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Miller v. C. W. Myers Trading Post: North Carolina Adopts Expansive Tenant Remedies for Violations of the Implied Warranty of Habitability

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Miller v. C.W. Myers Trading Post: North Carolina Adopts Expansive Tenant Remedies for Violations of the Implied Warranty of Habitability

In 1977 the North Carolina General Assembly enacted the Residential Rental Agreements Act[1] which created an implied warranty of habitability in all residential leaseholds.[2] The Act does not specify the remedies available to an aggrieved tenant,[3] and reported decisions under the Act have until recently only addressed the landlord's tort liability for personal injury or wrongful death caused by unfit or dangerous conditions.[4]

In *Miller v. C.W. Myers Trading Post*[5] the North Carolina Court of Appeals adopted a contract damage formula that guarantees a tenant the difference between a leasehold's value in compliance with the Act and its value in the current "uninhabitable" state.[6] The court in *Miller* held that landlords who provide tenants with dwellings at below-market rental rates may not escape their statutory duty to adequately repair and maintain the premises. This Note examines the development of the implied warranty of habitability in residential leaseholds, the purposes behind the Residential Rental Agreements Act, and the potential impact the damage formula adopted in *Miller* may have on the number of persons living in substandard housing in North Carolina. The Note concludes that, by giving full effect to the purposes of the general assembly, the

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1. Act of June 28, 1977, ch. 770, 1977 N.C. Sess. Laws 1006 (codified at N.C. GEN. STAT. §§ 42-38 to -44 (1984)).

2. Although the Act expressly requires landlords to keep premises "habitable," N.C. GEN. STAT. § 42-42(a)(2) (1984), and prevents waiver of the rights enumerated, *id.* § 42-42(b), some commentators have not recognized the Act as "implying a warranty of habitability" as the term is generally used. See *infra* note 18 for a discussion of this apparent confusion.

3. North Carolina General Statutes § 42-44 provides in part:

> *General remedies and limitations.*—(a) Any right or obligation declared by this Chapter is enforceable by civil action, in addition to other remedies of law and in equity.
>
> . . . .
>
> (c) The tenant may not unilaterally withhold rent prior to a judicial determination of a right to do so.
>
> (d) A violation of the Article shall not constitute negligence per se.

N.C. GEN. STAT. § 42-44 (1984).

4. *See* Jackson v. Housing Auth., 73 N.C. App. 363, 326 S.E.2d 295 (1985) (wrongful death by gas poisoning caused by failure to maintain heating equipment), *aff'd*, 316 N.C. 259, 341 S.E.2d 523 (1986); Brooks v. Francis, 57 N.C. App. 556, 291 S.E.2d 889 (1982) (plaintiff injured when steps to leased premises collapsed, but court held plaintiff contributorily negligent); O'Neal v. Kellett, 55 N.C. App. 225, 284 S.E.2d 707 (1981) (tenant fell from dimly lit steps in common area).

5. 85 N.C. App. 362, 355 S.E.2d 189 (1987).

6. *Id.* at 371, 355 S.E.2d at 194. A dwelling may violate an implied warranty of habitability, yet remain "habitable" in the literal sense of the word. The North Carolina Supreme Court has held, for example, that the judicially imposed implied warranty of habitability for the sale of new homes covers faulty air conditioning units. Gaito v. Auman, 313 N.C. 243, 252, 327 S.E.2d 870, 877 (1985); *see also* Park Hill Terrace Assoc. v. Glennon, 146 N.J. Super. 271, 277, 369 A.2d 938, 941-42 (1977) (faulty air conditioning affected habitability so as to justify rent abatement). *But see* Hilder v. St. Peter, 144 Vt. 150, 160, 478 A.2d 202, 208-09(1984) (de minimis violations of housing code do not breach warranty). For a discussion of the standards by which habitability is measured under the warranties of various jurisdictions, see R. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT § 3:17, at 130-31 (1980).

decision may accelerate adverse consequences of the Act by encouraging landlords to abandon the low-income housing market.

In August 1978, Richard and Brenda Miller began renting a Winston-Salem house for $175 per month from C.W. Myers Trading Post, Inc. (Myers).[7] From the beginning of the tenancy, structural, electrical, and plumbing problems existed in the residence.[8] In May 1984, the Winston-Salem Community Development Department, prompted by a telephone call from Mrs. Miller, investigated the premises and declared the house unfit for human habitation because of violations of the Winston-Salem City Housing Code.[9] Myers subsequently repaired some of the problems cited by the inspectors, but the Millers contended the house remained uninhabitable.[10]

In May 1985, the Millers brought suit in the district court of Forsyth County, alleging violations of the Residential Rental Agreements Act.[11] They sought recovery of a portion of all rents paid for the period of more than six years in which they lived in the house. Myers answered that all violations were corrected by May 1982 and that the statute of limitations barred recovery.[12] The district court granted Myers' motion for summary judgment on the ground that no genuine issue of material fact existed.[13]

A unanimous panel of the court of appeals reversed, holding that the pleadings and depositions of the Millers adequately alleged a nonfulfillment of the landlord's duties so as to make summary judgment improper.[14] The court focused on the landlord's alternative defense under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure[15] as an opportunity to determine, as a matter of first impression, the contractual damages available to a tenant under the Act.[16]

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7. *Miller*, 85 N.C. App. at 364, 355 S.E.2d at 191.

8. *Id.* at 364-65, 355 S.E.2d at 191. The Millers described the premises as follows:

> Mrs. Miller . . . stated that there were naked wires about the hot water heater which would shoot fire. . . . [She] stated that she informed defendant in writing that there were holes in the living room walls, that the light fixtures were hanging out, that the plaster and the paint were falling from the ceiling, that there were holes in the bathroom walls, that the commode was getting ready to fall through the floor, that the kitchen sink and cabinets were rotted out, that the back porch had a hole in it, that screens were falling off, and that the front porch was rotting out.
>
> . . . Mr. Miller stated that . . . there was a cess pool in the backyard where water stood and collected, causing a foul odor. Mrs. Miller stated that the odor was particularly offensive when water was used in the house, such as when doing laundry, or when it rained.

Brief for Appellants at 6, *Miller* (No. 8621DC1059).

9. *Miller*, 85 N.C. App. at 365, 355 S.E.2d at 191.

10. *Id.*

11. The Millers alleged that Myers violated N.C. GEN. STAT. § 42-42(a)(1) (1984) by failing to comply with the local housing code, that Myers violated § 42-42(a)(2) (1984) by failing to repair and "keep the premises in a fit and habitable condition," and that Myers violated § 42-42(a)(4) by failing to maintain electrical and plumbing facilities. *Miller*, 85 N.C. App. at 364, 355 S.E.2d at 190.

12. *Id.*

13. *Id.* at 364, 355 S.E.2d at 190-91.

14. *Id.* at 368, 355 S.E.2d at 193.

15. N.C.R. CIV. P. 12(b)(6) allows a defending party to move for dismissal when the opposing party has failed "to state a claim upon which relief can be granted."

16. Reported decisions of the North Carolina appellate courts had previously interpreted the

In an opinion delivered by Judge Becton, the court construed the Act to overrule prior case law[17] and to create "implicitly" an implied warranty of habitability in residential leaseholds.[18] Noting that the Act makes the tenant's obligation to pay and the landlord's obligation to repair "mutually dependent,"[19] and that a tenant may not withhold rent prior to a "judicial determination" of the right to do so,[20] the court interpreted the Act to provide an affirmative action for retroactive rent abatement.[21] The court rejected as statutorily inadequate a damage formula that would have awarded the Millers only the difference between the rent paid and the actual value of the premises. The court deemed the rent actually charged irrelevant in computing damages:

> The rental or lease of residential premises for a price that is "fair" or below fair rental value does not absolve the landlord of his statutory obligation to provide fit premises and is not a defense to plaintiff's claims. The implied warranty of habitability entitles a tenant in possession of leased premises to the value of the premises *as warranted*, which may be greater than the rent agreed upon or paid. . . . Accordingly, a tenant may recover damages in the form of a rent abatement calculated as the difference between the fair rental value of the premises if as warranted (i.e., in full compliance with G.S. 42-42(a)) and the fair rental value of the premises in their unfit condition for any period of the tenant's occupancy during which the finder of fact determines the premises were uninhabitable, plus any special or consequential damages alleged and proved.[22]

Residential Rental Agreements Act only in cases of personal injury or wrongful death. *Miller*, 85 N.C. App. at 367, 355 S.E.2d at 192; *see supra* note 4.

17. *Miller*, 85 N.C. App. at 368, 355 S.E.2d at 193. In a pre-Act case, the court of appeals had held that a tenant could not recover rent paid for a dwelling that was unfit for human habitation. Thompson v. Shoemaker, 7 N.C. App. 687, 690-91, 173 S.E.2d 627, 630 (1970). The *Miller* court construed the Residential Rental Agreements Act "to provide an affirmative cause of action to a tenant for recovery of rent paid based on the landlord's noncompliance with G.S. 42-42(a) and, thus, to overrule *Thompson v. Shoemaker*." *Miller*, 85 N.C. App. at 368, 355 S.E.2d at 193.

18. *Miller*, 85 N.C. App. at 366-68, 355 S.E.2d at 191-93. Although many considered the Act to create an implied warranty of habitability, *see* Charlotte Observer, May 17, 1977, at 18A, col. 1; News & Observer (Raleigh), May 27, 1977, at 4, col. 1, some courts and commentators have doubted the creation of an actual warranty. *See* Jackson v. Housing Auth., 73 N.C. App. 363, 326 S.E.2d 295 (1985) (to the extent any implied warranty exists, it is "co-extensive" with the Act), *aff'd*, 316 N.C. 259, 341 S.E.2d 523 (1986); *see also* Note, *Another Look at the Implied Warranty of Habitability in North Carolina*, 64 N.C.L. REV. 869, 869-70 n.10 (1986) ("North Carolina has not adopted an implied warranty of habitability with respect to leasing agreements."). The point may be only technical; although the Act contains references to "mutually dependent" duties, N.C. GEN. STAT. § 42-41 (1984), and requires that premises be "in a fit and habitable condition," *id.* § 42-42(a)(2), nowhere in the statute can the direct term "implied warranty of habitability" be found. *See infra* note 37.

19. N.C. GEN. STAT. § 42-41 (1984).

20. *Id.* § 42-44(c).

21. *Miller*, 85 N.C. App. at 370-71, 355 S.E.2d at 194.

22. *Id.* at 370, 355 S.E.2d at 194 (citations omitted). In adopting this formula, the court cited an early analysis of the Residential Rental Agreements Act written by Theodore O. Fillette III, who had been one of the drafters of the Act. *See* Fillette, *North Carolina's Residential Rental Agreements Act: New Developments for Contract and Tort Liability in Landlord-Tenant Relations*, 56 N.C.L. REV. 785, 792 (1978). Fillette advocated an identical damages formula and observed that "the value of the premises as warranted may be more than the rent actually paid by the tenant or agreed to be paid in the lease." *Id.* at 792-93 (citing Troitino v. Goodman, 225 N.C. 406, 413, 35 S.E.2d 277, 282 (1945) (similar damage measure adopted under merchantability principles for sales of goods)).

The adoption of such a formula results in an expansive remedy for tenants and, as such, marks a drastic change in the attitude of North Carolina courts toward landlord-tenant relations.

Historically, North Carolina adhered to the landlord-tenant principles adopted in feudal England, under which the law imposed no duty on the landlord to provide or maintain any structures on the land.[23] When the landlord made an express covenant to repair, a breach of the covenant did not excuse the tenant of the duty to pay rent.[24] This common-law doctrine has been explained as well-suited to fifteenth-century England, where leaseholds were established primarily for agricultural purposes.[25] The tenant farmer in a subsistence economy was virtually a jack-of-all-trades, and the law of waste required the tenant to make all repairs in order to protect the landlord's reversionary interest in the property.[26]

Nearly all jurisdictions in the United States followed the common-law doctrine absolving the landlord of any duty to repair until the 1960s, when courts began to recognize changes in the landlord-tenant relationship.[27] In the landmark case of *Javins v. First National Realty Corp.*,[28] the United States Court of Appeals for the District of Columbia observed the obvious differences between the feudal farmer and the modern urban residential tenant: urban tenants are not usually skilled in the complex maintenance work required in modern dwellings, are increasingly mobile and cannot justify expenditures for long-term repairs, are unable to obtain financing for such repairs, and lack sufficient bargaining power to protect their expectations of adequate facilities.[29] The *Javins* court noted that the social impact of substandard housing "has led to the realization that poor housing is detrimental to the whole society, not merely to the unlucky ones who must suffer the daily indignity of living in a slum."[30] These factors convinced the court that an implied warranty of habitability, based on

23. *See* 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 122-23 (3d ed. 1923). North Carolina adhered to the no-repair rule as late as 1970. *See* Thompson v. Shoemaker, 7 N.C. App. 687, 690-91, 173 S.E.2d 627, 630 (1970).

24. R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, THE LAW OF PROPERTY § 6.36, at 302 (1984).

25. *Id.* § 2.17, at 85.

26. Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1077 & n.30, 1078 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); *see also* 3 W. HOLDSWORTH, *supra* note 23, at 122-23 (outlining tenant's duties at common law).

27. *See, e.g.*, Lemle v. Breeden, 51 Haw. 426, 429-34, 462 P.2d 470, 472-75 (1969); Reste Realty Corp. v. Cooper, 53 N.J. 444, 454-58, 251 A.2d 268, 273-75 (1969) (citing Pines v. Perssion, 14 Wis. 2d 590, 595-96, 111 N.W.2d 409, 412-13 (1961) (*caveat emptor* is an "obnoxious legal cliche")). Although these courts adopted implied warranties of habitability in residential leases, the case of Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970), caught the attention of the legal community and set in motion widespread adoption of that doctrine. *See infra* note 32 and accompanying text.

28. 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

29. *Id.* at 1078-79. Some commentators have argued that the warranty should not protect those tenants who do not actually "expect" quality facilities. *See* Abbott, *Housing Policy, Housing Code and Tenant Remedies: An Integration*, 56 B.U.L. REV. 1, 22 (1976); Krieger & Shurn, *Landlord-Tenant Law: Indiana at the Crossroads*, 10 IND. L. REV. 591, 616 (1977).

30. *Javins*, 428 F.2d at 1079-80. For a discussion of the value to society of an increase in available minimum quality, low-income housing, see *infra* notes 71-73 and accompanying text.

municipal housing codes, must be read into every residential lease.[31]

The logic of the *Javins* opinion proved appealing, and over the next decade a large majority of states adopted the implied warranty of habitability for residential leaseholds, either by statute or case law.[32] These developments paral-

31. *Javins*, 428 F.2d at 1080. Housing codes as a means of insuring quality dwellings have become common throughout the country, beginning with New York's Tenement House Law of 1867. Act of May 14, 1867, ch. 908, § 1-19, 1867 N.Y. Laws 2265 (repealed by N.Y. Tenement House Law § 171 (McKinney 1916)). As a result of the 1954 Federal Housing Act, over 4,000 communities adopted code regulations. NATIONAL COMM'N ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY, H.R. DOC. NO. 91-34, 91st Cong., 1st Sess. 276-77 (1968). Typically, housing codes provide for a progressive scale of enforcement, from violation notices with no penalties to eventual court-ordered demolition of unfit dwellings. *See* R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, *supra* note 24, § 6.37, at 309. For a discussion of the relative benefits of simple code enforcement over the implied warranty of habitability, see *infra* notes 84-85 and accompanying text.

32. At least 43 states have adopted the implied warranty of habitability. *See* Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972); Old Town Dev. Co. v. Langford, 349 N.E.2d 744 (Ind. Ct. App. 1976); King v. Moorehead, 495 S.W.2d 65 (Mo. Ct. App. 1973); Kline v. Burns, 111 N.H. 87, 276 A.2d 248 (1971); Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970); ALASKA STAT. §§ 34.03.100, .160, .180 (1985); ARIZ. REV. STAT. ANN. §§ 33-1324 to 33-1365 (1974 & West Supp. 1987); CAL. CIV. CODE §§ 1941, 1942 (West 1985) (superseding Green v. Superior Court, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974)); CONN. GEN. STAT. ANN. §§ 47a-7, -12, -13 (West 1978 & Supp. 1987); DEL. CODE ANN. tit. 25, §§ 5303, 5309 (1974 & Supp. 1986); FLA. STAT. ANN. §§ 83.51-.56 (1987); GA. CODE ANN. § 44-7-13 (1982); HAW. REV. STAT. §§ 521-42, -64 (1985) (superseding Lemle v. Breeden, 51 Haw. 426, 462 P.2d 470 (1969)); IDAHO CODE § 6-320 (1979); IOWA CODE ANN. §§ 562A.15 to .21 (West Supp. 1987) (superseding Mease v. Fox, 200 N.W.2d 791 (Iowa 1972)); KAN. STAT. ANN. §§ 58-2553 to -2559 (1983) (superseding Steele v. Latimer, 214 Kan. 329, 521 P.2d 304 (1974)); KY. REV. STAT. ANN. §§ 383.595-.640 (Michie/Bobbs-Merrill Supp. 1986); ME. REV. STAT. ANN. tit. 14, § 6021 (1980); MD. REAL PROP. CODE ANN. § 8-211 (1981 & Supp. 1987); MASS. ANN. LAWS ch. 111, §§ 127A to 127L (Law. Co-op. 1985 & Cum Supp. 1987) (superseding Boston Hous. Auth. v. Hemingway, 363 Mass. 184, 293 N.E.2d 831 (1973)); MICH. STAT. ANN. § 26.1109 (Callaghan 1982) (superseding Rome v. Walker, 38 Mich. App. 458, 196 N.W.2d 850 (1972)); MINN. STAT. ANN. § 504.18 (West Supp. 1988); MONT. CODE ANN. §§ 70-24-101 to -442 (1987); NEB. REV. STAT. §§ 76-1419 to -1427 (1986); NEV. REV. STAT. §§ 118A.290 to .350 (1985); N.M. STAT. ANN. §§ 47-8-20 to -33 (1982 & Supp. 1987); N.Y. REAL PROP. LAW § 235-b (McKinney Supp. 1988); N.C. GEN. STAT. §§ 42-38 to -44 (1984); N.D. CENT. CODE § 47-16-13.1 (1978); OHIO REV. CODE. ANN. §§ 5321.04 to .07 (Anderson 1981); OKLA. STAT. ANN. tit. 41, §§ 118 to 120 (West 1986); OR. REV. STAT. §§ 91.770 to 91.800-.817 (1987); PA. STAT. ANN. tit. 35, § 1700-1 (Purdon 1977) (superseding Commonwealth v. Monumental Properties, 459 Pa. 450, 329 A.2d 812 (1974)); R.I. GEN. LAWS § 34-18-22 to -30 (Supp. 1986); S.C. CODE ANN. §§ 27-40 to 140 (Law. Co-op. Supp. 1986); S.D. CODIFIED LAWS ANN. §§ 43-32-8, -32-9 (1983); TENN. CODE ANN. §§ 66- 28-304, -501 to -502 (1982); TEX. PROP. CODE ANN. §§ 92.051-.061 (Vernon 1984 & Supp. 1988); VT. STAT. ANN. tit. 9, §§ 4451-4468 (Supp. 1987) (superseding Hilder v. St. Peter, 144 Vt. 150, 478 A.2d 202 (1984)); VA. CODE ANN. §§ 55-248.13 to .30 (1986 & Supp. 1987); WASH. REV. CODE ANN. §§ 59.18.060-.120 (Supp. 1987) (superseding Foisy v. Wyman, 83 Wash. 2d 22, 515 P.2d 160 (1973)); W. VA. CODE § 37-6-30 (1985); WIS. STAT. ANN. § 704.07 (West 1981 & Supp. 1987) (superseding Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961); *see also* Hall v. Warren, 692 P.2d 737, 738-39 (Utah 1984) (building code standards imposed on every residential landlord, but court did not "reach the issue of whether there is a duty imposed . . . by an implied warranty of habitability"). In states where the implied warranty of habitability was adopted first by the courts and later by statute, the statutes usually are silent on damages and thus do not overrule formulas adopted by the courts.

At least five states, California, Montana, North Dakota, Oklahoma, and South Dakota, had earlier enacted statutes, derived from the model Civil Code drafted by David D. Field, requiring lessees to "put [dwellings] into a condition fit for such occupation, and to repair all subsequent dilapidations thereof." Reppy, *The Field Codification Concept*, in DAVID DUDLEY FIELD CENTENARY ESSAYS 17, 48 (A. Reppy ed. 1949).

Louisiana has followed the equivalent of an implied warranty of habitability under its version of French civil law since the beginning of the nineteenth century. The modern codification is LA. CIV. CODE. ANN. arts. 2692 to 2695, 2716 to 2717 (West 1952).

The Alabama, Arkansas, Colorado, and Mississippi courts have expressly refused to adopt the implied warranty of habitability. *See* Martin v. Springdale Stores, Inc., 354 So. 2d 1144, 1145-46

leled similar measures adopted to protect the purchasers of fee interests in new homes.[33]

Following the lead of other states, North Carolina slowly began cutting its common-law ties in transfers of real property interests. First, in the 1974 case of *Hartley v. Ballou*,[34] the North Carolina Supreme Court recognized an implied warranty of habitability in the sale of newly constructed houses.[35] One year later, however, the court of appeals refused to apply the warranty to residential rentals, and deferred instead to the general assembly for adoption of any changes in the treatment of residential rental agreements.[36]

The general assembly's enactment of the Residential Rental Agreements Act in 1977 created new tenant rights by making mutually dependent the tenant's duty to pay rent and the landlord's duties to make repairs, keep common areas safe, maintain fixtures, and otherwise comply with building and housing codes.[37]

The tenant's rights under the Act, of course, are not absolute. One particularly curious component of the Act is its requirement that "[t]he tenant may not unilaterally withhold rent prior to a judicial determination of a right to do so."[38] This language appears to be unique among states enacting the implied warranty by statute,[39] yet the requirement complements the landlord's prohibition from evicting defaulting tenants through self-help.[40] Similarly, the Act recognizes the potential problems of tenant waste and destruction by requiring the tenant to maintain the dwelling unit "as clean and safe as the conditions of the premises permit."[41] Although North Carolina acted late in abandoning the doctrine of

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(Ala. 1978) (implied warranty of fitness applies only to newly constructed homes, not residential leases); Alston v. Kahn, 242 Ark. 47, 48, 411 S.W.2d 659, 660 (1967); Blackwell v. Del Bosco, 191 Colo. 344, 348, 558 P.2d 563, 565 (1976); Cappaert v. Junker, 413 So. 2d 378, 380 (Miss. 1982). Neither the state legislature nor courts of Wyoming appear to have addressed the issue.

33. *See generally* McDonald v. Mianecki, 79 N.J. 275, 283-91, 398 A.2d 1283, 1287-91 (1979) (discussing the history of implied warranty of habitability for sales of new homes).

34. 286 N.C. 51, 209 S.E.2d 776 (1974).

35. *Id.* at 62, 209 S.E.2d at 783.

36. Knuckles v. Spaugh, 26 N.C. App. 340, 340, 215 S.E.2d 825, 826, *cert. denied*, 288 N.C. 241, 217 S.E.2d 665 (1975).

37. The Act provides that "[t]he tenant's obligation to pay rent under the rental agreement or assignment and to comply with G.S. 42-43 and the landlord's obligation to comply with G.S. 42-42(a) shall be mutually dependent." N.C. GEN. STAT. § 42-41 (1984). Section 42-42(a) provides in part that the landlord shall

> [c]omply with the current applicable building and housing codes, . . . [m]ake all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition, [and] [m]aintain in good and safe working order and promptly repair all electrical, plumbing, sanitary, heating, ventilating, air conditioning, and other facilities and appliances supplied by him. . . .

Id. § 42-42(a).

38. § 42-44(c).

39. *See* statutes cited *supra* note 32. One result of the "judicial determination" clause has been to prevent tenants from repairing defects themselves and deducting rental payments accordingly. *See infra* note 59 and accompanying text.

40. *See* N.C. GEN. STAT. § 42-25(6) (1984) (landlord must resort to summary ejectment proceedings in order to evict tenant).

41. *Id.* § 42-43(a)(1).

caveat emptor[42] for residential tenancies, the policy shift, once begun, was complete. Both landlord and tenant now have mutual duties to protect one another's interests, and neither may gain redress except through the courts.[43]

Conspicuously absent from the Act are any specified remedies for aggrieved tenants. Although section 42-44 of the North Carolina General Statutes prescribes existing remedies "by civil action" and "other remedies of law and in equity,"[44] the determination of a tenant's damages when the warranty is breached has been left to the courts. The North Carolina appellate courts first addressed the damages issue in tort actions. The landlord's failure to keep common areas well lighted,[45] to repair the steps of leased premises,[46] and to maintain heating equipment[47] have all been acknowledged as violations of the Act in cases of personal injury and death.

Miller provided the appellate courts with their first opportunity to consider what remedies, if any, exist under the Act on a theory of contract. The court of appeals in *Miller* observed that leading decisions from other jurisdictions have held that a tenant who remains in possession may have a cause of action for recoupment of all or part of rents paid.[48]

The *Miller* court rejected the landlord's argument that rent abatement under the Act amounted to a statutory "penalty or forfeiture" under the state's one-year statute of limitations.[49] Construing such damages as "in the nature of a restitutionary remedy," the court instead applied the general three-year civil statute of limitations.[50] Because the Millers' suit was filed in May 1985, they were required to establish on remand that the alleged violations existed after May 1982 and could recover for any period after that date.[51]

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42. The term *caveat emptor*, "[l]et the buyer beware, . . . summarized the rule that a purchaser must examine, judge and test for himself." BLACK'S LAW DICTIONARY 202 (5th ed. 1979).

43. *See* N.C. GEN. STAT. § 42-44(c) (tenant may not withhold rent before adjudication); *id.* § 42-25(6) (landlord may evict only by summary ejectment proceedings). A landlord, by virtue of greater wealth, may of course be in a much better position than a low-income tenant to assert her rights in court.

44. *Id.* § 42-44(a).

45. O'Neal v. Kellet, 55 N.C. App. 225, 284 S.E.2d 707 (1981).

46. Brooks v. Francis, 57 N.C. App. 556, 291 S.E.2d 889 (1982).

47. Jackson v. Housing Auth., 73 N.C. App. 363, 326 S.E.2d 295 (1985), *aff'd*, 316 N.C. 259, 341 S.E.2d 523 (1986).

48. 85 N.C. App. at 367-68, 355 S.E.2d at 192 (citing Mease v. Fox, 200 N.W.2d 791 (Iowa 1972); King v. Moorehead, 495 S.W.2d 65 (Mo. Ct. App. 1973); Berzito v. Gambino, 63 N.J. 460, 308 A.2d 17 (1973); Teller v. McCoy, 162 W.Va. 367, 253 S.E.2d 114 (1978)).

49. *Miller*, 85 N.C. App. at 368, 355 S.E.2d at 193. Section 1-54 provides for commencement of a cause of action "[w]ithin one year [for] an action or proceeding . . . (2) Upon a statute, for a penalty or forfeiture, where the action is given to the State alone, or in whole or in part to the party aggrieved, or to a common informer, except where the statute imposing it prescribes a different limitation." N.C. GEN. STAT. § 1-54 (1983).

50. *Miller*, 85 N.C. App. at 368-69, 355 S.E.2d at 193. Section 1-52 provides for commencement of a cause of action "[w]ithin three years [for] an action—(1) Upon a contract, obligation or liability arising out of a contract, express or implied. . . . (2) Upon a liability created by statute, either state or federal, unless some other time is mentioned in the statute creating it." N.C. GEN. STAT. § 1-52 (1983).

51. *Miller*, 85 N.C. App. at 369, 355 S.E.2d at 193. The court held that tenants can recover for the three most recent years of violations because a landlord's letting of unfit premises "constitute[s] a continuing offense." *Id.* In Gaito v. Auman, 313 N.C. 243, 250, 327 S.E.2d 870, 876 (1985), the North Carolina Supreme Court adopted a "reasonableness" test for determining how long the im-

Although it upheld the Millers' claim under the Act, the court affirmed a denial of punitive damages.[52] Because "[t]he action for a rent abatement for breach of an implied warranty of habitability is wholly contractual," the court followed the North Carolina rule that punitive damages are not recoverable in contract even though the breach is "wilful, malicious, or oppressive."[53] The decision therefore makes the implied warranty of habitability identical, at least in form, to the contract warranty of merchantability.[54]

Miller is most significant, however, in that the court, under the rubric of a "restitutionary remedy," enacted a measure of damages that goes beyond mere protection of a tenant's personal expectations.[55] If the damage formula endorsed by the court is not a "penalty,"[56] it also cannot be considered mere restoration: a tenant who knowingly enters a lease for substandard facilities cannot be said to "expect" conformity with the implied warranty of habitability as that term is used in traditional contract law.[57]

Other jurisdictions determining the proper measure of damages for breach of the implied warranty of habitability have set forth four basic formulas the *Miller* court could adopt. First, some courts have simply awarded the tenant the cost of repairing and upgrading the premises.[58] This measure is considered appropriate, however, only in states where unilateral tenant self-help is allowed in

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plied warranty of habitability protects the purchaser of a new home. The court held that the facts of each case would determine whether a home is "new" for warranty purposes. *Id.* at 250, 325 S.E.2d at 876. The *Gaito* holding is akin to the common-law doctrine of laches, by which the neglect to assert a claim, taken together with a lapse of time and other circumstances prejudicial to the adverse party, operates as a bar in a court of equity. *See* Wooded Shores Prop. Owners Ass'n v. Mathews, 37 Ill. App. 3d 334, 338, 345 N.E.2d 186, 189 (1976).

A court's application of a "reasonableness" standard to the landlord-tenant situation would be inappropriate, because the residential tenancy involves an ongoing contractual relationship (unlike the vendor-purchaser relationship in sales of homes), and because such a rule would likely run afoul of the Act's prohibition against tenant waiver. *See* N.C. GEN. STAT. § 42-42(b) (1984).

52. *Miller*, 85 N.C. App. at 371-72, 355 S.E.2d at 195.

53. *Id.* (citing Newton v. Standard Fire Ins. Co., 291 N.C. 105, 229 S.E.2d 297 (1976)); Murray v. Allstate Ins. Co., 51 N.C. App. 10, 275 S.E.2d 195 (1981)). Fillette has argued, however, that violations of the Act might constitute unfair or deceptive trade practices under N.C. GEN. STAT. § 75-1.1 (1985), so as to allow an award of treble damages under § 75-16 (1985). *See* Fillette, *supra* note 22, at 800.

54. The warranty of merchantability, part of the state's Uniform Commercial Code, provides in pertinent part:

> (1) Where the buyer has accepted goods and given notification . . . he may recover as damages for any nonconformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.
>
> (2) The measure of damages for breach of warranty [for sale of goods] is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted. . . .

N.C. GEN. STAT. § 25-2-714 (1986). Both the implied warranty of merchantability and the damage formula adopted in *Miller* award a party the difference between the warranted value of the "good" and its defective value. For differences in the effect of these two formulas, see *infra* note 57 and accompanying text.

55. *Miller*, 85 N.C. App. at 368-69, 355 S.E.2d at 193-94.

56. *Id.* at 368, 355 S.E.2d at 193.

57. "Expectation" or "loss-of-bargain" damages in contract compensate the promisee for the loss of the value the promisee subjectively expected to receive through the bargain. *See* Fuller & Perdue, *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 54, 57 (1936).

58. *E.g.*, Berzito v. Gambino, 63 N.J. 460, 472-73, 308 A.2d 17, 22-23 (1973); Katurah Corp. v. Wells, 115 Misc. 2d 16, 17, 454 N.Y.S.2d 770, 771 (N.Y. App. Div. 1982); Pugh v. Holmes, 253 Pa.

repairing the dwelling.[59]

A second measure adopted by other states has been a "percentage diminution approach," which allows abatement of a percentage of the rent equal to the percentage reduction in use and enjoyment a jury determines the tenant to have suffered.[60] This formula appears to be the most common measure adopted by courts that have actually set damages,[61] possibly because it avoids the problems of acquiring expert testimony to establish the market rental value.[62]

Third, some jurisdictions have set the measure of damages as the difference between the agreed rent and the fair rental value of the premises in their defective condition.[63] Such a rule requires the tenant to pay the fair value of what is

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Super. 76, 88, 384 A.2d 1234, 1240-41 (1978), *aff'd*, 486 Pa. 272, 405 A.2d 897 (1979); Hilder v. St. Peter, 144 Vt. 150, 163, 478 A.2d 202, 207, 209 (1984).

59. *See supra* notes 37-40 and accompanying text. North Carolina's provision that "[t]he tenant may not unilaterally withhold rent," N.C. GEN. STAT. § 42-44(c) (1984), along with an absence of any self-help language in the Act, would seem to preclude the self-repair allowed in many states. No North Carolina appellate court, however, has addressed the question. Fillette has argued:

> Given the general rules on mitigation of damages, it would seem unreasonable to require a tenant who is willing and able to make small repairs to bring suit to recover his costs rather than allowing him to deduct them directly from his rent. If faced with a situation in which the tenant has made a repair and deducted the cost from his rent, the North Carolina courts could treat the tenant not as if he had "withheld" his rent, but rather as if he had simply *applied* the rent, on the landlord's behalf, to the cost of repairing the premises. Such a construction would avoid the prohibition against the unilateral withholding of rent set forth in section 42-44(c).

Fillette, *supra* note 22, at 796 (citations omitted). North Carolina General Statute § 44(c) seems to contradict other provisions of the Act. N.C. GEN. STAT. § 42-44(a) (1984). Section 42-44(a) allows a tenant to enforce her rights "by civil action" and an "action" is defined in the Act to mean "recoupment, counterclaim, defense, setoff, and any other proceeding including an action for possession." *Id.* § 42-40(1). This implies that, although the Act purports to preclude a tenant from withholding rent, it contemplates raising the landlord's failure to repair as a defense to a suit against the tenant for failure to pay rent. *See* Jordan v. Miller, 179 N.C. 73, 75, 101 S.E. 550, 551-52 (1919) (in tort action against landlord by employee of tenant, court noted that if landlord breached express covenant to repair boarding house, the duty of the tenant was to make the repairs himself and to "recover the cost in an action for that purpose, or upon a counterclaim in action for rent"). If a tenant were to repair and deduct from the rental payments, and the landlord were then to sue for eviction, a court might construe the tenant's action as a "defense" or "set-off" under § 42-44(a) as opposed to a "unilateral withholding" of rent under § 44(c). *See also* Cato Ladies Modes, Inc. v. Pope, 21 N.C. App. 133, 135, 203 S.E.2d 405, 406 (1974) (recognizing the use of self-help for commercial tenants when the landlord breached an express covenant to repair).

60. This measure of damages is similar to that adopted in the Restatement (Second) of Property: "If the tenant is entitled to an abatement of the rent, the rent is abated to the amount of that proportion of the rent which the fair rental value after the event giving the right to abate bears to the fair rental value before the event." RESTATEMENT (SECOND) OF PROPERTY, LANDLORD AND TENANT § 11.1 (1977). Because the Restatement formula is based on determining market rental value, expert testimony is generally required. R. SCHOSHINSKI, *supra* note 6, § 3:25, at 143. Under the normal "percentage diminution" approach, the jury determines the percentage of enjoyment lost without the aid of experts.

61. *E.g.*, Cooks v. Fowler, 455 F.2d 1281, 1282-83 (D.C. App. 1971); Cazares v. Ortiz, 109 Cal. App. 3d Supp. 23, 33, 168 Cal. Rptr. 108, 113 (Cal. App. Dep't Super. Ct. 1980); Academy Spires, Inc. v. Brown, 111 N.J. Super. 477, 488, 268 A.2d 556, 562 (1970); Morbeth Realty Corp.v. Rosenshine, 67 Misc. 2d 325, 327, 323 N.Y.S.2d 363, 366 (N.Y. Civ. Ct. 1971); *see also* 111 East 88th Partners v. Simon, 106 Misc. 2d 693, 696, 434 N.Y.S.2d 886, 889 (N.Y. Civ. Ct. 1980) (percentage diminution damages added to "as warranted" damage award).

62. Abbott, *supra* note 29, at 22-24.

63. *E.g.*, Welborn v. Society for Propogation of Faith, 411 N.E.2d 1267, 1270 (Ind. Ct. App. 1980); Kline v. Burns, 111 N.H. 87, 93-94, 276 A.2d 248, 252 (1971); Bay Park One Co. v. Crosby, 109 Misc. 2d 47, 47, 442 N.Y.S.2d 837, 838 (N.Y. App. Div. 1981); Lane v. Kelley, 57 Or. App. 197, 201, 643 P.2d 1375, 1377, *cert. denied*, 293 Or. 394, 650 P.2d 927 (1982); Beausang v. Bernotas, 296

actually received and therefore denies traditional loss-of-bargain damages.[64] This measure, advocated by the landlord in *Miller*,[65] provides a tenant with only nominal damages if the premises were rented at fair market value, or if the market value exceeds the rent actually paid.[66]

Fourth, the expansive view adopted by the *Miller* court, in which the actual rent paid is not considered in the damage formula, appears to have been endorsed by courts in only three jurisdictions.[67] Courts adopting this measure of damages have awarded the tenant the difference in the value of the premises if conforming to the implied warranty and the rental value of the premises in their defective condition. This view has been criticized as inappropriate, however, when substandard conditions exist at the commencement of the tenancy, on the ground that the tenant has knowingly not bargained for premises satisfying the implied warranty.[68]

Pa. Super. 335, 341, 442 A.2d 796, 799 (1982); *see also* Glasoe v. Trinkle, 107 Ill. 2d 1, 17, 479 N.E.2d 915, 921 (1985) (market value approach adopted, but agreed rent may be considered evidence of such value).

64. *See supra* note 57.

65. 85 N.C. App. at 370, 355 S.E.2d at 194.

66. R. SCHOSHINSKI, *supra* note 6, § 3:25, at 142.

67. Green v. Superior Court, 10 Cal. 3d 616, 638, 517 P.2d 1168, 1183, 111 Cal. Rptr. 704, 719 (1974); Mease v. Fox, 200 N.W.2d 791, 797 (Iowa 1972); Teller v. McCoy, 162 W. Va. 367, 391, 253 S.E.2d 114, 128 (1978); *see also* Steele v. Latimer, 214 Kan. 329, 336, 521 P.2d 304, 310 (1974) ("traditional remedies for breach of contract" available to aggrieved tenant). At least four other jurisdictions have endorsed the "as warranted" formula, but have expressly stated that the actual rent negotiated should be considered evidence of the market value of the premises if conforming to the warranty. *See* Cooks v. Fowler, 455 F.2d 1281, 1282 n.5 (D.C. App. 1971); Glasoe v. Trinkle, 107 Ill. 2d 1, 17, 479 N.E.2d 915, 921-22 (1985); Boston Hous. Auth. v. Hemingway, 363 Mass. 184, 203, 293 N.E.2d 831, 845 (1973); Hilder v. St. Peter, 144 Vt. 150, 161, 478 A.2d 202, 209 (1984).

This latter variation, in which the rent paid by the plaintiff is considered as evidence of the fair rental value of the premises conforming to the implied warranty, was recently endorsed by the North Carolina Court of Appeals in *Cotton v. Stanley*, 86 N.C. App. 534, 358 S.E.2d 692 (1987). *Cotton*, decided three months after *Miller* by a different three-judge panel, involved a class action by tenants against a landlord who allegedly failed to correct violations of the Residential Rental Agreements Act by the repair deadline set by the Raleigh Housing Code. Citing *Miller*, the court held that landlords who violate the Act are liable for the fair rental value of a unit "as is" and the fair rental value "as warranted" for the period between the expiration of a "reasonable opportunity to repair" after notice from the housing inspector and the date repairs are made. *Id.*, at 539, 358 S.E.2d at 695-56. The court stated that "[t]he rent agreed upon by the parties when entering into the lease is some evidence of the property's 'as warranted' fair rental value, but it is not binding." *Id.*, at 539, 358 S.E.2d at 695.

This interpretation arguably contravenes the purposes of the Residential Rental Agreements Act. A tenant's damage award under *Miller* equals the amount by which the quality of premises falls below the warranty's fixed standards, yet the *Cotton* court would allow the "as warranted" value of the premises to vary according to the agreed rent. The *Miller* court rejected such a view, stating that a low rental price "does not absolve the landlord of his statutory obligation to provide fit premises." *Miller*, 85 N.C. App. at 370, 355 S.E.2d at 194. A tenant's acceptance of a low rent which is later adopted as the "as warranted" value of the premises is tantamount to a "waiver" of the fixed warranty standard, something the Act expressly prohibits. *See* N.C. GEN. STAT. § 42-42(b) (1984).

68. Abbott, *supra* note 29, at 22; Krieger & Shurn, *supra* note 29, at 616. One commentator has noted that, when tenants are never deemed to have waived warranty rights, and when a measure of damages similar to that in *Miller* has been adopted, a landlord might have to pay the tenant to live in the substandard dwelling.

> [I]f the value as warranted is $150, the contract rent is $60, and the fair rental value of the premises in its actual condition is $50, damages under the difference in value rule would be . . . $100. Therefore, the reasonable rental value would be equal to the contract rent ($60)

The *Miller* court did not provide a rationale for awarding this additional compensation to tenants, except to state that such a measure was necessary to fulfill the "statutory obligations" set forth in the Act.[69] Commentators have criticized "statutory obligations" that do more than protect an aggrieved party's expectations as an economically unjust and ill-fitted means of bettering the plight of those trapped in low-income housing.[70] When the broader purposes of the warranty are considered, however, economic justification for the additional compensation awarded under *Miller* becomes apparent.

The court in *Javins*[71] considered the detriment accruing to society from substandard housing as a compelling reason for adoption of the implied warranty of habitability.[72] Similarly, benefits beyond those of the aggrieved tenant have been recognized in North Carolina as a basis for requiring minimum housing standards. In 1969, the general assembly outlined the collective benefit resulting from the elimination of substandard housing:

> The General Assembly hereby finds and declares that as a result of the spread of slum conditions and blight . . . there exists in the State of North Carolina a serious shortage of decent, safe and sanitary residential housing available at low prices or rentals to persons and families of lower income. This shortage is severe in certain urban areas of the State, is especially critical in the rural areas, and is inimical to the health, safety, welfare and prosperity of *all residents of the State* and to the sound growth of North Carolina communities.[73]

In this context the additional compensation awarded under the *Miller* formula can be viewed as analogous to what economists refer to as collective or "public" goods.[74] These are those goods and services from which every member of society benefits, but which no one person has incentive to fund individually.[75] Examples of public goods include public highways, national defense, public

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less damages ($100), or -$40 . . . forcing a landlord to pay a tenant $40 per month to live in the premises worth $50 a month.

Note, *The Great* Green *Hope: The Implied Warranty of Habitability in Practice*, 28 STAN. L. REV. 729, 764 n.162 (1976).

69. *Miller*, 85 N.C. App. at 370, 355 S.E.2d at 194.

70. *See infra* note 82 and accompanying text.

71. *See supra* notes 28-31 and accompanying text.

72. *Javins*, 428 F.2d at 1079-80.

73. N.C. GEN. STAT. § 122A-2 (1986) (enacted 1969) (emphasis added). In the enabling act for the promulgation of housing codes, the general assembly recognized that

> the existence and occupation of dwellings in this State that are unfit for human habitation are inimical to the welfare and dangerous and injurious to the health, safety and morals of the people of this State, and that a public necessity exists for the repair, closing or demolition of such dwellings.

N.C. GEN. STAT. § 160A-441 (1987).

74. The term "public" good was derived from the works of the economist Paul Samuelson. *See* Samuelson, *The Pure Theory of Public Expenditures*, 36 REV. ECON. & STAT. 387, 387-89 (1954).

75. E. BROWNING & J. BROWNING, PUBLIC FINANCE AND THE PRICE SYSTEM 23-25 (2d ed. 1983). The authors define public goods as goods or services that have the two characteristics of nonrival consumption and nonexclusion. A good is nonrival when, at a given level of production, consumption by one person need not diminish the quantity consumed by others. *Id.* at 23. Nonexclusion exists when it is impossible, or prohibitively costly, to confine the benefits of the good to selected persons. *Id.* at 24.

parks, and the clean air resulting from automotive pollution controls.[76]

The societal benefit of housing code enforcement—whether direct, in the form of safer and healthier communities, or indirect, in the form of the satisfaction of having aided the destitute—justifies, at least in part, compensating the tenant above the amount for which she actually bargained.[77] These benefits presumably better everyone, but it is difficult to imagine any *one* citizen stepping forward to foot the repair bill for a low-income tenant. As with traditional public goods, government action is required to upgrade the plight of all involved.[78] The results of improved low-income housing may be less immediately tangible than the construction of highways, but this actually underscores the need for legislative or judicial action to reduce the adverse effects of unfit housing.[79]

In *Miller* the court of appeals did no more than attempt to give full effect to the policies of the general assembly.[80] Had the court simply required a landlord to limit the rental price to the fair market value of the defective dwelling, the tenant may have been protected from a loss of expectation, but the people of the state—and the tenants themselves—would be prohibited from receiving the purportedly broader benefits of the Act. This greater purpose could only be preserved by guaranteeing low-income tenants the monetary equivalent of code-quality housing.[81]

The courts, however, lack the power to give the goals of the general assembly full realization when landlords can avoid the consequences of the *Miller* decision. Dean Charles Meyers of the American Law Institute has summarized the consequences of a rigorously enforced warranty of habitability when landlords operate in a free market:

> 1) Some proportion of the substandard rental housing stock would be upgraded and rents would be raised to cover the added costs. . . . Those tenants who are unable or unwilling to pay for the upgraded housing will move out, creating an increased demand for lower-priced, lower-quality housing.
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> 2) For some proportion of the substandard rental housing stock, rents could not be raised, but landlords could still upgrade the housing

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76. *See id.* at 23-29.

77. Justifying public desire to charitably aid those in low-income housing as being motivated by self-interest is a concept not devoid of controversy. Implicit in such an explanation is the principle of "egoism," which holds that all actions, including charity, are based on an individual's narrow self-interest. Such a view is criticized in Harrison, *Egoism, Altruism and Market Illusions*, 33 U.C.L.A. L. REV. 1309 (1986). The validity of the principle is not critical to analysis of the *Miller* decision; regardless of motivation, the general assembly clearly has viewed the upgrading of low-income housing as necessary for the well-being of all citizens. *See supra* note 73 and accompanying text.

78. *See* E. BROWNING & J. BROWNING, *supra* note 75, at 31-33.

79. Government action when benefits are not immediately tangible is frequently encountered. For example, communities have flouridated drinking water to guarantee long-term dental health. *See* Plaut, *Flouridation in a New England Town* (report prepared for Univ. of Mich. School of Public Health), *reprinted in* D. MACRAE & J. WILDE, POLICY ANALYSIS FOR PUBLIC DECISIONS 248-262 (1979). The federal government has for some years considered legislation to restrict emission of chloroflurocarbons, which destroy the earth's protective ozone layer. *See* (Raleigh) News & Observer, Dec. 1, 1987, at 2A, col. 1; News & Observer (Raleigh), Oct. 18, 1987, at 7D, col. 1.

80. *See supra* note 73 and accompanying text.

81. *See Miller*, 85 N.C. App. at 371, 355 S.E.2d at 194.

> without incurring a deficit. In these cases the tenants would enjoy a short-term wealth transfer, for they would enjoy better housing at no increase in rent. But low-income tenants as a class would not benefit in the long run, for the covenant of habitability will retire this component of the housing stock sooner than would otherwise be the case and will discourage new investment in low-rent housing.
>
> 3) The third portion of the substandard housing stock will be abandoned as soon as the owner determines that income will not cover the expense. . . .[82]

These same results, however, are likely to result to a lesser degree from conventional housing code enforcement, even in the absence of the implied warranty. Any policy that cuts into landlord profits will undoubtedly cause the enterprising landlord to transfer resources to more productive investments.[83] At least one commentator has suggested that local housing codes without more may actually prove superior to the statutory warranty, because underlying the housing code is a policy of discretionary administration.[84] Enforcement of the code is committed to the building inspectors who may gauge their enforcement discretion against the availability of local housing. The housing code, unlike the implied warranty of habitability, "does *not* provide for rent abatement and rent withholding, for those remedies frustrate the achievement of the code's objective, which is the maintenance of the housing stock and its improvement *where economically feasible* in the judgment of knowledgeable public officials."[85]

The *Miller* court, unlike a building inspector, could not look to the local housing market in order to fashion a discretionary remedy. It was bound to enforce the Residential Rental Agreements Act as written, and the legislative goals underlying the State's housing policies suggest the court has done just that.[86] The Act and the insights of those drafting it intimate a mandate to the

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82. Meyers, *The Covenant of Habitability and the American Law Institute*, 27 STAN. L. REV. 879, 893 (1975). The Meyers article was written to voice objection to the Institute's adoption, in its second Restatement, of an implied warranty of habitability for residential rentals. *See* RESTATEMENT (SECOND) OF PROPERTY, LANDLORD AND TENANT § 11.1 (1977). For similar criticisms and comments see R. POSNER, ECONOMIC ANALYSIS OF LAW § 16.6 (3d ed. 1986); Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 YALE L.J. 1093 (1971); Komesar, *Return to Slumville: A Critique of the Ackerman Analysis of Housing Code Enforcement and the Poor*, 82 YALE L.J. 1175 (1973).

83. Of course, the general assembly might be tempted to consider methods of preventing landlords from abandoning the low-income market, but constitutional problems would abound. *See* First English Evangelical Lutheran Church v. County of Los Angeles, 107 S. Ct. 2378, 2388 (1987) (government's deprivation of "all use" intended by property owner, even if deprivation only temporary, requires compensation under "takings" clause of fifth amendment); Penn Central Transp. Co. v. New York City, 438 U.S. 104, 149 (1978) (inability of landowner to make a reasonable return on property as a result of government regulation requires compensation). *But see* Robinson v. Diamond Hous. Corp., 463 F.2d 853, 869 (D.C. Cir. 1972) (suggesting that landlords might be forbidden, under retaliatory eviction theory, to abandon buildings as an alternative to housing code compliance if they were "able" to comply). Alternative uses may not, however, immediately exist for slum properties. Meyers, *supra* note 82, at 890-93.

84. Meyers, *supra* note 82, at 901-02.

85. Meyers, *supra* note 82, at 902 (emphasis added). The county manager of Wake County, North Carolina, has said that his government was unwilling to enact even a discretionary housing code unless it can first construct public housing for residents evicted from condemned dwellings. News & Observer (Raleigh), Nov. 30, 1987, at 1C, col. 5.

86. *See supra* note 73 and accompanying text.

courts to fashion remedies for insuring minimum quality housing to the fullest extent possible.[87] The unfortunate result, however, may be only to highlight and exacerbate inadequacies in the structure of the Act itself. If the commentators are correct, any damage measure under the implied warranty would encourage a gradual worsening of the low-income housing situation. The *Miller* court's enunciation of the most liberal formula possible only speeds up the process.

To predict the adverse effects of the Act under the *Miller* decision, however, is not necessarily to call for demolition of the tenant-protection mechanism. The broad damage formula of *Miller*, if combined with increased assertion of tenant rights under the Act, may compel the general assembly to consider supplementing the warranty with more direct income-redistribution measures.

Otherwise critical commentators have acknowledged that a warranty such as the Residential Rental Agreements Act, with a stringent legal sanction such as that adopted in *Miller*, can produce a long-term increase in quality housing for the poor, so long as these policies are coupled with outright rent subsidization.[88] Under such a scheme, tenants can afford to absorb any costs of repair and maintenance passed on by landlords.[89] By offering a higher price, tenants can more realistically bargain for and expect premises conforming to warranty standards. The *Miller* damage formula would be transformed from a tenant windfall into a mere preservation of the bargain between the parties to the lease contract.[90] At the same time, the warranty would serve to prevent "rapacious slumlords" from devouring the increased wealth of tenants, without discouraging continued investment in private market housing for the poor.[91]

The Residential Rental Agreements Act lay largely dormant during much of its first ten years: investigation of the adverse consequences that might result and the necessary supplements that might be required could be postponed long into the future. The decision of the court of appeals in *Miller*, however, will likely shorten the timetable for determining the actual level of public commitment that exists for improving low-income housing. The Act under the *Miller*

87. *See supra* note 22.

88. *See* R. POSNER, *supra* note 82, § 16.6, at 446-47; Ackerman, *supra* note 82, at 1116-17; *see also* Meyers, *supra* note 82, at 902 ("Raise the income of the poor and they can afford better housing.").

89. The government can subsidize the low-income tenant in two ways. Low-income housing can be directly supplemented by a general income subsidy to the poor with no restrictions on its use. This method, called a "negative income tax," allows the tenant to decide which expenditure—more rent for better housing or more money spent on other goods—results in the greatest individual happiness. Of course, politically such a method may prove unpopular, because people want to channel the beneficiaries' income to prevent "bad" choices.

The other method of subsidizing tenants is to restrict the use of the supplement to exclusively housing-oriented expenditures. This can be done by paying the moneys directly to the landlords. *See* M. FRIEDMAN, CAPITALISM AND FREEDOM 190-95 (1962); Tobin, *Raising the Incomes of the Poor*, in AGENDA FOR THE NATION 77-116 (K. Gordon ed. 1968); Ackerman, *supra* note 82, at 1119-22.

90. The Act would then be identical, in form *and* in substance, to the contract warranty of merchantability. *See supra* note 54.

91. Meyers maintained that "[t]he classic view of the rapacious slumlord waxing fat as he milks the property is a myth," even in the absence of an implied warranty of habitability. Meyers, *supra* note 82, at 894 (citing empirical studies of George Sternlieb in G. STERNLIEB & R. BURCHELL, RESIDENTIAL ABANDONMENT: THE TENEMENT LANDLORD REVISITED xvi-xvii (1973)).

formula prevents tenants from losing the battle for adequate facilities only by encouraging landlords to forego the war. So long as low-income tenants lack the resources with which to bargain sufficiently for quality dwellings, *Miller* may prove to be an unfortunate Pyrrhic victory, rather than a triumph of social policy, for the growing class of citizens in substandard housing.

Attempting to remedy the plight of the low-income tenant without additional public expenditure may well have been a prudent tactic for the general assembly. It is only logical to avoid taxing the public when "taxing" the landlord seems possible. Yet if increased quality in housing is indeed a *public* good,[92] and if substandard housing is indeed "inimical to the health, safety, welfare and prosperity of all residents of the State,"[93] it appears equally as rational to look to the public for funding. Reliance on landlord altruism at a time when land is becoming more valuable[94] and the low-income population of the North Carolina is increasing,[95] appears neither reasonable nor just. When landlords may raise rents or abandon the market altogether, the general assembly, in order to secure the public benefit, should require the public to pay the costs.

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92. *See supra* notes 71-80 and accompanying text.

93. N.C. GEN. STAT. § 122A-2 (1986).

94. From the period 1974-1984, total assessed value of real property in North Carolina grew at an annual compound rate of more than 11.5%. STATE OF NORTH CAROLINA, STATISTICS OF TAXATION 163 (Biennial report, May 31, 1985).

95. A statewide committee, chaired by William C. Friday, investigated poverty in North Carolina and concluded than more people are living in poverty in the State in the 1980s than were in the preceding decade. COMMITTEE ON POVERTY AND CIVIC RESPONSIBILITY, POVERTY AND CIVIC RESPONSIBILITY: A STATEMENT TO ALL NORTH CAROLINIANS § 6 (published by The Human Services Institute, Greensboro, N.C. 1986). The Committee noted that Current Population Surveys of the United States Bureau of Census indicate the percentage of North Carolinians living below 125% of the federal poverty threshold increased from 19.6% in 1980 to 22% in 1984. *Id.*