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The Unwarranted Implication of a Warranty of Fitness in Commercial Leases-An Alternative Approach

Fred W. Bopp, III

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The Unwarranted Implication of a Warranty of Fitness in Commercial Leases—An Alternative Approach

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I. INTRODUCTION

The classical landlord-tenant relationship has undergone a substantial transformation since its origin in feudal England. The most recent and far-reaching change has been the emergence of an implied warranty of habitability in residential leases.¹ An overwhelming majority of jurisdictions recognizes this implied warranty either by statute² or judicial decision³ or both. These same jurisdictions, however, uniformly

1. See generally Abbott, *Housing Policy, Housing Codes, and Tenant Remedies: An Integration*, 56 B.U.L. REV. 1 (1976); Cunningham, *The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status*, 16 URB. L. ANN. 3 (1979).

2. See *infra* note 57 and accompanying text.

3. See *infra* note 56 and accompanying text. These decisions also have adopted the contrac-

have rejected an extension of the underlying rationale to the commercial setting by refusing to imply an analogous warranty of fitness or suitability in nonresidential leases.⁴ Consequently, while modern notions of consumer protection have made rapid advances in residential tenancies, commercial lease law continues to be dominated by principles of property which originated in medieval times and have not been altered significantly since that time.⁵

This dichotomy has been criticized by several commentators who see little reason for continuing the distinction between residential and commercial leases.⁶ Applying the protections afforded the residential leaseholder to the commercial tenant involves three distinct, yet inter-related, issues. The broadest question is whether an analogous warranty of suitability or fitness should be implied in the commercial setting. A closely related issue concerns the interrelation of the covenants, both express and implied, in the commercial lease. While all nonresidential lease covenants traditionally have been considered independent,⁷ one way to expand the tenant's remedies in the commercial field would be to make all lease covenants dependent. Finally, the issue of whether a commercial leaseholder should be able to assert the landlord's material breach of any of these covenants as a defense in a summary action for dispossession must be resolved.

This Note will examine the development of residential leasehold protections in order to isolate the underlying rationales that have prompted judicial and legislative action. Part II traces the history of residential leases, while Part III sets forth the development of commercial lease law. A close examination of these two areas of lease law reveals that the factors significant in the residential setting are not as compelling in the commercial field.⁸ In addition, certain disadvantages

tual notion of mutually dependent covenants and have allowed the residential tenant to assert the landlord's breach of any lease covenant, whether express or implied, in a summary dispossession proceeding.

4. See cases cited *infra* note 69. They also have rejected the other two prongs of residential protection. See *infra* notes 59, 66 and accompanying text.

5. See Greenfield & Margolies, *An Implied Warranty of Fitness in Nonresidential Leases*, 45 ALB. L. REV. 855, 855-56 (1981); Note, *Modernizing Commercial Lease Law: The Case for an Implied Warranty of Fitness*, 19 SUFFOLK U.L. REV. 929, 930 n.5 (1985); see also Comment, *Landlord-Tenant: The Medieval Concepts of Feudal Property Law Are Alive and Well in Leases of Commercial Property in Illinois*, 10 J. MARSHALL J. PRAC. & PROC. 338 (1977).

6. See Brennan, *The Implied Warranty of Fitness in Commercial Leases and the Subrogating Insurance Company*, 18 FORUM 683 (1983); Greenfield & Margolies, *supra* note 5; Levinson & Silver, *Do Commercial Property Tenants Possess Warranties of Habitability?*, 14 REAL EST. L.J. 59 (1985); Note, *Landlord-Tenant—Should a Warranty of Fitness be Implied in Commercial Leases?*, 13 RUTGERS L.J. 91 (1981); Note, *supra* note 5; Comment, *Commercial Leases: Behind The Green Door*, 12 PAC. L.J. 1067 (1981).

7. See sources cited *infra* note 12 and cases cited *infra* note 59.

8. See *infra* notes 155-61 and accompanying text. See generally R. SCHOSHINSKI, *AMERICAN*

that were mildly disquieting in the residential setting have the potential of becoming significantly detrimental in the nonresidential context.⁹ For these reasons, Part IV concludes that a comprehensive extension of residential leasehold protections to the commercial area is unwarranted.

II. HISTORY OF RESIDENTIAL LEASES

A. *Early Common Law*

At common law the lease was essentially a conveyance of an estate in land, usually either a periodic tenancy or term of years, that included covenants on both sides of the transaction.¹⁰ In an agrarian setting, the land assumed primary importance.¹¹ Although the lease was a contractual relationship, the covenants on both sides were treated as independent.¹² Once the landlord made the conveyance, therefore, any breach of the lease by him would not suspend any of the tenant's independent obligations, including the payment of rent.¹³ The tenant's remedy was to sue in contract because "the breach of such covenant [could] be readily compensated for in damages."¹⁴

The lessee was disadvantaged further by the application of the common-law rule of *caveat emptor*. With the coming of the industrial

LAW OF LANDLORD AND TENANT § 3:29 (1980).

9. See *infra* notes 161-64 and accompanying text.

10. See R. SCHOSHINSKI, *supra* note 8, § 1:1, at 1-3; Lesar, *The Landlord-Tenant Relation in Perspective: From Status to Contract and Back in 900 Years?*, 9 U. KAN. L. REV. 369, 369-71 (1961); Love, *Landlord's Liability for Defective Premises: Caveat Lessee, Negligence, or Strict Liability?*, 1975 WIS. L. REV. 19, 23-24.

11. See 3A A. CORBIN, CORBIN ON CONTRACTS § 686, at 240 (rev. ed. 1960); Friedman, *The Nature of a Lease in New York*, 33 CORNELL L.Q. 165, 166 (1947).

12. See J. BRUCE, J. ELY & C. BOSTICK, MODERN PROPERTY LAW: CASES AND MATERIALS 31 (1984) (stating that the "common law treatment of lease covenants as independent obligations developed because, from a property law perspective, the landlord fulfills his obligation by conveying a leasehold estate to the tenant"); 3A A. CORBIN, *supra* note 11, § 686, at 238-40; 1 H. TIFFANY, THE LAW OF REAL PROPERTY § 88 (3d ed. 1939).

13. See, e.g., McArdle v. Courson, 82 Ill. App. 3d 123, 125, 402 N.E.2d 292, 295 (1980) (applying a strict application of the traditional rule in a modern setting). *But see* Higgins v. Whiting, 102 N.J.L. 279, 131 A. 879 (1926) (holding that express covenants to pay rent and to heat an apartment are mutual and dependent). See generally 1 M. FRIEDMAN, FRIEDMAN ON LEASES § 1.1 (2d ed. 1983).

14. Rubens v. Hill, 213 Ill. 523, 534, 72 N.E. 1127, 1130 (1904); see also 1 H. TIFFANY, *supra* note 12, § 88. In its purest form, the doctrine of independent covenants treated both the landlord and tenant the same. Consequently, if the tenant failed to pay rent, the landlord could not take possession. See, e.g., Brown v. Bragg, 22 Ind. 122 (1864). With the legislative enactment of an action for summary dispossession, the landlord could evict the tenant for nonpayment of rent notwithstanding the landlord's own breach of an express lease covenant. See, e.g., Truman v. Rodesch, 168 Ill. App. 304 (1912). This disparate result occurred because the only litigable issue in the statutory proceeding was that of possession. Accordingly, the tenant could not raise the landlord's breach as a defense. Rather, consistent with the doctrine of independent covenants, he was forced to sue on the lease for contractual damages.

revolution, a majority of the population began to move into cities.¹⁵ As a direct result, the importance of the land to the tenant became subordinate to that of the structures on it; the lease became more residential in its use.¹⁶ Many leases began to contain express covenants about these improvements.¹⁷ The tenant who did not bargain for such terms, however, leased the property with no implied warranties as to its habitability, condition, or fitness for the tenant's intended use.¹⁸ This doctrine had an additional disabling effect on the lessee in that the unfitness of the leased premises could not be used as a defense to an action for rent.¹⁹

The rules of independent covenants and *caveat emptor* were rational products of the times. Originally, the conveyance of an estate in land was of primary importance to the lessee in an agricultural society.²⁰ Even when improvements to the real estate assumed greater significance, the courts reasonably could assume that because the tenant had an opportunity to inspect the premises, he could detect at least the major defects. Moreover, the tenant presumably had the ability to put the demised premises into a livable condition.²¹ The problem of hidden defects could be avoided by an express warranty in the lease.²² If the tenant failed to secure an express warranty, it was likely that he was capable of making repairs himself.²³ In their original applications, therefore, these rules did not work harsh results.

15. Hicks, *The Contractual Nature of Real Property Leases*, 24 BAYLOR L. REV. 443, 448-54 (1972).

16. *Id.* at 451.

17. See Lesar, *supra* note 10, at 372.

18. See, e.g., Franklin v. Brown, 118 N.Y. 110, 115, 23 N.E. 126, 127 (1889) (stating that lessee must "run the risk of [the dwelling's] condition"); see also 1 AMERICAN LAW OF PROPERTY § 3.45, at 34-36 (A. Casner ed. Supp. 1977) [hereinafter 1 A.L.P.]; RESTATEMENT (SECOND) OF PROPERTY § 5.1 comment b (1977) [hereinafter RESTATEMENT]. Since *caveat emptor* had its origin in contract law, the courts easily applied it to conveyances of real property because the landlord and tenant also were assumed to be dealing at arm's length. See generally Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133, 1135, 1156-63 (1931); Siegel, *Is the Modern Lease a Contract or a Conveyance?—A Historical Inquiry*, 52 J. URB. L. 649, 672-79 (1975).

19. See, e.g., Arbuckle Realty Trust v. Rosson, 180 Okla. 20, 67 P.2d 444 (1937). See generally 1 A.L.P., *supra* note 18, § 3.45, at 35; discussion *supra* note 14.

20. See sources cited *supra* note 11.

21. See 1 A.L.P., *supra* note 18, § 3.45, at 35; Greenfield & Margolies, *supra* note 5, at 862; Annotation, *Modern Status of Rules as to Existence of Implied Warranty of Habitability or Fitness for Use of Leased Premises*, 40 A.L.R.3d 646, 650 (1971).

22. See 1 A.L.P., *supra* note 18, § 3.45, at 35; Note, *supra* note 6, at 94.

23. See RESTATEMENT, *supra* note 18, § 5.1 comment h; Love, *supra* note 10, at 28; Comment, *supra* note 6, at 1068 (stating that "given the nature of the lease and the capabilities of the tenant in feudal-agrarian times, *caveat emptor* adequately reflected contemporary social concerns regarding the average farm tenant" (footnote omitted)).

B. Erosion of the Doctrines

1. Judicial Exceptions

As the process of urbanization continued, the foundation of these common-law property doctrines began to crumble. Accordingly, early in the nineteenth century, the courts tried to mitigate the harshness of the doctrine of independent covenants by implying a covenant of quiet enjoyment into residential leases.²⁴ Under this covenant, the landlord had an obligation to transfer good title for the term of the lease to the tenant and actual eviction of the tenant by the landlord or by anyone with paramount title constituted a breach.²⁵ Breach of the covenant of quiet enjoyment relieved the tenant of his obligation to pay rent.²⁶ In a sense, this result was consistent with existing doctrine because total eviction constituted a complete failure of consideration.²⁷ The strict test applied by the courts²⁸ and the limited scope of the covenant,²⁹ however, combined to provide the lessee with effective protection only for the most egregious violations.³⁰

The next attack on the notion of the independence of covenants came in the case of *Dyett v. Pendleton*.³¹ The *Dyett* court held that "other acts of the landlord going to diminish the enjoyment of the premises, besides an actual expulsion, will exonerate from the payment of rent."³² This case is heralded as the first case to employ the doctrine of constructive eviction.³³ Because the lessor had interfered with the

24. See Greenfield & Margolies, *supra* note 5, at 861.

25. See J. BRUCE, J. ELY & C. BOSTRICK, *supra* note 12, at 26-27; Note, *supra* note 5, at 933. There is a split of authority on whether the landlord must convey merely the legal right of possession to the tenant (the "English" rule) or must oust any trespassers and put the lessee in actual possession of the leasehold (the "American" rule). Compare *Hannan v. Dusch*, 154 Va. 346, 153 S.E. 824 (1930) (following the "American" rule) with *Herpolsheimer v. Christopher*, 76 Neb. 352, 111 N.W. 359 (1907) (following the "English" rule).

26. See 1 H. TIFFANY, *supra* note 12, § 95; Greenfield & Margolies, *supra* note 5, at 861; see also *State Bank of Chicago v. Wheeler*, 146 Ill. App. 568 (1909); *Riley v. Hale*, 158 Mass. 240, 33 N.E. 491 (1893); *Phoenix Land & Improvement Co. v. Seidel*, 135 Mo. App. 185, 115 S.W. 1070 (1909); *Hannan v. Harper*, 189 Wis. 588, 208 N.W. 255 (1926).

27. See Greenfield & Margolies, *supra* note 5, at 861.

28. The tenant had to prove that the interference with his use of the leasehold was substantial and that the landlord or his agent caused the interference. R. POWELL, *POWELL ON REAL PROPERTY* § 225 (P. Rohan rev. ed. 1986).

29. See Note, *supra* note 6, at 96. The Note stated that "this implied covenant provided no remedy for a tenant whose landlord failed to maintain the premises in a habitable condition. An action for damages remained the tenant's only recourse." *Id.* (footnote omitted).

30. See Greenfield & Margolies, *supra* note 5, at 861 (stating that "[p]rior to 1826, however, the interference by the landlord that would justify the suspension of the tenant's obligations to pay rent had to be an *actual eviction*" (emphasis added)).

31. 8 Cow. 727 (N.Y. 1826) (in which lessee was evicted constructively by landlord who habitually brought "lewd women" into demised premises).

32. *Id.* at 732 (footnote omitted).

33. See, e.g., Greenfield & Margolies, *supra* note 5, at 861; Note, *supra* note 6, at 96. It

tenant's beneficial enjoyment of the premises, the tenant was justified in quitting the premises and was relieved of his obligation to pay rent under the lease.³⁴

Subsequent decisions recognized a constructive eviction when the landlord either actively³⁵ or by omission³⁶ breached the implied covenant of quiet enjoyment. As the doctrine evolved, courts lessened the required degree of interference³⁷ while failing to establish clearly what duty the lessor had violated.³⁸ As a result, the use of constructive eviction moved residential leasehold law away from the realm of property law and closer to embodying contract principles.³⁹ Despite its expanded scope, however, the doctrine of constructive eviction did not become a widely used tenant remedy. This result was due to the rigorous elements that the lessee had to prove,⁴⁰ as well as the inherent risks involved in utilizing this approach.⁴¹

In the middle of the nineteenth century the courts began to attack the doctrine of *caveat emptor*. This attack, focused on the residential setting, gained momentum at the turn of the century and continued until the 1970's, when the vast majority of courts finally recognized the doctrine as obsolete in the residential context. The assault consisted of three major exceptions to the common-law rule. In situations when the tenant was unable to inspect the premises adequately, and thus a major

should be noted that the court viewed the landlord's disturbance as a "total failure of the consideration." *Dyett*, 8 Cow. at 733. This case doctrinally was consistent with the idea of independent covenants, yet, because the landlord expressly had covenanted regarding the peaceable use of the dwelling, it was also a significant move toward the dependency of covenants.

34. *Dyett*, 8 Cow. at 733.

35. See, e.g., *Radinsky v. Weaver*, 170 Colo. 169, 460 P.2d 218 (1969); *Lester v. Griffin*, 57 Misc. 628, 108 N.Y.S. 580 (App. Term 1909); *Bruckner v. Helfaer*, 197 Wis. 582, 222 N.W. 790 (1929).

36. See, e.g., *Berwick Corp. v. Kleinginna Inv. Corp.*, 143 So.2d 684 (Fla. Dist. Ct. App. 1962); *Overstreet v. Rhodes*, 213 Ga. 181, 97 S.E.2d 561 (1957); *John Munic Meat Co. v. H. Gartenberg & Co.*, 51 Ill. App. 3d 413, 366 N.E.2d 617 (1977); *Tallman v. Murphy*, 120 N.Y. 345, 24 N.E. 716 (1890).

37. See generally Note, *supra* note 6, at 96-97.

38. See *Rapacz, Origin and Evolution of Constructive Eviction in the United States*, 1 DE PAUL L. REV. 69, 72-74, 79-84 (1951).

39. See J. BRUCE, J. ELY & C. BOSTICK, *supra* note 12, at 31-32; Note, *supra* note 6, at 98.

40. The tenant had to establish: (1) substantial interference with the tenant's possession, (2) by or at the direction of the landlord, (3) that the landlord was notified of the problem, and (4) the abandonment of the premises by the tenant within a reasonable time. See R. SCHOSHINSKI, *supra* note 8, § 3:5, at 99.

41. If the tenant was mistaken as to whether the interference was substantial, he remained liable for the rent even though he had abandoned the premises. If the tenant waited too long to abandon, he faced the possibility that he had waived his right to do so. Finally, the tenant had to find new livable premises for himself. See generally R. SCHOSHINSKI, *supra* note 8, § 3:5, at 99-100; *Greenfield & Margolies*, *supra* note 5, at 867-69; Note, *supra* note 6, at 96-97; Note, *The Implied Warranty of Habitability in Landlord-Tenant Relations: A Proposal for Statutory Development*, 12 WM. & MARY L. REV. 580, 586 (1971); Comment, *supra* note 6, at 1076-77.

justification for *caveat emptor* was absent, two of the exceptions arose. First, a warranty of habitability was implied in the short-term lease of furnished premises,⁴² in which case the need for immediate occupancy was the underlying concern.⁴³ The second exception applied to leases that had been executed while the demised premises were still under construction, and similarly could not have been inspected easily.⁴⁴ The courts held the landlord to an implied warranty that the completed structure would be suitable for the tenant's particular purpose.⁴⁵ A final exception addressed situations in which there had been fraudulent behavior by the lessor. The tenant would be excused from performance under the lease if the landlord either fraudulently misrepresented the leasehold's condition or knowingly failed to disclose latent defects which the tenant could not discover upon reasonable inspection.⁴⁶ The inability of these exceptions to protect the residential tenant adequately eventually prompted the vast majority of courts to abolish *caveat emptor* completely in the residential setting.

2. Legislative Action

Judicial activity was the primary force behind the transformation of the landlord-tenant relationship until the twentieth century. By the mid-1900's, however, federal, state, and local legislatures began to get involved.⁴⁷ On the federal level, Congress took its first major step con-

42. This exception had its origin in the English case of *Smith v. Marrable*, 152 Eng. Rep. 693 (8 Ex. 1843). The first American decision to adopt the exception was *Ingalls v. Hobbs*, 156 Mass. 348, 31 N.E. 286 (1892) (holding a breach of this warranty constituted defense to payment of rent). Other jurisdictions followed suit. *See, e.g., Young v. Povich*, 121 Me. 141, 116 A. 26 (1922); *Delamater v. Foreman*, 184 Minn. 428, 239 N.W. 148 (1931); *Morgenthau v. Ehrich*, 77 Misc. 139, 136 N.Y.S. 140 (Sup. Ct. 1912). This theory, however, initially was rejected by some courts. *See, e.g., Fisher v. Lighthall*, 15 D.C. (4 Mackey) 82 (1885); *Murray v. Albertson*, 50 N.J.L. 167, 13 A. 394 (1888); *Franklin v. Brown*, 118 N.Y. 110, 23 N.E. 126 (1889). Some courts followed the doctrine of independent covenants and held that the tenant was bound by his obligation to pay rent despite the lessor's breach. *See, e.g., Hunter v. Porter*, 10 Idaho 72, 77 P. 434 (1904).

43. *See generally* R. SCHOSHINSKI, *supra* note 8, § 3:11; 1 A.L.P., *supra* note 18, § 3.45, at 35.

44. *See generally* 1 A.L.P., *supra* note 18, § 3.45, at 35; *Greenfield & Margolies, supra* note 5, at 862 n.44.

45. *See, e.g., Woolford v. Electric Appliances, Inc.*, 24 Cal. App. 2d 385, 75 P.2d 112 (1938); *Levitz Furniture Co. v. Continental Equities, Inc.*, 411 So.2d 221 (Fla. Dist. Ct. App.) (citing other cases in agreement), *petition denied*, 419 So.2d 1196 (Fla. 1982); *J.D. Young Corp. v. McClintic*, 26 S.W.2d 460 (Tex. Civ. App. 1930), *rev'd on other grounds*, 66 S.W.2d 676 (Tex. 1933).

46. *See, e.g., Gamble-Robinson Co. v. Buzzard*, 65 F.2d 950 (8th Cir. 1933); *Taylor v. Leedy & Co.*, 412 So.2d 763 (Ala. 1982); *Grimes v. Gano*, 111 Ga. App. 543, 142 S.E.2d 413 (1965); *Sunasack v. Morey*, 196 Ill. 569, 63 N.E. 1039 (1902); *Service Oil Co. v. White*, 218 Kan. 87, 542 P.2d 652 (1975); *Cowen v. Sunderland*, 145 Mass. 363, 14 N.E. 117 (1887); *Blake v. Dick*, 15 Mont. 236, 38 P. 1072 (1895); *Goldberg v. Reed*, 97 N.J.L. 170, 116 A. 429 (1922); *Daly v. Wise*, 132 N.Y. 306, 30 N.E. 837 (1892); *Pulaski Housing Auth. v. Smith*, 39 Tenn. App. 213, 282 S.W.2d 213 (1955); *Perkins v. Marsh*, 179 Wash. 362, 37 P.2d 689 (1934).

47. *See Abbott, supra* note 1, at 40-45.

cerning residential tenancies with the Housing Act of 1949.⁴⁸ Soon after, President Lyndon Johnson's Great Society program greatly increased the availability of low-cost legal services to poor tenants.⁴⁹ These two developments, along with other federal action, spurred state and local governments either to promulgate new housing codes or to amend their existing ones.⁵⁰ From the mid-1960's the courts and local legislatures were poised to confront and reject the common-law notions concerning residential tenancies. Courts began to render decisions that either were based on, or formed the basis for, legislation protecting the newly emerging rights of tenants.

C. Present Residential Protection

In the second half of the twentieth century it increasingly became obvious that the common-law assumptions about the landlord-tenant relationship had little or no application under current urban conditions. Despite a few early decisions,⁵¹ the first major cases to abandon the

48. 42 U.S.C. §§ 1441-1490j (1982). The Act's goal was to realize "a decent home and a suitable living environment for every American family." *Id.* § 1441.

49. See Donahue, *Change in The American Law of Landlord and Tenant*, 37 *Mod. L. Rev.* 242, 246 (1974).

50. See Abbott, *supra* note 1, at 43-45; Cunningham, *supra* note 1, at 5-10, 25-51.

51. The first decision was *Pines v. Perssion*, 14 Wis. 2d 590, 111 N.W.2d 409 (1961). The court in *Pines* stated that "there was an implied warranty of habitability in the residential lease." *Id.* at 594, 111 N.W.2d at 412. Subsequent decisions by the Supreme Court of Wisconsin, however, make the continued vitality of this statement unclear. See *Posnanski v. Hood*, 46 Wis. 2d 172, 180-82, 174 N.W.2d 528, 532-33 (1970) (refusing to imply judicially a city housing code into residential leases while not mentioning *Pines*); see also *State ex rel. Michalek v. LeGrand*, 77 Wis. 2d 520, 532 n.20, 253 N.W.2d 505, 509 n.20 (1977) (stating that *Pines* limited "a landlord's right to receive rent where landlord fails to maintain rented premises in habitable condition"). In light of these decisions, and because *Pines* involved the lease of a furnished dwelling, some commentators argue that it falls within this exception to *caveat emptor*. See *supra* note 42 and accompanying text (discussing this exception); see also R. Schoshinski, *supra* note 8, § 3:16, at 124 (characterizing the court's discussion of an implied warranty as dictum); Love, *supra* note 10, at 95.

Two years later, the Supreme Court of Wisconsin cited *Pines* for the proposition that "[t]he covenant of possession implies . . . that the tenant will be able . . . to use the premises for its intended purpose." *Earl Millikin, Inc. v. Allen*, 21 Wis. 2d 497, 500, 124 N.W.2d 651, 654 (1963) (footnote omitted). Because *Allen* involved the construction of a leasehold and an express covenant to provide the tenant with a suitable water supply, the case more accurately belongs in the category of the common law exception for demised premises to be built by the landlord for a specific purpose of the prospective tenant. See *supra* note 45 and accompanying text (discussing this exception); see also Brennan, *supra* note 6, at 690 n.45 (stating that "[t]he court's implication of a warranty of fitness does not appear to have been necessary for its conclusion"). The real significance of this decision is its application of the *Pines* theory of residential protection in the commercial context.

Buckner v. Azulai, 251 Cal. App. 2d Supp. 1013, 59 Cal. Rptr. 806 (1967) represents an intermediate step on the way to complete abandonment of the common law tradition. In *Buckner*, the court expressed its distaste for *caveat emptor* and discussed an implied warranty of habitability. Its final holding, however, was based on the state statutes requiring the demised premises to be suitable for occupation.

traditional rules and to imply a warranty of habitability in residential leases were *Lemle v. Breeden*⁵² and *Javins v. First National Realty Corp.*⁵³ *Lemle* was the first case to make a clean break from traditional principles and to characterize the residential lease as a contractual relationship in which the landlord implicitly warranted the habitability of the demised premises.⁵⁴ Although cited more often because of its detailed and comprehensive reasoning, *Javins* was not an exclusively judicial action. While the court held that a warranty of habitability was implied into residential dwellings, the warranty was based on the housing regulations of the District of Columbia and applied only to units covered by the housing regulations.⁵⁵ Nevertheless, with the powerful force of these decisions behind it, the movement for greater lessee protection in the residential area swept across the nation. The vast majority of courts considering the issue have decided to imply a warranty of habitability into residential leases.⁵⁶ Additionally, thirty-nine state leg-

52. 51 Haw. 426, 462 P.2d 470 (1969).

53. 428 F.2d 1071 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970).

54. *Lemle*, 51 Haw. at 433, 462 P.2d at 474.

55. *Javins*, 428 F.2d at 1072-73, 1081. See generally R. SCHOSHINSKI, *supra* note 8, § 3:16, at 125-26.

56. See *Green v. Superior Court*, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974); *Jack Spring, Inc. v. Little*, 50 Ill. 2d 351, 280 N.E.2d 208 (1972); *Breezewood Management Co. v. Malthbie*, 411 N.E.2d 670 (Ind. Ct. App. 1980); *Mease v. Fox*, 200 N.W.2d 791 (Iowa 1972); *Steele v. Latimer*, 214 Kan. 329, 521 P.2d 304 (1974); *Boston Hous. Auth. v. Hemingway*, 363 Mass. 184, 293 N.E.2d 831 (1973); *Detling v. Edelbrock*, 671 S.W.2d 265 (Mo. 1984) (en banc); *Kline v. Burns*, 111 N.H. 87, 276 A.2d 248 (1971); *Marini v. Ireland*, 56 N.J. 130, 265 A.2d 526 (1970); *Tonetti v. Penati*, 48 A.D.2d 25, 367 N.Y.S.2d 804 (1975); *Glyco v. Schultz*, 35 Ohio Misc. 25, 289 N.E.2d 919 (1972); *Pugh v. Holmes*, 486 Pa. 272, 405 A.2d 897 (1979); *Kamarath v. Bennett*, 568 S.W.2d 658 (Tex. 1978); *Birkenhead v. Coombs*, 143 Vt. 167, 465 A.2d 244 (1983); *Foisy v. Wyman*, 83 Wash. 2d 22, 515 P.2d 160 (1973); *Teller v. McCoy*, 162 W. Va. 367, 253 S.E.2d 114 (1978); see also *Pines*, 14 Wis. 2d 590, 111 N.W.2d 409. But see *Martin v. Springdale Stores, Inc.*, 354 So. 2d 1144 (Ala. Civ. App. 1978); *Hurst v. Feild*, 281 Ark. 106, 661 S.W.2d 393 (1983) (holding landlord has no duty to repair unless expressly provided for in the lease); *Blackwell v. Del Bosco*, 191 Colo. 344, 558 P.2d 563 (1976); *Thomas v. Roper*, 162 Conn. 343, 294 A.2d 321 (1972) (concluding no implied warranty in a single family dwelling); *Solomon v. Gentry*, 388 So. 2d 52 (Fla. Dist. Ct. App. 1980) (holding no warranty of fitness or merchantability implied in mobile home which is considered real property); *Worden v. Ordway*, 105 Idaho 719, 672 P.2d 1049 (1983) (finding no implied warranty because legislature already had acted); *Zimmerman v. Moore*, 441 N.E.2d 690 (Ind. Ct. App. 1982) (finding no such warranty when a non-merchant lessor leases single family, used dwelling); *Miles v. Shauntee*, 664 S.W.2d 512 (Ky. 1983) (concluding no implied warranty absent legislation to the contrary); *Cappaert v. Junker*, 413 So. 2d 378 (Miss. 1982) (holding no implied warranty); *Paxton v. Hinkle*, 282 S.C. 273, 318 S.E.2d 123 (Ct. App. 1984) (finding landlord has no duty to repair unless expressly provided for in the lease); *Hall v. Warren*, 632 P.2d 848 (Utah 1981) (personal injury action).

The vast majority of these jurisdictions also expressly abandoned the common-law doctrine of independent lease covenants. See, e.g., *Javins*, 428 F.2d 1071; *Green*, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704; *Boston Hous. Auth.*, 363 Mass. 184, 293 N.E.2d 831; *Birkenhead*, 143 Vt. 167, 465 A.2d 244. These courts also allowed an aggrieved tenant to assert as a defense a breach of the implied warranty of habitability in a summary dispossession proceeding. See, e.g., *Javins*, 428 F.2d at 1071; *Green*, 10 Cal. 3d at 616, 517 P.2d at 1168, 111 Cal. Rptr. at 704; *Boston Hous. Auth.*,

islatures have mandated that landlords can rent only habitable residential premises.⁵⁷ As a result, forty-three jurisdictions currently afford many or all residential tenants the protection of an implied warranty of habitability.

The courts have emphasized several motivating factors for departing from the common law. The predominant considerations include: (1) the shift in importance from the land to the structures and improvements on the land; (2) the difficulties and costs involved in inspecting a potential leasehold and attempting to make repairs; (3) the disparity in bargaining power and the resulting inequities, including the use of form leases created by the shortage of adequate, low-cost housing; (4) the poor enforcement of existing housing codes which reflects the public policy promoting the maintenance of habitable dwellings; and (5) the tendency of common-law approaches to encourage slums.⁵⁸ Considered

363 Mass. at 184, 293 N.E.2d at 831; *Birkenhead*, 143 Vt. at 167, 465 A.2d at 244. *But cf.* *Brown v. Young*, 364 A.2d 1171 (D.C. 1976) (breach of covenant concerning option to purchase residential premises was not allowed as defense); *Timber Ridge Town House v. Dietz*, 133 N.J. Super. 577, 338 A.2d 21 (Law Div. 1975) (holding breach of covenant to provide swimming pool was not justification for residential rent abatement).

57. ALASKA STAT. § 34.03.100 (1985); ARIZ. REV. STAT. ANN. § 33-1324 (Supp. 1987); CAL. CIV. CODE §§ 1941, 1941.1 (West 1985); CONN. GEN. STAT. § 47a-7 (1978 & Supp. 1988); DEL. CODE ANN. tit. 25, § 5303 (1974); FLA. STAT. § 83.51 (1988); GA. CODE ANN. § 44-7-13 (1982); HAW. REV. STAT. § 521.42 (1985); IDAHO CODE § 6-320 (1979); IOWA CODE ANN. § 562A.15 (Supp. 1988); KAN. STAT. ANN. § 58-2553 (1983); KY. REV. STAT. ANN. § 383.595 (Michie/Bobbs-Merrill Supp. 1986); LA. CIV. CODE ANN. arts. 2692, 2693, 2695, 2717 (West 1952); ME. REV. STAT. ANN. tit. 14, § 6021 (1964 & Supp. 1987); MD. REAL PROP. CODE ANN. § 8-211 (1988); MASS. ANN. LAWS ch. 111, § 127A (Law. Co-op. 1985 & Supp. 1988); MASS. ANN. LAWS ch. 111, § 127L (Law. Co-op. 1985); MASS. ANN. LAWS ch. 239, § 8a (Law. Co-op. 1986 & Supp. 1988); MICH. COMP. LAWS § 554.139 (1981); MINN. STAT. ANN. § 504.18 (West Supp. 1988); MO. ANN. STAT. §§ 441.500, 441.510 (Vernon 1986); MONT. CODE ANN. § 70-24-303 (1986); NEB. REV. STAT. § 76-1419 (1986); NEV. REV. STAT. § 118A.290 (1987); N.J. STAT. ANN. § 2A:42-88 (West 1987); N.M. STAT. ANN. § 47-8-20 (Supp. 1987); N.Y. MULT. DWELL. LAW §§ 301, 302(1)(b) (McKinney 1974 & Supp. 1988); N.Y. MULT. RESID. LAW §§ 305, 305a (McKinney 1952 & Supp. 1988); N.Y. REAL PROP. LAW § 235-b (McKinney Supp. 1988) (generally applicable warranty of habitability); N.Y. REAL PROP. ACTS. LAW §§ 755, 770 (McKinney 1979 & Supp. 1988); N.C. GEN. STAT. § 42-42 (Supp. 1987); N.D. CENT. CODE § 47-16-13.1 (1978); OHIO REV. CODE ANN. § 5321.04 (Anderson 1981); OKLA. STAT. ANN. tit. 41, § 118 (West 1986); OR. REV. STAT. § 91.770 (1987); PA. STAT. ANN. tit. 35, § 1700-1 (Purdon 1977); R.I. GEN. LAWS §§ 34-18-16, 45-24-3-6 (1984 & Supp. 1987); S.D. CODIFIED LAWS ANN. § 43-32-8, 32-9 (1983); TENN. CODE ANN. § 66-28-304 (1982); TEX. PROP. CODE ANN. § 92-052 (Vernon 1984); VA. CODE ANN. § 55-248.13 (1986 & Supp. 1987); WASH. REV. CODE ANN. § 59.18.060 (Supp. 1988); W. VA. CODE § 37-6-30 (1985); WIS. STAT. § 704.07 (1981 & Supp. 1987).

Only the states of Alabama, Arkansas, Colorado, Mississippi, South Carolina, Utah, and Wyoming have not implied judicially or imposed statutorily a warranty of habitability in any type of residential premise.

58. For a general discussion of these concerns, see *Javins*, 428 F.2d 1071; *Green*, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704; *Jack Spring, Inc.*, 50 Ill. 2d 351, 280 N.E.2d 208; *Kline*, 111 N.H. 87, 276 A.2d 248; *Marini*, 56 N.J. 130, 265 A.2d 526. Numerous commentators also have outlined these factors. See, e.g., 1 A.L.P., *supra* note 18, § 3.45, at 36; RESTATEMENT, *supra* note 18, § 5.1, at 169-70; R. SCHOSHINSKI, *supra* note 8, § 3:16, at 123; Greenfield & Margolies, *supra* note 5, at 871-72; Note, *supra* note 6, at 98.

together, these concerns are compelling in the case of the urban, residential tenant and they explain the rapid acceptance of the new implied warranty of habitability.

III. COMMERCIAL LEASE LAW

A. *The Common-Law Tradition—Rejection of The New Warranty*

In feudal times no distinction was made between commercial and residential leases. Accordingly, the common-law doctrine of independent covenants applied with equal force to commercial tenancies.⁵⁹ Additionally, the covenant of quiet enjoyment was available to the residential and nonresidential lessee because it was implied into all leases.⁶⁰ Due to the early limitations on the covenant of quiet enjoyment,⁶¹ however, the business tenant's protection also evolved into the remedy of constructive eviction.⁶² But the commercial lessee faced the same problems as his residential counterpart.⁶³ Even though some decisions recognized the dependence of commercial lease covenants⁶⁴ and

59. See, e.g., *Northwestern Mut. Life Ins. Co. v. Axton (In Re Axton)*, 641 F.2d 1262 (9th Cir. 1981); *Murphy v. Texaco, Inc.*, 567 F. Supp. 910 (N.D. Ill. 1983); *Collins v. Shanahan*, 34 Colo. App. 82, 523 P.2d 999 (1974); *Interstate Restaurants, Inc. v. Halsa Corp.*, 309 A.2d 108 (D.C. 1973); *McArdle v. Courson*, 82 Ill. App. 3d 123, 402 N.E.2d 292 (1980); *Yuan Kane Ing v. Levy*, 26 Ill. App. 3d 889, 326 N.E.2d 51 (1975); *C & J Delivery, Inc. v. Vinyard & Lee & Partners, Inc.*, 647 S.W.2d 564 (Mo. Ct. App. 1983); *Earbert Restaurant, Inc. v. Little Luxuries, Inc.*, 99 A.D.2d 734, 472 N.Y.S.2d 359 (1984). *But see, e.g., Reed v. United States Postal Serv.*, 660 F. Supp. 178 (D. Mass. 1987) (applying Massachusetts' law, the court held that the landlord's duty to repair was given in exchange for the tenant's duty to pay rent based on language in the lease and recognition by Massachusetts' courts of a trend within the state to treat these covenants as interdependent); *Westrich v. McBride*, 204 N.J. Super. 550, 499 A.2d 546 (1984) (holding landlord's express covenant to heat premises and tenant's covenant to pay rent were mutually dependent); *Teodori v. Werner*, 490 Pa. 58, 415 A.2d 31 (1980) (holding landlord's non-competition clause and commercial tenant's duty to pay rent were mutually dependent); *Pawco, Inc. v. Bergman Knitting Mills, Inc.*, 283 Pa. Super. 443, 424 A.2d 891 (1980) (rejecting the "independence-of-obligations approach" when landlord breached express covenant to heat premises); *Davidow v. Inwood N. Professional Group—Phase I*, 747 S.W.2d 373 (Tex. 1988) (holding landlord's implied warranty of suitability and tenant's covenant to pay rent mutually dependent in commercial setting); *cf., e.g., Earl Millikin, Inc. v. Allen*, 21 Wis. 2d 497, 124 N.W.2d 651 (1963).

60. See *Stevan v. Brown*, 54 Md. App. 235, 247-48, 458 A.2d 466, 473 (1983); *Charles E. Burt, Inc. v. Seven Grand Corp.*, 340 Mass. 124, 127, 163 N.E.2d 4, 6 (1959); *Reste Realty Corp. v. Cooper*, 53 N.J. 444, 456-57, 251 A.2d 268, 275-76 (1969); *supra* notes 24-30 and accompanying text.

61. See *supra* notes 28-30 and accompanying text.

62. See *Groh v. Kover's Bull Pen, Inc.*, 221 Cal. App. 2d 611, 34 Cal. Rptr. 637 (1963); *Automobile Supply Co. v. Scene-in-Action Corp.*, 340 Ill. 196, 172 N.E. 35 (1930); *Charles E. Burt, Inc.*, 340 Mass. 124, 163 N.E.2d 4; *Barash v. Pennsylvania Terminal Real Estate Corp.*, 26 N.Y.2d 77, 256 N.E.2d 707, 308 N.Y.S.2d 649 (1970); *Perkins v. Marsh*, 179 Wash. 362, 37 P.2d 689 (1934); *cf. Ringwood Assocs. v. Jack's of Route 23, Inc.*, 153 N.J. Super. 294, 379 A.2d 508 (1977).

63. See *supra* notes 40-41 and accompanying text.

64. See, e.g., *Medico-Dental Bldg. Co. v. Horton & Converse*, 21 Cal. 2d 411, 132 P.2d 457 (1942); *Groh*, 221 Cal. App. 2d at 611, 34 Cal. Rptr. at 637; *Westrich*, 204 N.J. Super. 550, 499 A.2d 546; *Pawco, Inc.*, 238 Pa. Super. 443, 424 A.2d 891. These decisions did not extend the broad

other decisions relaxed the rigid requirements of constructive eviction,⁶⁵ the vast majority of jurisdictions steadfastly clung to the notion that, absent express evidence to the contrary, commercial lease covenants were independent.⁶⁶ Consequently, in the face of a breach of an express covenant by the lessor, commercial lessees in the vast majority of jurisdictions had to repair the premises themselves, while still paying rent, and then sue the lessor for damages arising out of that breach.

The nonresidential lessee also was burdened by the doctrine of *caveat emptor*. As the common-law courts began to carve out exceptions to this rule,⁶⁷ a bifurcation occurred in the treatment of leases. The judicial retreat from *caveat emptor* in property law was confined exclusively to the residential leasehold, and nonresidential tenants expressly were denied the same protection.⁶⁸ The most glaring examples of this dichotomy surfaced as the overwhelming majority of courts refused to

contractual theory of mutual dependency to all of the covenants in a commercial lease. Rather, they made it clear that the covenant which the landlord breached was the consideration for the lease because of its crucial importance to the tenant. Thus, these cases can be read as judicial interpretations of the lease agreement holding that the landlord's duty to perform substantially certain express covenants was a condition of the tenant's obligation to make rental payments. The decisions represent a greater judicial willingness to extend contract principals to commercial lease law.

65. At least two jurisdictions have allowed a commercial tenant to remain on the premises and file suit seeking equitable remedies and a determination of whether a constructive eviction has occurred which would allow the tenant to abandon the premises without liability for rent. *See, e.g., Stevan*, 54 Md. App. 235, 458 A.2d 466; *Charles E. Burt, Inc.*, 340 Mass. 124, 163 N.E.2d 4. While this doctrine of equitable constructive eviction does eliminate the tenant's dilemma when the existence of a constructive eviction is unclear, it does not address the other problems that a commercial tenant faces, such as forfeiting a profitable location and re-establishing the business in a new area. *See, e.g., Mobil Oil Corp. v. Handley*, 76 Cal. App. 3d 956, 143 Cal. Rptr. 321 (1978).

66. *See* cases cited *supra* note 59. The natural consequence of these decisions was that the commercial lessee could not assert the lessor's breach of any lease covenant in a summary dispossession action. *See, e.g., Schulman v. Vera*, 108 Cal. App. 3d 552, 166 Cal. Rptr. 620 (1980) (finding breach of express covenant to repair roof could not be asserted); *Halsa Corp.*, 309 A.2d 108. *But see, e.g., Davidow*, 747 S.W.2d 373 (holding commercial tenant was allowed to assert landlord's breach of implied warranty of habitability as a defense in an action for unpaid rent); *Reed*, 660 F. Supp. 178 (in which the court, applying Massachusetts law, allowed a commercial tenant to defend landlord's eviction action by asserting landlord's breach of express lease covenant to repair); *cf., e.g., Warfield v. Richey*, 167 Cal. App. 2d 93, 334 P.2d 101 (1959) (concluding defenses of fraudulent inducement and failure to make agreed repairs were allowed in action for summary dispossession); *Teodori*, 490 Pa. 58, 415 A.2d 31 (allowing commercial tenant to assert landlord's breach of non-competition clause by landlord as defense to action for summary eviction and rent).

67. *See supra* notes 42-46 and accompanying text.

68. *See, e.g., Gade v. National Creamery Co.*, 324 Mass. 515, 87 N.E.2d 180 (1949) (refusing to apply the furnished dwelling exception to business premises). *But see, e.g., Warfield*, 167 Cal. App. 2d 93, 334 P.2d 101 (concluding that a commercial lessee was allowed to rescind lease because landlord fraudulently induced him to enter it and failed to make agreed-upon repairs); *Vermes v. American Dist. Tel. Co.*, 312 Minn. 33, 40-41, 251 N.W.2d 101, 105 (1977) (finding that "[i]n cases where suitability factors might not be obvious upon casual inspection . . . a basic duty of the landlord [is] to inform the prospective tenant of any qualities of the premises which might reasonably be undesirable from the tenant's point of view").

abandon *caveat emptor* in the commercial context and denied business tenants the remedy of an implied warranty of habitability.⁶⁹ Additionally, almost all state legislatures have left commercial tenants to conduct their own inspection of the demised premises and to secure express covenants from the landlord as to its suitability for use.⁷⁰

B. Signs of Uncertainty

Despite judicial reluctance to depart from the common-law doctrines of independent covenants and *caveat emptor* in the commercial setting, Texas recently extended the full ambit of residential tenant

69. See, e.g., *E.P. Hinkel & Co. v. Manhattan Co.*, 506 F.2d 201 (D.C. Cir. 1974); *Parris v. Sinclair Regining Co.*, 359 F.2d 612 (6th Cir. 1966) (Tennessee law); *Schulman*, 108 Cal. App. 3d 552, 166 Cal. Rptr. 620; *Hohan v. Masters*, 36 Conn. Supp. 611, 421 A.2d 1318 (1980); *Halsa Corp.*, 309 A.2d 108; *J.B. Stein & Co. v. Sandberg*, 95 Ill. App. 3d 19, 419 N.E.2d 652 (1981); *McArdle*, 82 Ill. App. 3d 123, 402 N.E.2d 292 (1980); *Service Oil Co. v. White*, 218 Kan. 87, 542 P.2d 652 (1975); *Buker v. National Management Corp.*, 16 Mass. App. Ct. 36, 448 N.E.2d 1299, *appeal denied*, 389 Mass. 1104, 451 N.E.2d 1167 (1983); *Kootman v. Kaye*, 744 S.W.2d 898 (Mo. Ct. App. 1988); *Gehrke v. General Theatre Corp.*, 207 Neb. 301, 298 N.W.2d 773 (1980); *Golub v. Colby*, 120 N.H. 535, 419 A.2d 397 (1980); *Coulston v. Telescope Prods., Ltd.*, 85 Misc. 2d 339, 378 N.Y.S.2d 553 (App. Term 1976) (per curiam); *Cappadora Realty Corp. v. Studio R, Inc.*, No. 102-521, slip op. (Ohio Ct. App. Dec. 31, 1987) (LEXIS, States library, Omnifile file); *Olson v. Scholes*, 17 Wash. App. 383, 563 P.2d 1275 (1977); cf. *Axton*, 641 F.2d 1262 (commercial lease covenants independent under California law); *Murphy*, 567 F. Supp. 910 (commercial lease covenants are independent). But see *In re D.C. Diamond Head, Inc.*, 51 Bankr. 309, 312-13 (D.D.C. 1985) (urging future litigants to argue for extension of *Javins'* rationale to commercial tenancies); *Klatman v. Barnett*, 458 So. 2d 806 (Fla. Dist. Ct. App. 1984) (Glickstein, J., concurring) (noting while there are meritorious reasons to extend implied warranty of habitability to commercial tenants, task is best left to state legislature); *McArdle*, 82 Ill. App. 3d at 128-29, 402 N.E.2d at 297 (Craven, J., dissenting) ("an implied warranty of usability is included in contracts governing tenancies in commercial realty"); *40 Assocs., Inc. v. Katz*, 112 Misc.2d 215, 446 N.Y.S.2d 844 (Civ. Ct. 1981) (stating warranty of fitness is implied in all commercial tenancies); *Davidow*, 747 S.W.2d 373 (first major decision to extend implied warranty of suitability to commercial setting); cf. *Dravillas v. Vega*, 294 A.2d 363 (D.C. 1972) (see discussion *infra*); *Reste Realty*, 53 N.J. 444, 251 A.2d 268 (see *infra* notes 72-78 and accompanying text); *Hodgson v. Chin*, 168 N.J. Super. 549, 403 A.2d 942 (App. Div. 1979) (holding that builder-vendor extended implied warranty of quality to vendee covering entire premises in sale of combined residential and commercial building); *Earl Millikin, Inc.*, 21 Wis. 2d 497, 124 N.W.2d 651. See generally RESTATEMENT, *supra* note 18, § 5.1 *caveat*, comment b (no position taken regarding applicability of residential remedies to commercial tenant).

In *Dravillas*, the court of appeals affirmed the lower court's decision in favor of the tenant. The lower court held that the landlord either misrepresented the premises or breached an "implied warranty as to the nature and condition of the premises." *Dravillas*, 294 A.2d at 365. The fact that this decision affirmed an alternate holding, that the landlord still received all rent due under the lease, and that the same court expressly rejected the implication of such a warranty one year later in *Interstate Restaurants, Inc.*, casts serious doubt on the current validity and scope of this decision.

70. There are two jurisdictions whose statutes do not distinguish between residential and nonresidential rental property. GA. CODE ANN. § 44-7-13 (1982); LA. CIV. CODE ANN. art. 2695 (West 1952). While there are no Georgia decisions on point, courts expressly have applied the Louisiana statute to commercial leases. See *Volkswagen of Am., Inc. v. Robertson*, 713 F.2d 1151 (5th Cir. 1983) (applying Louisiana law); *Pylate v. Inabnet*, 458 So. 2d 1378 (La. Ct. App. 1984); *Freeman v. G.T.S. Corp.*, 363 So. 2d 1247 (La. Ct. App. 1978).

protection to the commercial lessee in *Davidow v. Inwood North Professional Group—Phase I*.⁷¹ Additionally, decisions in New Jersey, New York, and California have evidenced a willingness to retreat from, if not abandon, these traditional concepts. The decisions in these states are evidence of both the existence of new judicial reasoning and the need for a coherent, analytical framework in this field. As the framework for analyzing landlord-tenant disputes moves further away from property law and closer to contract principles, it is inevitable that other states will face these controversies. Accordingly, this Note will examine the current state of the law in New Jersey, New York, and California, which suggests a movement toward an implied warranty of commercial suitability.

1. New Jersey

Exploration of the origins of an implied warranty of suitability in commercial leases properly should begin with the New Jersey Supreme Court's decision in *Reste Realty Corp. v. Cooper*.⁷² In *Reste* the tenant leased the ground floor of a commercial office building to train its employees and to conduct sales meetings. After each rainfall, water drained into the office building making it unpleasant to use the premises. After several incidents, the tenant gave notice and vacated. The landlord sued for the rent due for the remainder of the lease term.⁷³ Although the court expressed its agreement with the rationale underlying the implication of a warranty of habitability in residential leases,⁷⁴ the final decision was grounded in the doctrine of constructive evic-

71. 747 S.W.2d 373 (Tex. 1988). In *Davidow*, the Texas Supreme Court held that "there is an implied warranty of suitability by the landlord in a commercial lease that the premises are suitable for their intended commercial purpose." The court also stated that this warranty was mutually dependent with the tenant's obligation to pay rent. Finally, as a natural consequence of these holdings, the tenant could assert a breach of this warranty as a defense to an action brought by the landlord for unpaid rent. Although the lease contained a number of express clauses regarding repair obligations of the landlord, and the failure to supply essential services could have supported a constructive eviction, the court decided not to rest its decision on these grounds. Rather, it seized the opportunity to abandon completely traditional commercial lease doctrine. The court's opinion constitutes the first judicial statement that separates itself from the majority view. As such, it will be a powerful weapon for commercial tenants in future judicial battles.

72. 53 N.J. 444, 251 A.2d 268 (1969).

73. *Id.* at 447-50, 251 A.2d at 270-71.

74. In laying the foundation for its opinion, the court stated:

A prospective lessee, such as a small businessman, cannot be expected to know if the plumbing or wiring systems are adequate or conform to local codes. . . . Ordinarily all this information should be considered readily available to the lessor who can in turn inform the prospective lessee. These factors have produced persuasive arguments for re-evaluation of the *caveat emptor* doctrine and, for imposition of an implied warranty that the premises are suitable for the leased purposes

Id. at 452, 251 A.2d at 272.

tion.⁷⁵ The opinion, however, used language indicating that a warranty was implied into the lease; but this warranty was against latent defects.⁷⁶ Consequently, *Reste Realty* can be read broadly as a constructive eviction "plus" case. The "plus" seems to suggest that express covenants in the lease should be mutually dependent.⁷⁷ *Reste Realty*, however, does not imply a warranty of suitability in commercial leases.⁷⁸

The following year, the New Jersey Supreme Court made two significant decisions in this area. In *Marini v. Ireland*⁷⁹ the court extended the full panoply of rental protection to the residential lessee. The court discarded *caveat emptor* and replaced it with an implied warranty of habitability.⁸⁰ Compliance with the implied warranty of habitability and the fulfillment of the tenant's obligation to pay rent were held to be dependent.⁸¹ Finally, the court stated that a tenant could assert a breach of the implied warranty as a defense to the nonpayment of rent in a summary dispossession proceeding.⁸² The court in *Kruvant v. Sunrise Market, Inc.* established that these remedies were not available to

75. The court devoted the majority of its discussion of the tenant's action to an analysis of the relevant elements of constructive eviction. See *id.* at 455-58, 251 A.2d at 274-77.

76. See *id.* at 455, 458, 251 A.2d at 274, 277; see also *Berzito v. Gambino*, 63 N.J. 460, 465, 308 A.2d 17, 20 (1973).

77. Four years later, the New Jersey Supreme Court in *Berzito*, explained that the language purporting to imply a warranty against latent defects in *Reste Realty* was "considered *dictum*," 63 N.J. at 465, 308 A.2d at 20 (emphasis in original), and the *Reste Realty* decision rested upon the doctrine of constructive eviction. The court noted that "*Reste* is probably more important for what the opinion said and for what it forecast than for what it held." *Id.* This interpretation of *Reste Realty* was reinforced by the Superior Court of New Jersey in *Ringwood Associates, Ltd. v. Jack's of Route 23, Inc.*, 166 N.J. Super 36, 44, 398 A.2d 1315, 1319 (App. Div. 1979) (stating that "our Supreme Court has heralded, if not commanded, the demise of the doctrine of independent covenants in commercial leaseholds in *Reste Realty Corp. v. Cooper*" (citation omitted)), and was echoed most recently in the opinions of *Carisi v. Wax*, 192 N.J. Super. 536, 471 A.2d 439, 443 (Bergen County Ct. 1983) (noting that *Reste* indicates the tendency to treat commercial leases as contracts rather than as conveyances of land) and *Westrich v. McBride*, 204 N.J. Super 550, 555, 499 A.2d 546, 548 (Law Div. 1984) (stating that "[t]he *Reste* decision signaled the demise of the doctrine of independent covenants in commercial leaseholds").

78. See *Westrich*, 204 N.J. Super. at 555, 499 A.2d at 548 (stating *Reste* held that "landlord's breach of the covenant of quiet enjoyment justified tenant's vacation of the leased premises and constituted a constructive eviction and a defense to the landlord's suit based on non-payment of rent"); *Berzito*, 63 N.J. at 465, 308 A.2d at 20 (finding that decision in *Reste* based on constructive eviction); *Academy Spires, Inc. v. Jones*, 108 N.J. Super 395, 403, 261 A.2d 413, 417 (Law Div. 1970); *Stevan v. Brown*, 54 Md. App. 235, 240-41, 458 A.2d 466, 470 (1983). *But cf.* *Timber Ridge Town House v. Dietz*, 133 N.J. Super. 577, 581, 338 A.2d 21, 23 (Law Div. 1975) (asserting that *Reste* "announced the implied warranty of habitability doctrine in a commercial leasehold setting"); *Olson v. Scholes*, 17 Wash. App. 383, 393, 563 P.2d 1275, 1281 (1977) (stating that the *Reste* court imposed an implied warranty of habitability in commercial leases).

79. 56 N.J. 130, 265 A.2d 526 (1970).

80. *Id.* at 142-43, 265 A.2d at 532-34.

81. *Id.* at 144, 265 A.2d at 534-35.

82. *Id.* at 139, 265 A.2d at 530-31.

the commercial lessee.⁸³ The court distinguished *Marini*⁸⁴ and expressly reserved the question of whether such a warranty should be implied in a commercial lease.⁸⁵ Consequently, the court left the issue to the lower courts so that they could guide future developments in this area.

The lower courts in New Jersey have shown some willingness to retreat from traditional common-law doctrine, although they have not elected to abandon completely the familiar positions. In *Demirci v. Burns*⁸⁶ the superior court held that a commercial tenant could assert the landlord's breach of an express lease covenant as a defense in a summary dispossession action.⁸⁷ *Demirci* involved tenants in a professional office building who had placed their rental money in escrow because of the landlord's alleged breach of an express covenant to provide adequate climate control for the demised premises.⁸⁸ The tenants sought to raise this breach as a defense when the landlord sued for overdue rent. Ruling for the tenants, the court relied on *Reste Realty, Marini*, and *Kruvant* and found the particular status of the demised premises and the fact that these "commercial tenants" were providers of professional services to be a persuasive basis to imply a warranty of suitability.⁸⁹

The superior court's next decision in this area was *Van Ness Industries v. Clairmont Painting & Decorating Co.*⁹⁰ The court was faced with a commercial tenant's constitutional challenge to the New Jersey distraint statute.⁹¹ The court ultimately found that the statute was unconstitutional.⁹² In its analysis of the tenant's argument, however, the court made it clear that the warranty of fitness did not apply to non-residential premises.⁹³ While this statement was not necessary for the

83. 58 N.J. 452, 279 A.2d 104 (1970) (per curiam).

84. See *id.* at 456, 279 A.2d at 105-06 (noting that this lease "was negotiated at arm's length between parties of equal bargaining power").

85. *Id.* at 456, 279 A.2d at 106 (adding that "[w]hen and under what circumstances [an implied warranty of suitability] should be applied in other than residential situations is a matter we leave open for future determination in an appropriate case").

86. 124 N.J. Super. 274, 306 A.2d 468 (App. Div. 1973).

87. *Id.* at 276, 306 A.2d at 469.

88. *Id.* at 275, 306 A.2d at 468.

89. *Id.* at 276, 306 A.2d at 469 (stating that "[t]he present case is an appropriate one for the use of such defense since the 'commercial tenants' are actually professional men renting relatively small premises for the delivery of personal services").

90. 129 N.J. Super. 507, 324 A.2d 102 (Ch. Div. 1974).

91. *Id.* at 509, 324 A.2d at 103. New Jersey allows the landlord to seize the personal property of a tenant for nonpayment of rent. See N.J. STAT. ANN. 2A:33-1 to 33-23 (West 1987). This remedy is known as distress. The tenant in *Van Ness* had withheld rent because of the landlord's poor maintenance of the leasehold. Consequently, the landlord had seized some of his personal property. *Van Ness*, 129 N.J. Super. at 509-10, 324 A.2d at 103.

92. *Van Ness*, 129 N.J. Super. at 513-15, 324 A.2d at 105.

93. *Id.* at 513, 324 A.2d at 105.

court's holding, and, thus, may be regarded as dicta, it does show a judicial reluctance to disclaim the viability of *caveat emptor* and to allow the commercial lessee the same ambit of protection as his residential counterpart.

Most recently, the New Jersey Superior Court in *Westrich v. McBride*⁹⁴ was presented with a situation very similar to the one in *Demirci*.⁹⁵ A commercial tenant providing professional services sought to assert the landlord's breach of an express covenant in the lease in a summary eviction action brought by the landlord for the nonpayment of rent.⁹⁶ After citing the supreme court's reservation in *Kruvant*, the *Westrich* court stated that the circumstances before it warranted an extension of the principles first enunciated in *Marini* in a residential setting.⁹⁷ While the superior court's decision did not go as far as *Marini*, the court held that the covenants in a commercial lease were mutually dependent and, accordingly, the tenant could raise the landlord's breach of a covenant as a defense.⁹⁸ Concerning the implication of a warranty of suitability, however, the court merely echoed the "latent defects" language of *Reste Realty*,⁹⁹ thereby precluding the full utilization of residential remedies by the commercial lessee.¹⁰⁰

The *Westrich* decision is significant in holding that the landlord's breach of an express covenant suspends the commercial tenant's obligation to pay rent¹⁰¹ because this ruling is a rejection of the common law doctrine of independent covenants which forced the tenant to continue to pay rent and sue for breach of contract. This decision, however, should not be read too broadly. Even though the superior court used some expansive language,¹⁰² several factors dictate a narrow interpretation of the scope of this decision. The fact that the court's underlying rationale tracked *Reste Realty* very closely, as well as the size of the commercial premises and the relative sophistication of these business

94. 204 N.J. Super. 550, 499 A.2d 546 (Law Div. 1984).

95. See *supra* notes 86-89 and accompanying text. The court acknowledged this authority, stating that "[t]he relative bargaining positions of the parties, the type of use of the premises, and the equities involved in the breach of the lease are all quite similar [to the *Demirci* case]." *Westrich*, 204 N.J. Super. at 555, 499 A.2d at 548.

96. *Westrich*, 204 N.J. Super. at 552, 499 A.2d at 546-47.

97. *Id.* at 554, 499 A.2d at 548.

98. *Id.* at 556, 499 A.2d at 548.

99. See *supra* note 76 and accompanying text.

100. *Westrich*, 204 N.J. Super. at 556, 499 A.2d at 548-49.

101. *Id.* at 556, 499 A.2d at 549.

102. See, e.g., *id.* at 554, 499 A.2d at 548 (stating that "[t]his court holds that the facts of the present case are such as to permit the extension of the principles of *Marini* and *Berzito* to a commercial lease setting"); *id.* at 556, 499 A.2d at 548 (noting that "this court holds that a lease, whether it be for a residence or for commercial purposes, is a set of mutually dependent covenants").

tenants, counsel against a broad application of this opinion.

These lower court decisions indicate the direction that these courts have taken since the supreme court's invitation to explore further the potential application of residential tenants' remedies in the nonresidential setting. The decisions have moved New Jersey toward an abandonment of the residential-nonresidential distinction. The superior court opinions have shown a judicial willingness to provide at least smaller, less sophisticated business tenants with the protection of the contract doctrine of mutual dependence of covenants, as well as granting these business tenants the ability to raise the landlord's breach in a summary dispossession action. These same decisions, however, also have demonstrated a hesitancy to discard the residential-nonresidential distinction completely by failing to imply a warranty of suitability in commercial leases.

2. New York

The New York experience began similarly to the one in New Jersey.¹⁰³ In *Barash v. Pennsylvania Terminal Real Estate Corp.*¹⁰⁴ the tenant of a commercial office building sought to establish the defense of either a partial-actual or constructive eviction in a summary dispossession action brought by the landlord for the nonpayment of rent.¹⁰⁵ The tenant's claim was based on the landlord's refusal to provide after-hour ventilation of the premises.¹⁰⁶ In holding for the landlord, the New York Court of Appeals found a potential constructive eviction, but because the tenant had failed to abandon the premises, his cause of action was insufficient at law.¹⁰⁷ *Barash* clearly indicates that this court was unwilling to deviate from the common-law principles in a commercial setting.

Most recently, the court of appeals decided the case of *Park West Management Corp. v. Mitchell*.¹⁰⁸ In *Park West* the court upheld the implication of a warranty of habitability in residential leases, made the tenant's obligation to pay rent dependent upon the landlord's compliance with this warranty, and allowed the tenant to assert noncompliance as a defense in an action for summary dispossession.¹⁰⁹ *Park West*

103. See generally *supra* notes 72-78 and accompanying text (describing the New Jersey Supreme Court's disposition of the *Reste Realty* case).

104. 26 N.Y.2d 77, 256 N.E.2d 707, 308 N.Y.S.2d 649 (1970).

105. *Id.* at 80-82, 256 N.E.2d at 708-09, 308 N.Y.S.2d at 651-52.

106. *Id.* Unlike *Reste Realty*, this lease did not contain an express covenant addressing ventilation. Instead, the tenant alleged oral assurances by the landlord. *Id.*

107. *Id.* at 86, 256 N.E.2d at 711, 308 N.Y.S.2d at 655-56.

108. 47 N.Y.2d 316, 391 N.E.2d 1288, 418 N.Y.S.2d 310, *cert. denied*, 444 U.S. 992 (1979).

109. *Id.* at 325-30, 391 N.E.2d at 1292-95, 418 N.Y.S.2d at 314-17.

represents the final judicial step in discarding the traditional common-law rules as they applied to residential leases. It did not provide any real guidance, however, for the lower courts facing the same issue in nonresidential situations.

Despite one earlier decision,¹¹⁰ the greatest development in the commercial arena has occurred since *Park West* in New York's lower courts. The most revolutionary decision, *40 Associates, Inc. v. Katz*,¹¹¹ occurred in the Civil Court of the City of New York which held that there was an implied warranty of fitness for commercial purposes, that the tenant's rent should be abated for its breach, and that such a breach could be asserted as a counterclaim in a summary dispossession action notwithstanding an express waiver of all counterclaims in the lease. In *Katz* the civil court relied heavily on the restated reasoning of *Reste Realty* and *Park West* and made no attempt to distinguish *Coulston*. The court also failed to make any distinction between residential and nonresidential premises in coming to its conclusion. Accordingly, the opinion lacks persuasiveness and has failed to attract subsequent support.

Two significant reasons explain why *Katz*'s status as "good law" is, at best, questionable. First, and most importantly, later decisions construing New York law uniformly have come to the opposite conclusion. Two years after *Katz*, in *Randall Co. v. Alan Lobel Photography, Inc.*,¹¹² the civil court noted in dicta¹¹³ that the warranty of habitability had not been implied in commercial leases¹¹⁴ and that clauses waiving tenants' counterclaims had been "consistently upheld" in commercial leases.¹¹⁵ Similarly, the civil court in *Kachian v. Aronson*¹¹⁶ stated in

110. See *Coulston v. Telescope Prods., Ltd.*, 85 Misc. 2d 339, 340-41, 378 N.Y.S.2d 553, 554 (App. Term. 1975) (per curiam) (holding the doctrine of rent abatement for breach of implied warranty of habitability does not apply to corporate tenant under commercial lease).

111. 112 Misc. 2d 215, 216, 446 N.Y.S.2d 844, 845 (Civ. Ct. 1981).

112. 120 Misc. 2d 112, 465 N.Y.S.2d 489 (Civ. Ct. 1983).

113. The decision involved the validity of a clause in a residential lease waiving the tenant's right to assert counterclaims in a summary proceeding.

114. *Randall Co.*, 120 Misc. 2d at 112, 465 N.Y.S.2d at 489. The court cited *Rockefeller Center, Inc. v. La Parfumerie Marco Corp.*, N.Y.L.J., July 6, 1981, at 5, col. 1 (App. Term Jan. 23, 1981) as authority for this proposition. In *Rockefeller Center*, the court stated that it did not read *Park West* "as necessarily foreshadowing an intention on the part of [the Court of Appeals] to modify traditional rules governing commercial tenancies." *Id.* The court, after citing *Barash*, held that the landlord's breach of an express covenant in the lease "did not suspend tenant's independent obligation to pay the contracted-for rent while it remained in possession." *Id.* (citation omitted). The *Rockefeller Center* decision, therefore, demonstrates the continued vitality of the common law doctrine of independent covenants. The fact that the *Randall* court cited *Rockefeller Center* instead of *Katz* further negates the strength of the *Katz* holding.

115. *Randall Co.*, 120 Misc. 2d at 113, 465 N.Y.S.2d at 490. This statement also directly contradicts one prong of the holding in *Katz*.

116. 123 Misc. 2d 743, 475 N.Y.S.2d 214 (Civ. Ct. 1984).

dicta that the warranty of habitability did not apply to commercial premises.¹¹⁷ This court also ignored the *Katz* decision, citing instead the two other lower court opinions.¹¹⁸ Additionally, the United States District Court for the District of Connecticut, in *Middletown Plaza Associates v. Dora Dale of Middletown, Inc.*,¹¹⁹ recently noted that New York law requires that the commercial tenant be evicted constructively in order to have a valid defense in an action for the nonpayment of rent.¹²⁰ This statement is at odds with the premise of *Katz*. In fact no subsequent decision has cited *Katz* for any part of its holding. Additionally, the *Katz* court overlooked the existing precedent¹²¹ on this issue and embarked on a course of judicial independence in writing essentially new law in this area. For these reasons, the current viability of the *Katz* holding is highly suspect.

Because the *Katz* opinion has not been overruled expressly by a higher court, any statement on the status of current commercial lease law in New York necessarily is subject to the contrary authority that this decision carries. In light of the overwhelming one-sidedness of the decisions as a whole, it seems safe to say that New York remains rooted firmly in traditional, common-law ground. This state has not shown signs of accepting the notion that smaller, less sophisticated business tenants are suitable candidates for at least some of the current residential remedies. Rather, with one glaring exception, the New York lower court decisions firmly embrace the time-tested doctrines of independence of covenants and *caveat emptor*. Given the lack of a decision by the court of appeals in this area, as well as the existence of *Katz*, the state of New York lease law remains unacceptably uncertain. New

117. *Id.* at 747, 475 N.Y.S.2d at 218. This case also involved a residential dispute. In reaching its holding, the court noted that because one quarter of the rental space was used for commercial purposes, the residential tenants were entitled to a maximum rent abatement of 75%. Thus, the court neatly excised the commercial nature of one part of the dwelling from further consideration. *Id.* at 748, 475 N.Y.S.2d at 218-19.

118. The court cited *Bomze v. Jaybee Photo Suppliers, Inc.*, 117 Misc. 2d 957, 460 N.Y.S.2d 862 (App. Term 1983) and *230 Park Ave. Assocs. v. Term Indus., Inc.*, N.Y.L.J., Feb. 11, 1982, at 6, col. 3 (App. Term March 18, 1981) as support. *Bomze* involved a nonpayment proceeding under a commercial lease. The court did not mention *Katz* and stated that a warranty of habitability had not been applied to commercial property. *Bomze*, 117 Misc. 2d at 958, 460 N.Y.S.2d at 863. In *230 Park Ave.*, the court stated that covenants in a business lease were independent and that no implied warranty of habitability would be read into these leases. *230 Park Ave.*, N.Y.L.J., Feb. 11, 1982, at 6, col. 4. Significantly, both courts cited *Rockefeller Center* as supporting this conclusion.

119. 621 F. Supp. 1163 (D. Conn. 1985) (applying New York law in dispute involving commercial lease).

120. *Id.* at 1165. The court also directly contradicted *Katz* in holding that New York law will enforce contractual waivers of a tenant's right to assert counterclaims. *Id.* at 1166.

121. See *230 Park Ave.*, N.Y.L.J., Feb. 11, 1982, at 6, col. 3; *Rockefeller Center*, N.Y.L.J., July 6, 1981, at 5, col. 1; *Coulston v. Telescope Prods., Ltd.*, 85 Misc. 2d 339, 378 N.Y.S.2d 553 (App. Term 1975) (per curiam).

York's highest court should clear up the current confusion as soon as it is practicable.

3. California

In *Green v. Superior Court*¹²² the California Supreme Court extended the full ambit of leasehold remedies to the residential tenant. The court held that the implied warranty of habitability that existed in residential leases could be asserted in an action brought for summary dispossession.¹²³ Additionally, the tenant's payment of rent was mutually conditioned on the landlord's fulfillment of the obligations imposed by this warranty.¹²⁴ Because the decision concerned a residential lease, *Green* left open the question of whether any of these principles would be applied to commercial parties. Subsequent decisions of the lower courts of appeal have resulted in inconsistent answers to this question.

The First District Court of Appeals had the first opportunity to address this issue. In 1976 the court decided *Golden v. Conway*¹²⁵ and noted in dicta that the underlying rationale of *Green* was "persuasive [sic] . . . [in] a small commercial outlet."¹²⁶ Because the tenant in *Golden* was asserting a cross-complaint against the landlord for fire damage to his personal property based on alternative theories of strict liability and negligence, the court was not faced directly with the commercial question.

The court's second pronouncement on commercial tenant remedies occurred in *Four Seas Investment Corp. v. International Hotel Tenants' Association*.¹²⁷ In *Four Seas* the landlord instituted an unlawful detainer action against the tenants in his hotel and they asserted the defense of retaliatory eviction.¹²⁸ The court held for the landlord on this issue.¹²⁹ In addressing the tenants' claim for damages resulting from the hotel's substandard conditions, the court noted that the lease was primarily residential and, thus, the implied warranty of habitability was applicable.¹³⁰ Finally, the court stated in dictum that under the proper circumstances, this warranty could apply to small commercial busi-

122. 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974).

123. *Id.* at 637, 517 P.2d at 1182, 111 Cal. Rptr. at 718. The California statute, as well as California decisions, describes this proceeding as an unlawful detainer action. See CAL. CIV. PROC. CODE §§ 1161-1174 (West 1982 & Supp. 1988).

124. *Green*, 10 Cal. 3d at 635, 517 P.2d at 1181, 111 Cal. Rptr. at 717.

125. 55 Cal. App. 3d 948, 128 Cal. Rptr. 69 (1976).

126. *Id.* at 962, 128 Cal. Rptr. at 78.

127. 81 Cal. App. 3d 604, 146 Cal. Rptr. 531 (1978).

128. *Id.* at 608-09, 146 Cal. Rptr. at 532-33.

129. *Id.* at 610, 146 Cal. Rptr. at 533-34.

130. *Id.* at 612-13, 146 Cal. Rptr. at 535.

nesses under its earlier decision in *Golden*.¹³¹ In *Four Seas* the First District Court of Appeals appeared to be setting the stage for the implication of a warranty of suitability in the leases of commercial tenancies, at least in those commercial tenancies that are the most similar to their residential counterparts.

This trend came to an abrupt halt two years later with the Fourth District Court of Appeals' decision in *Schulman v. Vera*.¹³² The tenant in *Schulman* operated a restaurant in a commercial building under a lease which provided expressly that the landlord would, after receiving notice, repair the roof, exterior walls, and paved areas.¹³³ Due to a dispute on the amount of real property taxes that had accrued under the lease, and the lessee's refusal to pay the full tax amount, the lessor instituted an unlawful detainer action.¹³⁴ The lessee attempted to raise the affirmative defense that the lessor had breached the express covenant to repair the roof under the lease.¹³⁵ The trial court did not allow the assertion of this defense and the court of appeals affirmed, holding that the landlord's breach of an express covenant to repair in a commercial lease could not be asserted as a defense in an unlawful detainer action.¹³⁶

The true significance of the *Schulman* opinion is not its holding but the reasoning the court used to reach its decision. The court examined the rationale of the holding in *Green*, which allowed a residential tenant to raise the breach of the implied warranty of habitability in an action for summary dispossession,¹³⁷ to determine if similar considerations should apply to commercial tenancies. The court found the *Green* rationale inapplicable to the case at bar because, due to their greater bargaining power and financial means, commercial lessees are better able to protect their legal rights.¹³⁸ Based on these distinctions,

131. *Id.* at 613, 146 Cal. Rptr. at 535 (stating that "the warranty of habitability could, since *Golden* . . . , extend to small commercial operations if the facts warranted, which they do not" (citation omitted)).

132. 108 Cal. App. 3d 552, 166 Cal. Rptr. 620 (1980).

133. *Id.* at 555-56, 166 Cal. Rptr. at 621-22.

134. *Id.* at 556-57, 166 Cal. Rptr. at 622.

135. *Id.* at 557, 166 Cal. Rptr. at 622. The lessee sought to introduce evidence that the roof had leaked consistently, causing one puddle two inches deep and requiring the lessee to place buckets on the restaurant's tables. *Id.*

136. *Id.* at 563, 166 Cal. Rptr. at 626 (holding that "[t]he trial court correctly concluded that lessees' claim was not properly litigable in the unlawful detainer proceeding" (emphasis added)). The court based its holding on two grounds: (1) the nonapplicability of the *Green* rationale in a commercial setting; and (2) the need to preserve the summary nature of an unlawful detainer proceeding. See generally *id.* at 560-63, 166 Cal. Rptr. at 624-26.

137. See *Green*, 10 Cal. 3d at 637, 517 P.2d at 1182, 111 Cal. Rptr. at 718.

138. *Schulman*, 108 Cal. App. 3d at 561, 166 Cal. Rptr. at 625 (stating that "[t]he parties are more likely to have equal bargaining power, and, more importantly, a commercial tenant will presumably have sufficient interest in the deeded premises to make needed repairs and the means to

the court stated that the supreme court in *Green* intended for the decision to apply only to residential leases.¹³⁹ Several subsequent appellate court decisions have focused on this language and asserted, incorrectly, that *Schulman* stands for the proposition that the defense of breach of an implied warranty of habitability cannot be asserted by a commercial tenant in an unlawful detainer action.¹⁴⁰ While the *Schulman* court's distinction of *Green* may be persuasive, *Schulman* did not preclude a commercial tenant from raising the defense of breach of an implied warranty of habitability in an unlawful detainer action.¹⁴¹ Beyond the apparent interpretive inconsistencies, however, *Schulman* remains significant for its unqualified reversal of the emerging trend in the California courts of appeal.¹⁴²

The most recent California decision in this area is from the Second District Court of Appeals. In *Muro v. Superior Court*¹⁴³ the court faced the issue of whether a landlord who leases commercial property should be strictly liable in tort for injuries caused by latent defects on the premises, as was the lessor of residential property. Once again, the court's analysis was more important than the actual holding of the case. The court, in deciding not to extend the strict liability theory from residential to commercial premises,¹⁴⁴ analogized to the similar question of whether a warranty of habitability should be implied in commercial leases. While the court briefly mentioned both *Golden*¹⁴⁵ and *Schulman*,¹⁴⁶ it engaged in its own analysis on the issue. For several reasons, the *Muro* court found no support for the extension of an implied warranty of suitability to commercial leases.¹⁴⁷ Although this reasoning was

make the needed repairs himself or herself, if necessary, and then sue the lessor for damages").

139. See *id.* at 560, 166 Cal. Rptr. at 624 (agreeing with lessor's contention that "the *Green* decision did not and was not intended to alter the well-established law relating to commercial leases"); *id.* at 561, 166 Cal. Rptr. at 625 (concluding that "[i]t is our conclusion that the *Green* decision is and was intended by the [supreme court] to be restricted to residential leases").

140. See *Muro v. Superior Court*, 184 Cal. App. 3d 1089, 1098, 229 Cal. Rptr. 383, 389 (Dist. Ct. App. 1986) (second district); *Fish Constr. Co. v. Moselle Coach Works, Inc.*, 148 Cal. App. 3d 654, 658, 196 Cal. Rptr. 174, 176 (Dist. Ct. App. 1983) (second district); *Kemp v. Schultz*, 121 Cal. App. 3d Supp. 13, 16 n.1, 175 Cal. Rptr. 412, 414 n.1 (1981); cf. *Custom Parking, Inc. v. Superior Court*, 138 Cal. App. 3d 90, 100, 187 Cal. Rptr. 674, 681 (Dist. Ct. App. 1982) (first district) (stating that "[t]he sound analysis of *Schulman* reveals that there is some validity to the commercial/residential distinction").

141. See *supra* note 136 and accompanying text. It seems clear, however, that the actual holding of *Schulman*, combined with the broad statements rejecting an extension of *Green* to commercial tenancies, allows this statement to be drawn as a logical inference from the decision.

142. It is significant that neither the *Schulman* court nor any subsequent decision until *Muro* even mentioned *Golden* or *Four Seas* on this point.

143. 184 Cal. App. 3d 1089, 229 Cal. Rptr. 383 (1986).

144. *Id.* at 1097-98, 229 Cal. Rptr. at 388-89.

145. *Id.* at 1095 n.3, 229 Cal. Rptr. at 387 n.3.

146. *Id.* at 1098, 229 Cal. Rptr. at 389.

147. See *id.* at 1097-99, 229 Cal. Rptr. at 388-89. The court's analysis disclosed these distin-

used to reach a parallel holding on tort liability, and, thus, properly can be considered dicta, it will be influential as future California courts grapple with this issue.

As a result of the recent decisions in *Schulman* and *Muro*, the rhetoric of *Golden* and *Four Seas* appears to be moot. *Schulman*, expressly and by implication, foreclosed the commercial tenant's right to assert the landlord's breach of both express and implied lease covenants. *Muro's* well-developed reasoning and *Schulman's* distinction of *Green* are persuasive authority for not extending the implied warranty of habitability to commercial leases. These two opinions also effectively deny the remaining residential remedy, that of the mutual dependency of lease covenants. Thus, while the California courts of appeal initially indicated a willingness to extend *Green* to some commercial tenancies, recent decisions seemingly have quashed the movement away from traditional common-law doctrine *sub silentio*. Accordingly, the situation is ripe for the California Supreme Court to resolve the apparent conflict in the lower courts.

C. The Policy Considerations

In the vast majority of jurisdictions, legislative and judicial action has shown an increased willingness to alter the traditional common-law rules affecting residential leases. Rather than continuing to view the lease as a conveyance of an estate in land subject to property law, the modern approach treats the residential lease as a set of mutually dependent covenants and refuses to subject the tenant to the long-favored maxim of *caveat emptor*.¹⁴⁸ As a result, the modern residential lessee has three-pronged protection. First, the lessor implicitly warrants that the premises will be fit for human occupation.¹⁴⁹ Second, subject to the contract notion of substantial performance, this implied warranty and all express covenants made by the landlord are mutually dependent on the tenant's obligation to pay rent.¹⁵⁰ Finally, if the landlord institutes an action for summary dispossession, the tenant can raise the breach of any lease covenant as a defense and is not forced to sue separately for

guishing factors: (1) the greater sophistication of the commercial tenant; (2) the equality of bargaining position and resultant negotiation of lease provisions between commercial parties; (3) the lack of a strong public policy with respect to commercial buildings; (4) the availability of commercial property; and (5) the financial ability of commercial tenants. *Id.*

148. See *supra* notes 24-46 and accompanying text (summarizing developments that undermined the common law foundation of *caveat emptor*).

149. See *supra* note 56 and accompanying text. For an argument that this process of applying contract analysis to landlord-tenant law may hinder true reform of the law in this area, see Humbach, *The Common-Law Conception of Leasing: Mitigation, Habitability, and Dependence of Covenants*, 60 WASH. U.L.Q. 1213 (1983).

150. See *supra* note 56 and accompanying text.

contractual damages.¹⁵¹ Thus, in most jurisdictions the residential lessee has available a broad and potent package of remedies.

These sweeping changes have not altered significantly the common-law rules regarding commercial leases. With very few exceptions, judicial decisions and statutory provisions have limited their reach to the residential field.¹⁵² In the overwhelming majority of jurisdictions the commercial lessee still labors under the restrictions of the common-law doctrines of independence of covenants and *caveat emptor*.¹⁵³ Consequently, if the landlord's breach is not substantial enough to constitute a constructive eviction, or if this remedy is impractical, the tenant under a commercial lease must remedy the problem himself and then sue the landlord in contract for damages. If the lessee decides to withhold rent and the lessor brings a summary dispossession action, the lessee will not be allowed to raise the lessor's breach as a defense. While many commentators have urged the rejection of this distinction, especially in the case of smaller commercial tenancies, an analysis of the three separate prongs of residential protection reveals that the duality of treatment still is warranted to some extent.

1. The Implied Warranty

At first glance, it would seem that the same societal changes that led the courts in the residential arena to question the vitality of *caveat emptor* are equally applicable in a commercial context.¹⁵⁴ The commercial tenant, especially the lessee of office space, is more concerned about the building that he occupies than the land on which it sits. Additionally, some business lessees may be no more knowledgeable than a residential lessee about inspecting the premises for defects in plumbing, wiring, and climate control systems or about making repairs. A closer examination of the factors that prompted the courts to imply a warranty of habitability in residential leases,¹⁵⁵ however, reveals that the same arguments are not as compelling in the commercial context.

As noted earlier, the nonresidential tenant also has a strong interest in the structures on the land. This interest, however, does not exist for the many lessees who derive locational benefits. Additionally, the interest in the existing structures is not a sufficient reason to discard the common-law rule because these tenants have a greater ability to protect their interests than their residential counterparts. The commer-

151. See *supra* note 56.

152. See *supra* notes 57, 70 and accompanying text.

153. See *supra* notes 66, 69, 70 and accompanying text.

154. See *supra* note 58 and accompanying text (listing the major rationales for applying a warranty of habitability to residential units).

155. See *supra* note 58 and accompanying text.

cial tenant is in a better position to inspect the premises, or hire a knowledgeable third party to do so and to pass this expense on to his customers as a cost of doing business. Due to the profit motive, which constitutes a driving force behind the acquisition of business space, the process of acquisition is conducted in a more rational, measured manner. Additionally, because of the greater availability of business space,¹⁵⁶ potential lessees are not forced to accept a unit that falls below their expectations. Finally, once on the premises, the commercial tenant is better able to take care of any necessary repairs by virtue of his stronger bargaining position and greater financial resources.¹⁵⁷ Consequently, because of the business tenant's dissimilar economic motivation,¹⁵⁸ the common-law concept that a lease is essentially a conveyance of an interest in land continues to have some validity in the commercial context. The nonresidential tenant simply is less dependent on the day-to-day services that the landlord can supply.

Perhaps the strongest reason for not implying a warranty of suitability into the commercial lease is the greater equality of bargaining power in the business arena. Given the availability of rental space, the general need for longer rental terms, the ability to offer greater rental returns, and the sophistication of the parties involved, these leases are usually the product of careful, evenly balanced negotiations.¹⁵⁹ The resulting terms are often much more in the tenant's favor than the terms of the standard form residential agreement. The obligation to maintain public areas and mechanical systems usually is placed on the landlord.¹⁶⁰ Additionally, the importance to the landlord of retaining commercial tenants, especially larger ones, for their steady income stream and ability to attract other business to the area by their success means that these tenants usually can influence the landlord through extrajudicial pressures to comply with the lease covenants. The bargaining inequities produced by the residential leasehold market simply are not present in the vast majority of commercial rental transactions.

The two remaining concerns, the evidence of a strong public policy

156. Currently, numerous cities are experiencing the growing pains of unrented commercial space. See *Otherwise Occupied*, REGARDIES, Aug. 1988, at 86 (indicating that the nationwide office occupancy rate rose in mid-1988 for the first time in six and one half years to 81.6%); see also Aaron, *The Impossible Dream Comes True: The New Tax Reform Act*, BROOKINGS REV., Winter 1987 at 3, 10 (noting 20% vacancy rate for offices in many cities).

157. As a proportion of rent payments, the cost of repairs is smaller. Additionally, in many cases the commercial lessee temporarily can absorb this cost and seek later reimbursement from the lessor through judicial or nonjudicial action.

158. The current commercial lessee is similar to the leaseholder in agrarian times, whose interest was in making a living from the land.

159. See 4 H. MILLER & M. STARR, *CURRENT LAW OF CALIFORNIA REAL ESTATE* § 27:75, at 365 (1977).

160. See *id.*

in favor of habitable premises and the tendency of the common-law rule to produce slum units, do not exist in the nonresidential setting. As noted previously, the overwhelming majority of state statutes limit their application to residential dwellings;¹⁶¹ thus, the legislatively promulgated public policy of protecting lessees from overreaching lessors is absent. Additionally, the common-law rule has not been shown to be a factor in the production of run-down business tenancies. As will be discussed later in this Note, the implication of an implied warranty actually creates the substantial risk of promoting commercial delapidation.

In addition to the lack of a compelling policy rationale for the implication of an implied warranty of suitability in commercial leases, there are several potential disadvantages that also counsel against such an extension. Rental costs will increase as the lessor passes on the expected outlays because of the implication of the warranty to the tenant.¹⁶² Assuming that the lessor's estimates are accurate, this increase in rent roughly will translate into the lessee paying for his own repairs on an installment plan.¹⁶³ There is no need for the warranty if this occurs. Additionally, the tenants who arguably need the protection of an implied warranty the most would be hit the hardest. Smaller commercial lessees with less capital to start up their companies or keep them running would be forced to allocate a disproportionate amount of their resources to rental payments. These tenants' choice to utilize scarce capital resources on nonrepair expenses effectively would be curtailed. Finally, to the extent that the landlord could not pass on all of the cost of this warranty protection to the tenant, his margin of profit would decrease. Property that is on the edge of profitability would be abandoned as unrentable.¹⁶⁴ In turn, urban decay would accelerate, forcing current tenants to relocate. Because of the absence of the extensive

161. See *supra* note 70 (listing the only two current exceptions).

162. The available empirical evidence in the residential setting indicates that habitability laws generally tend to increase rentals charged. Unfortunately, only a few indigent tenants (mainly the elderly) receive benefits in increased housing quality equal to or in excess of rental increases. In fact, the studies suggest that these laws have been counterproductive. See Hirsch, *From "Food for Thought" to "Empirical Evidence" About Consequences of Landlord-Tenant Laws*, 69 CORNELL L. REV. 604 (1984); Hirsch, Hirsch & Margolis, *Regression Analysis of the Effects of Habitability Laws Upon Rent: An Empirical Observation on the Ackerman-Komesar Debate*, 63 CALIF. L. REV. 1098, 1133-36 (1975).

163. It is at least arguable that, due to the uncertainty of the scope of an implied warranty of suitability, the landlord's forecasts would not correspond accurately to his actual costs. Accordingly, the increased rentals would produce an economically inefficient allocation of resources. Additionally, it is more likely that the landlord would err on the conservative side, actually overcharging the tenant compared to what the tenant would pay if he made his own repairs.

164. See Meyers, *The Covenant of Habitability and the American Law Institute*, 27 STAN. L. REV. 879, 889-93 (1975).

statutory regulations in the commercial context, this process is much more likely to happen.

2. Dependent Covenants and Summary Dispossession

Under the common-law rule, the doctrine of independent covenants initially did not disadvantage the lessee. The continuing obligation of the tenant to pay rent in the face of a material breach by the landlord was mirrored by the fact that the landlord could not recover possession based on the tenant's nonpayment of rent.¹⁶⁵ With the enactment of statutory dispossession actions, however, this doctrine did work a hardship because the landlord could regain possession of the demised premises even if he had breached express lease covenants.¹⁶⁶ This inequity eventually was eradicated in the residential area by the judicial abolition of the doctrine of independent covenants and the resultant ability of tenants to raise the breach of the implied warranty of habitability in summary dispossession proceedings.¹⁶⁷ These final two prongs of residential protection inexplicably have remained unavailable to the commercial lessee.¹⁶⁸

The notion that all lease covenants are dependent and that a tenant should be able to raise a material breach thereof as a defense in an action for possession should be extended to the nonresidential situation.¹⁶⁹ If it is true that commercial parties are more sophisticated, and that their negotiations produce a more accurate reflection of their intent, then the courts should not be hesitant to enforce that bargain. For example, if the tenant has bargained for an express clause placing the obligation to heat the premises on the landlord, the latter should not be able to ignore this obligation and still demand full payment of rent on the threat of dispossession. Rather, the tenant's duty to pay rent similarly should be suspended. This result would be an especially effective bargaining chip for the smaller commercial operation that does not have the financial resources to absorb the repair cost and engage in protracted litigation for reimbursement. The doctrine of mutually dependent lease covenants should be tempered by the contractual notion of substantial performance. In this way, a technical breach by either party, although often overlooked in practice, would not become the legal basis for interrupting a functioning agreement.

165. See *supra* note 14.

166. See *supra* note 14.

167. See *supra* note 56.

168. See *supra* notes 59, 66 and accompanying text.

169. See generally 1 M. FRIEDMAN, *supra* note 13, § 1.1, at 3-6 (arguing strenuously to abolish the "absurd" doctrine of independent covenants); R. SCHOSHINSKI, *supra* note 8, § 3:29, at 148-49.

Summary dispossession actions are necessary devices in current rental disputes. Their effectiveness depends on their ability to provide the landlord with a quick, short-term remedy by limiting the dispute to issues directly affecting possession. This procedure, however, is not justified in any context when the landlord actually has breached an express lease covenant. In this situation, the tenant's right to litigate this issue appears clear. As the evidence of a breach becomes less overwhelming, however, the advantages of the summary nature of the proceeding eventually outweigh the tenant's interest. The landlord should not be faced with unwarranted delay simply because the tenant can make a colorable claim of breach. This potential problem can be mitigated in two ways. First, the court must use its discretion to determine whether litigation of the claim justifies frustrating the summary nature of the proceeding. Second, the procedural mechanism should mandate that the tenant make full rental payments to the court while his right to setoff is being litigated. The landlord also should have limited access to these funds during the litigation on a need basis. After all, the landlord may need these same payments to effect the disputed repairs. Because these solutions appear workable, the tenant's right to assert the landlord's breach of a lease covenant should be preserved in most cases.

3. The Small Commercial Operation

In arguing to extend an implied warranty of suitability to commercial lessees, the commentators specifically have focused on the smaller, less sophisticated business tenant as the most compelling case.¹⁷⁰ While it is true that this tenant generally will have less bargaining power and financial ability than the large industrial lessee, these considerations do not counsel for the imposition of a commercial warranty of fitness for these tenants alone. Such a device would be difficult to implement because it is not easy to draw an appropriate line of application in the commercial spectrum. Although a balancing test could be used to weigh all the various factors, any balancing test inherently is subject to manipulation to achieve the desired result. In addition, the competing factors involved, including size and available capital, may be arbitrary indicators while other factors, such as bargaining power and business reputation, are extremely difficult to measure. Consequently, a balancing test would produce uncertain results, which especially would be costly in the business world in which a large degree of certainty in lease transactions is an integral part of the economic process. Because it cannot be applied fairly in a uniform manner to all tenants, an implied warranty of fitness should be rejected completely in the commercial

170. See *supra* note 6.

context.

These concerns, however, do point out the need for some protection for smaller businessmen. As indicated previously, that protection can be provided through the dual devices of establishing mutually dependent lease covenants and granting the ability to assert the breach of these covenants in a summary proceeding on possession. Additionally, the courts should follow the lead of decisions that have relaxed the requirements for constructive eviction,¹⁷¹ thereby providing aid to the tenant by finding a breach of the implied covenant of quiet enjoyment despite the fact that the lease does not contain an express covenant by the landlord to repair. In the case of the truly disadvantaged lessee who finds himself trapped in a complex, technical web of restrictions favoring the lessor, the courts should feel free to call this type of an agreement by its proper name: a contract of adhesion. In this situation the courts should use the doctrines of *contra proferentem* and unconscionability to provide appropriate relief.¹⁷² These familiar doctrines would allow the courts to provide fair results with a higher degree of certainty and uniformity.

A final reason for rejecting an implied warranty of suitability in commercial leases is that even its staunchest supporters admit that the parties should be free to write the warranty out of their agreement.¹⁷³

171. See *supra* note 65 and accompanying text.

172. In interpreting a lease involving a small, unsophisticated commercial tenant and a larger, more sophisticated landlord, the courts have several well-established doctrines of interpretation available to allow them to reach equitable results. First, the lease could be interpreted using *contra proferentem*. Under this approach, an ambiguity in the contract generally is resolved in favor of the party who did not draft the agreement. See generally 3 A. CORBIN, *supra* note 11, § 559; RESTATEMENT (SECOND) OF CONTRACTS § 206 (1979) [hereinafter RESTATEMENT CONTRACTS]. This approach has precedent in the commercial context. See, e.g., *Wilner's, Inc. v. Fine*, 153 Ga. App. 591, 266 S.E.2d 278 (1980) (limitation of liability clauses construed against landlord as drafter of lease). Second, the courts could use the similar contract of adhesion approach. This doctrine applies to standard form contracts in which there is no opportunity to negotiate the terms. The contract of adhesion approach is a more severe rule than *contra proferentem* in that it calls for the interpretation of all ambiguities against the draftsman. See generally 3 A. CORBIN, *supra* note 11, §§ 559A to 559I (Supp. 1984). Although the traditional view presumptively considers these contracts to be fair, see *id.* at § 559H, at least one commentator argues that all adhesive terms should be assumed to be unfair until proven otherwise. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1174, 1243-48 (1983).

Finally, the courts either could strike down the entire lease or excise the offending terms as unconscionable. See generally RESTATEMENT CONTRACTS, *supra*, § 208. In this situation, the general test is whether there exists an absence of meaningful choice in addition to unreasonably favorable contract terms. *Id.* comment d. This doctrine has been applied with some success to residential leases, see, e.g., *Weidman v. Tomaselli*, 81 Misc. 2d 328, 365 N.Y.S.2d 681 (Rockland County Ct.), *aff'd*, 84 Misc. 2d 782, 386 N.Y.S.2d 276 (App. Term 1975) (per curiam); *Seabrook v. Commuter Hous. Co.*, 72 Misc. 2d 6, 338 N.Y.S.2d 67 (Civ. Ct. 1972), but it has not enjoyed use where the parties roughly are equivalent in bargaining power. See, e.g., *Graziano v. Tortora Agency*, 78 Misc. 2d 1094, 359 N.Y.S.2d 489 (Civ. Ct. 1974).

173. See *Greenfield & Margolies*, *supra* note 5, at 887; Note, *supra* note 5, at 954.

This view is based on the twin notions of freedom of contract and the efficient operation of the free market system. Assuming that these powerful doctrines dictate that a landlord should be able to disclaim this warranty, then a most severe inequity will be worked in the guise of fairness and equality. The large industrial tenant, who does not need implied warranty protection because of its financial means and ability to extract express covenants from the landlord, will be able to use its leverage to avoid a disclaimer if it so desires. The smaller, less sophisticated tenant, the one who these commentators seek to protect because of his asserted inferior bargaining position and inadequate resources, would be unable to escape signing the standard form lease which would include a disclaimer of the implied warranty. As a result, accepting both premises leads to the inexorable conclusion that a warranty of suitability would be unavailable to those whom it was designed to protect most. Alternatively, uniform application of the other two prongs of residential protection to commercial tenants would afford all tenants a greater degree of security.

IV. CONCLUSION

At the beginning of the nineteenth century, lease law was based on the common-law doctrines that had shaped it since feudal times. As the nineteenth century wore on, however, changing societal conditions prompted the courts to carve out exceptions to the traditional rules. With the arrival of the most recent exceptions, the courts began to distinguish between the residential and commercial tenancy. Legislatures in the twentieth century also focused their protective gaze almost exclusively on the residential tenant. As a result, the full ambit of rental protection is not available to nonresidential lessees. Sound policy distinctions between the two tenancies rationally have dictated this divergent treatment.

The current commercial tenant, however, is not so different from his residential counterpart that he fairly can be denied any protection at all. The dissimilarities dictate confining the broadest remedy, an implied warranty of habitability, to the residential sphere. The differences, however, do not support persuasive arguments for preventing the application of the remainder of residential remedies to commercial tenancies. When parties to a commercial lease set down their agreement after negotiating as relative equals, their binding covenants should be given equal effect. Accordingly, the contract doctrine of mutual dependency should govern commercial leases. This doctrine often would be meaningless if the tenant could not assert the breach of a lease covenant as a defense in a summary dispossession proceeding. The threat of dispossession is a powerful weapon even if the aggrieved tenant has an

adequate remedy at law in a subsequent suit. Accordingly, subject to the guidelines previously detailed in this Note, these proceedings generally should allow the assertion of such defenses. The combination of these two remedies will provide commercial lessees with adequate protection of their legal interests while avoiding the potential disadvantages and inequities of the implication of a warranty of suitability in nonresidential leases.

Fred William Bopp III