LANDLORD AND TENANT—ABATEMENT OF RENT ALLOWED FOR BREACH OF THE IMPLIED WARRANTY OF HABITABILITY IN A PATENT DEFECT SITUATION—*Samuelson v. Quinones*, 119 N.J. Super. 338, 291 A.2d 580 (App. Div. 1972).

Valerie Quinones and her family of six were the occupants of a four-room basement apartment in Newark, New Jersey, at the time Hannah Samuelson, the landlord-owner, instituted summary dispossess proceedings against her.[1] Mrs. Quinones had initially accepted the apartment "as is," knowing that the apartment contained no heating fixtures and that the sole source of heat was a gas range. The lease required initial payments of $90 per month, which were subsequently raised to $100 and then $110 per month. After two and one-half years of occupancy, Mrs. Quinones refused to pay rent for two months, falling $220 in arrears.[2]

At the dispossess proceedings Mrs. Quinones sought a total abatement of rent, alleging the existence of uninhabitable conditions in the apartment, including numerous defects, disrepairs, and the lack of heating facilities.[3] The defendant asserted that she began withholding rental payments in order to pay for the repairs necessary to make the premises habitable. Moreover, she alleged that rent had been withheld only after the plaintiff had ignored her repeated complaints and requests to repair the defective conditions.[4] The rent withheld was deposited into court pending disposition of the case.[5]

The trial court allowed a rent abatement of $30 per month for

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1 Samuelson v. Quinones, 119 N.J. Super. 338, 339, 291 A.2d 580, 581 (App. Div. 1972). Proceedings were held pursuant to N.J. STAT. ANN. § 2A:18-53 (Supp. 1972-73), which provides in pertinent part:

> Any lessee or tenant at will or at sufferance, or for a part of a year or for 1 or more years, of any houses, buildings, land or tenements, and the assigns, undertenants or legal representatives of such tenant or lessee, may be removed from such premises by the county district court of the county within which such premises are situated, in an action in the following cases:
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> b. Where such person shall hold over after a default in the payment of rent, pursuant to the agreement under which the premises are held.

2 119 N.J. Super. at 339, 291 A.2d at 581. The parties were operating under an oral lease which created a tenancy from month-to-month at a fixed rental. There were apparently no express covenants. Brief for Appellant at 8.

3 119 N.J. Super. at 340, 291 A.2d at 581. Among the uninhabitable conditions were a defective gas range, an unsafe kitchen sink, pipe leakage, cracked walls, cracked and chipped plaster, a defective bathroom door, and a broken window.

4 Brief for Appellant at 3.

5 119 N.J. Super at 338, 291 A.2d at 580. The money was held by the court in escrow. This procedure is to be distinguished from that outlined by N.J. STAT. ANN. § 2A:18-55 (1952) by which payment into court terminates the action on jurisdictional grounds.

two months due to a variety of defective conditions which developed subsequent to the formation of the lease agreement. However, the trial court refused to allow an abatement for the lack of heating facilities, concluding that an abatement would not be proper where the condition was either known to, or observable by, the tenant at the inception of the lease, notwithstanding that the condition was in violation of a municipal housing ordinance.[6] The municipal housing ordinance, in establishing minimum housing standards, specifically required heating facilities for each and every dwelling unit occupied.[7]

On appeal, Mrs. Quinones sought a total rent abatement, contending that the lease should be deemed void, illegal, and unenforceable *ab initio* since the condition of the leased premises violated the municipal housing ordinance. Specifically, she alleged:

> (1) that rental of the premises in violation of the municipal housing code constituted a violation of the covenant of habitability, the housing code constituting the standard by which to measure habitability; (2) that rental of the premises in violation of the housing code was an illegal contract unenforceable by the courts; and (3) that enforcement of the contract where there was a violation of the housing code would be against the State's public policy of protection of urban low-income tenants.[8]

The Appellate Division of the Superior Court of New Jersey reversed the decision of the trial court and held that the landlord's failure to provide adequate heating facilities, in violation of the municipal housing ordinance, breached the implied warranty of habitability. The tenant was thereby entitled to a partial abatement of rent, notwithstanding her awareness of the defective condition at the in-

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6 119 N.J. Super. at 340, 291 A.2d at 581. Another New Jersey trial court, in a decision rendered just prior to *Quinones*, held that violations of municipal ordinances do not go to the issue of habitability. Mull v. Hamilton, No. T-257818 (Essex County Dist. Ct., Apr. 28, 1971). The facts in *Mull* are similar to those in *Quinones* except that the tenant lacked bath and shower facilities instead of heat.

Abatement in *Quinones* was limited to the two months of arrearage prior to the time of trial because N.J.R. 6:3-4 prohibits the joinder of a summary action for possession with any other claim, counterclaim or third-party complaint. Permitting an abatement *in futuro* would create, in effect, a prohibited counterclaim. The tenant must file a separate action to obtain this expanded relief. Academy Spires, Inc. v. Jones, 108 N.J. Super. 395, 402, 261 A.2d 413, 416 (L. Div. 1970).

7 NEWARK, N.J. REV. ORDINANCES art. 2, § 15:4-10 (1967) provides in part:

> All habitable rooms, bathrooms and water closet compartments shall be heated by central heating or, in lieu thereof, by a system vented by flue stacks to accommodate permanent heating fixtures or apparatus, except where heating is by electrical energy, in which case no flue stacks shall be required.

8 119 N.J. Super. at 340, 291 A.2d at 581.

ception of the lease and the acceptance of the apartment "as is."[9] In remanding the case to the trial court, the appellate division directed that the rent be determined according to the reasonable value of the demised premises with its lack of heating facilities.[10]

The implied warranty of habitability, upon which the *Quinones* decision was based, developed from principles of warranty relative to contract law.[11] A warranty, at common law, is a promise that a certain fact or condition exists or will exist as stipulated, thus relieving the warrantee from ascertaining the fact for himself.[12] Primarily for the warrantee's benefit and protection, it provides security that in the event the fact or condition proves untrue, any loss suffered will be indemnified by the warrantor.[13]

Warranties may be either express or implied. When a landlord

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9 *Id.* at 342-43, 291 A.2d at 583.

10 *Id.* at 343, 291 A.2d at 583.

11 *See* Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1074-77 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); Note, *Implied Warranty of Habitability in Housing Leases*, 21 DRAKE L. REV. 300, 306 (1972). Many recent decisions concerning the landlord-tenant relationship discuss the degree to which the law of contracts should govern the leasehold. Historically, leaseholds have been regulated solely by the law of real property. Lesar, *Landlord and Tenant Reform*, 35 N.Y.U.L. REV. 1279, 1279-82 (1960), and cases cited therein.

Initially, the lease was a conveyance of an interest in land. As the emphasis in renting shifted from the land to dwellings on the land, tenants began to demand that their leases contain covenants to repair the demised property. *Cf.* Javins v. First Nat'l Realty Corp., *supra* at 1076.

Such covenants were independent of the tenant's covenant to pay rent as "the rent issues out of the land, without reference to the condition of the buildings or structures upon it." Hart v. Windsor, 152 Eng. Rep. 1114, 1119 (Ex. 1843). Therefore, the tenant was obliged to pay the rent whether the landlord kept the premises habitable or not. More recently, however, these covenants have become either independent or dependent "according to the intention and meaning of the parties and the good sense of the case." Marini v. Ireland, 56 N.J. 130, 145, 265 A.2d 526, 534 (1970) (quoting from Higgins v. Whiting, 102 N.J.L. 279, 280, 131 A. 879, 880 (Sup. Ct. 1926)). Thus, in the early exceptional cases where a breach of an implied warranty of habitability was found, the courts generally construed the covenant to pay rent and the covenant to let a habitable dwelling as mutually dependent. As in any contractual arrangement, a breach of one covenant permitted the termination of obligation under the other. *E.g.*, Smith v. Marrable, 152 Eng. Rep. 693 (Ex. 1843); Ingalls v. Hobbs, 156 Mass. 348, 31 N.E. 286 (1892). Modern decisions finding a breach of an implied warranty of habitability in residential or commercial leaseholds generally recognize this dependency of covenants in lease agreements. They have permitted contractual remedies on the basis that the intent of the parties was that the dwelling would remain habitable during the entire existence of the lease. *See, e.g.*, Javins v. First Nat'l Realty Corp., *supra* at 1079; Brown v. Southall Realty Co., 237 A.2d 834, 836 (D.C. Ct. App. 1968); Marini v. Ireland, *supra* at 144, 265 A.2d at 534; Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969); Academy Spires, Inc. v. Brown, 111 N.J. Super. 477, 268 A.2d 556 (Essex County Dist. Ct. 1970).

12 *E.g.*, Dittman v. Nagel, 43 Wis. 2d 155, 160, 168 N.W.2d 190, 193 (1969).

13 *Id.*

expressly warrants a given fact or condition in a contract or lease, he promises that the stipulated fact or condition will be met;[14] whereas, an implied warranty is imposed by law to compel equitable results between the parties.[15] Reflective of strong public policy,[16] an implied warranty is inferred by the nature of the lease or the relative situation or circumstances of the parties.[17] It is an obligation on the part of the warrantor, regardless of his intent,[18] which the court imposes on the basis that both parties to the lease or contract know, or should know, that a certain fact or condition exists although it is not expressly stated therein.[19]

Among the earliest implied warranties of significance in leases was the landlord's implied covenant of quiet enjoyment, necessitated by law to assure the tenant a peaceful occupancy.[20] The covenant was breached if the landlord, or one acting by and through the landlord, physically ousted the tenant from the demised premises or deprived him in whole or in part of the use or enjoyment of the leased estate.[21]

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14 Strika v. Netherlands Ministry of Traffic, 185 F.2d 555, 558 (2d Cir. 1950); Mitchell v. Rudasill, 332 S.W.2d 91, 95 (Mo. Ct. App. 1960); *see* Hyland v. Parkside Inv. Co., 10 N.J. Misc. 1148, 1149, 162 A. 521 (Sup. Ct. 1932) (a landlord's specific restriction of use interpreted as an express guaranty of fitness for that purpose).

15 Markovich v. McKesson & Robbins, Inc., 106 Ohio App. 265, 272, 149 N.E.2d 181, 186 (1958); *see* Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 370, 161 A.2d 69, 76 (1960).

16 *See* Lemle v. Breeden, 51 Hawaii 426, 462 P.2d 470 (1969); Marini v. Ireland, 56 N.J. 130, 141-44, 261 A.2d 526, 532-34 (1970); Reste Realty Corp. v. Cooper, 53 N.J. 444, 452, 251 A.2d 268, 272 (1969); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 404, 161 A.2d 69, 95 (1960); Pines v. Perssion, 14 Wis. 2d 590, 595-96, 111 N.W.2d 409, 412-13 (1961).

17 The court in Pines v. Perssion, 14 Wis. 2d 590, 595, 111 N.W.2d 409, 412 (1961), stated that

> [the implied warranty of habitability] is based on an intention inferred from the fact that under the circumstances the lessee does not have an adequate opportunity to inspect the premises at the time he accepts the lease.

Accord, Marini v. Ireland, 56 N.J. 130, 143, 261 A.2d 526, 533 (1970). *Cf.* Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 404, 161 A.2d 69, 95 (1960).

18 Strika v. Netherlands Ministry of Traffic, 185 F.2d 555, 558 (2d Cir. 1950); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 404, 161 A.2d 69, 95 (1960).

19 Marini v. Ireland, 56 N.J. 130, 143, 261 A.2d 526, 533 (1970) (quoting from William Berland Realty Co. v. Hahne & Co., 26 N.J. Super. 477, 487, 98 A.2d 124, 129 (Ch. 1953)).

20 The court in Pierce v. Nash, 126 Cal. App. 2d 606, 272 P.2d 938 (1954), defined the covenant of quiet enjoyment as follows: "[w]hether expressed or implied, this covenant means that a tenant shall not be wrongfully evicted or disturbed in his possession by the lessor." *Id.* at 612, 272 P.2d at 943. *Accord*, Anderson v. Bloomheart, 101 Kan. 691, 694, 168 P. 900, 902 (1917); Stewart v. Drake, 9 N.J.L. 139, 141 (Sup. Ct. 1827).

21 *See* Reste Realty Corp. v. Cooper, 53 N.J. 444, 458, 251 A.2d 268, 275 (1969); Old Falls, Inc. v. Johnson, 88 N.J. Super. 441, 450, 212 A.2d 674, 680 (App. Div. 1965); Burnstine v. Margulies, 18 N.J. Super. 259, 268, 87 A.2d 37, 41 (App. Div. 1952); McCurdy v. Wyckoff, 73 N.J.L. 368, 369, 63 A. 992, 993 (Sup. Ct. 1906).

The exact origin of the implied warranty of habitability has been traced to *Smith v. Marrable*,[22] an 1843 English case before the Exchequer of Pleas. There the tenant had agreed to lease a furnished house for a period of five or six weeks, but vacated the premises after one week's occupancy upon discovering that it was infested with insects and the landlord's extermination attempts had failed.[23] In denying the landlord's request for the full payment of rent under the lease, the court reasoned:

> A man who lets a ready-furnished house surely does so under the implied condition or obligation—call it which you will—that the house is in a fit state to be inhabited.[24]

Instead of extending the holding in *Smith* to all leaseholds, later court decisions in England,[25] as well as those in America,[26] limited the warranty to the facts explicit in the *Smith* case, i.e., a furnished dwelling leased for a short and definite period of time. In succeeding cases the courts maintained that an implied warranty of habitability is inferred from the nature of the lease, for both parties know that the specific intent is the immediate occupancy of habitable premises. Therefore, an exception to the doctrine of *caveat emptor* should be allowed when the lessee is unable to inspect or investigate the premises prior to his occupancy.[27]

Except for a few gradual and minor allowances,[28] no significant

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22 152 Eng. Rep. 693 (Ex. 1843). *See* Skillern, *Implied Warranties in Leases: The Need for Change*, 44 DENVER L.J. 387, 391 (1967).

23 152 Eng. Rep. at 693.

24 *Id.* at 694. The court referred to Collins v. Barrow, 174 Eng. Rep. 38 (Ex. 1831), and Edwards v. Etherington, 171 Eng. Rep. 1016 (K.B. 1825). In *Collins*, a tenant who had expressly agreed to keep a house in good repair was allowed to quit when the premises became "unwholesome, noisome, and offensive" and when such condition was caused through no fault of his own and could not have been prevented except at unreasonable expense. In *Edwards*, the tenant was permitted to terminate a year-to-year tenancy for serious conditions which prevented the beneficial use and occupation of the premises.

25 *E.g.*, Hart v. Windsor, 152 Eng. Rep. 1114 (Ex. 1843); Sutton v. Temple, 152 Eng. Rep. 1108 (Ex. 1843).

26 *E.g.*, Davenport v. Squibb, 320 Mass. 629, 70 N.E.2d 793 (1947). *But see* Delmeter v. Foreman, 184 Minn. 428, 239 N.W. 148 (1931). For a detailed analysis see Comment, *Landlord and Tenant—Implied Covenant of Fitness for Use—Lease of Building to be Constructed*, 11 B.U.L. REV. 119, 120-21 (1931).

27 *See* Hacker v. Nitschke, 310 Mass. 754, 39 N.E.2d 644 (1942); Young v. Povich, 121 Me. 141, 116 A. 26 (1922).

28 In Ingalls v. Hobbs, 156 Mass. 348, 31 N.E. 286 (1892), the *Smith* holding was extended to seasonal leases and in Young v. Povich, 121 Me. 141, 116 A. 26 (1922) to a lease for eight months. Other cases held that an implied warranty of habitability existed where the lease agreement was entered into prior to completion of the premises to be let. *See, e.g.*, Woolford v. Electric Appliances, Inc., 24 Cal. App. 2d 385, 75 P.2d 112 (1938); J.D. Young Corp. v. McClintic, 26 S.W.2d 460 (Tex. Civ. App. 1930). *But see* Oliver v. Hartzell,

change in the law occurred until 1961 when, in the landmark case of *Pines v. Perssion*,[29] the Wisconsin supreme court extended the implied warranty of habitability to cover premises leased for an extended period.[30] The court, after acknowledging the common-law exceptions, based its decision upon strong dictates of public policy, imposing increased duties upon the landlord to insure adequate housing.[31] These increased duties, the court stipulated, should be imposed whenever latent defects caused a furnished dwelling held out for lease to become uninhabitable.[32] Although the court took notice of patent defects in existence at the time of the letting, it did not extend the implied warranty of habitability to protect the tenant from such known conditions.[33]

Although New Jersey was among the premier states in the area of consumer protection,[34] as late as 1968 a New Jersey court refused to accept the breach of a covenant of habitability as a defense to a suit

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170 Ark. 512, 280 S.W. 979 (1926) (if sufficiently close to completion, no warranty). For variations of the two exceptions see Comment, *Plotting the Long Overdue Death of Caveat Emptor in Leased Housing*, 6 U. SAN FRANCISCO L. REV. 147, 158-59 (1971).

29 14 Wis. 2d 590, 111 N.W.2d 409 (1961). The premises in this case was a house leased from the defendant-owner by students at the University of Wisconsin. The house was in disrepair and the students tried but failed to clean it up. The Madison, Wisconsin building inspector found numerous building code violations including "inadequate electrical wiring, kitchen sink and toilet in disrepair, furnace in disrepair." *Id.* at 593, 111 N.W.2d at 411.

30 *Id.* at 594-96, 111 N.W.2d at 412-13. Although this case was limited to a furnished house, subsequent courts and commentators utilized *Pines* as a cornerstone in extending the implied warranty of habitability into various commercial and residential leaseholds. *See, e.g.*, Marini v. Ireland, 56 N.J. 130, 142, 265 A.2d 526, 532 (1970); Reste Realty Corp. v. Cooper, 53 N.J. at 444, 454-55, 251 A.2d 268, 273 (1969). *See also* Note, *Landlord and Tenant: Implied Warranty of Habitability Derived from Contract Principles*, 1970 DUKE L.J. 1040, 1041-42; Note, *supra* note 11, at 306.

31 14 Wis. 2d at 595-96, 111 N.W.2d at 412-13, where the court stated:

> Legislation and administrative rules, such as the safeplace statute, building codes and health regulations, all impose certain duties on a property owner with respect to the condition of his premises. Thus, the legislature has made a policy judgment—that it is socially (and politically) desirable to impose these duties on property owner—which has rendered the old common law rule obsolete. 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 cliche, *caveat emptor*.

32 *Id.* at 596, 111 N.W.2d at 413. The court held this case to be an exception to the general rule that there are no warranties that the premises are habitable at the time the lease commences. The exception is limited to premises where the house is furnished. *Id.* at 595, 111 N.W.2d at 412. *See* Collins v. Hopkins, 2 K.B. 617 (1923).

33 14 Wis. 2d at 596, 111 N.W.2d at 413.

34 *E.g.*, Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960); Michaels v. Brookchester, Inc., 26 N.J. 379, 140 A.2d 199 (1958).

for possession for non-payment of rent.[35] New Jersey's recognition of the implied warranty surfaced the following year in *Reste Realty Corp. v. Cooper*,[36] where the court held that a latent defect in leased commercial premises rendered the premises uninhabitable and constituted a breach of the implied warranty of habitability.[37] The tenant was permitted to terminate the lease upon leaving the premises from which, the court held, she had been "constructively evicted."[38] In reaching its decision the court recognized the public policy considerations espoused by *Pines*, as well as the inequality of bargaining power between landlord and tenant and the need for tenant protection indicated by remedial tenement house and multiple dwelling statutes.[39]

In 1970 the implied warranty of habitability gained a stronger foothold in New Jersey when a tenant's self-help remedy[40] was sanctioned in *Marini v. Ireland*.[41] The *Marini* court recognized the right of a tenant to apply his rent to repairs needed to preserve habitability:

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35 Peters v. Kelly, 98 N.J. Super. 441, 237 A.2d 635 (App. Div. 1968). Although the tenant alleged numerous defects and disrepairs such as roach infested rooms, "off and on" heating, poor hot water system, and no locks on doors or lights in the hallway, the court ruled that "the alleged nonhabitable condition of the leased premises is not a defense to the landlord's suit for possession based on nonpayment of rent." *Id.* at 443-44, 237 A.2d at 636. Nowhere in its opinion did the court mention an implied warranty of habitability. The court, however, recognized the need for tenants to have a means to correct substandard housing, but stated that the solution rests on "administrative regulation and inspection by trained personnel at the local level." *Id.* at 444, 237 A.2d at 636.

36 53 N.J. 444, 251 A.2d 268 (1969).

37 *Id.* at 460-61, 251 A.2d at 276-77. Here, the tenant's commercial premises were rendered uninhabitable because of a continual flooding of the floor due to a latent defect in an exterior wall through which rainwater seeped. In discussing the tenant's rights the court stated:

> [I]t is immaterial whether the right is expressed in terms of breach of a covenant of quiet enjoyment, or material failure of consideration, or material breach of an implied warranty against latent defects.

Id. at 461, 251 A.2d at 277.

38 *Id.* at 462, 251 A.2d at 278.

39 *Id.* at 452, 454, 251 A.2d at 272, 273. The court referred to the New Jersey Hotel and Multiple Dwelling Law, N.J. STAT. ANN. §§ 55:13A-1 *et seq.* (Supp. 1972-73).

40 Marini v. Ireland, 56 N.J. 130, 141, 261 A.2d 526, 531 (1970), where the tenant was permitted to improve her plight by repairing and deducting the expense from the rent in lieu of vacating. This remedy is allowed, however, only after a reasonable attempt to have the landlord make such needed repairs fails. *Id.* at 146, 261 A.2d at 535.

41 56 N.J. 130, 261 A.2d 526 (1970). The tenant and landlord entered into a one-year lease for residential premises. The rent was payable in monthly installments of $95.00. When the toilet cracked and the tenant was unable to reach the landlord, she hired a plumber to repair the toilet and sent the plaintiff a check for $9.28 and the receipted bill for $85.72. Plaintiff commenced the action to dispossess the defendant for non-payment of rent. *Id.* at 134-35, 261 A.2d at 528.

Marini also increased the availability of the courts to the aggrieved tenant. Prior to this decision, it was not significantly recognized that a tenant could interpose an equitable

> If . . . a landlord fails to make the repairs and replacements of vital facilities necessary to maintain the premises in a livable condition for a period of time adequate to accomplish such repair and replacements, the tenant may cause the same to be done and deduct the cost thereof from future rents.[42]

Two months later in *Academy Spires, Inc. v. Brown*,[43] the existence of various latent defects compelled a New Jersey county court to extend the *Marini* doctrine by allowing the tenant a diminution of rent in lieu of making repairs for those conditions clearly in breach of the implied warranty of habitability.[44] The court reasoned that a tenant financially unable to make repairs should not be forced to seek another apartment in a time of severe housing shortage, but should be allowed a partial abatement of rent as an equitable remedy.[45]

Unlike the aforementioned cases which recognized an implied warranty of habitability in latent defect situations, *Quinones* employed the theory in a patent defect situation.[46] Historically, the doctrine of *caveat emptor* placed upon the tenant the duty to inspect the premises before leasing and to contract for the repair of any patent defects found. Failure to do so relieved the landlord of liability for all damages or injuries caused by the defect and constituted a waiver by the tenant of his right to all claims arising from the disrepair.[47]

As early as 1872, the Pennsylvania supreme court in *Moore v.*

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defense (breach of implied warranty of habitability) to a summary dispossess action, although a legal defense (payment or accord and satisfaction) was permitted. *See* Peters v. Kelly, 98 N.J. Super. 441, 444, 237 A.2d 635, 636 (App. Div. 1968). *But see* Vineland Shopping Center, Inc. v. De Marco, 35 N.J. 459, 469, 173 A.2d 270, 275 (1961). *Marini* specifically overruled the *Peters* holding, thus permitting tenants to plead breach of warranty of habitability without the need to file a separate action to recover for rent paid, 56 N.J. at 140, 265 A.2d at 531.

42 56 N.J. at 146, 265 A.2d at 535.

43 111 N.J. Super. 477, 268 A.2d 556 (Essex County Dist. Ct. 1970).

44 *Id.* at 484, 488, 268 A.2d at 560, 562.

45 *Id.* at 480, 268 A.2d at 558. The Supreme Court of New Jersey has not yet addressed itself to the propriety of allowing an abatement of rent as an alternative remedy. Brief for the New Jersey Tenants Organization as Amicus Curiae at 5, 10, Berzito v. Gambino, 114 N.J. Super. 124, 274 A.2d 865 (Union County Dist. Ct. 1971), *rev'd*, 119 N.J. Super. 332, 291 A.2d 577 (App. Div. 1972), *cert. granted*, 62 N.J. 67, 299 A.2d 65 (1973).

46 119 N.J. Super. at 340-43, 291 A.2d at 581-83.

47 The *Quinones* court recognized this potential problem area in their consideration of the proposition that

> a tenant who agreed in effect to accept the premises "as is" should not be allowed to obtain an agreement from the landlord as to the rent to be paid, take possession, and then require repairs and improvements by the landlord.

119 N.J. Super. at 341, 291 A.2d at 582 (referring to Berzito v. Gambino, 114 N.J. Super. 124, 128-29, 274 A.2d 865, 867-68 (Union County Dist. Ct. 1971), *rev'd*, 119 N.J. Super. 332, 291 A.2d 577 (App. Div. 1972), *cert. granted*, 62 N.J. 67, 299 A.2d 65 (1973)). *See* Note, *Violations of Housing Code as Inhabitability*, 42 MISS. L.J. 523, 525 (1971).

Weber[48] held that a lessee's knowledge of a patent defect negates any implication of a breach of a covenant of quiet enjoyment, as "[t]he lessee's eyes are his bargain."[49] In accord is the *Reste* court which in 1969 stated that "a tenant's knowing acceptance of a defective leasehold would normally preclude reliance upon any implied warranties."[50] Numerous court decisions regarding patent defects in commercial goods also hold that no warranty should apply against those defects of which the lessee or vendee has full knowledge at the time the property is leased or sold.[51]

Consistent with these precedents Mrs. Quinones, by accepting the apartment "as is," may have been deemed to have waived her right to heating facilities and any claim or defense arising from their absence. However, the appellate court acknowledged her claim stating that "the violation here involved (lack of heating apparatus) clearly goes to the issue of habitability."[52]

By employing the implied warranty of habitability in a patent defect situation, the *Quinones* decision raises a serious question as to whether the court has interfered with the rights of parties to freely contract[53]—a right of such significant importance that it is given protection by the Constitution.[54] Generally, parties may agree to waive contractual rights[55] and the courts have upheld such waivers, knowingly and voluntarily made, unless a question of public policy is involved.[56]

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48 71 Pa. 429, 10 Am. R. 708 (1872).

49 *Id.* at 432, 10 Am. R. at 711.

50 53 N.J. at 455, 251 A.2d at 274.

51 The court in Marko v. Sears, Roebuck & Co., 24 N.J. Super. 295, 94 A.2d 348 (App. Div. 1953) maintained that "[a]n action for breach of warranty does not arise as to any defect of which the buyer knows." *Id.* at 300, 94 A.2d at 350. This provision is also found in the UNIFORM COMMERCIAL CODE, *e.g.*, N.J. STAT. ANN. § 12A:2-316 (3)(b) (1962) which provides in part:

> [W]hen the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him . . . .

52 119 N.J. Super. at 342-43, 291 A.2d at 583.

53 *See* Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 389, 161 A.2d 69, 86 (1960).

54 U.S. CONST. art. 1, § 10 prohibits a state from passing a "law impairing the obligation of contracts."

55 Van Dusen Aircraft Supplies, Inc. v. Terminal Constr. Corp., 3 N.J. 321, 326, 70 A.2d 65, 67 (1949); Loria's Garage, Inc. v. Smith, 49 N.J. Super. 242, 248, 139 A.2d 430, 434 (App. Div. 1958). *See* Best v. Crown Drug Co., 154 F.2d 736, 737 (8th Cir. 1946) (implied covenant may be waived by an express covenant of a more limited character).

56 Although courts keep in mind that society's interests are best advanced when persons are not restricted in their freedom to contract, they "do not hesitate to declare void as against public policy contractual provisions which clearly tend to the injury

Therefore, it is apparent that the *Quinones* court determined that in New Jersey, public policy favors the decision that an implied warranty of habitability cannot be waived. Although the *Quinones* court did not specifically discuss those public policy issues prevalent in other recent landlord-tenant decisions, it did cite authorities which lend support to the societal protection rationale.[57]

The basis for the strong emphasis on public policy in the area of habitable dwellings is founded on the knowledge that inherently negative effects of poor housing are not limited to persons suffering "the daily indignity of living in a slum"[58] but extend to society in general.[59]

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of the public in some way." Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 403-04, 161 A.2d 69, 95 (1960).

The need for decent and habitable housing was recognized as a public policy issue over a half-century ago when Justice Holmes stated in Block v. Hirsh, 256 U.S. 135, 156 (1920) that "[h]ousing is a necessary of life. All the elements of a public interest justifying some degree of public control are present." This sentiment was recently enunciated in State v. Shack, 58 N.J. 297, 303, 277 A.2d 369, 372 (1971), by Chief Justice Weintraub: "Property rights serve human values. They are recognized to that end, and are limited by it." *Accord*, Inganamort v. Borough of Fort Lee, 120 N.J. Super. 286, 327, 293 A.2d 720, 742 (L. Div. 1972), *aff'd*, 62 N.J. 521, 303 A.2d 298 (1973):

> One can detect a movement—perhaps erratic, but progressive—towards the constitutional right to be housed. . . . It is an affront to the dignity of tenants to provide indecent housing.

See also Note, *New Jersey Municipalities Have the Power to Enact Rent Control Ordinances*, 4 SETON HALL L. REV. 360, 376 (1972). Public sentiment for decent housing has been expressed through laws at national, state and local levels. *E.g.*, the United States Housing Act of 1949, reaffirmed in 1968, 42 U.S.C. §§ 1441, 1441a (1972) provides in part that a national goal should encompass " 'a decent home and a suitable living environment for every American family.' " Likewise, the New Jersey Hotel and Multiple Dwelling Law, N.J. STAT. ANN. §§ 55:13A-1 *et seq.* (Supp. 1972-73), deemed and declared that remedial legislation,

> necessary for the protection of the health and welfare of the residents of this State in order to assure the provision therefor of decent, standard and safe units of dwelling space, shall be liberally construed to effectuate the purposes and intent thereof.

[57] *E.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); Brown v. Southall Realty Co., 237 A.2d 834 (D.C. Ct. App. 1968); Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970); Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969); Academy Spires, Inc. v. Brown, 111 N.J. Super. 477, 268 A.2d 556 (Essex County Dist. Ct. 1970).

[58] Javins v. First Nat'l Realty Co., 428 F.2d 1071, 1080 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

[59] *Id.* at 1079. In Frank v. Maryland, 359 U.S. 360, 371 (1959), the Court stated:

> The need to maintain basic, minimal standards of housing, to prevent the spread of disease and of that pervasive breakdown in the fiber of a people which is produced by slums and the absence of the barest essentials of civilized living, has mounted to a major concern of American government.

See also Berman v. Parker, 348 U.S. 26, 32-33 (1954) ("Miserable and disreputable housing

The *Pines* opinion, which so aptly expressed this sentiment, has been quoted in a recent New Jersey court decision:

> 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.[60]

Spearheaded by *Reste Realty, Marini* and *Academy Spires,* public policy considerations continue to afford protection to the tenant by strongly emphasizing the need for adequate and habitable dwelling units for all. Aware of the unequal bargaining position between landlords and tenants which is compounded by a severe housing shortage in Newark and elsewhere, the state legislature has enforced such a policy by the enactment of remedial tenement house and multiple dwelling statutes.[61] Courts, likewise, continue to afford the tenant additional protection by rigidly scrutinizing lease clauses which limit liability to uphold the just expectations and intentions of the contracting parties, particularly where an unequal bargaining position is evident.[62] In this regard, courts,

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conditions may do more than spread disease and crime and immorality."); Edwards v. Habib, 397 F.2d 687, 700 (D.C. Cir. 1968); Buckner v. Azulai, 251 Cal. App. 2d 1013, 59 Cal. Rptr. 806 (1967); Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961). *Cf.* Brown v. Board of Educ., 347 U.S. 483 (1954).

A favorable effect is noticed where tenants move from substandard to liveable dwellings. A study by A. SCHORR, SLUMS AND SOCIAL INSECURITY, at 5 (1964) (citations omitted), disclosed that:

> Even when their parents are not responding at all, children change their feelings about "the whole of life"—a change particularly noticeable in school . . . . There is evidence that children who are rehoused are "considerably more likely to be promoted at a normal pace . . . ."

60 Marini v. Ireland, 56 N.J. at 142, 265 A.2d at 532 (quoting from Pines v. Perssion, 14 Wis. 2d at 596, 111 N.W.2d at 413).

61 *E.g.,* N.J. STAT. ANN. §§ 55:13A-1 *et seq.* (Supp. 1972-73). In Michaels v. Brookchester, Inc., 26 N.J. 379, 386, 140 A.2d 199, 203 (1958), the court stated that the Tenement House Act is "comprehensive legislation intended to assure safe habitation, and it places responsibility where the Legislature has concluded it belongs." The New Jersey legislature has expressed concern in this area in its findings supporting the enactment of N.J. STAT. ANN. § 2A:42-85 (Supp. 1972-73), Actions, Etc., for Maintenance of Safe and Sanitary Housing:

> The Legislature finds:
>
> a. Many citizens of the State of New Jersey are required to reside in dwelling units which fail to meet minimum standards of safety and sanitation;
>
> b. It is essential to the health, safety and general welfare of the people of the State that owners of substandard dwelling units be encouraged to provide safe and sanitary housing accommodations for the public to whom such accommodations are offered;
>
> c. It is necessary, in order to insure the improvement of substandard dwelling units, to authorize the tenants dwelling therein to deposit their rents with a court appointed administrator until such dwelling units satisfy minimum standards of safety and sanitation.

62 Kuzmiak v. Brookchester, 33 N.J. Super. 575, 585, 111 A.2d 425, 430 (App. Div. 1955); Note, *The Significance of Comparative Bargaining Power in the Law of Exculpation,* 37 COLUM. L. REV. 248, 249 (1937), wherein it was stated:

on occasion, have gone so far as to construe the lease to require substantial compliance with those duties imposed on the landlord by local housing codes.[63] The utilization of housing code provisions as the standard by which habitability is measured has been based on the premise that the housing code expresses the "expectations and intentions of most people,"[64] even where the particular parties did not intend to incorporate the housing code into the lease.[65]

In cases where courts have not interpreted local housing codes to be a part of the existing lease, they have nonetheless afforded protection to the tenant by recognizing the tenant's inferior bargaining position caused by the shortage of low income housing. These courts have refused to give effect to exculpatory clauses contained in leases or to allow those clauses to be construed as a waiver by the beleaguered tenant.[66] This practice, familiar in many consumer protection cases, is followed where the contract is of an adhesive nature.[67] New Jersey's landmark case illustrating such a situation is *Henningsen v. Bloomfield Motors, Inc.*,[68] where the purchaser of a car was awarded damages for injuries sustained by his wife, even though the manufacturer and dealer disclaimed any and all warranties other than that limited to the replacement of car parts.[69] The court viewed the manufacturer's and dealer's contract as a standardized mass contract which allowed the dominant party to dictate terms to the consumer in need of goods and services but unable to shop around for more favorable terms " 'either because the author of the standard contract has a monopoly (natural

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> The validity of a particular exculpation contract depends on the whole complex of consideration bearing on the question whether it is socially desirable to allow escape from liability in the situation under scrutiny. . . . Yet it is interesting to note that exculpation is rarely allowed where the parties are not on roughly equal bargaining terms.

See Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704 (1931).

63 Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1080-81 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970). *Cf.* Schiro v. W.E. Gould & Co., 18 Ill. 2d 538, 545, 165 N.E.2d 286, 290 (1960) (breach of contract between builder and buyer when house constructed violated the Chicago building code).

64 Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1081 n.56 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

65 *Id.* at 1081-82.

66 *See* 53 N.J. at 451-54, 251 A.2d at 271-73. *Cf.* Kuzmiak v. Brookchester, 33 N.J. Super. 575, 585-87, 111 A.2d 425, 430-32 (App. Div. 1955).

67 Standard Oil Co. v. Perkins, 347 F.2d 379, 383 (9th Cir. 1965); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 388-90, 161 A.2d 69, 86 (1960). The UNIFORM COMMERCIAL CODE, *e.g.*, N.J. STAT. ANN. § 12A:2-302 (1962), prohibits enforcement of unconscionable contracts or clauses.

68 32 N.J. 358, 161 A.2d 69 (1960).

69 *Id.*

or artificial) or because all competitors use the same clauses.' "[70] Reflecting upon public policy considerations which found expression in statutory law through the imposition of an implied warranty of merchantability on the sale of goods,[71] the court held that an

> attempted disclaimer of an implied warranty of merchantability and of the obligations arising therefrom is so inimical to the public good as to compel an adjudication of its invalidity.[72]

By equating the two situations one can infer that Mrs. Quinones never bargained for a leasehold which was to be in a less than habitable condition.[73]

Having determined that Mrs. Quinones did not waive the implied warranty of habitability concerning a patent defect, the court considered whether a breach of the implied warranty had occurred.[74] In arriving at its decision, the court established that the failure of a landlord to provide heating facilities in a residential leasehold is a breach of the warranty substantial enough to impair habitability.

It is interesting to note that the *Quinones* court could have decided the case differently, albeit favorably for Mrs. Quinones, by ruling that the lease was void, illegal, and unenforceable from its inception, since it was in violation of the municipal housing ordinance.[75] Had the court employed this rationale, Mrs. Quinones would have become a tenant at will.[76] Such a tenancy would require that she be given a

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70 *Id.* at 389, 161 A.2d at 86 (quoting from Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 632 (1943)).

71 32 N.J. at 404, 161 A.2d at 95. The implied warranty of merchantability has been codified in New Jersey as N.J. STAT. ANN. § 12A:2-314 (1962).

72 32 N.J. at 404, 161 A.2d at 95.

Even though *Quinones* and *Henningsen* exemplify basically different areas of the law, the former governed by laws of property, the latter by contract, it is apropos to compare the two, for modern courts in applying principles of contract law to leases are striving to afford the tenant the same level of protection that the law affords other consumers. *See, e.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1075-76 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); Academy Spires, Inc. v. Brown, 111 N.J. Super. 477, 484-85, 268 A.2d 556, 560-61 (Essex County Dist. Ct. 1970).

73 *See* 119 N.J. Super. at 343, 291 A.2d at 583. The court in *Javins* stated:

> To the extent, however, that some defects *are* obvious, the law must take note of the present housing shortage. Tenants may have no real alternative but to accept such housing with the expectation that the landlord will make necessary repairs. Where this is so, *caveat emptor* must of necessity be rejected.

428 F.2d 1071, 1079 n.42 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

74 119 N.J. Super. at 342-43, 291 A.2d at 583.

75 *See id.* at 341-42, 291 A.2d at 582. This remedy was applied in Brown v. Southall Realty Co., 237 A.2d 834, 837 (D.C. Ct. App. 1968).

76 Katz v. Inglis, 109 N.J.L. 54, 55, 160 A. 314-15 (Ct. Err. & App. 1932) (lease void under the Statute of Frauds). The notice requirement was fixed at three months by N.J. STAT. ANN. § 2A:18-56(a) (1952).

minimum of three months notice prior to commencement of an action for possession by the landlord,[77] whereas her tenancy under the abatement remedy prescribed by the court does not alter her former status as a month-to-month tenant. As such, she is entitled to only one month's notice before the commencement of the landlord's action.[78] Considering the difficulty of locating habitable premises at a reasonable rental, she would have benefited from the court's voiding of the lease.

However, should the landlord decide to exercise his right to have the tenant removed on proper notice, the tenant, having successfully defended the first action for possession, may claim the landlord's later action is retaliatory in nature.[79] If the court is convinced that the landlord's action was brought in reply to the tenant's assertion of her legal rights, the notice will be rendered void and the action dismissed.[80] Furthermore, the landlord is liable for any damages which the tenant suffers through such a proceeding.[81]

However, the *Quinones* court recognized that many code violations are directed toward amenities or degrees of habitability, and was not inclined to open the doors to a total breakdown in the existing rental framework by voiding the lease:

> We take judicial notice of the fact that there is an acute shortage of low-income housing in the City of Newark, and that such housing which exists is frequently not in full compliance with the city's housing ordinances and building codes. *We must also recognize the hard practical facts of life that if landlords, under existing conditions, were to be deprived of all rents because of noncompliance with such ordinances and building codes there would be far fewer available low income housing units*—landlord[s] would either abandon their properties, or if they spent the money needed to comply with the ordinances and codes the amount of rent they would have to charge would price low income tenants out of the market. The problem seems to be almost insoluable [sic].[82]

Thus, the court's refusal to establish the housing code as a standard

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77 N.J. STAT. ANN. § 2A:18-56(a) (1952).

78 N.J. STAT. ANN. § 2A:18-53(b) (1952).

79 N.J. STAT. ANN. § 2A:42-10.10 (Supp. 1972-73). This procedure was followed by the United States Court of Appeals in Robinson v. Diamond Housing Corp., 463 F.2d 853 (D.C. Cir. 1972).

80 Silberg v. Libscomb, 117 N.J. Super. 491, 496, 285 A.2d 86, 88 (Union County Dist. Ct. 1971). Moreover, the court could use its power to stay issuance of a warrant for possession for six months if the eviction was found not to be retaliatory, but the situation merited such action. N.J. STAT. ANN. § 2A:42-10.6 (Supp. 1972-73).

81 N.J. STAT. ANN. § 2A:42-10.10 (Supp. 1972-73).

82 119 N.J. Super. at 343, 291 A.2d at 583 (emphasis added). *But see* Ackerman, *infra* note 86.

by which to measure habitability may be viewed as a pragmatic attempt to avoid an unnecessarily broad holding which, in the name of tenant-protection, would eliminate what little low-income housing was then in existence.

Quinones' remedy for a breach of the implied warranty was an equitable abatement of rent—a small remuneration for having to live in an uninhabitable dwelling and a warning to the landlord that she will suffer financial loss until the dwelling is made livable. The court's finding that a claim of breach of the implied warranty of habitability is not barred by the patent nature of the defect would seem to give the tenant the remedies previously limited to latent defect situations, *i.e.*, repair and deduct,[83] payment of rent to court appointed escrow agents to provide a fund from which repairs could be financed,[84] or constructive eviction.[85] However, in a severe housing shortage situation or when repairs are quite costly these remedies may be of little value. Even an abatement of rent may not suffice to fulfill the intentions of the policy makers, or the needs of the tenant, if it is ineffectual in causing landlords to improve their premises.[86] For example, the landlord, deprived financially by rent abatements, may be forced to abandon, sell, or enter into bankruptcy proceedings, a result the *Quinones* court desired to avoid.[87] Further, should he choose to repair, increased costs to landlords will price the low-income tenants out of the housing market due to rental increases for improved dwellings. The validity of these suppositions would appear to depend on how costly future court decisions will be for the landlords and, in turn, whether landlords will have available adequate financial aid.

One solution to the landlord's financial problem, which is also beneficial to the tenant, is the "mortgage theory."[88] By having the

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83 56 N.J. at 146, 265 A.2d at 535.

84 N.J. STAT. ANN. §§ 2A:42-85 *et seq.* (Supp. 1972-73).

85 53 N.J. at 462, 251 A.2d at 278.

86 If an abatement has the same effect as a fine imposed for a violation of the housing code, there is doubt as to its effectiveness in causing landlords to improve substandard housing conditions. In the District of Columbia "the grave conditions in the housing market required serious action. Yet official enforcement of the housing code has been far from uniformly effective." Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1082 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970). *See generally* Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Distribution Policy*, 80 YALE L.J. 1093 (1971); Gribetz & Grad, *Housing Code Enforcement: Sanctions and Remedies*, 66 COLUM. L. REV. 1254 (1966).

87 *See* 119 N.J. Super. at 343, 291 A.2d at 583.

88 This theory apparently had its roots in Connor v. Great W. Sav. & Loan Ass'n, 69 Cal. 2d 850, 447 P.2d 609, 73 Cal. Rptr. 369 (1968). In that case, the financial institution loaned money to a tract developer under terms extremely favorable to its pecuniary

mortgagee declare a moratorium on all payments from the landlord for a fixed period while allowing interest to accumulate, the mortgagee suffers little financial loss, the landlord is not compelled to give up his apartment building, and the tenant obtains the needed repairs by having the total rent paid by all tenants directed to the repair expense. Resolving the problem in this manner has merit, and the court, by ordering injunctions to repair, can aid the tenant without imposing an unbearable burden upon the landlord.

Other solutions for the landlord might include governmental rent subsidies, supplements and increased tax write-offs. Although this in turn compels a re-evaluation of governmental spending, the losses accruing to tenants and society from substandard housing significantly outweigh the difficulties imposed upon the legislatures in resolving this problem.

Sarah E. Noddings

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advantage and without the precautions normally taken in such a situation, causing damage to plaintiffs when their houses were subsequently damaged by defects. The court held that the plaintiffs could recover from the institution for its actions. *Id.* at 867, 447 P.2d at 618, 73 Cal. Rptr. at 378. A Florida court refused to impose liability on a financial institution in a case distinguishable on its facts. Rice v. First Fed. S. & L. Ass'n of Lake County, 207 So. 2d 22 (Fla. Dist. Ct. App. 1968) (an inspection made by the institution need not be for the mortgagor's benefit).

A New Jersey court referred to these decisions in Morocco v. Felton, 112 N.J. Super. 226, 234, 270 A.2d 739, 743 (L. Div. 1970). The court further stated, in dictum, that it might be necessary to implead a third party depending upon the facts of the situation and the appropriateness of the relief sought. *Id.* at 234-36, 279 A.2d at 743-44. The mortgage theory might well be the next logical step in this progression.