent. In *Marini* the court noted:

It is of little comfort to a tenant in these days of housing shortage to accord him the right, upon a constructive eviction, to vacate the premises and end his obligation to pay rent. Rather he should be accorded the alternative remedy of terminating the cause of the constructive eviction where as here the cause is the failure to make reasonable repairs.¹⁶⁴

A New York court reached the same result in an almost identical factual situation.¹⁶⁵ It is interesting to note that in both these cases the landlord's duty to repair was based on the implied warranty of habitability rather than an express covenant to repair.

In 1965, the Indiana Court of Appeals in *Rene's Restaurant Corp. v. Fro-Du-Co Corp.*,¹⁶⁶ recognized the remedy of rent application without the aid of a statute or a reevaluation of the common law of landlord-tenant. The historical development of this remedy in Indiana is extremely interesting. In several early cases involving suits by tenants against their landlords for breaches of the covenant to repair, the courts held that the tenants could not recover consequential damages which they could have avoided.¹⁶⁷ In discussing the duty of the tenant to mitigate his damages the courts concluded that when the cost of repairs is "trifling" and the potential damage from nonrepair great, the tenant has a duty to make the repairs himself, and if he fails to do so, he cannot recover any special damages resulting from the landlord's failure to repair.¹⁶⁸ Thus, the "right" of the tenant to repair a defective condition himself, when the landlord, after notice and a reasonable time to make the repairs, has failed to comply with his obligations under a covenant to repair, began as a "duty" to mitigate damages.¹⁶⁹

In passing, the courts noted that the tenant could sue the landlord for the cost of the repairs or set off the cost of such repairs in an action by the landlord for rent. This was not, of course, the same as suggesting that the tenant could deduct the cost of the repairs from the rent due and owing or that payment by the tenant could be raised as a defense in a summary proceeding by the landlord for possession under Indiana's FED statute. Nevertheless, the court in *Rene's*

¹⁶⁴*Id.* at 146, 265 A.2d at 535 (citation omitted).

¹⁶⁵*Jackson v. Rivera*, 65 Misc. 2d 468, 318 N.Y.S.2d 7 (N.Y. Civ. Ct. 1971).

¹⁶⁶137 Ind. App. 599, 210 N.E.2d 385 (1965).

¹⁶⁷*Hendry v. Squier*, 126 Ind. 19, 25 N.E. 830 (1890); *Olinger v. Reahard*, 117 Ind. App. 172, 70 N.E.2d 436 (1947); *Hamilton v. Feary*, 8 Ind. App. 615, 35 N.E. 48 (1893).

¹⁶⁸*See* cases cited note 167 *supra*.

¹⁶⁹*Id.*

Restaurant held that when the landlord has agreed to repair and fails to do so, the tenant may make the repairs himself and deduct the cost from the rent.¹⁷⁰ Thus, if the tenant has paid the balance of the rent after deduction for repairs to the landlord, the tenant would have a defense to an action for possession.

One can argue that allowing the introduction of setoffs and counterclaims destroys the summary nature of the action for possession. On the other hand, it can be viewed simply as a limited recognition of the doctrine of dependent covenants. The breach of a dependent covenant by the landlord is directly related to the tenant's obligation to pay rent and thus goes directly to the issue of whether rent is actually owing.¹⁷¹ As such, it does not unduly complicate the summary procedure since it is merely evidence relevant to the sole issue.

Another question involves the type and extent of repairs authorized in Indiana under the rent application remedy. Unlike the statutes permitting rent application, the courts have not set any specific limits concerning the cost of repairs which can be made and offset by the tenant. However, such words as "small" and "trifling" suggest that the repairs must be reasonable in light of the value of the leasehold and cannot exceed the value of the rent payable for the term.¹⁷² While the Indiana cases recognizing the remedy of rent application have all involved an express covenant to repair, there is no logical reason why the remedy should not be recognized in a situation involving an implied duty to repair under the warranty of habitability.

(d) *Rent Abatement and Rent Withholding*

Rent abatement and rent withholding are entirely separate and distinct remedies. Rent withholding merely authorizes the tenant to withhold the rent while the landlord is in default of his obligations under the lease. It does not address the question of whether the landlord is entitled to all the rent withheld once he has remedied the

¹⁷⁰137 Ind. App. at 563-64, 210 N.E.2d at 387. The tenant had withheld the cost of repairs (\$268.40) from the rent due and owing (\$338.04) and submitted a check for the balance along with a receipt for the repair costs.

¹⁷¹

Since the affirmative defense of breach of implied warranty of habitability goes directly to the issue of rent due and owing, which is one of the basic issues in an unlawful detainer action . . . , we now hold said defense is available in an unlawful detainer action of this nature.

Foisy v. Wyman, 83 Wash. 2d 22, 31-32, 515 P.2d 160, 166 (1973) (citation omitted).

¹⁷²*See, e.g., Rene's Restaurant Corp. v. Fro-Du-Co Corp.*, 137 Ind. App. 559, 210 N.E.2d 385 (1965); *Marini v. Ireland*, 56 N.J. 130, 265 A.2d 526 (1970).

default.¹⁷³ Rent abatement, on the other hand, is a recognition that the covenants in a lease are mutually dependent and that the tenant should not be required to pay the full amount of the reserved rent while the landlord is in default of his obligations under the lease. This does not, however, necessarily authorize the tenant to withhold all of the rent during the time the landlord is in default.¹⁷⁴

A number of states have enacted rent withholding statutes which provide that the tenant may withhold rent when the premises do not comply with local health and housing codes. These statutes were adopted because the criminal sanctions used for housing code enforcement proved ineffective in eliminating substandard housing.¹⁷⁵

The rent withholding statutes vary considerably but in general they provide that the premises must be certified as uninhabitable by the governmental agency charged with code enforcement before the tenant is authorized to withhold the rent.¹⁷⁶ Also, there are provisions requiring the rent be paid into the court or deposited in an escrow account. Some of the statutes allow funds to be used by the landlord or the code enforcement agency to correct the deficiencies, and others permit the landlord to reach these funds to pay certain expenses such as taxes, utilities, and mortgage payments if irreparable harm would otherwise result.¹⁷⁷

Several decisions, most notably *Javins v. First National Realty Corp.*,¹⁷⁸ have suggested that a total breach of the warranty of

¹⁷³These rights are often clarified by statute, however. Pennsylvania's rent withholding statute, for example, provides that the landlord is entitled to all rent held in the escrow account if he corrects the defect within six months; otherwise, all money is to be returned to the tenant. PA. STAT. ANN. tit. 35, §§ 1700-01 (Purdon Supp. 1976-77). For a discussion of this law, see Clough, *Pennsylvania's Rent Withholding Law*, 73 DICK. L. REV. 583, 584 (1969).

¹⁷⁴Some decisions suggest that the landlord may evict the tenant for non-payment of rent if too much is withheld leaving some rent due and owing. See, e.g., *Jack Spring, Inc. v. Little*, 50 Ill. 2d 351, 280 N.E.2d 208 (1972), as interpreted in *Lehndorff USA (Central) Ltd. v. Cousins Club, Inc.*, 40 Ill. App. 3d 875, 353 N.E.2d 171 (1976); *Foisy v. Wyman*, 83 Wash. 2d 22, 515 P.2d 160 (1973).

¹⁷⁵Grad, *supra* note 60, at 125-38.

¹⁷⁶For a list of these statutes, see RESTATEMENT DRAFT 2, *supra* note 145, Statutory Note to § 10.3 at 277-79.

¹⁷⁷Similar in their results to rent withholding statutes are receivership statutes which permit the sovereign to take possession of unsafe premises and use the rents and income for repairs. See, e.g., IND. CODE § 18-5-5.5-15 (Burns 1974). For broad provisions relating to housing code standards and enforcement in Indiana, see *id.* §§ 18-5-5-1 to -12; 18-5-5.5-1 to -20. If a landlord permits his property to become uninhabitable, he cannot be assured of continued operation with reduced rental. Instead, the sovereign may cause vacation of the premises resulting in loss to the landlord. See *City of Gary v. Ruberto*, 354 N.E.2d 786 (Ind. Ct. App. 1976).

¹⁷⁸428 F.2d 1071, 1082-83 (D.C. Cir. 1971).

habitability suspends the tenant's obligation to pay rent,¹⁷⁹ a judicial rent suspension doctrine. This doctrine appears somewhat questionable under contract law because continued possession of the premises by the tenant results in continued part performance by the landlord. Even under the doctrine of dependent covenants one party is not relieved of his duty to perform unless the other party's performance is worthless.¹⁸⁰ One might argue that the courts are concluding that when the premises are uninhabitable the landlord's performance is worthless, but the courts have held that when the obligation to pay rent is only "partially suspended" the tenant must pay the back rent found owing to the landlord within a reasonable time in order to avoid eviction.¹⁸¹ Similar language is found in the URLTA which allows the tenant to raise the landlord's noncompliance with the warranty of habitability as a defense to an action for possession, and unless the claim is without merit, gives the tenant a reasonable time to pay any rent found due and owing in order to prevent a judgment for possession.¹⁸²

There are several major problems with the doctrine of rent suspension. First, there is no requirement of an impartial determination made by a governmental agency before the tenant is permitted to withhold the rent. Normally the doctrine of rent suspension will be raised as a defense in an action by the landlord for possession of the premises for nonpayment of rent. This will then require a judicial determination as to whether the obligation to pay rent has in fact been suspended. In the meantime, the landlord is not receiving any income which in turn leads to the second problem. It is very unlikely that the tenant will voluntarily set up an escrow account to pay the money into court. Some commentators have expressed the fear that an insolvent or judgment-proof tenant may take advantage of the situation by claiming a breach of the warranty of habitability in order to obtain a few months of rent-free possession.¹⁸³ One solution to this problem is for the court to issue a protective order requiring the tenant to pay all or a portion of the rent into court pending adjudication of the controversy. While only one decision has suggested that the tenant will be required to deposit the rent *in custodia legis* when this defense is raised,¹⁸⁴ a number of

¹⁷⁹*Id.*

¹⁸⁰See J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS § 159 (1970).

¹⁸¹See, e.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d at 1083; *Green v. Superior Court*, 10 Cal. 3d 616, 639, 517 P.2d 1168, 1184, 111 Cal. Rptr. 704, 720 (1974).

¹⁸²URLTA, *supra* note 4, § 4.105. The same rule applies to the landlord's noncompliance with the rental agreement. *Id.*

¹⁸³E.g., *The Great Green Hope*, *supra* note 138, at 742-43.

¹⁸⁴*King v. Moorehead*, 495 S.W.2d at 77.

courts have indicated their willingness to issue a protective order under the proper circumstances.¹⁸⁵

The remedy of rent abatement recognizes that the covenant to pay rent and the warranty of habitability are mutually dependent, and that the tenant should not be required to pay the full amount of the reserved rent while the landlord is in default under the lease. This does not mean, however, that the tenant can withhold all the rent. The problems then are to determine the proper amount of rent which may be withheld, and the consequences if the tenant withholds too much.

If the tenant withholds any rent it is likely that the landlord will bring an action for possession under the FED statute. Even if such summary procedure does not allow counterclaims or setoffs to be raised as a defense, it appears that the landlord's breach of a dependent covenant is relevant to the issue of whether or not rent is in fact owing.¹⁸⁶ Thus, if the tenant's damages from the landlord's breach of the warranty plus the abated rent paid to the landlord are equal to or greater than the reserved rent, the court should find that no rent is owing and the action for possession should be dismissed. On the other hand, if the court finds that any rent is still owing then logically it should grant the judgment for possession, a result reached by several courts.¹⁸⁷ Thus, it may be risky for the tenant to withhold any rent unless the jurisdiction follows the *Javins* theory of rent suspension or permits the tenant a reasonable time to pay the additional rent found due and owing as indicated by the URLTA.

Since it is not clear whether Indiana would allow a tenant a reasonable time to pay rent found due and owing, it is advisable for the tenant to pay the reserved rent into court pending determination of the amount of nonabatable rent. The *Restatement* would permit a tenant to pay the money into an escrow account and such payments would serve as an absolute defense to an action for possession.¹⁸⁸

It should be noted that there is no constitutional objection to treating the covenants as independent.¹⁸⁹ Consequently, the tenant could be evicted if he failed to tender the full amount of the reserved rent even though the landlord had breached the covenant of habitability. However, such a position would be illogical, because to recognize the contractual concept of a warranty of habitability and at the same time to reject the doctrine of dependent covenants would be to create a right without a remedy.¹⁹⁰

¹⁸⁵See, e.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1083 n.67 (D.C. Cir. 1970); *Hinson v. Delis*, 26 Cal. App. 3d 62, 71, 102 Cal. Rptr. 661, 666 (1972).

¹⁸⁶See note 171 *supra*.

¹⁸⁷See cases cited in note 174 *supra*.

¹⁸⁸RESTATEMENT DRAFT 2, *supra* note 145, § 10.3, Comment e.

¹⁸⁹*Lindsey v. Normet*, 405 U.S. 56 (1972).

¹⁹⁰*Love*, *supra* note 10, at 108.

(e) Specific Performance

Although a number of courts have listed specific performance as one of the contractual remedies available to the tenant for breach of the warranty of habitability,¹⁹¹ the authors have found only one decision applying this remedy to cure a major defective condition in the premises.¹⁹² It should be noted, however, that the remedy of repair and deduct is a limited form of self-help specific performance which can be used to correct minor defects. Likewise, rent withholding and receivership statutes which permit the rent paid into escrow to be used to make repairs are another type of specific performance.

It has been suggested that the courts are reluctant to utilize this remedy because of the burden of supervision which would be thrust upon the courts.¹⁹³ But perhaps the courts are merely mindful of the economic unfeasibility of bringing many substandard structures up to code standards.¹⁹⁴ While some commentators have concluded that specific performance is the only remedy which will insure decent housing,¹⁹⁵ others have observed that strict code enforcement could result in no housing at all for the poor.¹⁹⁶ Thus the reluctance of the courts to apply enforcement remedies such as specific performance may be due to judicial uncertainty as to the impact of vigorous code enforcement on the housing market, and the fear of making a bad situation worse.

4. Tort Remedies

It would be presumptuous to attempt to elaborate on Professor Love's comprehensive article on the landlord's tort liability for

¹⁹¹*E.g.*, *Javins v. First Nat'l Realty Corp.*, 428 F.2d at 1082 n.61; *Old Town Dev. Co. v. Langford*, 349 N.E.2d at 761.

¹⁹²*Key 48th Street Realty Co. v. Muney*, 174 N.Y.L.J. 17 (Civ. Ct. Sept. 22, 1975).

¹⁹³*Beyond URLTA*, *supra* note 4, at 29-30; *Moskovitz*, *supra* note 24, at 1492.

¹⁹⁴In one extreme situation the cost of bringing two buildings up to housing code standards would have been \$42,000, although the two buildings were valued at less than \$30,000. *Gribetz, Housing Code Enforcement in 1970—An Overview*, 3 *URBAN LAW*. 525, 528-29 (1971). Often the landlord is operating on a very small margin of profit and because of the age and location of the structure he could never hope to recover the cost of repairs from the rent even if he could obtain the financing necessary to make them. *Meyers*, *supra* note 152, at 889-97.

¹⁹⁵*See, e.g., Beyond URLTA*, *supra* note 4, at 27-29. The remedy of repair and deduct is usually limited to an amount too small to correct major defects. *Id.* at 28. Likewise, rent abatement may provide little incentive to make repairs because the courts will allow the landlord to recover the reasonable rental value of the premises in their defective condition and, in the case of substandard housing, there is often little or no difference between the reserved rent and the actual value. *Hirsch*, *supra* note 152, at 1110 n.50.

¹⁹⁶*See* note 152 *supra* and accompanying text.

defective premises.¹⁹⁷ For this reason this discussion will focus on the present state of the law in Indiana as set forth in *Old Town*.

The action was brought against Old Town Development Co., the builder-lessor, and Joe Ogle, the supplier-installer of the apartment heating system, by the tenant, Langford, individually for personal injuries, property damage, and the wrongful death of his two children, and as administrator of his wife's estate for the wrongful death of his wife which resulted from a fire in their apartment. Expert testimony established that the fire resulted from defects in the heating system. An inspection after the fire revealed a deteriorated section of a flue vent in close proximity to wooden joists at the point of origin of the fire. Further, in direct violation of the local building code and the manufacturer's own specifications, the flue vent was too near the wooden joist, a condition which could have been discovered only by an inspection at the "rough-in stage" of the construction of the apartment unit. The evidence also established that all repairs and maintenance of the furnace were handled by Old Town and not the tenant. After hearing the evidence the trial judge instructed the jury on three separate theories of liability: (1) breach of an implied warranty of habitability; (2) negligence, including negligence based on *res ipsa loquitur*; and (3) strict liability in tort based upon the defective heating system. Pursuant to these instructions the jury returned a verdict against Old Town in the amount of \$505,500, and Old Town appealed.

The court of appeals began by rejecting the landlord's common law tort immunity for personal injury and property damage resulting from the condition of the premises on the ground that such a doctrine is inconsistent with the recognition of an implied warranty of habitability.¹⁹⁸ Having rejected tort immunity the court was immediately faced with the issue of "what becomes the basis of the landlord's liability for personal injury and personal property damages."¹⁹⁹

In light of the rejection of the landlord's tort immunity and the establishment of an implied warranty of habitability in residential leases, Judge Buchanan found two separate bases for the landlord's liability:

Upon a *breach* of this warranty . . . , a landlord is liable to his tenant (1) for all damages available under traditional remedies for breach of contract . . . including any consequential damages within *Hadley v. Baxendale* guidelines; and (2) for

¹⁹⁷See Love, *supra* note 10.

¹⁹⁸349 N.E.2d at 760 (rejecting a long line of Indiana cases).

¹⁹⁹*Id.* at 761.

personal injury and personal property damage in tort under traditional negligence principles.²⁰⁰

However, Judge Buchanan rejected the doctrine of strict liability in tort, traditionally imposed upon the seller of defective goods under the *Restatement (Second) of Torts*, section 402(A), noting that the comparison of a lessor to a seller of goods is "strained."²⁰¹ While conceding that "the wind in Indiana blows in the direction of strict liability," he concluded that this question requires a policy decision suitably reserved for policy makers—the Indiana Supreme Court or the legislature.²⁰² But having rejected strict liability, the court had to decide whether the trial court erred in giving Instruction 7, which was apparently based on a strict liability in tort theory.²⁰³ The court of appeals determined that the instruction was "harmless error" since a verdict will not be set aside when the jury has been instructed on two or more theories and there is evidence on *any* theory which will sustain the judgment.²⁰⁴ Here there were two other theories—breach of an implied warranty (contract) and negligence (tort).

Turning first to recovery for the contractual breach of the warranty of habitability, Judge Buchanan noted that consequential damages under *Hadley v. Baxendale* have been extended to encompass personal injuries and personal property damages, and that the UCC likewise permits recovery of such damages resulting from a breach of warranty.²⁰⁵ However, he was not willing to go all the way with the analogy to the breach of warranty under the UCC: "Permeating discussions of what constitutes a breach of the implied warranty of habitability is the requirement of notice. . . . As Professor Love explains, this notice requirement reflects a continued unwillingness on the part of courts to subject a landlord to strict liability."²⁰⁶

²⁰⁰*Id.* at 765 (emphasis in original). Presumably, then, personal injury and property damages should be recoverable either under tort principles (negligence) or as consequential damages for breach of contract as earlier recognized by the court. *Id.* at 761-62.

²⁰¹*Id.* at 768. *But see* *Gilbert v. Stone City Constr. Co.*, 357 N.E.2d 738 (Ind. Ct. App. 1976).

²⁰²349 N.E.2d at 768-69.

²⁰³Instruction 7 was as follows:

It is the law of this state that *one who leases an apartment containing a heating system that is in a defective condition unreasonably dangerous to the lessee or his property . . . is liable for injuries or damages thereby caused . . . if the lessor is in the business of leasing apartments containing such heating systems This law applies even though the lessor exercised all possible care in the leasing of the premises or heating system.*

Id. at 765 (emphasis by *Old Town* court).

²⁰⁴*Id.* at 769-71.

²⁰⁵*Id.* at 761-62.

²⁰⁶*Id.* at 774-75.

Under the UCC the warranty is breached if the goods are not merchantable or fit for the use intended at the time of delivery without any showing of notice on the part of the seller.²⁰⁷ In other words the seller is strictly liable without proof of fault.

Much of the court's discussion of the warranty of habitability can easily be misinterpreted because the concept of contractual liability is introduced in issue two, dealing with strict liability in tort and the effect of the trial court's Instruction 7, prior to the discussion, in issue three, of what constitutes a breach of the warranty. These premature comments can easily lead one to believe that the implied warranty is based on strict liability without proof of fault, *i.e.*, without notice of the defective condition and a reasonable time to correct it. The following passages illustrate this obscurity:

Jurisdictions adopting an implied warranty of habitability have bottomed the concept in strict liability . . . a *contractual* strict liability derived from the holding out of the premises by the landlord to be fit for human inhabitation and from the strong analogy to the Uniform Commercial Code . . .

. . . .

But while the landlord's *contractual* liability is conditioned only upon breach of his implied warranty of habitability without *independent proof of fault*, his *tort* liability has not been so determined.²⁰⁸

By the first quoted paragraph, the court apparently intended to show that there are still important legal distinctions between strict liability in tort based upon section 402(A) and strict liability for breach of warranty under UCC §§ 2-314 and 2-315.²⁰⁹ But that there

²⁰⁷J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 286-88 (1972).

²⁰⁸349 N.E.2d at 767 (emphasis added in last paragraph) (footnote omitted).

²⁰⁹While fault is not a factor in either a breach of warranty or § 402(A) suit, there are several important distinctions between the two actions. In most states the statute of limitations in a § 402(A) action is two years, whereas the statute of limitations for breach of warranty is longer. WHITE & SUMMERS, *supra* note 207, at 339-43. In Indiana the statute of limitations for breach of warranty could be six, ten, or fifteen years in non-sale transactions. IND. CODE §§ 34-1-2-1 to -3, 34-4-20-2 (Burns 1973). In sale of goods cases the statute of limitations is four years. *Id.* § 26-1-2-725 (Burns 1974). More importantly, however, in a warranty suit the statute of limitations would begin to run from the time of the transaction, while in a § 402(A) suit the statute of limitations would not begin to run until the time of the injury. WHITE & SUMMERS at 339-43.

The second important distinction is the privity issue. In a § 402(A) action privity of contract is not an issue, and strangers to the transaction may recover for personal injuries caused by the defective condition of the product when the supplier of the product should reasonably have foreseen them as subject to harm. *Gilbert v. Stone*

may be important distinctions between the warranties under the UCC and the hybrid warranty of habitability in residential leases is not apparent.²¹⁰ The second quoted paragraph is more enlightening. The reference to "independent proof of fault" suggests that there may be a nonindependent element of fault connected with the warranty itself, and the statement is followed by a footnote directing the reader to issue three for a discussion of what constitutes a breach of the implied warranty. Thus, while Judge Buchanan has concluded that contractual strict liability will result from a breach of the implied warranty of habitability, at the same time he has indicated that the warranty is not breached until the landlord has notice of the defect and time to repair.

Although Judge Buchanan has introduced the notice or fault concept into the first branch of the warranty, thus distinguishing it from the UCC warranties, he has reduced its impact by stating that the notice requirement is minimal:

Constructive notice of latent defects is presumed by some jurisdictions from the landlord's prior possession of the premises and from his implied warranty, i.e., his implied "affirmation of fact," that the premises are free from any such defects.

. . . .

Presuming the landlord has notice of existing latent defects at the inception of the lease (regardless of whether

City Constr. Co., 357 N.E.2d 738 (Ind. Ct. App. 1976). In a breach of warranty action, however, privity of contract is an issue, and Indiana has adopted the most restrictive of the UCC alternative provisions, limiting the seller's warranty to the buyer, his family, household, and guests. IND. CODE § 26-1-2-318 (Burns 1974).

A third distinction involves disclaimers and limitations of remedies. These are permitted by the UCC. IND. CODE §§ 26-1-2-316, -2-719. *But see* Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960) (suggesting that a disclaimer of warranties will not prevent recovery where there has been personal injury). Disclaimers should have no effect in a § 402(A) action.

Perhaps the distinctions are less important now in light of *Barnes v. Mac Brown & Co.*, 342 N.E.2d 619 (Ind. 1976), which ignored the privity of contract question in allowing a remote vendee to recover on the implied warranty of habitability from the builder-vendor and suggested that there should be no distinction made between "economic loss of bargain" and "personal injuries" caused by a defective product, i.e., between a contract and a tort action.

²¹⁰While the court talks about strict liability following a breach of the warranty of habitability, the court later holds that the breach itself does not occur without proof of fault. 349 N.E.2d at 774-75. Thus, as noted by Judge Sullivan in his concurring opinion, the landlord is not in breach of the warranty unless his failure to provide a habitable dwelling is tantamount to negligence. *Id.* at 789-90. This is far different from the UCC warranties under which the seller is strictly liable when the goods are not merchantable or fit for the use intended, i.e., where strict liability refers to the breach itself, not to damages flowing from the breach.

they must be ascertainable by a reasonable inspection) carries strong overtones of strict liability. A blurry line separates constructive notice and the imputed notice characteristic of the UCC warranties . . . and strict products liability in terms of . . . §402(A).²¹¹

With the introduction of the fault concept into the warranty of habitability it is difficult to detect any practical difference in the result reached, regardless of whether the suit for personal injury and personal property damage is brought for breach of the warranty of habitability (contract) or for negligence (tort). The court in *Old Town* found that the failure to inspect at the "rough-in stage" of construction was the basis for both the builder's constructive knowledge of the defect (notice) and negligence in failing to perform his duty to repair.²¹² This led Judge Sullivan, in his concurring opinion, to conclude that the opinion of Judge Buchanan holds:

[A] defendant . . . is not in "breach" of his "warranty" unless his failure to live up to his obligation to provide a leasehold substantially free of defects is *tantamount to negligence*, i.e., he "must receive notice of the allegedly defective condition and a reasonable time to correct it before the tenant can assert a breach of the warranty of habitability."²¹³

Judge Sullivan, citing both *Theis v. Heuer*,²¹⁴ in which the Indiana Supreme Court established an implied warranty of fitness in the sale of a new home by a builder-vendor, and *Barnes v. Mac Brown & Co.*,²¹⁵ in which the Indiana Supreme Court extended the builder-vendor's warranty to subsequent purchasers, would apply the doctrine of strict liability to a builder-lessor for injuries resulting from a defective condition in the leased premises.²¹⁶ Judge Sullivan contended that both of the above cases are based, in part, on an analogy to the law of products liability, section 402(A),²¹⁷ but that even if they are "cast in terms of the builder-vendor's warranty of habitability," as suggested by Judge Buchanan, there is nothing in the decisions suggesting a pre-injury notice requirement.²¹⁸

²¹¹*Id.* at 775.

²¹²*Id.* at 775, 781.

²¹³*Id.* at 789-90 (emphasis added).

²¹⁴280 N.E.2d 300 (Ind. 1972).

²¹⁵342 N.E.2d 619 (Ind. 1976).

²¹⁶349 N.E.2d at 789.

²¹⁷*Id.* at 790.

²¹⁸As noted by Judge Sullivan, *Barnes v. Mac Brown & Co.* suggests there should be no distinction between the sale of real property and the sale of personal property. 342 N.E.2d at 621. Likewise, *Theis* cited as authority *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 270 A.2d 314 (1965), which held a builder of a house liable for personal

It is interesting to note that while both parties assumed Instruction 7 was a section 402(A) instruction, as a footnote in the case suggests, “[i]t could be theorized that the Instruction is justifiable as a type of strict liability *in contract* arising from breach of implied warranty of habitability as consequential damages.”²¹⁹ As such, the giving of the instruction could be viewed as harmless error. But this argument would be more convincing if the warranty were not a hybrid requiring pre-injury notice. Instruction 7 contains no language suggesting such a limitation, but on the other hand, neither does Instruction 6, dealing with the warranty of habitability.²²⁰

Perhaps the problem is that the case was not presented as a suit against a builder for breach of his warranty of fitness for use. No doubt the plaintiff’s attorneys could not foresee that the court would pierce the corporate veil of the builder-corporation thereby making the builder and the lessor partnership one and the same.²²¹ Nor could they foresee that the Indiana Supreme Court would subsequently extend the builder’s warranty to subsequent purchasers, and by analogy to subsequent lessees. Thus, this theory was not considered at the trial level and the court of appeals may have been unwilling to decide the case on a new theory. Had the court been presented with this theory, it might been more willing to apply strict liability to the builder-lessor. Instead, Judge Buchanan considered the liability of an ordinary landlord under his implied warranty of habitability rather than the liability of a builder under his warranty of fitness for use. Thus, the language suggesting the analogy of a landlord to a seller (builder) is strained. Likewise, Judge Sullivan indicated that it was not necessary to decide whether to apply the doctrine of strict liability

injuries of the vendee without regard to fault. Subsequent to *Old Town* the Indiana Court of Appeals has held the lessor of personal property strictly liable for injury to a bystander caused by defective leased equipment. *Gilbert v. Stone City Constr. Co.*, 357 N.E.2d 738 (Ind. Ct. App. 1976). If § 402(A) applies to one in the business of leasing goods, then the same rule should logically apply to the landlord in the business of leasing real estate.

²¹⁹349 N.E.2d at 766 n.25 (emphasis by court).

²²⁰Instruction 6 stated:

If you find that plaintiff and his family leased such apartment, relying on defendant Old Town Development Company to furnish to them an apartment suitable for such purpose, and that the defendant . . . knew that the apartment was to be used for such purpose [as a single family dwelling], then you may find an implied warranty

. . . .
If you find that the apartment was not reasonably fit and proper for the purpose to which it was to be used, then you may find a breach of an implied warranty by defendant

Id. at 752-53.

²²¹*Id.* at 776-80.

to the ordinary landlord, and that he was doing so in this case only because the defendant was a builder-lessor.²²² It appears we must await further development or clarification of the nature of the landlord's warranty of habitability. In view of *Theis* and *Barnes* the court could, when the issue is more clearly presented, extend the law of products liability to a builder-vendor, or as suggested by some commentators, to a landlord "in the business of leasing";²²³ or it could simply decide, on the grounds of public policy, to treat the warranty of habitability the same as the warranties under the Uniform Commercial Code.

5. Waiver

The creation of an implied warranty of habitability in residential leases, with the resultant contractual and tort remedies, impliedly raises a critical question: To what extent may this warranty be negated by waiver or exculpatory clauses? Since standard lease forms are drafted by landlords' attorneys, and based upon past practices, it can be assumed that anything which can be waived will be waived in the lease.²²⁴ If the implied warranty of habitability can readily be waived through lease provisions, then discussion of the implied warranty itself becomes moot and illusory.

Because the recognition of an implied warranty of habitability is relatively new, few courts have dealt directly with the concept of waiver.²²⁵ The use of exculpatory clauses in leases, however, has been a common method through which landlords have attempted to insulate themselves from tort liability for their own negligence, and one is tempted to draw an analogy to these clauses. If this analogy holds, then there is indication that waiver will be severely restricted, but not prohibited, in Indiana.

Although waiver of the implied warranty of habitability was not raised in *Old Town*, the lease did contain exculpatory²²⁶ and hold

²²²*Id.* at 793.

²²³Love, *supra* note 10, at 160.

²²⁴A common assumption is that "[s]ince the landlord usually occupies an impregnable bargaining position, it may be assumed that any responsibility placed on the landlord which can be waived, will be waived." MODEL CODE, *supra* note 4, § 2-203, Comment.

²²⁵See notes 94 & 95 *supra* and accompanying text for a discussion of these cases.

²²⁶The exculpatory clause read as follows:

19. LESSORS' NON-LIABILITY. It is agreed that *the Lessor shall not be liable to the Lessee or any other person* on the demised premises or in the building or adjoining grounds and parking lot, by the Lessee's consent, invitation or license, expressed or implied, *for any damages either to person or property*, sustained by reason of the condition of said premises or building or any part thereof, or arising from the bursting or leaking of any water, gas,

harmless²²⁷ clauses intended to insulate the landlord from tort liability. As to the lease provisions “involved in this case,”²²⁸ the trial court instructed that they were “unreasonable and unenforceable under the law of this state.”²²⁹ Despite the lessor’s argument that “[i]n the absence of evidence that the contract was in fact unconscionable due to a great disparity of bargaining power or lack of mutuality . . . an exculpatory clause is valid in Indiana,” the court of appeals found no error in the instruction “under these circumstances.”²³⁰

The “circumstances” under which the court of appeals determined the exculpatory and save harmless clauses to be invalid as a matter of law were that the lessees signed a printed form contract without reading it or having the waiver provisions called to their attention.²³¹ It is therefore safe to conclude that the implied warranty can never be waived merely by having the tenant sign a form lease containing a waiver provision.

sewer, or steam pipes, or *due to the act of neglect of any employee of the Lessor, or the act of any co-tenant or any occupant of said building or other person therein, or due to any casualty or accident in or about said building.*

349 N.E.2d at 782-83 (quoting Lease Article 19) (emphasis by court).

²²⁷The hold harmless clause provided:

20. LESSEE'S LIABILITY. *The Lessee agrees to be responsible for any damage to the property of the Lessor which may result from any use of the demised premises, or any act done thereon by the Lessee or any person coming or being thereon by the license of the Lessee, expressed or implied, and will also save the Lessor harmless from any liability. The Lessee agrees to save the Lessor harmless from all costs, damages or losses resulting from their conduct or acts relating to or in and about the demised premises.*

Id. at 783 (quoting Lease Article 20) (emphasis by the court).

²²⁸*Id.* When the court of appeals quoted these provisions, which were contained in the trial court’s instruction as set out in note 226 *infra*, it italicized them as though to emphasize that the *Old Town* decision concerning the unenforceability of these types of provisions was limited to the lease and facts of this case.

²²⁹*Id.* The entire instruction read:

Any provisions *in the lease involved in this case* which attempt to exculpate, excuse or release defendant Old Town Development Company from its own wrongful acts or omissions, or which provide that the Lessee shall indemnify or hold harmless defendant Old Town Development Company from injuries or damages resulting therefrom, are unreasonable and unenforceable under the law of this state. The lease is to be construed most strictly against defendant Old Town Development Company, and any ambiguities in such lease are to be construed against defendant Old Town Development Company.

Id. at 783 (quoting Plaintiff’s Instruction No. 10) (emphasis by court).

²³⁰*Id.* at 783-87.

²³¹The lease in *Old Town* was a copyrighted form lease drafted by the owners- lessors who were also attorneys. The evidence was without conflict that the lessees neither read the lease nor had these exculpatory provisions brought to their attention. *Id.* at 782.

Apparently, however, waiver is still possible. The court of appeals recognized a general rule of enforceability of exculpatory clauses but came to the "inescapable [conclusion] that the general rule is more honored in the breach than in the observance."²³² Nevertheless, presumably waiver clauses may be placed in leases and enforced if "*knowingly and willingly*"²³³ recognized and accepted by all parties.

What constitutes knowing and willing acceptance of a waiver provision must certainly depend, in large part, upon the facts of each case. The circumstances, such as the bargaining position of the parties²³⁴ and the general atmosphere of the transaction,²³⁵ should present a situation conducive to intelligent and meaningful choice. In other words, liability may not be shifted contractually through what the court terms intimidation or trickery.²³⁶

Most commentators have concluded that the extent to which each jurisdiction will permit a waiver of the warranty depends upon the rationale used to establish the warranty.²³⁷ If the warranty is viewed simply as an implied term of the rental agreement then logically it can be waived by another contractual provision. The lessee should not escape the effect of such a provision if it is brought to his

²³²*Id.* at 784 (recognizing exceptions to the general rule of waiver based on public policy and necessitated by housing shortages, large complexes, public housing laws, unequal bargaining position of the parties, active negligence of the landlord, the tenant's lack of skill to comprehend lease terms' meaning and unconscionability).

²³³*Id.* at 785, quoting *Weaver v. American Oil Co.*, 257 Ind. 458, 276 N.E.2d 144 (1971) (emphasis by *Old Town* court). Both *Old Town* and *Weaver* place the burden on the party submitting these terms to demonstrate the willing character of the other party's acceptance.

²³⁴Although housing shortages are not as pervasive in Indiana as in the more densely populated states, see discussion at note 18 *supra*, a disparity of bargaining power obviously still occurs in Indiana and is illustrated by the widespread use of form leases, containing waiver and exculpatory clauses, along with rental office attendants who are powerless to alter the provisions.

²³⁵Likewise, even a knowledgeable individual secures no better position than the uninformed lessee since lease provisions are rarely negotiable.

²³⁶349 N.E.2d at 785.

²³⁷Professor Love, for example, concludes:

When the warranty is based upon the provisions of a housing code, the courts have not permitted the tenant to waive or disclaim it. This is consistent with general principles of both tort, and contract law.

On the other hand, when the warranty is premised on judicial notions of public policy, the courts have normally held that the warranty may be waived or disclaimed.

Love, *supra* note 10 at 106 (footnotes omitted). Most suggested statutes, however, range from restrictive to prohibitive on the permissibility of waiver provisions. See MODEL CODE, *supra* note 4, at 2-203 & Comment; notes 98-100 *supra* and accompanying text (RESTATEMENT); notes 96-97 *supra* and accompanying text (URLTA).

attention, it is reasonably understandable, and the circumstances surrounding the lease agreement are not oppressive or intimidating.²³⁸ Likewise, waiver by the actions of the parties should theoretically be possible if the defect is patent at the lease's inception, since acceptance of the premises in the known defective condition excludes the possibility of an implied understanding that the premises will be habitable, at least with respect to the known defects.²³⁹ The same rationale should apply if defects arise during the term of the lease and the tenant remains silent.

On the other hand, if the jurisdiction has determined that it is against public policy to lease premises with housing and health code violations materially affecting health and safety, then this would seem to negate the possibility of a waiver of such code violations.²⁴⁰ In the final analysis, though, we see little distinction among the bases of public policy—whether housing code or other judicial reasoning—as they relate to waiver. No court creates a warranty purely as a matter of implied contracts; instead, societal conditions have become such as to compel the warranty. Thus, any rationale for unbridled waiver is militated against.

B. Retaliatory Eviction

At the end of the term, the landlord has the option of terminating the estate or reletting the premises for another term on such terms and conditions as he sees fit. Likewise, the tenant has the right to report housing and health code violations materially affecting health and safety to the proper governmental authorities. It is obvious that these two fundamental rights may conflict. If the landlord can evict a tenant or increase his rent at the end of the term in retaliation for his reporting housing and health code violations, this will have a "chilling effect" on code enforcement.²⁴¹ It should be noted that the poor seldom have long term leases and are often tenants from month

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The lesson of *Weaver* is not that lessees are excused from reading leases or that they are necessarily relieved from liability resulting from exculpatory and save harmless clauses, but rather that they may not be intimidated or tricked into assuming unlimited liability under circumstances making it unconscionable for them to be bound by booby trap clauses hidden away in a printed form lease prepared by the lessor. Under such circumstances, to allow a lessor to require a lessee to assume the lessor's negligence and to indemnify the lessor for the lessor's own negligence, is to allow a wary landlord to ambush an unwary lessee.

349 N.E.2d at 785 (footnote omitted).

²³⁹See notes 90-95 *supra* and accompanying text.

²⁴⁰See, e.g., *Foisy v. Wyman*, 83 Wash. 2d 22, 515 P.2d 160 (1973).

²⁴¹See *Dickhut v. Norton*, 45 Wis. 2d 389, 397-99, 173 N.W.2d 297, 301-02 (1970).

to month or week to week, so that the ones who are most in need of protection from retaliatory conduct are the ones with the least protection.²⁴²

While the right of the landlord to evict the tenant at the end of the term for any legitimate reason, or for no reason at all, is still recognized, a growing number of jurisdictions now recognize that it is against public policy to permit the landlord to evict the tenant or to increase his rent in retaliation for the tenant's reporting housing code violations to the proper authorities.²⁴³

One difficult issue raised by the defense of retaliatory conduct is the issue of burden of proof.²⁴⁴ Since the landlord's conduct would be proper if done for any reason other than retaliation for the tenant's exercise of his legal rights, how can the tenant show that the landlord's motive was unlawful? One simple solution would be to create a rebuttable presumption that such action by the landlord is retaliatory if done within a certain period of time following the tenant's request for the landlord to remedy code violations or following the tenant's reporting of such violations to a governmental agency.²⁴⁵ This would then shift the burden of going forward with the evidence to the landlord to demonstrate that his conduct was not retaliatory, *i.e.* that he was taking the action for some legitimate reason. The argument against this position, however, is that a clever tenant could report housing code violations merely to create a form of "tenure" under which the landlord could evict the tenant only for cause.

Although there are no Indiana cases directly on point, a recent Indiana Supreme Court decision, *Frampton v. Central Indiana Gas Co.*,²⁴⁶ leaves little doubt that Indiana will recognize the retaliatory defense under the proper circumstances. The case involved the firing of an employee for filing a claim under the Indiana Workmen's Compensation Act. In reversing the lower court's dismissal of the suit for failure to state a cause of action, the court held that while the employer could fire the employee for any legal reason, or for no

²⁴²See Schoshinski, *supra* note 7, at 541-42.

²⁴³For a collection of cases on this point, see Annot., 40 A.L.R. 3d 753 (1971).

²⁴⁴See Note, *Landlord and Tenant, Burden of Proof Required to Establish Defense of Retaliatory Eviction*, 1971 WIS. L. REV. 939.

²⁴⁵The URLTA would create a presumption of retaliatory eviction for a period of one year following a reporting of housing code violation. URLTA, *supra* note 4, § 5.101. Several courts have also established a rebuttable presumption of retaliatory eviction following the tenant's reporting of housing code violations. *E.g.*, *Robinson v. Diamond Housing Corp.*, 463 F.2d 853, 865 (D.C. Cir. 1972); *Edwards v. Habib*, 397 F.2d 687, 702 n.53 (D.C. Cir. 1968).

²⁴⁶260 Ind. 249, 297 N.E.2d 425 (1973).

reason at all, the employer could not fire the employee for filing the claim because such conduct would have a chilling effect on the exercise of a statutory right.²⁴⁷ While the case did not involve a retaliatory eviction the analogy is clear, and in dictum the court itself drew this analogy: "Housing codes are promulgated to improve the quality of housing. The fear of retaliation for reporting violations inhibits reporting and, like the fear of retaliation for filing a claim, ultimately undermines a critically important public policy."²⁴⁸ The court did not address the burden of proof issue other than to note that the issue of retaliation is a question for the trier of fact.

C. *Abandonment, Mitigation of Damages,
and Anticipatory Repudiation*

One of the most troublesome problems arising under traditional landlord-tenant law was what action, if any, the landlord should take when the tenant has abandoned the premises and repudiated his obligations under the lease before the end of the term.²⁴⁹ Since the lease was viewed as a conveyance of land, the landlord was under no obligation to mitigate damages caused by the tenant's default.²⁵⁰ In fact, the landlord was afraid to take any action to mitigate his damages. If the landlord reentered and relet the premises, a court might find such action inconsistent with the tenant's rights under the lease and that it thus effected a surrender by operation of law.²⁵¹ If the landlord accepted the offer to surrender, the estate came to an end and with it the obligation to pay rent.²⁵² Likewise, since acceptance of surrender ends all future obligations under the lease, no damages result from the surrender.²⁵³

²⁴⁷*Id.* at 253, 297 N.E.2d at 428.

²⁴⁸*Id.*

²⁴⁹McCormick, *The Rights of the Landlord Upon Abandonment of the Premises by the Tenant*, 23 MICH. L. REV. 211, 211-12 (1925).

²⁵⁰11 WILLISTON, *supra* note 2, § 1403. The modern trend, however, is to recognize a duty on the part of the landlord to mitigate damages following an abandonment or breach of the lease by the tenant. C. DONAHUE, T. KAUPER & P. MARTIN, *CASES AND MATERIALS ON PROPERTY: AN INTRODUCTION TO THE CONCEPT AND THE INSTITUTION* 795 (1974). For a collection of cases on this point, see Annot., 21 A.L.R.3d 534 (1968).

²⁵¹2 POWELL, *supra* note 12, ¶ 247[5].

²⁵²*See, e.g.*, *Paxton Realty Corp. v. Peaker*, 212 Ind. 480, 9 N.E.2d 96 (1937); *Carp & Co. v. Meyer*, 89 Ind. App. 490, 167 N.E. 151 (1929); *Donahoe v. Rich*, 2 Ind. App. 540, 28 N.E. 1001 (1891). *See also* A.L.P., *supra* note 2, § 3.99. Attempts to preserve the tenant's liability by rent acceleration clauses or provisions for forfeiture of the security deposits generally have been unsuccessful. *Id.* § 3.97.

²⁵³3A THOMPSON, *supra* note 27, § 1348. Most courts have allowed damages following a termination of the estate when the lease contains a "forfeiture" or "saving" clause permitting the lessor to relet the premises and hold the lessee liable for the difference between the reserved rent and the rent received from reletting or in

Of course, the landlord could sit back, do nothing, and collect the rent as it became due, but this would require him to rely upon the continued solvency of the tenant.²⁵⁴ Instead, the landlord would prefer to relet the premises to a new tenant, thereby reducing his losses in the event of the original tenant's insolvency or disappearance.²⁵⁵ To prevent the reletting from being viewed as an acceptance of surrender by operation of law, landlords often insert a clause in the standard lease permitting them to relet the premises to mitigate damages in the event of a forfeiture or abandonment by the tenant.²⁵⁶ Such provisions have been enforced by the courts; the only problem is that the courts have often held that such a provision creates a duty on the part of the landlord to use reasonable efforts to relet the premises in the event of an abandonment or forfeiture of the estate, and that unless the landlord does so, the tenant's liabilities under the lease terminate.²⁵⁷

Such a provision, however, does not solve a more serious problem. Most long term leases provide for the payment of rent in installments, usually in advance, on the first day of each month. Since the abandonment is generally accompanied by words or actions indicating that the tenant is repudiating his obligations, and is usually followed by a partial breach—the failure to pay rent installments as they become due—the landlord would like to treat the abandonment and partial breach as an anticipatory repudiation of the entire lease. This would permit the landlord to sue at once for his damages. Unfortunately, a number of courts have refused to designate an abandonment, even when accompanied by a partial breach of the lease, as a repudiation of the entire lease.²⁵⁸ The refusal of courts to apply this contract remedy to breach of a lease is based upon the historic concept that the lease is a conveyance and not a contract.²⁵⁹ As long as the landlord did not treat the abandonment or partial

damages. *Id.*; A.L.P., *supra* note 2, § 3.97. However, a recent Indiana decision, *Northern Ind. Steel Supply Co. v. Chrisman*, 139 Ind. App. 27, 204 N.E.2d 668 (1965), seems to draw a distinction between a landlord's attempt to mitigate damages under such a provision and an actual acceptance of surrender. In *Chrisman* the landlord had sold fixtures and equipment reducing the building to a "shell," rather than attempting to relet the premises "furnished." In the latter situation the lease terminates, including the saving clause and the tenant is relieved of all further liability.

²⁵⁴2 POWELL, *supra* note 12, ¶ 231[1].

²⁵⁵*Id.*

²⁵⁶*Id.*; 3A THOMPSON, *supra* note 27, § 1343.

²⁵⁷*See, e.g.,* *Carpenter v. Wisniewski*, 139 Ind. App. 325, 215 N.E.2d 882 (1966); *Waffle v. Ireland*, 86 Ind. App. 119, 155 N.E. 513 (1927).

²⁵⁸A. CORBIN, A COMPREHENSIVE TREATISE ON THE RULES OF CONTRACT LAW § 986 (1951). The cases on this point are collected in Annot., 137 A.L.R. 432 (1942).

²⁵⁹McCormick, *supra* note 249, at 216-18.

breach as a forfeiture of the estate, or accept the offer to surrender, the obligation to pay rent continued.²⁶⁰ However, if the landlord did treat the abandonment or partial breach as a forfeiture or by his actions accepted the offer to surrender, the estate terminated and with it the obligation to pay rent.²⁶¹ The landlord was without a remedy since no damages could be recovered following a forfeiture or acceptance of surrender.²⁶² Despite this general rule of law, the courts have uniformly upheld the "saving clause" in a lease which permits the landlord, in the event of a forfeiture or abandonment, to reenter and relet the premises and hold the tenant liable for the difference between the reserved rent and the rent received from reletting.²⁶³ While most writers recognize that such a clause is in reality an indemnity or liquidated damages provision,²⁶⁴ some courts treat it as if the estate continues and the action is one for rent.²⁶⁵ As a result, the landlord is forced to file separate suits as each rent installment comes due, or because of the expense of multiple litigation, wait until a sufficient amount of rent has become due to justify the cost involved in recovering the rent.

Now that the courts have recognized that the lease is a contract as well as a conveyance of land, there is no justification for refusing to apply contract principles to breach of a lease.²⁶⁶ Such a position benefits both the landlord and the tenant. The landlord is able to sue at once for his damages.²⁶⁷ The only difficulty is in determining the amount of damages. While the tenant will no longer be liable for the rent, the loss of rent should be considered in computing damages, less the amount received from the landlord's reasonable efforts to

²⁶⁰3A THOMPSON, *supra* note 27, §§ 1299, 1343 & 1344.

²⁶¹*Id.*; 1 A.L.P., *supra* note 2, §§ 3.94 & 3.99.

²⁶²*Id.* § 3.97; McCormick, *supra* note 249, at 217-19.

²⁶³1 A.L.P., *supra* note 2, § 3.97; 2 POWELL, *supra* note 12, ¶ 231[1]; 3A THOMPSON, *supra* note 27, § 1343.

²⁶⁴*See generally* authorities cited note 263 *supra*.

²⁶⁵*See* *Booher v. Richmond Square, Inc.*, 310 N.E.2d 89 (Ind. Ct. App. 1974); *Northern Ind. Steel Supply Co. v. Chrisman*, 139 Ind. App. 27, 204 N.E.2d 668 (1965).

²⁶⁶There could, however, be a problem in applying the law of contracts to the lease because of the historic "rent for possession" concept. Several decisions have treated the lease as a unilateral contract or a bilateral contract fully performed by the landlord—the landlord having given the tenant possession of the land has no further obligations to perform and the tenant's obligation is the payment of rent at fixed times in the future. 4 CORBIN, *supra* note 258, § 986. When the only obligation is the payment of money at specified times the general rule is that there can be no anticipatory repudiation and a suit can only be maintained for each installment as it becomes due. DONAHUE, KAUPER & MARTIN, *supra* note 250, at 800. But the obligations in the lease are not unilateral particularly in view of the implied warranty of habitability. For an excellent discussion of the lease as a bilateral contract, see *Hawkinson v. Johnston*, 122 F.2d 724 (8th Cir.), *cert. denied*, 314 U.S. 694 (1941).

²⁶⁷*Id.*

mitigate his damages by reletting the premises. Until the landlord is able to relet he should be allowed to recover the reserved rent;²⁶⁸ and when he is able to relet the premises, the income received from the reletting should be considered by the court to be the fair rental value. A reasonable good faith effort to relet the premises should satisfy the contractual duty to mitigate damages. To require the landlord to prove his damages—the difference between the reserved rent and the fair rental value—by expert testimony would be too expensive and too speculative.²⁶⁹

While the landlord will now be required to mitigate his damages following an abandonment by the tenant, in reality this duty may in fact benefit the landlord. This result occurs because it appears highly unlikely that a court would find that the landlord's reentry and reletting constitute an acceptance of surrender since he is now under a duty to relet.²⁷⁰

The application of contract principles will be of equal benefit to the tenant. The landlord will now be required to mitigate his damages by making a reasonable effort to relet the premises. Also, it may result in the courts' interpreting of covenants prohibiting assignment without the landlord's written consent to require the withholding of consent to be reasonable rather than absolute in light of the landlord's duty to mitigate his damages.²⁷¹

At the present time, it appears that Indiana will not apply the doctrine of anticipatory repudiation to the tenant's abandonment of the premises, despite the existence of unpaid rent installments. In *Booher v. Richmond Square, Inc.*,²⁷² the Indiana Court of Appeals affirmed the lower court's refusal to dismiss a landlord's suit to recover rents which had become due and owing subsequent to a judgment in a prior action for rent under the same lease. In rejecting the tenant's defense of *res judicata*, the court held that the landlord could not have recovered rent which was not due and owing at the time of the prior action.²⁷³ If Indiana recognized the doctrine of anticipatory repudiation, the suit should have been dismissed since the landlord could have recovered all of his damages in the prior

²⁶⁸This is the position taken by the URLTA. The estate continues after abandonment until the landlord by the use of reasonable efforts is able to relet the premises, at which time the estate terminates. URLTA, *supra* note 4, § 4.203. Upon reletting, the landlord can recover actual damages and attorney's fees. *Id.* § 4.206.

²⁶⁹See note 146 *supra* and accompanying text.

²⁷⁰See *State v. Boyle*, 344 N.E.2d 302 (Ind. Ct. App. 1976); *Hirsch v. Merchants Nat'l Bank & Trust Co.*, 336 N.E.2d 833 (Ind. Ct. App. 1975).

²⁷¹2 POWELL, *supra* note 12, ¶ 246(1)(a); RABIN, *supra* note 13, at 167.

²⁷²310 N.E.2d 89 (Ind. Ct. App. 1974).

²⁷³*Id.* at 90-92.

action based upon the tenant's abandonment and his refusal to pay subsequent rent installments.²⁷⁴

Two recent Indiana Court of Appeals decisions offer some hope that the *Booher* decision will not be followed in the future. In *Hirsch v. Merchants National Bank & Trust Co.*,²⁷⁵ the court of appeals held that a landlord is required to use such diligence as would be exercised by a reasonably prudent man to relet the premises after abandonment by the tenant. A similar conclusion was reached in *State v. Boyle*.²⁷⁶ In both cases the tenants claimed that the landlord's actions in reentering and attempting to relet the premises effected a surrender by operation of law. In rejecting this defense the court noted that the landlord is now under a duty to mitigate damages and it would be inconsistent to hold that an attempt to relet the premises constitutes an acceptance of surrender.²⁷⁷ The language in both cases suggests that the court considered the lease a contract and applied contractual principles. Now that the landlord is under a duty to mitigate damages, there is no reason to refuse to apply the doctrine of anticipatory repudiation.

D. Legislation

At the present time Indiana does not have a comprehensive landlord-tenant code, and the few statutes in this area date from the nineteenth century.²⁷⁸ Within the past five years there have been three attempts in the Indiana legislature to enact a modern landlord-tenant code. The bills introduced have all been variations of the URLTA.²⁷⁹

In 1973 the URLTA was introduced in the Indiana legislature but the Act never got out of the Judiciary Committees of the House and Senate.²⁸⁰ The URLTA was again introduced in the legislature in 1975. This time H.B. 1042 passed in the House by a vote of 53 to 25,²⁸¹ but died in the Senate Public Policy Committee without a hearing.²⁸²

²⁷⁴Polston, *Property, Survey of Recent Developments in Indiana Law*, 8 IND. L. REV. 228, 229-30 (1974).

²⁷⁵336 N.E.2d 833 (Ind. Ct. App. 1975).

²⁷⁶344 N.E.2d 302 (Ind. Ct. App. 1976).

²⁷⁷*Id.* at 304-05; *Hirsch v. Merchants Nat'l Bank & Trust Co.*, 336 N.E.2d at 836-37.

²⁷⁸IND. CODE §§ 32-7-1-1 to -4-1 (Burns 1973).

²⁷⁹The URLTA, in various forms, has been enacted in 13 states and is being actively considered for adoption in several others. *Beyond URLTA*, *supra* note 4, at 3-4. For a list of the states and cites to statutes with commentary, see *id.* at 3 n.6.

²⁸⁰*Indiana House Journal*, 1973 Regular Session 1833; *Indiana Senate Journal*, 1973 Regular Session 1409.

²⁸¹*Indiana House Journal*, 1975 Regular Session 207.

²⁸²*Indiana Senate Journal*, 1975 Regular Session 183, 437.

In 1976, a watered down version of the URLTA was introduced in the legislature. The compromise bill, H.B. 1153, was the result of efforts by Representative John Day, the sponsor of the bill, Professor R. Bruce Townsend, a member of the subcommittee of the Commissioners on Uniform State Laws which actually drafted the URLTA, Jerry Gorup, the Executive Director of the Apartment Association of Indianapolis, and other interested persons.²⁸³ At the last minute the Apartment Association of Indianapolis withdrew its support from the bill and actively opposed its adoption.²⁸⁴ In the House, the bill received 47 ayes and 45 nays but fell four votes short of the constitutional majority necessary for passage.²⁸⁵

In January 1977, H.B. 132, another modified version of the URLTA, was introduced in the legislature.²⁸⁶ It will be interesting to see whether the legislature will accept even a modified version of the URLTA. Some tenant organizations were opposed to sponsoring the "vastly stripped down shadow" of the URLTA introduced in the 1976 legislature but reluctantly agreed to do so in order to establish the concept of an implied warranty of habitability in residential leases.²⁸⁷ Now that the court has established the concept in *Old Town*, tenant organizations may be less willing to sponsor the compromise bill. Likewise, it does not appear that the landlords have changed their myopic attitude toward legislative reform.²⁸⁸ In the long run the landlords' opposition to enactment of the URLTA may prove very unwise. In several jurisdictions the law has already developed beyond the URLTA, and its enactment in those states is being actively opposed by tenants' groups as "regressive."²⁸⁹ Several commentators have suggested that if the URLTA were enacted in a majority of the states, it might set a standard beyond which any suggested reform would be viewed as unreasonable, if not radical.²⁹⁰ On the other hand, continued legislative inaction can only lead to judicial activism.

It is submitted that the failure of the legislature to enact a comprehensive landlord-tenant code is detrimental to both land-

²⁸³*Uniform Landlord-Tenant Acts Fails a Third Time in Indiana Legislature*, The Advocate, Feb. 1976, at 7.

²⁸⁴*Id.* at 7-8.

²⁸⁵*Indiana House Journal*, 1976 Regular Session H290-91.

²⁸⁶Wells, *Backers Hope Changes Key To Passing Landlord Reform*, Indianapolis Star, Jan. 24, 1977, at 1, col. 4.

²⁸⁷The Advocate, *supra* note 283.

²⁸⁸Wells, *Landlord-Tenant Rights Bill Criticized in Housing Hearing*, Indianapolis Star, Jan. 27, 1977, at 7, col. 1.

²⁸⁹Blumberg, *Analysis of Recently Enacted Arizona and Washington State Landlord Tenant Bill*, 7 CLEARINGHOUSE REV. 134 (1973).

²⁹⁰See Furner, *From the Legislatures: Uniform Residential Landlord-Tenant Act*, 2 REAL ESTATE L.J. 481, 481 (1973); cf. Gibbons, *supra* note 4, at 414-15.

lords and tenants. Without a code, the courts will be compelled to modernize the law of landlord-tenant by case law. This slow and piecemeal process will breed uncertainty and litigation, thereby benefiting no one.

IV. CONCLUSION

Events arising since the main body of this article was written have led the authors to conclude that Indiana is truly at the crossroads of landlord-tenant reform—and is wavering.

Following the Second District Court of Appeals' efforts in *Old Town* to apply modern and realistic standards in an area of law which has long needed revitalization, the Indiana General Assembly once again failed to revise Indiana landlord-tenant law. Not only does any reform based on URLTA appear dead for this session of the legislature,²⁹¹ but one author has sensed a resentment among some legislators that the courts would even venture into the area after the legislature considered the problem and chose not to act. If change is to come in the near future, then the responsibility for effectuating it has been delegated to the courts.

However, judicial emergence into modern landlord-tenant law still is not characterized by absolute consistency in Indiana. What the authors saw as hopeful signs for broad application of contract principles to leases—especially in relation to the doctrine of anticipatory repudiation²⁹²—appears partially stymied. The First District Court of Appeals, in *Roberts v. Watson*,²⁹³ rejected the application of anticipatory repudiation to a lease situation, relying on nineteenth century precedent without considering how its decision accords with modern law and the duties imposed on landlords, such as the duty to mitigate damages.²⁹⁴

The Indiana judiciary nevertheless has the responsibility for guiding this jurisdiction through a still developing field of law. Now that the Indiana Supreme Court has *Old Town* before it, on petition to transfer,²⁹⁵ the courts have the opportunity to devise a statement of minimum expectations because of the legislature's at least temporary abrogation.

²⁹¹Ind. S. 185 was defeated on third reading on March 14, 1977, by a vote of 26-25.

²⁹²See notes 275-77 *supra* and accompanying text.

²⁹³359 N.E.2d 615 (Ind. Ct. App. 1977).

²⁹⁴*Id.* at 621. *Roberts* relied on Indianapolis D & W Ry. v. First Nat'l Bank, 134 Ind. 127, 33 N.E. 679 (1893) and Elmer v. Sand Creek Twp., 38 Ind. 56 (1871). It is ironic to note that *Roberts* relied on *Booher v. Richmond Square, Inc.*, 310 N.E.2d 89 (Ind. Ct. App. 1974) for the proposition that "the landlord may bring actions for rent as it becomes due," 359 N.E.2d at 621—the very case we had hoped would not be followed.

²⁹⁵As this article goes to the printer, it appears that the Indiana Supreme Court is studying *Old Town*. Oral arguments were held by the court on April 12, 1977.

