

COLORADO HB 1061 AND ADVOCATING FOR THE END OF CAVEAT EMPTOR IN RESIDENTIAL LEASES

DAVID I. BLOWER*

In 2005, Governor Bill Owens vetoed House Bill 1061, which was an attempt by the Colorado legislature to enact some minimal protections for residential tenants. Governor Owens's veto was the latest chapter in Colorado's failure to provide residential-tenant protections. Although the vast majority of states have either judicially-implied or statutory tenant protections, Colorado has bucked the trend. First, in 1976, the Colorado Supreme Court refused to imply a warranty of habitability in residential leases, instead deferring to the legislature. Since then, in addition to Governor Owens's veto, the legislature has also failed to pass a residential warranty. Instead of maintaining the status quo of caveat emptor, the Colorado legislature should pass broad tenant protections like those embodied in the Uniform Residential Landlord Tenant Act. If a warranty fails to gain the support of the political branches, Colorado's courts should recognize their role in creating caveat emptor and their duty to eliminate it in light of changing conditions that undermine the doctrine's underlying assumptions.

INTRODUCTION

Valerie Velasquez lived on Gilpin Street in Denver.¹ She shared her apartment with her eight-year-old daughter and cockroaches.² The cockroaches crawled on the stove while she cooked.³ She found dead roaches in her freezer.⁴ They even fell into her daughter's hair.⁵ In addition to her roach problem,

* Juris Doctor Candidate, University of Colorado Law School. The author would like to thank Shilpi Banerjee, Sarah Holloway, and Jennifer Ratkiewicz for their helpful suggestions.

1. Ann Carnahan, *Roaches, Landlord Rile Tenant*, ROCKY MTN. NEWS, July 24, 1996, at 5A.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

Velasquez did not have hot water or a working kitchen sink.⁶ Her situation was not unique. Velasquez's neighbor also had a roach problem; she even found roaches climbing on the mouth of her one-week-old infant son.⁷

The problem of uninhabitable apartments is not isolated to the two cases discussed above.⁸ It is so pervasive that two Denver suburbs, Glendale and Thornton, considered passing building codes for rental properties in the late 1990s.⁹ But Velasquez's situation is evidence that housing codes do little to solve the problem: her landlord had been cited for housing code violations more than eighty times in just three years.¹⁰ Despite these citations, and the threat of legal action by the city, his apartments were still in a deplorable condition.¹¹

In most states, tenants have a number of avenues to remedy such situations because, under state law, landlords must ensure that leased premises are habitable.¹² Colorado, in contrast, has no such tenant protections. Unlike the courts of other states,¹³ the Colorado Supreme Court has refused to imply a warranty of habitability in residential leases.¹⁴ Additionally, Colorado has bucked the trend of statutory tenant protec-

6. *Id.*

7. *Id.*

8. See Gary Massaro, *Mom Taught that Helping Was 'Normal,'* ROCKY MTN. NEWS, July 6, 2005, at 24A (documenting a Denver metropolitan area resident who had to use her gas stove to heat her apartment because of a lack of heat). Additionally, *Denver Westword* describes the situation of a senior at the University of Colorado whose furnace did not work. Scott C. Yates, *Footing the Bill: How Lobbyist Pancho Hays Gave the Boot to Tenants-Rights Legislation,* DENVER WESTWORD, Apr. 24, 1997, <http://search.westword.com/Issues/1997-04-24/news/news2.html>. The property manager and owner did not fix the problems despite the student's calls. *Id.* When the student attempted to use space heaters, fuses would blow. *Id.* Eventually the pipes broke due to the cold. *Id.* Interestingly, the student's father was an attorney in Michigan who, wrongly, told his son that the law protects tenants in such situations. *Id.*

9. Gary Massaro, *Glendale Ready to Do Battle with Slumlords,* ROCKY MTN. NEWS, Mar. 26, 1995, at 30A; Mike Patty, *Thornton Looks at Separate Building Code for Rentals,* ROCKY MTN. NEWS, Feb. 27, 1997, at 33A.

10. Carnahan, *supra* note 1.

11. *Id.*

12. DAVID S. HILL, LANDLORD AND TENANT LAW IN A NUTSHELL 110 (4th ed. 2004); see Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. REV. 503, 523-24 (1982); see also *infra* Part I.B-C (discussing statutory and judicially implied warranties).

13. See *infra* Part I.B (discussing judicially implied warranties of habitability).

14. *Blackwell v. Del Bosco*, 558 P.2d 563, 563 (Colo. 1976).

tions, which are in place in most other states:¹⁵ a residential warranty failed to pass the Colorado legislature on one occasion,¹⁶ and, most recently, the governor vetoed very modest tenant protections which paled in comparison to a warranty of habitability.¹⁷

Part I of this Comment explores the history and development of the warranty of habitability (the "warranty"). Part II discusses the failure of both the Colorado courts and the Colorado legislature to create meaningful tenant protections. Finally, Part III critiques Governor Bill Owens's veto of the most recent legislative attempt to establish very modest tenant protections and advocates for broad protections of the type provided by a warranty. Instead of maintaining the status quo of *caveat emptor*, the Colorado legislature should pass broad tenant protections like those embodied in the Uniform Residential Landlord Tenant Act ("URLTA"). If a warranty similar to the URLTA fails to gain the support of the political branches, as it did in 1997 and again in the spring of 2005, Colorado's courts should recognize their role in creating *caveat emptor* and their duty to eliminate it in light of changing conditions that undermine the doctrine's underlying assumptions.

I. WARRANTY OF HABITABILITY

At common law, landlords had no obligation to ensure habitable conditions before the beginning of a residential lease.¹⁸ They also had no duty to repair premises if they later became uninhabitable.¹⁹ Despite the common law rule of *caveat emptor*, or "[l]et the buyer beware,"²⁰ most courts that have ad-

15. See *infra* Part I.B.2 (discussing statutory implied warranties).

16. S.B. 63, 61st Gen. Assem., Reg. Sess. (Colo. 1997), http://www.state.co.us/gov_dir/leg_dir/sbills/SB063.htm [hereinafter SB 63].

17. Letter from Bill Owens, Governor of Colorado, to the Colorado House of Representatives (May 4, 2005), available at <http://www.colorado.gov/governor/press/may05/hb1061.html> [hereinafter Owens's Veto Letter] (explaining his veto of House Bill 05-1061). House Bill 1061 would have established several protections for tenants including maximum late fees. H.B. 1061, 65th Gen. Assem., Reg. Sess. (Colo. 2005), <http://www.leg.state.co.us/Clics2005a/csl.nsf/BillFoldersAll?OpenFrameSet>, (follow "HB05-1061.pdf" hyperlink) [hereinafter HB 1061].

18. HILL, *supra* note 12, at 109; see also WILLIAM B. STOEBUCK & DALE A. WHITMAN, *THE LAW OF PROPERTY* 289-90 (3d ed. 2000).

19. HILL, *supra* note 12, at 109; see also STOEBUCK & WHITMAN, *supra* note 18, at 289-90.

20. BLACK'S LAW DICTIONARY 222 (6th ed. 1990). Under the doctrine of *caveat emptor*, the buyer is expected to "examine, judge, and test for himself." *Id.*

ressed the issue of uninhabitable apartments since the 1960s have implied a warranty of habitability into residential leases.²¹ The warranty imposes upon the landlord the duty to maintain the leased premises in a habitable condition.²² Additionally, legislatures in states with and without judicially crafted warranties have created statutory duties to repair giving tenants, whose dwellings are not habitable, private remedies.²³

A. *Caveat Emptor*

At common law, a lease was viewed as a conveyance of the leasehold estate, to which the doctrine of *caveat emptor* applied.²⁴ *Caveat emptor* put the onus of examining the property on the lessee.²⁵ Ordinarily, the landlord did not "impliedly warrant that the leased premises were suitable for the intended use, whether the use was agricultural, residential, commercial, or industrial."²⁶ Under *caveat emptor*, the tenant owed the landlord rent, and the landlord only owed the tenant possession of the leased premises.²⁷ As a result, tenants could not recover damages, rescind a lease, or defend against an action for unpaid rent based on uninhabitable conditions.²⁸

The factual assumptions underlying the doctrine of *caveat emptor* originated in the Middle Ages.²⁹ At the time, "the most important feature of a leasehold" was the land³⁰ because the

In some states, "strict liability, warranty, and other consumer protection laws protect the consumer-buyer." *Id.* Colorado, however, applies the doctrine to residential leases and does not protect tenants otherwise. *See infra* Part II.

21. HILL, *supra* note 12, at 110-11.

22. *Id.* at 110.

23. Glendon, *supra* note 12, at 523-24; Stephen J. Maddex, Note, Propst v. McNeill: *Arkansas Landlord-Tenant Law, A Time for Change*, 51 ARK. L. REV. 575, 595 nn.121-77 (1998) (discussing legislative landlord-tenant reform).

24. STOEBUCK & WHITMAN, *supra* note 18, at 289.

25. *See* BLACK'S LAW DICTIONARY 222 (6th ed. 1990).

26. STOEBUCK & WHITMAN, *supra* note 18, at 289.

27. Glendon, *supra* note 12, at 510-11; *see also* HILL, *supra* note 12, at 109 (commenting that this may have been appropriate "to the agrarian economy in which they arose. At that time the primary value of a lease was the land itself").

28. STOEBUCK & WHITMAN, *supra* note 18, at 289-90. These are the remedies typically available to tenants whose dwellings are uninhabitable, although the remedies are not uniform. *See infra*, Part I.C.

29. *See* Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1077 (D.C. Cir. 1970).

30. *See id.* at 1078.

purpose of the leasehold was agrarian.³¹ It was also assumed that the tenant was capable of making the repairs necessary to maintain the property.³² Additionally, tenants during the Middle Ages often remained on the same piece of land for life, justifying the tenants' responsibility for repairs because the tenants would benefit from them.³³ Finally, leases were comprehensive documents "embodying the full expectations of the parties,"³⁴ and both the landlord and tenant were expected to have equal knowledge of the land.³⁵

Although the landlord did not impliedly warrant that the leasehold was habitable, the landlord and tenant could expressly contract for the landlord to provide maintenance.³⁶ However, even if the landlord breached an express covenant to maintain the premises, the only remedy a tenant had was to sue for damages; at common law, the breach of an express repair covenant did not justify the tenant's non-payment of rent.³⁷

B. History of the Implied Warranty

In recent years a large number of courts and legislatures have abandoned the doctrine of *caveat emptor* in favor of imposing duties to repair on landlords. Courts, after re-examining the assumptions on which *caveat emptor* relied, began to reject the doctrine in the early 1960s.³⁸ Additionally, while some states had adopted statutory duties to repair in the nineteenth century, more began to do so in the 1970s.³⁹

1. Judicially Implied Warranties

In the last fifty years, courts have reevaluated the assump-

31. See *id.* at 1077.

32. *Id.* at 1078.

33. See *id.* This can be contrasted to modern tenants, who may live in an apartment for only a year; they likely would not benefit from the repairs to the same degree. See *id.*

34. *Lemle v. Breeden*, 462 P.2d 470, 472-73 (Haw. 1969).

35. *Id.* at 473.

36. See Arthur R. Gaudio, *Wyoming's Residential Rental Property Act—A Critical Review*, 35 LAND & WATER L. REV. 455, 460 (2000).

37. HILL, *supra* note 12, at 164; Glendon, *supra* note 12, at 511.

38. STOEBUCK & WHITMAN, *supra* note 18, at 299.

39. See *id.* at 309-11.

tions underlying *caveat emptor*.⁴⁰ Tenants are no longer “jacks-of-all-trades:” most are raised in urban areas and do not have the requisite skills to discover or fix maintenance problems that may arise in their residential apartment.⁴¹ Additionally, courts began to recognize that there was a lack of habitable housing available to rent,⁴² that tenants lacked bargaining power,⁴³ and that most tenants enter a residential lease looking for a habitable dwelling and not for land.⁴⁴ Courts also began to shift their focus from the property law aspects of a residential lease to the contractual aspects.⁴⁵ Focusing on this contractual aspect of a lease—and “the real and obvious intent of the residential tenant . . . to acquire a package of residential goods and services amounting to habitable premises and not merely the conveyance of a leasehold estate”—some courts began to imply a warranty of habitability into residential leases.⁴⁶

Pines v. Perssion was a landmark case in imposing the implied warranty of habitability.⁴⁷ In *Pines*, the Wisconsin Supreme Court implied a warranty of habitability into a residential lease, stating that the absence of such a warranty would “be inconsistent with the current legislative policy concerning housing standards.”⁴⁸ The *Pines* court couched its argument in policy reasons underlying existing statutes and regulations. “[T]he legislature has made a policy judgment—that it is socially (and politically) desirable to impose these duties on a

40. See Gaudio, *supra* note 36, at 463–64.

41. *Id.* at 463; see also Krista L. Noonan & Frederick M. Preator, Comment, *Implied Warranty of Habitability: It is Time to Bury the Beast Known as Caveat Emptor*, 33 LAND & WATER L. REV. 329, 332 (1998).

42. *Green v. Superior Court*, 517 P.2d 1168, 1174 (Cal. 1974); see also *Park West Mgmt. Corp. v. Mitchell*, 391 N.E.2d 1288, 1292 (N.Y. 1979) (citing *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1079–81 (D.C. Cir. 1970); *Boston Hous. Auth. v. Hemingway*, 293 N.E.2d 831, 842 (Mass. 1973)).

43. See *Green*, 517 P.2d at 1173; *Lemle v. Breeden*, 462 P.2d 470, 472–73 (Haw. 1969).

44. See, e.g., *Green*, 517 P.2d at 1172; *Lemle*, 462 P.2d at 472–73; *Mease v. Fox*, 200 N.W.2d 791, 793 (Iowa 1972); *Boston Hous. Auth.*, 293 N.E.2d at 841.

45. Gaudio, *supra* note 36, at 463.

46. *Id.*; see Noonan & Preator, *supra* note 41, at 332.

47. 111 N.W.2d 409 (Wis. 1961); see STOEBCUK & WHITMAN, *supra* note 18, at 300 (“The ‘revolution’ in residential landlord-tenant law began only in 1961 with the decision of the Wisconsin Supreme Court in *Pines v. Perssion* . . .”); Michael Madison, *The Real Properties of Contract Law*, 82 B.U. L. REV. 405, 413 (2002).

48. Madison, *supra* note 47, at 414 (quoting *Pines v. Perssion*, 111 N.W.2d 409, 412–13 (Wis. 1961)).

property owner"⁴⁹

The next major case implying a warranty of habitability into a residential lease, *Javins v. First National Realty Corp.*,⁵⁰ did so on a different rationale. The *Javins* court used a contract-based approach, which, according to some scholars, led to the demise of *caveat emptor*.⁵¹ First, the court concluded that the value of a residential lease is not in the land, as it was when landlord-tenant law was formed, but is instead in a "package of goods and services . . . 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."⁵² Second, the court believed that landlord-tenant law should be brought in line with other consumer protection cases⁵³ where courts had "sought to protect the legitimate expectations of the buyer" by implying warranties of fitness and merchantability.⁵⁴ In the case of an apartment lease, the tenant "may legitimately expect that the apartment will be fit for habitation for the time period for which it is rented."⁵⁵ Finally, the court reasoned that the nature of the urban housing market, which involved unequal bargaining power between landlords and tenants,⁵⁶ supported abandoning *caveat emptor*.⁵⁷ After rejecting *caveat emptor*, the court concluded that "the housing code must be read into housing contracts."⁵⁸

Other courts have also implied a warranty of habitability, using reasoning that mirrors that of *Javins* and *Pines*. As the Supreme Judicial Court of Massachusetts aptly concluded, "the essential objective of the leasing transaction is to provide a dwelling suitable for habitation,"⁵⁹ rather than to provide an interest in land. Other courts cite the shortage of adequate and affordable housing in urban areas.⁶⁰ Such a shortage

49. *Pines*, 111 N.W.2d at 410.

50. 428 F.2d 1071 (D.C. Cir. 1970).

51. Madison, *supra* note 47, at 415.

52. *Javins*, 428 F.2d at 1074; *see also* Noonan & Preator, *supra* note 41, at 333.

53. *Javins*, 428 F.2d at 1077.

54. *Id.* at 1075.

55. *Id.* at 1079; *see* Noonan & Preator, *supra* note 41, at 333.

56. *Javins*, 428 F.2d at 1079; Noonan & Preator, *supra* note 41, at 333.

57. *Javins*, 428 F.2d at 1077.

58. *Id.* at 1081.

59. *Boston Hous. Auth. v. Hemingway*, 293 N.E.2d 831, 841 (Mass. 1973).

60. *See, e.g., Green v. Superior Court*, 517 P.2d 1168, 1173-74 (Cal. 1974); *see*

leaves tenants with little bargaining power, giving landlords no incentive to agree to a warranty of habitability.⁶¹ In addition to these reasons, the California Supreme Court adopted an implied warranty of habitability in part because tenants generally lack the skills to maintain their increasingly complex apartments.⁶²

2. Statutory Implied Warranty

State legislatures have also imposed a warranty on landlords. Only five states, including Colorado, do not have statutory warranties of habitability.⁶³ In the early twentieth century, Louisiana's legislature declared that "[t]he lessor warrants . . . that the thing is suitable for the purpose for which it was leased and that it is free of vices or defects that prevent its use for that purpose."⁶⁴ A few states, such as Louisiana, adopted statutory warranties early on, but it was not until the proposal of the Uniform Residential Landlord Tenant Act ("URLTA") in the early 1970s that states began to adopt, en masse, tenant protections.⁶⁵

The language of the URLTA, if adopted by an individual jurisdiction, imposes on landlords a duty to repair.⁶⁶ The landlord's enumerated duties include, among other things, compliance with building and housing codes that materially affect health and safety; putting and keeping the premises "in a fit

also *Park West Mgmt. Corp. v. Mitchell*, 391 N.E.2d 1288, 1292 (N.Y. 1979) (citing *Javins*, 428 F.2d at 1079-81; *Boston Hous. Auth.*, 293 N.E.2d at 831).

61. *Green*, 517 P.2d at 1173; see also *Kline v. Burns*, 276 A.2d 248, 251 (N.H. 1971); *Park West Mgmt. Corp.*, 391 N.E.2d at 1292.

62. *Green*, 517 P.2d at 1173; see also *Detling v. Edelbrock*, 671 S.W.2d 265, 269 (Mo. 1984) (citing *Green*, 517 P.2d at 1171-76).

63. *Maddex*, *supra* note 23, at 595-96 & n.121. According to *Maddex*, Alabama, Arkansas, Colorado, Illinois, Indiana, and Wyoming have not codified some form of a warranty of habitability, but in the years since that note was written, Wyoming enacted a landlord duty to repair. See WYO. STAT. ANN. § 1-21-1202 (2005). Additionally, both Illinois and Indiana recognize an implied warranty of habitability. *Maddex*, *supra* note 23, at 595-96 & n.121.

64. LA. CIV. CODE ANN. art. 2696 (2005). Article 2696 restates the principles of Articles 2692 and 2695 of the Civil Code of 1870. *Id.*, revision cmt. Article 2696 was enacted in 1924. Barbara Jo Smith, Note, *Tenants in Search of Parity with Consumers: Creating a Reasonable Expectations Warranty*, 72 WASH. U. L.Q. 475, 486 n.94 (1994).

65. STOEBCUK & WHITMAN, *supra* note 18, at 309-11; see, e.g., CAL. CIV. CODE § 1941 (West 1985) (enacted in 1872).

66. UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 2.104 (amended 1974), 7B U.L.A. 326 (2006) [hereinafter URLTA].

and habitable condition;" maintaining "electrical, plumbing, sanitary, heating," and "other facilities and appliances . . . supplied or required to be supplied by" the landlord; and supplying running water, hot water, and heat.⁶⁷ Eighteen states have enacted legislation similar to the URLTA.⁶⁸

In addition to URLTA-like statutes, a variety of other statutory warranties exist throughout the United States.⁶⁹ Some state statutes require only that the landlord keep the premises in a habitable condition.⁷⁰ Many of these habitability statutes list a litany of conditions that make a dwelling uninhabitable.⁷¹ Georgia, on the other hand, simply requires that the landlord "keep the premises in repair."⁷² Michigan requires that the premises be "fit for the use intended by the parties," that the premises be kept in reasonable repair, and that the landlord comply with health and safety laws.⁷³

C. Scope & Remedies

The warranty of habitability, whether judicially implied or statutorily mandated, generally requires the landlord to put and maintain the premises in a habitable condition.⁷⁴ Some

67. *Id.* § 2.104(a), at 326.

68. Maddex, *supra* note 23, at 597-98; *see* ALASKA STAT. § 34.03.100 (2006); ARIZ. REV. STAT. ANN. § 33-1324 (2007); CONN. GEN. STAT. ANN. § 47a-7 (West 2006); HAW. REV. STAT. § 521-42 (1993); IOWA CODE ANN. § 562A.15 (West 1992); KAN. STAT. ANN. § 58-2553 (2006); KY. REV. STAT. ANN. § 383.595 (LexisNexis 2002); MISS. CODE ANN. § 89-8-23 (1999); MONT. CODE ANN. § 70-24-303 (2006); NEB. REV. STAT. § 76-1419 (2003); N.M. STAT. § 47-8-20 (1995 & Supp. 2006); N.C. GEN. STAT. § 42-42 (2005); N.D. CENT. CODE § 47-16-13.1 (1999); OHIO REV. CODE ANN. § 5321.04 (LexisNexis 2004); R.I. GEN. LAWS § 34-18-22 (1995); S.C. CODE ANN. § 27-40-440 (2005); TENN. CODE ANN. § 66-28-304 (2004); VA. CODE ANN. § 55-248.13 (2003 & Supp. 2006).

69. Maddex, *supra* note 23, at 598-600.

70. *Id.* at 598; *see, e.g.*, ME. REV. STAT. ANN. tit. 14, § 6021 (2003) ("In any written or oral agreement for rental of a dwelling unit, the landlord shall be deemed to covenant and warrant that the dwelling unit is fit for human habitation."); N.Y. REAL PROP. LAW § 235-b (McKinney 2006) ("In every written or oral lease or rental agreement for residential premises the landlord or lessor shall be deemed to covenant and warrant that the premises so leased or rented . . . are fit for human habitation . . .").

71. *See, e.g.*, NEV. REV. STAT. ANN. § 118A.290 (LexisNexis 2004) (listing, among other things, waterproofing, weather protection and adequate heating facilities); OR. REV. STAT. § 90.320 (2005) (same).

72. GA. CODE ANN. § 44-7-13 (1991).

73. MICH. COMP. LAWS ANN. § 554.139 (West 2005).

74. HILL, *supra* note 12, at 116-17; Glendon, *supra* note 12, at 529.

warranties are based on a housing code.⁷⁵ Where this is the case, "the provisions of the code will determine the dwellings to which the warranty will be extended."⁷⁶ In other jurisdictions, the warranty is premised on public policy.⁷⁷ In those jurisdictions, "[h]abitability is to be measured by community standards, reflected in most cases in local housing and property maintenance codes,"⁷⁸ although compliance with housing codes is not necessarily sufficient.⁷⁹ Also, as discussed in the previous section, some statutes include specific duties. For instance, the URLTA, adopted in some form by eighteen states,⁸⁰ requires not only that housing and safety codes be complied with, but also that electrical, sanitary, and heating facilities, among others, be kept in working order.⁸¹ Other statutes provide for waterproofing and weather protection⁸² and require landlords to cure pest infestation.⁸³

Generally, if the landlord breaches the warranty of habitability, the tenant is entitled "to pursue traditional contract remedies."⁸⁴ Tenants can bring an action seeking damages where the landlord has breached the warranty.⁸⁵ The tenant can also use a breach to defend against "a landlord's action for possession and rent."⁸⁶ Additionally, a tenant can abate the rent, repair the defects and deduct the cost from his rent, or terminate or rescind the lease.⁸⁷

75. HILL, *supra* note 12, at 114–15; Gaudio, *supra* note 36, at 464.

76. HILL, *supra* note 12, at 117; Gaudio, *supra* note 36, at 464.

77. HILL, *supra* note 12, at 118; *see* Gaudio, *supra* note 36, at 464–65; *see, e.g.*, Boston Hous. Auth. v. Hemingway, 293 N.E.2d 831 (Mass. 1973); Detling v. Edelbrock, 671 S.W.2d 265 (Mo. 1984).

78. Detling, 671 S.W.2d at 270; *see* Gaudio, *supra* note 36, at 464–65.

79. Gaudio, *supra* note 36, at 464–65 ("Housing codes, if applicable, are excellent evidence of the meaning of habitability, but they are not conclusive. Furthermore, the lack of a housing code does not mean that the landlord has no obligation to supply habitable housing.").

80. *See supra* note 68 and accompanying text.

81. URLTA, *supra* note 66, § 2.104, at 326.

82. NEV. REV. STAT. § 118A.290 (2005); OR. REV. STAT. § 90.320 (2005).

83. MD. CODE ANN., REAL PROP. § 8-211 (LexisNexis 2003) (providing that "[i]nfestation of rodents in two or more dwelling[s]" constitutes a threat to the "life, health [or] safety" of the occupants); WASH. REV. CODE § 59.18.060 (2006) ("The landlord will . . . [p]rovide a reasonable program for the control of infestation by insects, rodents, and other pests . . .").

84. Dietling v. Edelbrock, 671 S.W.2d 265, 270 (Mo. 1984).

85. *Id.* at 265.

86. *Id.* at 270 (citation omitted). *But see* FLA. STAT. § 83.51 (2004) ("Nothing in this part authorizes the tenant to raise a noncompliance by the landlord with this subsection as a defense to an action for possession . . .").

87. Gaudio, *supra* note 36, at 465–66; *see also* HILL, *supra* note 12, at 126–32

In some cases, a tenant's remedy is statutorily defined. Under the URLTA, a tenant can give notice that the landlord has breached the warranty and that the rental agreement will terminate in thirty days if the breach is not remedied within fourteen days.⁸⁸ Alternatively, the tenant can repair a defect and deduct the repair cost from his rent.⁸⁹ Finally, a tenant can use the landlord's failure to comply with the warranty as a defense in an action for possession or rent.⁹⁰ Other statutes provide that a tenant can initiate an action for damages and specific performance against a landlord who fails to comply with the statutory warranty.⁹¹ Some courts refuse to limit the tenant's remedies to those enumerated in the relevant statute, thus allowing an even wider range of possible remedies.⁹²

II. COLORADO: NO WARRANTY OF HABITABILITY

The doctrine of *caveat emptor*, at least in residential leases, fell into disrepute beginning in the 1960s. As a result, courts began judicially implying warranties of habitability.⁹³ Shortly thereafter, legislatures followed, passing a variety of statutory warranties.⁹⁴ During this time, in 1976, the Colorado Supreme Court refused to imply a warranty of habitability, instead deferring to the legislature.⁹⁵ Since then, Colorado's political branches have twice tried and failed to provide tenant protections in residential leases, most recently in the spring of 2005.⁹⁶ Despite those failures, there is still hope for a war-

(listing specific performance in addition to those remedies already mentioned).

88. URLTA, *supra* note 66, § 4.101, at 375.

89. *Id.* § 4.103, at 382 (allowing this remedy provided that the cost is less than \$100 or one-half the periodic rent, whichever is greater; the tenant has notified the landlord of the tenant's intention to make the repair at the landlord's expense; and the landlord has not made the repair within fourteen days of that notification).

90. *Id.* § 4.105, at 387.

91. See, e.g., IDAHO CODE ANN. § 6-320 (2004).

92. See, e.g., *Green v. Superior Court*, 517 P.2d 1168, 1176-82 (Cal. 1974) (allowing a tenant to raise as a defense the breach of implied warranty of habitability despite the fact that CAL. CIV. CODE §§ 1941-1942.1 provided for only one remedy: repair and deduct).

93. See *supra* Part I.B.1 (discussing judicial implication and the courts' reasoning in discarding *caveat emptor* in residential leases).

94. See *supra* Part I.B.2 (discussing the history and scope of statutory warranties of habitability).

95. *Blackwell v. Del Bosco*, 558 P.2d 563 (Colo. 1976).

96. HB 1061, *supra* note 17; SB 63, *supra* note 16; see also *infra* Part II.B (discussing the fate of both SB 63 and HB 1061). SB 63 and HB 1061 are not the

ranty of habitability in Colorado.⁹⁷

A. *No Judicially Implied Warranty of Habitability*

Although most states have implied a warranty of habitability into residential leases, Colorado courts have failed to do so. In the 1976 case *Blackwell v. Del Bosco*, the Colorado Supreme Court recognized “the strength of many of the arguments in favor of abandoning the common law landlord-tenant rules.”⁹⁸ Despite this recognition, the court declined to adopt a warranty of habitability.⁹⁹ In *Blackwell*, Armando Del Bosco purchased a tract of land that contained, among other things, a “run-down one-bedroom house” where an almost sixty-year-old widow lived.¹⁰⁰ The landlord conceded that the house was in a “wretched condition.”¹⁰¹ A building inspector, after finding the house “unfit for human habitation,” gave the landlord sixty days to fix the building.¹⁰² The tenant began withholding rent payments when the landlord refused to make repairs that she claimed the landlord had promised to make.¹⁰³ Instead of repairing the defects, the landlord brought a forcible entry and detainer (“FED”) action for return of the premises and payment of withheld rent.¹⁰⁴

At the conclusion of the FED hearing, the tenant was ordered to vacate the house.¹⁰⁵ While no appeal was taken, the tenant brought an action against the landlord for rent paid.¹⁰⁶ The district court dismissed the case, holding that the landlord did not warrant, impliedly or expressly, that the premises were habitable.¹⁰⁷ The appeals court affirmed and the Colorado Su-

legislature’s only attempts to pass a warranty of habitability. See S.B. 192, 63d Gen. Assem., Reg. Sess. (Colo. 2002) (proposing to enact the URLTA); Julia C. Martinez, *Thicket of Issues Awaits Budget, Initiative Bills Loom in Final 24 Days*, DENVER POST, Apr. 14, 2002, at B3 (discussing an attempt by Senator Bill Thiebaud to pass a warranty of habitability in 2002).

97. See *infra* Part II.C (discussing ongoing efforts to enact landlord-tenant legislation).

98. Glendon, *supra* note 12, at 527 (citing *Blackwell*, 558 P.2d at 563).

99. *Id.*

100. *Blackwell*, 558 P.2d at 563.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 563–64.

105. *Id.* at 564.

106. *Id.*

107. *Id.*

preme Court granted certiorari.¹⁰⁸ While admitting that such a warranty may be desirable, the Colorado Supreme Court concluded that “resolution of this issue is more properly the function of the General Assembly.”¹⁰⁹ According to the court, because adoption of the implied warranty would “involve[] many economic and social complexities,” the legislature was better equipped to address the warranty issue.¹¹⁰ Despite the continued adoption of both statutory¹¹¹ and judicially implied¹¹² warranties of habitability in other states, *Blackwell* remains the law in the state of Colorado.¹¹³

B. Attempts by Legislators to Enact Tenant Protections

In the intervening thirty years, the Colorado legislature has twice tried to respond to *Blackwell* and enact tenant protections. In the late 1990s a warranty proposal was defeated in the legislature, and, in 2005, Governor Bill Owens vetoed a milder form of tenant protections.¹¹⁴

1. Senate Bill 63: “Concerning the Warranty of Habitability for Residential Tenancies”

In 1997, the Colorado General Assembly did what the state Supreme Court had suggested in *Blackwell*: it introduced a statutory warranty of habitability.¹¹⁵ Colorado State Senator Stan Matsunaka sponsored a bill entitled “Concerning the Warranty of Habitability for Residential Tenancies” (“SB

108. *Id.*

109. *Id.* at 565.

110. *Id.*

111. See, e.g., Act of Mar. 10, 1977, 1977 Idaho Sess. Laws 80 (codified at IDAHO CODE ANN. § 6-320 (2004)) (adding a statutory warranty of habitability).

112. See, e.g., *Detling v. Edelbrock*, 671 S.W.2d 265 (Mo. 1984); *Pugh v. Holmes*, 405 A.2d 897 (Pa. 1979); *Wade v. Jobe*, 818 P.2d 1006 (Utah 1991); *Teller v. McCoy*, 253 S.E.2d 114 (W. Va. 1978).

113. *Bedell v. Los Zapatistas, Inc.*, 805 P.2d 1198, 1200 (Colo. Ct. App. 1991) (“The trial court was correct in noting that an implied warranty of habitability of leased premises does not exist in this state.” (citing *Blackwell*, 558 P.2d at 563)). In *Bedell*, the tenant rented a house from the defendant and lived there with her children for almost four and one-half years. 805 P.2d at 1199. During the tenancy, part of the ceiling collapsed and “severe problems developed with the heating and plumbing systems.” *Id.* Although repairs were attempted, they were ineffective. *Id.* The landlord filed suit to recover unpaid rent. *Id.*

114. See *supra* note 96.

115. SB 63, *supra* note 16.

63").¹¹⁶ The bill incorporated many of the provisions of the URLTA and mirrored other states' URLTA-based statutes.¹¹⁷ Specifically, like the URLTA, the bill required a landlord to comply with those provisions of the building and housing codes that affect public health and safety.¹¹⁸ Additionally, landlords would have been required to maintain "all electrical, plumbing, sanitary, heating, ventilating, [and] security lights and systems."¹¹⁹ Landlords would also have to supply running water, hot water and heat.¹²⁰ SB 63 provided that the landlord and tenant may "agree in writing that the tenant perform" some of the landlord's duties "only if the agreement is entered into in good faith[,] supported by separate consideration," and, in the case of a lessee not living in a single family home, "set forth in a separate writing signed by the parties."¹²¹

SB 63 established two sets of remedies for the tenant in case of the landlord's breach: general remedies and remedies for "wrongful failure to supply heat, running water, hot water, or essential services."¹²² In general, a tenant may give written notice of the breach and state "that the rental agreement will terminate upon a date not less than thirty days after receipt of the notice if the breach is not remedied within fourteen days."¹²³ Should the landlord "willfully or negligently fail[] to supply heat, running water, hot water, electricity, or gas[,] and such failure substantially and materially affects health or safety," the tenant may give written notice of the breach.¹²⁴ If the breach is not remedied within forty-eight hours, the defendant may "[r]ecover damages based upon the diminution of the

116. SB 63, *supra* note 16 (specifically, the sections concerning tenant remedies).

117. Compare *id.*, with URLTA, *supra* note 66, § 2.104, at 326–27.

118. SB 63, *supra* note 16 (specifically, "Landlord's duties to maintain premises").

119. *Id.*

120. *Id.*

121. *Id.* The URLTA and state statutes provide similar provisions. See URLTA, *supra* note 66, § 2.104(c)–(d), at 326–27 (providing that the landlord and tenant can agree that the tenant is to perform repairs if the agreement is entered into in good faith, supported by adequate consideration, and the work is not needed to cure noncompliance); see also ALASKA STAT. § 34.03.100(c)–(d) (2006); MONT. CODE ANN. § 70-24-303(3)–(4) (2006).

122. SB 63, *supra* note 16 (specifically, "Landlord's duties to maintain premises").

123. *Id.* (specifically, "Tenant remedies generally").

124. *Id.* (specifically, "Tenant remedies—wrongful failure to supply heat, running water, hot water, or essential services").

fair rental value” or “procure reasonable substitute housing,” during which time the tenant is “excused from paying rent.”¹²⁵ If the landlord does not make the necessary repairs within fourteen days, the tenant has the right to terminate the rental agreement, providing he previously gave notice.¹²⁶

SB 63 was approved by the Senate Business Affairs and Labor Committee and passed the Senate with support from all Democrats and a few Republicans.¹²⁷ Senator Ben Alexander, a GOP Senator from Montrose in the real estate business, said, “That’s the way I run my business, and I don’t have a problem seeing this put into the law.”¹²⁸ After passing the Senate, SB 63 went to the House of Representatives.¹²⁹ The House then passed what has been described as “a landlord-rights” bill.¹³⁰ The House bill contained no warranty of habitability and was eventually defeated in the Senate.¹³¹ This ended Colorado’s 1997 attempt to enact tenants-rights legislation.¹³²

2. House Bill 1061: “Concerning Landlord and Tenant Relations”

In the spring of 2005, the Colorado General Assembly again tried to pass tenant’s rights legislation, this time containing far more modest protections than SB 63. Sponsored by Colorado State Representative Mike Merrifield, the House Bill “Concerning Landlord and Tenant Relations” (“HB 1061”) required a landlord to return a tenant’s security deposit within forty-five days and provide a copy of any written lease to a tenant.¹³³ It also capped fees for late payment of rent at two percent per day and fifteen percent per month.¹³⁴ Additionally, HB 1061 mandated that, where the landlord is terminating a lease pursuant to an unlawful detention¹³⁵ or substantial viola-

125. *Id.*

126. *Id.*

127. Yates, *supra* note 8.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. HB 1061, *supra* note 17 (specifically, “Return of security deposit” and “Tenant’s copy of a lease”).

134. *Id.* (specifically, “Rent—maximum late payment”).

135. COLO. REV. STAT. § 13-40-104 (2006).

tion,¹³⁶ the landlord must provide notice of (1) "the grounds for the termination of the tenancy," (2) "whether or not the tenant has a right to cure under the Forcible Entry and Detainer Act," and (3) "when the property shall be returned to the landlord."¹³⁷ Finally, HB 1061 provided that "[a]ny provision in a lease that waives a protection of a tenant created by Colorado statute shall be deemed to be against public policy and shall be void."¹³⁸ HB 1061 passed both houses of the General Assembly and was presented to Governor Bill Owens for his signature.¹³⁹ Even though the tenant protections in HB 1061 were modest in comparison to SB 63, Governor Owens vetoed the bill on the grounds that it did not consider the interests of private property owners and that it injected the state government "unnecessarily into the lease negotiations between property owners and prospective tenants."¹⁴⁰

C. Governor Owens's Veto is Not the End of the Debate

All three branches of Colorado's government have failed to provide for tenant protections. First, the Colorado Supreme Court refused to imply a warranty of habitability.¹⁴¹ Then, the General Assembly defeated Senator Matsunaka's Warranty of Habitability.¹⁴² Finally, and most recently, the governor vetoed Representative Merrifield's HB 1061.¹⁴³ But Governor Owens's veto is not the end of Colorado's quest for tenant protections. Deplorable housing conditions, like roach infestation and lack of hot water, are unlikely to go away.¹⁴⁴ Additionally, in the wake of Governor Owens's veto, Representative Merrifield stated his intention to reintroduce legislation similar to HB 1061, perhaps including some type of warranty of habitabil-

136. *Id.* at § 13-40-107.5.

137. HB 1061, *supra* note 17 (specifically, "Notice required for termination")

138. *Id.* (specifically, "Waiver of protections—void").

139. Mark P. Couch, *Owens Vetoes 3 More Measures*, DENVER POST, Apr. 15, 2005, at B2.

140. Owens's Veto Letter, *supra* note 17 (explaining his veto of HB 1061).

141. *Blackwell v. Del Bosco*, 558 P.2d 563, 565 (Colo. 1976).

142. Yates, *supra* note 8.

143. Owens's Veto Letter, *supra* note 17 (explaining his veto of H.B. 1061).

144. See *supra* notes 1-8 and accompanying text (describing deplorable housing conditions in Denver); *infra* notes 236-38 and accompanying text (discussing Colorado's growing population and low vacancy rate as reasons why Colorado needs a Warranty).

ity.¹⁴⁵ The campaign for a warranty of habitability in Colorado is far from over.

III. CRITIQUE OF GOVERNOR OWENS'S VETO AND RECOMMENDATION

Despite Governor Owens's veto, HB 1061 was defensible. However, HB 1061 itself was inadequate in that it fell far short of a full warranty of habitability. Thus, the Colorado legislature should pass, and the governor should sign, more comprehensive tenant protections. If the legislature fails to do so, Colorado's judiciary should take the initiative to imply a warranty.

A. Critique of Governor Bill Owens's Veto of HB 1061

Governor Owens vetoed HB 1061 on the premise that its tenant protections were unfair and did not "adequately consider[] the interests of private property owners."¹⁴⁶ Governor Owens's criticism rested on three grounds: (1) the capped late fees make it more likely that a tenant will pay his credit card bill than his rent; (2) the bill "ignores the fact that limiting a property owner's ability to collect back rent does not eliminate the owner's legal responsibility to make mortgage payments;" and (3) HB 1061, by prohibiting tenants from waiving statutory protections, "injects the state government unnecessarily into the lease negotiations between property owners and prospective tenants."¹⁴⁷

145. E-mail from Mike Merrifield, Representative, Colorado House of Representatives, to David Blower, author of this Comment (Sept. 29, 2005) (on file with author). Merrifield introduced landlord-tenant legislation in 2006, which capped late fees at fifteen dollars or twenty percent per month, voided waivers of tenant or landlord protections, required the landlord to provide the tenant a copy of the lease, and required the landlord to return a tenant's security deposit within forty-five days. H.B. 1333, 65th Gen. Assem., 2d Reg. Sess. (Colo. 2006). Merrifield had the bill killed in Committee when a "compromise between the landlords and a tenant association" fell through. Lynn Bartels, *Why Kill Own Bill, Leader Asks*, ROCKY MTN. NEWS, Mar. 24, 2006, at 23A. No tenant protections bills had been introduced in the 2007 legislative session as of February 3, 2007. See Colorado General Assembly, House Bills, <http://www.leg.state.co.us/Clics/Clics2007A/csl.nsf/BillFoldesHouse?openFrameset> (last visited Feb. 3, 2007); Colorado General Assembly, Senate Bills, <http://www.leg.state.co.us/Clics/Clics2007A/csl.nsf/BillFoldersSenate?openFrameset> (last visited Feb. 3, 2007).

146. Owens's Veto Letter, *supra* note 17 (explaining his veto of H.B. 1061).

147. *Id.*

1. HB 1061's Capped Late Fees Are More Than Sufficient

Although there is limited precedent for HB 1061's capped late fees,¹⁴⁸ there are a number of arguments for their sufficiency. First, late fees are intended to be liquidated damages, i.e., an estimation, at the time of contracting, of the actual damages incurred if rent is paid late.¹⁴⁹ Despite Governor Owens's suggestions to the contrary, the capped late fees are not a penalty to ensure prompt payment of rent.¹⁵⁰ Second, the late fees provided for in HB 1061 far exceed credit card interest rates.¹⁵¹ Third, the capped late fees do not alter a landlord's remedies under the Forcible Entry and Detainer Act.¹⁵²

There is a good argument that late fees in excess of HB 1061's capped fees are unenforceable penalties. The governor claimed that HB 1061 diminished the "economic incentive to have tenants pay back rent."¹⁵³ However, late fees are not designed to be an "economic incentive." Instead, late fees in a lease function as liquidated damages, which are the sum a party agrees to pay for breaching a contract and are a good-faith forecast of the "actual damages that will probably ensue from the breach."¹⁵⁴ If the purpose of the liquidated damages provision is merely to secure performance it will be treated as a penalty and not be upheld.¹⁵⁵

148. See, e.g., CHI., ILL., MUNICIPAL CODE § 5-12-140(h) (1991), available at http://www.chicityclerk.com/legislation/codes/chapter5_12.pdf (limiting late fees to ten dollars per month for the first \$500 in monthly rent plus five percent per month for any amount in excess of \$500 in monthly rent). Other statutes interfere with late fees in other ways. See, e.g., MASS. ANN. LAWS ch. 186, § 15B(1)(c) (LexisNexis 1994) (prohibiting leases from imposing any interest or penalty for failure to pay rent until thirty days after the rent is due).

149. 22 AM. JUR. 2D *Damages* § 490 (2003); see also *infra* notes 153–55 and accompanying text.

150. 22 AM. JUR. 2D *Damages* § 490 (2003); see also *infra* notes 153–55 and accompanying text.

151. See *infra* notes 161–64 and accompanying text.

152. See HB 1061, *supra* note 17. Although HB 1061 required the landlord to apprise tenants of their right to cure under the Forcible Entry and Detainer Act ("FED"), it did not reduce a landlord's rights thereunder. *Id.* FED provides landlords with swift eviction proceedings for tenants who have unlawfully detained. 2A CATHY STRICKLIN KRENDL, COLORADO METHODS OF PRACTICE § 71.28 (4th ed. 1998); see also COLO. REV. STAT. §§ 13-40-101 to -126 (2005) (laying out Colorado's FED statute); KRENDL, *supra*, §§ 71.14–.28 (same).

153. Owens's Veto Letter, *supra* note 17 (explaining his veto of H.B. 1061).

154. 22 AM. JUR. 2d *Damages* § 490 (2003).

155. *Id.*

Although there are no cases in Colorado dealing with late fees as penalties in residential leases, Colorado courts have generally refused to enforce late fees that amount to a penalty.¹⁵⁶ Additionally, courts in other states have found a variety of residential lease late fees to be unenforceable. In New York, courts have held both a five percent per month late fee¹⁵⁷ and a five dollar per day late fee on rent of \$475 per month to be unenforceable.¹⁵⁸ The Supreme Court of Oklahoma held a late fee of twenty dollars if rent was not paid by the third day of the month plus five dollars for each day thereafter to be a penalty.¹⁵⁹ Under the first New York case, even the capped late fees of fifteen percent per month provided for in HB 1061 would be unenforceable. In the Oklahoma case, a late fee of five dollars per day (on \$465 per month rent—a little more than one percent per day, half of the capped late fee provided for by HB 1061), was found to be an unenforceable penalty. Considering the holdings of other state courts and the unenforceability of penalty provisions in Colorado, late fees in excess of HB 1061's capped fees are arguably unenforceable.¹⁶⁰

Additionally, the late fees provided for in HB 1061 far exceeded monthly credit card interest rates. According to the Federal Reserve, the average commercial bank credit card interest rate in November 2006 was 15.09% per year,¹⁶¹ and the maximum average commercial bank credit card interest rate for all accounts over the last thirty-five years was 18.85% per year.¹⁶² Thus, on average, the monthly interest rate on a credit card is a mere 1.61%.¹⁶³ Renters who pay \$500 per month in

156. See, e.g., *O'Hara Group Denver, Ltd. v. Marcor Hous. Sys., Inc.*, 595 P.2d 679, 683 (Colo. 1979).

157. *943 Lexington Ave., Inc. v. Niarchos*, 373 N.Y.S.2d 787, 787–88 (App. Term 1975).

158. *Dashnaw v. Shiflett*, 10 Misc. 3d 1051A (N.Y. App. Term 2005).

159. *Sun Ridge Investors, Ltd. v. Parker*, 956 P.2d 876, 877–79 (Okla. 1998).

160. *But see Gershin v. Demming*, 685 N.E.2d 1125, 1129–31 (Ind. Ct. App. 1997) (upholding a one percent per day late fee).

161. Board of Governors of the Federal Reserve System, Federal Reserve Statistical Release G.19: Consumer Credit (Jan. 8, 2007), <http://www.federalreserve.gov/releases/g19/Current/g19.pdf>.

162. Board of Governors of the Federal Reserve System, Consumer Credit Historical Data: Terms of Credit, http://www.federalreserve.gov/releases/g19/hist/cc_hist_tc.txt (last visited Feb. 3, 2007).

163. Assuming the thirty-five year high, compounded daily. $[1+(r/m)]^m$ yields “the equivalent annually compounded rate of interest” where r equals annual rate and m equals the number of times per year the interest is compounded. RICHARD A. BREALEY & STEWART C. MYERS, *PRINCIPLES OF CORPORATE FINANCE* 45 (6th

rent and have a \$500 credit card balance will pay a seventy-five dollar late fee if they are a month late paying rent and a mere eight dollars for carrying their credit card balance. So, despite Governor Owens's suggestion that "a tenant with financial difficulties would be more likely to pay his or her delinquent credit card bill before paying rent" under HB 1061,¹⁶⁴ just the opposite seems likely.

Finally, HB 1061 does not abrogate a landlord's rights under an FED action. Under Colorado law, a tenant has unlawfully detained

[w]hen such tenant or lessee holds over without permission of his landlord after any default in the payment of rent pursuant to the agreement under which he holds, and three days' notice in writing has been duly served upon the tenant or lessee holding over, requiring in the alternative the payment of the rent or the possession of the premises.¹⁶⁵

The purpose of FED "actions is to provide an unusually swift procedure for the eviction of a person wrongfully in possession of real estate."¹⁶⁶ Should the tenant refuse to pay rent, the landlord can initiate an FED action and regain possession of the premises. Thus, liquidated damages, in the form of fees for the late payment of rent, are not the only remedy that landlords have for nonpayment. Surely the prospect of being evicted from one's apartment is a greater incentive to pay rent than whatever differential the Governor foresees between the fifteen percent cap in HB 1061 and what the landlord can charge without the caps in place.

2. Tenant Protections Warrant Governmental Intrusion Into Lease Negotiation

In addition to the inadequacy of fifteen percent late fees, the Governor also premised his veto on a reluctance to "inject[]

ed. 2000). Accordingly, $[1+(18.85\%/365)]^{31}$ (or 1.61%) equals the monthly interest rate, compounded daily, of an 18.85% annual credit card interest rate, assuming there are 365 days in a year and thirty-one days in a month.

164. Owens's Veto Letter, *supra* note 17 (explaining his veto of H.B. 1061).

165. COLO. REV. STAT. § 13-40-104(d) (2006); *see also* KRENDL, *supra* note 152, § 71.15.

166. KRENDL, *supra* note 152, § 71.28; *see also* COLO. REV. STAT. § 13-40-101 to -126 (2006) (laying out Colorado's FED statute); KRENDL, *supra* note 152, §§ 71.14-.28 (same).

the state government unnecessarily into the lease negotiations between property owners and prospective tenants.”¹⁶⁷ He focused specifically on the provision in HB 1061 that states that “[a]ny provision in a lease that waives a protection of a tenant created by Colorado Statute” would be void as against public policy.¹⁶⁸ Despite the Governor’s protests, there are a number of reasons why a tenant should not be able to waive statutory protections. First, tenant protections—like consumer protections—fail to protect tenants if they can be waived. Additionally, use of adhesion leases—leases where the tenant has little choice over the terms¹⁶⁹—undermines the argument that such waivers are voluntary or efficient. Finally, many cases and statutes either prohibit or limit the enforceability of such waivers, showing that other states believe such waivers to be improper.¹⁷⁰

HB 1061 attempted to create a mandatory rule, one which parties cannot contract around.¹⁷¹ Mandatory rules are justifiable to “protect one party to the contract from being taken advantage of by the other.”¹⁷² Consumer protection laws are an example of this concept: mandatory consumer protection rules are appropriate because “[a] consumer protection law would not do much good if a business could avoid it simply by inserting a clause in the business’s standard form contract.”¹⁷³ Similarly, tenant protections should also be mandatory. Like consumer protection legislation, tenants’ rights legislation would not do much good if a landlord could simply contract around the statutory provisions.

Additionally, typical residential leases “involve[] gross inequality of bargaining power between landlord and tenant, making the lease a virtual adhesion contract.”¹⁷⁴ Governor Owens,

167. Owens’s Veto Letter, *supra* note 17 (explaining his veto of HB 1061).

168. HB 1061, *supra* note 17; see Owens’s Veto Letter, *supra* note 17.

169. See BLACK’S LAW DICTIONARY 342 (8th ed. 2004).

170. See *infra* notes 183–207 and accompanying text.

171. See Christopher R. Drahozal, *Default Rule Theory and International Arbitration (with Comments on Expanded Review and Ex Parte Interim Relief)*, INT’L ARB. NEWS, Winter 2004/2005, at 2.

172. *Id.*

173. *Id.*

174. Benjamin J. Lambiotte, Comment, *Defensively Pleading Commercial Landlords’ Breaches in Summary Actions for Possession: A Retrospective and Proposal*, 37 CATH. U. L. REV. 705, 726 (1988); see also Martha Wach, *Withholding Consent to Alienate: If Your Landlord is in a Bad Mood, Can He Prevent You from Alienating Your Lease?*, 43 DUKE L.J. 671, 688 (1993) (commenting that since “a

in support of his position, protested that "[t]he bill prohibits property owners and tenants from waiving any statutory rights in the lease. A property lease is a contract, mutually entered into by both sides and where the waiver of statutory rights would presumably be undertaken for the mutual benefit of both parties."¹⁷⁵ Considering that many leases are adhesion contracts, it seems unlikely that a tenant voluntarily and knowingly waives his statutory rights when entering into a lease. "[L]egal obligations commonly aris[ing] from standard form terms in the absence of a substantial understanding and a substantially unconstrained choice . . . are clearly not best understood as voluntary obligations."¹⁷⁶

The governor suggested that unfettered lease negotiations are efficient.¹⁷⁷ Scholars of law and economics believe that contracts efficiently allocate resources "because parties would not agree to an exchange unless each party believed that she would be better off as a result."¹⁷⁸ Presumably, this was the Governor's perspective when he claimed that leases were mutually beneficial to both the landlord and the tenant,¹⁷⁹ but this efficiency argument is weakened in the context of form leases.¹⁸⁰ Form contracts benefit the market economy and drafting parties by increasing organizational efficiency.¹⁸¹ However, the efficiency benefits are one-sided because, "where the nondrafting party is a consumer[,] . . . the advantages of a form agreement are negligible while the disadvantages are numerous."¹⁸² As a result, the Governor's conclusion that unfettered contracting in a residential leasing situation is mutually beneficial to both landlord and tenant is suspect.

residential lease contract could arguably be considered to be a contract of adhesion" a tenant might not have read the clause requiring landlord's consent to alienate a leasehold).

175. Owens's Veto Letter, *supra* note 17.

176. Andrew Robertson, *The Limits of Voluntariness in Contract*, 29 MELB. U. L. REV. 179, 202 (2005).

177. Owens's Veto Letter, *supra* note 17.

178. Nancy S. Kim, *Evolving Business and Social Norms and Interpretation Rules: The Need for a Dynamic Approach to Contract Disputes*, 84 NEB. L. REV. 506, 513-14 (2005) (citing ANTHONY T. KRONMAN & RICHARD A. POSNER, *THE ECONOMICS OF CONTRACT LAW* 1-2 (1979)).

179. Owens's Veto Letter, *supra* note 17 ("[A] waiver of statutory rights would presumably be undertaken for the mutual benefit of both parties.").

180. Lambiotte, *supra* note 174, at 726 (describing many leases as "virtual adhesion contracts").

181. Kim, *supra* note 178, at 547.

182. *Id.* at 548.

Finally, a number of statutes in other states provide that tenant protections cannot be waived. Massachusetts, in a statute allowing tenants to raise uninhabitable conditions as a defense to an action for possession or damages, declares any provision purporting to waive the statutory protections to be void as against public policy.¹⁸³ Massachusetts also requires that a landlord “exercise reasonable care to correct” unsafe conditions and declares purported waivers of that statutory duty to be void as against public policy.¹⁸⁴

Minnesota also prohibits waivers of the landlord’s statutory duties.¹⁸⁵ Minnesota requires that the landlord covenant that the premises are fit for the parties’ intended use,¹⁸⁶ keep the premises in reasonable repair,¹⁸⁷ and maintain the premises in compliance with health and safety laws.¹⁸⁸ In addition to those requirements, the statute declares that parties may not waive the statutorily imposed covenants.¹⁸⁹ California,¹⁹⁰ New York,¹⁹¹ South Dakota,¹⁹² Vermont,¹⁹³ and Wisconsin¹⁹⁴ all have similar provisions prohibiting parties from waiving statutory duties, as does Chicago’s municipal warranty.¹⁹⁵

Some state courts have also held waivers to be unenforceable, even when the statute does not prohibit them. In West Virginia, where the statute is silent concerning waivers,¹⁹⁶ the state Supreme Court held a waiver void as against public policy.¹⁹⁷ Additionally, courts in California, Massachusetts, and

183. MASS. ANN. LAWS ch. 239, § 8A (LexisNexis 2003).

184. *Id.* ch. 186, § 19.

185. MINN. STAT. ANN. § 504B.161, subdiv. 1 (West 2002).

186. *Id.* § 504B.161, subdiv. 1(1).

187. *Id.* § 504B.161, subdiv. 1(2).

188. *Id.* § 504B.161, subdiv. 1(3).

189. *Id.* § 504B.161, subdiv. 1.

190. CAL. CIV. CODE § 1942.1 (West 1985) (declaring such waivers as against public policy).

191. N.Y. REAL PROP. LAW § 235-b(2) (McKinney 2006) (voiding as against public policy any waiver by the tenant of his rights).

192. S.D. CODIFIED LAWS § 43-32-8 (2004) (stating that parties may not waive the statutory requirements). In South Dakota, the landlord and tenant can agree that the tenant will perform certain repairs “in lieu of rent.” *Id.*

193. VT. STAT. ANN. tit. 9, § 4457 (2006) (declaring waivers contrary to public policy, unenforceable, and void).

194. WIS. STAT. ANN. § 704.07 (West 2001 & Supp. 2006) (declaring any waiver of the statutory requirements in a residential tenancy void).

195. CHICAGO, ILL., MUN. CODE § 5-12-140 (1991), available at http://www.chicityclerk.com/legislation/codes/chapter5_12.pdf.

196. W. VA. CODE ANN. § 37-6-30 (LexisNexis 2005).

197. *Teller v. McCoy*, 253 S.E.2d 114, 130–31 (W. Va. 1978); see also *STOEBUCK*

Washington have found waivers to be unenforceable.¹⁹⁸

Although the URLTA allows waivers in certain circumstances, it places limits on their enforceability.¹⁹⁹ Under the URLTA, a tenant can waive his rights if the waiver is agreed to in a separate writing²⁰⁰ and is made in good faith.²⁰¹ In the case of a multi-unit dwelling,²⁰² the waiver must be supported by adequate consideration²⁰³ and the repairs must not be needed to cure defects that violate housing or building codes.²⁰⁴ While the URLTA allows such waivers, the limitations on them reduce their abuse. The provision requiring the waiver to be set forth in a separate document helps to reduce the practice of routinely putting waivers into adhesion contracts.²⁰⁵ Additionally, the URLTA provides that a tenant can recover actual damages, attorney's fees, and up to three times the monthly rent "[i]f a landlord deliberately uses a rental agreement containing provisions known by him to be prohibited."²⁰⁶ Such provisions would include a waiver of rights.²⁰⁷

Overall both public policy and precedent support a statute that prohibits tenants from waiving their rights. Tenant protections, like consumer protections, will not do much good if they can be waived. The expanded use of adhesion contracts undermines the argument that such waivers are entered into voluntarily. Finally, evidencing the problematic nature of waivers, a number of state statutes and state courts prohibit them entirely.

& WHITMAN, *supra* note 18, at 315-16.

198. STOEBUCK & WHITMAN, *supra* note 18, at 315-16; *Green v. Superior Court*, 517 P.2d 1168, 1173 n.9 (Cal. 1974); *Boston Hous. Auth. v. Hemmingway*, 293 N.E.2d 831, 843 (Mass. 1973); *Foisy v. Wyman*, 515 P.2d 160, 164 (Wash. 1973).

199. STOEBUCK & WHITMAN, *supra* note 18, at 314-15; see URLTA, *supra* note 66, § 2.104(c), at 567.

200. STOEBUCK & WHITMAN, *supra* note 18, at 314 & n.2; see URLTA, *supra* note 66, § 2.104(c)-(d), at 567.

201. URLTA, *supra* note 66, § 2.104(c)-(d), at 567.

202. *Id.* § 2.104(d).

203. *Id.* § 2.104(d)(1).

204. *Id.* § 2.104(d)(2).

205. STOEBUCK & WHITMAN, *supra* note 18, at 314 & n.1; see URLTA, *supra* note 66, § 1.403 cmt., at 554.

206. URLTA, *supra* note 66, § 1.403(b), at 554.

207. STOEBUCK & WHITMAN, *supra* note 18, at 314-15.

B. Recommendation: Colorado Needs a Warranty One Way or Another

1. HB 1061 Was Just a Good Start

While HB 1061's provisions were eminently defensible, they fell far short of the broad and comprehensive tenant protections that are needed in Colorado. HB 1061 attempted to ensure prompt return of a tenant's security deposit, cap late fees, ensure proper notice of an FED action, and protect tenants from a landlord's attempt to contract around statutory protections.²⁰⁸ Unfortunately, existing tenant protections are hardly comprehensive because the Colorado Supreme Court has refused to imply a warranty of habitability²⁰⁹ and the General Assembly's attempts to pass a statutory warranty also failed.²¹⁰ This lack of protection results in problems, such as roach infested apartments and lack of heat and hot water.²¹¹ Attempts by both Glendale and Thornton to pass building codes for rental properties in the 1990s aptly illustrate the very real problem of uninhabitable apartments.²¹² The problem is also illustrated by the fact that forty-seven states plus the District of Columbia have either a statutory or judicially implied warranty of habitability.²¹³ It is not just the states with large metropolitan areas that have adopted tenant protections. Although one of the most influential cases, *Javins v. First National Realty Corp.*,²¹⁴ originated in the District of Columbia, the other seminal case, *Pines*, originated in Wisconsin.²¹⁵ Other states with fewer people than Colorado,²¹⁶ such as Vermont²¹⁷ and Alaska,²¹⁸ and even our neighbors Utah²¹⁹ and

208. HB 1061, *supra* note 17.

209. *See supra* Part II.A.

210. *See supra* Part II.B.

211. *See supra* notes 1–8 and accompanying text.

212. *See supra* note 9 and accompanying text.

213. *See* Maddex, *supra* note 23, at 595–96 & n.121; *supra* note 63 and accompanying text.

214. 428 F.2d 1071 (D.C. Cir. 1970).

215. 111 N.W.2d 409 (Wis. 1961).

216. MARC J. PERRY & PAUL J. MACKUN, U.S. CENSUS BUREAU, CENSUS 2000 BRIEF: POPULATION CHANGE AND DISTRIBUTION 2 (2001), available at <http://www.census.gov/prod/2001pubs/c2kbr01-2.pdf>.

217. VT. STAT ANN. tit. 9, § 4457 (2006).

218. ALASKA STAT. § 34.03.100 (2006).

219. UTAH CODE ANN. § 57-22-4 (2000); *Wade v. Jobe*, 818 P.2d 1006 (Utah 1991).

Wyoming,²²⁰ also have significant tenant protections.

2. Colorado Needs a Warranty of Habitability

For all the reasons discussed above, Colorado needs a residential warranty of habitability. The assumptions that underlie *caveat emptor* in residential leases no longer apply. Most tenants are no longer leasing just land. Instead, they are leasing apartments, with the expectation that their apartments will have running water, heat, light, and electricity.²²¹ Additionally, tenants are no longer “jack[s] of all trades;” it is unlikely that they have the skills to determine if the apartment is habitable or to fix household amenities that malfunction.²²² Finally, given the nature of today’s housing market, which frequently involves unequal bargaining power between landlords and tenants, tenants often do not have choices about the terms of their lease agreements.²²³

a. *Wyoming: Providing Hope that Colorado Will Overcome Resistance to Tenant Protections*

The Wyoming legislature passed fairly broad tenant protection legislation in 1999²²⁴ after the Wyoming Supreme Court refused to imply a warranty, claiming that this was a matter for the legislature.²²⁵ There was resistance to Wyoming’s statutory warranty of habitability,²²⁶ just as there has been in Colorado.²²⁷ But, in the end, the belief that Wyoming needed a law to deal with landlord-tenant relations prevailed.²²⁸ Al-

220. WYO. STAT. ANN. §§ 1-21-1201 to -1211 (2005).

221. See *supra* notes 52–55 and accompanying text.

222. See *supra* note 62 and accompanying text.

223. See *supra* notes 56, 60–61 and accompanying text.

224. Gaudio, *supra* note 36, at 456–57. The legislation is codified at WYO. STAT. ANN. §§ 1-21-1201 to -1211 (2005).

225. Ortega v. Flaim, 902 P.2d 199, 204 (Wyo. 1995).

226. Jessica Lowell, *Senate Approves Tenant/Landlord Bill*, WYO. TRIB.-EAGLE, Feb. 25, 1999, at A6 (citing Senators’ concerns for landlords). One Wyoming state senator was concerned that “there’s little justice for landlords in court and the bill does not address how to get problem tenants out of apartments.” *Id.*

227. See Yates, *supra* note 8 (discussing how the House of Representatives passed a landlord-rights bill in response to the Senate’s implied warranty of habitability); Owens’s Veto Letter, *supra* note 17 (explaining his veto of HB 1061) (citing concern for landlords and a desire not to inject the state into contract negotiations).

228. Jessica Lowell, *Panel Looks at Rental Housing Law*, WYO. TRIB.-EAGLE,

though not as comprehensive as the URLTA,²²⁹ the Wyoming statute includes significant tenant protections. It requires that the landlord maintain the premises in a "safe and sanitary condition fit for human habitation."²³⁰ It also requires that the dwelling have operational electricity, heating, plumbing, and hot and cold water.²³¹ One weakness in the Wyoming statute is that it neither prohibits waivers²³² nor does it provide for the URLTA's protections against waivers.²³³ Instead, the Wyoming statute permits the statutory duties to "be assigned to a different party or modified by explicit written agreement signed by the parties."²³⁴ Regardless of the statute's shortcomings,²³⁵ its passage by the Wyoming state legislature in 1999, despite Wyoming's history of adherence to *caveat emptor*, is encouraging.

Wyoming's adoption of tenant-protection legislation can serve as a model for Colorado legislative action. Wyoming and Colorado are neighbors and are both western states. Neither has the population (or population density) of California, New York, or the District of Columbia. However, there are certain characteristics of Colorado that make an implied warranty of habitability even more essential here than in Wyoming. Colorado's population is ten times that of Wyoming.²³⁶ The state population grew by thirty percent from 1990 to 2000, compared to a growth rate of just less than nine percent during the same

June 20, 1998, at A1. The Wyoming Association of Realtors opined that there needed to be a landlord-tenant bill. *Id.* An attorney for the Cheyenne Housing Authority also opined that he thought this legislation was "balanced on the whole." *Id.*

229. Compare WYO. STAT. ANN. § 1-21-1202(a) (2005), with URLTA, *supra* note 66, § 2.104, at 566.

230. WYO. STAT. ANN. § 1-21-1202(a) (2005).

231. *Id.*

232. See *supra* notes 183-98 and accompanying text (discussing statutes and cases finding such waivers void as contrary to public policy).

233. See *supra* notes 199-207 and accompanying text (discussing the URLTA's waiver provisions and how they operate to protect tenants).

234. WYO. STAT. ANN. § 1-21-1202(d) (2005).

235. Gaudio, *supra* note 36, at 517 (concluding an Article critiquing Wyoming's Residential Rental Property Act, or implied warranty of habitability, by outlining the Act's main issues). According to Professor Gaudio, the legislature and judiciary still have work to do because the Act does not "assur[e] tenants that the protection of the implied warranty cannot be denied to them by the simple act of the landlord's disclaimer, and that the remedies provided to them will be prompt and adequate for the purpose of enforcing the warranty." *Id.*

236. PERRY & MACKUN, *supra* note 216.

period in Wyoming.²³⁷ Finally, Wyoming has a housing vacancy rate of over thirteen percent, while Colorado has a vacancy rate of just over eight percent.²³⁸

Colorado's greater population and population growth, as well as the lower housing vacancy rate, make the issue of habitable apartments more salient here than in Wyoming. A quickly growing population and a low housing vacancy rate lead to a housing squeeze. The lack of housing leads to bargaining power inequity, which in turn contributes to uninhabitable housing.²³⁹ Consequently, Colorado's demographics make apartment habitability a more significant issue than in Wyoming. Yet, Wyoming has instituted a warranty statute while Colorado has not. Considering that the vast majority of states, including neighboring Wyoming, have a warranty of habitability, the adoption of a warranty in Colorado is long overdue.

b. URLTA: A Good Model for Colorado

For reasons already discussed, Colorado needs an implied warranty of habitability for residential leases. The state of Wyoming, a state similar in many ways to Colorado, provides hope that such tenant protections can succeed in Colorado's legislature. At the same time, the Wyoming bill leaves much to be desired, and thus, should not be used as model legislation for Colorado. The URLTA—upon which State Senator Matsunaka's SB 63 was based—is a better model for Colorado.

The URLTA is a good model for Colorado for a number of reasons. First, it was initially propagated in 1972 and amended in 1974,²⁴⁰ making it one of the early attempts to codify tenant protections and giving it a long track record.²⁴¹ Second, fifteen states have adopted the URLTA and at least three other states have adopted similar legislation.²⁴² This wide-

237. *Id.*

238. JEANNE WOODWARD & BONNIE DAMON, U.S. CENSUS BUREAU, CENSUS 2000 BRIEF: HOUSING CHARACTERISTICS: 2000 2 (2001), available at <http://www.census.gov/prod/2001pubs/c2kbr01-13.pdf>.

239. See *supra* notes 56, 60–61 and accompanying text.

240. STOEBCUK & WHITMAN, *supra* note 18, at 314 n.2.

241. *Id.* at 309–10 (noting that a few states adopted the Field Code, long before the URLTA, which required the landlord to maintain leased premises but that no other jurisdiction followed their lead).

242. *Id.* at 311 (commenting that fifteen states have adopted the URLTA and six other states have adopted residential landlord-tenant acts that incorporate

spread adoption suggests that the URLTA's provisions are working suitably for a number of states, from Alaska and North Dakota to Ohio.²⁴³ Most importantly, the URLTA provides the protections that tenants need. It requires that a rental dwelling be habitable and comply with building and housing codes.²⁴⁴ It also requires that the landlord maintain an apartment's essential facilities, like electricity and plumbing.²⁴⁵ Finally, it requires a landlord to provide heat and hot water.²⁴⁶ Such protections should adequately address the problems outlined in the beginning of this Comment.²⁴⁷ Ms. Valasquez had an inoperable sink and roach infestation, which would almost certainly violate the URLTA. Moreover, her landlord had eighty housing code violations, which would also violate the URLTA.

The URLTA also provides sufficient remedies for the tenant. Under the URLTA, a tenant can terminate the lease agreement, repair the premises and deduct the costs from his rent, or use failure to comply with the warranty as a defense to an action for possession or rent.²⁴⁸ Having a variety of remedies is important because tenants "need a remedy that will get their present living quarters fixed up, not a remedy that . . . will require them to move to another apartment where the rats are even larger."²⁴⁹ Additionally, the URLTA provides protections against a tenant waiving his rights. Although not as protective as those statutes and cases that hold waivers void as contrary to public policy, the URLTA requires waivers to be in a separate writing and supported by adequate consideration.²⁵⁰ Such protections against waivers are especially important where tenants have little bargaining power,²⁵¹ as is the case in Colorado with a growing population and low housing vacancy

those provisions of the URLTA requiring landlords keep residential premises in habitable condition); Maddex, *supra* note 23, at 597-98 (commenting that fifteen states have adopted the URLTA and another three have adopted something similar to the URLTA).

243. See *supra* note 68 and accompanying text (listing those states that have adopted the URLTA).

244. URLTA, *supra* note 66, § 2.104(a)(1)-(2), at 566.

245. *Id.* § 2.104(a)(4).

246. *Id.* § 2.104(a)(6).

247. See *supra* notes 1-8 and accompanying text.

248. See *supra* notes 88-90 and accompanying text.

249. STOEBCUK & WHITMAN, *supra* note 18, at 318.

250. See *supra* notes 199-207 and accompanying text.

251. See *supra* note 174-76 and accompanying text.

rate.²⁵² For all of these reasons, the URLTA provides a good model for Colorado warranty of habitability legislation.

c. The Courts Should Act if the Legislature Fails to Do So

Legislative action establishing a warranty of habitability is the most desirable outcome for tenants in Colorado. But, given the reluctance of the General Assembly to pass broad tenant protections in the wake of *Blackwell*,²⁵³ the courts should consider stepping in. Although the Colorado Supreme Court said that the legislature is better equipped than the courts to make this type of decision, it also recognized the merits of the argument for implying a warranty of habitability.²⁵⁴ Considering the compelling arguments for a warranty²⁵⁵ and the willingness of courts in other jurisdictions to imply warranties,²⁵⁶ Colorado's Supreme Court should no longer hesitate to do so.

Supporting the argument in favor of a judicially implied warranty of habitability in Colorado, other modern courts have been willing to imply such a warranty. In 1991, the Utah Supreme Court implied a warranty of habitability in residential leases despite previously refusing to do so.²⁵⁷ According to the Utah court, the assumptions underlying *caveat emptor* are no longer true because of changes in society.²⁵⁸ For instance, tenants no longer bargain for the land itself, but instead bargain for use of the structures on the land.²⁵⁹ The court cited the modern-day tenant's lack of skills necessary to make repairs and current inequality in bargaining power between landlord and tenant.²⁶⁰ These were essentially the same factors cited by courts twenty years earlier.²⁶¹

The Alabama Supreme Court and the Colorado Supreme Court have both claimed that warranties of habitability are

252. See *supra* notes 236–38 and accompanying text.

253. See *supra* Part II.B.

254. *Blackwell v. Del Bosco*, 558 P.2d 563, 565 (Colo. 1976).

255. See *supra* Part I.A.1.

256. *Detling v. Edelbrock*, 671 S.W.2d 265 (Mo. 1984); *Pugh v. Holmes*, 405 A.2d 897 (Pa. 1979); *Teller v. McCoy*, 253 S.E.2d 114 (W. Va. 1978).

257. *Wade v. Jobe*, 818 P.2d 1006, 1010 (Utah 1991).

258. *Id.* at 1009–10.

259. *Id.* at 1009.

260. *Id.* at 1010.

261. See *supra* Part I.A.1.

properly the domain of the legislature,²⁶² rather than the courts, but other courts that have addressed this issue disagree. Some, like the Utah Supreme Court, have disagreed implicitly.²⁶³ Others have explicitly refuted the idea that warranties of habitability are properly the province of the legislature.²⁶⁴ In *Pugh v. Holmes*, the Supreme Court of Pennsylvania stated that "*caveat emptor* was a creature of the common law."²⁶⁵ Accordingly, courts had a duty to reevaluate *caveat emptor* as part of their continuing duty to reevaluate the judicially crafted rules of the common law.²⁶⁶ Finally, citing Justice Cardozo, the court said that "when a rule has been duly tested by experience and found inconsistent with the sense of justice or the social welfare there should be little hesitation in 'frank avowal and full abandonment.'"²⁶⁷ Likewise, if the Colorado legislature fails to pass tenant protections legislation, the Colorado Supreme Court should not hesitate to discard *caveat emptor*, a creature of judicially created common law that is inconsistent with modern realities.

CONCLUSION

Colorado is one of the few American states still clinging to the antiquated doctrine of *caveat emptor* in residential leases. This leads to powerless tenants being forced to live in uninhabitable conditions. Despite widespread adoption, either by the legislature or by the courts, in all but three states, the Colorado Supreme Court, legislature, and most recently, the Governor, have all prevented meaningful change in the area of tenant protections.

The Governor's most recent veto of HB 1061 was unfortunate because the bill provided wholly defensible, and modest, tenant protections. However, HB 1061 did not go nearly far enough. The Colorado legislature should pass a warranty mod-

262. *Murphy v. Hendrix*, 500 So. 2d 8, 8 (Ala. 1986); *Blackwell v. Del Bosco*, 558 P.2d 563, 565 (Colo. 1976).

263. *Cf. Wade v. Jobe*, 818 P.2d 1006, 1010 (implying a warranty and not deferring to the legislature).

264. *Green v. Superior Court*, 517 P.2d 1168, 1184 (Cal. 1974); *Pugh v. Holmes*, 405 A.2d 897, 904-05 (Pa. 1979).

265. *Pugh*, 405 A.2d at 904.

266. *Id.*

267. *Id.* (quoting BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 150-51 (1921)).

eled after the URLTA. If the legislature fails to do so, or if the governor vetoes such legislation, the Colorado Supreme Court, recognizing societal changes in the context of residential leases, should judicially imply a warranty to correct the outdated judicial doctrine of *caveat emptor*.