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Landlord-Tenant Reform: Toward a Warranty of Habitability for Leased Residential Premises in Wyoming

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LANDLORD-TENANT REFORM: TOWARD A WARRANTY OF HABITABILITY FOR LEASED RESIDENTIAL PREMISES IN WYOMING

The continued vitality of the common law doctrine of *caveat emptor* with regard to leased residential premises in Wyoming is an anachronism which must be done away with in the health and safety interests of this state's citizens. The laws of forty-two states and the District of Columbia now hold that a residential lessee's obligation to pay rent depends upon his landlord's conveyance of habitable premises. In those jurisdictions the lessor is said to warrant, either impliedly or by statute, such habitability and fitness for use.[1] This nomenclature reflects recognition by modern courts and legislatures that residential leases are essentially contractual in nature, with mutually dependent rights and obligations on the part of landlord and tenant.[2] Wyoming's treatment of rental transactions as limited conveyances of real property flies in the face of contemporary legal thinking and ignores the dramatic changes in housing patterns and usages which have occurred since the Middle Ages. Accelerated development of this state's natural resources has brought about a considerable population increase, attended by serious "impact" problems, not the least of which is a shortage of decent housing in many communities.[3] By imposing upon landlords a duty to convey tenantable premises, Wyoming would bring itself into conformity with the vast majority of other jurisdictions and help ensure that its citizens live in a safer and more dignified manner.

THE DEMISE OF *Caveat Emptor*

At common law, a lease was considered a limited transfer of an interest in land. Accordingly, leases were governed by real property law. During feudal times, the lease's value to the

1. Those jurisdictions adopting the warranty of habitability include: Alaska, Arizona, California, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia, Wisconsin and the District of Columbia. *See* Appendix. States having no warranty of habitability are Alabama, Arkansas, Colorado, Mississippi, South Carolina, South Dakota, Utah and Wyoming.
2. *See* Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1075 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 925 (1970).
3. *See infra* text accompanying notes 80-114.

tenant was primarily in the land itself, agriculture being the business of the day. Any buildings were by and large incidental to the lease. Houses were of simple construction and could be easily maintained by the yeomen who inhabited them as tenants.[4] Prospective lessees were able to enter upon and inspect land before leasing it to determine its fitness for their particular purposes.[5] After inspection, a would-be tenant in most cases had as much knowledge of the premises as his landlord.[6]

Under the circumstances described above, the doctrine of *caveat emptor* made sense. Absent fraud or active concealment by the lessor, no covenant or warranty implying that a dwelling was tenantable, fit or suitable for the lessee's purposes existed.[7] A landlord's only obligation was to give undisturbed possession of the property; this fulfilled, the tenant's obligation to pay rent was unconditional.[8] Once in possession, the lessee was entirely responsible for upkeep of the leased premises.[9]

Needless to say, times have changed and the principles applied to pastoral feudal leaseholds have little relevance to situations in which residential property is leased today. Though exceptions exist, the majority of modern tenants seek a combination of living space, facilities and utilities which will allow them to live in a healthy and comfortable fashion.[10] The ordinary lessee is at best only secondarily concerned with any interest in land which may be appurtenant to the lease; this is particularly true in the case of apartment dwellers.[11] Furthermore, the complexity of modern dwellings and the increased mobility of their tenants makes it unreasonable to expect that lessees will be able or willing to perform the sort of repairs that are often necessary.[12] This being so, the burden of maintaining rental premises falls to the landlord.

4. *See* Mease v. Fox, 200 N.W.2d 791, 793 (Iowa 1972).
5. Annot., 40 A.L.R.2d 646, 650 (1971).
6. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT § 3:10 (1980) [hereinafter referred to as SCHOSHINSKI].
7. Annot., 40 A.L.R.2d 646, 650 (1971).
8. SCHOSHINSKI, *supra* note 6, § 3:10.
9. Mease v. Fox, 200 N.W.2d at 793 (Iowa 1972).
10. *Id.*
11. Javins v. First Nat'l Realty Corp., 428 F.2d at 1074 (D.C. Cir. 1970).

Recognizing this trend, and noting that the viability of the common law depends on its relation to the realities of modern-day society,[13] most states now adhere to the view that a residential lease is essentially a contract.[14] Accordingly, the rights and obligations of landlord and tenant under the lease are intertwined. At common law, in contrast, covenants arising from leases of real property operated independently of each other. Treatment of leases as contracts has recently led to the conclusion, accepted in all but a few jurisdictions, that "the tenant's promise to pay rent is in exchange for the landlord's promise to provide a livable dwelling."[15] A description of defects which have been held to render a dwelling unlivable will be presented subsequently.

Movement away from *caveat emptor* was not accomplished at once. Courts originally felt constrained to carve out only limited exceptions to the doctrine, leaving its main body intact. One such exception involved furnished homes rented for temporary purposes, such as vacation cottages.[16] This "furnished home exception" held that when this type of dwelling was leased for a short period of time, the lessor impliedly warranted that it was suitable for use and occupation.[17] The exception was based on the belief that a person renting a furnished home does so out of an immediate need to secure livable quarters. Such persons were presumed unable to inspect the dwelling properly and determine its suitability.[18] If the limited warranty were deemed breached, the tenant was entitled to withhold rent or recover rent already paid.[19] Availability of the "furnished home exception" was in some cases confined to situations where the alleged defects arose prior to execution of the lease.[20]

A second exception to *caveat emptor* recognized by many courts dealt with latent defects in a rental dwelling which were known to the landlord but not revealed to prospective tenants.

12. *Id.* at 1078, 1079.
13. *Id.* at 1074.
14. *See* Steele v. Latimer, 214 Kan. 329, 521 P.2d 304, 308 (1974).
15. Foisy v. Wyman, 83 Wash. 2d 22, 515 P.2d 160, 164 (1973).
16. *See generally* Young v. Povich, 121 Me. 141, 116 A. 26 (1922).
17. *Id.*
18. SCHOSHINSKI, *supra* note 6, § 3:11.
19. *See* Young v. Povich, 116 A. at 27 (1922).
20. Forrester v. Hoover Hotel and Inv. Co., 87 Cal. App. 2d Supp. 226, 196 P.2d 825, 828-29 (1948).

This exception was closely related to the tort doctrine of fraudulent nondisclosure.[21] Remedies available to the wronged tenant included actions for damages and withholding of rent if the defective premises were vacated.[22] Personal injuries resulting from failure to disclose latent defects have also made the landlord liable in tort.[23]

Legislatures in some states created narrow exceptions to *caveat emptor,* as well. Of these, so-called "repair and deduct" statutes were the most typical, and often constituted the only relief available to tenants for defective conditions in their dwellings.[24] If a landlord failed to repair a defect significant enough to invoke the statute within a reasonable time of notice of the dilapidation, the aggrieved tenant could either vacate the premises without further rental liability or repair the defect himself and deduct the expense from his rent.[25] In order to qualify for such relief, a tenant generally could not himself have been the cause of the defective condition.[26]

THE WARRANTY OF HABITABILITY: DEVELOPMENT AND CHARACTERISTICS

A 1961 Wisconsin case, *Pines v. Perssion,*[27] was the first to set forth the basic tenets of an implied warranty of habitability and fitness for use as to leased residential premises. Though the court's decision that the tenants were not liable for rent was predicated on the aforementioned "furnished home exception," it indicated in dictum that general public policy and the existence of municipal housing codes created an obligation on the landlord to convey habitable premises.[28] Taking its analysis one step further, the court in *Pines* suggested that the tenant's obligation to pay rent should be dependent upon, and

21. The doctrine of fraudulent nondisclosure imposes liability upon a landlord for injuries incurred by his tenant as the result of defective conditions in the leased premises when the landlord knew of the said defects but did not reveal them to the tenant, the latter having been unable to ascertain the defects upon ordinary and reasonable inspection of the premises. *See* Capitol Amusement Co. v. Anheuser-Busch, Inc., 94 Colo. 372, 30 P.2d 264, 265 (1934).
22. *See* Highmount Music Corp. v. J. M. Hoffman Co., 397 Pa. 345, 155 A.2d 363, 365 (1959).
23. Merrill v. Buck, 58 Cal. 2d 552, 375 P.2d 304, 307, 25 Cal. Rptr. 456 (1962).
24. S CHOSHINSKI, *supra* note 6, § 3:35.
25. *See* CAL. CIV. CODE §§ 1941, 1941.1, 1942 (West 1954, as amended 1982).
26. *See* CAL. CIV. CODE §§ 1929, 1941 (West 1954).
27. 14 Wis. 2d 590, 111 N.W.2d 409 (1961).
28. *Id.,* 111 N.W.2d at 412-13.

not independent of, the lessor's conveyance of a habitable dwelling.[29]

Although courts in Hawaii and New Jersey[30] preceded it in formally establishing an implied warranty of habitability, the District of Columbia Circuit Court of Appeals is most often credited with the leading opinion in the area. *Javins v. First National Realty Corporation*[31] seems to have been the case most directly responsible for beginning the exodus away from *caveat emptor* which was to occur in the next decade. The trial court in *Javins* had held that evidence of housing code violations was inadmissible in defense against a landlord's action for possession based on nonpayment of rent; this ruling was upheld by an intermediate appellate court.[32] The D.C. Circuit reversed, holding that a warranty of habitability is implied in all residential leases, the breach of which makes contract remedies available to the tenant.[33]

The court's holding rested on two principal bases. First, a legislative policy attempting to ensure habitable dwelling places for District of Columbia residents, reflected in the D.C. Housing Regulations, would be frustrated by limiting the regulations' effect to defective conditions arising before execution of the lease.[34] Second, the court found that the common law rule relieving landlords from any duty to repair dilapidated premises was unacceptable in modern society.[35]

In arriving at this second conclusion, Circuit Judge J. Skelly Wright enunciated several considerations which have often been repeated by other courts rejecting the *caveat emptor* doctrine as applied to leased residential premises. He noted initially that the historical foundations for the no-repair rule no longer exist since acquisition of dwelling places, and not land itself, is the primary purpose of the modern residential lease.[36]

29. *Id.* at 413. This language tended to reject the common law notion of independent lease covenants and instead characterized the lease as a contractual arrangement.
30. Lemle v. Breeden, 51 Hawaii 426, 462 P.2d 470 (1969); Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969).
31. 428 F.2d 1071 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 925 (1970).
32. Saunders v. First Nat'l Realty Corp., 245 A.2d 836 (D.C. 1968).
33. 428 F.2d at 1072, 1073.
34. *Id.* at 1080-82.
35. *Id.* at 1080.
36. *Id.* at 1074.

Judge Wright went on to endorse the notion that leases are in essence contracts, and that implied warranties should be attached to them as they are to contracts for sales of goods.[37] Finally, he pointed out that in most situations there is a vast discrepancy in bargaining power between lessor and lessee—another reason to afford the tenant protection.

Relying on its finding that the lease was actually a contract, and that the tenant's duty to pay rent depended on the landlord's providing habitable premises, the *Javins* court remanded the case for a determination of the severity of the breach of the implied warranty of habitability. A total breach, the court held, would relieve the tenant of all his rental obligations.[38] If only a partial breach were found, the lessee could remain in possession of the premises if that portion of the rent found due the landlord was tendered.[39]

The *Javins* opinion has proved persuasive authority in courts and state houses across the nation. Details vary, but a vast majority of jurisdictions now recognize that residential leases are contractual in nature, and that landlords warrant the habitability of the dwellings they rent.[40]

Habitability Defined

Despite the seeming subjectivity of the term, courts have had little difficulty determining what is meant by "habitability."[41] In many cases the provisions of municipal housing codes have been utilized as standards against which alleged defects are measured.[42] Whether or not these code provisions are read directly into the lease varies according to the jurisdiction involved.[43] It is clear, however, that something more than trivial non-compliance with a housing code is necessary before courts will find a breach of the implied war-

37. *Id.* at 1079.
38. *Id.* at 1083.
39. *Id.*
40. *See infra* Appendix.
41. Other terms frequently used include "warranty of livability fitness," "warranty to maintain residential dwellings in conformity with the housing code," and "warranty against latent defects."
42. *See* Green v. Super. Ct. of San Francisco, 10 Cal. 3d 616, 517 P.2d 1168, 1183, 11 Cal. Rptr. 704 (1974).
43. Steele v. Latimer, 521 P.2d at 309-10 (1974) (city housing code read into and became part of rental agreement since parties presumed to contract in reference to existing law).

ranty.[44] Even where safety regulations exist, courts have not been loath to set their own standards of fitness for habitation. In *Mease v. Fox,* the Supreme Court of Iowa listed several factors relevant to a determination of whether the implied warranty had been breached:

1. The nature of the deficiency or defect,
2. Its effect on safety and sanitation,
3. The length of time for which it persisted,
4. The age of the structure,
5. The amount of the rent,
6. Whether the tenant voluntarily, knowingly and intelligently waived the defects, or is estopped to raise the question of the breach, and
7. Whether the defects or deficiencies resulted from unusual, abnormal or malicious use by the tenant.[45]

Where no housing code is available for guidance, it is generally acknowledged that whether a breach of the implied warranty has occurred must be determined on a case-by-case basis.[46] Among the specific defects found to have caused breaches are rodent infestation,[47] leaky plumbing fixtures,[48] faulty wiring,[49] lack of heat[50] or hot water,[51] broken windows and door locks,[52] and unsafe ceilings[53] and floors.[54]

Remedies

Upon breach of the warranty of habitability courts have held that several fundamental contract remedies are available to the tenant.[55] Perhaps the most significant of these is the right to withhold rent. Authorities are split as to whether

44. *See* Jack Spring, Inc. v. Little, 280 N.E.2d at 217 (1972).
45. 200 N.W.2d at 797.
46. Lemle v. Breeden, 462 P.2d at 476 (1969).
47. *Id.*
48. *See* Morbeth Realty Corp. v. Velez, 343 N.Y.S.2d 406, 409 (1973).
49. Berzito v. Gambino, 63 N.J. 460, 308 A.2d 17, 18 (1973).
50. Steinberg v. Carreras, 74 Misc. 2d 32, 344 N.Y.S.2d 136, 140 (1973), *rev'd on other grounds,* 77 Misc. 2d 774, 357 N.Y.S.2d 369 (1973).
51. Pugh v. Holmes, 253 Pa. Super. 76, 384 A.2d 1234, 1237 (1978), *aff'd,* 405 A.2d 897 (1978).
52. *Id.*
53. Mease v. Fox, 200 N.W.2d at 792 (Iowa 1972).
54. Hinson v. Delis, 26 Cal. App. 3d 62, 102 Cal. Rptr. 661, 662 (Cal. Dist. Ct. App. 1972).
55. *See* Lemle v. Breeden, 462 P.2d at 475 (1969).

withholding the entire amount of rent due is permissible.[56] Total withholding of rent, if allowed, is not without certain risks to the tenant. If, in an unlawful detainer action brought by the landlord, it is found that the landlord did not breach the warranty of habitability, the tenant's total withholding of rent may result in his forfeiting the premises.[57] That is, the tenant's right to possession of the leased premises would be destroyed by the nonperformance of his obligation to pay rent. Equitable relief from forfeiture, recognized in some states, can lessen this danger. An example of such relief is restoration of possession in the tenant if he tenders all rent arrearages before execution of judgment in the unlawful detainer action.[58] Partial withholding, in such amounts as not to be "excessive,"[59] may be the better practice. In either case, breach of the warranty of habitability is asserted as a defense to the landlord's subsequent action for rent or for possession based on nonpayment of rent. Utilized in this way, warranties of habitability afford a means of relief for tenants unknown to the common law.[60]

A second contractual remedy resulting from breach of the warranty of habitability is rescission of the lease by the tenant. Relief of this kind appears to be available only if the breach is total—so material as to justify the tenant's regarding the whole transaction as ended.[61] Under such circumstances the lessee is entitled to treat the lease as terminated and may vacate without liability for future rent.[62] Although quite similar to the common law remedy for constructive eviction, rescission following breach of the warranty of habitability differs in one significant respect. Constructive eviction requires a default by the landlord which causes substantial interference with the tenant's right of possession.[63] This standard is higher than that created by most warranties of habitability. In other words, a defect that would normally cause a breach of a warranty of habitability might not be severe enough to constitute a "substantial interference with the tenant's right of

56. Javins v. First Nat'l Realty Corp., 428 F.2d at 1083 (1970). *Contra* Foisy v. Wyman, 515 P.2d at 167 (1973).
57. *See* SCHOSHINSKI, *supra* note 6, § 3:22.
58. *See* Teller v. McCoy, 253 S.E.2d 114, 129 (W. Va. 1978).
59. *See* SCHOSHINSKI, *supra* note 6, § 3:22.
60. *See supra* note 29.
61. 4 CORBIN ON CONTRACTS § 946 (1951).
62. Teller v. McCoy, 253 S.E.2d at 125-26 (W. Va. 1978).
63. 44 AM. JUR. 2D *Landlord and Tenant* § 301 (1970).

possession." In such a case, where the breach was less than "substantial," no claim of constructive eviction would arise under the common law and the tenant's obligation to pay rent would be unaffected. On the other hand, if a warranty of habitability existed, the tenant could claim a breach of the warranty and thus possibly be afforded relief.[64]

An action for damages may be a third alternative remedy. However, the availability of the action and the measure of damages recoverable are dependent on the nature of the breach and on the jurisdiction in which the case is tried. A tenant who has rescinded his lease and vacated will generally be able to recover the difference between the fair rental value of the premises if they had been as warranted and the agreed rent for the remainder of the term.[65] This is referred to as compensation for the tenant's loss of the "benefit of his bargain" for the time left on his lease.[66] Tenants remaining in possession may also be entitled to damages resulting from a landlord's breach if they have continued to pay their rent and can show that their enjoyment of the premises was impaired during their term of occupancy.[67] Courts in different jurisdictions have arrived at varying formulas for determining the dollar value of the impairment,[68] but it appears that in most instances the amount of damages actually awarded has been nominal, regardless of the approach taken.

A final possibility as to remedies for breach of the warranty of habitability is an injunction for specific performance of the lease contract—that is, an order forcing the landlord to repair the premises so that they will meet the requirements of the warranty. A factor favoring this form of relief is that termination of tenancy or an action for damages does a tenant little good if no other housing is available, or if the tenant is unable to make repairs. Unfortunately, few courts seem to have considered injunctive relief,[69] perhaps for lack of suggestions by counsel that they do so. In any case, the approach holds promise for future application.

64. *See generally* Reste Realty Corp. v. Cooper, 251 A.2d 268 (1969).
65. *See* Mease v. Fox, 200 N.W. 2d at 797 (Iowa 1972).
66. *Id.*
67. *Id.*
68. *See generally* Annot., 1 A.L.R.4th 1182 (1980).
69. *See* South Austin Realty Ass'n v. Sombright, 47 Ill. App. 3d 89, 361 N.E.2d 795, 798 (1977).

Notice and Waiver

Before invoking any of the aforesaid remedies, a tenant must notify his landlord of the alleged defects in the rented property if they are unknown to the latter.[70] Notification gives the landlord an opportunity to rectify the breach and avoid litigation. If the landlord makes repairs, the purpose of the warranty is achieved in the most expeditious manner possible. If repairs are not made, notice serves to demonstrate the tenant's good faith effort to have the defects corrected before withholding rent.[71]

Whether a tenant may waive the protection of the warranty of habitability, either at the inception of his tenancy or after a breach has occurred, in most cases turns upon the source of the warranty itself. When implied from existing housing codes or enacted directly by statute, the weight of authority indicates that the warranty and the protections it confers cannot be waived after a breach has taken place.[72] Courts which have so held base their findings on a reluctance to undermine the public policy of protecting tenants voiced by those laws.[73] Warranties not based on statutes or housing codes, or those derived from the intent of the parties, do appear to be waivable in some jurisdictions.[74] Even where permitted, however, such waivers must be knowing, intelligent,[75] and not unconscionable.[76]

Momentum Toward Adoption

As noted at the outset, an overwhelming majority of states have either judicially or legislatively adopted warranties of habitability for leased residential premises, virtually all within the past decade.[77] Reinforcing this flight from *caveat emptor,*

70. Teller v. McCoy, 253 S.E.2d at 126 (W. Va. 1978).
71. SCHOSHINSKI, *supra* note 6, § 3:24.
72. *See* Javins v. First Nat'l Realty Corp., 428 F.2d at 1081-82 (1970); UNIF. RESIDENTIAL LANDLORD AND TENANT ACT § 1.403(a)(1), 7A U.L.A. 521 (1972).
73. *See* Boston Housing Auth. v. Hemingway, 363 Mass. 184, 293 N.E.2d 831, 843 (1973).
74. *See* Kamarath v. Bennett, 568 S.W.2d 658, 660 n.2 (Tex. 1978).
75. *See* Mease v. Fox, 200 N.W.2d at 797 (Iowa 1972).
76. RESTATEMENT (SECOND) OF PROPERTY § 5.6 (1977). Financial inability of the tenant to eliminate a condition that makes occupancy of the leased premises unsafe and unhealthy and the inequality of the bargaining positions of the respective parties, are two factors to be considered in determining if a waiver is unconscionable. (Comment e[6]).
77. For jurisdictions adopting implied warranties of habitability, see Appendix. For jurisdictions enacting statutory warranties of habitability, see Appendix.

the Uniform Residential Landlord and Tenant Act[78] and the Restatement (Second) of Property[79] have likewise included warranties of habitability. For the time being, Wyoming remains among a handful of jurisdictions retaining the common law approach. It is apparent, however, that the impropriety of continued application of *caveat emptor* in this state has been recognized, and that the doctrine's life expectancy here is short.

THE WARRANTY IN WYOMING

The notion that *caveat emptor* governs leases of residential property in Wyoming is due primarily to a paucity of authority holding to the contrary. Section 8-1-101 of the Wyoming statutes states that the "common law of England" is in full force in this state so far as not expressly repealed by the courts or legislature.[80] As part of the common law, *caveat emptor* has naturally been considered part of Wyoming law.

Surprisingly enough, the Wyoming Supreme Court did not have occasion to comment on the doctrine until 1961, in *Lawson v. Schuchardt.*[81] In that case, which dealt with fraudulent representations made by a vendor of real property, the court stated that "[T]he doctrine of *caveat emptor* is employed by modern courts under new standards of business ethics which demand that statements of fact be at least honestly and carefully made."[82] The clear implication of this language is that the court was not inclined to view *caveat emptor* as a means by which unscrupulous vendors might deceive buyers of real property. Arguably, this same intent could be applied in the landlord-tenant situation to prevent the doctrine from denying lessees habitable rental dwellings.

In a sense, until fairly recent times *caveat emptor* was a relevant and appropriate concept in Wyoming. Traditionally, most residents' occupations were closely tied to the land itself. Agriculture, in one form or another, was predominant; towns were few, far between, and small in size. Maintenance and

78. UNIF. RESIDENTIAL LANDLORD AND TENANT ACT § 2.104, 7A U.L.A. 529 (1972).
79. *See generally* RESTATEMENT (SECOND) OF PROPERTY ch. 5 (1977).
80. WYO. STAT. § 8-1-101 (1977).
81. 363 P.2d 90 (Wyo. 1961).
82. *Id.* at 93.

repair of homes were largely up to the individual. In short, conditions were markedly similar to those from which *caveat emptor* arose in feudal England.

Circumstances began to change rapidly during the late 1960's and early 1970's, however, as the nation looked to Wyoming's natural resources to help satisfy its energy needs. The state's population increased dramatically, as an influx of new residents arrived to work the mines, oil and gas fields, and other sites.[83] Once-small towns such as Gillette, Rock Springs and Evanston quickly became centers of energy-related activity, "boomtowns" in the common parlance. Municipalities all over the state began to have difficulty coping with the increased demand for services caused by their exploding populations. A fundamental problem faced by newcomers and old-timers alike was finding a place to live. A 1977 study of housing demand in Wyoming illustrates this fact:

> In the State of Wyoming, the analysis of future housing need is further complicated by the fact that the state is experiencing a rapid increase in its economic development under a relatively unique set of circumstances. The "impact" of rapid development of mineral and energy resources will inevitably have a profound effect on the provision of housing throughout the entire state.[84]

The same study predicts that the number of households in Wyoming will increase by 26 percent over the 1976 level by 1986.

It is clear that a substantial portion of housing now leased in Wyoming is of dubious quality. This is especially true in those communities hardest hit by energy development "impact," as indicated in a recent Sweetwater County housing inventory:

> Rental housing within the county can be brutal. The landlords are renting housing that was or should have

83. Wyoming's population grew by 27.5% between 1970 and 1977. ZELENSKI, LOW TO MODERATE INCOME HOUSING NEED IN THE STATE OF WYOMING 2 (1977).
84. ZELENSKI, FUTURE HOUSING DEMAND IN THE STATE OF WYOMING: 1977 to 1986, at 1 (1977).

> been condemned years ago. They forego fixing up the property because of tax breaks and because of the rising value of the land. Improvements to the apartment might lead to an updating of the wiring within the building. Thus a good percentage of the newer citizens are living in firetraps without adequate facilities; yet they pay almost as much as those living in adequate housing.[85]

Besides the obvious health and safety risks involved, it can hardly be doubted that such unfavorable living conditions contribute to a multitude of social problems;[86] dissatisfaction with one's surroundings is easily translated into disrespect for the community, its laws and its mores. That circumstances like those noted continue to exist in Wyoming must, to at least some degree, be attributed to an absence of sanctions that can be imposed on landlords who fail to deliver and maintain dwellings fit to live in. A warranty of habitability would provide those sanctions through the contractual remedies thus made available to tenants. A need for the warranty clearly exists; as the following will demonstrate, recent developments indicate that one may soon be forthcoming.

Promise for Change: Judicial and Legislative Possibilities

A most compelling argument for creation of an implied warranty of habitability in this state is that *caveat emptor* has already been abolished here with regard to sales of new residential premises. This was accomplished by the Wyoming Supreme Court in a 1975 case, *Tavares v. Horstman,*[87] where a land developer and builder was held liable for the negligent design and installation of a septic tank. In holding that an implied warranty of habitability existed, the court freely admitted the declining relevance of *caveat emptor* in modern society,[88] and noted that it had never expressly embraced the doctrine to begin with.[89] Though the holding in *Tavares* was confined to *sales* of new residential property, it seems almost

85. YOUNG, HOUSING INVENTORY OF SWEETWATER COUNTY, WYOMING 3 (1975).
86. Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409, 413 (1961).
87. Tavares v. Horstman, 542 P.2d 1275, 1282 (Wyo. 1975). *See also* Note, *PROPERTY—IMPLIED WARRANTIES—Partial Death of Caveat Emptor in Wyoming: Tavares v. Horstman,* 11 LAND & WATER L. REV. 633 (1976).
88. 542 P.2d at 1278.
89. *Id.* at 1279.

certain that the court would be equally receptive to similar arguments advocating abrogation of *caveat emptor* as to leased residential premises. So much was indirectly acknowledged in *Tavares* itself, the court stating that implied warranties might well be applied in different situations in the future.[90] An even stronger indication was given in *Moxley v. Laramie Builders, Inc.*,[91] a 1979 case following the rule laid down in *Tavares*. There it was said that "As in *Tavares*, we must confine our rulings to the facts alleged in the complaint. A full development of the law has not taken place, though there are identifiable trends."[92] This statement seems to demonstrate an open-minded attitude on the part of the Wyoming Supreme Court concerning future expansion of implied warranties of habitability. Indeed, the language used very nearly imparts a sense of regret that further steps were not taken to bury *caveat emptor* altogether.

In *ABC Builders, Inc. v. Phillips*,[93] a 1981 case, the Wyoming Supreme Court held, *inter alia*, that comercial builders have a duty to furnish safe locations for residential structures. In so holding the court cited *Tavares* for the proposition that "This court has observed that the harsh rule of caveat emptor has undergone some softening and has never been applied literally in this jurisdiction."[94] The language quoted supports that cited from *Tavares* and *Moxley, supra*, in casting an unfavorable light on *caveat emptor* and, inferentially, its application to residential leases.

A potential obstacle to adoption of a warranty of habitability for leased premises in Wyoming is a statute forbidding implied covenants in conveyances of most real estate. Section 34-1-135 of the Wyoming Statutes states that "No covenant shall be implied in any conveyance of real estate other than a conveyance of oil, gas or other minerals whether such conveyance contains special covenants or not."[95] It appears, however, that the court would not be greatly bothered by the

88. 542 P.2d at 1278.
89. *Id.* at 1279.
90. *Id.* at 1282.
91. 600 P.2d 733 (Wyo. 1979).
92. *Id.* at 735.
93. 632 P.2d 925, 938 (Wyo. 1981).
94. *Id.* at 932 (citing Tavares v. Horstman, 542 P.2d 1275 (Wyo. 1975)).
95. WYO. STAT. § 34-1-135 (1977).

statute; it proved no impediment to the holding in *Tavares. Indeed, the statute was not even mentioned in Tavares.* Cases interpreting section 34-1-135 and its predecessors have dealt with lease covenants, and not implied or statutory warranties of the sort being advocated in this comment.[96] Accordingly, if the court decided to treat leases as contracts (accompanied by implied warranties of habitability), a law disallowing implied covenants in real property transactions would be of little consequence. Furthermore, it should be noted that, according to section 34-1-102 of the Wyoming Statutes, leases having a duration of less than three years are not considered conveyances of real property.[97] This statute exempts most residential leases from the operation of section 34-1-135, and adds support to arguments favoring treatment of such leases as contractual arrangements. It is to be hoped, then, that when "the right case" comes before the court, Wyoming will join those states ensuring tenants livable dwellings by way of judicial decision.

A possibility also exists that the Wyoming State Legislature will enact a statutory warranty of habitability and fitness for use as part of a comprehensive residential landlord-tenant act. Attempts to do so have been made during the last three general sessions of the legislature, but have thus far had no success. A bill introduced in 1981 by Representative Wiederspahn, for example, included a section entitled "Landlord to Maintain Fit Premises."[98] Under the proposed act, landlords would have been obligated to comply with applicable housing codes materially affecting health and safety;[99] make necessary repairs;[100] maintain common areas,[101] wiring,[102] heat, [103] and plumbing facilities;[104] and provide for disposal and removal of waste.[105] Waivers of the above duties would be possible, but only if obtained in good faith.[106]

96. *See* Ayres Jewelry v. O & S Bldg., 419 P.2d 628 (Wyo. 1966); Laramie Printing Trustees v. Krueger, 437 P.2d 856 (Wyo. 1968).
97. WYO. STAT. § 34-1-102 (1977).
98. H.R. 325, 46th Leg., 1981 Wyo.
99. *Id.*, H.R. 325 at § 34-22-204(a)(i).
100. *Id.* at § 34-22-204(a)(ii).
101. *Id.* at § 34-22-204(a)(iii).
102. *Id.* at § 34-22-204(a)(iv).
103. *Id.*
104. *Id.* at § 34-22-204(a)(vi).
105. *Id.* at § 34-22-204(a)(v).
106. *Id.* at § 34-22-204(c).

Remedies for breach of the proposed statutory warranty included termination of tenancy after notice to the landlord,[107] and actions for damages.[108] No provision was made for withholding rent.

Passage of a statute such as the one proposed in 1981 would certainly be a step toward real landlord-tenant reform in Wyoming. At present, no definitive principles exist to ensure uniform application of the law in this area. Past failures seem to make the likelihood of legislative enactment small when compared to that of judicial action, however. State legislators who have sponsored landlord-tenant bills in recent years attribute their lack if success to several factors. Perhaps first among these is the fact that many members of Wyoming's legislature are landlords themselves, and are reluctant to support legislation they perceive to be inimical to their own financial best interests.[109] An additional obstacle to passage of a landlord-tenant act is the generally conservative bent of the legislature as a whole. Beliefs concerning freedom of contract and lack of governmental interference in the marketplace are widely and strongly held, and militate against imposition of a duty upon landlords to maintain habitable dwellings.[110] A third problem proposed legislation faces is a misperception of its effect on the landlord-tenant relationship. Many legislators fear that any landlord-tenant bill must necessarily strike a balance too far to the side of tenants' rights, to the detriment of landlords' rights. In actuality, however, legislation offered in the past has balanced the interests of landlords and tenants evenly.[111] Finally, all the bills proposed in recent years have been thought of as parochial in nature, primarily affecting only one locality or another. If ever this was the case, the perception is certainly inaccurate now. Landlord-tenant problems exist state-wide, and are likely to be exacerbated by the growing number of people renting housing throughout Wyoming.[112]

107. *Id.* at § 34-22-401(a).
108. *Id.* at § 34-22-401(b).
109. Telephone interview with T. A. Larson, Albany County State Representative (Jan. 24, 1982).
110. *Id.*
111. Telephone interview with Alvin Wiederspahn, Laramie County State Representative (Jan. 26, 1982).
112. Interview with T. A. Larson, *supra* note 109.

Two bills similar to that offered in 1981 were filed during the 1983 General Session of the Wyoming Legislature; neither was approved.[113] Their failure indicates that attitudes like those discussed above have not changed, and poses doubts as to whether legislative relief for renters will be forthcoming from future legislatures.

ARGUMENTS AGAINST ADOPTION

Three principal reservations concerning the wisdom and efficacy of warranties of habitability have been advanced by commentators knowledgeable in the field of landlord-tenant law. These problems relate to the ability of the legal system to enforce the warranties, the question of whether or not the warranties will in fact improve rental housing market conditions, and the possibility of so-called "retaliatory evictions" of tenants who have asserted breaches of warranty against their landlords.

Administrative Difficulties

Professor Charles J. Meyers, in opposing the warranty of habitability proposed (and later accepted) for inclusion in the *Restatement (Second) of Property,*[114] contended that "[T]he legal system does not have the resources to administer the proposed new rules."[115] Two rounds of litigation, he claimed, would be required to determine the residential suitability of rental housing: an initial determination of the dwelling's unfitness, and a later assessment after repairs had been made.[116] Additionally, he pointed out that many jurisdictions make a jury trial available to either landlord or tenant,[117] and that extensive presentations of evidence, sometimes involving expert witnesses, would frequently be required as to the condition of the dwelling and the terms of the housing code, if one is applicable.[118] As a result of all this, Meyers claimed, court

113. H.R. 23, 47th Leg., 1983 Wyo.; H.R. 83, 47th Leg., 1983 Wyo. According to the Wyoming Legislative Services Office, H.R. 23 was returned from committee with a "do not pass" recommendation and was never voted on by the full House of Representatives. H.R. 83 was never reported out of committee. Telephone interview with Marge Cotton, Office Manager, Wyoming Legislative Service Office (Mar. 25, 1983).
114. *See generally* RESTATEMENT (SECOND) OF PROPERTY ch. 5 (1977).
115. Meyers, *The Covenant of Habitability and the American Law Institute,* 27 STAN. L. REV. 879, 885 (1975).
116. *Id.* at 887.
117. *Id.*
118. *Id.*

dockets would become even more clogged than ever, causing long delays in hearings of these and other cases.[119]

In considering the relevance of these concerns it is important to determine which parties will feel their adverse effects most acutely. Quite obviously those parties are landlords and tenants themselves, for they will bear the expenses and hardships of delay and litigation. It is thus apparent that the self-interest of both landlord and tenant will significantly regulate the amount of litigation dealing with warranties of habitability that comes before the courts. Professor Myron Moskovitz, commenting from the tenant's perspective, has said that

> By allowing tenants to decide when the codes should be enforced by withholding rent or filing affirmative lawsuits, the doctrine permits those persons who bear the greatest risk vis-a-vis code violations to decide whether enforcement or non-enforcement in any particular case creates the greater danger for them.[120]

Landlords, on the other hand, must balance the costs of protracted litigation against those of simply making the needed repairs. If the latter is found to be more economical, the quality of dwellings will be improved and the purpose of the warranty accomplished. Litigation may reach the same result at a considerably higher cost.

It seems unlikely that a burdensome number of cases would arise in Wyoming. As bad as rental housing is in many communities, the state's relatively low population and lack of large metropolitan areas should keep litigation within manageable levels. Rather than creating a court backlog, by adopting a warranty of habitability Wyoming would provide a means of protection for a limited number of tenants inclined to make use of it.

Housing Market Effects

Professor Meyers also predicted adverse effects upon the amount of low-income housing available for lease and the rent

119. *Id.* at 888.
120. Moskovitz, *The Implied Warranty of Habitability: A New Doctrine Raising New Issues*, 62 CALIF. L. REV. 1444, 1503 (1974).

charged in that which does remain on the market as a result of warranties of habitability. Some rental property, he claimed, can be brought up to habitable status profitably, since by raising rents landlords holding this type of dwelling can cover their repair expenses and still make money. These dwellings would remain available for tenancy, though at a higher rent.[121]

Other property, however, could not profitably be brought up to habitable standards. These dwellings would be abandoned by landlords, Meyers contends. In this way also, he claimed, the warranty works to the disadvantage of low-income tenants.[122]

Moskovitz responds to arguments like those above by claiming that there is no actual evidence that raised rents and abandonment result from existence and enforcement of warranties of habitability.[123] Even recognizing that such consequences may come to pass, he says, state courts and legislatures have elected to take the chance and have adopted warranties nonetheless. This, he contends, is a wise choice in view of the adverse effects on low-income people of *not* requiring habitable premises.[124] This argument can easily be extended to Wyoming's situation. The consequences of doing nothing to force landlords to maintain livable dwellings are obvious in communities across the state. There is no doubt that some action to ensure habitable rental dwellings is needed; this action ought not be foregone because economic problems, which may never come to pass, have been predicted. As noted earlier, virtually all states have reached the conclusion that warranties of habitability, and the protections they confer, are sufficiently beneficial to justify the economic risks they present.

Retaliatory Evictions

A third possible argument against the warranty of habitability for leased residential premises is that landlords may exercise their right to evict tenants against those who have asserted their warranty in an attempt to obtain livable

121. Meyers, *supra* note 115, at 889.
122. *Id.* at 889-90.
123. Moskovitz, *supra* note 120, at 1503.
124. *Id.*

dwelling space. This practice, known as the retaliatory eviction, can occur when state law or the lease itself permits a landlord to evict tenants or raise rent for any or no reason whatsoever, merely by giving adequate notice that the eviction will take place.[125] There is no statutory authority for retaliatory eviction in Wyoming. Retaliatory evictions pose a considerable threat to utilization of the warranty of habitability. As stated by one commentator,

> In large measure, the scope and effectiveness of tenant remedies for substandard housing will be determined by the degree of protection given tenants against retaliatory actions by landlords. If a landlord is free to evict or otherwise harass a tenant who exercises his right to secure better housing conditions, few tenants will use the remedies for fear of being put out on the street.[126]

In a sense, evictions where tenants have previously made a valid assertion of breach of warranty of habitability based on a housing code appear to be justified. This is because housing codes often do not permit occupancy of dwellings that violate their terms.[127] By using this rationale, landlords have in the past disguised evictions which were in fact made for no other reason than to punish tenants who have sought to better their living conditions.

Many courts, however, now permit a tenant who is the subject of an eviction action which he feels is punitive to claim retaliatory eviction as a defense to that action.[128] The underlying rationale for allowing the defense often appears to be the fact that retaliatory evictions have been used by landlords to blunt the effectiveness of tenant remedies afforded by warranties of habitability.[129] To be successful in asserting the defense of retaliatory eviction, the tenant must prove the landlord's retaliatory motive in seeking the eviction. This can be difficult, for the lessor will inevitably claim a business-related purpose

125. For an example of a state law allowing an eviction without cause, see CAL. CIV. CODE § 1946 (West Supp. 1974).
126. Daniels, *Judicial and Legislative Remedies for Substandard Housing: Landlord-Tenant Law Reform in the District of Columbia*, 59 GEO. L.J. 909, 943 (1971).
127. Moskovitz, *supra* note 120, at 1495.
128. *See generally* Robinson v. Diamond Housing Corp., 463 F.2d 853 (D.C. Cir. 1972).
129. *See id.* at 860.

for the eviction. For example, the landlord in *Robinson v. Diamond Housing Corp.*, a District of Columbia case, contended that he wished to remove the particular rental unit involved from the market.[130]

Robinson was particularly notable in that it established a presumption of retaliatory intent on the landlord's part when his conduct has the effect of discouraging tenants from exercising their rights under housing codes and implied warranties of habitability.[131] In order to rebut this presumption, the landlord, it was held, had to show that he was motivated by a legitimate business purpose in evicting the tenant.[132] Among such purposes were the impossibility or infeasibility of making repairs,[133] situations where repairs cannot be made during occupancy,[134] or the landlord's going out of the business entirely.[135] In establishing a presumption of retaliatory intent the *Robinson* court made it far easier for tenants to assert the retaliatory eviction defense, as it shifted the burden of proof as to the landlord's subjective intent to the landlord himself.[136] If a warranty of habitability for leased residential premises is adopted in Wyoming, the supreme court could do much to ensure its effective utilization by following the *Robinson* case, if and when the issue of retaliatory eviction arises. To do otherwise would allow landlords to substantially frustrate the protections meant to be afforded by the warranty.

A final argument against adoption may be the claim that states which have adopted warranties of habitability have far more urban areas than Wyoming, and that application of the warranty would be inappropriate under circumstances different from those which inspired it. To this it must be responded that warranties of habitability are no longer considered strictly urban in character. Enactment of statutory warranties in Montana[137] and North Dakota,[138] states hardly more urban

130. *Id.* at 857.
131. *Id.* at 865.
132. *Id.*
133. *Id.* at 865-66.
134. *Id.* at 866 n.20.
135. *Id.* at 867.
136. Moskovitz, *supra* note 120, at 1499.
137. MONT. CODE ANN. § 70-24-303 (1977). *See* Corrigan v. Janney, 626 P.2d 838, 839 (Mont. 1981).
138. N.D. CENT. CODE § 47-16-13.1 (1977).

than Wyoming, demonstrates this fact. Those two states, like Wyoming, have undergone considerable energy-related growth in recent years.

In the author's opinion, then, there are no truly compelling reasons why a warranty of habitability for leased premises should not be adopted in this state. To the contrary, a number of factors strongly support it, most notably protecting the health and safety of Wyoming residents living in rental housing. Most other states have made this determination; it is time for Wyoming to do the same.

CONCLUSION

Chief Justice Martin, speaking for the Wisconsin Supreme Court in *Pines v. Perssion,* aptly stated the fundamental rationale for treating leases as contracts attended by warranties 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 cliche, *caveat emptor.*"[139] This statement, applicable in Wisconsin in 1961, is certainly applicable in present-day Wyoming. This state must discard that which is obsolete and confer upon lessees the protection they deserve and are accorded elsewhere.

JEFFREY S. MORRIS

APPENDIX

A. Jurisdictions adopting implied warranty of habitability:

California: Green v. Super. Ct. of San Francisco, 10 Cal. 3d 616, 111 Cal. Rptr. 704, 517 P.2d 1168 (1974).

District of Columbia: Javins v. First Nat'l Realty Corp., 138 App. D.C. 369, 428 F.2d 1071, *cert. denied,* 400 U.S. 925 (1970).

Florida: Mansur v. Eubanks, 401 So. 2d 1328 (Fla. 1981).

Hawaii: Lemle v. Breeden, 51 Hawaii 426, 462 P.2d 470 (1969).

Illinois: Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972).

Indiana: Welborn v. Society For Propagation of Faith, 411 N.E.2d 1267 (Ind. App. 1980).

139. 111 N.W.2d at 413 (emphasis in original).

Iowa: Mease v. Fox, 200 N.W.2d 791 (Iowa 1972).

Kansas: Steele v. Latimer, 214 Kan. 329, 521 P.2d 304 (1974).

Massachusetts: Boston Housing Auth. v. Hemingway, 363 Mass. 184, 293 N.E.2d 831 (1973).

Missouri: Henderson v. W. C. Haas Realty Management, Inc., 561 S.W.2d 382 (Mo. Ct. App. 1977).

New Hampshire: Kline v. Burns, 111 N.H. 87, 276 A.2d 248 (1971).

New Jersey: Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969).

New York: Morbeth Realty Corp. v. Velez, 73 Misc. 2d 996, 343 N.Y.S.2d 406 (1973).

Pennsylvania: Pugh v. Holmes, 253 Pa. Super. 76, 384 A.2d 1234 (1978), *aff'd*, 405 A.2d 897 (1978).

Texas: Kamarath v. Bennett, 568 S.W.2d 658 (Tex. 1978).

Washington: Foisy v. Wyman, 83 Wash. 2d 22, 515 P.2d 160 (1973).

B. Jurisdictions enacting statutory warranties of habitability:

ALASKA STAT. §§ 34.03.100, .160, .180 (1975).

ARIZ. REV. STAT. ANN. §§ 33-1324, 1361 (1974).

CAL. CIV. CODE §§ 1941, 1941.1, 1942 (West 1954, as amended 1982).

CONN. GEN STAT. ANN. §§ 47a-7 to- 47a-13 (1978).

DEL. CODE ANN. tit. 25 §§ 5303-5308 (1975).

FLA. STAT. ANN. §§ 83.51, 83.56 (Supp. 1983).

GA. CODE ANN. §§ 61-111, 112 (1979).

HAWAII REV. STAT. §§ 521-42, 521-61 to -66 (1976).

IDAHO CODE § 6-320 (1979).

IOWA CODE ANN. §§ 562A.15 (West Supp. 1982).

KANSAS STAT. ANN. § 58-2553 (1976).

KY. REV. STAT. ANN. §§ 383.595, 383.625 (Supp. 1982).

LA. CIV. CODE ANN. arts. 2693, 2700 (1952).

ME. REV. STAT. ANN. tit. 14 § 6021 (1981).

MD. REAL PROP. CODE ANN. § 8-211 (1981).

MASS. GEN. LAWS ANN. ch. 239 § 8A (West 1974).

MICH. COMP. LAWS ANN. § 554.139 (Supp. 1982).

MINN. STAT. ANN. § 504.18 (Supp. 1983).

MONT. CODE ANN. § 70-24-303 (1977).

NEB. REV. STAT. §§ 76-1419, 76-1425 to -1449 (1978).

NEV. REV. STAT. tit. 10 § 118A.290 (1977).

N.M. STAT. ANN. § 47-8-20 (1978).

N.J. STAT. ANN. §§ 2A:42-85 to -96 (West Supp. 1982).

N.C. GEN. STAT. §§ 42-38 to -56 (1977).

N.D. CENT. CODE § 47-16-13.1 (1977).
OHIO REV. CODE ANN. §§ 5321.04, .07 (Baldwin 1974).
OKLA. STAT. ANN. tit. 41 §§ 101-135 (West 1978).
OR. REV. STAT. §§ 91.770, 91.800-815 (1975).
PA. STAT. ANN. tit. 35 § 1700-1 (Purdon 1966).
R.I. GEN. LAWS § 34-18-16 (1968).
TENN. CODE ANN. §§ 53-5501 to -5507 and 66-28-304 (1975).
VT. STAT. ANN. tit. 12 § 4859 (1971).
VA. CODE ANN. §§ 55-248.13, .25 (Supp. 1982).
WASH. REV. CODE ANN. § 59.18.060 (1973).
W. VA. CODE § 37-6-30 (1978).
WIS. STAT. ANN. § 704.07 (Supp. 1982).