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The Implied Warranty of Habitability in Residential Leases

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THE IMPLIED WARRANTY OF HABITABILITY IN RESIDENTIAL LEASES

The implied warranty of habitability is a property law concept of relatively recent vintage. The development of this tenant-oriented principle has necessarily involved a departure from the traditional doctrine of caveat emptor. This Note will discuss the implied warranty of habitability itself, the rationale behind it, and the remedies it has made available to the residential tenant subjected to unsafe and unhealthy living conditions. Although much of the Note is devoted to judicial treatment of the implied warranty, particular attention is given to the recent adoption of the warranty by the American Law Institute in its second Restatement of Property. Finally, the status of the implied warranty in West Virginia is considered. Prior to 1978 the state had followed the common law caveat emptor doctrine. In the later half of that year, however, the implied warranty of habitability received separate recognition by both the West Virginia Legislature and the West Virginia Supreme Court of Appeals. This recent development in West Virginia law is analyzed and compared to the Restatement model.

I. THE HISTORICAL CONTEXT

At common law, a lease of land from a landlord to a tenant was considered equivalent to a sale of the premises for a term of years. The tenant became the owner and occupier of the leased premises for that term, subject to the doctrine of caveat emptor.1 This treatment as term ownership resulted from the fact that the real estate lease developed in the field of property law rather than contract law.2 The doctrine of caveat emptor, however, is a contract doctrine, which, as this Note will indicate, may be misplaced in the area of property law. Under caveat emptor, the landlord owes no duty to place the premises in a habitable condition prior to the tenant’s entry, nor any duty to repair or maintain the premises during the term the lease is in effect.3 His primary obligation

1 Annot., 40 A.L.R. 3d 646 (1971).
3 Id.
is to deliver possession of the premises to the tenant and agree not to interfere with the tenant's peaceful possession. The main duty of the tenant, of course, is to pay the agreed rent to the landlord.¹

The use of the doctrine of caveat emptor and the treatment of leases as conveyances of land can be best understood by examining the historical setting from which the practices grew. During the Middle Ages, the land itself was considered the single most important element of the lease transaction. During that time, urbanization, as we know it today, was unknown and life styles in general were comparatively simple. In fact, farming was the primary occupation until the nineteenth century. Since a person's prosperity was dependent upon the productivity of the land, a prospective tenant would walk the land and necessarily determine for himself its fitness for his purposes. Also, if any buildings existed on the leased premises, they were likely to be of a simple structural nature. Since such structures were typically intended for habitation, they too would be inspected. Furthermore, the tenant of the Middle Ages, as a prerequisite to survival, possessed a jack-of-all-trades knowledge and skill with regard to the condition of the leased premises and how to maintain them.² Thus, the application of the "buyer beware" doctrine to the landlord-tenant relationship during that agrarian period seems fairly reasonable.

In addition to the landlord and tenant possessing equal knowledge with respect to the land, most leases of that period were lengthy attempts to embody the complete agreements and expectations of the parties. Consequently, the common law courts were reluctant to imply further covenants into the lease.³ All these factors supported the use of the caveat emptor doctrine and neither party necessarily operated at a disadvantage.

An important attribute of common law treatment of the residential lease was the limited duties of both landlord and tenant and the limited remedies available to redress the breach of those duties. In the lease transaction, rent was considered to be the quid pro quo for possession of the premises. If the tenant failed to pay his rent he could be deprived of possession of the premises. Likewise, if the landlord interfered with the tenant's actual possession,

the tenant could terminate his rent payment until possession was recovered. The main concern at common law was to correct whatever imbalance existed in the basic rent-possession relationship.

This approach involved serious difficulties, however, when the landlord interfered with the tenant's peaceful possession of the leased premises without physically dispossessing him. Technically, the landlord had not breached his duty to deliver possession of the premises, and a rigid application of the quid pro quo principle would require the tenant to continue paying rent despite the interference. An example of such an interference would be the breach of a duty to supply water or heat—duties often created in the lease but treated as independent of the rent obligation of the tenant. In order to avoid the harsh result of the application of the strict rule, the courts created the doctrine of constructive eviction. The use of the word "eviction" in this doctrine indicates the continued adherence to the traditional rent-possession point of view. In fact, abandonment of the premises by the tenant was a prerequisite to the application of the constructive eviction doctrine. This remedy, to be sure, was a step forward in alleviating some of the hardships which the caveat emptor doctrine imposed on the tenant, since the tenant could now vacate unfit premises without any remaining obligation to pay rent. In many cases, however, the hardships remained. Since the new doctrine required the tenant to abandon the premises, it demanded a course of action not available to the tenant living in areas where housing was in short supply. Tenants in such circumstances were forced to continue paying the full rent despite the defective condition of the premises.

These restrictive common law rules did not all fade with the prosperity that accompanied the Industrial Revolution. Rather, the laws of property that resulted in the harsh treatment of the residential tenant in the situations outlined above remain in operation in many states today. Only in the past ten years has there been any real impetus toward updating these antiquated principles.

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7 Quinn and Phillips, supra note 4, at 229.
8 Id. at 230.
9 Id. at 233.
10 Id. at 235.
12 Quinn and Phillips, supra note 4, at 236.
Courts and legislatures have recently begun to abandon the doctrine of caveat emptor as applied to the modern residential lease. The shift has occurred primarily on the grounds that the caveat emptor doctrine seems unsuited to a complex industrial society in which it is unreasonable to expect the typical tenant to be capable of inspecting and repairing a dwelling likely to be of complicated structural and electrical design.\(^4\) This abandonment of the caveat emptor doctrine has been coupled with the adoption of the implied warranty of habitability.\(^5\) Although the different legislatures and courts have couched their explanations of the implied warranty in varying terms, the common theme has been that the landlord impliedly warrants that the premises are habitable and fit for their intended use at the time of the letting, and that they will be maintained in that condition for the duration of the lease.\(^6\)

The most important aspect of the implied warranty lies in its expansion of the remedies available to the aggrieved tenant.\(^7\) Whereas the only common law remedy generally available to the tenant required his abandonment of the premises, most of the jurisdictions adopting the implied warranty of habitability have developed remedies which the tenant may pursue while continuing to occupy the leased property. The remedies include damages,\(^8\) rent abatement,\(^9\) and the right to apply the rent money directly to remedy the defective condition.\(^10\) The West Virginia Legislature, however, has adopted the implied warranty without addressing

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\(^7\) Annot., 40 A.L.R.3d 646, 650 (1971).
\(^9\) Id.

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itself to the critical question of available remedies, apparently leaving that decision to the courts.

II. THE RATIONALE BEHIND THE IMPLIED WARRANTY OF HABITABILITY

The rigid rules accompanying the caveat emptor doctrine originated in a time when society was predominantly agrarian. In an urban society where tenants do not reap the rent directly from the land but bargain primarily for the right to enjoy the premises for living purposes, often signing standardized leases, the common law conception of a lease and a tenant's liability for rent may no longer be viable.\(^2\)

Judge Skelly Wright noted the inapplicability of the former assumptions to modern day leases by stating:

> It is overdue for courts to admit that these [common law] assumptions are no longer true with regard to all urban housing. Today's urban tenants, the vast majority of whom live in multiple family dwelling houses, are interested, not in the land, but solely in a "house suitable for occupation." Furthermore, today's city dweller usually has a single specialized skill, unrelated to maintenance work; he is unable to make repairs like the "jack of all trades" farmer who was the common law's model of a lessee.\(^2\)

The consumer protection policy of placing the burden of merchantability and fitness for purpose on the seller of goods has become one of the justifications for the imposition of the implied warranty of habitability upon the residential landlord.\(^2\) Similar to the seller who, armed with superior knowledge, is in the best position to inspect the goods and insure their quality, the landlord has knowledge concerning the building, its wiring, plumbing, etc., that is far superior to that possessed by the tenant. Also, violations of, or changes in, applicable building, safety or health codes are

\(^2\) Lemle v. Breeden, 51 Hawaii 426, 430, 462 P.2d 470, 472 (1969) (affirming a judgment in favor of a tenant who, upon discovering severe rat infestation, successfully sued to recover the deposit and rent payment).

\(^2\) Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1078 (D.C. Cir. 1970), cert. denied, 400 U.S. 925 (1970). Similar statements can be found in numerous decisions that have involved, in one way or another, the implied warranty of habitability. See, e.g., Green v. Superior Court, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974); Mease v. Fox, 200 N.W.2d 791 (Iowa 1972); Pines v. Persision, 14 Wis. 2d 590, 111 N.W. 2d 409 (1961).
likely to be brought to the attention of the landlord rather than the tenant. The landlord is thus in a better position to know what the codes require of a building, and how well his particular building meets those requirements. These factors indicate that the consumer protection policy lends itself well to the law of landlord-tenant, and gives additional support to the implied warranty of habitability.

Implied warranties are widely recognized where the subject matter of a contract necessarily involves public health and human life. Often the warranty is implied as a matter of public policy, and not pursuant to an underlying contractual duty, as in the case where unwholesome food is sold. Courts will imply warranties in such cases for a number of reasons. First, they are dealing with a very important interest—the very health and safety of the individual—which merits taking steps to prevent as much potential harm as possible. Second, often the seller is the only person adequately able to analyze the product and determine its suitability.

These general policy considerations that often justify the imposition of warranties in other areas of the law can also apply to the landlord-tenant relationship and supply further justification for the implied warranty of habitability in residential leases. Unquestionably, a person's environment exerts a considerable effect on his health and safety. The effect of his actual dwelling on his life is even more direct. It cannot be seriously contended that a rodent-infested apartment with insufficient heat, water or electrical service does not affect the health, safety and even the very life of the tenant. The imposition of the implied warranty of habitability for leased premises seems to be an advisable means of safeguarding these essential health and safety interests.

Housing conditions exert a considerable impact not only on the health of the tenant, but also on the society in general. In the first case that adopted the implied warranty of habitability, the Wisconsin Supreme Court expressed a concern for the undesirable impact that uninhabitable housing can have on our society:

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24 See, e.g., Jacob E. Drecker & Sons v. Capp, 139 Tex. 609, 164 S.W. 2d 828 (1942).
25 Line, supra note 6 at 167.
WARRANTY OF HABITABILITY

The need and social desirability of adequate housing for people in this era of rapid population increases is too important to be rebuffed by that obnoxious legal cliché, *caveat emptor*. Permitting landlords to rent "tumbledown" houses is at least a contributing cause of such problems as urban blight, juvenile delinquency, and high property taxes for conscientious landowners.28

III. STANDARDS USED TO DETERMINE HABITABILITY OF RESIDENTIAL PROPERTY

Although the various jurisdictions are not in harmony regarding what precise standards ought to be met before residential property will be considered habitable, the common requirement is that the premises not be unsafe or unhealthy for the tenant to enter.29 The split of authority among the different states concerns what kind of more definite guidelines a court should follow to determine whether a specific dwelling is unsafe or unhealthy.

A frequent source of guidelines is provided by applicable building codes. In a suit for possession for nonpayment of rent, the Illinois Supreme Court accepted the tenant's defense based on breach of implied warranty, holding that "included in the contracts, both oral and written, governing the tenancies of the defendants in the multiple unit dwellings occupied by them, is an implied warranty of habitability which is fulfilled by substantial compliance with the pertinent provisions of the Chicago building code."30

A California court of appeals similarly used a city housing code as the standard to be met in order for the leased premises to be considered habitable. The court suggested *how* the standard ought to be applied:

In considering the materiality of an alleged breach, both the seriousness of the claimed defect and the length of time for which it persists are relevant factors. Minor housing code violations standing alone which do not affect habitability must be considered *de minimus* and will not entitle the tenant to reduction in rent; and likewise, the violation must be relevant and affect the tenant's apartment or the common areas which he uses.31

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28 Pines v. Persson, 14 Wis. 2d 590, 596, 111 N.W.2d 409, 413 (1961).
29 RESTATEMENT (SECOND) OF PROPERTY § 5.1, Comment e (1976).

The practice of using local housing or building codes as standards of habitability has been used in most of the states that have adopted the implied warranty of
The American Law Institute has also adopted the idea that significant violations of any controlling building or sanitary code, or similar public regulation, which has a substantial impact on health and safety, is a conclusive indication that the premises are unsafe or unhealthy, and thus, violative of the implied warranty of habitability.\(^{32}\) Not all jurisdictions, however, are in accord with the prevailing standard. For example, one court treated housing or building code violations merely as constituting evidence that the leased premises are uninhabitable.\(^{33}\)

The housing codes reflect a legislative decision as to the condition in which property should be maintained in order to render it acceptable for human habitation. Prior to their use in landlord-tenant litigation, however, the effectiveness of the codes was highly criticized:

Even in New York, a major housing area with countless structures in fearsome disrepair ... a prison sentence in a housing case is rare indeed. The fine is the usual remedy, and ... it is simply not significant. The average fine per case in New York City has been variously estimated as $14 and $16. What does it all amount to when the law has run its course and the fine imposed? Very little indeed, and honesty compels a frank admission of that fact.\(^{34}\)

With such "enforcement" of the building and housing codes, the appearance of the implied warranty of habitability is welcome news indeed. By implying the codes into residential leases through the implied warranty of habitability, the courts and legislatures are indirectly putting much needed teeth into formerly ineffective regulations.

IV. THE AMERICAN LAW INSTITUTE AND THE IMPLIED WARRANTY OF HABITABILITY

In recognition of recent trends requiring the landlord to maintain his property in a suitable condition, the American Law Institute has expressed its support of the implied warranty of habitability.\(^{35}\) The Institute analyzed the implied warranty itself, the ra-[\footnotesize{\textit{habitability. See, e.g., Mease v. Fox, 200 N.W.2d 791 (Iowa 1972); Boston Housing Authority v. Hemingway, 363 Mass. 184, 293 N.E.2d 831 (1973); Glyco v. Schultz, 35 Ohio Misc. 25, 289 N.E.2d 919 (1972).}
\^[32] Restatement (Second) of Property § 5.1, Comment e (1976).
\^[34] Quinn and Phillips, supra note 4, at 240.
\^[35] Restatement (Second) of Property, Ch. 5 (1976).}
tionale behind it, the remedies it normally provides for the residential tenant, the standards available to determine the habitability of leased premises, and the validity of agreements which relieve the landlord of his obligations with regard to the condition of the leased premises. The Restatement should prove helpful both to legislatures and the judiciary as these bodies consider the propriety of adopting various aspects of the implied warranty of habitability.

A. The Implied Warranty

Section 5.1 states the basic implied warranty of habitability and the remedies it makes available to the residential tenant. The section requires the landlord to place the premises in a habitable condition at the beginning of the term and maintain their habitability for the duration of the lease. This section specifically concerns situations where the defect in the leased premises is present on the date the lease agreement is entered into by the landlord and tenant. The comments to the section state that the justification for the departure from common law principles lies in the inapplicability of the caveat emptor doctrine to present landlord-tenant realities. The comments note that the tenant's knowledge of a defective condition does not, in and of itself, prevent the rule of this section from applying.

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34 § 5.1 Condition Unsuitable on Date the Lease Is Made—Remedies Before Entry

Except to the extent the parties to a lease validly agree otherwise, there is a breach of the landlord's obligations if the parties contemplate that the leased property will be used for residential purposes and on the date the lease is made and continuously thereafter until the date the tenant is entitled to possession, the leased property, without fault of the tenant, is not suitable for residential use. For that breach the tenant before entry may:

1. terminate the lease in the manner prescribed in § 10.1 and recover damages to the extent prescribed in § 10.2; or

2. affirm the lease and obtain equitable and legal relief including:
   a. the recovery of damages to the extent prescribed in § 10.2;
   b. an abatement of the rent to the extent prescribed in § 11.1;
   c. the use of the rent to eliminate the unsuitable condition to the extent provided in § 11.2;
   d. the withholding of the rent in the manner and to the extent prescribed in § 11.3.

37 Restatement (Second) of Property § 5.1, Comment b (1976).

38 Id. Comment c.
With respect to the tenant's knowledge of the defects, the
Restatement provides that the tenant is justified in assuming that
the defective condition will be corrected prior to the date that he
is entitled to possession. However, if the tenant knows of the un-
suitable condition and should realize that it will take longer to
correct the defect than the time between the date of the lease and
the scheduled date of entry, then it is assumed that the parties
have impliedly agreed that the condition need not be eliminated
prior to the tenant's possession, and that the landlord has a reason-
able time within which to eliminate the condition before he will be
held in default.39 The Restatement also notes that, subject to some
limitations, if the tenant knows of the defective condition and has
reason to believe that the landlord has no intention of correcting
it, the conclusion is justified that the parties impliedly agreed that
this section not apply to them.40

Section 5.2 is similar to the section described above, but in-
volves situations in which the defective condition arises subse-
quent to the date of the lease although prior to the tenant's entry.
The section provides for the termination of the lease by the tenant,
and, if the defective condition arose through the fault of the land-
lord, the additional remedies of damages, rent abatement, rent
application, and rent withholding are available. This section
places on the landlord the risk of loss from a change in condition
of the premises. The Institute takes this position because the ten-
ant is ordinarily unable to prevent or cure such a change in the
physical condition of the leased property.41 If this change in condi-
tion of the leased premises is caused by natural forces such as
wind, rain or fire, and the premises are not restored prior to the
date of entry, then the tenant's sole remedy is termination of the
lease.42

In Section 5.3, the Restatement considers the effect of the
tenant's entry. Generally, unless the parties otherwise agree or the
entry constitutes a waiver of the implied warranty of habitability,
the same general remedies are available. An accompanying com-
ment, however, indicates a limitation on the validity of an alleged
waiver by entry. The comment notes that "[t]he tenant as a

39 Id.
40 Id. This implied agreement, however, is subject to restrictions concerning
agreements that modify the obligations of the landlord. See discussion, infra, of
Section 5.6 of the Restatement.
41 RESTATEMENT (SECOND) OF PROPERTY § 5.2, Comment b (1976).
42 Id. Comment f.
matter of law is unable to waive any remedies available to him at
the time of entry, if at the time of entry it would be unsafe or
unhealthy to use the leased premises in the manner contemplated
by the parties." This comment is obviously based on public policy
considerations. It forces the landlord to place the premises in a
habitable condition as defined in prevailing housing codes, without
being permitted to rely on a waiver by the tenant.

Section 5.4 of the Restatement considers the implied warranty
of habitability when the unsuitable condition arises after the ten-
ant's entry upon the premises. When the premises become unsuit-
able for the contemplated use as a result of the landlord's conduct
or failure to fulfill an obligation to repair, the tenant can avail
himself of the same general range of remedies mentioned in Sec-
tion 5.2 if the landlord has not corrected the situation within a
reasonable period of time. Again, if the changed condition has been
cause by a non-manmade force, the tenant's sole remedy is termi-
nation of the lease, and then only if the condition has not been
corrected within a reasonable time. In order for the tenant to
utilize the remedies provided by Section 5.4, there are two prere-
quites: (1) the tenant must give notice of the change in condition
to the landlord and (2) the tenant must allow the landlord rea-
sonable time to correct the situation.

Section 5.5 concerns the obligation of the landlord to keep the
leased property in repair. Basically, the landlord is obligated to
keep the leased property in a condition that meets the require-
ments of the governing health, safety and housing codes, unless the
failure to meet the requirements is the fault of the tenant or is
cased by non-manmade forces. If the landlord fails to meet this
duty, the same remedies outlined in Section 5.4 are available to
the tenant. This section also requires that the landlord keep
"common areas," such as hallways, safe and in good repair.

Section 5.6 acknowledges the validity of agreements wherein
the parties agree "otherwise" as to the landlord's obligations with
regard to the condition of the leased premises. The rule adopted
by the Restatement is that such an agreement is valid and binding
on the parties unless it is "unconscionable or significantly against
public policy." Most notable among agreements that will be con-
sidered unconscionable is one that shifts the responsibility of eli-

a Id. § 5.3, Comment c.
b Id. § 5.4, Comment f.
c Id. Comment g.
d Id. § 5.5, Comment c.
inating an unsafe or unhealthy condition to a tenant who is likely to be unable to eliminate the condition himself.\textsuperscript{4} The comments indicate the Restatement's disfavor with agreements whereby a poor residential tenant, by virtue of his lack of bargaining power, is faced with relieving the landlord of an obligation that the tenant is financially incapable of performing. Such an agreement, for all practical purposes, forces the tenant to live in unsafe or unhealthy surroundings and undermines the basic tenant-oriented philosophy embraced by the Restatement.

B. A Closer Look at Remedies Available to the Tenant

1. Termination of the Lease

Where the defective conditions arise after the tenant's entry and are caused by non-manmade forces, the tenant's only remedy is to terminate the lease. In order to exercise the right to terminate, the Restatement requires certain steps to be followed: (1) the tenant must vacate the leased property; and (2) he must comply with any lease provision that controls the method of termination, or, in the absence of any such valid provision, take reasonable steps to assure that the landlord has knowledge of his intention to terminate the lease and the reason for his termination.\textsuperscript{46} The timeliness of the tenant's termination is important because the right to terminate must exist at the time the tenant undertakes to terminate.\textsuperscript{49} It is quite possible to have the right to terminate, and then lose that right. Loss of the right would occur where the landlord, prior to the tenant's termination, had corrected the unsuitable condition upon which the tenant relied.\textsuperscript{50}

2. Damages

If the tenant terminates the lease based on a defective condition caused by the fault of the landlord, his recovery can include the fair market value of the lease on the date that he terminates it.\textsuperscript{51} This element of damages is recoverable when a lease has built into it certain bargain features that are not obtainable from similar property available at the time the value of the present lease is being determined.\textsuperscript{52} Generally, this bargain feature is the preferen-

\textsuperscript{4} Id. § 5.6, Comment e.
\textsuperscript{46} Id. § 10.1.
\textsuperscript{48} Id. Comment d.
\textsuperscript{50} Id.
\textsuperscript{51} Id. § 10.2.
\textsuperscript{52} Id. Comment b.
tial amount of the rent. For example, if a tenant leases property from a landlord and pays a monthly rent of $200, but the reasonable rental value of the property is $300, the lease has a $100 fair market value—the difference between the reasonable rental value and the actual rent charged. Therefore, if the tenant has the right to terminate the lease and in fact does so, he will have the right to recover an amount equal to the $100 fair market value multiplied by the number of months remaining on the lease.\(^{53}\) Of course, damages for fair market value are available only when the reasonable rental value exceeds the actual rent charged by the landlord, an event that may seldom occur in actual residential landlord-tenant transactions.

Section 10.2 lists other possible elements of a tenant's damage recovery. Some of the more important elements of that recovery are: (1) the reasonable relocation costs incurred by the tenant who has terminated the lease; (2) the additional cost of substitute premises; (3) the reasonable costs incurred by the tenant in the event he elects to eliminate the defective condition causing the uninhabitability; and (4) such interest as is appropriate under the circumstances.

3. Rent Abatement

In Section 11.1, the Restatement provides that when the tenant elects to affirm the lease, he should not be required to pay the full amount of rent during the time in which the premises remain in the defective condition. He is entitled to rent abatement, and the amount of the abatement is that proportion of the rent which the fair rental value after default bears to the fair rental value before such event. This formula reflects the Restatement's attempt to retain any bargain aspect which may have existed in the lease. For example: a tenant leases premises from a landlord for $100 per month. After a few years, however, the rental value of those premises actually increases to $250 per month. If a breach of the landlord's implied warranty of habitability renders this value only $225, the tenant has still been injured, despite the fact that the premises are still worth more than the rent he actually pays. Using the Restatement formula, the tenant is entitled to a 10% reduction in his rent, or $10 a month. The result is that the tenant pays an abated rent of $90 per month until the default is corrected, or the term of the lease expires, whichever comes first.\(^{54}\)

\(^{53}\) Id.

\(^{54}\) Id. § 11.1, Comment c.
Of course, in a situation where the actual rent paid is equal to the fair rental value, the determination of the abated rent is much simpler. If the premises are rented for their fair rental value of $100 per month and the landlord's breach of the implied warranty of habitability lowers the reasonable rental value to $80 per month, the tenant is entitled to a $20 monthly reduction in rent.

The comments note that the issue of rent abatement will normally arise in a judicial proceeding brought by the landlord to evict the tenant for failure to pay rent. The tenant can defend such an action by establishing his right to abate the rent. By not paying the rent the tenant has forced the landlord's hand: the landlord must either sue the tenant who has a strong defense, or he must correct the defective condition which has caused the tenant to stop paying rent.

4. Application of the Rents to Elimination of the Defects

Section 11.2 provides that the tenant can use his personal funds to eliminate the defective condition that constitutes the landlord's breach of the implied warranty, and, upon giving proper notice to the landlord, he can deduct from his rent the reasonable costs that he has incurred. This self-help remedy provides a simple and effective means of accomplishing the goal of achieving habitable living conditions for today's tenant. The tenant, however, must abide by certain ground rules. He is required to act as a reasonably prudent owner would act under similar circumstances, and must eliminate in a reasonable manner only those defects a reasonably prudent owner would eliminate.

5. Rent Withholding

The last remedy provided for by the Restatement permits the tenant to place the rent that becomes due after the default in an escrow account until the defective condition is eliminated or until

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55 Id. Comment b.
the lease terminates, whichever comes first. When there has been a proper abatement of the rent, it is the abated rent that is placed in escrow. The rationale for this remedy lies in its ability to place pressure on the defaulting landlord to eliminate the defective condition.

V. THE IMPLIED WARRANTY OF HABITABILITY IN WEST VIRGINIA

In many respects, the recently enacted West Virginia implied warranty of habitability statute is similar to the implied warranty

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55 Restatement (Second) of Property § 11.3 (1976).

With respect to residential property:

(a) A landlord shall:

(1) At the commencement of a tenancy, deliver the dwelling unit and surrounding premises in a fit and habitable condition, and shall thereafter maintain the leased property in such condition; and

(2) Maintain the leased property in a condition that meets requirements of applicable health, safety, fire and housing codes, unless the failure to meet those requirements is the fault of the tenant, a member of his family or other person on the premises with his consent; and

(3) In multiple housing units, keep clean, safe and in repair all common areas of the premises remaining under his control that are maintained for the use and benefit of his tenants; and

(4) Make all repairs necessary to keep the premises in a fit and habitable condition, unless said repairs were necessitated primarily by a lack of reasonable care by the tenant, a member of his family or other person on the premises with his consent; and

(5) Maintain in good and safe working order and condition all electrical, plumbing, sanitary, heating, ventilating, air-conditioning and other facilities and appliances, including elevators, supplied or repaired [sic] to be supplied by him by written or oral agreement or by law; and

(6) In multiple housing units, provide and maintain appropriate conveniences for the removal of ashes, garbage, rubbish, and other waste incidental to the occupancy of the dwelling unit; and

(7) With respect to dwelling units supplied by direct public utility connections, supply running water and reasonable amounts of hot water at all times, and reasonable heat between the first day of October and the last day of April, except where the dwelling unit is so constructed that running water, heat or hot water is generated by an installation within the exclusive control of the tenant.

(b) If a landlord's duty under the rental agreement exceeds a duty imposed by this section, that portion of the rental agreement imposing a greater duty shall control.
adopted by the Restatement. Section (a)(1) provides that the landlord, at the beginning of the tenancy, must "deliver the dwelling unit and surrounding premises in a fit and habitable condition, and shall thereafter maintain the leased property in such condition." The following section sets forth the applicable standards for determining the habitability of the dwelling unit. It provides that the landlord must maintain the premises in a condition that satisfies the requirements of governing health, safety, fire and housing codes, unless the failure to meet those requirements is the fault of the tenant. The statute also requires the landlord to make all repairs necessary to keep the premises in a fit and habitable condition. The landlord must also maintain in good repair all electrical, plumbing, sanitary, heating, ventilating, air-conditioning and other appliances supplied or required to be supplied by the landlord by agreement or by law. The final major duty placed upon the residential landlord is that in dwelling units supplied by direct public utility connections, the landlord must supply "running water and reasonable amounts of hot water at all times, and reasonable heat between the first day of October and the last day of April." No such duty will exist, however, when the dwelling unit is so constructed that such utility generation is by an installation within the exclusive control of the tenant.

The statutory duties imposed upon the West Virginia residential landlord seem to reasonably mirror those adopted by the Restatement. In particular, the basic implied warranty itself and the standards to be used in applying it are nearly identical to their counterparts in the Restatement model. On the other hand, the West Virginia statute does not compare nearly so well in the critical area of remedies available to the residential tenant.

The American Law Institute considers the creation of new and flexible remedies to be the single most important aspect of the

(c) None of the provisions of this section shall be deemed to require the landlord to make repairs when the tenant is in arrears in payment of rent.

(d) For the purposes of this section, the term "multiple housing unit" shall mean a dwelling which contains a room or group of rooms located within a building or structure forming more than one habitable unit for occupants for living, sleeping, eating and cooking.

Id. § (a)(2).

Id. § (a)(4).

Id. § (a)(5).

Id. § (a)(7).

Id.
implied warranty of habitability. The remedies of damages, rent abatement, rent application, rent withholding, as well as lease termination, are all considered by the Restatement to be necessary prerequisites to an effective implied warranty. This posture reflects the philosophy that the imposition of such a duty can only be as effective as the means available to redress its breach. In the West Virginia statute, however, the legislature did not address the question of remedies, apparently intending to leave the resolution of that issue to the courts.

Fortunately, the period of uncertainty in West Virginia as to precisely what remedies will be available to the tenant was short lived. Within only a few months after the new statute became effective, the West Virginia Supreme Court of Appeals squarely addressed the issue in Teller v. McCoy. Although Teller did not arise under the implied warranty of habitability statute, the court recognized that its decision would certainly have a strong impact on those cases that arise under the statute in the future. The court noted that “[c]our treatment of these topics is intended . . . to guide not only the lower court which certified these questions to us but all courts that will undoubtedly be called upon to deal with the new statute and these attending topics.”

The West Virginia Court then set forth the remedies that are available to the tenant when the implied warranty has been breached. Basically the remedies adopted by the court are similar to those discussed earlier in reference to the Restatement model. Specifically, the Supreme Court held that a tenant may either vacate the premises and thus terminate his obligation to pay rent, or he may continue to pay rent and bring his own action or counterclaim to recover damages caused by the breach. The measure of the tenant’s damages would be the difference between the fair market value of the premises if they had been as warranted and the fair rental value of the premises as they were during the occupancy of the tenant in the unsafe or unhealthy condition. Thus, this remedy is similar to the rent abatement suggested in the

47 The cause of action in Teller arose prior to the enactment of the implied warranty of habitability statute and thus the statute did not apply in the case. Rather, in response to certified questions from the Circuit Court of Logan County, the Supreme Court of Appeals judicially adopted the implied warranty of habitability and then proceeded to set forth those remedies that would be available under the warranty.
Restatement proposal. However, the methods used by the West Virginia court and the Restatement to measure the tenant’s damages differ slightly. The Restatement formula presents a somewhat more sophisticated approach inasmuch as an attempt is made to retain any “bargain” element that may be present in a lease. With respect to the damage recovery, the West Virginia court added that the tenant may also recover damages for annoyance and inconvenience caused by the landlord’s breach.

The Supreme Court also held that a breach of the implied warranty of habitability may constitute a defense to an action for unlawful detainer or to an action for rent brought by the landlord. In explaining how this defense would operate at trial, the court stated that if a jury determines that there has been a breach of the implied warranty and that the tenant’s entire obligation to pay rent was suspended because of a total breach by the landlord, then the landlord’s action for rent or unlawful detainer would fail. On the other hand, when it is found by applying the court’s measure of damages that part, but not all, of the tenant’s obligation for rent is suspended, the tenant must be given a reasonable opportunity to pay that part of the rent that is due.

It now seems that the law of West Virginia satisfactorily compares with the Restatement model concerning the implied warranty of habitability and the remedies it makes available to the residential tenant. However, the remedies available to the West Virginia tenant are comparatively limited in two respects. First, the West Virginia statute provides that “[n]one of the provisions of this section shall be deemed to require the landlord to make repairs when the tenant is in arrears in payment of rent.” Second, the Supreme Court in Teller specifically rejected the remedy of rent application, a self-help remedy adopted in the Restatement. The West Virginia court explained that it considered the approved remedies adequate to protect the residential tenant’s interests. Although these two limitations render the West Virginia tenant’s remedies somewhat less expansive than those proposed in the Restatement, this shortcoming should be considered heavily outweighed by the beneficial effect that the state’s recent legislative and judicial activity has had with respect to West Virginia landlord-tenant relationships.

VI. THE RESPONSE OF THE JUDICIARY TO RETALIATORY EVICTIONS

As noted earlier, building, safety and health codes have provided the courts with standards to use in determining the habitability of leased premises. The effectiveness of such codes as a means of upgrading the quality of housing in our communities depends, however, on the initiative taken by private individuals in reporting code violations to the proper authorities. It is unrealistic to assume that governing agencies have the time or resources to continually inspect residential dwellings for defective conditions. Obviously, complaints of tenants can play a major role in the identification and rectification of substandard housing conditions. Often, however, tenants are reluctant to report housing violations to the authorities because the consequences of such action may be eviction by an angry landlord. Typically, retaliatory eviction is used in situations involving tenancies at will, where statutes normally require only a 30-day notice prior to eviction.

In Edwards v. Habib, the District of Columbia Circuit Court of Appeals held that proof of a retaliatory motive constitutes a defense to an action for eviction. The court stated:

In light of the appalling condition and shortage of housing in Washington, the expense of moving, the inequality of bargaining power between tenant and landlord, and the social and economic importance of assuring at least minimum standards in housing conditions, we do not hesitate to declare that retaliatory eviction cannot be tolerated.

The court noted, however, that the tenant who benefits from the defense of retaliatory eviction does not receive a right to continue in possession in perpetuity, but can be evicted after the landlord's illegal purpose has dissipated. Although the determination of illegal purpose is not an easy one, it is a factual question for the jury to decide that is not significantly different from problems that courts must deal with in a host of other contexts.

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71 Id.
73 397 F. 2d at 701.
74 Id. at 702.
75 Judicial recognition of the defense of retaliatory eviction has been followed by numerous recent cases. See, e.g., Portnoy v. Hill, 57 Misc. 2d 1097, 294 N.Y.S. 2d 298 (1968); Dickbut v. Norton, 45 Wis. 2d 389, 173 N.W. 2d 297 (1970).
VII. CONCLUSION

The common law doctrine of caveat emptor is a product of the early, agrarian society which existed centuries ago. During this period, the doctrine operated well, to the disadvantage of neither the landlord nor the tenant. As society progressed, though, the needs of its members changed. Instead of being solely interested in the land itself, the modern tenant places more importance on the necessity of renting habitable living space. The tenant, no longer the jack-of-all-trades of the past, is not in a position to inspect and repair premises, as was his agrarian predecessor. Consequently, the caveat emptor doctrine is out of place in modern landlord-tenant transactions. It simply has outlived its usefulness.

The need for new and responsive principles to guide modern society in its leasing relationships has been answered by the creation of the implied warranty of habitability. The American Law Institute has provided a codification of the general principles set down in the numerous cases and statutes that have adopted the implied warranty of habitability. The recent combination of West Virginia's implied warranty of habitability statute with the adoption by the Supreme Court of Appeals of strong tenant-oriented remedies has placed the state well in line with this important trend in American property law.

The recognition of the defense of retaliatory eviction has also served to strengthen the position of the residential tenant. This defense creates an atmosphere conducive to the upgrading of residential housing by protecting the exercise of the private complaint.

This trend toward a more enlightened concern for the plight of the often abused urban tenant is quite encouraging. Hopefully, each new court and legislature presented with the opportunity to apply the implied warranty of habitability will recognize the reasonableness of the warranty and finally put to rest the outdated doctrine of caveat emptor.

Glen L. Kettering