The Next Step in the Evolution of the Implied Warranty of Habitability: Applying the Warranty to Condominums

Christopher S. Brennan
THE NEXT STEP IN THE EVOLUTION OF THE IMPLIED WARRANTY OF HABITABILITY: APPLYING THE WARRANTY TO CONDOMINIUMS

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INTRODUCTION

Three residential buildings are located side-by-side on the same street. A landlord owns the first building and tenants occupy its units. The second building is a cooperative, occupied by cooperative owners. The third building is a condominium, occupied by condominium owners. By coincidence, the water heaters in each of the three buildings burst at the same time, and the landlord and management agents fail to take corrective action. As a result, the occupants of all three buildings have no hot water for a month. In many jurisdictions throughout the United States, the tenants of the first building, along with the cooperative owners of the second building, have the unwaivable action or defense of an implied warranty of habitability. This doctrine allows for rent or maintenance fee abatements in response to habitability-threatening defects. The implied warranty of habitability would not be available, however, to the condominium owners of the third building.

The disparity in remedies available to tenants, cooperative owners, and condominium owners illustrated above is a result of reluctance by some courts to extend the implied warranty of habitability to condominium owners. While it is settled that purchasers of condominium units have the warranty of habitability available to them against their sellers for defects present at the time of purchase, this Note focuses on the warranty as a remedy against a condominium's board of direc-

* This Note is dedicated to my wife, Lisa, without whom none of this would be possible. I would also like to thank Professor Michael Madison of Fordham University School of Law for inspiring the topic.

1. See, e.g., Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1082 (D.C. Cir. 1970) (holding that “the tenant's obligation to pay rent is dependent upon the landlord's performance of his obligations, including his warranty to maintain the premises in habitable condition”); Richard Siegler, An Update on the Warranty of Habitability, N.Y. L.J., July 1, 1998, at 3 (“In the 23 years since [New York's warranty of habitability] was enacted, courts have repeatedly held it applicable to co-op apartments.”).

2. See, e.g., Agassiz W. Condominium Ass'n v. Solum, 527 N.W.2d 244, 247 (N.D. 1995) (indicating that “individual [condominium] unit owners may not withhold payment of common charges and assessments, because of disagreements over repairs to common areas”).

3. See Kathleen McNamara Tomcho, Note, Commercial Real Estate Buyer Beware: Sellers May Have the Right to Remain Silent, 70 S. Cal. L. Rev. 1571, 1572 (1997) (“[C]aveat emptor has been effectively abolished in residential real property transactions.”); see also Johnson v. Davis, 480 So. 2d 625, 629 (Fla. 1985) (holding that the seller of real property has a duty to inform the purchaser of any defects); Posner v. Davis, 395 N.E.2d 133, 137 (Ill. App. Ct. 1979) (same); Thacker v. Tyree, 297 S.E.2d 885, 888 (W. Va. 1982) (same).
tors for habitability-threatening defects that arise in the condominium's common areas during a resident's ownership and occupancy of his unit. 4

It may be enticing to dismiss this controversy by stating the obvious: because condominium owners hold deeds while tenants and cooperative owners hold leases, the estates' disparate legal compositions explain why statutes dealing with the implied warranty of habitability do not encompass condominiums. 5 Such a quick dismissal based on the statutory "letter of the law," however, does not take into account the evolution of the implied warranty of habitability and the engines that drove this evolution. This Note proposes that extending the implied warranty of habitability to condominiums is in line with the doctrine's common law development.

Part I of this Note examines the relative legal position that tenants, cooperative owners, and condominium unit owners possess in reference to their landlords and boards of directors. This part also discusses the similarities between these three forms of habitation. Part II evaluates the development of the implied warranty of habitability from its common law birth to its codification, and finally to its application to cooperatives. Part III analyzes the arguments against the extension of the statutory warranty to condominiums. This part demonstrates that the same equitable considerations that created an implied warranty of habitability for renters and cooperative owners demand that the common law doctrine be extended to condominiums. This Note concludes that the next logical step in the evolution of the implied warranty of habitability is to apply the doctrine to condominiums.

I. The Legal Definitions of Tenants, Cooperative Owners, and Condominium Unit Owners

This part analyzes the legal structures of the relationships between landlords and tenants, boards of directors and cooperative owners, and boards of directors and condominium unit owners. The analysis illustrates that tenants, cooperative owners, and condominium unit owners share a similar dependency: all rely upon their landlords or boards of directors to maintain the common elements that effect the habitability of their units.

4. More specifically, this Note focuses on the habitability-threatening defects that arise in the areas over which the board of directors generally retains control.

A. The Legal Structures

1. Landlord-Tenant Relationship

In the early Middle Ages, the tenant was not considered to be an owner of an interest in land.\(^6\) In fact, the tenant was "one who had no right in the land, but merely the benefit of a contract."\(^7\) As time progressed, however, the tenant gradually gained more possessory rights in the land, and the lease was eventually considered more a conveyance than a contract.\(^8\)

The hybrid nature of the lease as both a contract and a conveyance has led some states to view the lease as personal property and other states to view it as real property.\(^9\) The classification of a tenant’s property interest is important. If the tenant is viewed as an owner of real property, then the same statutory requirements that apply to an owner in fee apply to the tenant.\(^10\)

Regardless of how a tenant’s property interest is classified, all jurisdictions now view the focus of a residential lease to be shelter, not land.\(^11\) In addition, most jurisdictions recognize that whether or not a tenant is considered an owner of real property, he relies exclusively on his landlord to maintain the common elements that bear on the essence of his property interest: the habitability of the leased housing.\(^12\)

2. Board of Directors-Cooperative Owner Relationship

Cooperatives can be legally constructed in several ways. Since the early part of the twentieth century, the corporation has been the most widely used form to create cooperatives.\(^13\) The corporate form has become the most popular method primarily due its flexibility.\(^14\) It allows the owners to retain control over the management of the property and minimizes the owners’ liability exposure.\(^15\) Another possible

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\(^7\) Id. (quoting 2 Frederick Pollack & Frederick Maitland, History of English Law 36 (1895)).
\(^9\) See Powell & Rohan, supra note 6, § 16.02[2].
\(^10\) See id.
\(^11\) See id.
\(^12\) Cf. infra note 46 and accompanying text (discussing the role of a managing agent).
\(^13\) See Chester C. McCullough, Jr., Cooperative Apartments in Illinois, 26 Chi.-Kent L. Rev. 303, 309 (1948) ("The corporate form of organization has been by far the most popular in the co-operative housing movement.").
\(^14\) See id.
\(^15\) See Philip N. Smith, Comment, A Survey of the Legal Aspects of Cooperative Apartment Ownership, 16 U. Miami L. Rev. 305, 310 (1961) (identifying the disadvantage of the trust form as "the fact that its use either results in the relinquishment of control by the members or, if the control is exercised, there is a risk of personal liability").
method of forming a cooperative is to issue a title in fee to the occupant of each housing unit. Finally, the cooperative can originate in the form of a trust. Under the trust structure, title to the property is "transferred to a trustee who signs a declaration of trust and issues certificates of beneficial interest entitling the holder to occupancy of designated apartments." This section focuses on the corporate form of cooperatives.

One who promotes the cooperative venture must take the necessary pre-incorporation measures, just as he would if he were forming an ordinary corporation. One of these measures usually includes the acquisition of the land and building that will constitute the cooperative, which almost always requires the corporation to take out a mortgage. Once the corporation is formed and shares are issued, prospective apartment owners buy blocks of shares commensurate to the value of the unit they plan to occupy. Therefore, a cooperative owner does not own the space within his unit. For the owner to take legal possession of his particular unit, the corporation issues a proprietary lease. The stock certificate and the proprietary lease, held in conjunction, are viewed as a "unitary, indivisible whole not subject to separate ownership." While banks issue loans to owners for the purchase of stock, rather than for the purchase of individual units, the loan is almost always secured with an interest in the owner's proprietary lease for a specific unit.

All cooperative owners pay what is usually termed a maintenance fee. In a cooperative, only part of this monthly fee is for the cost of maintaining the common areas. The other part of the fee enables the

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16. See 1 American Law of Property § 3.10 (Casner ed. 1952) (discussing the possible legal structures of a cooperative).
17. See id.
18. Id.
19. Cf. Nina J. Crimm, Should Internal Revenue Code Section 277 Be Applied to Cooperative Housing Organizations?, 7 Akron Tax J. 87, 91 (1990) (indicating that, while promoters secure the underlying mortgage, cooperative shareholders enjoy the benefit of an income tax deduction commensurate to the portion of the underlying mortgage interest that is allocable to their units).
20. See 1 American Law of Property, supra note 16, § 3.10 ("Shares of stock . . . are sold to persons who will occupy the housing units, the number of shares . . . depending on the value of the particular . . . unit.").
23. Mortgages of individual cooperative owners are usually secured by filing a lien in accordance with the state's Uniform Commercial Code. See, e.g., N.Y. U.C.C. § 9-104(j) (McKinney 1990) (explaining the procedure to perfect a security interest in a cooperative).
corporation to pay its own real property taxes and underlying mortgage. In essence, then, the cooperative shareholder has double mortgage exposure: liability for the mortgage used to purchase his shares (as a shareholder) and for the corporation's underlying mortgage. As with a shareholder of any corporation, a cooperative owner runs the risk of losing his entire investment if the cooperative becomes insolvent. In such a situation, creditors foreclose on the real property owned by the corporation, and the proprietary lease becomes invalid.

Cooperative owners are subject to by-laws and the terms of their proprietary leases. The by-laws normally provide that a board of directors will govern the cooperative. The cooperative board of directors has a substantial voice in determining who may become a shareholder. In fact, a cooperative board "can refuse to allow a resident to sell his or her unit to a particular buyer 'for any reason or no reason,' as long as their decision is not based on illegal discrimination." Managing agents usually handle the day-to-day operations of cooperatives, including all back-office operations, upkeep of the common elements, maintenance of building systems, and the hiring of specialists to make emergency repairs. Nonetheless, the ultimate responsibility for the fitness of the common elements that bear on the habitability of each unit rests with the board of directors.

3. Board of Directors-Condominium Unit Owner Relationship

All condominiums share a basic legal definition. Each unit of the condominium is owned separately, and the owner of each unit holds a

25. Since a cooperative owner does not have a deed to his individual unit, the specific unit is not taxed. Rather, the entire real property of the cooperative is assessed, and the corporation pays this real property tax. See id. at 5.

26. See 1 American Law of Property, supra note 16, § 3.10 (stating that the maintenance fee "is based upon estimates of amounts necessary to pay operational costs and interest and installments of principal on any capital indebtedness"). The fact that the corporation, and not the individual owners (as with a condominium), pays the real property taxes and underlying mortgage on the real property makes the cooperative owner's maintenance fee more costly than that of a condominium owner.

27. See Schaffer v. Eighty-One Hundred Jefferson Ave. E. Corp., 255 N.W. 324, 327 (Mich. 1934) (explaining that cooperative shareholders share the same risks as shareholders in any other corporation and "must submit to the burdens as well as enjoy the benefits which inhere in the plan they adopt").

28. See id. (indicating that shareholders "are not necessary parties to the foreclosure suit").


30. Cf. infra Part I.A.3 (detailing how a condominium is governed).


32. See id. at 5-6.

33. Cf. infra note 46 and accompanying text.
deed to that specific unit. All of the unit owners have an undivided co-ownership of the common property outside of the separately owned units, and when an individual unit is sold, the appurtenant share of the common elements adhere to the unit. Thus, a condominium unit owner has a deed to the area within his unit and ownership interest in the deed to the condominium's common elements. If the owner requires a loan to purchase the condominium unit, then the owner mortgages that specific unit. Each unit owner is personally responsible for paying the real estate tax assessed on his unit only. Maintenance or association fees are paid by each of the unit owners for the maintenance of the common elements. Furthermore, the condominium statute of each state usually requires owners to comply with the declarations, by-laws, and administrative rules of the condominium.

Just as with a cooperative, a board of directors normally governs the condominium. The directors usually volunteer their services and are elected to the board by the other unit owners. Also, as cooperative boards do, condominium boards of directors regularly hire outside managing agents, who are responsible for handling the day-to-day operations of the condominium. In fact, it is not uncommon for both condominiums and cooperatives to employ the same managing agent. The managing agent's responsibilities to a condominium parallel its responsibilities to a cooperative. While a management contract can delegate a great deal of authority to the managing agent, the

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35. It is important to emphasize that in a condominium, the common elements are not owned by the association board, but rather by the owners of the individual units themselves. If the common elements have been deeded to the association, then co-ownership no longer exists, and the development is not a condominium. See, e.g., Thisted v. Country Club Tower Corp., 405 P.2d 432, 433 (Mont. 1965) (discussing the legal composition of a horizontal property apartment building).
37. See Co-op and Condo Ownership, supra note 24, at 6 (“[A] condo owner actually buys a piece of real estate—an apartment. . . . The common space and fixtures of the building are jointly owned by the unit owners according to the size and value of their apartments as each owner’s ‘common interest allocation.’”).
38. See id. (“Each owner may take out a mortgage to buy an individual unit.”).
39. See id.
40. See, e.g., Natelson, supra note 36, at 507 (discussing the Montana Unit Ownership Act).
41. See Co-op and Condo Ownership, supra note 24, at 6.
42. See id. at 5 (stating that “[t]he boards of . . . condos are made up of volunteers”).
43. See id. at 6 (explaining that “condos are also run by elected boards”).
44. See id. at 5-6.
45. See supra note 32 and accompanying text. The standard contract with a managing agent spans from one to three years. See Co-op and Condo Ownership, supra note 24, at 5-6.
board of directors is ultimately liable for ensuring that the condominium is run properly.\textsuperscript{46}

The sale of a condominium unit is similar to the sale of a house, with one exception: the condominium's board of directors has the right of first refusal.\textsuperscript{47} This means that if the board of directors objects to the sale of the unit, it has the right to purchase the unit itself.\textsuperscript{48} As a practical matter, boards rarely exercise their right of first refusal.\textsuperscript{49} Nevertheless, this board approval process is one of many fundamental similarities between condominiums and cooperatives.

\textbf{B. Cooperative/Condominium Similarities}

Courts often interchange the legal concepts of condominiums and cooperatives,\textsuperscript{50} because the two forms of property ownership are very similar.\textsuperscript{51} Both were created to deal with shortages of land and skyrocketing homeownership costs.\textsuperscript{52} Both condominium and cooperative owners jointly own the common areas of their real property,\textsuperscript{53} and the habitability of each unit depends upon the proper maintenance of these common areas. Moreover, condominium and cooperative owners elect a board of directors composed of volunteers.\textsuperscript{54} The success of both the condominium and the cooperative depends greatly on the competency of their respective boards and the proper selection of a managing agent to run day-to-day operations.\textsuperscript{55}

One may point to cooperative owners' potential liability for two mortgages as a significant difference between cooperatives and condo-

\begin{itemize}
\item \textsuperscript{46} Any authority that the managing agent possesses is derived from the agency relationship between the board as “master” and the managing company as “agent” established in the contract.
\item \textsuperscript{47} See Co-op and Condo Ownership, supra note 24, at 6.
\item \textsuperscript{48} See id.
\item \textsuperscript{49} See id. at 5-6.
\item \textsuperscript{50} See, e.g., Harrison Park Owners v. Dixon, 604 A.2d 165, 168 (N.J. Super. Ct. App. Div. 1992) (“Recent cases and statutory enactments tend to blur the distinction between co-operatives and condominiums.” (citations omitted)).
\item \textsuperscript{51} A cooperative owner, like a condominium owner, is more than a mere tenant or lessee. She has certain proprietary rights which a mere tenant does not have. She has most of the attributes of an owner. She has a voice in the management and operation of a building. . . . She has a voice, too, in the important matter of any proposed sale or mortgage of the property. More important, she has the exclusive, personal right to occupy her particular apartment. Hicks v. Bigelow, 55 A.2d 924, 926 (D.C. 1947).
\item \textsuperscript{52} See Keith B. Romney & Brad Romney, Condominium Development Guide 1-4 (revised ed. 1983) (observing that the condominium concept was created to address the lack of land in ancient Rome for residential construction); Note, Co-operative Apartment Housing, 61 Harv. L. Rev. 1407, 1407 (1948) (indicating that cooperative apartments gained popularity in urban areas following World War I due to a shortage of affordable residential housing).
\item \textsuperscript{53} See supra notes 20, 37 and accompanying text.
\item \textsuperscript{54} See supra notes 41-43 and accompanying text.
\item \textsuperscript{55} See supra notes 32, 44 and accompanying text.
\end{itemize}
miniums. But this increased liability is eventually balanced out, because "the purchase price of a condominimum is generally higher than that of a comparable cooperative, for this reason. Taking all things into account, the ownership costs are approximately the same."56

Financial considerations, more than legal considerations, will often determine whether a condominium or a cooperative is created.57 The promoter will analyze the economic climate and determine which form is more feasible at that particular time in that particular jurisdiction.58 Promoters view condominium and cooperative ownership as two available means to the same end: community homeownership.59

In short, tenancies, condominiums, and cooperatives are not exactly distinct breeds, but rather closely related hybrids. Indeed, all three are reliant on one form of management or another to ensure the "community" aspect of their home is maintained properly. This similarity is important to keep in mind when analyzing the development of the implied warranty of habitability, as discussed below in part II. Specifically, part II details the process by which courts, and later state legislatures, created and refined the warranty to meet the needs of a changing society.

II. THE EVOLUTION OF THE IMPLIED WARRANTY OF HABITABILITY

The emergence of the implied warranty of habitability at common law has been called "revolutionary,"60 while the court opinions that ignited this revolution have been described as "doctrinal flagship[s]."61 The warranty merits such accolades primarily because it usurped

57. In his article, Mark S. Rosen lists the following financial reasons for a sponsor's decision to create a cooperative instead of a condominium:
   1. The availability of underlying blanket mortgage financing at terms better than those for condominium-end loans for individual purchasers;
   2. The future ability of the cooperative to mortgage the real estate to avoid large special assessments for capital repairs;
   3. Better economic leverage for the individual homeowner in purchasing and financing their unit;
   4. The ability of other cooperative owners to conduct a credit review to ensure the financial capabilities of unit purchasers to pay maintenance fees;
   5. The ability of the sponsor to retire debt more quickly and, therefore, accelerate the reduction of its economic risks;
   6. Lower real estate tax assessments;
   7. Favorable income tax treatment for the owner of a rental complex seeking to convert.
Rosen, supra note 22, at 17.
58. See id.
59. See id.
61. Id. at 647.
ancient property concepts that had become entrenched in the English and American legal systems over hundreds of years.

The implied warranty of habitability applies to the landlord-tenant relationship during two different stages. At one stage, it applies to "commencement defects"—defects present on the premises at the time the parties enter into the lease agreement. At the next stage, the implied warranty of habitability applies to "post-commencement defects"—defects that develop on the premises after the start of the lease term. While the two stages are related, they developed separately and distinctly. This part looks at the development of the two stages, the codification of the warranty doctrine, and its eventual application to cooperatives.

A. The Common Law Birth of the Implied Warranty of Habitation

Before the development of the implied warranty of habitability, a fundamental premise in common law was that, "in the absence of some agreement, there is no obligation upon a landlord to make repairs upon leased property or to keep it in a safe condition." The reason for this doctrine was twofold. First, in medieval times, the bargained-for expectation of the tenant was the use of the land itself. Any structures on the land were usually easy to inspect, and courts assumed that the tenant had the skill to make any necessary repairs. Second, earlier courts held that the tenant more properly bore the burden of initial inspection of the home and subsequent repairs, because any structure on the land was considered an inconsequential part of the tenant's consideration. This "no repair" doctrine shares a common history with caveat emptor, the doctrine generally applicable to commencement defects. Beginning in the Middle Ages, English courts applied both doctrines to the conveyance of real property;

63. See id. at 1285.
64. See id. at 1286.
66. See Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1077 (D.C. Cir. 1970) (indicating that in the Middle Ages "the land was more important than whatever small living structure was included on the land") (citation omitted)); Pugh v. Holmes, 384 A.2d 1234, 1237 (Pa. Super. Ct. 1978) ("Because the focal point of early landlord-tenant relationships was the land itself, little attention was paid to the dwelling situated on the land.").
67. See Pugh, 384 A.2d at 1238 (emphasizing that "[i]t was assumed . . . that the agrarian tenant had the ability . . . to make simple repairs in the buildings").
68. But see Javins, 428 F.2d at 1077 n.33 (discussing the common law's deviation from the general rule in situations where a tenant's paramount consideration was, in fact, the housing itself, such as when the tenant was a guest of an inn).
American courts adopted this approach in the seventeenth century. Among other points, American courts adopted this approach in the seventeenth century.69 Between caveat emptor and the “no repair” doctrine, the general rule was that the landlord was completely insulated from liability at all stages of the tenancy.70

The “no repair” doctrine was even more formidable when combined with an equally entrenched common law contract principle: the doctrine of “independent covenants.”71 This doctrine mandated that even if the landlord covenanted to keep the leased premises in good repair, his covenant was independent of the tenant’s covenant to pay rent.72 Thus, the tenant was prohibited from withholding performance (i.e., paying rent) even if the landlord breached any promise he had made to complete needed repairs.73 Once again, these courts reasoned that any additional covenants in the lease made by the landlord were “merely incidental” to his main covenant of land conveyance.74 Therefore, as long as the landlord conveyed the land, the tenant had received his primary bargained-for consideration, obligating him to provide the landlord’s primary consideration—the rent.75

The medieval doctrines of “no repair” and independent covenants entered the twentieth century well-intact in the United States.76 But their foundation began to erode as their common law sibling, caveat emptor, came under heavy attack. In 1892, the Supreme Judicial Court of Massachusetts, in Ingalls v. Hobbs,77 was the first United States court to imply an initial warranty of habitability into a short-term lease for furnished premises.78 In Ingalls, a renter of a summer cottage sued her landlord to recover her $500 rental payment, claiming that the cottage was uninhabitable because it was infested with bugs.79 The court agreed with the renter and permitted recovery, explaining that “[i]t would be unreasonable to hold, under such circum-


70. See supra note 65 and accompanying text.

71. See Williston & Jaeger, supra note 8, § 890 (explaining that the doctrine of independent covenants was settled prior to the development of the contract principle of mutual dependency).

72. See 1 American Law of Property, supra note 16, § 3.11 (“[T]he covenants are assumed to be independent.”).

73. See Stone v. Sullivan, 15 N.E.2d 476, 479 (Mass. 1938) (“[T]he lessee’s covenant to pay rent and the lessor’s covenant or agreement to make ‘outside repairs’ . . . were independent.”).

74. See 1 American Law of Property, supra note 16, § 3.11.

75. See id.

76. See, e.g., Chambers v. Lowe, 169 A. 912, 914 (Conn. 1933) (applying the doctrine of “no repair”); Stone, 15 N.E.2d at 479 (applying the doctrine of independent covenants).

77. 31 N.E. 286 (Mass. 1892).


79. See Ingalls, 31 N.E. at 286.
stances, that the landlord does not impliedly agree that what he is letting is a house suitable for occupation in its condition at the time.”

The court emphasized that the bargained-for expectations of the tenant, namely, “[the house’s] fitness for immediate use of a particular kind, . . . is a far more important element entering into the contract than when there is a mere lease of real estate.”

Subsequent decisions expanded the scope of the Ingalls decision. For example, the Supreme Court of Minnesota, in Delamater v. Foreman, permitted Ingalls’s implied warranty of habitability to apply to a lease for an unfurnished apartment. There, the plaintiffs claimed that they were constructively evicted from their apartment because the unit was infested with bedbugs. The court observed that “[t]here is much in and about such an apartment building far beyond the control of a tenant in one of the apartments.”

According to the court, if tenants are invaded by a “verminous enemy” from areas outside their control, then the landlord has violated his implied covenant that “the premises will be habitable.”

Following Ingalls and Delamater, numerous states began to adopt statutes that imposed a duty on landlords to maintain leased premises in habitable condition. Many courts viewed these statutes as a legislative nod for them to imply that, at the outset of every lease, landlords warrant that the leased premises are in habitable condition.

This attack on caveat emptor came to a crescendo in the 1960s with the cases of Pines v. Persson and Brown v. Southall Realty Co.

In Pines, a group of students from the University of Wisconsin leased a house on the condition that the landlord would put the premises in good repair by the start of the lease. The landlord did not make the repairs and, in addition to the defects the students observed upon their initial inspection, housing inspectors later discovered that the plumbing, heating, and wiring systems were also defective. In
Brown, the landlord sued to evict tenants who refused to pay their rent when housing inspectors found “an obstructed commode, a broken railing and insufficient ceiling height in the basement.”

In both Pines and Brown, the tenants argued that even though the defects were present at the start of their leases, they were nonetheless entitled to withhold their rental payments because the defects violated local housing codes and rendered their units uninhabitable. Both courts determined that the lease agreements were void because the condition of the rental units violated the warranty of habitability, and found that the doctrine of caveat emptor would not interfere with this conclusion. As the Pines court observed:

To follow the old rule of no implied warranty of habitability in leases would, in our opinion, be inconsistent with the current legislative policy concerning housing standards. The need and social desirability of adequate housing for people in this era of rapid population increases is too important to be rebuffed by that obnoxious legal cliché, caveat emptor. Permitting landlords to rent “tumbledown” houses is at least a contributing cause of such problems as urban blight, juvenile delinquency and high property taxes for conscientious landowners.

Pines and Brown came after nearly a century of courts tinkering with the warranty of habitability’s application to commencement defects. With the courts focusing on the modern tenant’s bargained-for expectations vis-à-vis caveat emptor, it appeared that it would only be a matter of time before their focus shifted to the doctrines of “no repair” and independent covenants. Because the two applications are distinct, however, the elimination of these post-commencement doctrines was not a foregone conclusion. Nonetheless, the D.C. Circuit made the leap between the two applications in Javins v. First National Realty Corp.

In Javins, tenants directly challenged the doctrines of “no repair” and independent covenants. The tenants claimed that they were entitled to withhold their rental payments due to the landlord’s failure to correct approximately 1500 housing code violations that arose on the

94. See id. (“[P]rior to the signing of the lease agreement, [the tenant] was on notice that certain Housing Code violations existed on the premises in question.”); Pines, 111 N.W.2d at 413 (“There is no question in this case but that the house was not in a condition reasonably and decently fit for occupation when the lease term commenced.”).
95. See Brown, 237 A.2d at 837 (“‘T]he general rule is that an illegal contract . . . is void and confers no right upon the wrongdoer.’” (quoting Hartman v. Lubar, 133 F.2d 44, 45 (1942)); Pines, 111 N.W.2d at 413 (“Since there was a failure of consideration, [the tenants] are absolved from any liability for rent.”).
98. See id. at 1073.
premises after the commencement of their lease terms. In considering this claim, the court first emphasized that, in the case of the "modern apartment dweller," the value of the lease is not in the land itself, but in the habitability of the housing structure. Next, the court surveyed the current case law and acknowledged the reluctance of other courts to extend the implied warranty of habitability beyond commencement defects to include post-commencement defects as well. But the court found this authority to be non-persuasive, emphasizing that "[c]ourts have a duty to reappraise old doctrines in the light of the facts and values of contemporary life—particularly old common law doctrines which the courts themselves created and developed." Additionally, the court, in echoing Pines and Brown, observed that "inequality in bargaining power between landlord and tenant . . . mean[s] that landlords place tenants in a take it or leave it situation." Thus, according to the court, a standardized lease does not reflect all of the tenant's bargained-for expectations.

Finally, the court examined the adverse impact that the doctrines of "no repair" and "independent covenants" had on the social policies advanced by state statutes requiring landlords to meet a minimum standard of habitability.

With these considerations in mind, the court extended the warranty of habitability to post-commencement defects. The court observed that "by signing the lease the landlord has undertaken a continuing

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99. See id. at 1072 ("These cases present the question whether housing code violations which arise during the term of a lease have any effect upon the tenant's obligation to pay rent." (citation omitted)).
100. Id. at 1074.
101. See id. ("When American city dwellers, both rich and poor, seek 'shelter' today, they seek a well known package of goods and services—a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance." (citation omitted)).
102. See id. at 1076 ("Recent decisions have offered no convincing explanation for their refusal; rather they have relied without discussion upon the old common law rule that the lessor is not obligated to repair . . . ." (citation omitted)). Prior to Javins, courts often applied state statutes requiring landlords to maintain leased premises in good repair under the penalty of law. See supra note 87. But the statutes did not explicitly indicate that the landlord warranted the habitability of the premises to the tenant. Most courts were reluctant to subject landlords to punishment under the provisions of these statutes while simultaneously providing tenants with a viable action or defense against the landlord. See, e.g., Kearse v. Spaulding, 176 A.2d 450, 451 (Pa. 1962) (arguing that if the legislature intended to create this remedy for tenants it would have done so explicitly).
103. Javins, 428 F.2d at 1074 (citation omitted).
104. Id. at 1079 (citations omitted).
105. See id. at 1079-80.
106. See id. at 1082 ("To follow the old rule of no implied warranty of habitability in leases would, in our opinion, be inconsistent with the current legislative policy concerning housing standards." (quoting Pines v. Perssion, 111 N.W.2d 409, 412-13 (Wis. 1961))).
107. See id.
obligation to the tenant to maintain the premises.\textsuperscript{108} The court applied contract principles\textsuperscript{109} to the lease agreement and concluded that the landlord's proper maintenance of the leased premises was a condition precedent to the tenant's performance of paying rent.\textsuperscript{110}

\textit{Javins} was quickly\textsuperscript{111} followed by decisions throughout the United States that extended the implied warranty of habitability to post-commencement defects.\textsuperscript{112} \textit{Javins} and its legacy used common law to effectively destroy the doctrines of "no repair" and independent covenants.\textsuperscript{113} The decision's blustering momentum motivated state legislatures to consider further insulating their social policies by codifying the implied warranty of habitability.

**B. Codification of the Implied Warranty of Habitability**

The National Conference of Commissioners on Uniform State Laws sought to eliminate state courts' reluctance to provide tenants with the warranty remedy.\textsuperscript{114} Therefore, in 1972, when the Commissioners adopted the Uniform Residential Landlord and Tenant Act ("URLTA"),\textsuperscript{115} it contained section 2.104, which "clearly states the principles of the implied warranty of habitability" without specifically mentioning the warranty itself.\textsuperscript{116}

The Commissioners' intent was to fuse the warranty of habitability as it existed in the case law of numerous jurisdictions\textsuperscript{117} with the statutory obligations that had been imposed on landlords for nearly a cen-

\textsuperscript{108} \textit{Id.} at 1081 (emphasis added).

\textsuperscript{109} Although \textit{Javins} has been praised by many scholars for infusing contract law into antiquated property law, the fact of the matter is that "[o]riginally the lessee's rights were purely contractual." 1 American Law of Property, \textit{supra} note 16, § 3.11. So, in essence, \textit{Javins} simply brought landlord-tenant common law full circle.

\textsuperscript{110} \textit{Javins}, 428 F.2d at 1082 ("Under contract principles, however, the tenant's obligation to pay rent is dependent upon the landlord's performance of his obligations, including his warranty to maintain the premises in habitable condition." (footnote omitted)).

\textsuperscript{111} Within two weeks after the \textit{Javins} decision, the New Jersey Supreme Court, in \textit{Marini v. Ireland}, 265 A.2d 526, 532-34 (N.J. 1970), recognized a warranty of habitability in residential leases.

\textsuperscript{112} \textit{See} Olin L. Browder, \textit{The Taming of a Duty—The Tort Liability of Landlords}, 81 Mich. L. Rev. 99, 111 (1982) (indicating that the \textit{Javins} decision became the model used by courts looking to apply the implied warranty of habitability).

\textsuperscript{113} \textit{See}, e.g., Berzito v. Gambino, 308 A.2d 17, 21 (N.J. 1973) (holding that a tenant's obligation to pay rent and a landlord's warranty of habitability are mutually dependent).


\textsuperscript{116} Pullen, \textit{supra} note 114, at 347.

\textsuperscript{117} \textit{See} id. at 346-47.
The results of their efforts were well-defined guidelines for landlords. Section 2.104 begins with the broad generalization that a landlord “shall make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition.”119 It then defines the maintenance of habitability by indicating that a landlord “shall maintain in good and safe working order and condition all electrical, plumbing, sanitary, heating, ventilating, air-conditioning, and other facilities and appliances, including elevators, supplied or required to be supplied by him.”120 URLTA failed, however, to explicitly state that a warranty of habitability is implied in every residential lease. Nevertheless, most courts understood that the Commissioners intended to do just that.121 The result was that a total of twenty-three states adopted URLTA by statute in one form or another.122 Moreover, the rhetoric of the Javins decision motivated numerous state legislatures to explicitly spell out that the warranty of habitability was an unwaivable aspect of every residential lease. For example, title 9, section 4457 of the Vermont Statutes Annotated sets forth that “[i]n any residential rental agreement, the landlord shall be deemed to covenant and warrant to deliver over and maintain, throughout the period of the tenancy, premises that are safe, clean and fit for human habitation.”123 In addition, New York Real Property Law section 235-b states, in part, that “the landlord or lessor shall be deemed to... warrant that... [tenants] shall not be subjected to any conditions

118. This seems to follow the “normal” process of codification. See Ronald J. Allen, The Explanatory Value of Analyzing Codifications by Reference to Organizing Principles Other Than Those Employed in the Codification, 79 Nw. U. L. Rev. 1080, 1080 (1984-1985) (“The process of codification normally proceeds by identifying the basic concerns of the case law of the relevant area, supplemented, of course, by consideration of the contributions of any relevant statutes.”).


120. Id. § 2.104(a)(4).

121. See, e.g., Schaefer v. Murphey, 640 P.2d 857, 860 (Ariz. 1982) (holding that the specific duties listed within the Arizona statute, which was modeled after URLTA, define the warranty of habitability); Detling v. Edelbrock, 671 S.W.2d 265, 270 (Mo. 1984) (“Habitability is to be measured by community standards, reflected in most cases in local housing and property maintenance codes.”).


which would be dangerous, hazardous or detrimental to their life, health or safety.124 Many states that adopted an explicit warranty of habitability, however, have a much less detailed statutory definition of the warranty itself, preferring to rely on their rich history of case law to fill the gap.125

The American courts, beginning with Ingalls and culminating with the Javins legacy, created the implied warranty of habitability through innovative and necessary case law. State legislatures could not ignore the need for the law to mature as the realities of society changed. The momentum that the case law created for the implied warranty of habitability resulted in it being codified in most states and settled law in almost every state.126

C. Application of the Implied Warranty of Habitability to Cooperatives

Soon after states created a statutory warranty of habitability for renter-tenants, courts were asked to determine whether these statutes applied to cooperative owners.127 The few courts that have directly addressed this issue focus on the relationship between the cooperative and its shareholders.128 This section first looks at cases that have considered the board of directors-shareholder relationship analogous, under certain circumstances, to a landlord-tenant relationship. Next, this section examines cases that have extended the statutory warranty of habitability to cooperative owners.

1. Comparison of Cooperative Shareholders to Tenants

When not directly faced with the issue of whether the warranty of habitability should apply to cooperative shareholders, courts have generally accepted the proposition that the relationship between co-

128. See, e.g., Laight Coop. Corp. v. Kenny, 430 N.Y.S.2d 237, 239 (Civ. Ct. 1980) (examining the relationship between the cooperative and its shareholders); Hauptman, 418 N.Y.S.2d at 729 (indicating that “at the outset . . . the relationship between an apartment cooperative and the various cooperators” should be determined).
operative boards of directors and their shareholders could be favorably compared to a landlord-tenant relationship in particular situations.\textsuperscript{129} For example, some courts have held that because cooperative shareholders occupy their own units under a lease, the relationship between a cooperative and its shareholders is, in fact, equivalent to the relationship between a landlord and his tenants.\textsuperscript{130} In Green v. Greenbelt Homes, Inc.,\textsuperscript{131} the Court of Appeals of Maryland held that a cooperative shareholder should not be treated as an owner of realty, but instead as a holder of a leasehold interest (i.e., tenant).\textsuperscript{132} The court observed that a corporate cooperative has access to all of the legal remedies available to a landlord and can terminate a proprietary lease based on a cooperative owner's misconduct.\textsuperscript{133} It upheld the board's claim against the cooperative shareholder by rendering the shareholder's ownership interest valueless through the termination of his lease.\textsuperscript{134} In doing so, the court ignored the cooperative shareholder's ownership interest and relied exclusively on landlord-tenant law: "The courts have recognized that the relation is that of landlord and tenant in allowing the corporation the usual remedies of a landlord against a tenant."\textsuperscript{135} The court, however, did not address the warranty of habitability issue, limiting its interpretation of a cooperative shareholder as a tenant to the specific question of whether the cooperative has the right to terminate a proprietary lease due to a shareholder's misconduct.

Other courts have looked to their state legislatures for guidance on how to define the role of the cooperative shareholder in certain situations. The New York Court of Appeals, in State Tax Commission v. Shor,\textsuperscript{136} found that state banking laws were "persuasive" evidence of legislative intent that "the stock certificate and proprietary lease of a co-operative apartment corporation are to be treated under principles governing personal property," rather than real property.\textsuperscript{137} This clas-

\textsuperscript{129} But see United Hous. Found. v. Forman, 421 U.S. 837, 847-58 (1975) (holding that, for the narrow purpose of interpreting the Federal Securities Acts, cooperative units should be treated as realty, not leasehold estates held by tenants).

\textsuperscript{130} See, e.g., Sun Terrace Manor v. Municipal Court, 108 Cal. Rptr. 307, 309-10 (Ct. App. 1973) (recognizing a landlord-tenant relationship with respect to the application of summary proceeding statutes); Hauptman, 418 N.Y.S.2d at 729 (same).

\textsuperscript{131} 194 A.2d 273 (Md. 1963).

\textsuperscript{132} See id. at 277.

\textsuperscript{133} See id.

\textsuperscript{134} See id. The shareholder's ownership interest was rendered valueless because shares in a cooperative are meaningless without their accompanying proprietary lease. See Edward M. Ross, Condominium in California—The Verge of an Era, 36 S. Cal. L. Rev. 351, 352-53 (1963).

\textsuperscript{135} Green, 194 A.2d at 276 (citation omitted); see also Frank S. Sengstock & Mary C. Sengstock, Homeownership: A Goal for All Americans, 46 J. Urb. Law. 313, 435, 443 (1969) (stating that the cooperative shareholder's "relationship to the property is that of a lessee who has some control over his landlord's action").

\textsuperscript{136} 371 N.E.2d 523 (N.Y. 1977).

\textsuperscript{137} Id. at 526.
sification moved the definition of a shareholder much closer to that of a tenant, because the shareholder, like the tenant, is not considered an owner of real property in New York. The court indicated that the legislative intent behind New York's banking law would be undermined if the cooperative owner's interest were defined as that of a real property owner in this specific context. At the same time, however, the court limited its holding to cases involving the prioritization of secured interests in cooperative shares under section 9 of the Uniform Commercial Code. The court observed that because this case dealt with banking laws, it could be distinguished from other non-banking cases that generated seemingly contradictory definitions of cooperative shareholders.

In 1973, a California appellate court considered whether an "unlawful detainer" statute, originally designed for use by landlords against "holdover" tenants, could be used by a cooperative's board of directors to evict a shareholder. The court initially observed that for such an action to be sustained, the relationship between the cooperative and the shareholder would have to be classified as a landlord-tenant relationship. After indicating that there was no California case law on point, the court "turn[ed] to other authorities that have considered the character of the relationship of a corporate cooperative with the shareholder-tenant." Relying on cases decided in Maryland and New York, along with the opinions set forth in various law review articles, the court concluded that the cooperative-shareholder relationship was equivalent to the landlord-tenant relationship. The court, however, limited its holding to unlawful detainer actions, and "express[ed] no opinion as to any other legal relationships that may exist between [the cooperative] and [its shareholders]."

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138. See Powell & Rohan, supra note 6, § 16.02[2].
140. See id. at 527 (discussing how secured interests in stock and a proprietary lease of a cooperative should be handled like a security interest in chattel paper under UCC § 9-305).
141. See id. ("Different policy reasons underlie those decisions, and those reasons do not necessarily support or controvert their applicability to the problems at hand.").
143. See id. at 309.
144. Id.
146. Sun Terrace Manor, 108 Cal. Rptr. at 310 n.4. No state high court has squarely addressed the question of whether the statutory warranty of habitability applies to cooperatives. Further, cases that address this issue at all are scarce; only New York has a modest stable of cases. This is probably due to the fact that there are approxi-
2. Extending the Statutory Warranty of Habitability to Cooperatives

Once courts established that, under certain circumstances, the cooperative-shareholder relationship could be treated as a landlord-tenant relationship, the question arose as to whether the statutory warranty of habitability could be applied to cooperatives. From the late 1970s to the early 1980s, several New York cases answered this question in the affirmative.147 In Hauptman v. 222 E. 80th St. Corp., a shareholder brought a cause of action against his cooperative for its failure to repair the ceiling in his apartment.149 Along with a breach of contract action, the shareholder claimed a violation of New York’s statutory warranty of habitability.150 The court declared that “[a] stockholder in a cooperative does not own his own apartment, but rents it from the cooperative corporation of which he owns shares.”151 As a result, the court found that the relationship between an apartment cooperative and the various cooperators could be favorably compared to a landlord-tenant relationship.152 The court then analyzed New York’s statutory warranty of habitability and concluded nothing in the statute indicated “an intention by the legislature to exempt cooperatives from the ambit of the warranty.”153 Ultimately, the court held the board of directors responsible for making the necessary repairs.154

148. 418 N.Y.S.2d 728.
149. See id. at 729.
150. See id.
151. Id. (citation omitted).
152. See id.
153. Id. at 730.
154. See id.
The New York Civil Court followed the precedent it established in Hauptman in Laight Cooperative Corp. v. Kenny.\textsuperscript{155} Kenny, a cooperative shareholder, withheld $4000 in maintenance fees, claiming faulty construction work supervised by the corporation. The board of directors brought summary proceedings against the shareholder to recover payment, insisting that the shareholder was precluded from raising the implied warranty of habitability as a defense.\textsuperscript{156} For a second time, the court interpreted New York’s statutory warranty of habitability as being “explicit and inclusive” and applying to cooperatives.\textsuperscript{157} The court explained the inequity that would result from a contrary holding:

An examination of the relationships in a housing cooperative reveals that a minority shareholder is often as powerless against the board of directors as any tenant vis-à-vis a landlord. In such a situation a tenant/cooperator cannot even obtain the advantages of a tenant organization since the other tenants are, in effect, the landlord. To distinguish cooperative housing corporations from rental housing entities for one purpose (warranties) and treat them identically for others (summary proceedings) may create the anomalous situation where a tenant in a cooperative is subject to all of the liabilities but none of the rights of a tenant in a rental building.\textsuperscript{158}

The court was primarily motivated by a sense of fairness and equity for cooperative shareholders, along with a desire to compensate for the shareholders’ lack of bargaining power with respect to their boards of directors. Kenny placed cooperatives within the statutory warranty not because it was a good fit, but because it was equitable\textsuperscript{159}—just as the Javins court felt it equitable to create the implied warranty of habitability for renters.\textsuperscript{160}

Hauptman and Kenny set the stage for Suarez v. Rivercross Tenants' Corp.,\textsuperscript{161} which has been cited as the primary authority concerning the extension of the implied warranty of habitability to cooperatives.\textsuperscript{162} Suarez, a shareholder, brought an action against his cooperative for “breach of the lease terms as well as breach of the statutory duty to supply heat.”\textsuperscript{163} In reviewing the trial court’s denial of the parties' motions for summary judgment, the Appellate Term's majority quickly validated the lower court’s decision and, in dictum, launched

\textsuperscript{155} 430 N.Y.S.2d 237 (Civ. Ct. 1980).
\textsuperscript{156} See id. at 238-39.
\textsuperscript{157} Id. at 239.
\textsuperscript{158} Id.
\textsuperscript{159} See id.
\textsuperscript{160} See supra notes 104-06 and accompanying text.
\textsuperscript{162} See Richard Siegler, \textit{Responsibility for Repairs in Co-ops and Condominiums}, N.Y. L.J., Nov. 21, 1984, at 1 (“The applicability of the implied warranty of habitability to cooperative apartments was affirmatively resolved by [the] 1981 decision of [Suarez].”).
\textsuperscript{163} Suarez, 438 N.Y.S.2d at 165.
into a justification for extending the statutory warranty of habitability to cooperatives.\textsuperscript{164}

The \textit{Suarez} majority used the holdings of \textit{Shor, Hauptman}, and \textit{Kenny} to justify its support for extending the statutory warranty of habitability to cooperatives.\textsuperscript{165} It did not suggest the extension because cooperatives fit so perfectly within the parameters of the statute, but rather because it makes sense and is equitable. As the court observed:

\begin{quote}
Whether the [statutory warranty of habitability] was intended to apply to the proprietary lessor-lessee situation ... is ... not expressly stated in the statute. Nevertheless, "It is not unprecedented in our jurisprudence for language shaped by a particular purpose to be found useful in responding to other problems," and as a matter of sound policy the [cooperative shareholder] ... should enjoy whatever benefits flow from the warranty of habitability.\textsuperscript{166}
\end{quote}

While conceding that placing cooperatives within the gamut of the statutory warranty is like "pounding square pegs in round holes,"\textsuperscript{167} the \textit{Suarez} majority justified its manipulation of the statute by indicating that "the result should be ... an increased attention on the part of cooperative boards of directors to the well-being of the members of the cooperative."\textsuperscript{168}

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{164}] See id. ("While there are indeed fact issues that require a trial, this court cannot ignore the issue of whether or not the statute (RPL 235-b) applies to cooperative apartments.").
\item[\textsuperscript{165}] See id. at 166-67.
\item[\textsuperscript{166}] Id. at 167 (citation omitted). The court further noted that the cooperative shareholder "is entitled to the statutory protection as well as the non-investing, ordinary tenant." Id.
\item[\textsuperscript{167}] Id.
\item[\textsuperscript{168}] Id. A concurring judge in \textit{Suarez} was much more concerned about the majority's use of the statutory warranty in this situation. He suggested that it was intellectually dishonest to include cooperatives in the statutory warranty:

\begin{quote}
There is little if any basis for concluding that the Legislature intended to extend the application of [the statutory warranty] to the sui generis relationship which exists between the cooperative corporation and its shareholders. ... [I]t is nowhere stated in the statute ... that the ameliorative legislation was ever intended to apply to the proprietary lessor-lessee situation.
\end{quote}

\textit{Id.} at 169 (Asch, J., concurring). The judge reminded the majority that even if the statutory warranty were not available to cooperative owners, the shareholders would still have other legal tools to sustain an action against the cooperative corporation. \textit{See id.} (Asch, J., concurring). Specifically, the fiduciary relationship that exists between a cooperative and its shareholders creates an arsenal of effective remedies available to the cooperative owner (i.e., breach of fiduciary duty). \textit{See id.} (Asch, J., concurring). For this reason, the judge doubted that "the Legislature considered it necessary to further protect the cooperative shareholder through application" of the statutory warranty of habitability. \textit{Id.} (Asch, J., concurring). While the judge did not shut the door to the possibility of providing cooperative shareholders with a warranty of habitability, he expressed his doubts regarding the wisdom of manipulating the inflexible statutory warranty to include cooperatives. \textit{See id.} at 169-70 (Asch, J., concurring).
\end{enumerate}
\end{footnotesize}
The majority also confronted one criticism of the extension: by applying the implied warranty of habitability to a shareholder, the court is providing a remedy for the shareholder to sue himself and thus attack his own interests. In other words, "[T]here is thus created the anomalous situation that one who is essentially an owner (by virtue of his purchase of shares) is in a sense suing himself."169 The court answered this challenge by drawing a parallel between the cooperative shareholder and the shareholder of a major corporation: "No one would deny the owner of shares of stock in General Motors the right to sue that corporation if he purchased a defective vehicle."170

Undoubtedly, the statutory warranty of habitability is not a comfortable fit for anyone other than tenants. With some difficulty, the statutory warranty has been stretched to encompass cooperatives. Part III illustrates that the elasticity of the statutory warranty is at its limits and suggests that, to maintain the doctrine's integrity while satisfying equity, it should be applied to condominiums via the common law.

III. Extending the Implied Warranty of Habitability to Condominiums Via the Common Law

This part begins by analyzing the difficulties of extending the statutory warranty to condominiums. It then discusses the inequity in each of the arguments used to deny condominium unit owners relief under the warranty doctrine. A synthesis of these two perspectives demonstrates that the problem is not with the application of the warranty doctrine to condominiums, but rather with the attempted application of inflexible statutes intended for renter-tenants. Finally, this part proposes that both law and equity are satisfied when the common law is used to extend the warranty to condominiums.

A. Arguments Against the Extension of the Warranty to Condominiums

Courts have developed various justifications for refusing to extend the warranty of habitability to condominiums. First, courts have pointed to their state legislatures' failure to specifically provide an implied warranty of habitability for condominiums.171 These courts re-

169. Id. at 167.
170. Id. Perhaps an even more powerful analogy can be drawn between cooperative shareholders and shareholders of publicly held corporations that own and manage rental properties. An example of such a corporation is Avalon Bay Communities, Inc., which is listed on the New York Stock Exchange. See Stock Tables, N.Y. Times, Feb. 23, 1999, at Cl. It is unlikely that any court would hold that a shareholder of Avalon Bay Communities, Inc., who was also a tenant at one of the corporation's properties, would be barred from using the warranty of habitability on the basis that he would be using it against his own "interests."
171. See, e.g., Pooser v. Lovett Square Townhomes Owners' Ass'n, 702 S.W.2d 226, 230 (Tex. Ct. App. 1985) (holding that the state Condominium Act does not mandate
garding legislative silence as being dispositive on the warranty issue. As one court has observed, "Had the Legislature intended to allow owners of condominium units to withhold assessments where owners believe that their condominium association is not performing its obligations properly, we believe the Legislature would have explicitly so provided." 172

Along the same lines, some courts have found that, because condominium by-laws generally contain no provision that allows an owner to withhold his maintenance fee payments when management fails to maintain the common elements, the owner must continue to make payments regardless of management's failure to act. 173 This rationale embraces a contractual policy that "apartment owners in condominiums accept the terms, conditions, and restrictions in their Condominium Declaration by acceptance of deeds to the individual apartment units." 174

Other courts have relied on the differing legal compositions of cooperatives and condominiums as a reason for declining to extend the statutory warranty of habitability to condominiums. 175 Indeed, as one court has noted, "While some superficial aspects of condominium and cooperative ownership are similar, (e.g., the payment of monthly charges for the maintenance of common areas), the two forms of interest in real property are fundamentally different by design and as a matter of law." 176 Therefore, according to this reasoning, the fact that the statutory warranty has been applied to cooperatives is irrelevant with respect to condominiums.

that "the duty to pay assessments is contingent upon the obligation to repair common elements").


173. The Pooser court indicated that:

In fact, the declaration provides for no exemption whatsoever from payment of the assessments, stating in pertinent part: "No Owner is or shall be exempt from such obligation to make such payment by waiver of use of the Common Areas, or any portion thereof, or because of any restrictions of such use pursuant to this Declaration, the By-Laws or the Rules and Regulations, or for any other reason."

Pooser, 702 S.W.2d at 230.

174. Id. at 230-31 (citations omitted). See also Agassiz W. Condominium Ass'n v. Solum, 527 N.W.2d 244, 247 (N.D. 1995) (noting that, under the condominium owner's declaration and by-laws, an owner has no authority to "withhold assessments for common charges for any reason"); Rere, 568 A.2d at 263 (observing that the by-laws "explicitly require that a unit owner continue to pay the condominium assessment even if the owner is not receiving services owed to him, i.e., repairs to the common elements").


176. Frisch, 597 N.Y.S.2d at 965. The Appellate Division issued this holding not withstanding the lower court's observation that the "trend in case law has been toward wider application of the [implied warranty of habitability's] protection." Id. (citing the lower court).
Still another argument maintains that providing condominium unit owners with an implied warranty of habitability offends good business sense. This argument contends that making the withholding of maintenance payments illegal benefits all unit owners because if all unit owners continue to pay their monthly fee, the board will be able to cover the condominium's operating costs and make necessary repairs. In other words, the extension of the implied warranty of habitability to condominiums would allow unit owners to sabotage the condominium's operations and thus commit legal suicide.

B. Inequity of Arguments Refusing to Extend the Warranty to Condominiums

Upon close examination, it becomes evident that each of the categorical arguments for not extending the warranty to condominiums is inapplicable. Most of the concerns raised by courts that refuse to extend the warranty to condominiums have been answered by the Javins legacy. This section examines these concerns.

1. Silence of the Legislature

The Javins court decided that while legislatures may not have explicitly created a warranty of habitability, they had passed housing laws to promote habitable housing standards. Thus, according to Javins, a judicially-created implied warranty of habitability for renter-tenants was in accordance with current legislative intent, despite the absence of a warranty of habitability statute, because the doctrine supported existing statutes' objective of maintaining habitable housing. Similarly, courts have applied some housing standards that legislatures originally created for rental units to condominiums, because these standards promote and ensure habitable housing, whatever legal form the housing may take. These holdings suggest that extending the warranty of habitability to condominiums is not at odds with the legislative intent behind statutes that have already been enacted.

Pershad v. Parkchester S. Condominium is one court's interpretation that its state's legislature also intended to regulate the habitability

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177. See Rere, 568 A.2d at 263.
180. See id.
181. See id.
183. 662 N.Y.S.2d at 993.
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of condominiums. In *Pershad*, a condominium board claimed that a housing court did not have subject matter jurisdiction over its dispute with a unit owner, who asserted that the board had failed to make necessary repairs to the common elements.\textsuperscript{184} The board claimed that the housing court was “restricted to the resolution of disputes between a landlord and tenant and not a condominium unit owner.”\textsuperscript{185} The court disagreed, observing that the “function of the Housing Court . . . [is the] protection and enforcement of state and local laws for the establishment and maintenance of housing standards,”\textsuperscript{186} and held that it did have subject matter jurisdiction over the case.\textsuperscript{187}

The condominium board further argued that it was not subject to New York’s Housing Maintenance Code, because the code applied only to landlords.\textsuperscript{188} The court refused to accept this argument, finding that:

The definition of an owner under [the] Housing Maintenance Code . . . includes any other person, firm or corporation, directly or indirectly in control of the building. Although this definition is extremely broad, there is a strong indication that it includes the association, and its managing agent. A contrary interpretation is clearly unrealistic. What party or agent would be responsible for maintaining the pipes and other areas of common elements other than the association?\textsuperscript{189}

The court noted that the Housing Maintenance Code has “already been held to apply to residents of cooperative units,” and it should apply to condominiums as well.\textsuperscript{190}

The interpretation of the *Pershad* court is not a rogue holding, but rather one that comports with common sense and precedent.\textsuperscript{191} For example, the New York Appellate Division has held that housing Administrative Code section 27-2009.1, known as the “Pet Law,” applies both to rental units and condominiums,\textsuperscript{192} despite the fact that the Code “does not specifically include or exclude condominiums.”\textsuperscript{193} The Appellate Division reasoned that because the code “is conceded to apply to multiple dwellings that consist of rental apartments and it has been applied to residential cooperative buildings,” it should be

\begin{itemize}
\item \textsuperscript{184} See id. at 995.
\item \textsuperscript{185} Id. at 994.
\item \textsuperscript{186} Id. at 996.
\item \textsuperscript{187} See id. at 995.
\item \textsuperscript{188} See id.
\item \textsuperscript{189} Id.
\item \textsuperscript{190} Id. (citation omitted).
\item \textsuperscript{192} See Board of Managers v. Lamontanero, 616 N.Y.S.2d 744, 745 (App. Div. 1994).
\item \textsuperscript{193} Id.
\end{itemize}
extended to condominiums as well. In short, whether a state's warranty of habitability statute explicitly extends the warranty doctrine to condominiums should not resolve this controversy.

2. Contract Principles

One of the major motivating factors behind the creation of the warranty of habitability was the inequality of bargaining power between landlords and tenants. Javins, like Pines and Brown before it, was concerned that landlords required tenants to accept lease contracts on a take it or leave it basis. Tenants are usually in no position to negotiate much of anything into a lease contract, let alone a warranty of habitability. It is likely that many tenants are not even aware that contract negotiations are an option. This is why courts, as well as the state legislatures that codified the warranty of habitability, made the warranty unwaivable. Thus, any contract provision that restricts a tenant's action or defense for a breach of the warranty of habitability is void. This unwaivability ensures that there will always be a legal remedy available to a tenant when the disrepair of the common elements makes his apartment uninhabitable.

It is equally reasonable to assume that condominium unit owners do not have any more bargaining power with respect to their condominium boards than tenants have with their landlords. Just as a tenant accepts the terms of his lease, a unit purchaser accepts the terms of the condominium's governing documents, including the by-laws, when he accepts the deed to the unit. Negotiations to change the governing documents rarely occur. In fact, unit purchasers normally must obtain the approval of the condominium board, so it is unlikely that a unit purchaser would be anxious to "rock the boat."

Tenants, cooperative owners, and condominium unit owners all share a common bargained-for expectation that usually does not ap-

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194. Id. (citations omitted).
195. See supra notes 104-05 and accompanying text.
196. See supra notes 104-05 and accompanying text.
198. Cf. id. (discussing the landlord-tenant relationship).
199. See Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1080 n.49 (D.C. Cir. 1970) ("We need not consider the provisions of the written lease governing repairs since this implied warranty of the landlord could not be excluded."); see also, e.g., N.Y. Real Prop. Law § 235-b(2) (McKinney 1989 & Supp. 1999) ("Any agreement by a lessee or tenant of a dwelling waiving or modifying his rights as set forth in this section shall be void as contrary to public policy.").
200. See N.Y. Real Prop. Law § 235-b(2).
201. Cf. Javins, 428 F.2d at 1080 ("'[U]nless repairs . . . were made by the landlord, they would not be made by any one.'" (quoting Altz v. Lieberson, 134 N.E. 703, 704 (N.Y. 1922))).
202. See supra note 174 and accompanying text.
203. See supra notes 47-49 and accompanying text.
pear in their "housing contracts," namely, that their monthly payments will be used to ensure that the common elements do not adversely affect the habitability of their units. The common elements usually are not any more accessible to the condominium unit owner than they are to the tenant or the cooperative owner. In fact, most condominium by-laws have specific contract provisions that prohibit unit owners from making repairs to the common elements. Furthermore, courts have recognized that the condominium board's duty to "maintain the premises in good repair under [legislative law] is non-delegable."

When Javins created an implied warranty of habitability, it specifically made the warranty unwaivable, holding that it did not need to "consider the provisions of the written lease governing repairs since this . . . warranty of the landlord [cannot] be excluded." Similarly, neither the absence of an implied warranty within the condominium by-laws nor a by-law provision contradicting the warranty's principles should prevent a condominium unit owner from being able to invoke the doctrine. As a result, extending the warranty of habitability to condominiums would more accurately reflect the bargained-for expectations of the condominium unit owner.

3. The Dissimilarities of Condominiums and Cooperatives

Courts have extended the statutory warranty of habitability to cooperatives, citing the similarities between renter-tenants and coopera-

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204. The term "housing contracts" is being used collectively here to represent the lease, bylaws, and any other governing documents of a cooperative or condominium.
205. Cf. supra notes 39-40 and accompanying text (discussing maintenance fees).
206. See, e.g., Smith v. Parkchester N. Condominium, 619 N.Y.S.2d 523, 524 (Civ. Ct. 1994) ("It is undisputed that [the unit owner] has no control over the common areas/elements that would enable him to correct the violations found by the Housing Inspector.").
207. See, e.g., Agassiz W. Condominium Ass'n v. Solum, 527 N.W.2d 244, 247 (N.D. 1995) ("[The] bylaws . . . do not authorize [the unit owners] to repair common areas.").
210. Because Javins was primarily concerned with the empowerment of low-income, urban tenants, one could argue that the warranty of habitability should not be made available to cooperative and condominium owners who are financially capable of purchasing their units. But this argument fails to consider that courts have held that the implied warranty of habitability safeguards habitable housing at every income level. See Park W. Management Corp. v. Mitchell, 391 N.E.2d 1288, 1292-93 (N.Y. 1979). For evidence of the need for the implied warranty of habitability at every income level, see Dennis Hevesi, Tempest in a Penthouse Has Legal Fees Soaring and Agencies Entangled, N.Y. Times, Dec. 5, 1998, at B3, which reported that the New York City Department of Housing discovered 153 housing code violations in an apartment that cost a cooperative shareholder $1.5 million.
Some courts, however, have refused to extend the warranty to condominiums on the ground that, unlike cooperative shareholders, condominium unit owners are not analogous to renter-tenants. But the only legal similarity between tenants and cooperative owners is that they both occupy their respective units under a lease. This link between tenants and cooperative owners becomes even more tenuous when one considers that the issuance of shares and a proprietary lease under a corporation is only one legal form that can be used to create a cooperative. On the other hand, aside from the fact that the cooperative owner holds shares and a proprietary lease while the condominium unit owner holds a deed, many similarities exist between the two owners. The histories of the cooperative and condominium parallel one another. Both forms of ownership were spurred by the need to utilize limited real estate in a more efficient manner. Condominiums and cooperatives are simply hybrids of the same type of ownership interest: ownership of an apartment or residential unit.

Courts have extended the warranty of habitability to cooperatives because it is equitable and there is a legal technicality that allows them to do so, namely, that the cooperative owner possesses a lease. In addition, courts have recognized that a cooperative owner relies on his board of directors for the same reason a tenant relies on his landlord: to maintain the common elements that affect the habitability of the units. Clearly, the reliance of condominium and cooperative owners on their boards of directors is strikingly similar.

4. Legal Suicide

Some have argued that extending the warranty of habitability to cooperatives and condominiums forces owners to sabotage themselves and their fellow owners by committing "legal suicide." Another argument correctly asserts that, with or without the extension of the warranty to condominiums, condominium owners have other legal remedies to use against their boards of directors (i.e., breach of fiduciary duties).
ary duty). This illustrates the weakness of the "legal suicide" argument against the extension of the warranty, because condominium owners already possess the capability to commit "legal suicide."

Maintenance fee abatements by cooperative owners can be far more detrimental than abatements by condominium owners. The cooperative maintenance fee is not only used to maintain the common elements, but also to pay the underlying mortgage on the property and its taxes. Furthermore, if the cooperative corporation goes insolvent, the property is foreclosed upon, and the shareholders' proprietary leases are rendered void. Even with such grave consequences hanging in the balance, however, our legal system demands that the decision to take such potentially drastic action should be left to the aggrieved party.

It is patronizing to suggest that a legal remedy should not be extended to a condominium unit owner based on the premise that he may use it to commit "legal suicide." The implied warranty of habitability is a potent weapon that motivates parties responsible for the maintenance of habitability to fulfill their obligation. Even if the condominium board of directors has delegated the maintenance of the common elements to a managing agent, the board is ultimately responsible for the fiscal and physical condition of the condominium. Furthermore, the board of directors, not the individual condominium unit owner, has the right to bring an action against the managing agent for failing to maintain the common elements in accordance with the management contract.

The extension of the warranty of habitability to condominiums provides unit owners with a powerful, unwaivable remedy that spurs adherence to habitability standards. The "legal suicide" argument did not block the extension of the implied warranty of habitability to cooperatives, and in a legal system that empowers aggrieved parties, it should not prevent the extension of the warranty doctrine to condominiums. As both cooperative shareholders and condominium unit owners may have other remedies available to them, the extension of the warranty of habitability to condominiums and cooperatives does not create an action where one previously did not exist. The addition

221. See, e.g., Agassiz W. Condominium Ass'n v. Solum, 527 N.W.2d 244, 247 (N.D. 1995) (holding that the state condominium code "authorizes 'an aggrieved unit owner' to bring an action for damages or injunctive relief for failure to comply with the condominium's by-laws").
222. See supra notes 25-27 and accompanying text.
223. See supra notes 25-26 and accompanying text.
224. See supra note 28 and accompanying text.
225. The Suarez majority indicated that shareholders have the freedom to sue against their own interests when they wage a class action suit. See supra notes 169-70 and accompanying text.
226. See supra note 46 and accompanying text.
227. The contractual relationship is between the board of directors and the managing agent. See supra notes 45-46 and accompanying text.
of the unwaivable action simply encourages "an increased attention on the part of . . . boards of directors to the well-being of the members of the cooperative [and condominium]." It also helps to ensure that the minimum standards for the habitability of housing are met. In short, the extension furthers all of the equitable goals established by the Javins court.

C. An Alternative Method of Extending the Warranty

Undoubtedly, it is evident that condominiums are not a comfortable fit within current warranty statutes which were originally intended for renters. Indeed, it is like "pounding square pegs in round holes" and the integrity of the statute is arguably jeopardized when it is manipulated to include condominiums. The solution, therefore, is not to pigeonhole condominiums into warranty statutes, but to extend the warranty through common law.

Courts can create common law so long as it does not conflict with the legislative intent behind presently enacted statutes. The fact that housing standards originally intended for renter-tenants have been applied to condominiums indicates that a judicial extension of the implied warranty of habitability to condominiums would compliment current legislative intent, not undermine it. When the Javins court created an implied warranty of habitability at common law where one previously did not exist, it did not contradict existing statutes; it simply went outside of the statutes' inflexible structures to meet the needs of modern society. Instead of being shackled by the lack of explicit statutes, Javins, along with those courts that followed its precedent, stimulated the creation of the very statutes that were lacking. Statutory warranties do not specifically exclude condominiums; they simply do not make their inclusion explicit. Therefore, no legislative prohibition exists to prevent courts from extending the warranty of habitability to condominiums. Simply because state legis-
latures have not revisited their statutory warranties for two or three decades does not mean that the courts cannot revisit the common law and update the doctrine. After all, "[c]ourts have a duty to reappraise old doctrines in the light of the facts and values of contemporary life." 239

Further, when the warranty is applied through the common law rather than a statute, the differing legal compositions of condominiums and cooperatives become irrelevant. Although courts have chosen to extend the warranty of habitability statutorily to cooperatives because the wording of the statutes allow them to do so, common law can be used just as effectively to extend the warranty of habitability to condominiums. The legal technicality that a condominium owner does not hold a lease should not be the determinative factor on whether the warranty is extended to condominiums. What should be considered is whether the extension of the warranty to condominiums makes sense, fits within the legislative intent of current statutes, and is equitable. 240

Conclusion

The implied warranty of habitability was a revolutionary alteration of antiquated common law property concepts, created in response to the pressing concerns of modern standards of housing and habitability. It was applied to tenants to address their lack of bargaining power, to meet their bargained-for expectations of habitable living conditions, and to encourage the maintenance of the habitability within multiple dwellings. The warranty was further extended to cooperative owners because courts recognized that these owners depended on their boards of directors to perform the same role as that of a landlord: maintenance of the common elements to ensure the habitability of each unit. The next logical step in the evolution of the warranty is to apply it to condominiums.

Extending the common law warranty to condominiums is a small feat compared to the undertakings of Javins. Courts must not delay until their state legislatures decide to revisit their respective statutory warranties of habitability. Indeed, many courts have recognized that they should not wait for legislation to advance sound, equitable policies that they have an opportunity to effectuate immediately. Courts can meet these objectives without manipulating unyielding statutes by using common law that is consistent with current legislative intent. After all, if the common law had not stirred legislatures to take initial action on the implied warranty of habitability thirty years ago, it is unclear what the state of landlord-tenant law would be today.

240. Cf. Lemle v. Breeden, 462 P.2d 470, 474 (Haw. 1969) (stating that, in the context of the landlord-tenant law, "an implied warranty of habitability and fitness for the purposes intended is . . . just and necessary").
Notes & Observations