Housing Code Violations and Tenant Remedies

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I. Introduction

In 1985, the Indiana Court of Appeals used the illegal contract doctrine to declare a residential lease voidable where housing code violations existed.[1] This is a continuation of the trend of affording more protection to residential tenants. Along with the illegality doctrine, a tenant may be able to assert a breach of the warranty of habitability against the landlord. This Article examines and compares the illegal contract doctrine and the implied warranty of habitability as tenant remedies and notes their uses and limitations.

II. Illegal Contract Doctrine

A. *History Behind the Application*

Under the principle of freedom of contract, courts recognize that it is in the public interest to allow individuals broad powers to structure their own affairs by freely entering into legally enforceable agreements.[2] Occasionally, however, the courts will invoke the doctrine of illegality and refuse to enforce a contract because its terms violate positive law, offend public morality, or conflict with public policy.[3] The doctrine of illegality applies to all contractual agreements, including real estate leases.[4]

Legislation is now the major source of public policy[5] and the courts

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[1]Noble v. Alis, 474 N.E.2d 109 (Ind. App. 1985). *See infra* notes 27-42 and accompanying text.

[2]A. Farnsworth, Contracts § 5.1 (1982).

[3]6A A. Corbin, Contracts 1373-78 (1962); 14 S. Williston, Contracts 1628-30 (3d ed. 1972). The Restatement (Second) of Contracts (1981) objects to the use of the term "illegal" to describe the courts' refusal to enforce a contract on the grounds of public policy. Restatement (Second) of Contracts introductory note to chapter 8 (1981). The term "illegality" suggests that the contract itself is a crime when in fact there are many situations where no sanctions are provided for entering into an agreement which is against public policy. A. Farnsworth, Contracts § 5.1 (1982).

[4]49 Am. Jur. 2d *Landlord and Tenant* § 41 (1970). For discussion of the application of the illegality doctrine to leases in general, see Hicks, *The Contractual Nature of Real Property Leases*, 24 Baylor L. Rev. 443, 470-81 (1972).

[5]Restatement (Second) of Contracts § 179 comment b (1981). The term legislation is used in its broadest sense to include state and federal statutes, local ordinances, and administrative regulations.

frequently remark that "a contract made in violation of a statute is void."[6] This broad statement is not always true, however, for unless the statute expressly states that contracts made in violation of its provisions are void,[7] the court will not automatically declare the contract unenforceable, but instead will attempt to balance the interest in the enforcement of the contract against the potential furtherance of the legislative policy by nonenforcement of the agreement.[8] Sometimes the policy involved is so important or the conduct so serious that unenforceability is obvious. At other times the public interest is so trivial, the harm to the parties resulting from nonenforcement so great, and the conduct of the parties so free of serious moral turpitude that enforcement of the contract should clearly be allowed. In situations where the factors for and against enforcement are more evenly balanced, the court must examine these factors closely in reaching a decision.[9]

Housing codes[10] existed as early as 1867,[11] but most housing codes are of very recent origin. In 1954, there were only fifty-six housing codes in force in the United States,[12] but by 1968, there were no fewer than 4,904 local housing codes and at least six state-wide housing codes.[13]

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[6]*See, e.g.*, Sandage v. Studabaker Bros. Mfg., 142 Ind. 148, 156, 41 N.E. 380, 382 (1895); Noble v. Alis, 474 N.E.2d 109, 111 (Ind. Ct. App. 1985); Maddox v. Yocum, 109 Ind. App. 416, 422, 31 N.E.2d 652, 654 (1941).

[7]Occasionally a statute will provide that contracts made in violation of its provisions are null and void. In such cases the court is bound to carry out the legislative mandate. RESTATEMENT (SECOND) OF CONTRACTS § 178 comment a (1981). Statutes dealing with gambling and usury often state that contracts made in violation of the statutes are void. A. FARNSWORTH, CONTRACTS § 5.1 (1982).

[8]RESTATEMENT (SECOND) OF CONTRACTS § 178 (1981). For an example of the courts' use of this balancing test, see Noble v. Alis, 474 N.E.2d 109 (Ind. Ct. App. 1985).

[9]For a discussion of the factors which should be considered by the courts when approaching the question of the enforceability of a contract which violates public policy, see RESTATEMENT (SECOND) OF CONTRACTS §§ 178-99 (1981).

[10]The term "housing codes" refers to statutes or ordinances establishing minimum standards for rental units intended for human habitation. These codes regulate structure elements, facilities, services, and number of occupants. They are to be distinguished from building codes which only regulate structural elements. Building codes generally operate only prospectively on structures constructed or substantially altered after enactment of the code. Housing codes, on the other hand, are applied retroactively to all existing dwelling units from the date of their enactment. Because housing codes apply only to dwelling units, they do not apply to commercial units; building codes apply equally to residential and commerical units. *See* R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, LAW OF PROPERTY § 6.37 (1984); Abbott, *Housing Policy, Housing Codes and Tenant Remedies: An Integration*, 56 B.U.L. REV. 1, 40-41 (1976).

[11]Most scholars agree that the New York Tenement House Law of 1867, which applied only to multi-unit dwellings, was the first true housing code. For a brief discussion of the history of housing codes, see Abbott, *supra* note 10, at 40-45; Cunningham, *The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status*, 16 URB. L. ANN. 3, 10-15 (1979).

[12]Abbott, *supra* note 10, at 44.

[13]R. CUNNINGHAM, W. STOEBUCK AND D. WHITMAN, *supra* note 10, at § 6.37 n.15,

This sudden increase in the number of housing codes can be explained by the enactment of the Housing Act of 1954.[14] The Act required each municipality to have a federally approved "workable program" for community improvement as a prerequisite for the receipt of federal urban renewal funds and federal housing subsidies.[15] The Housing and Home Finance Agency (HHFA), which administered the urban renewal program, made the enactment of housing codes a requirement for the approval of a "workable program."[16] There can be little doubt that the desire to obtain federal funds was as much a factor in the sudden enactment of housing codes as was the concern for the plight of the slum tenant.

While housing codes were enacted to comply with the "workable program" requirement for federal funding, housing code enforcement was not a high priority, and as a result, the administrative agencies charged with enforcement were understaffed and underfunded.[17] Many scholarly articles were highly critical of the ineffective administrative enforcement of housing codes.[18] In addition, the traditional view of the courts was that housing codes were criminal in nature and did not create any civil remedy for the tenant or in any way affect the landlord-tenant relationship.[19]

During the late 1960's and early 1970's, the courts began to question the traditional doctrine of *caveat lessee*.[20] No doubt the enactment of

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citing National Comm'n on Urban Problems, Building The American City, H.R. Doc. No. 34, 91st Cong., 1st Sess. 276-77 (1968).

[14]12 U.S.C. §§ 1701-1750, 42 U.S.C. §§ 1407-1592 (1982).

[15]Housing Act of 1954, ch. 649, 303, 42 U.S.C. § 1451(c) (1982) (omitted, 42 U.S.C. § 5316 (1982)).

[16]Abbott, *supra* note 10, at 43. The housing code requirement was incorporated into the statute itself in 1964. Housing Act of 1964, ch. 301(a), 42 U.S.C. § 1451(c) (1982). The "working program" requirement was eliminated in 1969. Housing and Urban Development Act of 1969, ch. 217(a), 42 U.S.C. § 1451(c) (1982).

[17]Levy, Lewis and Martin, Cases and Materials on Social Welfare and the Individual 1023-24 (1971).

[18]For a collection of the literature critical of housing code enforcement, see Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 Yale L.J. 1093, 1094 n.2 (1971).

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

[20]The 1960's and early 1970's were a time of civil rights activism. Some have suggested that this activism found its way into the judicial system and may have contributed to the radical changes in the traditional law of landlord-tenant. *See* Krieger and Shurn, *Landlord-Tenant Law: Indiana at the Crossroads*, 10 Ind. L. Rev. 591, 592-93 (1977); Rabin, *The Revolution in Traditional Landlord-Tenant Law: Causes and Consequences*, 69 Cornell L. Rev. 517, 546-49 (1984).

During the 1960's legal scholars wrote articles highly critical of the antiquated doctrine of caveat lessee. *See, e.g.*, Quinn & Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future*, 38 Fordham L. Rev. 225 (1969); Grimes, *Caveat Lessee*, 2 Val. L. Rev. 189 (1968); Lesar, *Landlord and Tenant Reform*, 35 N.Y.U. L. Rev. 1279 (1960); Schoshinski, *Remedies of the Indigent Tenant: Proposals for Change*, 54 Geo. L.J. 519 (1966); Skillern, *Implied Warranties in Leases: The Need for Change*, 44 Den. L.J. 387 (1967).

housing codes creating a duty to repair and maintain rental property seemed inconsistent with the old no repair rule of *caveat lessee*.[21]

B. The Emergence of the Illegal Contract Doctrine as a Tenant Remedy

In 1968, the District of Columbia Court of Appeals, in *Brown v. Southall Realty Co.*,[22] allowed the illegality doctrine as a defense to a landlord's action for possession for nonpayment of rent. The court found that substantial housing code violations existed at the inception of the lease and concluded that because a lease made in violation of the housing code was void, no rent was due and owing and the landlord was not entitled to possession based on nonpayment of rent.[23]

While the District of Columbia housing regulations did not specifically state that where violations of the housing code existed, the lease was illegal, the housing regulations did provide that "no person shall rent or offer to rent any habitation . . . unless such habitation and its furnishings are in a clean, safe and sanitary condition, in repair and free from rodents or vermin."[24] In deciding whether to enforce the lease, the court examined the public policy issues involved and concluded that the intent of the legislature was to insure for the prospective tenant that rental units were and would continue to be habitable. To enforce a lease where violations of the housing code were known to exist at the time of the agreement would be to "flout" the purposes for which the regulations were enacted.[25] Finding that the housing regulations did "indeed 'imply a prohibition' so as to render the prohibited act void," the court reversed the lower court's decision that the landlord was entitled to possession based on the tenant's nonpayment of rent.[26] Because the tenant had in fact already vacated the premises, the court did not address the status of a tenant remaining in possession under an illegal contract; because the landlord was only claiming a right to rent due under the lease, the court did not discuss the right of the landlord to recover in quantum meruit for the benefit conferred upon the tenant from his possession.

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[21]In Javins v. First Nat'l Realty, 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970), the court remarked, "In our judgment, the old no repair rule cannot coexist with the obligations imposed upon the landlord by a typical modern housing code, and must be abandoned in favor of an implied warranty of habitability. In the District of Columbia, the standards of this warranty are set out in the Housing Regulation." *Id.* at 1076-77.

[22]237 A.2d 834 (D.C. App. 1968).

[23]*Id.* at 836-37. The tenant had in fact already vacated the premises because of their uninhabitable condition, but the tenant was forced to defend the action for possession based on the nonpayment of rent, or the default judgment would have established conclusively that rent was due in any subsequent suit by the landlord for rent. *Id.* at 835.

[24]District of Columbia Housing Regulations § 2304 (cited at 237 A.2d at 836).

[25]237 A.2d at 837.

[26]*Id.*

During this Survey period, the First District Indiana Court of Appeals in *Noble v. Alis*[27] recognized the illegality defense in a suit by the landlord to recover rent. In *Alis* the tenants, Andrew Noble and Steward Odle, had leased an apartment in Bloomington, Indiana, from Linda Alis for a term of one year beginning August 16, 1983. Prior to returning to Bloomington, the tenants decided not to take possession of the premises and attempted to find a sublessee. While showing the apartment to a prospective sublessee on August 29th, the tenants discovered a number of defects in the apartment and contacted the City of Bloomington Housing Code Enforcement Officer, Ken Young, and requested an informal inspection of the premises.[28] Young had become aware of the residential use of the property on August 24th, and had sent a letter to A.B. Burnham, the legal title holder, requesting the property be registered as a residential rental unit as required by the Bloomington Housing Code.[29] When Young inspected the premises on September 1, 1983, he informed the tenants that the landlord did not have an occupancy permit, a violation of the Bloomington Housing Code. Further, Young advised that even if the property was registered, it would not pass an inspection.[30] Believing that they could not legally sublet the apartment, the tenants advised the landlord that they would no longer assume any responsibility for finding a sublessee.[31]

The apartment was subsequently rented to new tenants on September 15, 1983.[32] The landlord eventually brought suit against Noble and Odle for rent and damages. The trial court awarded the landlord the sum of $1,266.00 for rent and damages. The tenants appealed, asserting that the lease was void or voidable because the premises were neither registered as a residential rental unit nor had an occupancy permit as required by the housing code. The court of appeals agreed, reversing the damage award for rent and ordering the landlord to return the $300.00 security deposit plus interest.[33] In recognizing the illegal contract defense to the action for rent, the court recited the general rule that "broadly speaking, the law is that a contract made in violation of a statute is void."[34]

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[27]474 N.E.2d 109 (Ind. Ct. App. 1985).

[28]*Id.* at 110.

[29]From the facts it appears that Alis was the lessee of Burnham and that Alis had subleased a portion of the premises to Odle and Noble. Because the housing code required the owner to register the rental units, notice requesting that the property be registered as a rental unit was sent to Burnham.

[30]474 N.E.2d at 110.

[31]*Id.*

[32]*Id.* Though the property was rented on September 15, 1982, the property was not registered until October 4th, and was not inspected until October 17th, when eighty-three violations of the housing code were cited. An occupancy permit had still not been obtained at the time of the trial on January 26, 1984. *Id.* at 110-11.

[33]*Id.* at 113.

[34]*Id.* at 111.

Noting that the housing code did not expressly state that a contract in violation of its provisions was void and unenforceable, the court engaged in the balancing test discussed previously to determine whether to enforce the contract.[35] The court observed that where the provisions of an ordinance, such as the housing code's requirement of registration of rental units and issuance of an occupancy permit, are enacted under the city's police power for the protection of the public health, safety, and welfare, as opposed to those designed to raise revenues, courts are far more likely to deny the enforcement of an agreement in violation of such provisions.[36] In examining the registration and permit requirements, the court noted that until the unit is registered, the enforcement office is unaware of its existence and is unable to check for code compliance. Once it is registered, a temporary permit is issued, thus triggering an inspection by the Housing Department.[37] Thus, these administrative provisions clearly advanced the policies of public health, safety, and welfare.

In *Alis*, the court never found that the premises were actually "uninhabitable" as a result of the housing code violations. In fact, the tenants had raised the issue of a breach of an implied warranty of habitability at the trial, but the trial court did not find that the warranty was breached, and the tenants did not dispute this finding on appeal.[38] Several decisions from the District of Columbia Court of Appeals have indicated that in order for the illegality doctrine to apply, there must be serious violations of the housing code affecting health and safety.[39] One decision expressly held that failure to comply with registration and occupancy permit requirements would not render the lease void because these provisions did not affect the actual habitability of the premises.[40] Similarly, decisions from other jurisdictions considering housing code violations as possible breaches of the implied warranty of habitability have found that one or two minor code violations not affecting habitability might be considered "de minimus" and not a breach of the warranty.[41] The *Alis* decision, however, concluded that the registration

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[35]*Id.* at 113. *See supra* notes 6-9 and accompanying text for a discussion of the factors considered in the balancing test.

[36]*Id.* at 111. The Indiana court treated the registration and permit requirements as a "licensing" provision. When dealing with licensing requirements, courts distinguish between those designed only to obtain revenue and those designed to protect the health or safety of the public. *See* A. Farnsworth, Contracts § 5.6 (1982). This would explain why the Indiana court reached a decision contrary to Curry v. Dunbar House, 362 A.2d 686 (D.C. App. 1976) which did not view the licensing and permit requirements as directly affecting health and safety.

[37]474 N.E.2d at 112.

[38]*Id.* at 113.

[39]*E.g.*, Reese v. Diamond Housing Corp., 259 A.2d 112 (D.C. App. 1969); Diamond Housing Corp. v. Robinson, 257 A.2d 492 (D.C. App. 1969).

[40]Curry v. Dunbar House, 362 A.2d 686 (D.C. App. 1976).

[41]*E.g.*, Javins v. First Nat'l Realty, 428 F.2d 1071 (D.C. Cir.), *cert denied*, 400 U.S.

and occupancy permit requirements were an essential part of the enforcement process, indicating that their violation should not be considered "de minimus." The decision does not, however, suggest that *every* code violation, no matter how trivial, will trigger an illegal contract defense.

The second noteworthy aspect of the *Alis* decision is the narrow limitation the court placed on the use of the illegality doctrine. In allowing the tenants to plead the illegality defense, the *Alis* court indicated that an important factor was that the tenants had never taken possession of the apartment and thus never benefited in any way from the lease agreement.[42] If the tenants had moved into the apartment and then discovered that it was not registered and that no occupancy permit had been issued, their remedy would rest on their ability to prove a breach of an implied warranty of habitability as in *Breezewood Management Co. v. Maltbie.*[43] This requirement that the tenant never benefit in any way from the lease agreement suggests the court would use an estoppel theory to prevent the tenant from raising the illegality defense once the tenant had taken possession. One might seriously question why a wrongdoer should be entitled to his unlawful bargain merely because the party for whom the statute was designed to protect partly performed the contract before he became aware of its illegality. Commentators have questioned the application of the estoppel theory in an illegal contract situation.[44] In raising the estoppel theory, the court seemed genuinely concerned that the tenant, after living in the apartment, might attempt to escape future rental payments as well as demand a refund on past payments.[45] This concern may be unjustified, however, if the court allows the landlord to recover the reasonable rental value of the apartment for the time the tenant is in actual possession.[46] While the tenant could recover past rental payments over and above the fair rental value of the premises, he would not escape all past rent obligations. As to future rental payments, the tenant would be forced to vacate the premises to avoid future liability for the fair rental value of the premises while in possession. If the courts are concerned that the tenant might use some "technical" code violation to void the lease, this could be avoided by use of a "de minimus" rule. A concern that a tenant might

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925 (1970); Boston Housing Authority v. Hemingway, 363 Mass. 184, 293 N.E.2d 831 (1973); King v. Moorehead, 495 S.W.2d 65 (Mo. Ct. App. 1973); Folsy v. Wyman, 83 Wash. 2d 22, 515 P.2d 160 (1973).

[42] 474 N.E.2d at 112.

[43] *Id.* (citing Breezewood Management Co. v. Maltbie, 411 N.E.2d 670 (Ind. Ct. App. 1980)).

[44] 17 Am. Jur. 2d *Contracts* § 173 (1964); A. Farnsworth, Contracts § 5.1 (1982).

[45] 474 N.E.2d at 112. Perhaps the court did not believe the landlord could recover the fair rental value for the time the tenant was in actual possession. Perhaps also the court was concerned the tenant could use the illegality theory to terminate an unfavorable long-term lease.

[46] For discussion of this issue, see *infra* notes 117-22 and accompanying text.

use code violations as a pretext to void an unwanted lease after living in the apartment for a long period of time with knowledge of the code violations could be handled on a case-by-case basis, rather than by a blanket prohibition against use of the illegality doctrine where the tenant has in any way benefited from the lease.[47]

III. Implied Warranty of Habitability as an Alternative Remedy

In *Alis*, the court's holding was based on the illegal contract doctrine, but the decision also indicates that a tenant may have to look to an implied warranty of habitability as a remedy for housing code violations where he has benefited from the illegal lease.[48] The opinion left open many questions concerning the rights of the tenant when he is asserting a breach of the warranty of habitability. Can the tenant recover damages for breach of the warranty for the entire period of time the housing code violations existed?[49] Has the tenant waived his right to treat the breach of warranty as a constructive eviction or a termination of the lease?[50] Does the landlord's breach "suspend" future obligations to pay

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[47]Although the District of Columiba allows the tenant to raise the illegal contract doctrine even after the tenant has taken possession of the premises, in Watson v. Kotler, 264 A.2d 141 (D.C. App. 1970), the court rejected the tenant's illegality defense to the landlord's suit for possession based on nonpayment of the rent where the tenant had remained in possession under the lease for two years before she claimed the lease was "void" after falling behind in her rental payments.

[48]"In the latter case [where the tenants have received a benefit under the lease], the tenants' remedy rests on their ability to prove a breach of an implied warranty of habitability. . . ." 474 N.E.2d at 112.

[49]It would appear that the tenant could sue for damages for the entire period of time the premises have been uninhabitable. Nevertheless, when the tenant does not inform the landlord of code violation and provide him with an opportunity to repair, it may be unfair to award damages for the entire period of uninhabitability. *See* Berzito v. Gambino, 63 N.J. 460, 308 A.2d 17 (1973) ("As a prerequisite to maintaining such a suit [for recovery of a portion of rent paid while the premises were in an uninhabitable condition], the tenant must give the landlord positive and reasonable notice of the alleged defect, must request its correction and must allow the landlord a reasonable period of time to effect the repair or replacement."). *Id.*

In Thompson v. Shoemaker, 7 N.C. App. 687, 173 S.E.2d 627 (1970), the court refused to allow a tenant to recover rent voluntarily paid to the landlord where the tenant had remained in possession for fifty-three weeks with full knowledge of the housing code violations.

[50]If the tenant does not vacate the premises within a reasonable period of time after the breach of the warranty by the landlord, the court may find the tenant has "waived" this remedy. R. Cunningham, W. Stoebuck & D. Whitman, *supra* note 10, at §§ 6.33, 6.41. There may not, however, be any breach of the warranty until the landlord has been notified of the condition and given a reasonable time to repair. *See, e.g.*, Glasoe v. Trinkle, 479 N.E.2d 915 (Ill. 1985); Berzito v. Gambino 63 N.J. 460, 308 A.2d 17 (1973); Pugh v. Holmes, 486 Pa. 272, 405 A.2d 897 (1979).

the agreed rent and can the tenant withhold the rent until the landlord complies with the housing code standards?[51] The following discussion answers some of these questions.

A. *The Warranty in Indiana*

There are only three Indiana Court of Appeals opinions even acknowledging that an implied warranty of habitability in residential leases exists in Indiana,[52] and the Indiana Supreme Court has not yet ruled directly on the issue.[53] Although many states have recently enacted comprehensive landlord-tenant codes imposing duties on the landlord to maintain rental dwellings in a habitable condition and providing remedies to the tenant for breach of this duty, no such modern landlord-tenant code has been enacted by the Indiana legislature.[54]

Breezewood Management Co. v. Maltbie[55] is the first official Indiana Court of Appeals decision to recognize the implied warranty of habit-

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[51]*See infra* notes 86-88 and accompanying text.

[52]Zimmerman v. Moore, 441 N.E.2d 690 (Ind. Ct. App. 1982) (held no implied warranty of habitability in the rental of a single family dwelling by a landlord not in the business of leasing rental property); Welborn v. Society for Propagation of Faith, 411 N.E.2d 1267 (Ind. Ct. App. 1980) (assumed without deciding that an implied warranty of habitability existed, but concluded tenants had failed to prove damages for its breach); Breezewood Management Company v. Maltbie, 411 N.E.2d 670 (Ind. Ct. App. 1980) (recognized breach of an implied warranty of habitability where serious housing code violations existed in leased apartment and awarded damages).

[53]The Indiana Supreme Court has recognized an implied warranty of habitability in the sale of a new home by a builder-vendor, Theis v. Heuer, 264 Ind. 1, 280 N.E.2d 300 (1972), and has extended the builder-vendor's warranty to a subsequent purchaser. Barnes v. MacBrown and Co., 264 Ind. 227, 342 N.E.2d 619 (1976). In Theis v. Heuer, the Indiana Supreme Court in a footnote acknowledged the development of a similar implied warranty of habitability in residential leases: "There is a parallel development in the law which is relevant but not necessary for our decision here. It is in the area of landlord-tenant. Modern case law is now finding an implied warranty of habitability by a landlord to his tenant." 264 Ind. at 11 n.1, 280 N.E.2d at 305 n.1.

[54]The Indiana Legislature on four separate occasions from 1973-1977 rejected attempts to enact modified revisions of the Uniform Residential Landlord Tenant Act ("URLTA"). *See* Krieger & Shurn, *supra* note 20, at 641-43. No efforts appear to have been made since that time to enact a comprehensive landlord-tenant code. In an interesting turn of events, the city of Bloomington enacted the Uniform Residential Landlord Tenant Act as an ordinance. The Indiana Court of Appeals held the ordinance *ultra vires* because it attempted to regulate specific terms of the lease agreement totally unrelated to housing and safety codes. City of Bloomington v. Chuckney, 165 Ind. App. 177, 331 N.E.2d 780 (1975).

[55]411 N.E.2d 670 (Ind. Ct. App. 1980). The first "reported" court of appeals decision to recognize an implied warranty of habitability in residential leases was Old Town Dev. Co. v. Langford, 349 N.E.2d 744 (Ind. App. 1976), *vacated*, 267 Ind. 176, 369 N.E.2d 404 (1977). This decision was never included in the official reports because the Indiana Supreme Court granted transfer and later, when the parties reached a settlement, dismissed the case without opinion. *Id.* The effect of the supreme court's action was to render the

ability in Indiana and is the only Indiana decision actually to award damages for its breach. In *Breezewood*, two students at Indiana University leased an apartment in Bloomington, Indiana, for a term of one year. Upon moving into the apartment they discovered over fifty housing code violations, eleven of which were "life-safety" violations—hazardous to the health of the occupant.[56] One student vacated the premises and the other remained in possession and paid a portion of the rent. At the end of the term the landlord brought suit for the unpaid rent and the tenants counterclaimed for breach of the implied warranty of habitability. The lower court denied the landlord's claim, awarded damages to the tenants on their counterclaim, and ordered a return of the tenants' security deposit.[57] In affirming the judgment, the court of appeals, noting the development of an implied warranty of habitability in the sale of a new house by a builder-vendor, concluded that "the seeds of the modern trend abolishing *caveat lessee* and treating a lease as a contractual relationship have been sown in Indiana."[58] The court also quoted extensively and with apparent approval from the landmark case of *Javins v. First National Realty Corporation*[59] and another leading decision, *Boston Housing Authority v. Hemingway*,[60] in support of an implied warranty of habitability in residential leases.

The *Breezewood* decision raises several interesting questions regarding the implied warranty of habitability. First, the decision seems to define "habitability" in terms of the local housing code standards and raises a serious question as to whether the warranty can exist without a local housing code. In discussing the warranty, the court concluded that housing code provisions in effect at the time of the lease are incorporated into the lease by law.[61] However, where there are no local housing codes in effect, the court indicated that the parties might agree to rent the property "as is" under the doctrine of freedom of contract.[62] While *Boston Housing Authority* does not seem to limit the implied warranty to situations in which there is a local housing code or to the standards set forth in the housing code,[63] the *ratio decidendi* in *Breezewood* was much

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opinion of the court of appeals null and void. IND. R. APP. P. 11(b)(3). Thus, *Breezewood* is actually the first appellate court opinion to declare an implied warranty of habitability in residential leases in Indiana.

[56]411 N.E.2d at 671.

[57]*Id.* at 672.

[58]*Id.* at 674.

[59]428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

[60]363 Mass. 184, 293 N.E.2d 831 (1973).

[61]411 N.E.2d at 675.

[62]*Id.* at 675 n.2. While the language was contained only in a footnote, it was elevated into the body of the opinion by Judge Neal in Zimmerman v. Moore, 441 N.E.2d 690, 695 (Ind. Ct. App. 1982).

[63]363 Mass. at 184, 293 N.E.2d at 831.

more narrowly stated: "For the reasons that a housing code was in effect and the premises violated many of its provisions, we hold that Breezewood breached an implied warranty of habitability."[64]

B. Damages Under Breezewood's *Implied Warranty of Habitability*

The second issue regarding implied warranty raised in *Breezewood* is the measure of damages for breach of the warranty. While arguably not part of the decision itself, Judge Neal, author of the opinion, cited with apparent approval the standard contract measure of damages applied in *Boston Housing Authority* — the difference between the fair rental value of the premises as warranted and the fair rental value of the premises in their defective condition (hereinafter referred to as the first formula).[65] Likewise, the *Alis* opinion, also authored by Judge Neal, clearly indicates that the first formula is the proper measure of damages for breach of the warranty.[66] However, in *Welborn v. Society for Propagation of Faith*,[67] decided by the Indiana Court of Appeals Second District only one day after the *Breezewood* decision, Judge Shields noted that there is a split of authority as to the proper measure of damages for breach of the warranty.[68] She observed that, while some courts use the standard contract measure of damages (first formula), others use a different measure of damages — the difference between the rent agreed upon in the lease and the fair rental value of the premises in their present uninhabitable condition (hereinafter referred to as the second formula).[69] Because no damages were proven in the *Welborn* decision, the court did not indicate which of the two formulae it would use in the future.[70]

While the measure of damages under the two formulae may appear to be only slightly different, this is not necessarily true. There may be no substantial difference where the agreed upon rent actually reflects the fair rental value of the premises as warranted. But if the parties actually contract to lease substandard housing with existing code violations, the agreed upon rent has no relation to the fair rental value of the premises as warranted. If the first formula is used by the court, the slum tenant will reap a windfall because the parties never contracted to rent a habitable dwelling, and there has been no actual loss of bargain

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[64]411 N.E.2d at 675.
[65]*Id.*
[66]474 N.E.2d at 112.
[67]411 N.E.2d 1267 (Ind. Ct. App. 1980).
[68]*Id.* at 1270 n.5.
[69]*Id.* at 1271.
[70]*Id.*

to the tenant.[71] Under the second formula, however, there would be little or no damages since the agreed upon rent would be the same as the fair rental value of the premises in their present condition.[72] This might be more consistent with the expectations of the parties, but it would provide little incentive for the landlord to comply with the provisions of a housing code. Both formulae, however, cause difficulty and expense in proving actual damages, i.e., the fair rental value of the premises as warranted and the fair rental value of the premises in their present condition. This has led a number of courts to adopt yet another formula — the percentage diminution measure of damages. The rent is abated by a percentage amount equal to the percentage reduction in use and enjoyment which the trier of fact determines to have been caused by the defects (hereinafter referred to as the third formula).[73] The third formula seems to be the most equitable way to determine damages. It guarantees some rent to the landlord since it uses the agreed rent as the starting point, while at the same time providing some relief to the tenant by abating the rent based on the decreased use and enjoyment caused by the defective conditions.

The difficulties that can be encountered in assessing damages are indicated by the facts of the *Welborn* case. A family evicted by their landlord was allowed to rent half of a furnished double, including utilities, for fifty-five dollars a month from the Society for the Propagation of the Faith. During a four-month period, the utilities on the double amounted to $499.72.[74] While the decision does not indicate which formula the court used, the court found that "the record is devoid of any evidence that the fair rental value of the premises was less than the actual amount for which the premises were rented."[75] If evidence had been introduced as to the fair rental value of half a furnished double complying with code standards, damages based on the first formula might have proven ruinous to the landlord, especially one apparently not motivated by profit. On the other hand, if the court had used the second formula, it is unlikely any damages could have been proven. While the facts in the *Welborn* case might suggest the use

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[71]Several commentators have suggested that the use of the first formula might result in damages greater than the agreed upon rent, i.e., the landlord would have to pay the tenant to live in the uninhabitable dwelling. Abbot, *supra* note 10, at 21; Cunningham, *supra* note 11, at 106; Krieger & Shurn, *supra* note 20, at 616-17; Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 524-25 (1984).

[72]Abbot, *supra* note 10, at 21; Cunningham, *supra* note 11, at 106.

[73]*E.g.*, Green v. Superior Court, 10 Cal. 3d 616, 111 Cal. Rptr. 704, 517 P.2d 1168 (1974); McKenna v. Begin, 5 Mass. App. 304, 362 N.E.2d 548 (1977). For a general discussion of the percentage diminution theory, see Abbott, *supra* note 10, at 22-24; Academy Spires, Inc. v. Grown, 111 N.J. Super. 477, 268 A.2d 556 (1970).

[74]411 N.E.2d at 1268-69.

[75]*Id.* at 1271.

of the third formula, the language in the *Welborn* decision that "the trial court was not at liberty to speculate, guess, or surmise as to the value of the injury"[76] may present some problems should the lower court attempt to use the percentage diminution approach.

C. The Problem with Dependent Covenants

Another interesting aspect of the implied warranty touched upon in the *Breezewood* decision is the contract doctrine of dependent covenants. At common law, the covenants in a lease were independent of each other, and a breach of a covenant by the landlord in no way affected the duty of the tenant to pay the full amount of the rent in the lease.[77] If the tenant refused to pay the rent, the landlord could evict the tenant under the summary dispossessory statutes enacted in most states, and the landlord's breach of a covenant in the lease would be no defense to the tenant's nonpayment of the rent. Most of the recent decisions recognizing an implied warranty of habitability in residential leases have indicated, however, that the warranty and the covenant to pay rent are dependent and that the breach of the warranty by the landlord suspends the tenant's obligation to pay rent.[78] This may become a critical issue where the tenant withholds all or a portion of the rent and the landlord brings an action to evict the tenant for nonpayment of the rent.[79]

The *Breezewood* decision appears to recognize that the implied warranty of habitability and the tenant's covenant to pay rent are dependent. The opinion quotes with apparent approval from *Boston Housing Authority v. Hemingway* that "the landlord's breach of its implied warranty of habitability constitutes a total or partial defense to the landlord's claim for rent being withheld, depending on the extent of the breach."[80] In the same part of the *Breezewood* opinion, in responding to the landlord's claim that *Javins* suspends the tenant's obligation to pay rent but that no damages are recoverable by the tenant, Judge Neal noted that *Javins* did not address the tenant's right to recover damages, but instead stated that a "landlord's breach may suspend or extinguish a rental obligation and thereby cause the lessor's action against the tenants for nonpayment of rent to fail."[81] There is nothing in the *Breezewood* opinion to suggest

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[76] *Id.* at 1270.

[77] *E.g.*, Magee v. Indiana Business College, 89 Ind. App. 640, 166 N.E. 607 (1929); Bryan v. Fisher, 3 Blackf. 316 (1833).

[78] *E.g.*, Javins v. First Nat'l Realty, 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); Boston Housing Authority v. Hemingway, 363 Mass. 184, 293 N.E.2d 831 (1973); Pugh v. Holmes, 486 Pa. 272, 405 A.2d 897 (1979); Teller v. McCoy, 253 S.E.2d 114 (W. Va. 1978).

[79] *See infra* notes 86-88 and accompanying text.

[80] 411 N.E.2d at 675 (quoting Boston Housing Authority v. Hemingway, 363 Mass. at 203, 293 N.E.2d at 845).

[81] 411 N.E.2d at 675.

that the court disagreed with the *Javins* decision. It may seem surprising, therefore, that in the *Alis* opinion, Judge Neal, after expressing his concern that the tenant might try to demand a refund on past rental payments and avoid future rental payments under an illegal contract defense, would cite *Breezewood* in support of the position that "such a breach does not, however, suspend a tenant's obligation to pay rent and allow no damages recoverable to the landlord."[82] It is doubtful that Judge Neal ever intended these words as a commentary on the doctrine of dependent covenants. The sentence contains two unrelated thoughts — the tenant's obligation to pay "rent" and the landlord's right to recover "damages" for the tenant's use and enjoyment of the premises. It would appear that Judge Neal was simply indicating that the tenant could not live in the apartment "rent free" merely because the landlord had breached an implied warranty of habitability. Following this remark, he discussed the proper measure of damages for breach of the warranty and finally stated, "[I]n other words, tenants were obligated to pay the actual rental value of the apartment inasmuch as they derived some benefit from the rental arrangement."[83] From the context in which the words were used, Judge Neal was discussing damages for breach of the warranty and was not suggesting that the duty to pay rent and the warranty of habitability are independent covenants.[84]

The *Welborn* decision also addressed the dependency of covenants issue. In dictum, Judge Shields noted, "[A]rguably Indiana does treat leases as ordinary contracts containing dependent covenants."[85]

It should be noted, however, that finding the warranty of habitability and the covenant to pay rent dependent does not totally resolve the issue of rent withholding. In many jurisdictions, the summary dispossessory statute is limited to the single issue of whether rent is due and owing.[86] If the finder of fact should ultimately determine that some rent is still due and owing, there is no logical reason why the court could not grant the landlord's judgment for possession.[87] Nevertheless, the vast

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[82]474 N.E.2d at 112.

[83]*Id.*

[84]When the court speaks *obitur dictum*, these casual remarks may easily be misinterpreted when taken out of context and applied to an issue which was not under consideration by the court. *Cf.* Stoller v. Doyle, 257 Ill. 369, 100 N.E. 959 (1913).

[85]411 N.E.2d at 1269 n.4. While not cited by the court, it is suggested that the case of Rene's Restaurant Corp. v. Fro-Du-Co Corp., 137 Ind. App. 599, 210 N.E.2d 385 (1965) also supports the doctrine of dependent covenants.

[86]For an interesting discussion of the problems caused by the procedural limitations of the summary dispossession statutes, see Chused, *Contemporary Dilemmas of the* Javins *Defense: A Note on the Need for Procedural Reform in Landlord-Tenant Law*, 67 Geo. L. Rev. 1385 (1978-79).

[87]Despite Illinois' recognition that the covenants in the lease are dependent, empirical evidence indicates that in the Chicago area, the courts are awarding the landlord possession if any rent is found due and owing after deducting the damages for the landlord's breach

majority of jurisdictions, by case law or legislation, have allowed the tenant this right of self-help rent withholding. When it is later determined by the court how much rent is due after deducting damages for breach of the warranty, the tenant is given a reasonable period of time to pay this amount to the landlord.[88] In spite of the cited authority supporting the view that covenants in a lease are dependent, the issue of rent withholding is still an open question in Indiana, and it would not be advisable for the tenant to use this remedy until it is recognized by the courts or until the legislature enacts a rent withholding statute.

D. Limitations on the Warranty of Habitability

The few Indiana decisions discussing the implied warranty of habitability have all involved residential leases. While there has been no discussion of the warranty in regard to commercial or agricultural leases, it is very unlikely that the Indiana courts would extend the implied warranty to cover such situations. Most courts considering the issue have refused to extend the warranty of habitability beyond residential leases.[89] *Breezewood* and *Welborn* did not, however, indicate any limitation on the type of residential property involved. In *Zimmerman v. Moore*,[90] the First District Indiana Court of Appeals, in an opinion also written by Judge Neal, placed a major limitation on the use of the implied warranty of habitability. In *Zimmerman*, the tenant was injured by

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of his implied warranty of habitability. R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, *supra* note 10, at § 6.43. Also, in Boston Housing Authority v. Hemingway, 363 Mass. 184, 293 N.E.2d 831 (1973), the court held that while the warranty and the covenant to pay rent were interdependent, the tenant could be evicted for withholding rent unless he complied with the statutory rent withholding procedure. *Id.* at 202, 293 N.E.2d at 845.

[88]*E.g.*, Javins v. First Nat'l Realty, 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); Green v. Superior Court, 10 Cal. 3d 616, 111 Cal. Rptr. 704, 517 P.2d 1168 (1974); Glasoe v. Trinkle, 479 N.E.2d 915 (Ill. 1985); King v. Moorehead, 495 S.W.2d 65 (Mo. Ct. App. 1973); Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970); Pugh v. Holmes, 486 Pa.2d 272, 405 A.2d 897 (1979); Foisy v. Wyman, 83 Wash. 2d 22, 515 P.2d 160 (1973); Teller v. McCoy, 253 S.E.2d 114 (W. Va. 1978).

Much of the recently enacted landlord-tenant legislation contains provisions authorizing rent withholding under certain circumstances. For a discussion of the rent withholding provision, see Cunningham, *supra* note 11. Because the right to withhold rent would depend upon whether the landlord had breached the warranty of habitability, this would require a trial on the merits and would in most jurisdictions change the summary nature of the landlord's dispossessory action based on nonpayment of rent. Several cases have suggested that the court might issue a protective order requiring the tenant to pay the rent into the court to ensure funds will be available should the landlord prevail. *E.g.*, Javins v. First Nat'l Realty, 428 F.2d 1071, 1083 n.67 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); Green v. Superior Court, 10 Cal. 3d 616, 111 Cal. Rptr. 704, 517 P.2d 1168 (1974); Fritz v. Warthen, 298 Minn. 54, 213 N.W.2d 339 (1973); King v. Moorehead, 495 S.W.2d 65 (Mo. Ct. App. 1973).

[89]*See infra* note 128.

[90]441 N.E.2d 690 (Ind. Ct. App. 1982).

falling down the back steps of a single family dwelling leased from a non-merchant landlord. The landlord had acquired the house, her former home, by virtue of a divorce settlement with her prior husband, and had decided to rent the house after she moved into her new husband's home. There was evidence that the design of the steps violated provisions of the One and Two Family Dwelling Code.[91] The back steps had been poorly designed and there was no landing. The back door swung out over the steps, and there was a railing on only one side of the stairway. In reversing the lower court judgment for the tenant, the court of appeals held that the instruction on breach of an implied warranty of habitability was erroneous.[92] The court distinguished *Breezewood* on the ground that it involved an old converted home with four apartments in one building (which apparently made the landlord in the business of leasing apartments).[93] The court also noted that cases from other jurisdictions relied upon by the tenants (such as *Javins* and *Boston Housing Authority*) involved "large city apartment complexes operated and owned by professional landlords who were in the business of real estate development and ownership."[94] The court declined to extend an implied warranty of habitability to the rental of a single family, used dwelling,[95] effectively removing all used, single family dwellings from the coverage of the implied warranty of habitability. On the other hand, the court's emphasis on the fact that the landlord was not a merchant[96] and the extensive discussion of why liability under warranty or strict liability in tort should not be extended to a non-merchant[97] suggests that the court might

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[91]*Id.* at 692.

[92]*Id.* at 696.

[93]*Id.* at 695-96.

[94]*Id.* at 695.

[95]*Id.* at 696.

[96]For example, the sentence immediately preceding the sentence exempting used, single-family dwellings states: "Both philosophical underpinnings [superior knowledge and expertise of the merchant and the ability to spread the risk throughout the industry where the sale is by a merchant] are absent in our case of a non-merchant lessor who casually rents a single family dwelling in Greencastle, Indiana." 411 N.E.2d at 696.

[97]The court indicates that the two principal philosophical justifications for imposing strict liability upon a merchant or manufacturer under an implied warranty or section 402A of the RESTATEMENT (SECOND) OF TORTS are that the merchant or manufacturer has superior expertise and knowledge and that the manufacturer can spread the risk throughout the industry. 411 N.E.2d at 695-96. Both the Uniform Commercial Code and the RESTATEMENT (SECOND) OF TORTS limit strict tort liability to sales by merchants. *Id.* One commentator notes, however, that most of the cases rejecting the landlord's traditional immunity from tort liability for injuries to a tenant or his guest caused by defective conditions of the leased premises have not imposed "strict liability" standards. Instead, the courts have held the landlord liable only where he has been found to be negligent based on notice of the condition and an opportunity to repair. Mallor, *The Implied Warranty of Habitability and the "Non-Merchant" Landlord*, 22 DUQ. L. REV. 637, 650-53 (1984). The *Zimmerman* court seemed to assume that if the warranty of habitability were found to apply, then strict liability

have intended to exempt single family dwellings from the warranty only where the landlord is not a merchant.[98] Similarly, the rationale for not extending the warranty to the casual landlord not in the business of leasing rental units would seem to apply equally where the landlord leases one or two apartments in the house in which he resides.[99] Whether the *Zimmerman* holding will be extended to cover this situation is unsettled.

IV. Comparisons Between the Illegal Contract Doctrine and the Implied Warranty of Habitability

The illegality doctrine recognized in the *Brown* decision was viewed as an important new tenant remedy by many of the legal commentators of the day.[100] The doctrine, however, has not been widely used outside the District of Columbia.[101] The obvious reason was the almost simul-

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would follow. This would not be true unless the court chose to do so rather than apply a negligence standard for breach of the warranty. 411 N.E.2d at 695-96.

[98]Others have also found the holding in the *Zimmerman* case to be unclear: "It may stand for the proposition that the implied warranty of habitability is inapplicable to rentals of all single family dwellings . . . or to rentals of single family houses by non-merchants." Mallor, *supra* note 97, at 660-61.

[99]Of the states which have recently enacted modern landlord-tenant codes imposing a duty to repair on the landlord, several states have exempted non-merchant landlords. *See supra* note 97. Although the statute specifically exempts owner-occupied two or three family dwellings from the statutory warranty, a non-merchant landlord was held liable for injury under a judicially-imposed warranty. Crowell v. McCaffrey, 377 Mass. 443, 386 N.E.2d 1256 (1979).

[100]*E.g.*, Note, *Tenants' Rights in the District of Columbia: New Hope for Reform*, 19 Cath. L. Rev. 80 (1968); Note, *Leases and The Illegal Contract Theory - Judicial Reinforcement of the Housing Code*, 56 Geo. L.J. 920 (1968); Note, *Housing Violations Void Lease - A New Tenant Remedy*, 25 Wash. & Lee L. Rev. 335 (1968). Most of the commentators, however, also noted limitations of this remedy such as the ability of the landlord to evict the tenant immediately once the tenant had successfully raised the illegality defense in an action for rent.

[101]In the District of Columbia, residential tenants have made extensive use of the illegal contract doctrine as an alternative to the implied warranty of habitability remedy. Cunningham, *supra* note 11, at 80-81. In 1970, the illegality defense was included in the District of Columbia Landlord-Tenant Regulations. District of Columbia Landlord-Tenant Regulations § 2902.1 (1970).

Outside the District of Columbia, there are only a handful of cases suggesting the use of the illegality doctrine as a defense to an action for rent where housing code violations existed at the inception of a residential lease. Hinson v. Delis, 26 Cal. App. 3d 62, 102 Cal. Rptr. 661 (1972); Longenecker v. Hardin, 130 Ill. App. 2d 468, 264 N.E.2d 878 (1970); Noble v. Alis, 474 N.E.2d 109 (Ind. Ct. App. 1985); King v. Moorehead, 495 S.W.2d 65 (Mo. Ct. App. 1973); Glyco v. Schultz, 35 Ohio Misc. 25, 289 N.E.2d 919 (Ohio Mun. 1972); Riley v. Nelson, 256 S.C. 545, 183 S.E.2d 328 (1971).

At least one jurisdiction has refused to hold the lease void because of housing code violations, suggesting that housing codes should be administratively enforced and not enforced through the courts by tenants using civil remedies. Posnanski v. Hood, 46 Wis. 2d 172, 174 N.W.2d 528 (1970).

taneous recognition of an implied warranty of habitability in residential leases.[102] The implied warranty of habitability theory provided the tenant with an entire new range of effective contractual remedies.[103] In the context of residential leases, the implied warranty of habitability is in most circumstances the superior tenant remedy.[104] Nevertheless, the illegal contract doctrine may still prove a useful tenant remedy.

One of the major difficulties with the illegal contract theory from the tenant's viewpoint is the tenant's status once the court declares the contract illegal. Although *Brown* did not address this issue, it is generally agreed that because the landlord placed the tenant into possession, the tenant would not be considered a trespasser.[105] At common law, a tenant under a void lease normally becomes a tenant at will.[106] In *Diamond Housing Corp. v. Robinson*,[107] however, the District of Columbia Court of Appeals held that, under the District of Columbia statutes, a tenancy at will can only be created by an express contract, and therefore the tenant became a statutory tenant at sufferance which was in the nature of a tenancy from month to month requiring thirty days notice to quit.[108]

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[102]In the landmark decision of Javins v. First Nat'l Realty, 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970), the court found that "the Housing Regulations imply a warranty of habitability, measured by the standards which they set out, into leases of all housing that they cover." *Id.* at 1082. *Javins* was not the first decision to recognize an implied warranty of habitability in residential leases. *See, e.g.*, Lemle v. Breeden, 51 Hawaii 426, 462 P.2d 470 (1969); Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969); Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961). *Javins*, however, gained national attention and is cited in nearly every subsequent decision recognizing an implied warranty of habitability in a residential lease. There is an impressive body of literature on the subject. *See, e.g.*, Abbott, *supra* note 10; Cunningham, *supra* note 11; R. Schoshinski, American Law of Landlord and Tenant §§ 3:10-3:45 (1980).

[103]For a discussion of the contractual remedies available to the tenant under the implied warranty of habitability theory, see Cunningham, *supra* note 11, at 98-126; Krieger & Shurn, *supra* note 20, at 612-25; R. Schoshinski, *supra* note 102, at §§ 3:19-3:25.

[104]"The illegality defense innovated in Brown v. Southall has won few adherents outside the District of Columbia, doubtless because of its intrinsic limitations and the comparative attractiveness of an alternative theory—the implied warranty of habitability." P. Goldstein, Real Property 940 (1984).

Most cases and commentators have not bothered to state the obvious. Nevertheless, the small number of decisions outside the District of Columbia using the illegal contract doctrine as a tenant remedy and the wide use of the alternative implied warranty of habitability theory suggest that attorneys and juries have chosen the latter as the more attractive tenant remedy.

[105]Diamond Housing Corporation v. Robinson, 257 A.2d 492, 495 (D.C. App. 1969).

[106]*Id.; see also* King v. Moorehead, 495 S.W.2d 65, 79 (Mo. Ct. App. 1973).

[107]257 A.2d 492 (D.C. App. 1969).

[108]*Id.* at 495. Indiana has a statute similar to the District of Columbia statute which provides that a tenancy at will can only be created by express agreement. Ind. Code § 32-7-1-2 (1982). Indiana, however, would not require a notice to quit to terminate a tenancy at sufference. Ind. Code § 32-7-1-7 (1982). The entire question is probably moot in Indiana, however, because Noble v. Alis, 474 N.E.2d 109 (Ind. App. 1985), discussed *supra*, held

Whether the tenant is viewed as a tenant at will or a tenant at sufferance, however, the tenant will lose any benefits under the void lease and could be evicted immediately, or in some jurisdictions, upon giving the tenant the statutory notice to quit (usually thirty days).[109]

Where there is a shortage of decent housing or where the tenant has made a good bargain, he may not wish to terminate the lease under an illegal contract theory, but instead may wish to remain in possession under the lease and exert pressure on the landlord to comply with local housing code provisions. This is possible under the implied warranty of habitability theory.[110] Of course, if the tenant wishes to terminate the

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that the illegal contract defense is unavailable where the tenant has benefited from the lease by taking possession.

[109]One serious problem may still confront the landlord when he attempts to evict a tenant after the tenant has reported housing code violations to the proper authorities or has successfully pleaded an illegality defense or an implied warranty of habitability defense in a prior suit for possession based on the nonpayment of rent. In such a case the tenant may well claim that the eviction is in retaliation for the tenant's exercise of his legal rights. A classic — perhaps gothic — example of the problems that could await the landlord is set forth in Robinson v. Diamond Housing Corp., 463 F.2d 853 (D.C. Cir. 1973), the culmination of a series of legal actions filed by the landlord in an attempt to evict a tenant under an illegal lease. The landlord attempted to evict Mrs. Robinson for nonpayment of rent. She successfully argued that *Brown v. Southall Realty* (the illegal contract defense) prohibited the landlord from collecting accrued rent. The landlord filed a second action to evict her as a trespasser, only to discover that she was a tenant at sufferance. After giving her the required thirty days' notice, he once again attempted to evict her, only to be met with a retaliatory eviction defense. The lower court allowed the eviction, and on appeal to the District of Columbia Court of Appeals, the judgment for possession was affirmed. However, on appeal to the federal court of appeals, the judgment was reversed. The court noted that there had been a sudden rise in actions for possession based on notice to quit following closely behind successful *Javins* (implied warranty) and *Southall Realty* (illegality) defenses in actions for possession based on nonpayment of rent. To allow the landlord to evict the tenant in such a case would be to vitiate the tenant's legal rights recognized in *Javins* and *Southall Realty.* Thus the court concluded that the landlord could not evict Mrs. Robinson as long as his motive was to rid himself of the tenant because she was not paying rent. The court, however, suggested it was not "till death do them part," for Diamond could repair the premises, or if unable or unwilling to do so, could simply remove the property from the housing market. *Id.* The dissent felt this Draconian treatment of the landlord would discourage investment in rental housing. *Id.* at 872 (Robb, J., dissenting).

[110]In many of the implied warranty of habitability cases, the tenant chose to remain in possession and either repair the defective condition and deduct the cost of repair from the rent or withhold the rent until the landlord had made the necessary repairs. *E.g.*, Javins v. First Nat'l Realty, 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); Green v. Superior Court, 10 Cal. 3d 616, 111 Cal. Rptr. 704, 517 P.2d 1168 (1974); Glasoe v. Trinkle, 479 N.E.2d 915 (Ill. 1985), Marini v. Ireland, 56 N.J. 130, 265 A.2d 256 (1970); Pugh v. Holmes, 486 Pa. 272, 405 A.2d 897 (1979).

Several decisions recognizing both the illegal contract and implied warranty of habitability defenses have indicated that the two theories are inconsistent and that the illegal contract theory is appropriate only where the tenant wishes to terminate the lease. If the tenant wishes to remain in possession under the lease, he must elect to pursue the implied

lease because of the landlord's breach of the implied warranty of habitability, he can treat the breach as a common law constructive eviction[111] or use the contract remedy of rescission.[112]

Superficially, the illegal contract doctrine may appear to be very advantageous to one or the other of the parties. If the tenant has paid the agreed upon rent under the lease despite housing code violations, under the general principle of law that the courts will leave the parties to an illegal contract where it finds them, it would appear the tenant could not recover any past rental payments under the illegal contract.[113] The courts, however, have adopted a more equitable approach to the problem. Where the tenant is attempting to recover rent already paid to the landlord, the courts have applied two generally recognized exceptions to the rule that the law will leave the parties to an illegal

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warranty of habitability theory. Cooks v. Fowler, 459 F.2d 1269 (D.C. Cir. 1971); Hinson v. Delis, 26 Cal. App. 3d 62, 102 Cal. Rptr. 661 (1972); King v. Moorehead, 495 S.W.2d 65 (Mo. Ct. App. 1973).

[111]At common law, if the landlord substantially interfered with the tenant's use and enjoyment of the premises, the tenant could treat the landlord's breach of the covenant of quiet enjoyment as a constructive eviction and vacate the premises. A constructive eviction terminates the lease and the tenant's obligation to pay rent. Lafayette Realty Corp. v. Vonnegut's Inc., 458 N.E.2d 689 (Ind. Ct. App. 1984). There were two important requirements before the court would treat the landlord's breach as a constructive eviction: the landlord's breach must have been substantial, and the tenant must have vacated the premises within a reasonable time. Sigsbee v. Swathwood, 419 N.E.2d 789 (Ind. Ct. App. 1981). For a discussion of the doctrine of constructive eviction, see R. Cunningham, W. Stoebuck & D. Whitman, *supra* note 10, at § 6.33. In several of the early cases recognizing the warranty of habitability, the tenants used the remedy of constructive eviction and terminated the lease. Marini v. Ireland 56 N.J. 130, 265 A.2d 526 (1970); Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969); Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961). Caveat: Most courts which have recognized a warranty of habitability in residential leases have also indicated that before there can be a breach of the warranty, the landlord must be notified of the defective condition and given a reasonable time to repair. *E.g.*, Glasoe v. Trinkle, 479 N.E.2d 915 (Ill. 1985); Berzito v. Gambino, 63 N.J. 460, 308 A.2d 17 (1973); Pugh v. Holmes, 486 Pa. 272, 405 A.2d 897 (1979). Thus it would appear that the tenant could not treat the conditions as a constructive eviction until this requirement has been met. *See* Restatement (Second) of Property § 10.1 (1977).

[112]Several of the decisions have used the contract term "rescission" to describe the tenant's right to terminate the lease where the landlord has breached the implied warranty of habitability. *E.g.*, Lemle v. Breedon, 51 Hawaii 426, 462 P.2d 470 (1969); King v. Moorehead, 495 S.W.2d 65 (Mo. Ct. App. 1973); Kline v. Burns, 111 N.H. 87, 276 A.2d 248 (1971). It is not clear if the court will still require the tenant to vacate within a "reasonable time" under a contract theory as is required under the property concept of constructive eviction. For discussion of this point, see R. Cunningham, W. Stoebuck & D. Whitman, *supra* note 10, at § 6.41 (1984).

As discussed at *supra* note 111, the tenant may be required to notify the landlord and give him a reasonable opportunity to correct the defect before he can terminate the lease. Restatement (Second) of Property § 10.1 (1977).

[113]J. Calamari & J. Perillo, Contracts (2d ed. 1977).

contract where it finds them: (1) The court will not deny recovery of monies already paid where the parties are not in *pari delicto* because of an unequal bargaining position; and (2) the court will not refuse assistance where the statute in question was enacted for the protection of the party seeking recovery of monies paid pursuant to the illegal contract.[114]

If, on the other hand, the tenant has remained in possession but has refused to pay rent, it might appear under the *Brown* decision that the landlord is without any remedy because he cannot recover past due rent under the illegal lease.[115] However, the *Brown* decision did not address the landlord's right to recover in quantum meruit for the benefit received by the tenant from his possession. When the issue was raised in subsequent decisions, the courts held that the landlord was entitled to recover the reasonable rental value of the premises for the period of time the tenant was in actual possession.[116] In *William J. Davis, Inc. v. Slade*,[117] the District of Columbia Court of Appeals, relying in part on *Diamond Housing Corp. v. Robinson*,[118] allowed the landlord to recover in quantum meruit on the theory that, while the lease itself was void and unenforceable, a tenancy at sufferance was created and thus the tenant became liable for the reasonable rental value of his possession.[119] The court in *King v. Moorehead*[120] based its decision upon a much more practical rationale: "We prefer to base our decision openly on the hard reality that if, under existing conditions, the landlords were deprived of all rights because of noncompliance with housing codes there would be far fewer low income housing units available—landlords would find it to their economic advantage to abandon their properties rather than spend their separate resources to restore them to habitability."[121] If the

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[114]William J. Davis, Inc. v. Slade, 271 A.2d 412 (D.C. App. 1970) (tenant may not be *in pari delicto* because of disparity in bargaining position, but even if both parties are *in pari delicto*, on occasion, public policy would be better served by rescission); Glyco v. Schultz, 35 Ohio Misc. 2d 25, 289 N.E.2d 919 (Ohio Mun. 1972) (court will not apply *in pari delicto* rule where statute in question is for protection of one of the parties and where that party had no real choice but to acquiesce in the illegality).

[115]237 A.2d at 837. Denying the landlord possession for nonpayment of rent was in effect a finding that no rent was due and owing. Several other decisions have also indicated that the landlord is not entitled to the rent under the illegal lease. *E.g.*, Wm. J. Davis Inc. v. Slade, 271 A.2d 412 (D.C. App. 1970); Diamond Housing v. Robinson, 257 A.2d 492 (D.C. App. 1969), *motion denied*, 433 F.2d 497 (1970).

[116]*See infra* notes 117-18 and 120.

[117]271 A.2d 412 (D.C. App. 1970).

[118]257 A.2d 492. *See* discussion *supra* notes 107-09 and accompanying text.

[119]271 A.2d at 416.

[120]495 S.W.2d 65 (Mo. Ct. App. 1973).

[121]*Id.* at 79; *see also* Glyco v. Schultz, 35 Ohio Misc. 25, 289 N.E.2d 919 (Ohio Mun. 1972) (total abrogation of duty to pay rent would unjustly enrich tenant and be ruinous to landlord).

tenant is required to pay the reasonable rental value of the premises for the time of possession under the illegal contract doctrine, he is in no better position than he would be under an implied warranty of habitability theory.[122]

There are several other reasons why the tenant might prefer or even be required to use the warranty of habitability theory. First, most of the decisions allowing the *Brown* illegality defense have held that for the illegal contract theory to apply, the housing code violations must have been in existence at the inception of the lease.[123] On the other hand, cases recognizing an implied warranty of habitability in residential leases have indicated that the warranty not only covers conditions existing at the inception of the lease, but also creates a duty on the part of the landlord to maintain the premises in a habitable condition throughout the entire term of the lease.[124]

Second, the illegal contract theory depends upon the existence of a local housing code — there must be an ordinance which the contract violates before it can be declared illegal. In a number of jurisdictions, however, judical decisions and/or landlord-tenant legislation indicates

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[122]Courts have adopted three different approaches to the measure of damages for breach of the warranty of habitability. The measure of damage under standard contract approach would be the difference between the fair rental value of the premises as warranted and the fair rental value of the premises in their present condition. *E.g.*, Green v. Superior Court, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974). Under this approach the tenant might ultimately pay less than the fair rental value of the premises in their present condition. *See* discussion at *supra* note 71. Under the second approach the measure of damages would be the difference between the rent reserved under the lease and the fair rental value of the premises in their present condition. *E.g.*, Kline v. Burns, 111 N.H. 87, 276 A.2d 248, 252 (1971). Under this approach the tenant would pay the same rent as he would under the illegal contract theory. *See* R. SCHOSHINSKI, *supra* note 102. Under the third approach the measure of damages would be based on the percentage of use which the tenant lost because of the breach — the agreed rent would be reduced by an equal percentage. *E.g.*, Pugh v. Holmes, 486 Pa. 272, 405 A.2d 897 (1979). Once again, this should be close to, if not the same as, the amount of rent the tenant would be required to pay under the illegal contract theory. For a general discussion of the measure of damages under the implied warranty of habitability theory, see *supra* notes 65-76 and accompanying text.

[123]*E.g.*, Hinson v. Delis, 26 Cal. App. 3d 62, 102 Cal. Rptr. 661 (1972); Winchester Management Corp. v. Staten, 361 A.2d 187 (D.C. App. 1976); Riley v. Nelson, 256 S.C. 545, 183 S.E.2d 328 (1971).

[124]*E.g.*, Javins v. First Nat'l Realty, 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970) (the old nonrepair rule cannot coexist with obligations imposed upon landlord by typical modern housing code); Glasoe v. Trinkle, 479 N.E.2d 915 (Ill. 1985) (warranty requires that dwelling remain habitable throughout the term of the lease); Mease v. Fox, 200 N.W.2d 791 (Iowa 1972) (warranty of habitability creates a continuing duty on part of landlord to maintain the habitability of the dwelling during the entire term of the lease); Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970) (premises must remain habitable throughout the term of the lease); Pugh v. Holmes, 486 Pa. 272, 405 A.2d 897 (1979) (this warranty is applicable at the beginning of the lease and throughout its duration).

that the implied warranty of habitability can exist independent of a local housing code.[125] Similarly, where local housing codes exist, they often provide only a minimum standard of habitability and would provide no help to the middle class tenant.[126] Some decisions and/or legislation suggest the "habitability" standard of the implied warranty might be higher than housing code standards.[127] Thus, where there are no local housing codes or where the local housing code does not cover the defective condition, the implied warranty of habitability might still provide a remedy.

Despite the recognition of an implied warranty of habitability in residential leases, the illegality doctrine may still prove useful to the tenant in situations where an implied warranty of habitability might not

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[125]Glasoe v. Trinkle, 479 N.E.2d 915 (Ill. 1985) (housing code standards are only one factor to be considered in determining habitability); Boston Housing Authority v. Hemingway, 363 Mass. 184, 293 N.E.2d 831 (1973) (there may be instances where conditions not covered by the code regulations render the apartment uninhabitable); Pugh v. Holmes, 486 Pa. 272, 405 A.2d 897 (1979) (court declined to establish rigid standards for determining habitability preferring gradual development "in best common law tradition"). *But see* Winchester Management Corp. v. Staten, 361 A.2d 187 (D.C. App. 1976) (warranty of habitability only applied where there is a local housing code in effect). *Compare* Breezewood v. Maltbie, 411 N.E.2d 670 (Ind. Ct. App. 1980), where the decision is not clear whether the warranty can exist separate and apart from a local housing code.

Much of the recently enacted landlord-tenant legislation does not use housing code standards to define habitability under the statutory warranty. For example, the Uniform Residential Landlord Tenant Act ("URLTA") which has been enacted in some 18 states, defines habitability in terms of essential services, but seems to apply state wide to all residential housing, whether or not a local housing code exists. For a discussion of URLTA and other recently enacted landlord-tenant legislation, see Cunningham, *supra* note 11, at 59-74.

[126]*See* Moskovitz, *The Implied Warranty of Habitability: A New Doctrine Raising New Issues*, 62 CAL. L. REV. 1444, 1457-58 (1974).

Additionally, where code standards are worded in vague language, a court might interpret the statute as requiring more than "minimum" standards for habitability. *See* Himmel v. Chase Manhattan Bank, 47 Misc. 2d 93, 262 N.Y.S.2d 515 (N.Y Civ. Ct. 1965) (defective air conditioning system and elevators in luxury apartment were "dangerous" conditions within meaning of statute allowing rent abatement).

[127]Glasoe v. Trinkle, 497 N.E.2d 915 (Ill. 1985) (court declined to establish rigid standards for breach of warranty but gave guidelines distinct from housing code standards); Boston Housing Authority v. Hemingway, 363 Mass. 184, 201 n.16, 293 N.E.2d at 844 n.16 (1973) (there may be instances where conditions not covered by the code regulations render the apartment uninhabitable); Pugh v. Holmes, 486 Pa. 272, 405 A.2d 897 (1979) (existence of housing code violations is only one of several evidentiary considerations that enter into the materiality of the breach). *Contra* Winchester Management Corp. v. Staten, 361 A.2d 187 (D.C. App. 1976) (implied warranty measured "solely" by housing code standards); King v. Moorehead, 495 S.W.2d 65 (Mo. Ct. App. 1973) (landlord fulfills his obligation by substantial compliance with the relevant provisions of an applicable housing code).

Recently enacted landlord-tenant legislation such as URLTA establishes statewide standards of habitability which are often higher than local housing code standards. *See* Cunningham, *supra* note 11, at 65-74.

exist. In most jurisdictions, the implied warranty of habitability has been limited to residential leases and does not apply to commercial leases.[128] Although housing codes do not apply to commercial property,[129] where there are existing violations of building codes, electrical codes, or plumbing codes, the commercial tenant might be able to convince a court to apply the illegal contract doctrine.[130] Similarly, some jurisdictions by case law or legislation have limited the types of residential dwellings or types of leases to which the implied warranty of habitability applies.[131] In such a jurisdiction, the local housing codes might still apply to the residential unit even though the court would not find an implied warranty of habitability. The illegal contract doctrine might provide some relief to a tenant in such a situation. Finally, there may be housing code violations which do not necessarily affect the habitability of the premises, such as the failure to register the unit or to obtain an occupancy permit. At least one decision has applied the illegality doctrine where such housing code violations existed even though no actual breach of an implied warranty of habitability was proven.[132]

V. Conclusion

During the past sixteen years there has been nothing short of a revolution in residential landlord-tenant law. The application of the illegal contract doctrine to housing code violations and the recognition of an implied warranty of habitability in residential leases have replaced the old no duty to repair rule and the doctrine of *caveat lessee.* Nevertheless,

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[128]Most courts which have considered the issue have not extended the implied warranty of habitability to commerical leases. *See* R. Schoshinski, *supra* note 102, at § 3:29 n.61 (1980 and Supp. 1985).

[129]*See supra* note 10.

[130]The doctrine has been applied to leases in a variety of situations. *See* Hicks, *supra* note 4, at 470-81.

[131]A few states have limited the warranty of habitability to "multi-unit" rental structures. Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972) (reinterpreted by Pole Co. v. Sorrells, 84 Ill. 2d 178, 49 Ill. Dec. 283, 417 N.E.2d 1297 (1981) (warranty of habitability applies to single family dwellings as well)); Zimmerman v. Moore, 411 N.E.2d 690 (Ind. App. 1982). At least one court has also indicated that the warranty should not apply where the landlord is not a merchant in the business of leasing property. Zimmerman v. Moore, 411 N.E.2d 690 (Ind. Ct. App. 1982). *See also* Mallor, *The Implied Warranty of Habitability and the "Non-Merchant" Landlord*, 22 Duq. L. Rev. 637 (1984); Kline v. Burns, 111 N.H. 87, 276 A.2d 248 (1971).

Other states have statutorily limited the warranty of habitability in various ways. Mass. Gen. Laws Ann. ch. 186, § 19 (West 1981) (exempting owner-occupied two and three family dwellings); Neb. Rev. Stat. § 76-1408(8) (1981) (excludes leases of five years or more); Va. Code § 55-248.5 (1950) (not applicable to single family dwellings leased by landlord owning no more than 10 such residences).

[132]Noble v. Alis, 474 N.E.2d 109 (Ind. Ct. App. 1985). *See supra* notes 27-42. *Contra* Curry v. Dunbar House, 362 A.2d 686 (D.C. App. 1976).

in Indiana, the limited number of judicial decisions and the lack of legislation have left the scope of these new tenant remedies and landlord obligations uncertain.

For the attorney representing either the residential landlord or residential tenant, the predictability of the outcome of controversy under traditional rules of landlord-tenant law no longer exists. While the doctrine of *caveat lessee* may indeed be dead in Indiana, the attorney must still exercise caution in advising his client until further developments clarify the current residential landlord-tenant law.