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expansive reading of Sugarman's language and leaves uncertain exactly when the Justices will invoke the Sugarman exception and use less demanding review. The Foley opinion also leaves unclear which form of scrutiny—strict, intermediate, or minimal—the Court will apply in any given case involving the denial of state employment to aliens.

Robert J. Holland

Recognition of an Implied Covenant of Habitability in Residential Leaseholds: Kamarath v. Bennett

C.C. Bennett ordered his tenant, Wilford Kamarath, to vacate his apartment after the apartment building was found to violate the Dallas, Texas housing codes. The tenant refused, remaining for several months without paying rent. Kamarath then moved out and sued his former landlord to recover damages, claiming that the landlord's failure to maintain the premises in a habitable condition constituted a breach of their lease agreement. The trial court held that Bennett had neither breached the contract nor violated any duty imposed by law. The court of appeals affirmed, reiterating the well-established common law rule that a landlord does not impliedly warrant that the leased premises are habitable or reasonably suited for occupancy. The Texas Supreme Court granted a writ of error.

Held, reversed: There is an implied covenant of habitability imposed by law in residential leases which requires the unit to be suitable for living. *Kamarath v. Bennett*, 568 S.W.2d 658 (Tex. 1978).

I. EVOLUTION OF THE IMPLIED COVENANT OF HABITABILITY

Traditionally, the doctrine of caveat emptor governed the lessor-lessee relationship, and Texas courts uniformly followed that doctrine. The landlord could agree to make needed repairs and maintain the condition

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of the premises, but the law imposed no such duty upon him. 4 The tenant could not avoid liability for nonpayment of rent if the premises became uninhabitable; 5 only when the landlord procured the lease by fraudulent or deceitful means could the tenant escape his obligations under the agreement. 6 Texas courts, however, did not apply the doctrine in two other areas of real estate law. First, caveat emptor was not applied to the lease of a building when construction thereof had not progressed sufficiently for the tenant to judge its suitability for the intended use. 7 Secondly, the supreme court more recently held that the doctrine was inapplicable to the sale of new houses by a builder-vendor. 8

The common law rule has found little support among those courts that have recently passed upon the question. 9 The Supreme Court of Wisconsin was among the first to revise its stance. 10 In a probing reexamination of the doctrine of caveat emptor, the court reasoned that the legislature had made its intention known by passing laws and providing for administrative rules that set minimum requirements for housing. 11 The court determined that such legislation had rendered the traditional rule obsolete. 12

Although most courts that have recognized a covenant of habitability to be implied in leases have followed the Wisconsin court's reasoning, 13 the Supreme Court of New Jersey has adopted a different approach. Rather than holding that the covenant arises from statutes or municipal codes, the

court held that it arises from the intention of the parties, inferred from the terms of the lease. In Marini v. Ireland the court found the requisite intent in a description of the leased premises as a "4 rooms and bath, apartment" and a restriction of the tenant's use of the premises to that of a "dwelling."

The difference in approach can be important in determining whether an attempted waiver of the covenant is enforceable. In Javins v. First National Realty Corp. the United States Court of Appeals for the District of Columbia held that the local housing code must be read into housing contracts. The court then stated: "The duties imposed by the Housing Regulations may not be waived or shifted by agreement if the Regulations specifically place the duty upon the lessor." A waiver by the parties would therefore be ineffective. If, instead, the intent of the parties is the source of the covenant, a waiver in the lease agreement would indicate that the parties did not intend to include the covenant in their agreement. A growing body of consumer law suggests, however, that such a conclusion should not be drawn where the waiving party is at a clear disadvantage in bargaining power.

Early suggestions that the implied covenant of habitability is a potential source of expanded tort liability for landlords have not been supported by the courts. The New Jersey Supreme Court, for example, has refused to impose strict liability for personal injuries suffered on the leased premises, adhering instead to traditional negligence requirements.

II. Kamarath v. Bennett

Against this background of changing landlord-tenant law, the Texas Supreme Court granted a writ of error to examine its longstanding adher-
ence to the common law rule. In line with the reasoning followed by the New Hampshire Supreme Court in Kline v. Burns, the Texas court examined at length the context in which the landlord-tenant relationship originated. The court noted that the leasehold was originally viewed as an estate in land governed by principles of property law. In an agrarian society possession and the right to quiet enjoyment were central to the lessor-lessee relationship. Today, however, the apartment dweller is not interested in procuring an estate in land; he is merely seeking a habitable place to live. The court recognized that the legislature has responded to this change by granting home rule cities the authority to enact minimum housing standards and the power to enforce them. The court observed that in the instant case the landlord admitted that the premises in question were in violation of such a housing code.

In its analysis the court addressed three factors crucial to its decision that an implied covenant of habitability exists in residential leases: (1) the legislature’s recognition that public welfare may demand that dwellings be fit for human habitation; (2) the landlord’s superior knowledge of the premises he leases and the likelihood that he would know of housing code violations and latent defects when a tenant might not; and (3) the landlord’s continued ownership of the premises after expiration of the lease, which makes it logical that he bear the cost of repairs necessary to make the premises habitable. For these reasons, the court recognized an implied covenant of habitability in the rental of dwelling units.

23. Kamarath v. Bennett, 568 S.W.2d 658 (Tex. 1978). No Texas court of civil appeals had previously questioned adherence to the doctrine of caveat emptor.
25. 568 S.W.2d at 659-60.
26. Id. at 560.
27. Id.
28. Id.
30. 568 S.W.2d at 660.
31. Id.
32. Id. at 660-61. The supreme court’s decision in Kamarath is directed only toward residential dwelling units. Inasmuch as the implied warranty of habitability is analogous to the implied warranty of fitness for a particular purpose in the sale of goods, TEX. BUS. & COM. CODE ANN. § 2.315 (Tex. UCC) (Vernon 1968), a question remains as to how far the courts will eventually go in replacing older, more rigid property law principles with current contract doctrines. As mentioned in the text accompanying note 8 supra, the Texas Supreme Court has for the past decade recognized an implied warranty of fitness for habitability in the sale of new homes. As contracts for the lease and sale of farmlands and business properties do not directly affect the public welfare to the extent that contracts on residential dwellings do, the court will probably draw a distinction. Should the situation arise, however, where the interest of the general public is threatened by adverse operation of the doctrine of caveat emptor in these areas, the court may respond in like fashion by recognizing some type of warranty of fitness for the intended use. Such a theory is strengthened by the legislature’s inclusion of land sales and leases, in general, within the protections of the Deceptive Trade Practices-Consumer Protection Act. TEX. BUS. & COM. CODE ANN. § 17.45 (Vernon Supp. 1978). In concluding that an implied covenant of habitability exists in the rental of residential units, the court looked to the legislature’s action in establishing authority for creation of minimum housing standards. Legislative concern in these other areas might be sufficient to convince a court to extend the new rule to the point that all property must be fit for its intended use.
The court clearly indicated that only those defects that "render the premises unsafe, unsanitary, or otherwise unfit for living therein" will result in a breach of the implied covenant of habitability. The premises must be fit for living at the inception of the lease and must be maintained in such a condition. Furthermore, a tenant may not subject the premises to harsh and abnormal uses which deteriorate the dwelling and subsequently claim that the landlord has breached his legal duty to keep the unit in suitable living condition. In the final analysis, presence of a breach of the covenant is a question of fact which may only be resolved by weighing a variety of considerations.

The court's opinion left unanswered several important questions. No opinion was expressed as to the proper measure of damages for breach of the covenant, nor did the court rule upon the applicability of the Texas Deceptive Trade Practices-Consumer Protection Act (DTPA) to a breach of the covenant.
of the implied covenant of habitability. Under the DTPA a consumer may maintain an action if he has been adversely affected by the breach of an implied warranty.\textsuperscript{39} Thus, if breach of the implied covenant of habitability is found to be a violation of the DTPA, the lessor might be held liable for treble the tenant's actual damages plus court costs and reasonable attorney's fees.\textsuperscript{40}

One writer has suggested that the court implied that landlords might be able to disclaim the covenant of habitability effectively by use of a waiver.\textsuperscript{41} If such a conclusion is proper, the implication was made despite express recognition by the court that "[i]n the present day housing market, the landlord is usually in a much better bargaining position than the tenant which could result in the rental of poor housing and violation of public policies."\textsuperscript{42} Whether the court will subsequently apply principles of unconscionability to negate or limit the use of warranty waivers is an open question.\textsuperscript{43} The supreme court recognized a similar problem in Crowell v. Housing Authority,\textsuperscript{44} in which it held that an exculpatory clause will be considered void "where one party is at such disadvantage in bargaining power that he is practically compelled to submit to the stipulation."\textsuperscript{45} Use of a disclaimer of the implied covenant of habitability as a standard clause in lease agreements would give the tenant little if any choice.

Even if such a waiver is not void under the traditional contract doctrine of unconscionability, its inclusion as a standard clause might constitute an "unconscionable action or course of action" under the statutory definition in the DTPA.\textsuperscript{46} In fact, a waiver of the covenant might be totally ineffec-

\textsuperscript{39} Id. § 17.50(a)(2).

\textsuperscript{40} Such a conclusion would enable aggrieved tenants to gain access more readily to the courts, thereby discouraging the maintenance of dwelling units in an uninhabitable condition. In any event, the landlord could avoid treble damages by curing the defect. Id. § 17.50A(3).

\textsuperscript{41} Heath, The Implied Warranty of Habitability, PROB. & PROP., Summer 1978, at 9. Heath also suggests that a waiver of the implied covenant of habitability should comply with TEX. BUS. & COM. CODE ANN. § 2.316 (Tex. UCC) (Vernon 1968). On the other hand, he notes that id. § 2.302 provides for the defense of unconscionability.

In fact, the Texas Apartment Association has released a new standardized lease form that waives the implied covenant of habitability. The Dallas Morning News, Sept. 6, 1978, at 1A, col. 4. The Texas Tenants Rights Association, a coalition of tenants' groups, has announced its intention to file suit over the new lease form. Id.

\textsuperscript{42} 568 S.W.2d at 660.

\textsuperscript{43} See notes 16-20 supra and accompanying text for a discussion of the manner in which other jurisdictions have dealt with waivers.

\textsuperscript{44} 495 S.W.2d 887 (Tex. 1973) (Exculpatory clause read as follows: "[N]or shall the Landlord nor any of its representatives or employees be liable for any damage to person or property of the Tenant, his family, or his visitors, which might result from the condition of these or other premises of the Landlord, from theft or from any cause whatsoever." The clause was declared void insofar as it affected the Authority's liability for medical expenses incurred and pain and suffering of tenant who was alleged to have died of carbon monoxide poisoning from a defective gas heater.)

\textsuperscript{45} Id. at 889.

\textsuperscript{46} The statutory definition of an unconscionable action or course of action is: [A]n act or practice which, to a person's detriment: (A) takes advantage of the lack of knowledge, ability, experience, or capacity of a person to a grossly unfair degree; or (B) results in a gross disparity between the value received and consideration paid, in a transaction involving transfer of consideration.