

1994

The Evolution of Implied Warranties in Commercial Real Estate Leases

Paula C. Murray

Follow this and additional works at: <http://scholarship.richmond.edu/lawreview>

 Part of the [Property Law and Real Estate Commons](#)

Recommended Citation

Paula C. Murray, *The Evolution of Implied Warranties in Commercial Real Estate Leases*, 28 U. Rich. L. Rev. 145 (1994).
Available at: <http://scholarship.richmond.edu/lawreview/vol28/iss1/5>

This Article is brought to you for free and open access by the Law School Journals at UR Scholarship Repository. It has been accepted for inclusion in University of Richmond Law Review by an authorized editor of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

THE EVOLUTION OF IMPLIED WARRANTIES IN COMMERCIAL REAL ESTATE LEASES

*Paula C. Murray**

I. INTRODUCTION

Landlord-tenant law has undergone a major change since it was first developed in England in the Middle Ages. During feudal times, the lease was considered a conveyance of real property.¹ The landlord transferred possession of the property and in return the tenant paid rent. The lease covenants existed independently of each other. Thus, if the landlord breached the lease, the tenant was not relieved of his obligation to pay rent.² The landlord owed no obligation to the tenant other than the assurance of quiet enjoyment of the property.³ The tenant bore all the risk of the physical condition of the property—*caveat lessee*.⁴ The tenant could provide for landlord repairs in the lease, but could not withhold rent if the landlord failed to make those repairs.⁵ Additionally, the tenant assumed primary responsibility for the condition of the premises once he took possession of the property. Thus, the landlord was not

* Associate Professor, Legal Environment of Business, Graduate School of Business, University of Texas. B.A., 1977, Baylor University; J.D., 1980 University of Texas.

1. 2 RICHARD POWELL, *THE LAW OF REAL PROPERTY* ¶ 221[1] (Patrick J. Rohan & George Danielsens eds., 1993) (stating that a lease is a conveyance rather than a contract).

2. See HERBERT T. TIFFANY, 1 *THE LAW OF REAL PROPERTY* § 88 (3d ed. 1939) (contract doctrine of dependent covenants was not applicable to leases); see also *McArdle v. Courson*, 402 N.E.2d 292 (Ill. App. Ct. 1980) (finding that, although landlord breached covenant to maintain roof, tenant was not relieved of obligation to pay rent while continuing to occupy the premises; court declared lease forfeited and returned possession of building to landlord).

3. See 1 *AMERICAN LAW OF PROPERTY* § 3.47 (A. James Casner ed., 1952).

4. *Roth v. Adams*, 70 N.E. 445, 446 (Mass. 1904) (applying the doctrine of *caveat emptor* and holding that lessee takes property as is).

5. MILTON R. FRIEDMAN, *FRIEDMAN ON LEASES* § 1.1 (3d ed. 1990).

obligated to the tenant or to any third party for injuries resulting from defects in the property.⁶

In the past thirty years, the law of landlord-tenant has undergone vast change, particularly in the residential area. The tenant (formerly at the mercy of the landlord) has been given, by statutes and common law, many more rights than existed during feudal times. One major departure from the old common law system was the widespread adoption of an implied warranty of habitability in short-term residential leases by many American jurisdictions.⁷

Despite a major change in the residential lease area, the law of commercial leasing has not changed dramatically since the nineteenth century. In the past few years, there has been a movement in a few American jurisdictions to incorporate into the commercial lease an implied covenant of the warranty of fitness or suitability.⁸ Many commentators are also advocating the more widespread adoption of the implied warranty of fitness for all commercial leases. The commercial tenant of today is not vastly different from the residential tenant. The habitability of the commercial premises is of paramount importance and most commercial tenants do not have the financial resources or expertise to inspect for habitability.

This article will trace the evolution of implied covenants both in residential and commercial leases. It will examine the differences between the residential and commercial lease, and it will recommend the further adoption of an implied warranty of fitness or suitability by either court decision or statutory change.

6. See *id.* See generally ROBERT S. SCHOSHINSKI, *AMERICAN LAW OF LANDLORD AND TENANT* § 4:1 (1980).

7. See generally Donald R. Pinto, Note, *Modernizing Commercial Lease Law: The Case for an Implied Warranty of Fitness*, 19 SUFFOLK U. L. REV. 929 (1985).

8. See, e.g., *Reste Realty Corp. v. Cooper*, 251 A.2d 268 (N.J. 1969) (imposing on landlord an implied warranty against latent defects).

II. EVOLUTION OF THE RESIDENTIAL LEASE

A. Caveat Lessee and Independent Covenants

1. Independent Covenants

Under the contract doctrine of independent covenants, the tenant's only remedy for breach of the lease by the landlord was an action for damages.⁹ The tenant was not relieved of the obligation to continue paying rent under the lease.¹⁰ Even if the landlord had expressly covenanted to repair the premises, his breach of the express covenant did not relieve the tenant of the duty to continue rent payments.¹¹ Accordingly, the landlord could not take possession if the tenant stopped paying rent; the landlord could only sue for contractual relief.¹² However, landlords were not seriously disadvantaged because in the majority of leases, the tenant's right to possession was expressly conditioned upon the payment of rent.¹³ Thus, while in theory the landlord was as disadvantaged by the independence of covenants as the tenant, the landlord's superior bargaining position usually mitigated the mutuality.

As landlords began to incorporate language in their leases providing for termination of the tenant's interest in the event of failure to pay rent, many state legislatures passed statutes allowing for a type of summary procedure to regain the premises.¹⁴ Since the tenant's obligation to pay rent was independent of what the landlord did or did not do, failure to pay rent, for

9. See *Rubens v. Hill*, 72 N.E. 1127, 1130 (Ill. 1904) ("It is well settled that where a covenant goes only to a part of the consideration on both sides, and the breach of such covenant may be readily compensated for in damages, it is generally considered independent.").

10. 1 AMERICAN LAW OF PROPERTY, *supra* note 3, § 3.11.

11. See, e.g., *Stewart v. Childs Co.*, 92 A. 392 (N.J. 1914) (finding tenant's promise to pay rent independent of landlord's express covenant to repair premises); *McArdle v. Courson*, 402 N.E.2d 292 (Ill. Ct. App. 1980) (holding that tenant could not withhold rent and remain in possession even though landlord breached an express covenant to repair).

12. See FRIEDMAN, *supra* note 5, § 1.1.

13. See Bettina B. Plevin, Note, *Contract Principles and Leases of Realty*, 50 B.U. L. REV. 24, 26 (1970).

14. See, e.g., CAL. CIV. CODE § 792 (West 1954); ILL. REV. STAT. ch. 57, §§ 1-22 (1955).

any reason, triggered the landlord's remedies under the summary eviction statutes.¹⁵ These statutes were definitely a landlord's remedy. As one court stated, the object of the summary eviction statute was "to give a brief and summary remedy to the claimants of estates as against possessory interests with an estate less than the estate of freehold."¹⁶

The inhospitable climate for the defendant/tenant of these summary eviction procedures often resulted in the forfeiture of the tenant's estate for non-payment of rent. As the District of Columbia circuit court observed, "[t]he vast majority of suits for possession instituted in [the landlord-tenant] court result in default judgments for the landlords; in the thousands of others, the tenant simply confesses judgment."¹⁷ Gradually, in recognition of the bias toward the landlord, courts began to exercise equitable power in favor of the defendant-tenant.¹⁸

Landlord-tenant law had originally developed to accommodate an agrarian society. However, with the beginnings of the Industrial Revolution in the eighteenth and nineteenth centuries, the population began moving to the cities. The structures on the land, rather than the land itself became the focus of the lease.¹⁹ As a result, the lease became more residential in nature. The landlord was under no duty to deliver the premises in any particular condition and had no duty to repair the structure during the term of the lease.²⁰ Unless a tenant negotiated for express conditions concerning the property's condition there were no implied warranties as to habitability, fitness or condition of the property.²¹ Even if the landlord breached an

15. See Jean C. Love, *Landlord's Liability for Defective Premises: Caveat Lessee, Negligence or Strict Liability*, 1975 WIS. L. REV. 19, 32.

16. *Miller v. Johnson*, 6 D.C. (1 Mackey) 51 (1864).

17. *Bell v. Tsintolas Realty Co.*, 430 F.2d 474, 481 (D.C. Cir. 1970).

18. See Benjamin J. Lambiotte, Comment, *Defensively Pleading Commercial Landlords' Breaches in Summary Actions for Possession: A Retrospective and Proposal*, 37 CATH. U. L. REV. 705, 710 (1988).

19. See John F. Hicks, *The Contractual Nature of Real Property Leases*, 24 BAYLOR L. REV. 443, 451 (1972).

20. See Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. REV. 503, 510-11 (1982).

21. See Fred W. Bopp III, Note, *The Unwarranted Implication of a Warranty of Fitness in Commercial Leases—An Alternative Approach*, 41 VAND. L. REV. 1057, 1060 (1988).

express covenant in the lease, the tenant was not excused from payment of rent. This was truly *caveat lessee*. The operation of the doctrine of independent covenants and *caveat lessee* doubled the hardship of the residential tenant in particular because there was no guarantee that the premises would be fit for human habitation. Even if there were such a guarantee, the tenant still had the obligation to continue paying rent despite any habitation problem.²²

During this time, the courts justified this hardship by rationalizing that the tenant had the ability to inspect the building before signing the lease and could put the premises into acceptable condition himself.²³ Any latent defects could be remedied by an express condition in the lease or the tenant could make the repairs himself.²⁴ Today, these same arguments are expressed for the proposition that a commercial tenant does not need any additional protection from unsafe or nonfunctional premises. However, like today's typical residential tenant, the commercial tenant may lack the expertise to conduct a diligent inspection of the premises.

2. Implied Covenant of Quiet Enjoyment

During the early nineteenth century many courts and some legislatures began to mitigate the harshness of *caveat lessee* and the doctrine of independent covenants. Upon actual eviction from the property by the landlord, many courts found breach of an implied covenant of quiet enjoyment, and the tenant was relieved of his duty to continue paying rent.²⁵ The covenant of quiet enjoyment, as it developed, involved the tenant's right to

22. See, e.g., *Truman v. Rodesch*, 168 Ill. App. 304 (1912); *Arbuckle Realty Trust v. Rosson*, 67 P.2d 444 (Okla. 1937).

23. See generally Jonathan M. Purver, Annotation, *Modern Status of Rules as to Existence of Implied Warranty of Habitability or Fitness for Use of Leased Premises*, 40 A.L.R.3d 646, 650 (1971).

24. See John A. Marley, Note, *Landlord-Tenant—Should a Warranty of Fitness be Implied in Commercial Leases?*, 13 RUTGERS L. J. 91, 94 (1981) (citing 1 AMERICAN LAW OF PROPERTY, *supra* note 3, § 3.45).

25. See *State Bank of Chicago v. Wheeler*, 146 Ill. App. 568, 569 (1909).

expect that his possession would not be disturbed by the landlord, his agents, or any other person holding paramount title.²⁶

The application of the implied covenant of quiet enjoyment gave the lessee some limited protection, but was only applicable if there was a total and actual eviction.²⁷ The operation of the implied covenant of quiet enjoyment was not inconsistent with the independent covenants doctrine because ouster of the tenant involved a total failure of consideration.²⁸ Some jurisdictions enacted statutes relieving tenants of the obligation to pay rent if the premises were destroyed,²⁹ or if the landlord ousted the tenant from the premises.³⁰ Again, these statutes gave residential tenants limited protection, but only in the circumstance of total eviction or dispossession.

3. Constructive Eviction

In the early part of the nineteenth century, courts in this country began to accept the notion of constructive eviction as an assault on the independent covenants doctrine.³¹ The first case to use the doctrine of constructive eviction was *Dyett v. Pendleton*.³² The court in *Dyett* held that a lessee was constructively evicted by a landlord whose "indecent and riotous practices and proceedings" with "lewd women" on the premises caused the tenant to vacate the premises.³³ In addition, the court held that "other acts of the landlord going to diminish the enjoyment of the premises, besides an actual expulsion, will exonerate [the tenant] from the payment of rent."³⁴

26. See Glendon, *supra* note 20, at 510.

27. The implied covenant of quiet enjoyment can be modified by express language in the lease. See *HTM Restaurants, Inc. v. Goldman, Sachs & Co.*, 797 S.W.2d 326 (Tex. Ct. App. 1990).

28. See Gerald G. Greenfield & Michael Z. Margolies, *An Implied Warranty of Fitness in Nonresidential Leases*, 45 ALB. L. REV. 855, 861 (1981).

29. See CONN. GEN. STAT. § 2969 (1888).

30. See 2 HERBERT T. TIFFANY, *TREATISE ON THE LAW OF LANDLORD AND TENANT* § 184, at 1258 (1912).

31. See generally Glendon, *supra* note 20, at 512-17 (indicating that constructive eviction grew from intertwined property and contract principles).

32. 8 Cow. 727 (N.Y. 1826).

33. *Id.* at 738-39.

34. *Id.* at 732.

After *Dyett*, other courts began to adopt the doctrine of constructive eviction and somewhat loosened the amount of landlord interference that constituted constructive eviction. Constructively evicted tenants were allowed to terminate their leases, rather than merely suspend rent payments.³⁵ The types of landlord action which would trigger a successful constructive eviction claim gradually expanded. Such things as failure to provide heat,³⁶ stench from an adjacent property under the landlord's control,³⁷ and immoral acts in an adjacent room³⁸ were defined as constructive eviction. By the early twentieth century, courts began granting tenants relief for failure to provide such basic services as heat, electricity, and plumbing.³⁹ However, as the doctrine gained acceptance in the courts, the requirement continued that the tenant had to abandon the premises in order to utilize the constructive eviction remedy.⁴⁰

While the growth of the doctrine of constructive eviction was an erosion of the doctrine of independent covenants, many tenants did not take advantage of this new remedy because of the difficult burden of proof for the tenant. The tenant had to prove: 1) substantial interference with possession; 2) interference by or at the direction of the landlord; 3) that the landlord was notified of the problem; and, 4) abandonment of the property by the tenant within a reasonable time.⁴¹ In addition, if the court did not agree that the level of interference with the tenant's use and enjoyment of the property was sufficient to constructively evict, or if the tenant waited too long to abandon the premises, the tenant was then liable for the rent due (even if he had abandoned) or he may have waived his right to abandon.⁴² Requiring the tenant to abandon the premises was an

35. CORNELIUS J. MOYNIHAN, *INTRODUCTION TO THE LAW OF REAL PROPERTY* 71-72 (1st ed. 1962).

36. *See, e.g.,* *Automobile Supply Co. v. Scene-in-Action Corp.*, 172 N.E. 35, 38 (Ill. 1930) (holding that tenants right to terminate lease for lack of heat was waived by continuing to occupy premises); *Rome v. Johnson*, 174 N.E. 716, 718 (Mass. 1931) (finding that lack of heat caused tenants' employees to stop working).

37. *Sully v. Schmitt*, 41 N.E. 514, 515 (N.Y. 1895).

38. *Wolf v. Eppenstein*, 140 P. 751 (Or. 1914).

39. Glendon, *supra* note 20, at 513.

40. *See* SCHOSHINSKI, *supra* note 6, § 3:5, at 99.

41. *Id.*

42. *Id.*; *see also* Glendon, *supra* note 20, at 513; Greenfield & Margolies, *supra*

additional hardship for many tenants.⁴³ This necessitated finding another place to live and many tenants could not handle the additional financial burden.⁴⁴ Thus, many tenants chose to remain in unsuitable living conditions rather than face the uncertainty of a suit for constructive eviction.

Eventually, a few courts began to adopt a theory that allowed a tenant to be constructively evicted without actually having to vacate the premises. In 1959, the Massachusetts Supreme Judicial Court in *Charles E. Burt, Inc. v. Seven Grand Corp.*⁴⁵ held that a tenant did not have to leave the premises in order to qualify for relief under the doctrine of equitable constructive eviction.⁴⁶ However, the further expansion of the doctrine of constructive eviction became less necessary because of the erosion of the *caveat lessee* doctrine in other areas, most notably by the ascension of the implied covenant of habitability.⁴⁷

4. Erosion of *Caveat Lessee*

Later in the nineteenth century, the courts began attacking the doctrine of *caveat lessee*. Today, at least in the residential lease context, the doctrine is virtually dead. One of the first exceptions to the doctrine was the recognition by many courts of an implied warranty of habitability for a short-term lease of furnished premises.⁴⁸ The rationale for this exception to *caveat lessee* was that the premises were ready for immediate occupancy and, as such, the tenant did not have adequate opportunity to inspect the premises.⁴⁹ As one court recognized,

note 28, at 867-69.

43. Low-income tenants' risk of continuing responsibility for the rent was probably mitigated by the unwillingness of landlords to seek money judgments against them. Glendon, *supra* note 20, at 513.

44. See Love, *supra* note 15, at 36-37; Michael P. McCloskey, *Commercial Leases: Behind the Green Door*, 12 PAC. L.J. 1067, 1076-77 (1981).

45. 163 N.E.2d 4 (Mass. 1959).

46. *Id.* at 7-8 (landlord failed to provide electric current, heat, and elevator service).

47. See *infra* notes 80-106 and accompanying text.

48. See *Young v. Povich*, 116 A. 26 (Me. 1922) (finding an implied warranty of habitability in lease of apartment for summer); *Ingalls v. Hobbs*, 31 N.E. 286 (Mass. 1891) (holding that breach of the implied warranty of habitability was a defense to failure to pay rent).

49. Robert J. Brennan, *The Implied Warranty of Fitness in Commercial Leases*

an important part of what the hirer pays for is the opportunity to enjoy [the premises] without delay, and without the expense of preparing it for use. It is very difficult and often impossible, for one to determine on inspection whether the house and its appointments are fit for the use for which they are immediately wanted⁵⁰

The next exception to the doctrine of *caveat lessee* for buildings under construction also involved the inability of the tenant to inspect the premises.⁵¹ The courts held that the building, when completed or altered, had to be suitable for the tenant's purpose since the tenant could not determine suitability prior to execution of the lease.⁵² When applying this exception, the courts generally made no distinction between residential and commercial tenants.⁵³ Another exception to *caveat lessee* involved fraudulent concealment of the condition of the property by the landlord or the failure to disclose latent defects which could not be revealed by inspection.⁵⁴ The tenant would be excused from performance under the lease if he could prove fraudulent conduct by the landlord.⁵⁵ However, unless the ten-

and the Subrogating Insurance Company, 18 FORUM 683, 685 (1983); see, e.g., Young v. Povich, 116 A. 26 (Me. 1922); Delamater v. Foreman, 239 N.W. 148 (Minn. 1931); Morgenthau v. Ehrich, 136 N.Y.S. 140 (Sup. Ct. 1912). However, this exception was not universally followed. See Fisher v. Lighthall, 15 D.C. (4 Mackey) 82 (1885); Murray v. Albertson, 13 A. 394 (N.J. 1888); Franklin v. Brown, 23 N.E. 126 (N.Y. 1889).

50. Ingalls v. Hobbs, 31 N.E. 286, 286 (Mass. 1892).

51. J.D. Young Corp. v. McClintic, 26 S.W.2d 460, 462 (Tex. Civ. App. 1930), *rev'd on other grounds*, 66 S.W.2d 676 (Tex. Comm. App. 1933). The lease was signed before construction was completed and a roof leak caused damage to the tenant's goods. The court held there was an implied warranty of fitness since the tenant could not judge the suitability of the building at the time the lease was signed. *Id.* at 461-62.

52. See Woolford v. Electric Appliances, Inc., 75 P.2d 112 (Cal. Dist. Ct. App. 1938) (landlord failed to provide refrigeration equipment for a meat market); Levitz Furniture Co. v. Continental Equities, Inc., 411 So. 2d 221 (Fla. Dist. Ct. App.), *petition denied*, 419 So. 2d 1196 (Fla. 1982) (implied warranty that completed structure will be suitable for lessee's intended use); Ingalls v. Hobbs, 31 N.E. at 286; Hardman Estate v. McNair, 111 P. 1059 (Wash. 1910) (cafe and kitchen were not properly ventilated).

53. See cases cited *supra* note 52.

54. Sunasack v. Morey, 63 N.E. 1039 (Ill. 1902) (holding that tenant has right to rely on landlord's assurance that premises were in healthy condition); Pulaski Hous. Auth. v. Smith, 282 S.W.2d 213 (Tenn. Ct. App. 1955) (landlord has duty not to knowingly expose tenants to danger); *but see* Blake v. Dick, 38 P. 1072 (Mont. 1895).

55. See, e.g., Gamble-Robinson Co. v. Buzzard, 65 F.2d 950 (8th Cir. 1933); Taylor

ant could fit his claim into one of these exceptions or demonstrate that he had been constructively evicted, he would not be relieved of his obligation to pay rent.⁵⁶

These exceptions to the doctrine of *caveat lessee*, while a great step forward, did little to protect the tenant during the term of the lease. The landlord had no duty to make repairs after possession was transferred. The theory was that the tenant accepted the risk of loss at the time she accepted possession.⁵⁷ Once the tenant took possession of the property, the landlord was not liable to the tenant or the tenant's invitees.⁵⁸ This was an extremely harsh rule for tenants of improved property because the obligation to pay rent continued even if the improvement was destroyed or rendered unsuitable for the tenant's purpose.⁵⁹ This result made sense as long as the court's primary focus, when interpreting the lease, was the land, not the structures.

By the late nineteenth century, some jurisdictions had adopted statutes which allowed a tenant to abandon the building and no longer be liable for rent if the building was "untenantable," either as a result of being destroyed or damaged.⁶⁰ An 1860 New York statute provided:

[T]he lessees or occupants of any building, which shall, without any fault or neglect on their part, be destroyed or be so injured by the elements or any other cause as to be untenantable and unfit for occupancy, shall not be liable or bound to pay rent to the lessors or owners thereof, after such destruction or injury, unless otherwise expressly provided by written agreement or covenant; and the lessees or occupants may thereupon quit and surrender possession of

v. Leedy & Co., 412 So. 2d 763 (Ala. 1982); *Daly v. Wise*, 30 N.E. 837 (N.Y. 1892).

56. 1 AMERICAN LAW OF PROPERTY, *supra* note 3, § 3.45, at 267-69.

57. Glendon, *supra* note 20, at 516.

58. Marvin F. Milich, *Protecting Commercial Landlords from Liability for Criminal Acts of Third Parties*, 15 REAL EST. L.J. 236, 237 (1987). The exception to this rule was the innkeeper. The innkeeper possessed a "special relation" to the guests and was compelled to keep the inn in good repair and reasonably safe. *Id.*

59. Stephen A. Siegal, *Is the Modern Lease a Contract or Conveyance?—A Historical Inquiry*, 52 J. URB. L. 649, 656 (1975).

60. Glendon, *supra* note 20, at 516.

the leasehold premises, and of the land so leased or occupied.⁶¹

These statutes were construed narrowly by some courts, allowing the tenant to be relieved of liability only in the event of total destruction of the premises.⁶² Later, courts began to construe these statutes more broadly, allowing the tenant to vacate and be relieved of further liability even if the premises became gradually untenable.⁶³

Another step away from strict *caveat lessee* and the "no duty to maintain" rule was the widespread development of multi-unit buildings. Courts began to hold the landlord liable for areas over which he retained control.⁶⁴ This became important because in most multi-unit buildings the landlord retains control over such things as the heating and plumbing systems.⁶⁵ By the beginning of the twentieth century, the landlord's liability had expanded to include disclosure of latent defects on the property that he had reason to know were not discoverable by the tenant.⁶⁶ The landlord could be liable in tort if he failed to keep the common areas in good repair or made repairs negligently.⁶⁷ However, these advances in landlord-tenant law were not universal. Many courts clung to the old *caveat lessee* system which made significant, widespread change difficult.

Thus, while the courts in the nineteenth and early twentieth centuries were making some strides in moving away from *caveat lessee*, it was not until the mid-twentieth century that the courts, and then the legislatures (both state and federal), made significant headway in virtually abolishing the doctrine of *caveat lessee* in the context of residential leases.

61. 1860 N.Y. Laws ch. 345, (quoted in *Suydam v. Jackson*, 54 N.Y. 450, 453 (1873)).

62. *Id.*

63. See, e.g., *Meserole v. Hoyt*, 55 N.E. 274 (N.Y. 1899) (house leaked and was always damp to the extent tenant was stricken with malaria); *Tallman v. Murphy*, 24 N.E. 716 (N.Y. 1890) (tenants' rooms were at times filled with coal gas and smoke which made them sick).

64. 1 TIFFANY, *supra* note 2, §§ 89, 91; see also, *Glendon*, *supra* note 20, at 516-17.

65. See generally 1 TIFFANY, *supra* note 2, § 89.

66. See *Sunasack v. Morley*, 63 N.E. 1039 (Ill. 1902).

67. 1 TIFFANY, *supra* note 2, § 87.

B. *Implied Warranty of Habitability*

Following World War II, the need for low cost, adequate housing became readily apparent. In response to this need, Congress passed the Housing Act of 1949. The goal of this Act was to achieve "a decent home and a suitable living environment for every American family."⁶⁸ This statute, and other Federal statutes that followed, required cities to create or update ordinances and codes dealing with land use, sanitation, and safety standards in order to qualify for federal subsidies.⁶⁹ Almost immediately virtually all American cities began revising and adopting housing codes. Unfortunately, these codes were often unable to affect substantial changes in lower income housing. In many cities, the local government lacked the administrative resources to rigorously enforce the codes, and if the codes were enforced, courts would often only assess minimal fines.⁷⁰ While these codes were the first significant step away from *caveat lessee*, they alone were not enough.

During the mid-1960s, President Lyndon Johnson's Great Society program made low cost legal services available to poor tenants at little or no cost.⁷¹ As one commentator noted:

As a result of federal financial support and the idealism and aggressiveness of [the] attorneys, the legal status quo was challenged not only in the courts, but in state legislatures as well. High-profile litigation became an important tool in the burgeoning civil rights movement and served to raise public consciousness of the deplorable conditions under which many urban tenants were suffering.⁷²

The Great Society program, while not directly related to residential landlord-tenant law, was a direct cause of widespread reform in both common law and statutory law. In fact,

68. 42 U.S.C. § 1441 (1988).

69. *Id.* See also Pinto, *supra* note 7, at 939-40.

70. Comment, *Implied Warranty of Habitability: An Incipient Trend in the Law of Landlord-Tenant?*, 40 FORDHAM L. REV. 123, 127-28 (1971).

71. See Charles Donahue, Jr., *Change in the American Law of Landlord and Tenant*, 37 MOD. L. REV. 242, 246 (1974).

72. Pinto, *supra* note 7, at 941 (citations omitted).

the current majority of states have adopted comprehensive residential landlord-tenant legislation.⁷³ Many of these states' statutes are based on the Uniform Residential Landlord-Tenant Act (URLTA).⁷⁴ One of the main provisions of the URLTA is the requirement that landlords maintain the premises in a habitable condition. The Act further prohibits the landlord from waiving the provisions of the URLTA in the lease instrument.⁷⁵ The URLTA also permits the court to refuse to enforce any unconscionable lease provisions and to award punitive damages and attorney's fees to the prevailing party in a suit brought under the Act.⁷⁶ Of course, not all state statutes are quite as pro-tenant as the URLTA. In many of those states, and in most of the states that have not adopted an act dealing with tenant issues, the courts have been active in adopting the policies of the URLTA, even though the state legislature has not acted or has not enacted a statute as far-reaching as the URLTA.⁷⁷ However, not all courts have been so quick to adopt the pro-tenant policies of the URLTA, particularly if a statute was already in place.⁷⁸

The first widespread acceptance of the implied warranty of habitability in a residential lease occurred in the late 1960s. Two of the early cases recognizing the implied warranty in the

73. See, e.g., ALASKA STAT. §§ 34.03.100-380 (1990); ARIZ. REV. STAT. ANN. §§ 33-1301 to -1381 (1980 & Supp. 1993); CONN. GEN. STAT. ANN. §§ 47a-1 to -20 (West 1978 & Supp. 1992); IOWA CODE ANN. §§ 562A.1-37 (West 1992 & Supp. 1993); MONT. CODE ANN. §§ 70-24-101 to -442 (1992); N.M. STAT. ANN. §§ 47-8-1 to -51 (Michie 1982 & Supp. 1993); OKLA. STAT. ANN. tit. 41, §§ 101-35 (West 1986 & Supp. 1993); VA. CODE ANN. §§ 55.248.2 to .40 (Michie 1986 & Supp. 1993).

74. UNIFORM RESIDENTIAL LANDLORD & TENANT ACT, 7B U.L.A. 430 (1993) [hereinafter URLTA]; see, e.g., DEL. CODE ANN. tit. 25, §§ 5101-5112 (1989 & Supp. 1992); HAW. REV. STAT. §§ 521-1 to -77 (1985 & Supp. 1992).

75. URLTA §§ 1.403(a)(1), 2.104(a)(2).

76. *Id.* at §§ 4.101-102, 5.101.

77. See *Green v. Superior Court*, 517 P.2d 1168 (Cal. 1974); *Breezewood Management Co. v. Maltbie*, 411 N.E.2d 670 (Ind. App. 1980); *Detling v. Edelbrock*, 671 S.W.2d 265 (Mo. 1984) (en banc); *Pugh v. Holmes*, 405 A.2d 897 (Pa. 1979).

78. See *Hurst v. Field*, 661 S.W.2d 393 (Ark. 1983) (no duty to repair unless provided in lease); *Worden v. Ordway*, 672 P.2d 1049 (Idaho 1983) (no implied warranty where legislature had already acted and not provided for one); *Zimmerman v. Moore*, 441 N.E.2d 690 (Ind. App. 1982) (no implied warranty when non-merchant lessor leases single family, used dwelling); *Miles v. Shaunttee*, 664 S.W.2d 512 (Ky. 1983) (no implied warranty without legislative action).

residential lease context were *Lemle v. Breeden*⁷⁹ and *Javins v. First National Realty Corp.*⁸⁰ These decisions, and others recognizing an implied warranty of habitability in a residential lease, were anticipated by two earlier decisions: a 1931 Minnesota Supreme Court decision, *Delamater v. Foreman*,⁸¹ and a 1892 Massachusetts decision, *Ingalls v. Hobbs*.⁸²

Delamater, which involved vermin infestation, held that in modern apartment buildings a landlord should warrant that the premises will be habitable.⁸³ Both *Delamater* and *Ingalls* were cited in a 1961 Wisconsin Supreme Court case, *Pines v. Perssion*,⁸⁴ which held that in a one year residential lease, the "[implied] covenant to pay rent and [the] covenant to provide a habitable house were mutually dependent."⁸⁵ The *Pines* court was one of the first courts to recognize that "[t]he need and social desirability of adequate housing for people in this era of rapid population increases is too important to be rebuffed by that obnoxious legal cliché, *caveat emptor*."⁸⁶ Unfortunately, the Wisconsin Supreme Court reversed itself ten years later

79. 462 P.2d 470 (Haw. 1969).

80. 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

81. 239 N.W. 148 (Minn. 1931).

82. 31 N.E. 286 (Mass. 1892) (holding that a short term furnished lease must be habitable). In 1926, the Supreme Court of New Jersey in *Higgins v. Whiting* held:

[T]he covenant to pay rent and the covenant to heat the apartment are mutual and dependent. In the modern apartment house, equipped for heating from a central plant, entirely under the control of the landlord or his agent, heat is one of the things for which the tenant pays under the name "rent."

131 A. 879, 880 (N.J. 1926).

83. *Delamater*, 239 N.W. at 149.

84. 111 N.W.2d 409 (Wis. 1961).

85. *Id.* at 413. The court in *Pines* found that some legislative action in the area did not preclude the court from developing an implied warranty of habitability. The court stated:

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. Thus, the legislature has made a policy judgment—that it is socially (and politically) desirable to impose these duties on a property owner—which has rendered the old common law rule obsolete. 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.

Id. at 412.

86. *Id.* at 413.

and held that the Milwaukee Housing Code did not give rise to an implied warranty of habitability, and violations could not be used as a defense to paying rent.⁸⁷ These early cases, although limited in scope, paved the way for the revolution in residential lease law.

*Lemle v. Breeden*⁸⁸ was the first case to recognize the residential lease as a contract and hold that the landlord warranted by implication the habitability of the premises. The tenant in *Lemle* sued to recover his deposit and rent paid after vacating the furnished house because of rat infestation.⁸⁹ The court in *Lemle* refused to apply the doctrine of constructive eviction stating "[l]egal fictions and artificial exceptions to wooden rules of property law aside, we hold that in the lease of a dwelling house . . . there is an implied warranty of habitability and fitness for the use intended."⁹⁰

While *Lemle* is the first case to clearly establish an implied warranty of habitability, *Javins*, by far, is more widely cited as the beginning of the erosion of the independent covenants doctrine and the principles of *caveat lessee*.⁹¹ In *Javins*, the court held that "a warranty of habitability, measured by the standards set out in the Housing Regulations for the District of Columbia, is implied by operation of law into leases of urban dwelling units covered by those Regulations."⁹² Nevertheless, *Javins* opened the door to adoption of the implied warranty of

87. *Posnanski v. Hood*, 174 N.W.2d 528 (Wis. 1970). The court found that the structure of the Code precluded private remedies and that it only authorized administrative enforcement. *Id.* at 532-33.

88. 462 P.2d 470 (Haw. 1969).

89. *Id.* at 472.

90. *Id.* at 474. The court also rejected the doctrine of *caveat emptor* stating: [A]t one time [*caveat emptor*] may have had some basis in social practice as well as in historical doctrine, . . . [but] in an urban society where the vast majority of tenants do not reap the rent directly from the land but bargain primarily for the right to enjoy the premises for living purposes . . . common law conceptions of a lease and the tenant's liability for rent are no longer viable.

Id. at 472-73.

91. See *Green v. Superior Court*, 517 P.2d 1168 (Cal. 1974); *Jack Spring, Inc. v. Little*, 280 N.E.2d 208 (Ill. 1972); *Foisy v. Wyman*, 515 P.2d 160 (Wash. 1973).

92. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1072-73 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970) (the tenants alleged more than 1500 violations of the Housing Regulations of the District of Columbia).

habitability by other jurisdictions because of the public policy set forth in the opinion.

The *Javins* court recognized that the doctrine of independent covenants arose in the agrarian middle ages where the lease was considered a conveyance of an interest in land rather than a contract for the use of a building, and thus was not applicable to modern urban society.⁹³ The court also noted the modern trend of consumer protection which focused on the consumer's expectations of a safe and habitable place to live.⁹⁴ The *Javins* court also recognized the disparity of bargaining power between landlord and tenant in the residential lease setting.⁹⁵ The *Javins* court enumerated three other reasons for adoption of the implied warranty of habitability. The first was the short term nature of most residential leases—the tenant may not be able to justify the expenditures necessary for the repairs.⁹⁶ Second, the property needing to be repaired, in many residential leaseholds, may not be under the control of the tenant.⁹⁷ Finally, because of the short term of most residential leases, the tenant may have difficulty obtaining financing for needed repairs.⁹⁸ The court further analogized the lease as a purchase of a shelter for a short period of time, and, as in products liability law, the seller (landlord) should maintain the premises in a fit and merchantable manner.⁹⁹ Today, much of the *Javins* rationale is equally applicable to the commercial lease setting, particularly to the small tenant who has little bargaining power.¹⁰⁰

The vast majority of jurisdictions now have an implied warranty of habitability either by statute or by judicial decision.¹⁰¹ Beginning with *Javins*, the courts that have moved

93. *Id.* at 1074.

94. *Id.* at 1075-76.

95. *Id.* at 1079-80.

96. *Id.* at 1078.

97. *Id.*

98. *Id.* at 1078-79.

99. *Id.* at 1079-80.

100. See *infra* notes 152-54 and accompanying text.

101. See generally Bopp, *supra* note 21, at 1064-67 (39 state legislatures have adopted statutes requiring habitable dwellings). Not all legal commentators have applauded the adoption of the implied warranty of habitability. One author noted that

away from the old common law notions of independent covenants and *caveat lessee* have emphasized the following policy considerations:

1. the shift from the importance of the land in an agrarian society to the importance of the structures in an urban society;¹⁰²

2. the hardship of requiring a tenant to inspect the property and make improvements and/or repairs;¹⁰³

3. the disparity of bargaining power and the growing use of form leases;¹⁰⁴

4. the health hazards to persons living in substandard rental housing;¹⁰⁵

5. the inadequate enforcement of local housing and building codes; and,

6. the tendency of the old common law notions to favor the development of slums and slumlords.¹⁰⁶

These protections were created for the residential lessee, however, and have not been adopted for the commercial tenant even though many of the policy considerations are the same or similar for both residential and commercial tenants. The devel-

"[t]he objective of some courts in implying a warranty of habitability appears to be a redistribution of income from landlords to tenants by attempting to force landlords to offer higher quality housing at a lower rent than determined solely by market forces." Daniel P. Schwallie, Note, *The Implied Warranty of Habitability as a Mechanism for Redistributing Income: Good Goal, Bad Policy*, 40 CASE W. RES. L. REV. 525, 530 (1989-90).

102. See *Lemle v. Breeden*, 462 P.2d 470, 473 (Haw. 1969).

103. See *Putnam v. Stout*, 345 N.E.2d 319 (N.Y. 1976). The court in *Putnam* held that a third party injured upon leased premises could maintain a suit against the landlord for failure to repair. *Id.* at 326. The court noted that the term length of a tenant's lease and lack of funds could make it unreasonable to assume that the tenant would make repairs. The court also stated that the landlord, in return for the rent, "could properly be expected" to make repairs to guarantee the safety of the tenants and third parties. *Id.*

104. See *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1079 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

105. See *Pines v. Persson*, 111 N.W.2d 409, 412-13 (Wis. 1961).

106. Bopp, *supra* note 21, at 1066.

opment of implied warranties in the commercial lease has been extremely slow.

III. EVOLUTION OF IMPLIED WARRANTIES IN THE COMMERCIAL LEASE

The development of implied covenants in commercial leases has not kept pace with the development in residential leases. Courts that have eagerly embraced the notion of implied covenants in residential leases have not been very willing to do so in the commercial context.¹⁰⁷ At common law there was no distinction between commercial and residential leases. Thus, the doctrine of independent covenants and *caveat lessee* applied to the commercial lessee as well as the residential.¹⁰⁸ For a time, the commercial and residential lease law developed along the same path—the commercial tenant also had the remedy of constructive eviction.¹⁰⁹ However, the commercial tenant also had the same problems with the constructive eviction remedy; difficulty with proof, the abandonment requirement, inability to determine if the level of interference was sufficient for a successful cause of action, and the expense of moving and finding a new premises. In fact, the commercial tenant may find it more difficult to prove constructive eviction than the residential tenant since the level of interference must make the conduct of business impossible, not just difficult. The interference must be so severe as to be viewed by a court as an eviction. This may be interpreted by a court as a threat to life or health, not just a business interruption.¹¹⁰

107. See, e.g., *McArdle v. Courson*, 402 N.E.2d 292 (Ill. App. Ct. 1980) (refusing to apply *Javins* to a commercial lease); *Spialter v. Testa*, 392 A.2d 1265 (N.J. Dist. Ct. 1978), *aff'd*, 408 A.2d 444 (N.J. Super. Ct. 1979) (per curiam) (defense of uninhabitability not available to commercial tenant).

108. Bopp, *supra* note 21, at 1067.

109. See *Automobile Supply Co. v. Scene-in-Action Corp.*, 172 N.E. 35 (Ill. 1930); *Perkins v. Marsh*, 37 P.2d 689 (Wash. 1934).

110. Michael J. Glazerman, *Asbestos in Commercial Buildings: Obligations and Responsibilities of Landlords and Tenants*, 22 REAL PROP. PROB. & TR. J. 661 (1987). "Termination of the lease because of the mere presence of a dangerous substance, such as asbestos, is not supportable under the present state of the law, but this situation could change if the warranty of habitability were extended to commercial leases." *Id.* at 680 (citations omitted).

Although some courts have relaxed the requirements of constructive eviction,¹¹¹ the majority of jurisdictions have continued to hold that the doctrine of independent covenants is still viable in commercial lease law.¹¹² Thus, like the residential tenant in the early twentieth century, the commercial tenant is not excused from paying rent even though the landlord is in breach of express covenants in the lease,¹¹³ or the premises are not habitable or fit for commercial purposes through the action or inaction of the landlord.¹¹⁴

The commercial tenant also has not been treated in the same manner as modern residential tenants with regard to the doctrine of *caveat lessee*. While the courts and state legislatures have been quite willing to virtually abandon the doctrine with regard to residential leases, the same cannot be said for commercial leases. The vast majority of courts that have considered the issue have refused to abandon the *caveat lessee* doctrine and have denied the commercial tenant an implied warranty of habitability or fitness for purpose.¹¹⁵ In addition, almost all the state legislatures that have adopted statutes protecting residential tenants from uninhabitable premises have refused to expand the protection to commercial tenants.¹¹⁶

111. See *Stevan v. Brown*, 458 A.2d 466 (Md. Ct. Spec. App. 1983) (adopting the doctrine of equitable constructive eviction which allows the tenant to remain on premises while the court determines if constructive eviction occurred).

112. *Collins v. Shanahan*, 523 P.2d 999 (Colo. Ct. App. 1974) (tenant deducted costs of repainting premises from rent; disallowed because covenants independent); *McArdle v. Courson*, 402 N.E.2d 292 (Ill. App. Ct. 1975) (lessee not relieved of paying rent even though lessor did not repair leaky roof); *Murphy v. Texaco, Inc.*, 567 F. Supp. 910 (N.D. Ill. 1983) (service station lessee obligated to pay rent even though lessor did not perform any of its covenants).

113. See, e.g., *Collins v. Shanahan*, 523 P.2d at 1003 (covenants independent unless clear intention to the contrary); *McArdle v. Courson*, 402 N.E.2d at 295 (covenant to repair independent of covenant to pay rent).

114. See *Service Oil Co. v. White*, 542 P.2d 652 (Kan. 1975) (no implied warranty in commercial leases).

115. See *Yuan Kane Ing v. Levy*, 326 N.E.2d 51 (Ill. App. Ct. 1975) (common law principles govern commercial leases); *Service Oil Co. v. White*, 542 P.2d 652 (Kan. 1975) (no justification for extending implied warranties to commercial leases); *Kootman v. Kaye*, 744 S.W.2d 898 (Mo. Ct. App. 1988) (no implied warranty of habitability in non-residential lease); *Golub v. Colby*, 419 A.2d 397 (N.H. 1980) (no implied warranty of habitability in a commercial setting).

116. ALASKA STAT. § 34.03.100 (1988); ARIZ. REV. STAT. ANN. § 33-1324 (1990); CAL. CIV. CODE §§ 1941, 1941.1 (West 1985); CONN. GEN. STAT. ANN. § 47a-7 (West

A. A Slowly Developing Trend

Although most jurisdictions still refuse to recognize implied warranties in commercial leases, there recently has been a slowly expanding chink in the armor of *caveat lessee* in the commercial lease context. The first case in this trend was the 1969 New Jersey case of *Reste Realty Corp. v. Cooper*.¹¹⁷ This commercial lease case was decided at almost the same time that residential lease protections were being developed.¹¹⁸ In *Reste*, the tenant abandoned the office because constant water seepage made it impossible for the tenant to continue to conduct business. The landlord sued the tenant for non-payment of rent, arguing that the tenant had the opportunity to examine the office prior to execution of the lease and promised to keep the premises in good repair.¹¹⁹

The trial court found a constructive eviction that justified the tenant's abandonment of the premises.¹²⁰ The Supreme Court of New Jersey stated that "present day demands of fair treatment for tenants with respect to latent defects remediable

1978 & Supp. 1992); DEL. CODE ANN. tit. 25, § 5305 (1974); FLA. STAT. ANN. § 83.51 (West 1987); HAW. REV. STAT. § 521-42 (1985); IDAHO CODE § 6-320 (1990); IOWA CODE ANN. § 562A.15 (West 1992); KAN. STAT. ANN. § 58-2553 (1983); KY. REV. STAT. ANN. § 383.595 (Michie/Bobbs-Merrill Supp. 1992); ME. REV. STAT. ANN. tit. 14, § 6021 (West 1964 & Supp. 1992); MD. CODE ANN., REAL PROP. § 8-211 (1988); MASS. ANN. LAWS ch. 111, § 127A (Law. Co-op. 1985 & Supp. 1993); MICH. COMP. LAWS § 554.139 (1981); MINN. STAT. ANN. § 504.18 (West Supp. 1993); MO. REV. STAT. §§ 441.500, 441.510 (1986); MONT. CODE ANN. § 70-24-303 (1992); NEB. REV. STAT. § 76-1419 (1990); NEV. REV. STAT. § 118A.290 (1993); N.J. STAT. ANN. § 2A:42-88 (West 1987); N.M. STAT. ANN. § 47-8-20 (Michie 1993); N.Y. MULT. DWELL. LAW §§ 301, 302(1)(b) (McKinney 1977 & Supp. 1992); N.Y. REAL PROP. LAW § 235-b (McKinney 1988 & Supp. 1992); N.C. GEN. STAT. § 42-42 (1990); N.D. CENT. CODE § 47-16-13.1 (1960); OHIO REV. CODE ANN. § 5321.04 (Anderson Supp. 1992); OKLA. STAT. ANN. tit. 41, § 118 (West 1986); OR. REV. STAT. § 91.770 (1990); PA. STAT. ANN. tit. 35, § 1700-1 (1993); R.I. GEN. LAWS §§ 34-18-16, 45-24-3-6 (1984 & Supp. 1992); S.D. CODIFIED LAWS ANN. §§ 43-32-8, -9 (1983); TENN. CODE ANN. § 66-28-304 (1982); TEX. PROP. CODE ANN. § 92-052 (West 1984 & Supp. 1992); VA. CODE ANN. § 55-248.13 (Michie 1986 & Supp. 1993); WASH. REV. CODE ANN. § 59.18.060 (West Supp. 1993); W. VA. CODE § 37-6-30 (1985); WIS. STAT. § 704.07 (Supp. 1992).

117. 251 A.2d 268 (N.J. 1969).

118. See *supra* notes 90-106 and accompanying text.

119. *Reste*, 251 A.2d at 271.

120. *Id.*

by the landlord . . . require imposition on him of an implied warranty against such defects."¹²¹ The court noted that the landlord ordinarily knows the condition of the premises better than the tenant and is more likely to know of latent defects.¹²² The court also held that the tenant's obligation to pay rent was dependent on the landlord's implied warranty against latent defects and the covenant against quiet enjoyment.¹²³ Thus, because of the landlord's breach of these implied covenants, the tenant was justified in abandoning the premises and in refusing to pay rent.¹²⁴ The court in *Reste* was the first court in America to imply a warranty in a commercial lease—the implied warranty against latent defects.

Unfortunately, the *Reste* decision has not been expanded in New Jersey. Two years after *Reste*, the New Jersey Supreme Court refused to adopt an implied warranty of fitness in commercial leases. The court in *Kruvant v. Sunrise Market, Inc.*¹²⁵ stated that "[w]hen and under what circumstances [the implied warranty of fitness] should be applied in other than residential situations is a matter we leave open for future determination in an appropriate case."¹²⁶ In 1973, the same court found that the language in *Reste* indicating adoption of an implied warranty against latent defects was mere dictum and that the case was decided on constructive eviction.¹²⁷ However, the *Reste* decision was ambiguous enough to be interpreted by some courts as adopting an implied warranty of habitability in commercial leases.¹²⁸

121. *Id.* at 273.

122. *Id.* at 272.

123. *Id.* at 276-77.

124. *Id.* at 278.

125. 279 A.2d 104 (N.J. 1971), *modified on other grounds*, 282 A.2d 746 (1971).

126. *Id.* at 106. The same year *Kruvant* was decided, the New Jersey Supreme Court in *Marini v. Ireland* adopted the implied warranty of habitability and the doctrine of dependent covenants in residential leases. 265 A.2d 526, 533 (N.J. 1970). The court in *Kruvant* distinguished *Marini* on the grounds that the commercial lease "was negotiated at arm's length between parties of equal bargaining power." *Kruvant*, 279 A.2d at 106.

127. *See Berzito v. Gambino*, 308 A.2d 17, 19-20 (N.J. 1973); *see also Westrich v. McBride*, 499 A.2d 546, 548 (N.J. Super. Ct. Law Div. 1984) (*Reste* decision based on constructive eviction).

128. *See, e.g., Timber Ridge Town House v. Dietz*, 338 A.2d 21 (N.J. Super. Ct.

The New Jersey experience is not unusual in the evolution of implied covenants in commercial leases. For example, in New York, a lower court in *40 Associates, Inc. v. Katz*¹²⁹ held that an implied warranty of fitness for commercial premises existed and could be asserted despite an express waiver of counterclaims in the lease. The New York Civil Court found the rationale of *Reste* to be persuasive, stating that "[d]espite the absence of a statute, it is clear to this court that the respondent tenant is entitled to his 'rent money's worth' in services and maintenance. There ought to be and is an implied warranty of fitness for commercial purposes."¹³⁰

Unfortunately, other courts have not seen the issue so clearly. Subsequent decisions refused to recognize implied warranties in commercial leases. In 1983, a New York civil court in a residential lease case stated that the implied warranty of habitability had not been extended to commercial leases and that clauses waiving tenants' counterclaims had been routinely upheld in commercial leases.¹³¹ Although *Katz* has not been overturned by an appellate court, the lack of its acceptance by other New York courts casts doubt on the viability of the doctrine.¹³² As one commentator stated:

Law Div. 1975) (finding that *Reste* adopted the implied warranty of habitability in commercial leases); *Van Ness Indus., Inc. v. Claremont Painting & Decorating*, 324 A.2d 102 (N.J. Super. Ct. Ch. Div. 1974) (implied warranty of fitness in residential but not commercial leases); *Olson v. Scholes*, 563 P.2d 1275 (Wash. Ct. App. 1977) (*Reste* implied a warranty of habitability in commercial leases, but Washington court refused to follow).

129. 446 N.Y.S.2d 844 (Civ. Ct. 1981). The court also stated that "[t]he nature of the [implied] warranty would . . . differ from that of a residential lease warranty and would depend on the relationship of the parties, the nature of the tenant's business and the nature of the commercial premises involved." *Id.* at 845.

130. *Id.* at 845. See also *Park West Management Corp. v. Mitchell*, 391 N.E.2d 1288 (N.Y. Civ. Ct.), *cert. denied*, 444 U.S. 992 (1979) (implying warranty of habitability in residential leases and making tenant's obligation to pay rent dependent on landlord's compliance with warranty).

131. *Randall Co. v. Alan Cobel Photography*, 465 N.Y.S.2d 489 (Civ. Ct. 1983).

132. See also *Middletown Plaza Assoc. v. Dora Dale of Middletown, Inc.*, 621 F. Supp. 1163 (D. Conn. 1985) (applying New York law to commercial leases, constructive eviction necessary for defense to suit for nonpayment of rent); *Kachian v. Aronson*, 475 N.Y.S.2d 214 (Civ. Ct. 1984) (no implied warranty of habitability in commercial leases).

[I]t seems safe to say that New York remains rooted firmly in traditional, common law ground. This state has not shown signs of accepting the notion that smaller, less sophisticated business tenants are suitable candidates for at least some of the current residential remedies. Rather, with one glaring exception, the New York lower court decisions firmly embrace the time-tested doctrines of independence of covenants and *caveat emptor*.¹³³

Courts in other states have also flirted with the notion of abandoning the residential/nonresidential distinction in implied lease covenants, but as in New York and New Jersey, the current status of implied covenants in commercial leases remains unclear. In 1976, the California First District Court of Appeals in *Golden v. Conway*¹³⁴ stated that the same rationale for extending the implied warranty of habitability to residential leases could also be applicable to a small commercial tenant.¹³⁵ Two years after the *Golden* decision, the same court in *Four Seas Investment Corp. v. International Hotel Tenants' Ass'n*¹³⁶ again noted that, under appropriate circumstances, the implied warranty of habitability could be extended to small commercial tenants.¹³⁷

Unfortunately, not all California District Courts of Appeal have followed the lead of the first district. In 1980, the fourth district held in *Schulman v. Vera*¹³⁸ that the breach of an *express* covenant to repair could not be asserted as a defense to an unlawful detainer action in a commercial lease.¹³⁹ The court in *Schulman* rejected the notion that the California Supreme Court intended to extend the implied warranty of habitability to commercial tenants.¹⁴⁰ The court stated that "[t]he parties [in a commercial lease] are more likely to have equal

133. Bopp, *supra* note 21, at 1076.

134. 128 Cal. Rptr. 69 (Ct. App. 1976).

135. *Id.* at 78 (referring to *Green v. Superior Court*, 517 P.2d 1168 (Cal. 1974), adopting an implied warranty of habitability in residential leases).

136. 146 Cal. Rptr. 531 (Ct. App. 1978).

137. *Id.* at 535 (dicta).

138. 166 Cal. Rptr. 620 (Ct. App. 1980).

139. *Id.* at 624.

140. *See id.* at 624-25.

bargaining power, and, more importantly, a commercial tenant will presumably have sufficient interest in the demised premises to make needed repairs and the means to make the needed repairs himself or herself, if necessary, and then sue the lessor for damages."¹⁴¹ The final statement of the California courts on implied covenants in commercial leases was given in 1986 in *Muro v. Superior Court*.¹⁴² *Muro* concerned whether strict liability in tort for injuries caused by latent defects on the property should be extended to commercial as well as residential landlords. The court analogized this extension of liability to the extension of an implied warranty to commercial leases, finding no basis for either.¹⁴³ The court focused on five significant factors: 1) sophistication of the commercial tenant; 2) the more equal bargaining power of the commercial tenant; 3) the lack of a strong public policy with regard to commercial structures; 4) the availability of commercial properties; and 5) the financial strength of commercial tenants.¹⁴⁴ Thus, California's position as to implied warranties in commercial leases is not certain, but the recent trend appears to be clearly moving away from acceptance.

B. *The Texas Experience*

Despite the confusion and apparent inconsistencies in the positions of the lower state courts, until 1988 no state supreme court had clearly abandoned the residential/commercial distinction in lease law. In *Davidow v. Inwood North Professional Group—Phase I*,¹⁴⁵ the Texas Supreme Court held that "there is an implied warranty of suitability by the landlord in a commercial lease that the premises are suitable for their intended commercial purpose."¹⁴⁶ The court also held that the tenant's

141. *Id.* at 625. The court, however, did not expressly preclude the commercial tenant from raising breach of the implied warranty of habitability in an unlawful detainer action. *Id.* at 626. See generally Michael P. McCloskey, Note, *Commercial Leases: Behind the Green Door*, 12 PAC. L.J. 1067 (1981).

142. 229 Cal. Rptr. 383 (Ct. App. 1986).

143. *Id.* at 388-89.

144. *Id.*

145. 747 S.W.2d 373 (Tex. 1988).

146. *Id.* at 377.

duty to pay rent and the implied warranty of suitability are mutually dependent.¹⁴⁷ *Davidow* involved a suit for unpaid rent on medical office space leased to Dr. Davidow, M.D. The lease required that Inwood provide air conditioning, electricity, hot water, janitor services, and security services. Problems began soon after Dr. Davidow moved into the building. The air conditioning did not work properly, the roof leaked, rodents infested the office, the office was not cleaned, hot water was not provided, and burglaries occurred.¹⁴⁸ Finally, Dr. Davidow moved out of the office and discontinued paying rent, even though there were fourteen months remaining on the lease.¹⁴⁹ Inwood sued Dr. Davidow for the unpaid rent. Dr. Davidow raised the affirmative defenses of material breach of the lease and breach of the implied warranty that the building was suitable for use as a medical office.¹⁵⁰

The jury found that Inwood materially breached the lease, that Inwood warranted that the space was suited for a medical office, and that the lease space was not suitable for a medical office. The appeals court found that the covenant to pay rent was independent of the obligation of the landlord to maintain the building, and that the implied warranty of habitability did not extend to commercial leases.¹⁵¹

The Texas Supreme Court noted that the implied warranty of habitability had been extended to residential tenants and examined the rationale for extending the implied warranty to commercial tenants.¹⁵² The court found that commercial tenants were no more likely to be in a position to assure the suitability of the premises than the residential tenant. The court noted that many commercial tenants had short term leases and limited financial resources which decreased the likelihood that the tenant would make the necessary repairs.¹⁵³ The court con-

147. *Id.*

148. *Id.* at 374-75.

149. *Id.* at 375.

150. *Id.*

151. *Id.*; see also *Cottrell v. Carrillon Assoc.*, 646 S.W.2d 491 (Tex. Ct. App. 1982) (no writ); *Ravkind v. Jones Apothecary, Inc.*, 439 S.W.2d 470 (Tex. Ct. App. 1969) (writ ref'd n.r.e.).

152. *Davidow*, 747 S.W.2d at 376.

153. *Id.*

cluded that "[t]here is no valid reason to imply a warranty of habitability in residential leases and not in commercial leases. Although minor distinctions can be drawn between residential and commercial tenants, those differences do not justify limiting the warranty to residential leaseholds."¹⁵⁴

The court also listed several factors to be considered in evaluating whether there has been a breach of the implied warranty: 1) the type of defect; 2) the defect's effect on the tenants' use; 3) the length of time the defect has existed; 4) the age of the building; 5) the amount of rent; 6) the location of the building; 7) whether the tenant waived the defects in the lease; and 8) any unusual or abnormal use of the structure by the tenant.¹⁵⁵ These guidelines will be very helpful for other courts in determining the scope of the breach.

Davidow was the first major recognition that the differences between most commercial and residential tenants are not substantial. The next Texas decision involving the breach of the implied warranty of suitability was *Coleman v. Rotana, Inc.*¹⁵⁶ The court in *Coleman* held that the implied warranty of suitability only applied to latent defects "in the nature of a physical or structural defect which the landlord has the duty to repair."¹⁵⁷ The court found that the inadequate, nonexclusive use of a parking lot for the tenant's restaurant did not fall within the definition of "leased premises" to which the implied warranty of suitability applied.¹⁵⁸ The court focused on the fact that the restaurant/tenant specifically contracted for the nonexclusive use of the parking lot and refused to hold that a parking lot could never be covered under the implied warranty of suitability.¹⁵⁹

The next refinement of the *Davidow* holding was in the Houston Court of Appeals' decision of *Henry S. Miller Manage-*

154. *Id.* at 376-77.

155. *Id.* at 377.

156. 778 S.W.2d 867 (Tex. Ct. App. 1989).

157. *Id.* at 871.

158. *Id.* "We also conclude that not only must the defect alleged be within the scope of the warranty, the 'facility' alleged to be defective must be within the leased premises." *Id.*

159. *Id.*

ment Corp. v. Houston State Associates.¹⁶⁰ The tenant, U.S. Life, had problems with the air conditioning, heating, plumbing, parking and the appearance of the building. U.S. Life notified the landlord of its intent to cancel the lease because of these problems, and the landlord then sued U.S. Life for breach of the lease. U.S. Life countersued the landlord and its management company for constructive eviction, breach of warranties and violations of the Texas Deceptive Trade Practices Act.¹⁶¹ The jury found that the landlord breached the implied warranty of suitability, but did not constructively evict the tenant.¹⁶² The appeals court held that the tenant, under the *Davidow* analysis, did not have to prove "constructive eviction, loss of quiet enjoyment, or loss of benefit of the bargain, in addition to breach of the warranty of suitability, in order to have the lease canceled."¹⁶³ The mere breach of the implied warranty of suitability gave rise to the remedy of cancellation.¹⁶⁴

The most recent Texas case to interpret *Davidow* is *Kerrville HRH, Inc. v. City of Kerrville*.¹⁶⁵ The San Antonio Court of Appeals held that even though the tenant was found to be negligent in failing to discover the defects on the premises, contributory negligence would not defeat a cause of action for breach of the implied warranty of suitability.¹⁶⁶ The court stated that

A tenant, even one who inspects the premises prior to leasing them, is under no obligation to discover each latent defect that would render the premises unsuitable for his purposes at the risk of being found contributorily negligent. Such a doctrine would move us back to the days of caveat lessee.¹⁶⁷

160. 792 S.W.2d 128 (Tex. Ct. App. 1990).

161. *Id.* at 129.

162. *Id.* at 130.

163. *Id.* at 131.

164. *Id.*

165. 803 S.W.2d 377 (Tex. Ct. App. 1990).

166. *Id.* at 385-86. The tenant, a wholesale nursery, was found to be contributorily negligent for failing to properly inspect the premises, test the irrigation water, and test the soil. *Id.*

167. *Id.* at 386.

Thus, Texas has fully embraced the *Davidow* doctrine. Unfortunately, no other state supreme court has followed the Texas lead. In 1989, the Massachusetts Supreme Judicial Court in *Chausse v. Coz*¹⁶⁸ held that a landlord was not liable to an employee of the tenant for injuries resulting in an explosion caused, in part, by an inability to maintain a low humidity in the building. The court found that the failure to provide an unusually low humidity was not a structural defect that the landlord was under a duty to repair.¹⁶⁹ The court, while rejecting the adoption of an implied warranty of habitability in a commercial lease under these facts, left open the possibility of recognizing such an implied warranty under other circumstances.¹⁷⁰ Therefore, at least one other state supreme court has held the door open for acceptance of the implied warranties in a commercial lease context.

C. Policy Considerations

Courts have traditionally refused to imply the warranty of suitability or habitability in commercial leases because a commercial tenant is more likely to have equal bargaining power with the landlord and has the ability to inspect the premises. This argument assumes that most commercial tenants have the expertise required to inspect the building for latent defects. In fact, most commercial tenants inspect the building for space requirements, utilities, parking, and other issues relating to conducting their business. One commentator has stated that "[f]ew tenants are equipped to conduct sophisticated inspections of the mechanical and structural elements of a large commercial or industrial building."¹⁷¹ It is unrealistic to assume that all, or even most, commercial tenants have the bargaining power to force the landlord to expressly warrant the suitability of the property and/or the ability or financial resources to inspect the property for latent defects. Over ninety percent of American

168. 540 N.E.2d 667 (Mass. 1989).

169. *Id.* at 667-68.

170. *Id.* at 669.

171. Brennan, *supra* note 49, at 691.

corporations have assets of under one million dollars.¹⁷² In fact, more than fifty percent of American corporations have less than \$100,000 in assets.¹⁷³ Thus, it is clear that the vast majority of commercial tenants are not corporate giants that have the financial clout to bargain on equal footing with the landlord or to adequately inspect premises for suitability and habitability.

If the current state of the law is continued, then the commercial tenant will continue to be liable not only for inspection of the structure for mechanical and building defects, but also for environmental problems. Almost daily, the news media reports on the dangers of indoor pollution, friable asbestos, radon contamination, and a host of other potentially deadly substances found not only in residential structures, but in commercial ones as well. One of the strongest rationales for creating an implied warranty of habitability in residential tenancies was the issue of health hazards to persons living in substandard housing.¹⁷⁴ This rationale is equally forceful in the commercial setting.

Today, with the danger of indoor pollutants widely known, the commercial tenant should be able to expect that the premises is free of deadly pollutants and is habitable by humans. The landlord is more familiar with the building and its components and has a duty, once a toxic condition is discovered, to disclose the latent defect to the other tenants.¹⁷⁵ The ultimate responsibility for the safety of the building and the health of the people who work there must rest with the owner. To expect a commercial tenant to do the sophisticated inspections required to assure the environmental safety of the building *before* signing a lease is ludicrous. As one commentator has noted about the dangers of asbestos in a commercial building:

[T]he asbestos usually is located in common areas or areas under the landlord's control. Furthermore, the potential

172. STATISTICAL ABSTRACT OF THE UNITED STATES 516 (1985).

173. *Id.*

174. See *Pines v. Persson*, 111 N.W.2d 409, 412-13 (Wis. 1961); see also *supra* text accompanying note 105.

175. See Michael J. Glazerman, *Asbestos in Commercial Buildings: Obligations and Responsibilities of Landlords and Tenants*, 22 REAL PROP. PROB. & TR. J. 661, 674-75 (1987).

danger and indeterminate nature of the risk of deterioration are too unusual, extraordinary and unexpected to be within the contemplation of tenants at the time leases are signed. Finally, it would be unreasonable to expect a small or average-sized tenant to bear the economic burden and risks of undertaking an asbestos operations and maintenance program, let alone to pay for abatement or removal of the asbestos.¹⁷⁶

Clearly, the great majority of commercial tenants do not have the expertise or financial resources to determine whether the structure is environmentally safe. The tenant should be able to assume that the premises, at the very least, will be safe for the tenant and its employees to inhabit. An analogy can be made to product liability law. Today, the consumer of a product can assume that it will not be defective; and if it is, they will be compensated for injuries caused by the product.¹⁷⁷ Consumers almost never bargain over the safety of a product, in part because they lack the ability and information necessary to do so.¹⁷⁸ As one commentator has noted:

There is an important economy to knowing that if one purchases a tire, a soft drink, or an appliance, the seller will be held strictly liable for all physical harm resulting from a defect. That knowledge not only relieves the consumer of the burden of ferreting out and weighing extensive information relating to product safety, but it avoids such possible problems as the unwillingness of sellers to disclose information unfavorable to their products and insufficient

176. *Id.* at 691.

177. Robert A. Prentice & Mark E. Roszkowski, "Tort Reform" and the Liability "Revolution": Defending Strict Liability in Tort for Defective Products, 27 GONZ. L. REV. 251, 299 (1991-1992).

178. NATIONAL RESEARCH COUNCIL, IMPROVING RISK COMMUNICATION 302 (1989).

Laypeople are even more vulnerable when they have no way of knowing about information because it has not been disseminated [P]eople could always ask merchants whether there are any special precautions for using a new power tool, or ask proponents of a hazardous facility if their risk assessments have considered operator error and sabotage. In practice, however, these questions about omissions are rarely asked. It takes an unusual turn of mind to recognize one's own ignorance and insist that it be addressed.

Id.

sophistication on the part of some consumers to evaluate data relating to complex products.¹⁷⁹

The commercial landlord, just as the seller of a defective product, must take responsibility for the habitability or suitability of his property.

Another reason the courts have traditionally rejected the implied warranty of suitability or habitability is that the warranty could be waived.¹⁸⁰

The large industrial tenant, who does not need implied warranty protection because of its financial means and ability to extract express covenants from the landlord, will be able to use its leverage to avoid a disclaimer if it so desires. The smaller, less sophisticated tenant, the one who [the law seeks] to protect because of his asserted inferior bargaining position and inadequate resources, would be unable to escape signing the standard form lease which would include a disclaimer of the implied warranty.¹⁸¹

Certainly, under contract law, warranties can be waived by agreement of the parties, and the party with the most clout may be able to dictate the terms. However, to avoid adopting an implied warranty merely because there is a possibility that it may be waived is absurd. All commercial tenants should, as a starting point, be guaranteed that the premises is habitable and suitable for their needs.

The burden to introduce the waiver into the negotiation process would fall on the landlord. In this way, a tenant would at least be aware of the need to inspect for habitability and suitability.¹⁸² Today, in the majority of jurisdictions, only the most

179. LELAND JOHNSON, COST-BENEFIT ANALYSIS AND VOLUNTARY SAFETY STANDARDS FOR CONSUMER PRODUCTS 1042 (1982).

180. See Greenfield & Margolies, *supra* note 28, at 887. The authors state: This is not to say that such a warranty may not be expressly disclaimed [T]he parties to a nonresidential lease should be allowed to strike whatever deal they choose to make. If the parties agree that no warranty of fitness attaches to their lease agreement, this express declaration should control.

Id.

181. Bopp, *supra* note 21, at 1087.

182. See Greenfield & Margolies, *supra* note 28, at 887. "[T]he imposition of the

sophisticated tenants have the knowledge and the bargaining power to demand that the landlord expressly warrant the habitability and suitability of the property. Certainly this system does not result in efficient bargaining between the parties. In fact, it virtually insures that each party must be represented by a lawyer in order to fully understand the nature of the agreement. In an age when we are trying to reduce the amount of attorney involvement in business transactions, it seems that adoption of the implied warranty assists in this effort.

As things stand now, less sophisticated tenants who are not represented by lawyers do not have the opportunity to make an informed choice. With the imposition of an implied warranty, even if the landlord uses a form lease, the waiver language would alert the potential tenant to the lack of a warranty. In a soft rental market, even the small, less sophisticated tenant without benefit of legal counsel could demand the removal of the waiver. However, it would be very unlikely that the small tenant, unless represented by an attorney, would even think to demand inclusion of an express warranty.

IV. CONCLUSION

The Texas Supreme Court in *Davidow* has adopted the correct approach to the *caveat lessee* doctrine by abandoning the independent covenants rule and disregarding the distinction between residential and commercial tenants in the area of implied warranties. The Texas court has taken the first major step in abolishing the foolish distinction between commercial and residential leases. The distinction made sense 100 years ago, but today the differences have become virtually non-existent.

In the modern age, the habitability of the work-place as well as the home is becoming increasingly important. Many people spend almost as much time at their job site as they do at home. The health of these workers is being jeopardized by this

[implied] warranty would force the issue to be more conspicuous to the lessee and make him more aware of the potential liabilities he will be under by entering into the lease." *Id.*

outdated legal concept. Owners of real property should be ultimately responsible for the safety of their property. Most commercial tenants are comparably situated to the residential tenant prior to the widespread recognition of the implied warranty of habitability. The time has now come to recognize that the commercial/residential distinction no longer makes sense. The courts and/or state legislatures of other jurisdictions should follow the lead of the Texas Supreme Court by adopting an implied warranty of suitability and abolishing the doctrine of independent covenants in all commercial leases.

